

**BEFORE THE WAIKATO INDEPENDENT HEARINGS PANEL**

**In the Matter** of the Resource Management Act 1991 (**Act**)

**And**

**In the Matter** Hearing 25: Zone Extents for the Proposed District Plan

---

**Legal Submissions on behalf of Thorntree Orchards, Cindy and Tony Young and Parkmere Farms**

**Dated 12 May 2021**

---

Jeremy Brabant  
Barrister  
Level 4, Vulcan Building Chambers  
PO Box 1502, Shortland St  
Auckland City  
021 494 506  
Email: [jeremy@brabant.co.nz](mailto:jeremy@brabant.co.nz)

## Introduction

1. These legal submissions are presented on behalf of Thorntree Orchards,<sup>1</sup> Cindy and Tony Young,<sup>2</sup> and Parkmere Farms<sup>3</sup> (collectively **TYP**), who are submitters on the Proposed Waikato District Plan (**Plan**) Stage 1.
2. TYP are all landowners within an area known as Pokeno East that is defined by State Highway 1, Avon Road, and State Highway 2. These submissions refer to those properties collectively as the **Site**.
3. TYP seek a Future Urban Zone (**FUZ**) over the Site.

## TYP's Submission

### Submission on Notified Plan

4. In summary, for reasons addressed in the planning evidence of Mr Grala, TYP's submission:
  - a. Sought and supported a Village zoning being applied to the Site in place of the Plan's notified Rural zoning;
  - b. Advanced the Village zoning on the basis that the Site could be intensified over time, with additional infrastructure to be achieved on extension of public services;
  - c. Was lodged and submitted in advance of the gazettal of the National Policy Statement for Urban Development 2020 (**NPSUD**); and
  - d. Was predicated on the basis that the Village zoning was sufficient to meet housing demand within the next 30 years under the (then) applicable 2016 NPSUDC.
5. As notified, the Plan did not include a FUZ, rather submitters had a choice of either a live urban zone or retention of the Rural Zone.

---

<sup>1</sup> Submitter reference 54, Further Submission reference 1054.

<sup>2</sup> Submitter Reference 735, Further Submission Reference 1221.

<sup>3</sup> Submitter Reference 696, Further Submission Reference 1283.

6. Fundamentally TYP's submission sought a live zoning which would enable a level of intensification for the land in question.

**FUZ**

7. After the notification of the Plan and lodging of submissions, the NPSUD was gazetted.
8. WDC has produced various Section 42A Reports relevant to TYP's submissions:
  - a. Framework report, Hearing 25 Zone Extents, dated 19 January 2021.
  - b. Framework report, Hearing 25 Zone Extents, Supplementary Evidence, dated 28 April 2021.
  - c. Section 42A Report, Hearing 25: Zone Extents Pokeno, dated 14 April 2021.
  - d. Section 42A Rebuttal Report, Hearing 25: Zone Extents Pokeno, dated 10 May 2021.
9. I do not propose to summarise or set out any material detail from the above reports. It is sufficient to observe that WDC's s relevant 42A Report has identified that a FUZ zone for the Site is supported because it would allow for a more defensible Urban boundary, comprehensive development of the land surrounding the open space area of the Pokeno Domain and would provide for longer-term residential land capacity that would assist meeting the NPSUD growth capacity requirements.<sup>4</sup>
10. I would add with respect to growth capacity, that the Panel can (and arguably should) zone more than the demand plus 20% threshold in the NPSUD so long as infrastructure matters are satisfactorily addressed. The Supplementary Framework Report identifies with reference to the rezoning recommendations from the section 42 A planners that the "level of headroom" afforded to meet housing bottom lines are slim based on the

---

<sup>4</sup> Section 42 A Report 14 April 2021 – section 8, East Pokeno Requests, at [127] – [141] and [156] – [164].

analysis undertaken, and as a result there is a risk of not meeting the broader policy intent of the NPSUD with respect to allowing sufficient supply for competitive land markets to exist. Barely achieving what is intended to be a bottom line should not be the goal - such an approach carries risks of failing to generate desired outcomes. Provision of additional live zone land where that is within scope would be preferable to increase the likelihood that competitive land markets are created.

