BEFORE INDEPENDENT HEARING COMMISSIONERS
AT CHRISTCHURCH

I MUA NGĀ KAIKŌMIHANA WHAKAWĀ MOTUHAKE
KI ŌTAUTAHI

IN THE MATTER	**of the Resource Management Act 1991**
AND	
IN THE MATTER	**of the hearing of submissions and further submissions on Plan Change 14 to the Operative Christchurch District Plan**

LEGAL SUBMISSIONS ON BEHALF OF KĀINGA ORA – HOMES AND COMMUNITIES

TREE CANOPY AND FINANCIAL CONTRIBUTIONS

12 APRIL 2024

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MAY IT PLEASE THE COMMISSIONERS:

1. INTRODUCTION

1.1 These submissions are filed on behalf of Kāinga Ora – Homes and Communities in support of its submissions on the City-wide Qualifying Matters (**QMs**) and Various topic, which is due to be heard in the weeks of 15 and 22 April 2024. These submissions do not address the Airport Noise QM, which is addressed in the separate legal submissions by Mr Whittington. Rather, these submissions address the Kāinga Ora submissions on the proposed Tree Canopy Cover and Financial Contributions provisions.

1.2 In our submission, the following matters need to be answered in the affirmative, before the Tree Canopy Cover and Financial Contributions provisions can be lawfully imposed:

(a) Are the proposed Tree Canopy provisions a "financial contribution"?

(b) If so, is there a sufficient nexus between the proposed financial contribution rule and an adverse effect on the environment?

(c) If there is that sufficient connection, are the proposed financial contribution rules the most appropriate method, as required by s 32, RMA.

2. FINANCIAL CONTRIBUTIONS – LEGAL FRAMEWORK

2.1 A financial contribution is defined in s 108(9), RMA, as meaning a contribution of money, or land, or a combination of money and land.

2.2 Section 108(2)(a) authorises the imposition of a financial contribution condition on a resource consent, "subject to subsection 10". Section 108(10) reads (emphasis added):

> A consent authority **must not** include a condition in a resource consent requiring a financial contribution **unless**—
>
> (a) the condition is imposed in accordance with the purposes specified in the plan or proposed plan (including the purpose of ensuring positive effects on the environment to offset any adverse effect); and
>
> (b) the level of contribution is determined in the manner described in the plan or proposed plan.

2.3 Section 111 states that "[w]here a consent authority has received a cash contribution under s 108(2)(a), the authority shall deal with that money in reasonable accordance with the purposes for which the money was received."

2.4 The power to include financial contributions provisions applying to permitted activities was inserted into the RMA via s 77E.

2.5 Any plan provision providing for a financial contribution must be meet the statutory requirements, including s 32, RMA, and any resource consent condition imposed under s 108 must, amongst other things, meet the *Newbury* principles.

2.6 In our submission, the s 77E amendment was not intended to undermine or upset the well-established principle applying to the charging of financial contributions established through:

(a) the High Court's decision in *Infinity Investment*;[1] and

(b) the established, 43 year old, *Newbury* principles which apply as a matter of administrative law in relation to the exercise of any discretionary public power to impose conditions on a decision;[2] and

(c) the requirement for any proposed objective to be most appropriate way to achieve the purpose of the Act[3], and for every provision to be most appropriate way to achieve the objectives including by:

(i) identifying other reasonably practicable options;

(ii) assessing the relative efficiency and effectiveness of those options.[4]

3. OPERATION OF FINANCIAL CONTRIBUTION RULE

3.1 In this case, in summary our understanding is that there would be an amendment to Strategic Objective 3.3.10(a)(ii), and the introduction of a new sub-chapter 6.10A Tree Canopy Cover and Financial Contributions.

3.2 The Tree Canopy Cover and Financial Contributions provisions would:

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1 *Infinity Investment Group Holdings Ltd v Queenstown Lakes District Council* [2011] NZRMA 321 (HC).
2 See *Tauranga City Council v Minister of Education* [2019] NZEnvC 032, at [58]-[62].
3 Section 32(1)(a), RMA
4 Section 32(1)(b), RMA

(a) apply to all residential and subdivision activities; but

(b) would not apply if the proposed development activity provided (or retained) at least 20% canopy cover of the site, and 15% canopy cover of any new road corridor area; and

(c) would require this outcome to be secured in perpetuity by way of a consent notice registered on the record of title.

