

**BEFORE INDEPENDENT HEARING COMMISSIONERS  
APPOINTED BY THE WAIKATO DISTRICT COUNCIL**

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

**AND**

**IN THE MATTER** of the Proposed Waikato District Plan

**BETWEEN** **OHINEWAI LANDS LIMITED**

Submitter [No. 428]

**AND**

**WAIKATO DISTRICT COUNCIL**

Local Authority

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**LEGAL SUBMISSIONS FOR OHINEWAI LANDS LIMITED**

**HEARING 25 – ZONE EXTENTS (REST OF DISTRICT)**

Dated: 18 May 2021

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## INTRODUCTION

1. These legal submissions are presented on behalf of Ohinewai Land Limited (**OLL**) in relation to its submission (number 428) on the Proposed Waikato District Plan (**pWDP**).
2. OLL is the owner of rural properties in the Ohinewai area which, together with land owned by the related company Waikare Lands Limited, are in excess of 1,300 hectares in the wider Ohinewai area. The landholdings include properties situated both to the north and south of the site owned by Ambury Properties Limited (**Ambury**):
  - (a) The land located opposite the Ambury landholdings, and immediately south of Tahuna Road, which totals 39 hectares (the **Southern property**); and
  - (b) The land located on Balemi Road immediately north of the Ambury landholdings, which totals 80 hectares (the **Northern property**).
3. OLL seek a Future Urban Zone (**FUZ**) over both properties.

## THE OLL SUBMISSION

### *Ohinewai Structure Plan*

4. OLL's submission on the pWDP sought to have the Southern and Northern properties identified as a future growth area in the pWDP, to align with the recommendations in the Waikato 2070 growth strategy (**Waikato 2070**). On the Waikato 2070 Huntly and Ohinewai Development Plan:<sup>1</sup>
  - (a) The Northern property is identified as part of the Ohinewai South Industrial Cluster (1-10 years); and
  - (b) The Southern property is identified as part of the Residential Activity Zone (1-10 years) on the same Development Plan in Waikato 2070.

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<sup>1</sup> EIC Tony McLauchlan, at [11]; Attachment 1 to EIC Tony McLauchlan, *Waikato District Council Growth and Economic Development Strategy 2070*, at page 34.

5. Properties seeking rezoning at Ohinewai were assigned to Hearing 19 (Ohinewai), which was brought forward at the request of Ambury to accord with development timeframes for its Sleepyhead proposal.
6. The submission from Ambury seeks to rezone 176 hectares in Ohinewai to a combination of Industrial, Business and Residential zonings. If Ambury's rezoning is granted, the decision will also include specific zone objectives, policies and rules and a new Ohinewai Structure Plan.
7. OLL's requested relief through the Ohinewai hearing process included for the structure plan to show the Northern and Southern properties as potential "future growth areas". OLL also sought specific zone provisions to ensure that Ambury must achieve a positive interface to Tahuna Road to enable future integration between the Ambury land and the Southern property.

### ***FUZ***

8. The Ohinewai hearing was held prior to release of the Hearing 25: Zone Extents Future Urban Zone and Residential Medium Density Zone Report on 26 January 2021 (**Zone Extents Report**). That report took account of the National Policy Statement on Urban Development 2020 (**NPS-UD**) – which came into effect on 20 August 2020 after the notification of the pWDP and lodging of submissions. The recommendations of the Zone Extents Report include the introduction of a new FUZ into the pWDP.
9. Following the release of the FUZ Report OLL sought, and was granted, leave to file evidence in support of a FUZ for its land.
10. The OLL submission seeks FUZ for the two areas of land identified in paragraph [2] above:
  - (a) The Southern property – OLL considers that 26 hectares of land may be appropriate for residential activity in future, with the remaining 16 hectares retained as public open space.
  - (b) The Northern property – is part of the Ohinewai South Industrial Cluster and is identified by OLL as being appropriate for future industrial land. This is located to the north of the industrial land area identified in the Ambury submission, and will provide future capacity for industrial land uses.

