

# WAIKATO DISTRICT COUNCIL

## Hearings of Submissions on the Proposed Waikato District Plan

### Report and Decisions of Independent Commissioners

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#### Decision Report 28: Zoning Overview

17 January 2022

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#### Commissioners

Dr Phil Mitchell (Chair)

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Ms Linda Te Aho

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## **1 Introduction**

- 1.1 The zoning of properties was one of the most common matters addressed by submissions, and we heard evidence on this topic in Hearing 25 Zone Extents (“Hearing 25”). Due to the large number of submissions on zoning, Hearing 25 was broken into thirteen hearings, 12 based on specific geographic areas, and 1 relating to the “rest of the district”. Because of the large number of submissions seeking rezoning, we record in this decision our overall approach to our decision-making on the submissions seeking rezoning, rather than repeating it in the various zoning decisions.

## **2 Hearing arrangement**

- 2.1 A considerable number of submissions seeking rezoning provided no technical or factual information to support their various rezoning requests. Further, as the rezoning requests have arisen from submitters’ own submissions on the Proposed Waikato District Plan (PDP), rather than being included in the notified version, the section 32 report published at the time the PDP was notified does not provide (and could not have provided) any evaluation of the submitters’ rezoning requests. For these reasons, we organised the exchange of evidence differently for Hearing 25 so that submitter evidence preceded the section 42A report, as set out in our Directions (12 May 2020).
- 2.2 All of the relevant information pertaining to this hearing including the section 42A report, legal submissions and evidence is contained on the Waikato District Council (Council) website.

## **3 Statutory tests**

- 3.1 Early in the process, the Council produced a Framework Report that was intended to be a guiding document that provided a standardised framework for submitters to define their zoning relief, for the structuring and content of evidence and in order to have a consistent approach in the area specific section 42A reports. The Framework Report included a 3 lens method for section 42A authors to follow when assessing submissions, with the report indicating that Lens 1 needed to be satisfied before proceeding to Lens 2 and then Lens 3.
- 3.2 In response to criticisms from counsel for submitters that the 3 Lens approach, particularly the threshold Lens 1 test, may result in submitters and section 42A report authors following an incorrect statutory process, we issued directions to clarify the situation. Our directions confirmed that the Framework Report was to be considered as a guide only and that Lens 1 was an incorrect legal test that should not be applied as a gateway or threshold for assessment.
- 3.3 It was the consensus of all parties who attended a prehearing conference on the validity of the Framework Report that the correct legal and planning framework to be followed was the checklist described in Appendix 1 of the legal submissions by counsel for Council dated the 23<sup>rd</sup> of September 2019; as amended to include the new section 31(1) (aa) of the Resource Management Act 1991 (RMA) directing Council to ensure sufficient development capacity for housing and business land is provided for in the district.

- 3.4 In our assessment of the rezoning submissions, evidence and the recommendations in the section 42A reports, we have carefully considered the statutory requirements for undertaking a review of a district plan. In arriving at our decisions, we are satisfied that we have met the statutory requirements for giving effect to higher order planning documents, had regard to the relatively recent growth planning strategies for the district and taken into account the iwi planning documents as set out below.

#### **4 Te Ture Whaimana – Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010**

- 4.1 The Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010 (Settlement Act) gives effect to the Deed of Settlement entered into by the Crown and Waikato-Tainui in relation to Treaty of Waitangi claims pertaining to the Waikato River on 17 December 2009. The Settlement Act has the overarching purpose of restoring and protecting the health and well-being of the Waikato River for future generations. Section 9(2) of the Settlement Act confirms that Te Ture Whaimana, the Vision and Strategy for the Waikato River, applies to the Waikato River and activities within its catchment affecting the Waikato River. As well as being deemed part of the Waikato Regional Policy Statement (RPS) in its entirety pursuant to section 11(1), the Settlement Act prevails over any inconsistent provision in a national policy statement. Sections 11 to 15 of the Settlement Act also prevail over sections 59 to 77 of the RMA (which relate to regional policy statements, regional plans and district plans) to the extent to which the content of the Settlement Act relates to matters covered under the RMA. The overall vision for the Waikato River is captured in clause 2.5.1 of the RPS which states:

Our vision is for a future where a healthy Waikato River sustains abundant life and prosperous communities who, in turn, are all responsible for restoring and protecting the health and well-being of the Waikato river, and all it embraces, for generations to come.

- 4.2 We have been particularly mindful of the requirements of the Settlement Act, as well as the requirement to give effect to Te Ture Whaimana, the Vision and Strategy for the Waikato River, given that it is embedded in the RPS.

