

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

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of the hearing of submission on the Proposed
Waikato District Plan to rezone land at Te
Kowhai pursuant to Clause 6 of Schedule 1 of
the Act

**OPENING LEGAL SUBMISSIONS BY COUNSEL FOR HOUNSELL
HOLDINGS LTD- SUBMITTER #832**

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INTRODUCTION

1. The submitter Hounsell Holdings Limited (“Hounsell”) original submission sought rezoning of its land from rural to residential zoning. It is acknowledged Hounsell Holdings did not obtain extensive expert advice until late in the proposed plan hearing process. As a result of this advice, although its overall position as to the suitability of this land for urban zoning has not changed, it has accepted that there needs to be further technical reports and assessments prepared for the land before ‘live’ zoning. It is currently premature in terms of timing and process to be considered appropriate for live urban zoning. In acknowledgement of the challenges with timing and process of this plan review, Hounsell Holdings has amended its submission.
2. Hounsell’s position as to the suitability of the land for Future Urban Zone (FUZ) and/or Future Urban Expansion Area overlay is based primarily on the expert strategic and policy planning evidence of Craig Batchelar, supported by other technical assessments.
3. It is considered that this amendment to the submission is within legal scope of Hounsell original submission based on well-established caselaw principles on scope, as it is a lesser relief than was sought in the original submission and anticipated within what was notified as sought.¹ The scope of this lesser relief sought falling within the scope of Hounsell’s original submission has been accepted in the Section 42A report (Addendum report at para 12).
4. Hounsell presents the following reasons for seeking the Committee to apply a FUZ or Urban Expansion overlay through this hearing process,

¹ Palmerston North City Council v Motor Machinists Ltd [2013] NZHC 1290 at [90], endorsing the approach of William Young J in Clearwater Resort Ltd v Christchurch City Council HC Christchurch AP34/02, 14 March 2003. See also Mackenzie v Tasman District Council [2018] NZHC 2304 for a more recent application of the test.

based on the following propositions:

- a. There is a need for zoning of further residential land on the boundaries of Hamilton City jurisdiction to meet the short, medium, and long term demands for residential growth.
- b. the potential of this land to contribute to meeting future urban development capacity needs will be put at risk if the land is not identified and protected from fragmentation and inappropriate development.
- c. If the land is not rezoned as part of this Plan review, the development potential of land may not be factored into capacity assessments and strategic decisions on infrastructure which are about to be undertaken by the imminent scheduled reviews of HUGS and WRPS.
- d. The subsequent evaluation (in rebuttal evidence) of the proposed Development Area against RPS Appendix 6 General Development Principles shows that the land has good potential for urban development.
- e. The risks and potential adverse effects of “not acting” and leaving the land with rural zoning rather than identifying it for Future Urban, are greater than identifying it through a FUZ or plan method of an expansion overlay.

SECTION 42A REPORT

5. There are essentially three main impediments put forward by the Section 42A report author to giving effect to this form of future urban zoning as the most appropriate option, rather than ‘do nothing’ by retaining rural zoning on this land:
 - a. It does not give effect to the RPS settlement pattern which reflects the Future Proof Strategy (it has been put forward by a number of

expert planners that the RPS is in process of being reviewed, and FPS is now outdated).

- b. It does not and cannot encompass all of the land relevant to an integrated rezoning decision, due to the scope of the submission being site specific to Hounsell's current land interests.
 - c. There is a lack of technical evidence prepared by Hounsell in relation to matters including three waters and transport, such that its appropriateness for urban zoning cannot be ascertained at this time.
6. As in Para 3.9 of Mr Batchelar's evidence, regardless of whether the Committee can address the wider zoning appropriately through the current DP review, WDC still needs to carefully manage land that is within scope and the subject of submissions which is suitable for urban development on the HCC fringe.
7. It is accepted that a plan change may be needed that integrates surrounding land, including future industrial land expansion on the adjacent landholdings, as sought by Northport submission. A future urban zone or overlay sets down a policy framework to enable that process to occur, whilst identifying the likelihood and general suitability of the land forming part of the Waikato (and most likely Hamilton jurisdiction) urban area in the future.

