

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of a submission by Perrys Group in
the PROPOSED WAIKATO DISTRICT PLAN pursuant to
Clause 6 of Schedule 1 to the Act

**LEGAL SUBMISSIONS ON BEHALF OF
PERRY GROUP**

18 MAY 2021

Hearing 25: Zone Extents – Te Kowhai, Horotiu, Ngaruawahia, and Taupiri

KATE BARRY-PICENO
Barrister
Mauao Legal Chambers
1/9 Prince Ave
Mount Maunganui
Tauranga 3116
T: 021605832
E: kate@kbplawyer.co.nz

INTRODUCTION

1. Perry Group (or 'Perrys') made submissions and further submissions on Zone Extents for land it holds ownership or interests in at Horotiu, which are the subject of Hearing 25 ('S#464' and 'FS#1313').

SCOPE OF SUBMISSIONS

2. The purpose of these legal submissions is to briefly address:
 - a) the submission points made by Perry Group that are relevant to Hearing 25 Zone Extents at Horotiu.
 - b) the response to Perry Groups evidence set out in the Section 42 A report and from other submitters regarding Perry's rezoning requests.

SUMMARY

3. It is submitted the zoning relief Perry Group seeks through the district plan review process is consistent with the Waikato Proposed District Plan (**PDP**) and the wider strategic context and policy reflected within the Future Proof Strategy, Waikato 2070, Horotiu Structure Plan, and the PDP. The residential zoning sought will enable efficient use of land within the Horotiu area and is near efficient transport networks to the Hamilton and Auckland regions.
4. Perry Group's submission generally supports the Council's Proposed Plans settlement pattern for Horotiu as notified.
5. There were originally two exceptions to this, identified as S#464.11 and #464.12, whereby Perry Group was seeking:
 - a) A rectangular area of land on Pt Lot 5 DPS 5176, Lots 1-3 DPS 5176 and Lt Allot 105 Horotiu Parish which Perry Group sought be rezoned from "residential' zoning as notified in the PDP to 'Business' (s # 464.11).
 - b) A 1.3hectare triangle area of land on allotment 106 Horotiu Parish and Section 2SO486608 which Perry Group sought be rezoned from 'Rural' as notified in the PDP to 'Residential' (s

#464.12). This land is zoned rural under the ODP and PDP, but is part of the State Highway 1 designation J16.

Both areas are identified on an aerial map at paragraph 192 of the Section 42A report.

Business Zoning ‘rectangle’ (S# 464.11)

6. This land was proposed to be rezoned from Country Living residential to residential zoning in the PDP. Perrys submission 464.11 sought the proposed zoning for this rectangular area to be changed to ‘Business’ zoning. This submission was subject to three further submissions in opposition, from Waikato Regional Council (FS1277.31), NZTA (FS1202.132), and Mercury NZ Ltd (FS 1388.384).
7. As stated in the Section 42A report at paragraph, Mr. Collier’s evidence dated 17 February 2021 for Perrys states it had decided not to pursue the relief sought for Commercial business zoning on the ‘rectangle’ area. Perrys now support the proposed rezoning of this area of land to that as notified in the PDP of “residential zoning. The reasons for the withdrawal of this part of Perrys submission is as stated at para 2.5 of his evidence:

Since making its original submission, Perry Group has sought further advice in relation to the need for and extent of commercial land within the Horotiu Village. Based on several recent factors, Perry Group has requested that the commercial rezoning is not pursued further through the District Plan process. These factors include:

- *Recent rezoning of further land for Commercial purposes as part of the Te Awa Lakes Private Plan Change.*
- *Recent demographic work undertaken by the District Council indicating a significant deficit of residential land supply.*
- *The amended National Policy Statement on Urban Development (NPSUD) which identified Waikato District as a Tier 1 Council with a residential housing affordability and land supply issue.*

Residential Zoning Triangle(S#464.12)

