Before an Independent Hearings Panel

The Proposed Waikato District Plan (Stage 1)

IN THE MATTER OF the Resource Management Act 1991 (**RMA**)

IN THE MATTER OF hearing submissions and further submissions on the Proposed Waikato District Plan (Stage 1)

MEMORANDUM OF COUNSEL ON BEHALF OF HAVELOCK VILLAGE LIMITED AND TATA VALLEY LIMITED REGARDING ISSUES WITH SECTION 42A FRAMEWORK REPORT

9 March 2021

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MAY IT PLEASE THE COMMISSIONERS

1. We act for Havelock Village Limited[1] (**HVL**) and TaTa Valley Limited[2] (**TVL**) who are original and further submitters on the Proposed Waikato District Plan (Stage 1) (**Proposed Plan**).

2. We refer to the memorandum of counsel from Mr Peter Fuller dated 4 March 2021 *regarding legal and procedural issues with the section 42A Framework Report* and the Hearing Panel's subsequent Minute and Directions dated 5 March 2021.

3. In response to Mr Fuller's Memorandum, the Hearings Panel has directed that parties may:

> file a short memorandum with the Hearings Administrator (no more than 4 pages long) that succinctly addresses whether the procedure set out in the Framework Report and, in particular compliance with Lens1, should be generally adhered to, and, if not, the reasons why.

4. HVL and TVL largely agree with the legal and procedural issues raised by Mr Fuller's memorandum regarding the proposed 3 Lens approach, in particular, the concern that Lens 1 may be applied as a bar or threshold that rezonings must pass in order to be considered against the other 2 lens[3]. This proposed approach to Lens 1 is inconsistent with the relevant statutory tests and established case authority and should not be adopted.

5. At a practical level, the objectives and policies of the notified Proposed Plan (ie the proposed Lens 1 filter) are arguably now to a degree obsolete or will at the very least require refinement. They were the subject of extensive submission and evidence at the Topic 3: Strategic Objectives hearing. They were also prepared a number of years ago, before the most recent set of national directions, in particular the National Policy Statement on Urban Development 2020.

6. It would therefore be premature to assess rezoning proposals against objectives and policies that could change, perhaps materially in light of this ongoing hearing process and changing higher order directives. This reinforces the fact that Lens 1 should be a final check for the Panel, once the objectives and policies are settled, not a gateway or threshold test that must be passed for a rezoning proposal to be considered on its merits.

[1] Submitter 862.
[2] Submitter 574.
[3] See paragraph 14 of Mr Fuller's memorandum– referring to paragraph 46 of s42A Framework report

7. In short, we also agree with Mr Fuller's description of the proper role for Lens 1:

> 2. Lens 1 is better described as an "integration test" for horizontal and vertical consistency in the Plan. While such a check is appropriate, it should be a final internal check and is subservient to the relevant statutory tests.

8. Instead of the 3 lens analysis, HVL and TVL consider that the Section 42A report writers should be directed follow the standard statutory tests for plan making when assessing the rezoning proposals. The statutory tests will be well known to the Hearings Panel and were outlined in the Opening Legal Submissions by Counsel for the Waikato District Council, dated 23 September 2019. A useful summary or checklist of the relevant statutory tests, as outlined by the Environment Court in *Colonial Vineyard Limited v Marlborough District Council* [4], is contained within Appendix 1 to those submissions (attached). HVL and TVL respectfully suggest that Appendix 1 may form a more fulsome checklist for the s42A writers and acknowledge that the Lens 2 assessment largely captures steps 2-6 of that list.

9. HVL and TVL also acknowledge that the matters contained within Lens 3 may be of some practical assistance as part of the overall assessment toolkit. However, the matters listed are not specific statutory requirements and should be considered subservient to those. These principles should be treated as guidance only.

10. In summary, HVL and TVL:

    (a) Do not consider that compliance with Lens 1 should be adhered to in the manner currently proposed by the s42A Framework Report;

    (b) Suggest that Appendix 1 to the Opening Legal Submissions by Counsel for the Waikato District Council, dated 23 September 2019 may form a more fulsome checklist for the s42A writers (acknowledging that Lens 2 largely captures steps 2-6 of that list).

11. Counsel is available to attend the conference on Friday 12 March 2021 and answer any questions from the Panel.

DATED: 9 March 2021

V S Evitt / M G Gribben
Counsel for Havelock Village Limited and TaTa Valley Limited

[4] [2014] NZ EnvC 55 at [17] and supplemented by recent RMA amendments.

APPENDIX 1

Updated checklist post *Colonial Vineyard Ltd v Marlborough District Council* [2014] NZEnvC 55 and incorporating the 2013 and 2017 amendments to the RMA.