11. OLL acknowledges that the fate of its submission is contingent on the Panel's decision on the Ohinewai Structure Plan – if the Panel decides to accept Ambury's rezoning request then the question of the most appropriate zoning for the OLL land will remain to be addressed. If the request to urbanise Ambury's land is not accepted, then the planning rationale for OLL's FUZ relief falls away. This is accepted in Mr Twose's evidence, and is the basis of his assessment of the FUZ relief.<sup>2</sup>
12. Mr Twose's evidence (with reference to, and in reliance on, the s. 32AA evaluation prepared by Harrison Grierson) addresses reasons why a FUZ is appropriate. In summary:
  - (a) A FUZ gives effect to the higher-order documents providing for residential and business growth capacity in Ohinewai.
  - (b) A future urban zone is appropriate due to the lands strategic location between Hamilton and Auckland, and its proximity to the Waikato Expressway and the NIMTR.
  - (c) The FUZ for the Southern property is appropriate to ensure residential capacity for growth in the future in conjunction with the residential zone land proposed by Ambury.
  - (d) The FUZ for the Northern property is appropriate to ensure sufficient land capacity is available to address industrial land supply for the medium and long term.
  - (e) The notified Rural Zoning would not enable the level of residential and business growth anticipated in the Waikato 2070 strategy in the next 3 – 10 years, nor would it achieve requirements of the NPS-UD to respond to changes in demand.
13. The s. 42A report<sup>3</sup> supports this assessment for the Southern property (i.e. the 39-hectare block south of Ambury's landholdings intended for future residential), but recommends against a FUZ being introduced for the Northern

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<sup>2</sup> EIC Matthew Twose, at [13] and [15].

<sup>3</sup> Section 42A Report Hearing 25: Zone Extents Rest of District, Catherine Boulton (16 April 2021), Section 12.

property (i.e. the 80-hectare block intended for future industrial) due to insufficient evidence documenting the future uses and constraints of this land.

14. The reporting planner notes that the s. 42A report for the Ohinewai hearing recommended rejecting Ambury's rezoning relief and, on that basis, also recommended rejecting the OLL relief.<sup>4</sup> The reporting planner considers that OLL's request "*hinges*" on the Panel's decision on Ambury's rezoning – if the Panel accepts the Ambury relief then the FUZ for the Southern property "*seems logical*".<sup>5</sup>
15. Accordingly, the reporting officers and Mr Twose on behalf of OLL agree that OLL's relief is contingent on the outcome of the Ambury rezoning, and as to the appropriate outcome for the Southern property. The outstanding matter of disagreement is the appropriate zoning for the Northern property.

#### **STATUTORY CONSIDERATIONS**

16. The opening legal submissions on behalf of Waikato District Council set out the relevant legal framework in detail.<sup>6</sup> I agree that the "Checklist" in Appendix 1 to the opening legal submissions correctly summarise the statutory considerations based on the *Long Bay* case, as recently updated in the *Colonial Vineyard* case.<sup>7</sup>
17. However, the Checklist does not reference s. 31(1)(aa) which – together with s. 30(1)(ba) – is particularly relevant to planning for development capacity. Section 31(1)(aa) provides that:

(1) Every territorial authority shall have the following functions for the purpose of giving effect to this Act in its district:

(aa) the establishment, implementation, and review of objectives, policies, and methods to ensure that there is sufficient development capacity in respect of housing and business land to meet the expected demands of the district:

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<sup>4</sup> Section 42A Report Hearing 19: Ohinewai Rezoning and Development, Chloe Trenouth (13 March 2020), at [343]-[345].

<sup>5</sup> Zone Extents Section 42A report, at [263].

<sup>6</sup> Opening legal submissions on behalf of Waikato District Council (23 September 2019), at [26].

<sup>7</sup> *Long Bay-Okura Great Park Society v North Shore City Council* A078/08 (EC); *Colonial Vineyard Limited v Marlborough District Council* [2014] NZEnvC 55.

18. In summary, the Panel needs to be satisfied that the FUZ relief sought by OLL:
- (a) Is in accordance with the Council's functions in s. 31 of the RMA (including s. 31(1)(aa) above);
  - (b) Gives effect to any relevant national policy statement, national environmental standard and the Waikato Regional Policy Statement (**RPS**); and
  - (c) Is the most appropriate zoning for the land having regard to the evaluations undertaken pursuant to ss. 32 and 32AA of the RMA.
19. Mr Twose's evidence applied a two-part analysis of the higher order policies and growth strategies followed by a land evaluation, adjusted to fit within the "three-lens" method recommended in the s. 42A Framework Report.<sup>8</sup> Several submitters involved in the Zone Extents topic raised concerns about the legality of the proposed lens 1 approach – requiring an analysis of rezoning requests against the objectives and policies of the notified pWDP. Following a pre-hearing conference the Panel issued a direction (dated 15 March 2021) 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.
20. This direction does not alter Mr Twose's assessment that the proposed FUZ relief is the most appropriate zoning for the Northern and Southern properties.

