Tabled
3/12

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

IN THE MATTER of Proposed Whangarei District Plan Urban and Services Plan Changes

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LEGAL SUBMISSIONS ON BEHALF OF KĀINGA ORA-HOMES AND COMMUNITIES (FORMERLY HOUSING NEW ZEALAND CORPORATION)

3 December 2019

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MAY IT PLEASE THE HEARINGS PANEL:

1. Introduction

1.1 These legal submissions are presented on behalf of Kāinga Ora-Homes and Communities ("**Kāinga Ora**") (as successor to Housing New Zealand Corporation ("**HNZC**")) in relation to its submission and further submissions lodged on the Proposed Whangarei District Plan Urban and Services Plan Changes ("**USPC**").

1.2 These submissions are structured as follows:

(a) The evidence to be called on behalf of Kāinga Ora.

(b) Background to Kāinga Ora.

(c) The reasons for Kāinga Ora's submission on the USPC.

(d) A discussion of the implications of the National Policy Statement-Urban Development Capacity, and the proposed National Policy Statement-Urban Development.

(e) Response to certain legal and procedural issues that Kāinga Ora is aware have arisen during the course of the hearing.

2. Witnesses on behalf of Kāinga Ora

2.1 The following witnesses will be called on behalf of Kāinga Ora:

(a) *Brendon Liggett* – Mr Liggett is Development Planning Manager within the Urban Development – Delivery Group at Kāinga Ora-Homes and Communities. Mr Liggett will provide context for Kāinga Ora, its objectives, functions and operating principles. He will describe the organisations existing property portfolio in Whangarei, how it intends to manage that portfolio in coming decades and the purpose and scope of the submission it has lodged in respect of the USPC.

(b) *Sarah Johnson* – Ms Johnson is a Senior Urban Designer at Beca Limited. Ms Johnson will present a summary of the evidence prepared by Ms Annette Jones in relation to urban design principles informing and directing the Kāinga Ora

submission, in particular with respect to the spatial extent of residential zones within the USPC. Unfortunately, Ms Jones is unable to attend today's hearing, but Ms Johnson assisted with the preparation of Ms Jones's evidence and is well placed to assist the panel with any questions. If necessary, Ms Jones can be made available to the panel for questions later in the hearing.

(c) *Phil Osborne* – Mr Osborne is a consultant economist who provides a principles-based analysis of the Kāinga Ora submission contrasted with the outcomes that would likely arise from implementation of the USPC as notified. Mr Osborne concludes that the relief sought by Kāinga Ora, particularly in terms of the spatial extent of residential zones, would better achieve the Council's objectives and the requirements of the higher-level planning instruments.

(d) *Tim Heath* – Mr Heath is a colleague of Mr Osborne's and provides a retail economic assessment of the appropriateness of the relief sought by Kāinga Ora in terms of the zoning of Local Commercial land at Otangarei. In light of the conclusions of that assessment, Mr Heath has proposed a revised extent of rezoned commercial land that would be sustainable by the market, commercially realistic and appropriate to accommodate commercial, community, social, cultural and other anticipated uses to create a commercial and social heart to the Otangarei community and which would support a rejuvenation of this particular area over time.

(e) *Blair Masefield* – Mr Masefield is a Whangarei-based consultant planner who assisted the Kāinga Ora team with development of the Kāinga Ora submission in respect of the USPC. Mr Masefield has prepared a statement of evidence which addresses Kāinga Ora's submission in respect of the Strategic Direction, Subdivision and Services aspects of the USPC. Mr Masefield will outline how the higher order planning documents direct the enablement of consolidated and intensified urban development.

(f) *Matt Lindenberg* – Mr Lindenberg is a consultant planner from Beca Limited who worked closely with Mr Masefield in respect of the preparation of the Kāinga Ora submission. Mr Lindenberg has lodged two separate statements of evidence for today's hearing, the first addressing the specific zone provisions subject of submissions by Kāinga Ora, and the second addressing relief sought by Kāinga Ora in terms of the spatial extent of zones both in terms of the Living zones as well as the Local Commercial zone at Otangarei. Mr Lindenberg will describe the best practice principles applied by Kāinga Ora in formulating its relief before taking the panel through summary of the area-by-area ground-truthing analysis undertaken by the Kāinga Ora team to identify the relevant opportunities and constraints that might influence the decision to apply a more intensive zone in relation to a particular area.

