

**BEFORE THE HEARING COMMISSIONERS
AT WAIKATO DISTRICT COUNCIL**

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of hearing submissions and further submissions on the
Proposed Waikato District Plan

**SUBMISSIONS OF COUNSEL FOR SUBMITTER #368 IAN MCALLEY:
RESIDENTIAL ZONE
20 February 2020**

Next Event Date: Hearing 10 - 25 February 2020

Harkness Henry
SPECIALIST LAWYERS

www.harknesshenry.co.nz

Phone (07) 838 2399
Fax (07) 839 4043
Address Level 8, KPMG Centre,
85 Alexandra Street, Hamilton 3204
Mail Private Bag 3077, Hamilton 3240,
New Zealand, DX GP 20015

Submitter Solicitor:
Dr J B Forret
(joan.forret@harkness.co.nz)

SUBMISSIONS OF COUNSEL FOR IAN MCALLEY

Introduction

- 1 These submissions are made on behalf of Mr Ian McAlley (**Mr McAlley**) and concern his submission on the Residential Zone provisions for the Proposed Waikato District Plan (**PWDP**).
- 2 Mr McAlley is identified as submitter #368.
- 3 These submissions cover the provisions of the PWDP Mr McAlley has made a submission on and provide context to his pre-circulated expert evidence from planner Stephen Gascoigne.
- 4 Mr McAlley's interests in the PWDP relate to substantial landholdings in the Waikato District's township of Te Kauwhata specifically with a significant interest in the Te Kauwhata West Residential Zone.
- 5 Te Kauwhata Land Limited (**TKL**) is the owner of 16.5ha residential land zoned Te Kauwhata West Living Zone (**TKWLZ**) in the Operative Waikato District Plan (**OWDP**). The TKWLZ is within the Te Kauwhata Structure Plan area (**Structure Plan**) which is also a component of the OWDP. Mr McAlley is the sole director of TKL.
- 6 Mr McAlley's submission sought several amendments and changes to the zone provisions to better promote sustainable management under the Resource Management Act 1991 (**RMA**), to better achieve the purpose of Part 2 and other provisions of the Act, and to meet the reasonably foreseeable needs of future growth.

Statutory considerations

- 7 The role of a district plan within the RMA planning hierarchy (and Part 2 generally) has been the subject of comment since the decision in *King Salmon*.¹ The statutory considerations when considering the content of a district plan were recently summarised by the High Court in *Gock v Auckland Council*² as follows:³

¹ *Environmental Defence Soc Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593.

² *Gock v Auckland Council* [2019] NZHC 1603.

³ At [20 - 21].

...the statutory considerations when considering the contents of the District Plan are set out in the un-amended versions of ss 31, 32, and 72-77D of the RMA.

To summarise, the relevant factors include whether district plan provisions:

- (a) are designed to accord with and assist the Council to carry out its functions, so as to achieve the purpose of the Act;⁴
- (b) are in accordance with any regulations (including national environmental standards);⁵
- (c) give effect to any national policy statement or the New Zealand Coastal Policy Statement;⁶
- (d) give effect to the RPS;⁷
- (e) are "not inconsistent" with an operative regional plan for any matter specified in section 30(1),⁸ and have regard to any proposed regional plan on any matter of regional significance;⁹ and
- (f) have regard to any relevant management plans and strategies under other Acts and to any relevant entry in the New Zealand Heritage Lists to the extent their content has a bearing on the resource management issues of the region.¹⁰

- 8 In terms of Part 2 of the RMA, it is important that a plan has been prepared having regard to Part 2 and with a coherent set of policies designed to achieve clear environmental outcomes. The policies of a district plan need to give effect to the purpose of the RMA, that is sustainable management, but also need to be sufficiently flexible to be able to respond to ever-changing environment and community needs over the period of the plan's life.

⁴ Resource Management Act 1991, ss 31 and 74(1)(a).

⁵ Section 74(1)(f).

⁶ Section 75(3).

⁷ Section 75(3)(c).

⁸ Section 75(4).

⁹ Section 74(2)(a)(ii).

¹⁰ Section 74(2)(b).

Submissions

- 9 These submissions address legal issues in relation to Mr McAlley's submission on the PWDP.

