IN THE MATTER OF The Resource Management Act 1991

AND

IN THE MATTER OF Proposed Waikato District Plan (Stage 1) Hearing 25 – Zone Extents

LEGAL SUBMISSIONS ON BEHALF OF
2SEN LIMITED AND TUAKAU ESTATES LIMITED
[Submission 299]

MAY IT PLEASE THE HEARING COMMISSIONERS

Introduction

1. These submissions are presented on behalf of 2Sen Limited and Tuakau Estates Limited ("**Submitters**"), in relation to matters raised by the Submitters' submission on the proposed Waikato District Plan (Stage 1) ("**PDP**") seeking the rezoning of the balance of their properties at 48 and 52 Dominion Road, Tuakau to the General Residential Zone ("**Properties**" and "**Rezoning Request**").

2. The Submitters ask that the Hearing Panel grant the Rezoning Request, subject to the inclusion in the PDP of the "amenity yard" and associated rules 16.3.9.2, P2 and RD1, as set out in the evidence of Catherine Heppelthwaite.

Statutory considerations

3. The Hearing Panel will already be familiar with the RMA legal framework that applies to its decision-making on submissions. That framework is summarised in the Council's "opening legal submissions" at paragraphs 26-55. As noted in those submissions, the critical component of the framework is the section 32 evaluation.

4. In summary, the decision whether or not to grant relief sought in a submission must be resolved with reference to section 32 and Part 2 of the RMA. As is required by section 32AA of the RMA and the Hearing Panel's direction, a further evaluation of the Rezoning Request has been prepared by Ms Heppelthwaite and included with

her evidence in chief. The analysis concludes that the Rezoning Request, subject to the inclusion of the amenity yard mechanism and associated rules, is a more appropriate outcome than the PDP as notified. Ms Trenouth, s42A author, agrees with Ms Heppelthwaite's analysis, and recommends that the Rezoning Request be granted.

5. In summary:

   (a) The Submitters do not propose a change to the objectives of the PDP, which the consider generally (in relation to the Residential zone) will achieve the purpose of the RMA.

   (b) The Rezoning Request, and the amenity yard mechanism, are the most appropriate method and provisions to achieve the relevant objectives of the PDP, when assessed:

      (i) Relative to other reasonably practicable options; and

      (ii) In light of the more efficient and effective manner in which the objectives of the PDP will be achieved.

National Policy Statement – Urban Development

6. The National Policy Statement on Urban Development 2020 ("**NPS-UD**") requires local authorities to provide for adequate development capacity in urban areas for housing and business land. It contains a broad suite of objectives and policies that encompass high-level goals and explicit instructions to councils as to how to accomplish those goals based on a three-tiered approach.

7. While Waikato District Council is identified as a Tier 1 Local Authority, Tuakau itself is not identified as a Tier 1 or Tier 2 urban environment and would therefore presumably fall to be considered as a Tier 3 urban environment.

8. There are a number of consistent themes within the NPS which apply irrespective of what 'Tier' a particular settlement falls within. These include:

   (a) The importance of providing housing capacity and choice within urban environments.[1]

[1] Objective 2, Policy 1, Policy 2, Policy 6. See also Clauses 3.2, 3.23(2), 3.24 and 3.25.

(b) Urban environments (and amenity values) are expected to change over time, sometimes significantly, and those changes are not of themselves adverse effects.[2] The historic approach of maintaining the status quo is no longer appropriate.[3]

(c) The importance of integrating land use and infrastructure development.[4]

(d) Greatest density of development should be located in proximity to centres of employment, public transport, or in areas of high demand.[5]

(e) Decision-making should be strategic,[6] future focused and evidence based.[7] When making a trade-off between intensification and some other matter, ensuring a robust assessment is undertaken.[8]

(f) Overall, that expectations regarding the density of development and the range of housing typologies will alter in regional centres (as is currently occurring in major cities).

9. Council has opted (appropriately in the Submitters' view) to assess demand and capacity of its Tier 3 urban environments, as well as the Tier 1 urban environment of Hamilton for which it is partially responsible. The section 42A framework report: supplementary evidence confirms that, including the section 42A zoning recommendations, the PDP will provide marginally enough housing supply to meet demand with a 20% competitiveness margin.