2.2 Kāinga Ora says that the evidence that the panel will hear demonstrates that the relief sought by it will ensure better alignment with higher order planning documents and deliver better urban outcomes in terms of compact and efficient urban redevelopment over time than implementation of the USPC as notified. Unless the relief sought by Kāinga Ora is granted, the existing pressure to expand Whangarei into the rural environment will continue, which will have negative implications in terms of efficiency, urban amenity and cost of infrastructure necessary to service such development.

3. Kāinga Ora—Homes and Communities.

3.1 HNZC has been disestablished and now forms part of Kāinga Ora, a new Crown agency that is the Government's delivery agency for housing and urban development. The recently enacted Kāinga Ora-Homes and Communities Act 2019 provides for the establishment of Kāinga Ora and sets out its objectives, functions and operating principles. Detail around its enabling development powers is expected to be provided in a second bill to be introduced before Parliament rises at the end of this year.

3.2 Detailed evidence regarding public housing in the Whangarei District, the benefits of such housing and the role Kāinga Ora has in the provision of public and affordable housing on behalf of the Government,

as well as its role in initiating, facilitating or undertaking urban development will be presented today by Mr Liggett.

3.3 However, a brief summary of Kāinga Ora is as follows:

(a) Kāinga Ora will work across the entire housing spectrum to build complete, diverse communities that enable New Zealanders from all backgrounds to have similar opportunities in life. As a result, Kāinga Ora will have two core roles:

(i) being a world class public housing landlord; and

(ii) leading and co-ordinating urban development projects.

(b) Kāinga Ora was formed in 2019 as a statutory entity established under the Kāinga Ora Act, and brings together HNZC, HLC (2017) Ltd and parts of the KiwiBuild Unit. Under the Crown Entities Act 2004, Kāinga Ora is listed as a Crown agent and is required to give effect to Government policies.

(c) Kāinga Ora owns or manages more than 64,000 rental properties throughout New Zealand[1], including about almost 1,500 homes for community groups that provide housing services. Approximately 40% of the total state housing portfolio was built before 1967.

(d) Kāinga Ora's tenants are people who face barriers (for a number of reasons) to housing in the wider rental and housing market.

(e) Kāinga Ora's statutory objective requires it to contribute to sustainable, inclusive, and thriving communities that:

(i) provide people with good quality, affordable housing choices that meet diverse needs; and

(ii) support good access to jobs, amenities and services; and

[1] As at June 2019.

(iii) otherwise sustain or enhance the overall economic, social, environmental and cultural well-being of current and future generations.

(f) In recent years the demand for social housing has changed markedly from 2-3 bedrooms houses, to single unit housing for the elderly and 4-5-bedroom houses for larger families. This demand contrasts with Kāinga Ora's existing housing portfolio of which a significant proportion comprises 2-3-bedroom houses on larger lots.

(g) HNZC's focus in recent times has been to provide social housing that matches the requirements of those most in need. To achieve this, it has largely focused on redeveloping its existing landholdings.

(h) Kāinga Ora will continue this approach of redeveloping existing sites by using them more efficiently and effectively, so as to improve the quality and quantity of public and affordable housing that is available.

(i) In addition, Kāinga Ora will play a greater role in urban development more generally. The legislative functions of Kāinga Ora illustrate this broadened mandate and outline two key roles of Kāinga Ora in that regard: [2]

(i) initiating, facilitating and/or undertaking development not just for itself, but in partnership or on behalf of others; and

(ii) providing a leadership or coordination role more generally.

3.4 Notably, Kāinga Ora's functions in relation to urban development extend beyond the development of housing (which includes public housing, affordable housing, homes for first home buyers, and market housing) to the development and renewal of urban environments, as well as the

[2] Sections 12(f)-(g) of the Kāinga Ora Act.

development of related commercial, industrial, community, or other amenities, infrastructure, facilities, services or works. [3]

4. Reasons for Kāinga Ora's submission in respect of the USPC

4.1 Due to Kāinga Ora's operational and development requirements, and in light of the legislative expansion of the scope of its role, its interest in the USPC is broad. Kāinga Ora has made submissions on a wide range of USPC provisions, including provisions relating to the Strategic Overview/Directions, the provisions of various residential and business zones and chapters relating to subdivision and services. In general, it has sought to amend the USPC in order to remove obstacles to residential or appropriate business growth including in terms of unnecessary consenting and/or process requirements, and to incentivise and enable the development of a greater density and range of housing including different built form typologies. It has also sought substantial changes in terms of the spatial extent of certain zones including in particular the Medium Density and General Residential zones (as they are now, appropriately, titled), as well the application of a Local Commercial zoning to land at Otangarei.