## **EVIDENCE**

21. OLL has provided expert planning evidence from Mr Twose in support of the FUZ relief.<sup>9</sup> In addition, OLL has submitted a s. 32AA evaluation<sup>10</sup> in support of the OLL proposal for the Southern property and provided evidence from Mr McLachlan for Hearing 19.<sup>11</sup>
22. The evidence advance by OLL confirms that FUZ is the appropriate zone for both the Southern and Northern properties.

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<sup>8</sup> Framework report, Hearing 25 Zone Extents, Dr Davey (19 January 2021).

<sup>9</sup> EIC Matthew Twose (planning), 17 February 2020.

<sup>10</sup> Section 32AA Report prepared by Harrison Grierson, 5 December 2020

<sup>11</sup> EIC Tony McLachlan, 21 August 2020.

23. While the s. 32AA evaluation predates Mr Twose’s assessment of the FUZ relief, the conclusions of that report – that there are no inherent physical or environmental constraints that would preclude urbanisation – remain valid. The s. 32AA evaluation was prepared to support a “future urban growth area” and had regard to the full range of evaluative factors.
24. With respect to the reporting planner’s concerns regarding the proposed FUZ on the Southern property, I submit it is not necessary to provide a full assessment of the future uses and constraints of this land as part of this planning process. The High Court has held that OLL is not required to demonstrate that the proposed FUZ is the “superior” method to the notified Rural Zone. The s. 32 test of “most appropriate” means “suitable”, and requires a value judgement as to what, on balance, is the most appropriate method when measured against the relevant objectives.<sup>12</sup>
25. OLL has provided sufficient evidence to assess the proposed FUZ against the relevant objectives, including the proposed FUZ objectives introduced by the Zone Extents Report. A comprehensive planning assessment of the future uses and analysis of any constraints on development can occur as part of the First Schedule structure plan process to convert the FUZ to a live zoning.

### **HIGHER ORDER POLICIES**

26. The Supreme Court in *King Salmon* gave directions on how higher order documents should be given effect to as part of the plan change process.<sup>13</sup> Relevant to the statutory obligation for the pWDP to “give effect to” the NPS-UD and the RPS the Supreme Court described the following principles:
  - (a) The obligation to give effect to a national policy statement or regional plan simply means to implement. That, on the face, is a strong directive, creating a firm obligation on the part of those subject to it.
  - (b) The hierarchal nature of RMA plans mean it is generally not necessary to resort to Part 2 or higher order documents to determine

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<sup>12</sup> *Rational Transport Society Inc v NZTA* [2021] NZRMA 290 (HC) at [44] - [46].

<sup>13</sup> *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593.

appropriate plan provisions unless there is invalidity, uncertainty or incompleteness.

- (c) More recent higher order planning documents (like a national policy statement) should be given greater weight than older, lower order planning documents (like a regional policy statement) that were prepared before the higher order document was issued. This is because the lower order planning document may not give effect to that higher order document.

27. In terms to the hierarchy, and relative weight to be given to the higher order policies and strategy:

- (a) The NPS-UD came into force on 20 August 2020 and post-dates the notified pWDP. Under s. 75 of the RMA the pWDP is required to implement the NPS-UD.
- (b) RPS provisions were developed over a decade ago before the NPS-UD, and before the requirement of regional councils to ensure sufficient development capacity under s 30(1)(ba) of the RMA. The RPS growth management provisions do not currently give effect to the directions in the NPS-UD.<sup>14</sup> If the Panel finds there is any inconsistency between the NPS-UD and the RPS, I submit that the NPS-UD should be afforded more weight.
- (c) Waikato 2070 was prepared using the special consultative procedures under section 83 of the Local Government Act 2002. This was the same procedure used for Future Proof 2019. Both are therefore a “strategy” for consideration by the Panel under section 74(2)(b)(i) of the RMA. Future Proof is incorporated into the operative RPS, and therefore is accorded more weight than Waikato 2070 in the statutory hierarchy. However, Waikato 2070 is the most recent strategy, and more reflective of the growth that is occurring in the district today, with a more accurate vision into the future. I submit Waikato 2070 is more aligned with the growth management

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<sup>14</sup> EIC Matthew Twose, at [34].



directions of the NPS-UD, and should be accorded more weight than Future Proof pending the completion of the Phase 2 review.