#### **5 National Policy Statement for Urban Development**

- 5.1 The National Policy Statement for Urban Development (NPS-UD) came into force on 20 August 2020, some two years after the notification of the PDP, and four years after the RPS became operative. Nonetheless, district plans are required to give effect to any national policy statement pursuant to section 75(2) of the RMA, and therefore we have given this careful consideration in our decision making.
- 5.2 The NPS-UD requires well-functioning urban environments, that enable all people and communities to provide for their social, economic, and cultural well-being, and for their health and safety; now and into the future. It also seeks to improve housing affordability through supporting competitive land and development markets by requiring Tier 1 and

- 2 Local Authorities to provide sufficient development capacity, plus 20% competitiveness margins, for both housing and business land over the defined short term, medium term and long term (15% competitiveness margin for the long term). The Waikato District Council is a Tier 1 Local Authority. In general terms, the NPS-UD requires district plans to enable more people to live in, and more businesses and community services to be located in, areas of an urban environment in which certain criteria apply. Similar to its predecessor (being the National Policy Statement for Urban Development Capacity) there is a focus on integrating land use with infrastructure.
- 5.3 It is not clear in the NPS-UD whether the requirement to provide sufficient development capacity (plus a 20% competitiveness margin) in a district plan to meet demand applies:
- a) To the district as a whole; or
  - b) To individual towns of the district that have, or are intended to have, a housing and labour market of at least 10,000 people and to other smaller towns that form a housing or labour market for Hamilton or Auckland.
- 5.4 We have decided to apply the NPS-UD direction concerning development capacity to individual towns across the district that have been identified for future growth in the RPS and recent growth strategy documents. This is because a housing capacity assessment required under the NPS-UD involves an estimate of the demand for additional housing in different locations that Council chooses. Similarly for business land, Council may identify, in any way it chooses, business sectors which would include locations (clauses 3.24 and 3.28).
- 5.5 We consider that if growth demand is not addressed in those areas identified for future growth; housing affordability and sufficient land supply to provide for a competitive land and development market will remain issues for the Waikato District. We note here that in considering demand capacity as directed by NPS-UD in response to zone changes sought by submitters, we need to take into account whether our decisions will contribute to well-functioning urban environments as defined by Policy 1 of the NPS-UD. In other words, providing for housing and business land demands is not absolute at the expense of promoting well-functioning urban environments.
- 5.6 Finally, we should make it clear that in addition to our consideration of the NPS-UD directions, we have also considered other submissions seeking rezoning outside identified growth areas. We have considered these submissions on their merits and whether the zoning changes sought are appropriate.

## **6 New Zealand Coastal Policy Statement**

- 6.1 Section 75(3)(b) of the RMA requires a district plan to give effect to any New Zealand coastal policy statement. The New Zealand Coastal Policy Statement (NZCPS) guides development within the coastal environment. Under the NZCPS, the protection of the values of the coastal environment does not preclude use and development in appropriate places and forms, and within appropriate limits. We have been particularly aware of where, how and when to provide for urban development in the coastal

environment and where areas of the coastal environment are inappropriate for development.

## **7 National Policy Statement for Freshwater Management**

- 7.1 The National Policy Statement for Freshwater Management (NPS-FM) came into force on 3 August 2020. The fundamental concept is Te Mana o te Wai which refers to the fundamental importance of water and recognises that protecting the health of freshwater protects the health and well-being of the wider environment. It protects the mauri of the wai. While the NPS-FM is of most relevance to the regional councils, the NPS-FM policies relating to health and well-being of water bodies, freshwater ecosystems, wetlands, river extents and values are relevant to rezoning requests and we have given effect to them accordingly.

## **8 Waikato Regional Policy Statement**

- 8.1 Pursuant to section 75(3)(c) of the RMA, a district plan must give effect to any regional policy statement. In terms of the RPS, Objective 3.12 is the only objective that specifically acknowledges urban development. It is a high level objective and provides the basis for the more specific policies relating to the Future Proof land use pattern. The policies in Section 6 of the RPS give effect to Objective 3.12 and were the focus of planning evidence from a number of parties, meaning they are highly relevant to our consideration of rezoning. We are aware that Policy 6.1 is not particularly directive in that “regard is to be had” to Section 6A which are the development principles. We note that the development principles are cross-referenced in a number of the policies within Section 6 as well as implementation methods.
- 8.2 Policy 6.14 of the RPS seeks to ensure that new development within the sub-region adopts the Future Proof land use pattern. Specifically, the relevant clauses seek to ensure:

Within the Future Proof area:

- a) new urban development within Hamilton City, Cambridge, Te Awamutu/Kihikihi, Pirongia, Huntly, Ngaruawahia, Raglan, Te Kauwhata, Meremere, Taupiri, Horotiu, Matangi, Gordonton, Rukuhia, Te Kowhai and Whatawhata shall occur within the Urban Limits indicated on Map 6.2 (section 6C);
  - b) new residential (including rural-residential) development shall be managed in accordance with the timing and population for growth areas in Table 6-1 (section 6D);
- 8.3 We consider Clause (b) creates some flexibility for land use to depart from the Future Proof pattern, provided that certain criteria and principles are met. It seems to us that while the presumption of Policy 6.14 is that development will fit within the Future Proof settlement pattern embedded in the RPS; the policy also expressly provides a mechanism to implement an alternative land use pattern, in part. The alternative release criteria contained in Method 6.14.3 are specifically designed to address this issue. The criteria states:

District plans and structure plans can only consider an alternative residential or industrial land release, or an alternative timing of that land release, than that indicated in Tables 6-1 and 6-2 in section 6D provided that:

- a) to do so will maintain or enhance the safe and efficient function of existing or planned infrastructure when compared to the release provided for within Tables 6-1 and 6-2;
- b) the total allocation identified in Table 6-2 for any one strategic industrial node should generally not be exceeded or an alternative timing of industrial land release allowed, unless justified through robust and comprehensive evidence (including but not limited to, planning, economic and infrastructural/servicing evidence);
- c) sufficient zoned land within the greenfield area or industrial node is available or could be made available in a timely and affordable manner; and making the land available will maintain the benefits of regionally significant committed infrastructure investments made to support other greenfield areas or industrial nodes; and
- d) the effects of the change are consistent with the development principles set out in Section 6A.

8.4 We note that the preface of the 6A Development Principles states “new development *should...*”, which is not particularly directive or mandatory. It seems clear to us that development should be compatible with the Development Principles when they are read as a whole. While analysis of each principle is necessary, and particular attention should be paid to the principles that are most relevant in the circumstances, it is not necessary for the development to be consistent with every one of the twenty principles (and the eight principles that are relevant to rural residential development).

8.5 Given the complexity created by the NPS-UD being gazetted recently and the RPS not yet being updated to give effect to it, we consider that the RPS is sufficiently responsive and flexible to deal with out-of-sequence unplanned development; particularly given the alternative land release criteria in Method 6.14.3. We consider that the alternative land release provisions in the RPS mean it is sufficiently responsive to planned and unanticipated development opportunities so as to be consistent with the NPS-UD, particularly Policy 8. As to the outdated growth areas in the RPS, the alternative land release provisions cover this very situation in order to provide flexibility for new growth opportunities. Even if the RPS needs to be changed to give effect to the NPS-UD, then we take direction from the NPS-UD in any case as the district plan also needs to give effect to the NPS-UD. It seems to us that the need for recourse to Part 2 does not arise.

## **9 Future Proof**

9.1 While Future Proof 2009 was embedded in the RPS, there was a subsequent 2017 update as part of a two-stage review process to recognise national and sub-regional planning change that had occurred since 2009. The 2017 Strategy updated the Future Proof settlement pattern and included the areas in the north (Tuakau and Pōkeno) that were brought into the Waikato District as part of the Auckland boundary change. It also included a new Section 7.5, A Responsive Approach to Development. This section

refers to the difficulty of predicting future growth demands and trends, and provides further context and guidance for changes to the settlement pattern.

- 9.2 Section 74(2)(b)(i) of the RMA requires us to have regard to management plans and strategies prepared under other Acts. This would include Future Proof 2017 and we have therefore had regard to it.

## **10 Waikato 2070**

- 10.1 Waikato 2070 is the growth strategy recently adopted by Council in 2020. As it was prepared under the special consultative process in the Local Government Act 2002, it has the same status as Future Proof 2017 in terms of our requirement to “have regard” to it in accordance with section 74(2)(b)(i) of the RMA. We note however that Future Proof 2009 has an elevated status, given it is embedded in the RPS, and therefore it is to be given more weight. While we are only required to have regard to Waikato 2070, it was a useful document for indicating the future level of growth anticipated for each town and village and where that growth is likely to be located. We note that it is not our role to evaluate the merits of Waikato 2070 but rather have regard to it in our assessment of the submissions seeking rezoning. The weight we have placed on Waikato 2070 is not determinative of our decision on the submissions and we have given more weight to the higher order planning documents as required by the RMA.
- 10.2 Overall, in order to give effect to the NPS-UD, we have taken into account the growth areas identified in Future Proof 2017 and Waikato 2070 when considering zone changes sought by submitters.