4.2 Kāinga Ora's primary concern, reflected in its submissions, is that the provisions of the USPC as notified do not sufficiently address the significant growth pressures that Whangarei District faces. In particular, Kāinga Ora is concerned that the USPC provisions, particularly the extent of the Medium Intensity and General Residential Zones and the rules proposed to apply within those zones, are not the most appropriate way to achieve the Council's residential and economic growth goals or deliver on Councils strategic planning documents. As well as this, the following themes can be taken from Kāinga Ora's submission:

(a) *Giving effect to higher order planning documents* – Kāinga Ora seeks to ensure that relevant higher order planning instruments are implemented appropriately within the USPC. This includes the relevant national policy statements, national planning standards and also the relevant regional and district level statutory and non-statutory planning documents where and to the

[3] Section 12(f) of the Kāinga Ora Act.

extent those documents are consistent with the national documents. Kāinga Ora's witnesses describe how this approach is to be achieved, and why the relief sought by Kāinga Ora is more appropriate than the provisions of the USPC as notified. In particular, Kāinga Ora says that higher level documents in the context of Whangarei require restrictions to be placed on the continued expansion of residential and commercial activities in the rural areas (now implemented through the Rural Plan Changes process), with the corollary being that such development must be enabled and encouraged in appropriate locations within the urban area of Whangarei.

(b) *Existing vs future planned character/amenity issues* – Kāinga Ora's submission has taken an unapologetically forward-looking approach, of seeking to provide for a future urban environment in Whangarei which may look quite different to what currently exists. This has been picked up on by some submitters, who prefer a more protectionist approach of maintaining the status quo, particularly in their own neighbourhoods. Recent caselaw, which we return to below in the context of the National Policy Statement-Urban Development Capacity has made it clear that the Kāinga Ora approach is more appropriate and consistent with central government policy direction in terms of provision for urban growth, subject to requirements for high quality urban design.

(c) *King Salmon* – the Supreme Court's decision in *Environmental Defence Society Inc v New Zealand King Salmon Co* [2014] NZSC 38, has been described as a "sea change in New Zealand resource management law" (see *Forest & Bird Protection Society of New Zealand Inc v Bay of Plenty Regional Council* [2017] NZHC 3080). It confirms that Decision-makers should pay, "*careful attention to the way in which [the relevant policies] are expressed*". The words used are significant.[4] Policies are "*expressed in deliberately different ways*" and "*these differences matter*". Policies "*expressed in more directive terms will carry*

[4] *King Salmon* at [129], [126].

greater weight than those expressed in less directive terms". Some are expressed "*in such directive terms that the decision-maker has no option but to implement it*". Recent caselaw, including the Court of Appeal's decision in *RJ Davidson Family Trust v Marlborough District Council* [2018] NZCA 316 has confirmed the applicability of *King Salmon* in the context of resource consent applications, and in particular that where a plan has been "competently prepared" and is not subject of error, invalidity or incomplete coverage that it is not appropriate to go beyond the expression of Part 2 in the relevant planning instruments by undertaking an overall Part 2 assessment of an application. Kāinga Ora's submission seeks to respond to these developments in caselaw by ensuring that directive objective and policy wording is only used where necessary and subject to appropriate caveats. To do otherwise risks significant unintended consequences or outcomes when it come to implementing a newly minted planning framework in the future.

