

**UNDER**

the Resource Management Act 1991 (“RMA” or “the Act”)

**AND**

**IN THE MATTER**

of Variation 3 to the Proposed Waikato District Plan

**LEGAL SUBMISSIONS OF COUNSEL FOR PŌKENO VILLAGE HOLDINGS LIMITED**

**1. INTRODUCTION**

- 1.1 These submissions are made on behalf of Pōkeno Village Holdings Limited (“PVHL”).
- 1.2 PVHL is a wholly owned subsidiary company of Dines Group and Fulton Hogan. It is the architect and developer of the Pōkeno Village Estate and Pōkeno Gateway Business Park, which has transformed Pōkeno from a small settlement to a vibrant urban village.
- 1.3 Although PVHL is close to completing its development in Pōkeno, it still retains a keen interest in the future of the town. PVHL’s particular concern is that the Havelock Village site at Pōkeno South (“HVL site”) is not developed to an inappropriate extent.

**Evidence pre-circulated**

- 1.4 PVHL has filed evidence of the following witnesses on 4 July 2023:
  - (a) Rachel de Lambert, landscape architect; and
  - (b) Melissa McGrath, planning consultant.
- 1.5 PVHL’s witnesses are available to provide an overview of their evidence and answer any questions that the Panel may have.

**Scope of submissions**

- 1.6 These brief submissions address:
  - (a) PVHL’s interest in Variation 3;

- (b) Overlap with Proposed Waikato District Plan ("PWDP") process and the application of qualifying matters over land outside the scope of Variation 3 (namely Rural zoned land above RL100);
- (c) Intensification of land where there are water / wastewater infrastructure capacity constraints; and
- (d) Inclusion of the Environmental Protection Area as a qualifying matter.

## 2. **PVHL'S INTEREST IN VARIATION 3**

2.1 PVHL was the proponent of Plan Changes 24 and 21<sup>1</sup> which provided the planning framework for Pōkeno's urban transformation. The structure planning process that preceded those plan changes was the result of many years of rigorous technical analysis, stakeholder consultation and community building. Some of the particular considerations were:

- (a) The need to make good provision for heavy industrial activities which would be the economic "lifeblood" of the town, with adequate separation from residential areas to avoid reverse sensitivity issues; and
- (b) The need to protect Pōkeno's rural backdrop (particularly areas above RL100), to maintain the identity of the town as an "urban village in a rural setting" and the visual amenity this bestows.

### **PVHL involvement in PWDP process**

2.2 PVHL lodged a submission on the PWDP because of a concern that as notified, the PWDP had failed to properly acknowledge and build on this planning history in favour of simply enabling as much development capacity as possible.

2.3 PVHL's particular concerns about the HVL site arose because of the visual impact of development on the ridgelines that form Pōkeno's rural backdrop, and because of the potential reverse sensitivity issues arising from the location of residential development overlooking heavy industry.

2.4 The Decision on the PWDP took into account those concerns, to a certain extent, insofar as it provided for:

1 To the Franklin District Plan and Waikato District Plan: Franklin section respectively.

- (a) Rural zoning on the land on the HVL site above RL100 to maintain the rural backdrop; and
- (b) Precinct provisions which are intended to exclude development in certain areas, including the Pōkeno Industry Buffer, in order to manage reverse sensitivity and visual effects.

### **Involvement in PWDP appeals**

2.5 PVHL is a section 274 party to a number of appeals on the PWDP concerning the appropriate zoning and precinct provisions for the HVL site. In particular, it is a party to:

- (a) The appeal by Hynds Pipe Systems and the Hynds Foundation which seeks that either the Residential zoning of the HVL site is rejected in its entirety or that the precinct provisions that are intended to prevent development in the "Pōkeno Industry Buffer" are strengthened; and
- (b) The appeal by Havelock Village Limited ("HVL"), which seeks to delete some of the controls applying to development on the HVL site and to extend the General Residential zoning across the site to include the area above RL100.

2.6 While these appeals are currently at an early stage, as discussed at the Strategic Hearing, there was an expectation that the two proceedings would be managed in parallel due to the level of overlap between the processes.<sup>2</sup>

### **Variation 3**

2.7 PVHL's interest in Variation 3 is in the extent to which there are qualifying matters which justify not applying the Medium Density Residential Standards ("MDRS") to the HVL site.

2.8 PVHL filed a further submission supporting the inclusion of the Urban Fringe qualifying matter in Pōkeno, in particular over the HVL site. In light of WDC's decision not to pursue this qualifying matter, a number of alternative qualifying matters and controls have been recommended by WDC, and PVHL has an interest in ensuring that these alternative qualifying matters and controls are appropriate.

<sup>2</sup> See for example the Fifth Case Management Reporting Memorandum of Respondent in relation to the appeals dated 3 April 2023, at paragraph 70.