Te Kauwhata Structure Plan and Te Kauwhata West Residential Area:

- 10 The (operative) TKWLZ and relevant provisions, including Urban Design Guide, were established following a Council-led Structure Planning process and the resolution of two appeals to the former Proposed Waikato District Plan.¹¹ The Environment Court granted the rezoning of the majority of the Structure Plan area, incorporating a new Te Kauwhata West Living Zone into the framework of the OWDP, Living Zone and Te Kauwhata West Ecological Zone.
- 11 The relevant provisions for the Structure Plan currently sit under Chapter 21, Schedule 21B and Appendix A of the OWDP.
- 12 The PWDP as notified does not include the Structure Plan. The majority of provisions applying to the Structure Plan area have been removed in the notified version of the PWDP (along with the Structure Plan itself), however specific reference to Te Kauwhata West is retained within the Residential Zone rules as the Te Kauwhata West Residential Area. This reference remains despite there no longer being a Te Kauwhata Structure Plan.
- 13 Waikato District Council (**Council**) has provided no assessment as to why the Te Kauwhata West area should be treated any differently from the standard residential zone. Section 32 report does not include any evaluation about the Structure Plan and/or about the Te Kauwhata West Residential area. The submitter agrees that the Structure Plan should be removed and Te Kauwhata West should now be fully integrated into the general Residential Zone as has been the neighbouring land that was previously zoned for residential development.
- 14 Structure plans do not have any explicit legal status or statutory effect unless they are incorporated in a statutory planning document such as a district plan through policies, rules, or specific zoning.¹² Structure plans

¹¹ *Te Kauwhata Action Group Incorporated v Waikato District Council* [2012] NZEnvC 83, *Te Kauwhata Action Group Incorporated v Waikato District Council* [2012] NZEnvC 192

¹² See *Malory Corporation v Rodney District Council* [2010] NZRMA 392 at [13].

that are not included in the district plan may otherwise be considered as “non-statutory” plans. The Environment Court in *Auckland Memorial Park Ltd v Auckland Council*¹³ considered the Silverdale South Structure Plan and its non-statutory origin. The Court balanced the plan against the current statutory documents, in particular, the operative district plan and held that the structure plan was of little significance or help.¹⁴ The Court also noted that the non-statutory origin of the plan also meant that it was not a document to be considered under s 74(2)(b)(i) of the RMA.¹⁵

- 15 The process set out in Schedule 1 of the RMA must be followed to incorporate structure plan into district plans. Furthermore, it must be supported by a robust s 32 evaluation that explains its inclusion. The main purpose of the s 32 evaluation is to ensure that the Council has adequately assessed that the particular proposal is the ‘most appropriate’ way to achieve the purpose of the Act.
- 16 As mentioned above, the s 32 report does not include any evaluation about the Structure Plan and/or about the Te Kauwhata West Residential area. In our submission, there is no basis to treat the Te Kauwhata West area differently from the general residential zone.
- 17 The decision of the Environment Court in *Te Kauwhata Action Group Incorporated and Waikato District Council*¹⁶ resolved the appeals against the Structure Plan provisions for Te Kauwhata West and articulated the development outcome anticipated for this land, which was previously zoned Country Living . The Court noted:¹⁷

...that Country Living zones have a legitimate role on a permanent basis to provide a buffer between rural areas and residential areas. Unfortunately, no plans that we are aware of properly provide for this as a method of development. On a permanent basis one would imagine that this would involve covenants against further subdivision, and a notation on the title. The District Council is in a very fortunate position, in that the land closest to the village boundary that was previously zoned Countryside Living is still

¹³ *Auckland Memorial Park Ltd v Auckland Council* [2014] NZEnvC 9

¹⁴ At [70(f)].

¹⁵ At [70(f)].

¹⁶ *Te Kauwhata Action Group Incorporated and Waikato District Council* [2012] NZEnvC 83.

¹⁷ At [56].

undeveloped. There is, in our view, a rare opportunity to provide for a consolidation of the village to the west by rezoning this land as residential and thereby providing for a significant population increase without utilising the important rural land resources producing an uncoordinated form of development lacking appropriate connectivity.

- 18 The Court, in that case, did not envisage Te Kauwhata West as being a transition zone even though that was what the objectors wanted. The Court directed a reduced density on the new zone boundary as a means to reduce privacy impacts, and anticipated a greater concentration of houses in the Te Kauwhata West Living Zone, than within the Country Living Zone.
- 19 It is submitted that the lack of the Structure Plan in the PWDP signals an intention to treat Te Kauwhata West in the same way as the rest of the Residential Zone in Te Kauwhata. It is therefore inappropriate to reference the Te Kauwhata West Residential Area (or any variety of description) within special rules where there is no policy support for that separation and no explanation for treating it differently.
- 20 Furthermore, the Residential Zone provisions as notified are contrary to the requirements of the Waikato Regional Policy Statement (**WRPS**), in particular, policy 6.15 – density targets for Future Proof area of the WRPS. Policy 6.15 sets out 12 – 15 households per hectare as the average gross density target for Te Kauwhata. The Te Kauwhata West Residential Area proposed minimum and average lot size will not achieve the applicable outcomes sought in terms of residential density under policy 6.15 of the WRPS. As a result, the PWDP will not give effect to the WRPS.
- 21 In our submission, the outcomes identified in Future Proof and incorporated in the WRPS of achieving a minimum residential density of 12 – 15 households per hectare in the Residential Zone must be achieved to enable growth across the region to be adequately managed and provided for.
- 22 We also note that any reference to the Structure Plan is referring to a document that is now 10 years old. The Structure Plan does not align with the WRPS and as such, it is a document that is out of date and should not be relied upon.