(d) *Default full discretionary activity status* – Kāinga Ora does not consider it appropriate that failure to comply with permitted or controlled activity thresholds immediately defaults to full discretionary activity status under the USPC. Where consent is only required for exceedance of a threshold set in the plan or for well understood engineering / design matters, in most if not all cases the potential implications of that exceedance will be clear to the Council, the applicant and any potentially affected parties. From a section 32 perspective, the most appropriate and efficient approach would appear to be application of a restricted discretionary activity, with matters for discretion and assessment criteria appropriately limited to those matters relevant to the relevant exceedance. An unrestricted discretion (and obligation) on the part of the Council to consider all relevant section 104 matters in respect of potentially very minor or technical matters is disproportionate, inefficient and does not strike an appropriate balance in terms of the costs and benefits of the alternative approach advocated for by Kāinga Ora.

(e) *Reverse sensitivity* – Kāinga Ora is concerned to ensure that the concept of reverse sensitivity is not inappropriately expanded to

prioritise any existing effects-generator or the expansion/intensification of regionally significant infrastructure above purportedly "sensitive activities" in all circumstances. While it may be appropriate for a district plan to manage "interface" issues under the RMA, reverse sensitivity has a particular meaning in relation to the encroachment by new sensitive activities into the effects envelope of an existing important effects generator (generally an industrial or infrastructural activity), giving rise to a constraint on the continued operation of that activity. In many cases the residential use may predate the primary effects-generator, or a question may arise as to whether or which of the two incompatible activities should be prioritised over the other. In such cases, it is not appropriate for the plan to give precedence to the primary effects-generator without consideration of relevant context. Given the need to provide for urban growth and greater housing capacity in appropriate locations, it is important that the panel is mindful of such issues when considering submissions in relation to provisions dealing with reverse sensitivity or "incompatible activities". Mr Masefield has given this issue further thought since preparing his evidence and will offer an update in terms of his opinion in respect of provisions of the Strategic Directions provisions of the USPC when he presents his summary to the Panel.

4.3 In Kāinga Ora's submission, in addition to the various amendments sought to the provisions of the USPC to address Kāinga Ora's concerns, which are addressed in the evidence, it is particularly important from Kāinga Ora's perspective that increased capacity is enabled in proximity to amenities and other attributes throughout Whangarei (e.g.: in proximity to employment opportunities, transport links and social infrastructure (schools and open space)) so as to facilitate the provision of an efficient urban form and the coordinated growth of Whangarei over time.

4.4 Kāinga Ora considers that providing opportunities for increased residential densities in such locations is important because it:

(a) Supports the wider social and economic wellbeing of residents (e.g.: by providing accessibility to employment, social services and transport);

(b) Enables future residential development and growth of the district to make efficient use of existing resources and reduces potential adverse impacts associated with housing provision in less proximate areas (e.g.: increased reliance on private vehicle travel for commuting and increased costs of travel for residents);

(c) Supports the potential for delivery of a variety of housing typologies and more affordable housing stock in suitable locations; and

(d) Supports the strategic directions and objectives of the USPC which seek to achieve a more consolidated and intensified urban form in Whangarei.

4.5 In order to achieve these outcomes, Kāinga Ora's submission seeks that:

(a) the Medium Density Residential Zone (as it is now proposed to be renamed) generally be applied to areas within 10min (800m) walkable catchments from the Local Centre Zone and 5min (400m) from the Neighbourhood Commercial Zone and within 200m of bus routes; and

(b) the General Residential Zone be applied generally within 10min (800m) walkable catchments of the Local Centre zone, beyond the 400m catchment of the Neighbourhood Commercial zone and beyond 200m of the bus network.

4.6 Kāinga Ora's approach is based on best practice urban design and planning principles as they relate to medium density residential intensification of existing urban areas – an approach endorsed by the recently proposed NPS-UD.

4.7 This approach identifies where opportunities for medium density development may be appropriate and where urban intensification outcomes can be enabled (acknowledging that there will be other considerations which may result in limitations to these opportunities e.g.

natural hazards, heritage or other significant values, and that simply rezoning land will not result in immediate change of land use or uptake of redevelopment opportunities).

4.8 Kāinga Ora considers that an increase in the extent of rezoning would allow for better provision of housing capacity and choice. It would provide greater flexibility and efficiency in terms of capacity across a larger part of the Whangarei District's urban area. It would also assist the Council in ensuring that affordable and varied housing options are available to communities as the district grows, and would facilitate the provision of a more efficient urban form.