8. Submission # 464.12 in relation to the further residential zoning sought on this area of land was opposed by Ports of Auckland (FS1087.3), Waikato Regional Council (FS1277.32), Mercury NZ Ltd (FS1388.385), Turangawaewae Trust Board (FS139.146), NZTA (FS 1202.114), Hamilton City Council (FS179.184) and Mercury NZ Ltd (FS 1388.385).
9. The Section 42A Report correctly states at paragraph 195 that the land is subject to designation j16 for the Waikato Expressway. The Land was purchased from Perry Group in 2003 for this purpose. However, the voluntary sale of the land '464.12' land is still owned by Waka Kotahi ('NZTA'). Mr. Wood for NZTA states that *"no decision has been made as to the timing for disposal of this land"*.
10. What Mr. Wood does not state is that this land has been acknowledged as likely surplus to the State Highway designation and the parties have been negotiating for its sale back to Perry Group since 2018. The land has not yet been the subject of a formal offer for sale solely because of an ongoing issue between NZTA and Perry Group related to the State Highway's stormwater drainage runoff and an existing culvert/ swale in this location that needs to be replaced.
11. In 2018, NZTA had offered two options to manage expressway stormwater adjacent where the expressway passes through Perrys Te Awa Lakes and this designated left over area of land. Option 1 was a totally segregated system where the expressway water is directed to a proposed water quality pond then discharged to the Waikato River. Option 2 was effectively the same except stormwater from the pond was discharged into the eastern lake within the Te Awa Lakes development so that the NZTA and Te Awa Lakes are combined. The State Highway stormwater runoff currently discharges onto Perrys Te Awa Lakes land. 'Option 2' is no longer acceptable to Perrys, due its Te Awa Lakes rezoning requirements. The Te Awa Lakes plan change requires the 'lake area 'adjacent to the Expressway to be of high-

water quality for safe recreational use.

12. Although remediation and a rebuild of NZTA's existing stormwater culvert and swale is accepted by NZTA as necessary, the final design and construction of the new stormwater runoff drainage system, and cost split/contribution between Perrys and NZTA, has yet to be finalised and is forming part of the agreement for sell back of the land. This issue is still to be resolved to the satisfaction of both parties.
13. However, only a very small part of this 1.3 ha surplus land, if any, will be needed for NZTA's stormwater drainage solution and it is not material to any zoning decision. The formalising of an offer back and sale of the land to Perry Group has been delayed for several reasons, but it is fair to say that Perrys had expected the land to be back in its ownership prior to these hearings. It is expected this stormwater issue will be resolved and the land returned to Perrys ownership in the very near future. There is no specific stormwater management zone set out in the Proposed District Plan, and therefore stormwater management areas adopt the underlying zone, urban or rural.
14. The issue of the most appropriate zoning is a separate RMA matter from ownership, and Perry Group considers it appropriate that the rezoning of the land is addressed now as part of this PDP process, regardless of the fact that ownership has not yet passed back to Perrys.
15. Mr. Wood's evidence on behalf of NZTA also cited noise concerns as a reason for NZTA's opposing residential zoning. Perrys accepts that the Horotiu acoustic overlay and potentially an additional NZTA acoustic overlay could apply, as well as related rules and policies. NZTA has a similar approach to other newly residential zoned land on either side of its State Highways, and this will appropriately address acoustic noise issues.
16. It is both inefficient and unnecessary to have to address this through a later plan change. Matters such as acoustic standards can and should be dealt with through District Plan rules and the consenting

process at the time of development. When Perrys does have the land returned, it does not want to have land split into two disparate zonings, and this may have unintended adverse effects on how the land is comprehensively developed.

17. The area of land being sought to be rezoned of 1.3 ha is sufficiently large to enable open space buffer areas, fencing, bunding and planting all of which are treatments done elsewhere in New Zealand, to enable affordable housing to be developed in these types of localities adjacent to State Highways. Reverse sensitivity concerns in relation to matters such as noise as raised by NZTA and POA, can be addressed through adoption of standard acoustic conditions.
18. With respect to reverse sensitivity issues, as referenced in previous legal submissions to Topic 3 hearings, at the time that the Horotiu Industrial area was rezoned through an Environment Court appeal in 2011, the position of the parties was that amenity of existing residential properties at Horotiu would be maintained and protected through policies and rules related to the industrial area¹.
19. The Industrial Park provisions agreed in 2011 through Environment Court appeal settlement, states at Section 24B 8 Reasons and Explanations:

“The boundary of the Horotiu Industrial Park is not affected by changes to the Waikato District/ Hamilton City boundary, which are proposed to result in the Waikato Expressway forming the boundary between the two local authorities. The area is well suited to a mix of light and heavy industrial activities, provided environmental mitigation measures are included to protect the amenity of the adjacent Living and Rural zones.”
20. This same level of effects would apply to houses on residential zoned land as with residential dwellings within a rural or Living zone. Whilst it is accepted the density of housing is expected to increase through a residential zoning, the design of the housing through location, setbacks and acoustic standards means the dwellings can be better

¹ *Northgate Developments and Perry Group v Waikato District Council [ENV-AKL- 2007-000029 and 00032], settled in 2011 by Environment Court appeals by consent order for Horotiu Industrial Park rezoning.*

planned to meet acoustic standards and with consideration of other amenity and traffic matters, than existing older dwellings.