A. General requirements

1. *A territorial authority must prepare and change its district plan in* ***accordance with***[87] — and assist the territorial authority to **carry out** — its functions[88] so as to achieve the purpose of the Act.[89]

2. The district plan (change) must also be prepared **in accordance with** any *national policy statement, New Zealand coastal policy statement, a national planning standard,*[90] regulation(s)[91] and any direction given by the Minister for the Environment.[92]

3. When preparing its district plan (change) the territorial authority **must give effect** to[93] any national policy statement and New Zealand Coastal *Policy Statement and a national planning standard*[94]*.*

4. When preparing its district plan (change) the territorial authority shall:

   (a) **have regard to** any proposed regional policy statement;[95]

   (b) **give effect to** any operative regional policy statement.[96]

5. In relation to regional plans:

   (a) the district plan (change) must **not be inconsistent** with an operative regional plan for any matter specified in section 30(1) or a water conservation order;[97] and

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[87] Section 74(1) (replaced on 3 December 2013, for all purposes, by section 78 RMAA 2013).
[88] Section 31.
[89] Sections 72 and 74(1).
[90] Section 74(1)(ea) (inserted, on 19 April 2017, by section 59 of the Resource Legislation Amendment Act 2017).
[91] Section 74(1)(f).
[92] Section 74(1)(c).
[93] Section 75(3).
[94] Section 75(3)(ba) (inserted, on 19 April 2017, by section 60 of the RLAA 2017).
[95] Section 74(2)(a)(i).
[96] Section 75(3)(c).
[97] Section 75(4).

(b) **must have regard to** any proposed regional plan on any matter of regional significance etc.[98]

6. When preparing its district plan (change) the territorial authority must also:

(a) **have regard to** any relevant management plans and strategies under other Acts, and to any relevant entry in the *Heritage List/Rarangi Korero* and to various fisheries regulations[99] to the extent that their content has a bearing on resource management issues of the district; and to consistency with plans and proposed plans of adjacent territorial authorities;[100]

(b) **take into account** any relevant planning document recognised by an iwi authority;[101] and

(c) not have regard to trade competition[102]or the effects of trade competition;

7. The formal requirement that a district plan (change) must[103] also state its objectives, policies and the rules (if any) and may[104] state other matters.

B. Objectives [the section 32 test for objectives]

8. Each proposed objective in a district plan (change) **is to be evaluated** by the extent to which it is the most appropriate way to achieve the purpose of the Act.[105]

C. Policies and methods (including rules) [the section 32 test for policies and rules]

9. The policies are to **implement** the objectives, and the rules (if any) are to **implement** the policies;[106]

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[98] Section 74(2)(a)(ii).
[99] Section 74(2)(b) (amendments to 74(2)(b)(iia) on 20 May 2014 by section 107 of the Heritage New Zealand Pouhere Taonga Act 2014).
[100] Section 74(2)(c).
[101] Section 74(2A) (replaced on 1 April 2011 by section 128 of the Marine and Coastal Area (Takutai Moana) Act 2011 – however no fundamental difference in relation to the test).
[102] Section 74(3).
[103] Section 75(1).
[104] Section 75(2).
[105] Section 74(1) and section 32(1)(a).
[106] Section 75(1)(b) and (c).

10. *Each proposed policy or method (including each rule) is to be examined, as to whether it is the most appropriate method for achieving the objectives of the district plan by:* [107]

- *Identifying other reasonably practicable options for achieving the objectives;*[108] *and*
- *Assessing the* ***efficiency and effectiveness*** *of the provisions in achieving the objectives by:*[109]
    - *Identifying and assessing the benefits and costs of the environmental, economic, social, and cultural effects that are anticipated from the implementation of the proposed policies and methods (including rules), including the opportunities for:*
        - *(i) economic growth that are anticipated to be provided or reduced;*[110] *and*
        - *(ii) employment that are anticipated to be provided or reduced*[111]*.*
    - *If practicable, quantify the benefits in costs referred to above.*[112]
    - *Assessing the risk of acting or not acting if there is uncertain or insufficient information about the subject matter of the policies, rules, or other methods;*[113]
- *Summarising the reasons for deciding on the provisions;*[114]
- *If a national environmental standard applies and the proposed rule imposes a greater prohibition or restriction*

[107] Section 32(1)(b).
[108] Section 32(1)(b)(i)
[109] Section 32(1)(b)(ii).
[110] Section 32(2)(a)(i).
[111] Section 32(2)(a)(ii).
[112] Section 32(2)(b).
[113] Section 32(2)(c).
[114] Section 32(1)(b)(iii)

than that, then whether that greater prohibition or restriction is justified in the circumstances.[115]

D. Rules

11. In making a rule the territorial authority must **have regard to** the actual or potential effect of activities on the environment.[116]

12. Rules have the force of regulations.[117]

13. Rules may be made for the protection of property from the effects of surface water, and these may be more restrictive[118]than those under the Building Act 2004.

14. There are special provisions for rules about contaminated land.[119]

15. <u>There must be no blanket rules about felling of trees[120] in any urban environment.[121]</u>

E. Other statues:

16. Finally territorial authorities may be required to comply with other statutes.

F. (On Appeal)

17. On appeal[122] the Environment Court must have regard to one additional matter — the decision of the territorial authority.[123]

[115] Section 32(4).
[116] Section 76(3).
[117] Section 76(2).
[118] Section 76(2A).
[119] Section 76(5).
[120] Section 76(4A).
[121] Section 76(4B).
[122] Section 290 and Clause 14 of the First Schedule.
[123] Section 290A RMA as added by the RMAA 2005.