4.9 Failure to enable or provide for appropriately located and designed residential growth will mean that the District Plan will not be consistent with the NPS-UDC nor aid the implementation of Council's own Whangarei District (Sustainable Futures 30/50) Growth Strategy or the Draft Whangarei District Growth Strategy ("**Sustainable Futures**" and "**DWDGS**").

4.10 While a model of incremental zoning changes to achieve urban intensification may be attractive in terms of a journey of small steps, such an approach runs a real risk of missing the growth targets set by the NPS-UDC and DWDGS as it fails to adequately recognise the market constraints of existing urban form and the natural process of incremental change that is likely in these areas because of existing development. For this reason, Kāinga Ora says it is critical that the issue of provision of sufficient residential capacity and enabling of a coherent, logical and quality urban form is addressed now rather than later. The Council has an opportunity through this process to identify a framework which will enable the future growth of Whangarei in a coordinated and integrated manner.

5. NPS-UDC and the Proposed NPS-UD

NPS-UDC

5.1 The NPS-UDC imposes a series of obligations on councils regarding the provision of sufficient residential and commercial capacity to accommodate future growth, based on an appropriate evidence base.

5.2 The following are consistent themes within the document:

(a) Urban environments are expected to change over time.[5]

(b) Provision of housing capacity and choice:[6]

(c) Integration of land use and infrastructure development.[7]

5.3 Those provisions are forward-looking. They anticipate a dynamic urban environment that is expected to intensify, and hence alter, over time. That is contrary to the historic approach in much of New Zealand, through which planning was concerned to maintain and avoid effects on historic forms and densities of development, and on the status quo.

5.4 This was recently confirmed by the Environment Court in *Summerset Villages (St Johns) Limited v Auckland Council* [2019] NZEnvC 173, where the analysed the NPS:UDC as follows (emphasis added):

> *[44] Turning first to the UPS, this instrument sets out matters relevant to the achievement of the purpose of the Act. It is at the top of the planning hierarchy and requires of regulatory authorities due consideration when these organisations establish their policy frameworks on the matters of urban growth and development.*
>
> *[45] Importantly, the UPS sets out its imperative as:*
>
> > *...(providing) direction to decision-makers under the Resource Management Act 1991 (RMA) on planning for urban environments. It recognises the national significance of well-functioning urban environments, with particular focus on ensuring that local authorities, through their planning, ... enable urban environments to grow and change in response to the changing needs of the communities and future generations; and*
> >
> > *Provide enough space for their populations to happily live and work. This can be both through allowing development to go "up" by intensifying existing urban areas, and "out" by releasing land in greenfield areas.*
>
> *The document goes on to confirm that:*
>
> > *... the overarching theme running through this national policy statement is that planning decisions must actively enable development in urban environments...*
>
> *Within this context of proactivity, the UPS describes its intention as follows:*

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[5] Refer, for example, NPSUDC Preamble page 3 (first bullet point), page 9, Objective OA3.

[6] Refer, for example, Objective OA2, Policy PA1, Policy PA3, Policy PC1.

[7] Objective OD1, Policy PA3, Policy PA2.

> *This national policy statement is about recognising the national significance of:*
>
> *(a) Urban environments and the need to enable such environments to develop and change; and*
>
> *(b) Providing sufficient development capacity to meet the needs of people and communities and future generations in urban environments.*
>
> *[46] At this point, we recognise the use of critical language in these provisions of the [National Policy Statement: Urban Development Capacity].* ***Deliberately, it seems to us, the authors of the document have deployed the words "change" and "future". Unarguably, the use of these terms intends a future focus for development planning.***
>
> *[47] Most significantly, the [National Policy Statement: Urban Development Capacity] sets out clear directions and the imperatives under which "decision makers" are to operate. In this connection, the document defines "decision makers" as "*any person exercising functions and powers under the Act." *This definition clearly embraces such entities and individuals as regulatory authorities, including unitary authorities and officers of these organisations responsible for policy formulation and similar tasks. It also includes this Court. This imposes an expectation and a presumption.*
>
> *[48] Founded on this "mission statement", key objectives contained within the document and the sub-parts of these relevant to this appeal are as follows:*
>
> *Objective Group A – Outcomes for planning decisions*
>
> *OA1: Effective and efficient urban environments that enable people and communities and future generations to provide for their social, economic, cultural and environmental well-being.*
>
> *OA3: Urban environments that, over time, develop and change in response to the changing needs of people and communities and future generations.*
>
> *[49] There is a clear commonality of purpose and principle to be found, on the one hand, in the theme of the UPS, set out above, and, on the other, in the particular thrust of OA3: "change".* ***In our view, the inescapable conclusion is apparent: the UPS gives direction to decision-makers to have regard to urban growth outcomes which have previously been under-emphasised in favour of local environmental or amenity considerations.***
>
> *[50] The UPS requires evaluation in the context of "national significance" within which planning endeavours are to be undertaken and which will allow "*(urban) environments to develop and change." ***Accordingly, our conclusion is that a more future-oriented, outcome-focused conclusion than what might have been the case otherwise and common-place before the promulgation of the UPS is envisaged.***