3.3 But even in circumstances where there is an existing 20% canopy cover, there is a requirement for a consent notice to be registered and for that canopy cover to be maintained in perpetuity. (This would lead to – literally – thousands, or tens of thousands, of consent notices being imposed on records of titles across Christchurch.)

3.4 The average financial contribution has been calculated as $2,037 (ex GST) per tree, plus the land value component of 50m^2 of land *per tree* (Ms Hansbury, s 42A Report, 5.2.14). (If the land value is $500/m^2 then then land cost component of the financial contribution is $25,000 per tree. But if the land value is double, then the cost of the financial contribution is over $50,000. And again this is *per tree*. So it could be much more.) This land value component is charged, irrespective of whether the Council never needs to actually pay for any land, and irrespective of the fact that development contributions are obtained from developers for parks and reserves. And this is in the context of the MDRS provisions already specifically requiring 20% landscaping.

3.5 The intention is that the Council will keep this collected money (somehow separately identifiable) and (somehow) ensure that it is spent to provide tree canopy cover as close as possible to the site of the particular land use charged (Ms Hansbury, s 42A Report, 5.2.16). There is no requirement for this money to be spent within a particular time, and therefore there is no certainty that the trees will be planted before the development occurs, or that it is ever spent. It is also a near certainty that the Council will not be imposing consent notices on its own land requiring the trees to be maintained in perpetuity.

3.6 Finally, the requirement to provide this tree canopy component applies irrespective of the MDRS provisions already specifying a requirement for on-site landscaping of 20% in grass or plants, including tree canopy (clause 18(1), Schedule 3A, RMA).

3.7 Even the brief summary above highlights fundamental questions of fairness as between landowners, between different land users, and between Council and other landowners.

4. FUNDAMENTAL PROBLEM WITH PROPOSED PROVISION – THE REQUIREMENT TO PROVIDE TREE CANOPY COVER IS NOT A "FINANCIAL CONTRIBUTION"

4.1 The most fundamental difficulty with the structure of the proposed rule is that it is not a "clean" financial contribution rule, rather there is a requirement to provide tree canopy cover (either retain existing or as a positive contribution) – and only if you *do not* – are you subject to a financial contribution. This proposed rule would appear to apply to all of the residential zones, not just those that are proposed to be intensified under the IPI. Furthermore, the proposed provisions include a requirement to register a consent notice that would impose on-going obligations on the landowner to maintain that tree cover on the site in perpetuity. Notably, this requirement goes well beyond required under the MDRS provisions of Schedule 3A, RMA.

4.2 In our submission, there is simply no scope under s 80E to include such a wide ranging rule in the IPI process that would affect all residential land – the requirement to provide tree canopy cover (and maintain that in perpetuity) is not *money* or *land* and is therefore not a financial contribution. Furthermore such a rule represents a disenabling of rights (or more restrictive control) when compared to the Operative District Plan, and is therefore contrary to the *Waikanae* decision.

4.3 In our submission, that should be the end of the matter. While the requirement to provide tree canopy cover could (theoretically) be excised from the rule, simply requiring a financial contribution – none of the Council's assessments (including any assessments of costs and benefits) have approached the question on that basis.

4.4 Nevertheless, if that submission is not accepted, we set out below some brief further reasons why, even if it is a lawful form of rule, it is invalid (due to a lack of an established nexus) or inappropriate (when assessed under s 32, RMA).

5. REQUIREMENT FOR A LINK BETWEEN THE FINANCIAL CONTRIBUTION CHARGED AND ADVERSE EFFECT OF THE ACTIVITY

5.1 In *Infinity Investment*, the High Court was tasked with determining whether a proposed financial contributions regime for affordable housing was ultra vires the Council's powers under the RMA. In finding that the proposed provisions fell within the Council's powers, the Court held (emphasis added):

> [41] A literal reading of s 31(1)(a) indicates that one of the functions of a territorial authority is to establish objectives, policies and methods to achieve integrated management of the effects of the use or development of land within its district for the purpose of giving effect to the Act. **It goes without saying that there must be a link between the effects of the use or development of the land and the objectives, policies and methods that are established to achieve integrated management. Moreover, that the purpose must be to give effect to the Act.**

5.2 The link between the contribution charged and an adverse effect of the activity is essential. If there was no such requirement for a link, then operators of Christchurch Adventure Park could be charged a financial contribution to construct a community swimming pool in Riccarton.