11. The 42 A Rebuttal Report records, with reference to the capacity analysis in the Supplementary Framework Report, that there is no room to remove housing capacity from the s42A zoning recommendations for Pokeno (which includes the FUZ proposed for part of East Pokeno).<sup>5</sup> The Rebuttal Report does not recommend any changes to the earlier recommendation of FUZ for the Site.
12. Mr Grala's evidence (with reference to, and in reliance on, the evidence of other witnesses for TYP) addresses reasons why a FUZ zone is appropriate. In summary:
  - a. A FUZ gives effect to the higher-order documents providing for residential growth in Pokeno East;<sup>6</sup>
  - b. The retention of the notified Rural Zoning would not achieve the level of residential growth anticipated in the next 3 – 10 years, nor would it achieve requirements of the NPSUD;
  - c. Lower levels of residential intensity anticipated by the Village zone will not achieve the level of development sought by the higher-level documents;
  - d. A FUZ will provide for an outcome where the iterative release of land for residential development is undertaken in an appropriate way which gives certainty of future land use to landowners and provides a mechanism for integrated development (including

---

<sup>5</sup> Section 42 A Rebuttal Report, at [20]

<sup>6</sup> Note it is also identified in Waikato 2070 and within the Future Proof urban limits.

infrastructure) as part of a future plan change exercise.

13. The 42A report adopts the Section 32AA evaluation assessment undertaken by Mr Grala supporting the rezoning to FUZ.
14. Thus, the reporting officers and the expert evidence on behalf of TYP agree as to the appropriate outcome for the Site.

### **Legal Framework**

15. The matters requiring consideration in law will be well known to the Commissioners and have already been addressed in detail before the Panel earlier in the Stage 1 hearing process. There seems little merit in trudging through those matters again.
16. At a high-level, the fundamental position is that the Panel needs to be satisfied that the relief sought by TYP:
  - a. Is in accordance with:
    - i. The Council's functions as set out in section 31 of the RMA;
    - ii. The purpose and principles in Part 2 of the RMA; and
    - iii. The Council's duty under section 32 of the RMA.
  - b. Gives effect to:
    - i. Any relevant national policy statement;
    - ii. Any relevant national environmental standard; and
    - iii. The WRPS.<sup>7</sup>

17. The opening legal submissions on behalf of Waikato District Council (**WDC**)<sup>8</sup> set out the relevant legal framework more fulsomely. I agree with the legal

---

<sup>7</sup> Section 75(3) of the Act.

<sup>8</sup> Dated 23 September 2019.

framework identified in those submissions.<sup>9</sup> I also agree that Appendix 1 to WDC’s opening submissions provides a useful and correct “checklist” of matters to address in the context of a plan change.

### *Lens 1 Approach*

18. WDC prepared a s 42A “Framework Report” to assist with Hearing Topic 25.<sup>10</sup> The Framework Report recommended a “three lens” method for s 42A authors to employ when assessing and making recommendations on zoning submissions.
19. The proposed lens 1 approach was the subject of memoranda, a pre-hearing conference and a subsequent direction from the Panel.<sup>11</sup> In summary, various parties (including TYP) involved in Hearing Topic 25 raised concerns about the legality of the proposed lens 1 approach.
20. By way of direction dated 15 March 2021, the Panel directed that the lens 1 approach was an incorrect legal test and should not be applied as a gateway or threshold test for assessment of plan provisions. I agree.

## **Evidence**

21. TYP has provided a comprehensive package of expert evidence in support of the FUZ advanced. The evidence covers matters relating to:
  - a. Planning;<sup>12</sup>
  - b. Urban Design;<sup>13</sup>
  - c. Traffic;<sup>14</sup>

---

<sup>9</sup> Commencing at paragraph 26 of WDC’s opening legal submissions.

<sup>10</sup> Prepared by Dr Davey dated 19 January 2021.

<sup>11</sup> Minute and Directions from Hearing Commissioners following Prehearing Conference, 15 March 2021

<sup>12</sup> Statement of Evidence of Nick Grala, 17 February 2021.

<sup>13</sup> Statement of Evidence of Anthony Vile, 17 February 2021.

<sup>14</sup> Statement of Evidence of Gary Black, 17 February 2021.

- d. Economic;<sup>15</sup>
- e. Civil Engineering;<sup>16</sup> and
- f. Landscape.<sup>17</sup>

22. In summary, the evidence advanced on behalf of TYP confirms the subject site as appropriate for FUZ.

23. The professional opinions of Mr Grala and Ms Foley<sup>18</sup> on behalf of WDC are essentially in agreement. The appropriateness of the FUZ zoning supported by Mr Grala and Ms Foley (and the s42A Report author, Mr Mead) will be the subject of a finding by the Panel on the evidence – as far as I am aware there are no unusual or specific legal issues arising.

24. I note in the context of making the finding referred to above, in law TYP does not need to demonstrate that the FUZ is the “best” outcome for the Site. The s 32 test of “most appropriate” does not mean the most “superior” method.<sup>19</sup> Section 32 requires a value judgement as to what, on balance, is the most appropriate (or “suitable”) when measured against the relevant objectives.