## **11 Waikato-Tainui Environmental Plan Tai Tumu, Tari Pari, Tai Ao**

- 11.1 We are required to take into account the Waikato-Tainui Environmental Plan Tai Tumu, Tari Pari, Tai Ao in accordance with section 74(2A) of the RMA and have done so.
- 11.2 The overarching purpose of the Waikato-Tainui Environmental Plan Tai Tumu, Tari Pari, Tai Ao is to provide a pathway that returns the Waikato-Tainui rohe to the modern day equivalent of the environmental state it was in when Kiingi Taawhiao composed his maimai aroha. We have been particularly aware of the Waikato-Tainui Environmental Plan Tai Tumu, Tari Pari, Tai Ao when considering rezoning requests, including those near the Waikato River or waterways.

## **12 Maniapoto - Ko Tā Maniapoto Mahere Taio: Environmental Management Plan**

- 12.1 We are required to take into account the Maniapoto - Ko Tā Maniapoto Mahere Taio: Environmental Management Plan (Environmental Management Plan) in accordance with section 74(2A) of the RMA and have done so. Only part of the Waikato District falls within the Maniapoto rohe so we have taken into account the Environmental Management Plan where it is relevant.

12.2 The aims of the Environmental Management Plan are to:

- a) Give effect to the overarching purpose of Nga Wai o Maniapoto Waipa River Act 2012 to restore, maintain and protect the quality and integrity of the waters that flow into and form part of the Waipa River for present and future generations;
- b) Raise awareness and understanding of Maniapoto values, interests and aspirations in the management of physical and natural resources; and
- c) Outline issues that affect Maniapoto values.

### **13 Sections 32 and 32AA of the RMA**

13.1 Sections 32 and 32AA of the RMA require an evaluation that considers the efficiency and effectiveness of a proposal (in this case zoning), taking into consideration benefits and costs and the risk of acting or not acting where there is uncertain information. If a change in zoning from the notified proposed district plan is being recommended, a section 32AA further evaluation must be undertaken in accordance with section 32(1) to (4).<sup>1</sup> We have drawn on the Assessment of Environment Effects and section 32AA evaluations filed in evidence as well as the section 42A reports. We are aware that case law has interpreted “most appropriate” to mean “suitable, but not necessarily superior”. Where we have recommended a change in zoning, this is because we consider it is the most appropriate way to achieve the objectives by:

- a) identifying other reasonably practicable options for achieving the objectives; and
- b) assessing the efficiency and effectiveness of the zoning in achieving the objectives.

13.2 This means the most appropriate zoning option does not need to be the optimal or best option, but must demonstrate that it will meet the objectives in an efficient and effective way. Our assessment of the efficiency and effectiveness of the zoning included consideration of the benefits and costs of the environmental, economic, social, and cultural effects that are anticipated from the implementation of the provisions, more specifically the:

- a) opportunities for economic growth that are anticipated to be provided or reduced; and
- b) opportunities for employment that are anticipated to be provided or reduced; and
- c) the risk of acting, or not acting, if there is uncertain or insufficient information about the zoning.

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<sup>1</sup> Resource Management Act 1991, Section 32AA(1)(a) and (b).

13.3 The requirement of section 32AA to evaluate the provisions (in this case zoning) against the objectives in the PDP was problematic; a matter which was raised by a number of legal counsel at the pre-hearing conference on 12 March 2021. Due to the process of decision-making and our decision not to issue interim decisions, both the submitters and the section 42A report authors were left having to assess the zoning against the PDP objectives as notified. In many situations we have amended these objectives in response to submissions. Thus, our section 32AA evaluation of zone changes has been assessed against the appropriateness of achieving the objectives as modified by our decisions on other hearing topics.

#### **14 Conclusion**

14.1 When considering the zoning submissions in Hearing 25, we have applied the legal tests set out in Appendix 1 of the legal submissions by counsel for Council dated the 23<sup>rd</sup> of September 2019, together with the addition of section 31(1)(aa) RMA and, where relevant, best practice planning guidance.

**For the Hearings Panel**



**Dr Phil Mitchell, Chair**

**Dated: 17 January 2022**