5.3 The broad scope of the purpose of the RMA, ie sustainable management, also does not give *carte blanche* to authorise any rule, or, in this case, any financial contribution related to that concept. As the Full Court of the High Court said in *Western Bay of Plenty District Council v Muir* [2000] NZRMA 353 one must be cautious about an over-reliance upon purpose, rather than the text of legislation:

> [27] … Whilst of course the purpose of the [Resource Management] Act is sustainable management of natural [and] physical resources and as a consequence rules must be necessary to achieve the purpose of the Act, simply because such a rule might be directed towards that purpose does not of itself make the rule lawful if the rule itself is ultra vires.

5.4 The Full Court also said that, at [31], if a power granted for one purpose is exercised for a different purpose, that power has not been validly exercised.

5.5 The need for a causal nexus is similar under the provisions applying to development contributions under the Local Government Act 2002. In *Neil*

Construction[5] the High Court held that in order to qualify as a "development" under that regime, a subdivision or other form of built development must generate a demand for infrastructure, with a direct causal connection between the development and its effect, either alone or jointly with another development, in requiring additional assets or increased capacity. While we accept that the financial contributions and development contributions regimes are separate, and should be treated that way, we submit that there are strong parallels to be drawn between the underlying principles at play: namely, development which generates a need for a financial response to address an effect of that development.

5.6 The Council's evidence has attempted to identify, only a very high level, a causal nexus between the activity for which the financial contribution is to be charged (the development of houses) and the nature of the financial contribution (a payment of money for trees). There is also no assessment as to how a house might generate the "demand" for tree canopy, and most fundamentally why "20%" is the 'magic number'; nor how a tree canopy is any better than, say grasses or other forms of vegetation. One might think that, in terms of managing stormwater infiltration and reducing sediment runoff, grasses would be at least as effective as mature trees. Nor is there any assessment, from a biodiversity perspective, as to why trees (which might not be native species), are so much better than other forms of vegetation. Rather, there is an evident bias towards tree canopy.

5.7 In our submission the Council's analysis in this regard is completely inadequate. At best it is a tenuous connection, which then feeds into the appropriateness of the proposed provision (discussed below).

6. DO THE PROPOSED RULES MEET THE SECTION 32 TEST?

6.1 The requirements of s 32 will be well known to the Panel and have been addressed in earlier submissions.

6.2 The benefits of vegetation, trees and tree canopy cover, including within urban areas, are not disputed. Nor is it disputed that vegetation, trees and tree canopy cover can mitigate some of the effects generated by urban development and can provide amenity benefits. But s 32 requires a far more rigorous assessment than simply accepting those very basic

[5] *Neil Construction Ltd v North Shore City Council* [2008] NZRMA 275 (HC).

propositions, particularly when the costs are significant (tens of thousands of dollars) and the obligations to maintain these trees are perpetual.

6.3 In respect of the proposed "tree canopy/financial contribution rules", we submit that:

(a) The requirement to provide 20% landscaping is already required by Schedule 3A, RMA, as part of the MDRS package of rules.

(b) Councils obtain development contributions from developers to provide parks and reserves across the City.

(c) There are other reasonably practicable alternatives to addressing the desire for improved tree canopy across Christchurch City – including the promulgation of a Plan Change specifically directed to that purpose under normal Schedule 1 processes. Or, if it were able to be justified, then the development contributions policy could be directed to the provision of additional vegetation (including tree canopy): or, LTP funding could be allocated to increasing the extent of tree canopy cover across Christchurch.

(d) A targeted Plan Change, development contribution, or LTP policy could address tree canopy cover across all zones and land uses, and would therefore be a more effective and efficient outcome. It would be more equitable and it would therefore be more enduring. It could also be much more straightforward in its application.

(e) The tree canopy and financial contribution provisions are complex to interpret and apply, and will generate administrative inefficiencies (including identifying the degree of tree cover required, area of coverage, maintaining that coverage, and potential enforcement).

(f) The effect of the tree canopy and financial contribution rules would appear to require the greatest financial contribution from development in those areas that can least afford it – ie in those areas where affordable housing is most needed, and where "every dollar counts" in terms of being able to provide affordable housing. How is that consistent with sustainable management, or the purpose of the Amendment Act?

6.4 The basis for those submissions are set out in the evidence to be presented by Kāinga Ora.

Dated 12 April 2024

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