5.5 This analysis on the part of the Environment Court is entirely consistent with the thrust of Kāinga Ora's submission in respect of the provisions and spatial extent of zoning contained within the USPC. Kāinga Ora is advocating for changes to the plan that are more directly enabling of development to meet the needs of future generations, and which better reflect the future-oriented, outcome focused approach that is now

required by this higher-level planning instrument. Kāinga Ora says that submitters opposing this approach are, in general, taking the now outdated approach of looking at the protection of existing amenity/the existing state of the urban environment – an approach expressly rejected by the Court in *Summerset* as being inconsistent with the requirements of the NPS-UDC.

Proposed NPS-UD

5.6 In August 2019 the Government released a discussion paper on the proposed NPS-UD. Whereas the NPS-UDC addresses issues regarding the provision of sufficient capacity to accommodate growth, the intention is that the proposed NPS-UD will address the ways in which that growth should be accommodated in urban areas, including directions to local authorities to enable higher density residential development in specified areas.

5.7 The proposed NPS-UD intends to enable growth by requiring councils to provide development capacity to meet the diverse needs of communities, address overly restrictive rules, and encourage quality, liveable urban environments. The aim of the proposed NPS-UD is to encourage more effective urban growth, particularly close to frequent public transport, and walking and cycling facilities. An efficient urban form growth strategy is key to delivering upon this aim of the proposed NPS-UD.

5.8 It is apparent from this document that, over time, expectations regarding the density of development and the range of housing typologies will alter in regional centres, as is currently occurring in major cities.

5.9 At this stage there is no NPS-UD in place and hence no statutory obligation to have regard or give effect to provisions in such a document. It is possible, however, that the NPS-UD may be approved and in place as a relevant (and mandatory) statutory consideration prior to the release of the Panel's decision in respect of the USPC.[8] Even if it is not, it is appropriate to consider the potential implications of the NPS, as it

[8] The Ministry for the Environment's intention is for the proposed NPS-UD to go to Ministers and Cabinet for approval in early 2020 and, if approved, to likely come into force in the first half of 2020 (https://www.mfe.govt.nz/consultations/nps-urbandevelopment)

would almost certainly come into force prior to the resolution of appeals in respect of the USPC.

5.10 Kāinga Ora says that it is important and appropriate for the Panel to anticipate this and give due consideration to the themes of the Proposed NPS-UD to ensure that the USPC will appropriately give effect to national policy direction.

6. Legal issue – scope

6.1 Counsel for the Council in opening submissions addresses the issue of "scope", and the application of the *Clearwater* test as re-described by Kos J in *Motor Machinists*. She goes on to identify the distinction that must be drawn between full plan review and plan changes/variations to planning documents as identified by Whata J in *Albany North Landowners* and Judge Jackson in *Tussock Rise*. Counsel concludes that the USPC should be "considered as plan changes, not a full plan review, and that the appropriate tests in terms of scope of submissions are those set out in *Clearwater* and *Motor Machinists*."