3. **OVERLAP WITH PWDP PROCESS**

- 3.1 The HVL site is the subject of both Variation 3 and the PWDP appeals, resulting in a considerable level of overlap between the two planning processes. The implications of this were discussed both in the opening Strategic Hearing held in February 2023, and in expert witness conferencing.
- 3.2 In light of this discussion, WDC expressed its intention to progress Variation 3 in tandem with the PWDP appeals, with WDC commenting that:<sup>3</sup>

*It is acknowledged that years of work have gone into considering the appropriateness of urban development within the Precinct, and that those discussions continue now under a new legislative regime, in parallel with the usual Environment Court appeals process.*

[Emphasis added.]

- 3.3 HVL then prepared a Havelock Precinct 'package' which contained zoning, rules and other controls relevant to the HVL site. The expectation was that this would help guide discussions in light of any qualifying matters proposed by WDC to apply to the HVL site.
- 3.4 Parties attended conferencing to discuss HVL's proposed precinct package, however, as the civil engineering and landscape analysis underpinning the proposed precinct package had not been circulated to the parties, discussions were limited. During conferencing, HVL's planner agreed to circulate these reports to the parties. Unfortunately, despite numerous requests, HVL was unwilling to provide these reports, which limited the ability for parties to assess the precinct package and undertake meaningful discussion.

**Application of qualifying matters over Rural zoned land**

- 3.5 WDC recommended the following qualifying matters to apply to the HVL site:<sup>4</sup>

1. Relationship of Maaori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga - in relation to the protection of landscapes with high cultural

<sup>3</sup> WDC procedural memorandum dated 23 February 2023, at paragraph 42.

<sup>4</sup> Section 42A Report, Appendix 5, 'Havelock Precinct – Draft Qualifying Matters and Controls', at page 3.

*values. This qualifying matter falls under 77I(a) of the RMA as a matter of national importance.*

2. *Slope stability – in relation to managing significant risks from natural hazards. This qualifying matter falls under 77I(a) of the RMA as a matter of national importance.*
3. *Reverse sensitivity – in relation to the importance of avoiding potential reverse sensitivity effects of residential activities on industrial operations. This qualifying matter falls under 77I(j) of the RMA as ‘any other matter’ and is an existing qualifying matter proposed through Variation 3.*

- 3.6 The associated controls that WDC recommended apply to the HVL site by and large replicate their equivalent provisions within HVL’s precinct package. PVHL’s concern is that WDC has proposed to apply a number of these controls over land within the HVL site that is zoned Rural and, as such, is outside the scope of Variation 3 and the jurisdiction of this Panel.
- 3.7 Most notably, the ‘issues of significance to Māori’ qualifying matter contains the “Havelock ridgeline height restriction area.” This control has been applied almost exclusively to Rural zoned land notwithstanding the fact that under section 77I of the RMA, the application of qualifying matters as part of the Variation 3 process is limited to ‘relevant residential zones.’
- 3.8 While PVHL agrees that it is appropriate for qualifying matters to be applied over the HVL site, as discussed by Ms McGrath at paragraph 3.9 of her evidence, it is inappropriate (and unlawful) for qualifying matters to be applied to areas of the HVL site that are zoned Rural. Any changes to the zoning of this land would need to be approved by the Environment Court, and this has not occurred.
- 3.9 It appears that all parties agree with this position<sup>5</sup> and the Section 42A Rebuttal Report has recommended an amended precinct plan that has removed the application of the qualifying matters from Rural zoned land.<sup>6</sup>

5 See by way of example, Statement of Evidence of Mark Tollemache dated 4 July 2023, at paragraph 5.34(c), on behalf of Havelock Village Limited.

6 Section 42A Rebuttal report, dated 19 July 2023, at paragraph 134 and Appendix A.

3.10 We therefore anticipate that correction of this error should be straightforward.

#### 4. **INTENSIFICATION OF LAND WITH WATER / WASTEWATER INFRASTRUCTURE CONSTRAINTS**

4.1 The integration of infrastructure with development is a key consideration in the National Policy Statement for Urban Development 2020. In particular, Objective 6 of the NPS-UD states:

**Objective 6:** *Local authority decisions on urban development that affect urban environments are:*

- (a) *integrated with infrastructure planning and funding decisions; and*
- (b) *strategic over the medium term and long term; and*
- (c) *responsive, particularly in relation to proposals that would supply significant development capacity.*

[Emphasis added.]

4.2 The issue of what “integration” means in this context was considered at length by the Independent Hearings Panel on Plan Change 49 in Auckland.<sup>7</sup> While not binding on you, the Panel’s findings were instructive. In that case, Auckland Council and AT were taking the opposite approach to that adopted by WDC and wanted surety that all necessary bulk infrastructure (in particular transport infrastructure) would be provided before the plan change at issue was approved. The Panel said:<sup>8</sup>

*We do not agree with the ACS and AT’s primary position for the reasons already set out (lack of funding and financing issues and therefore a lack of integration between planning and funding). Their approach assumes that infrastructure planning (and funding) and zoning need to happen sequentially – i.e. only live zone land where there is certainty of funding. In our view, the essence of integration is those matters happen*

<sup>7</sup> The Panel comprised Dr Phil Mitchell (Chair), Mr Paul Cooney (Deputy Chair), Mr Dynes Fulton, Ms Linda Te Aho, Ms Jan Sedgwick and Ms Janet Gibb.