10. The Submitters say that the Rezoning Request provides a small, but important contribution to the "reasonably expected to be realised" housing supply in Tuakau and broader Waikato Area.

[2] Objective 4, Policy 6.

[3] That position was confirmed by the Environment Court in *Summerset Villages (St Johns) Limited v Auckland Council* [2019] NZEnvC 173, which was considering the (now replaced, and less directive) NPS-UDC.

[4] Objective 6.

[5] Objective 3.

[6] Objective 6.

[7] Subpart 3, in particular Clause 3.11.

[8] Policy 4

Reverse sensitivity

11. The only discernible rationale for the PDP proposal for a split zone over the Properties is the potential for new residential development to generate reverse sensitivity effects on the Whangarata Industrial zone.

12. The most oft-quoted definition of "reverse sensitivity" is that set out in *Affco New Zealand v Napier City Council* NZEnvC Wellington W 082/2004 at [29]:

> *The legal vulnerability of an established activity to complaint from a new land use. It arises when an established use is causing adverse environmental impact to nearby land, and a new, benign activity is proposed for the land. The "sensitivity" is this: if the new use is permitted, the established use may be required to restrict its operations or mitigate its effects so as not to adversely affect the new activity.*

13. Reverse sensitivity effects are established, relevant effects for consideration under the RMA. However, the Environment Court has also established as the starting point that land users must limit (or "internalise") their effects to within their own property boundaries, except where activities cannot reasonably contain their adverse effects. In the case of regionally or nationally important infrastructure or industries, it may be appropriate to utilise mechanisms such as "buffer zones" to manage the effects that may arise from incompatibility of uses.[9]

14. The Court in *Waikato Environmental Protection Society Inc v Waikato Regional Council* [2008] NZRMA 431 (odour) adopted the following principles from earlier decisions (*Winstone Aggregates v Matamata-Piako District Council* (2005) 11 ELRNZ 48 and *Wilson v Selwyn District Council* NZEnvC (C023/04)):

    (a) In every case, adverse effects are to be internalised as far as reasonably possible (or unless it is shown that that cannot be achieved), and having done all that is reasonably achievable, the RMA does not impose a requirement that total internalisation of effects must be achieved;[10]

    (b) There is a greater expectation of internalisation in newly established activities than in older activities;

    (c) The main concern is to ensure that adverse effects beyond the boundary are not unreasonable, that is, are not offensive, objectionable, or significant; and

[9] *Winstone Aggregates Ltd v Papakura DC* EnvC A096/98.

[10] This is consistent with the approach taken in the Waikato Regional Plan, see discussion in Curtis EIC at parags 4.3-4.5.

(d) In assessing what is reasonable the context of the environment beyond the boundary is relevant.

15. Importantly, just as a lawfully established activity may not always be expected to fully internalise its effects where that cannot reasonably be achieved, a new supposedly "sensitive" use such as a residential activity is not inappropriate when any adverse effect at all is likely to be received by that new activity. To be unreasonable the effect must be significant, or in the case of odour offensive or objectionable.

16. Mr Hegley and Mr Curtis have carefully considered the potential that new residences developed on the Properties may receive "unreasonable" effects generated by industrial or other business activities in the Whangarata Industrial area south of the Properties. They conclude that:

(a) Existing noise generated from the industrial area will comfortably comply with operative and proposed noise standards.[11] There is no evidence to suggest a potential for reverse sensitivity effects, which would otherwise be apparent given existing, nearby residential uses.[12]

(b) Subject to the imposition of the amenity yard mechanism proposed in Ms Heppelthwaite's evidence in chief, an appropriate separation between the industrial area and proposed residential uses is provided to appropriately minimise the risk of reverse sensitivity effects generated by "residual emissions".[13] Mr Curtis is satisfied that the scope of the Council's discretion to consider a restricted discretionary consent for residential activities located within the amenity yard is appropriate and will enable proper consideration of dust and/or odour effects.[14]

Scope of Submitters' submission

17. For completeness, I briefly address the matter of scope and the Panel's ability to grant the relief now sought by the Submitters in their evidence.