HAMILTON CITY GROWTH

8. Waikato 2070 (prepared by Waikato District) is a non-RMA policy document that is meant to inform how, where and when growth occurs in the Waikato district over the next 50-years. It is noted that the extent of public open days and engagement on this document was focussed on these Waikato communities. It is not surprising this area is not

mentioned as the strategy focusses on Waikato communities, not HCC city boundary's expansion.

9. It is Mr. Batchelar's opinion that this land has been overlooked, rather than being the result of any deliberate policy position taken by any Council as to its inappropriateness for urban use. There is no indication as suggested by Mr. Cleese yesterday in speaking to his report that its lack of inclusion has been based on any technical or policy reasons.
10. Regarding Hamilton City Council, it is accepted that this land has not (yet) been included in any Strategic agreement for jurisdictional boundary expansion. As outlined in Mr. Batchelar's evidence it is expected that this will be addressed in the pending HUGS review.
11. Hamilton City Council's issues with its Areas of Interest and Urban Expansion Areas were addressed in Hearings 1 and 3 in 2019. Hounsell Holdings did not actively engage with HCC and the proposed plan review at that time. HCC original 2018 submission regarding AOI land adjacent to its jurisdictional boundaries is covered at 1.8-1.9:

“...

More broadly, within the Area of Interest, HCC seeks objectives and policies which control the nature, extent, and rate of development, including in both rural and non-rural zones, so that a consolidated urban form within the existing HCC boundary is prioritised and achieved, and that urban sprawl is avoided, and that the inefficient use of land and infrastructure is avoided. HCC seeks rules and methods to achieve these outcomes.

1.8 These objectives, policies, rules, and methods may vary within the Area of Interest. For example, HCC seeks a high level of planning control over development adjacent to the existing City boundaries, and within existing development nodes within the Area of Interest but may seek

less control at the outer extremities of the Area of Interest.

1.9 One practical mechanism for delivering these outcomes may be an “overlay” technique which corresponds to the geographic extent of the Area of Interest, which replaces and /or adds to zone provisions with a separate set of objectives, policies, and rules. In addition, the current proposed Hamilton Urban Expansion Area, and its associated policy overlay, may be extended or amended to better give effect to the outcomes sought in this submission”

12. HCC submission is generally consistent with Mr. Batchelar’s evidence that the method of a Future Urban overlay or FUZ will ensure that planning, land use, subdivision and infrastructure decisions are aligned and coordinated between the neighbouring councils to achieve a more sustainable urban form.
13. The Section 42A report authors rebuttal evidence states that he considers the risk of any landuse precluding its future urban development is low, given that it is owned by developpers and therefore its future development has effectively already been ‘tagged’. In my submission such an assumption or ‘method’ for forward strategic planning based on assuming how a developer may act when land is not safeguarded by some form of policy recognition lacks understanding of how investment and development decisions are made by the private sector. It also misses the strategic policy opportunities provided.
14. A lack of forward planning now will risk creating legacy issues for both Waikato District Council (WDC) and HCC and can and should be avoided by use of FUZ or overlay as sought by both HCC, and by Hounsell for this specific site. This will ensure that planning, land use, subdivision and infrastructure decisions are aligned and coordinated between the neighbouring councils to achieve a more sustainable urban form.

FRAMEWORK REPORT/THREE LENS APPROACH

15. Mr Batchelar's evidence does not explicitly evaluate the submission by Hounsell against the three lenses of the Rezoning Assessment Framework, although the s32AA report follows the template provided in the Framework Report.

16. Notwithstanding, the three lenses are addressed in the evidence:

- Lens 1: Assessment of Relevant Objectives and Policies in the PWDP – The Section 32AA report identifies the relevant objectives and policies, and provides commentary on the scale and significance of the rezoning proposal
- Lens 2: Consistency with higher order policy documents and strategies – The Section 32AA report identifies the higher order documents and strategies and discusses these in the S32AA report and evidence in chief (para 7.2) and rebuttal evidence (Section 3.0)
- Lens 3: Best practice planning guidance – The rebuttal evidence addresses these issues in the context of the RPS General Development Principles (Section 4.0)

17. Further to the assessment through Lens 1 is the ability to consider flexibility via the RPS alternative land release policy (Policy 6.14) and the NPS UD where development is not anticipated by an RMA document (Policy 3.8 Unanticipated or out-of-sequence developments). While it is acknowledged that the evidence provided by the submitter is not sufficient to support a live zoning, there is a case for identification and protection of this land for future development. It is accepted the ability to achieve this by FUZ or overlay is limited by the fact the adjacent blocks between the site and the city boundary were not included in the

Hounsell submission. However, the submission made by HCC on management of the Area of Interest including the method of overlay expansion areas (considered in Hearing 3) may provide some further scope.