6.2 Other than one matter raised in relation to the evidence of Mr Masefield, which we return to below, nothing appears to turn on this point from the Council's perspective insofar as there is no suggestion that Kāinga Ora's submission is not "on the plan change", or that any issues of procedural fairness arise in respect of the submission. Notwithstanding that, Kāinga Ora suggests the Panel must be careful insofar as it treats the USPC as "plan changes" rather than a plan review, particularly as counsel herself acknowledges that the USPC comprises "a significant phase of an ongoing rolling review". We submit that a too constrained categorisation of the USPC in terms of the application of the *Clearwater/Motor Machinists* tests has the potential to give rise to unforeseen and unhelpful consequences or outcomes such as those identified by the Environment Court in *Bluehaven Management Limited v Western Bay of Plenty District Council* [2016] NZEnvC 191. It would be inappropriate for a valid submission raising relevant resource management issues directly connected with the purpose of the plan changes to be excluded based on a strict application of the two-stage test in *Clearwater/Motor Machinists*. In the case of a rolling plan review, and in particular where a plan change involves a comprehensive review

of the plan's approach to (for example) providing for future urban growth, a hearing panel should be hesitant before seeking to exclude a submission that seeks to address those issues albeit in a different way, on the basis the submission is not "on" the plan change when strictly construed with reference to supporting section 32 reportage, or on the basis of procedural fairness concerns where a submission has been validly received, summarised and notified to the public under Schedule 1, clause 7. We submit that when considering the USPC on a spectrum between a plan change of limited scope and a full plan review, the USPC should be considered to fall closer to the "full plan review" end of that spectrum.

6.3 In terms of Kāinga Ora itself, the issue only arises in respect of the evidence of Mr Masefield and his planning opinion after reflecting on the issue that the EARTH chapter of the plan should be deleted. While Kāinga Ora remains of the view that Mr Masefield's recommendation is sound, for the reasons set out in his evidence, it acknowledges that this relief is likely beyond the scope of what is reasonably and fairly raised in either the Kāinga Ora submission or the Northland Regional Council submission to which Kāinga Ora is further submitter. It does not pursue this particular relief but suggests that the Council take on board the Mr Masefield's comments when formulating the next phase of its rolling review of the district plan.

7. Legal issue – reverse sensitivity provisions sought by NZTA/Kiwirail

7.1 NZTA and Kiwirail have lodged submissions seeking the insertion of provisions into the USPC to address "reverse sensitivity" considerations in relation to the State Highway network and rail corridor. By way of summary, the relief sought includes an "Acoustic Insulation Overlay" located 100m either side of the State Highway and North Auckland Rail Corridors, which would affect approximately 7,500 properties (according to the Council's section 42A Report).

7.2 The submitters suggest that the approach they advocate for is "common" within district plans, which Kāinga Ora doubts. Given the broad nature of its interests Kāinga Ora involves itself closely in most major district plan review processes and plan changes that propose

changes that would have implications for residential development. Kāinga Ora is not aware of any district plan in New Zealand that incorporates a 200m wide (either side of the relevant corridor) requirement for acoustic insulation of new or altered buildings. Certainly, where such measures are being proposed by NZTA and/or Kiwirail, Kāinga Ora has been seeking to engage in the process both directly with those entities and by way of further submission.

7.3 Counsel for Kiwirail helpfully refers in paras 2.7-2.11 of their legal submissions to relevant Environment Court caselaw relating to the appropriateness or otherwise of land use controls in district plans to manage reverse sensitivity effects. Kāinga Ora generally agrees with Kiwirail's description of "reverse sensitivity effects", and the principles that can be taken from the caselaw that they refer to. However, Kāinga Ora notes as follows:

(a) Kāinga Ora agrees that to justify imposition of land use controls on adjoining activities that the effects-generator must be of some considerable economic or social significance, local regionally or nationally. However, it is also clear that local, regional or national significance will not automatically justify the imposition of land use controls on adjoining land uses.

(b) In contrast to the situations covered by existing caselaw, in many cases sensitive land uses have not necessarily established later in time to the establishment or intensification of the effects generating activity. Sensitive activities in many cases have been lawfully established in their current locations prior to the establishment of the adjoining (for example) transport infrastructure. In such cases, it is appropriate to consider whether alterations to or intensification of such uses should have imposed on them the cost of managing the "interface effects" associated with incompatibility between the transport infrastructure effects and the purportedly sensitive land use.