28. Mr Twose considers the OLL proposal gives effect to the NPS-UD 2020 under Policy 8 and is consistent with the Waikato 2070 strategy.<sup>15</sup>

### **SCOPE OF SUBMISSION**

29. Due to the change in the relief sought through the Ohinewai hearing, and the relief now sought in the Zone Extent hearing, I briefly address the question of scope and the Panel's ability to grant the FUZ relief.

30. OLL's submissions were as follows:

- (a) Original submission: The inclusion of a growth area at Ohinewai in accordance with the plan attached to the submission, which encompassed the wider Ohinewai area.<sup>16</sup>
- (b) Further submission on Ambury's primary submission: The submission by OLL identifies a 'Proposed Growth Area' around and east of the Waikato Expressway interchange at Ohinewai. The submission sought that the entire 'Proposed Growth Area' should be the subject of a structure planning exercise to provide an overarching approach to land use planning in and around Ohinewai. OLL supported the Ohinewai Structure Plan proposed by Ambury but sought that the extent of the Structure Plan area be increased to consider the entire 'Proposed Growth Area' rather than Ambury's property alone.
- (c) A memorandum was filed on behalf of OLL on 14 August 2019 refining the 'The Proposed Growth Area' requested in its submissions to its land holdings, attaching a revised map to replace the map in OLL's original submission.<sup>17</sup>

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<sup>15</sup> Summary Statement of Evidence Matthew Twose (18 May 2021), at [13].

<sup>16</sup> As shown by the plan attached the Ohinewai Lands Limited submission No. 428.

<sup>17</sup> As shown on revised map that is included as Figure 1 to the EIC Tony McLauchlan, at page 3.

31. With respect to the legal principles concerning the Panel's jurisdiction to grant the relief I submit:
- (a) The FUZ relief sought by OLL was raised by and fairly within the ambit of its submission. This is a question of degree to be judged by the terms of the proposed change and the content of the submissions.<sup>18</sup> The FUZ relief is an alternative method for providing for future urban growth areas as sought in OLL's submission.
  - (b) Scope can involve relief that falls on the spectrum between the relief sought in the submissions and the notified provisions of the plan.<sup>19</sup> The FUZ relief confined to the OLL's landholdings lies on the continuum between the notified Rural Zone and the inclusion of a growth area encompassing the wider Ohinewai area as sought in the submission.
  - (c) The public has had a realistic opportunity to submit on OLL's request for a future growth area, either in further submissions on OLL's original submission or in the Hearing process followed after the release of the Zone Extents Report. OLL's proposal to seek provision for future urbanisation of its landholdings was clearly signalled in its original submission seeking an Ohinewai-wide future growth area, and the FUZ relief has not come "out of left field".<sup>20</sup>

## CONCLUSION

32. For the reasons given in Mr Twose's evidence, and supported in part by the s. 42A Report, OLL says that its request to confirm a FUZ for its land is the most appropriate outcome in terms of s. 32 of the RMA. OLL requests that the Panel grant the relief they seek.
33. In my submission:
- (a) The expert evidence before the Panel, including the s. 32AA evaluation and the evidence filed for Hearing 19, establishes that

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<sup>18</sup> *Countdown Properties (Northlands) Ltd v Dunedin City Council* [1994] NZRMA 145; *Royal Forest and Bird Protection Society v Southland District Council* [1997] NZRMA 408.

<sup>19</sup> *Environmental Defence Society v Otorohonga District Council* [2014] NZEnvC 070.  
<sup>20</sup> An expression used by the High Court in *Clearwater Resort Ltd v Christchurch City Council* HC Christchurch, AP34/02, 14 March 2003.

OLL's FUZ relief is appropriate in the context of the relevant statutory considerations; and

- (b) The reporting planner's concerns as to the future uses and constraints of the Northern property can be appropriately addressed in the context of a future First Schedule structure plan process to create a live zoning.

**Dated** 18 May 2021



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**Brianna Parkinson**  
**Counsel for Ohinewai Lands Limited**