18. High class soils in the WDC Plan are defined as including Class 1 and 2. This site is Class 2. The Spatial Plan identifies only “elite soils” (Class 1) in determining where urban development goes. It comes down to infill not being able to satisfy demand, then expansion onto land around Hamilton and adjacent to its jurisdictional boundaries will be needed.
19. Hounsell agrees with the Peer Review on the Framework report prepared by David Hill, where he states, noting the NPS-UD requirement for a demand +20% planned and zoned supply:

“While there may be argument about the specifics and the timing of that demand, the FR bases its conclusions on the best currently available data – and, of course, there is not a 1:1 relationship between zone-enabled land and development feasible land, such that the demand +20% metric needs substantially more land zoned than the raw number thereby calculated to account for that discrepancy. Without defined density minima the correlation between plan-enabled and development feasible is quite poor. In other words, plan-enabled zoning needs to exceed anticipated demand by a significant quantum both in space (where the market may move over the intervening period) and time (taking into account the lead time for development to materialise on the ground). Experience in Auckland, for example, suggests that this factor required between 50% and 100% more plan-enabled land to meet the actual demand once the reality and contingencies of conversion from live zoning to actual development is taken into account. Allied to that, contemplating a planning horizon of 15 – 20 years better matches the NPS-UD requirement for a rolling 7-year supply beyond the notional 10-year life of the next plan.”

20. The Council's Section 42A Report sets out a suggested pathway for the site before it should be contemplated as a candidate for future urban growth. These are described as 'by way of collaborative growth management processes within Future Proof', through 'the upcoming update of the Regional Policy Statement', then followed by a plan change (to either Future Urban Zone or "live" Residential zoning).
21. Whilst there is clearly logic to this pathway as the strictly correct legal process the Waikato Councils have adopted in the past, the suggested linear pathway to securing a future urban or residential zoning is likely take 5-6 years to complete, if timing is based on previous RMA public plan processes. In the meantime, as stated by Mr Batchelar, the potential of the land to contribute to meeting urban development capacity needs will be put at risk. The land should be identified and protected from fragmentation and inappropriate development given its proximity to the HCC boundary. This will then enable the land and the Hounsell Holdings can be included in strategic discussions around matters such as policy and funding technical reports analysis on future roading and three waters infrastructure capacity.
22. The broad appropriateness of the area for urban development in the north of Hamilton is illustrated on the plan in Annexure 1 to Mr. Batchelar's rebuttal. This plan shows the Te Kowhai East Development Area including all land located between the site subject of the submission and the city boundary.
23. The Hamilton urban area is expected to grow over coming years (as indicated in existing structure plans) to ultimately be located immediately south of this block. Whilst it is accepted this area is not currently identified as a growth area in Future Proof or the WRPS and the level of site-specific analysis that would normally underpin a rezoning of this size has not yet been undertaken by Hounsell, the suitability and logical

future urban use of this land as part of Hamilton's urban area is sufficient to support a Future Urban Zone (or Hamilton Urban Expansion Area Overlay) to signal the long-term suitability of the area for urbanisation and to maintain its development potential in the meantime.

24. As stated by Mr. Batchelar, the lack of identification of this block in the higher order documents such as Future Proof and WRPS appear to either by an oversight or reflect the fact that both higher order documents are out of date and are due to be updated. Given the proximity of this land to logically form part of future HCC jurisdiction, it is also not surprising the land was not included as part of the Waikato 2070, which focusses on expansion of existing Waikato towns.
25. Contrary to the position put forward in the Section 42A report, it is submitted that there is sufficient certainty regarding the 'in principle' acceptability of this area for urbanisation. The same planning principles relied on by Mr. Batchelar are support a FUZ or overlay are identified in the principles set out in the Hamilton City Council's submission and its legal submissions given to this Committee as part of Hearings 2 and 3.
26. The Section 42A Author correctly identifies that the submitter block is in single ownership and the submitter is clearly 'seeking to realise the site's potential'. These are sound reasons to identify the land for future development. It does not equate to an assumption that the submitter (as a property development company) would choose to continue to invest or retain the land in reliance on its urbanisation potential if this future potential is not properly recognised in planning documents.
27. The Hounsell land currently is subdividable under the rural zone WDC provisions which allow subdivision and minor dwelling creation on lots greater than 40Ha which exist in the subject area. If no indication is given towards future urban potential, then a rational developer would take advantage of the ability to create additional lifestyle block titles in the