25. In my submission, the evidence provided by TYP demonstrates that the FUZ is the most appropriate method to achieve the relevant objectives.

#### **Response to Traffic Effects – Opposing Evidence of Edwards**

26. Wes Edwards on behalf of Pokeno Village Holdings Ltd has raised some traffic-related concerns in relation to the future zoning of Pokeno East. Mr Edwards’ concerns are generally framed in relation to *future* infrastructure effects that might arise as a result of a live residential zoning. Mr Edwards also makes assertions without reliable supporting evidence to the effect that future infrastructure could not be physically and/or economically

---

<sup>15</sup> Statement of Evidence of Derek Foy, 17 February 2021.

<sup>16</sup> Statement of Evidence of Campbell McGregor, 17 February 2021.

<sup>17</sup> Statement of Evidence of Lisa Jack, 17 February 2021.

<sup>18</sup> Statement of Evidence of Marie-Louise Foley dated 10 March 2021.

<sup>19</sup> *Rational Transport Society Inc v NZTA* [2021] NZRMA 290 (HC) at [46].

provided. As a result, while his “traffic light” table<sup>20</sup> might be visually appealing at a superficial level, it is unhelpful.

27. TYP’s traffic engineer, Mr Black, has responded to Mr Edwards’ concerns in his rebuttal statement.<sup>21</sup> Mr Black has concluded that speculative assertions as to adverse future capacity effects are misplaced in the context of the FUZ zoning advanced.

28. In the context of specific traffic effects raised relating to the Dean Road and SH1 off ramp intersection, Deans Road Gradient, SH2 and Avon Road intersection and pedestrian and cyclist connectivity, Mr Black confirms that from a technical and physical perspective, future upgrades, gradients, safety improvements, and re-alignments are all feasible and can be addressed in any subsequent Plan Change for the Site and associated infrastructure upgrades.

29. The evidence of Mr Wood on behalf of Waka Kotahi in relation to Pokeno East agrees that a FUZ zoning for the Site is appropriate.<sup>22</sup>

30. Additionally, I submit:

- a. The current use of the Site does not create adverse traffic effects. The imposition of a FUZ does not of itself create adverse transport effects;
- b. The FUZ sought is inherently a “transitional zone” used to earmark land intended for future urbanisation. It does not require all technical matters to be resolved prior to a live zoning;
- c. Traffic-related effects, including upgrading and capacity matters, are more appropriately addressed in the context of a future plan change;
- d. Subsequent subdivision applications required under an eventual

---

<sup>20</sup> Rebuttal Evidence of Wes Edwards, 3 May 2021, Attachment A

<sup>21</sup> Rebuttal Evidence of Black, dated 4 May 2021.

<sup>22</sup> Evidence of Wood, at [7.10]



live zoning will appropriately require an assessment of the traffic effects arising and a conclusion on the merits as to the appropriateness of such effects. That is appropriately a matter for consenting; and

- e. A FUZ applied to the Site is likely to assist WDC and Waka Kotahi in future infrastructure planning on the basis that there is clarity that the Site is intended to be urbanised in the short to mid term.

### **Water and Wastewater Servicing**

31. The summary statement of Mr McGregor<sup>23</sup> records meetings he has had with Watercare in early April 2021 after preparation of his primary statement of evidence. Watercare have confirmed that Pokeno East will be serviced for both water and wastewater within the next 10 years. For reasons set out in his summary statement, Mr McGregor concludes that potable water and wastewater provision could be provided to service Pokeno East within five years.
32. I make one additional observation in the context of Mr McGregor's summary statement. As I understand it, the water and wastewater servicing for Pokeno East will be resolved much more rapidly than potentially had been understood previously. That might open the door to the Panel considering a live zone for Pokeno East on the basis that water, wastewater and stormwater, and transport matters, are subject to specific rule requirements in Chapter 14<sup>24</sup> (with supporting objectives and policies in Chapter 6: Infrastructure and Energy) which in essence allow for permitted development where services are available, and if not, requires resource consent to be obtained. That plan framework may secure appropriate integration of infrastructure and land uses whilst enabling live zoning of land thereby avoiding future plan changes within a relatively short timeframe.


---

<sup>23</sup> Dated 12 May 2021

<sup>24</sup> Chapter 14: Infrastructure and Energy

## Conclusion

33. I submit the expert evidence before the Panel establishes that rezoning of the Site to FUZ is appropriate in the context of the relevant considerations in law.
34. Further, in my submission, any outstanding infrastructure concerns can be appropriately addressed in the context of a future plan change to create a live zoning.



---

**Jeremy Brabant**

Counsel for Thorntree Orchards, Cindy and Tony Young and Parkmere Farms

Dated 12 May 2021