- 23 For the reasons set out above, it is submitted that the specific set of provisions for Te Kauwhata West Residential Area should be removed and standard residential zone provisions should apply (i.e. 16.3.6 re Building Coverage and 16.4.3 regarding subdivision in Te Kauwhata West – minimum subdivision lot size in this area should be the same as the standard residential zone).

References to future master or structure plans

- 24 Various provisions under Chapter 16 – Residential Zone require compliance with a structure plan or master plan without any specific reference to a particular and/or notified structure plan or master plan.
- 25 As submitted above, structure plans or master plans do not have any explicit legal status or statutory effect unless they are incorporated in a statutory planning document such as a district plan through policies, rules, or specific zoning.¹⁸ Therefore, it is inappropriate to reference future master or structure plans in the PWDP that have not been notified following the process set out in Schedule 1 of the RMA.
- 26 Such references create unacceptable uncertainty in terms of being able to effectively assess the issues associated with a particular project. The Courts have consistently directed that if a rule is unclear it may be void for uncertainty.¹⁹ The rules in a plan, and the provisions of the plan in general, must be clear and precise so that those who administer the plan or are affected by it should be able to identify without difficulty the provisions which apply to properties.²⁰ The Environment Court in *Haskett Investments Ltd v Waimakariri DC*²¹ found certain rules relating to signage to be void for uncertainty because they were so vague. More recently, the High Court in *Man O'War Farm Limited v Auckland City Council*²² held the definition of "land which may be subject to coastal hazards" in the Auckland unitary plan to be void because it provided no guidance as to the probability required.

¹⁸ See *Malory Corporation v Rodney District Council* [2010] NZRMA 392 at [13].

¹⁹ See for example *Murray v Tasman DC* W058/94 (PT).

²⁰ *Sandstad v Cheyne Developments Limited* (1986) 11 NZTPA 250 (CA).

²¹ *Haskett Investments Ltd v Waimakariri DC* EnvC C079/98

²² *Man O'War Farm Limited v Auckland City Council* [2017] NZHC 1349

- 27 In our submission, certainty is required to enable appropriate planning to occur, both for council and for private landowners/developers to ensure that the relevant requirements of the district plan can be administered with efficiency. The reference to future master or structure plans in the PWDP does not provide any certainty and is unclear as to which areas these 'future' master or structure plans would relate to. The point of a district plan is to provide some certainty about what is intended in particular areas.
- 28 It is submitted that references to future master or structure plans should be removed from the PWDP.

Submissions and further submissions

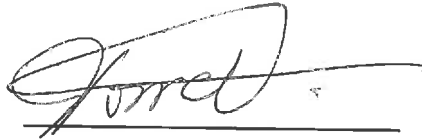
- 29 Campbell Tyson (#FS1061) and The Surveying Company (FS#1308) are the only submitters who have made further submissions in respect of Mr McAlley's submission.
- 30 Campbell Tyson **supports** Mr McAlley's submission points on:
- (a) Policy 4.2.15(d) - Earthworks;
 - (b) Rule 16.1.3 – Restricted Discretionary Activities – Mr McAlley's submission seeks relief in terms of rules for multi-unit developments that they are enabled in all residential areas of the district where connection is available, or will be available to reticulated services;
 - (c) Rule 16.2.4.1 – Earthworks general;
 - (d) Rule 16.3.6 – Building coverage;
 - (e) Rule 16.4.1(a)(iv) – Subdivision general;
 - (f) Rule 16.4.3 – Subdivision – Te Kauwhata West Residential Area; and
 - (g) Rule 16.4.13 – Subdivision creating reserves.
- 31 The Surveying Company **supports** Mr McAlley's submission about rule 16.2.4.1 – NC1 – earthworks general. The Surveying Company supports this submission on the basis that the assessment of the importation of cleanfill to a site as a non-complying activity is overly onerous. Fill may be required to meet engineering requirements.

- 32 The Surveying Company opposes Mr McAlley's submission on policy 4.2.15 and says there are certain sites where cleanfill is required to be imported or exported to ensure that development can occur.

Planning Evidence

- 33 Mr Stephen Gascoigne has provided expert planning evidence on behalf of Mr McAlley's submission on Hearing 10 – Residential Zone topic and that evidence also sets out the relief sought by Mr McAlley in terms of the Residential Zone provisions under the PWDP.

DATED: 20 February 2020

A handwritten signature in black ink, appearing to read 'J B Forret', is written over a horizontal line.

J B Forret
Counsel for submitter