21. It remains Perry Groups position as stated in Mr. Colliers evidence that retaining rural zoning for this land would be inappropriate, as it would leave it as an isolated and fragmented piece of rural land within an urban setting. Mr. Collier states at paragraph 2.6:

“The land is bordered by the commercial and residential zones and sits adjacent to the State Highway. In my opinion, its most appropriate zoning is Residential. ”

22. It is noted that aside from the J16 designation of the land, which as a matter of law is unaffected by the underlying zoning, HCC planner Laura Gant also stated in her further evidence that HCC now *“supports this discrete rezoning as it is locked by roads, including the WEX and other urban zoning.”* HCC originally opposed the extent of the residential zone proposed in Horotiu because of the uncertainty around servicing and the pending decisions on the Te Awa Lakes Plan Change. At paragraph 23 of Gant’s evidence, she states *“(HCC) is now in a position to support the extent of the notified residential zoning at Horotiu, including the additional 1.3ha sought by Perry Group Limited.”*

23. Waikato Regional Council evidence by Ms. Foley, states at paragraph 6.8 of her further evidence that she is concerned that witnesses such as Mr. Collier have raised the issue that the Waikato Regional Policy Statement and other policies now fall behind the NPS-UD in terms of its strong direction to making more residential land available for affordable housing. Despite Ms. Foley’s concerns and advice that the Regional Council is ‘actively working’ on notifying a plan change to the WRPS, that is not of any assistance to this committee’s deliberations and assessment of rezoning, as it unlikely to be operative prior to decisions being made on this WDP.

24. In my submission the evidence of Planners such as Mr. Collier on this matter correctly points out to the Commissioners the obvious

difficulties with respect to the NPS-UD changing the statutory planning framework this Plan Review must be considered against. There is a clear factual evidence that under the currently operative WRPS and related spatial plan restrictions there is a significant lack of available and suitable land supply. Any new policy approved by way of a Future Proof update, a plan change to the WRPS , or new statutes intended to replace the RMA, will all be expected to radically and urgently address the current lack of land available for residential housing.

25. The luxury of medium or long term solutions for the Regional Council to review this issue as suggested by Ms. Foley, or the calculations of 'capacity' of land supply as zoned in the PDP and assessed in the Section 32 report, does not address the obvious issue that just because land is rezoned for development, does not mean it will become available in the short or medium term. A more finely grained assessment of that issue is in my submission required of Councils to help address the current national housing crisis.
26. Land that is owned by well- resourced entities such as Perrys, and/or where rezoning is supported by proposed projects by experienced commercial land developers, is clearly more development ready due to these financial and expertise capabilities. Similarly, where there are technical assessments to show there is available infrastructure also means the land can be quickly developed in the short-term following rezoning. This should be the focus in terms of consideration of suitable land for rezoning, given the current housing crisis, not just lines on spatial maps without context to underlying land ownership or motivation or resources to give effect to the urban development the zoning enables. It is Perry's position that the land in the triangle area, falls within these kind of pragmatic rezoning considerations.
27. Section 32(1)(b) states the local authority is required to identify the "most appropriate" policies, rules, and methods to meet the objectives (and in turn the purpose of the RMA. The words "most appropriate" in section 32(1)(a) indicate that a comparative analysis

of the potentially available options is required² and a value judgment in terms of what is the most "suitable" option.³

28. In other words, all the criteria in terms of the rezoning assessment framework set out in the plan should not need to apply in all cases, as the level of detail must correspond to the scale and significance of the effects that are anticipated from implementation of the rezoning, including positive effects such as housing supply realistically being able to be delivered in the short term.

Conclusion

29. Perry Group support WDC's proposed plan rezoning to residential zoning as notified.
30. Perry Group also seeks the relief as sought in submission 464.12 for the triangle piece of land to be rezoned from rural to residential as the most appropriate zoning for this land and expect it will be subject to appropriate plan provisions to address any potential reverse sensitivity amenity effects caused from its proximity to the Waikato Expressway and/or Horotiu Industrial Zone.



Kate Barry-Piceno

Barrister

Dated 12 May 2021

² *Liv v. Auckland Council* [2018] NZEnvC 87 at [564]-[566].

³ *Rational Transport Soc Inc v New Zealand Transport Agency* HC Wellington CIV-2011-485- 2259, 15 December 2011.