(c) Putting aside the matters referred to above – Kāinga Ora says that the evidence presented by the submitters is not sufficient to demonstrate a *need* for a land use control of the nature and scope proposed by them. While Mr Chiles's evidence describes

the nature of noise and vibration effects generated by transport infrastructure it is not substantiated by any modelling, empirical or factual data specific to the Whangarei context. In the absence of such information, it is not possible for Kāinga Ora to engage with the submitters and Council regarding whether, considering the matter on a "case by case basis" as stated by the Court in *Ngatarawa*, whether any land use control is appropriate. Any control would need to strike an appropriate balance between internalisation of effects by the primary effects-generator and recognition of the economic and social importance of the infrastructure through mitigation of the potential for reverse sensitivity effects (if indeed, there is any).

7.4 We also note the separate 5m building setback sought by Kiwirail. As noted in the further submission and evidence filed, Kāinga Ora considers that the proposed setback:

(a) In not appropriate when regard is had to alternative mechanisms – For example, Kiwirail has other mechanisms available to it to enable ongoing operation / upgrade of rail network such as the use of its powers as a requiring authority under the RMA or Public Works Act.

(b) The approach is inequitable insofar as it seeks to apply setback restrictions on the use of land adjoining the corridor, without an equivalent setback within the rail corridor.

(c) The approach does not take account of the use of existing yard controls. Kāinga Ora has previously suggested this as an alternative approach which would include a specific suite of assessment criteria which would enable an appropriate assessment of any potential electrical safety concerns where a development proposal seeks to infringe the yard setback development control of the underlying zone, rather than the use of a blunt setback control.

8. Procedural issue – late filing of evidence

8.1 Kāinga Ora is aware that some submitters in presenting their submissions to this hearing panel have expressed a concern about the

late filing of Kāinga Ora's evidence in support of its submission. As the Panel will be aware:

(a) Kāinga Ora sought, and was granted, an extension of time to file its evidence, until 14 November 2019.

(b) Unfortunately, despite its best efforts, Kāinga Ora was not able to file its entire "package" of evidence by the extended deadline. It filed its evidence as follows:

(i) The evidence of Ms Jones and Mr Heath were filed on 14 November 2019.

(ii) The evidence of Mr Lindenberg (x2) and Mr Masefield were filed on 18 November 2019 – two working days after the extended deadline.

(iii) The evidence of Mr Osborne was filed on 19 November 2019 – three working days after the extended deadline.

8.2 The hearing panel has now issued a direction (2 December 2019), providing an opportunity for further submitters in respect of Kāinga Ora's submission to appear again before the Panel and provide comment on the Kāinga Ora evidence on 10 December 2019. The panel notes that further submitters who wish to provide expert evidence are encouraged to provide that evidence to the panel prior to 10 December, but will not be required to do so.

8.3 In the circumstances, and given the comprehensive nature of its submission which includes clear reasons for the specific relief that it seeks, Kāinga Ora considers that the submitters had sufficient information to understand the rationale for and potential implications of the relief sought in its submissions. However, notwithstanding that fact, Kāinga Ora does not oppose the submitters being given a further opportunity to respond. However, it notes that:

(a) Counsel for Kāinga Ora are not able to attend the hearing on 10 December 2019.

(b) Kāinga Ora itself will already have presented its case on 3 December 2019, prior to any expert evidence being filed by the

relevant further submitters (if any). Accordingly, Kāinga Ora will have had no opportunity to consider that evidence prior to presenting its case.

8.4 In the circumstances, as a matter of procedural fairness to Kāinga Ora, we respectfully request that the Panel confirm that Kāinga Ora will be notified of and given an opportunity to respond in writing by way of memorandum of counsel to any legal or procedural matters that may arise and that it may file rebuttal evidence in relation to any expert evidence filed by further submitters in relation to Kāinga Ora's submission or evidence that is received by the Panel after Kāinga Ora presents its case.

9. Concluding comment

9.1 For the reasons given in the evidence that the Panel will hear from Kāinga Ora's witnesses today, we say that the relief sought in Kāinga Ora's submission is more appropriate than the provisions of the notified USPC, and will better achieve the higher level planning documents and the Council's stated goal of providing sufficient capacity for and enablement of urban growth into the future. We ask that the Panel grant the relief sought, amended in accordance with the evidence Kāinga Ora's witnesses.

DATED this 3rd day of December 2019

Daniel Sadlier / Alex Devine
Counsel for Kāinga Ora-Homes and Communities