[11] Hegley EIC at 5.10-5.11.

[12] Hegley EIC at 7.1-7.3.

[13] Curtis EIC at 4.7.

[14] Curtis EIC at 7.14-7.15.

18. The “amenity yard” and associated rules were not identified in the Submitters’ submission. Instead, the Submitters simply sought the Rezoning Request – ie, application of a unified zone to the Properties.

19. There is significant caselaw authority regarding the scope of relief that can be granted through Schedule 1 planning processes. The fundamental principles relating to jurisdiction are:

    (a) The relief must be fairly and reasonably raised in submissions. That question must be approached in a “*realistic and workable fashion and not from the perspective of legal nicety*”. It is a question of degree to be judged by the terms of the proposed change and the content of the submissions.[15] Scope is not limited to accepting or rejecting written submissions, but may involve relief that falls on the spectrum between the relief sought in the submissions and the notified provisions of the plan.[16]

    Comment: The relief now pursued by the Submitters was fairly and reasonably raised. The amenity yard and associated rules comprise an additional constraint upon the rezoning sought in the submission, and clearly lies on the continuum between the notified zoning and the unconstrained rezoning sought in the submission.

    (b) The “public” must have had a realistic opportunity to participate. In most cases the submission and further submission process in Schedule 1 will be sufficient to ensure interested parties are able to participate. However, where a proposition comes “out of left field”, there may have been little or no real scope for public participation.[17]

    Comment: There is no risk that a submitter reading the Submitters’ original submission seeking unconstrained rezoning of the site would have not lodged a further submission, but would have done so had they known that the additional constraint of the amenity yard were to be imposed.

[15] *Royal Forest and Bird Protection Society v Southland DC* [1997] NZRMA 408.

[16] *Countdown Properties (Northlands) Ltd v Dunedin City Council* [1994] NZRMA 145*; Environmental Defence Society v Otorohonga District Council* [2014] NZEnvC 070.

[17] *Halswater Holdings Ltd v Selwyn District Council* (1999) 5 ELRNZ 192*; Clearwater Resort Ltd v Christchurch City Council* AP34/02.

20. As stated in *Royal Forest and Bird*:[18]

> *Ultimately, it is a question of procedural fairness. Procedural fairness extends to the public as well as to the submitter and the territorial authority. Adequate notice must be given to those who might seek to take an active part in the hearing before the Environment Court if they know of ought to foresee what the Environment Court may do as a result of the reference. …*

21. While those comments were in relation to the application of sections 292 and 293 of the Act, they are relevant to the panel's overarching consideration of the question of its jurisdiction/scope.

22. In light of all of the above, the Submitters' submit that the relief now sought, including incorporation of the amenity yard and rules 16.3.9.2 P2 and RD1, is clearly within scope of the Submitters' submission and the Hearing Panel have jurisdiction to grant that relief.

Issues raised by further submitters

23. Ms Heppelthwaite addresses further submissions received on the Submitters' submission. That content is not repeated in these submissions, except to say that it appears all matters have been appropriately resolved (in the case of Waka Kotahi and Waikato Regional Council who no longer oppose the Rezoning Request), or are being appropriately addressed in anticipation of a forthcoming resource consent application (in the case of Te Whakakitenga o Waikato Incorporated).

Concluding comments

24. For the reasons given in the evidence and section 42A report, the Submitters say that its Rezoning Request to confirm a consistent Residential zoning for the Properties, subject to the application of the amenity yard mechanism set out in Ms Heppelthwaite's evidence, is the most appropriate outcome in terms of section 32 and Part 2 of the RMA. The Submitters ask that the Hearing Panel grant the relief they seek on that basis.

Dated this 12th day of May 2021

Daniel Sadlier – Counsel for the 2Sen Limited and Tuakau Estates Limited

[18] *Royal Forest and Bird Protection Society v Southland DC* [1997] NZRMA 408. See also *Westfield (NZ) Ltd v Hamilton City Council* [2004] NZRMA 559 at para [74].