short term. This increased fragmentation is not a desired outcome for the purposes of a comprehensively planned and developed future urban use.

28. By deciding to identify this land as FUZ or with FU expansion overlay, it will ensure that consideration of this block is recognised and it will be part of future work programmes including updates to Future Proof, the ongoing spatial planning work underway on both the metropolitan Hamilton area and the Hamilton to Auckland corridor, and the Housing and Business Capacity Assessment ('HBA') required to be undertaken by the NPS-UD.
29. It is accepted by Hounsell that a plan change will be required to be undertaken in the future (either public or private) to address any HBA identified shortfalls in capacity, and that this would include adjacent landholdings to deliver a logical urban form and connections, and a level of site-specific analysis necessary to inform a rezoning proposal of this scale. The motivation and incentive for Hounsell to invest in this level of work needed for a future change should be secured through a proposed Waikato District Plan ('pWDP') decision that identifies the potential of this land for future urban use.
30. A 'do nothing' approach of retaining Rural zone on this land is not a more effective and certain method for giving effect to higher order documents and that NPS -UD which expects integration of urban areas and avoidance of risks such as activity or unwanted effect conflicts.
31. The extent to which "certainty", as opposed to a reasonable degree of confidence, is necessary in the context of district plan provisions is not accepted. The Section 42A report's author has focussed on the need for policy certainty by specific identification of this land for FUZ or expansion overlay purposes.

NATIONAL POLICY STATEMENT URBAN DEVELOPMENT(NPS-UD)

32. In my submission this level of certainty for an RMA method such as a FUZ or overlay sets the bar too high. The RMA is not a 'no risk' statute and the "perfect" linear planning pathway advocated by the Section 42A Author and other local authorities has clearly not been successful or worked out that well for the provision of meeting actual housing demand or land supply in the Waikato or other high growth areas in New Zealand.

33. The Central Government's intervention through the PSC-UFC and then NPS-UD was a clear statement and direction to Council's that Central Government wants Council's planning approach to be more flexible, to enable urban development to be delivered within shorter timeframes, and more effectively.² Government has clearly directed that adding housing capacity is more important (accepting that this is subject to matters such as infrastructure and three waters planning), than strict adherence to planning documents.

34. The interpretation section of the NPS-UD states that:

i. "urban environment means any area of land (regardless of size and irrespective of local capacity or statistical boundaries) that: is, or is intended to be, predominantly urban in character; and

ii. is, or is intended to be, part of a housing and labour market of at least 10,000 people."

35. This definition is very broad - it is not limited by geographic size, jurisdictional or other boundaries. This land is zoned Rural but is adjacent to the Waikato Expressway which is urban by its nature, and it

² Policy 8 of NPS-UD states that development capacity can be unanticipated by RMA plans and/or out of planned land release sequence.

is adjacent to the Hamilton City jurisdictional boundary (albeit severed by the Waikato Expressway).

36. In my submission the land falls within a broad Urban Environment definition, or at least is land clearly predicted in the future to form part of the (Hamilton City) urban environment. Strategic and responsive decisions on the Waikato District Plan review is expected by the NPS-UD, that needs to align and coordinate planning across urban areas well into the future to avoid any future land capacity issues as it currently being experienced under the operative WRPS and Future Proof higher order documents.

CONCLUSION

37. The inherent spatial appropriateness and suitability of the land for urban development means Council should take measures through this plan review process to ensure that the Hounsell Land is protected for future urban development and factored into capacity assessments and strategic decisions on infrastructure.

38. Adjacent land holdings will logically form part of those broader future planning processes and while their lack of inclusion in this submission is not ideal, this should not be an impediment to identifying this land and protecting it in the longer term for future urban use.



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Barrister

17 May 2021