<sup>8</sup> Auckland Council ‘Proposed Private Plan Change 49 – to the Auckland Unitary Plan: Decision following the hearing of a private plan change under the Resource Management Act 1991’ dated 29 April 2022, at paragraph 179.

contemporaneously, in a complementary way, and over time. This is what the plan change proponents are promoting; and we outline later below why we find that the 'package of precincts provisions' proposed, and those we have imposed (in particular the transport triggers), will ensure that appropriate infrastructure is in place to support the level of development proposed.

[Emphasis added.]

- 4.3 WDC has acknowledged that there are constraints on the local water and wastewater infrastructure networks within Pōkeno, with the Section 42A Report commenting:<sup>9</sup>

*...However, local water and wastewater networks may lack capacity due to an increase in infill development.*

- 4.4 Further, WDC has also acknowledged that:<sup>10</sup>

*...[N]etwork modelling is insufficient to readily map areas subject to capacity constraints.*

- 4.5 Notwithstanding this, WDC does not intend to manage the impact of urban intensification on water and wastewater infrastructure capacity in Variation 3. Instead, WDC proposes to rely on its local bylaws, Trade Waste and Wastewater Bylaw 2016 and the Waikato District Council Water Supply Bylaw 2014 ("the Bylaws"), and to address capacity issues at the building consent stage.

- 4.6 As Ms McGrath notes, there are a number of issues with this approach, including:<sup>11</sup>

(a) *Lack of network modelling to identify areas subject to capacity constrain[t]s indicates that further assessment is required to establish that the proposed extent of the PWDP GRZ (and proposed MDRS) will create an infrastructure ready and well-functioning urban environment.*

(b) *Shifting development patterns could result in significant demand that has not been anticipated or enabled by the provision of infrastructure.*

9 Section 42A Report dated 19 June 2023, at paragraph 671.

10 Section 42A Report, at paragraph 673.

11 Statement of Evidence of Melissa McGrath dated 4 July 2023, at paragraph 10.3.

- (c) *Both bylaws are over ten years old and will be subject to review. These bylaws can be changed without following an RMA statutory process.*
- (d) *Delaying capacity assessment and risk of decline to building consent stage may result in significant increase in cost to applicants as building consent requires a higher level of detailed design.*

4.7 Lack of water and/or wastewater capacity can be a fatal blow to any development, and on WDC's approach, this issue may not become apparent until the building consent stage, at which point time and resources will have been invested into the proposed development. The provision of educational materials to developers and house builders, to "...alert them to the need for a pipe capacity assessment in advance of progressing development or house plans"<sup>12</sup> places a large reliance on developers and home builders receiving and understanding this information before time and resources are invested.

4.8 In light of the above, PVHL submits that relying on the Bylaws to manage water and wastewater may not result in the development of a well-functioning environment. Instead, a qualifying matter under to section 77I(j) should be applied that identifies and manages the water and wastewater constraints within Pōkeno and enables these constraints to be addressed at the beginning of the subdivision consenting process. As Ms McGrath has suggested, a similar approach to that taken in Plan Change 12 by Hamilton City Council would be appropriate, namely that capacity mapping be carried out and a three waters capacity assessment should be required as a restricted discretionary activity.<sup>13</sup>

## 5. **EPA AS A QUALIFYING MATTER**

5.1 As part of the PWDP Decisions version, the Independent Hearing Panel clearly indicated that they considered that Area 1, identified in Figure 1 of Ms de Lambert's evidence, should be excluded from residential development due to potential reverse sensitivity effects. Specifically, the Independent Hearing Panel commented:<sup>14</sup>

*We have reviewed the photographs provided by Mr Pryor and the cross sections prepared by Mr Pitkethley as well*

12 Rebuttal evidence of Mathew Telfer dated 19 July 2023, at paragraph 12.

13 Statement of evidence of Melissa McGrath, at paragraph 10.4 – 10.5.

14 Proposed Waikato District Plan, 'Decision Report 28I: Zoning – Pokeno' dated 17 January 2022, paragraph 100.



*as undertaking our own site visits and we consider that the planting of the EPA will not provide enough screening of existing and future industrial activities from proposed dwellings in Area 1. We agree with Mr Mead's assessment that residential activity should be excluded from this area due to potential reverse sensitivity effects resulting from dominant views of lighting and air discharges, which would be difficult to minimise through subdivision design. The exclusion of this area, instead of adding the land into the EPA, will have the added benefits of extending the natural backdrop provided by Transmission Hill hilltop park and the EPA, and maintaining Transmission Hill as a visually prominent feature.*

[Emphasis mine.]

- 5.2 In support of this position, an Environmental Protection Area ("EPA") was applied to Area 1 in the PWDP Decisions version which restricted development within this area.
- 5.3 Ms McGrath has considered whether the EPA, including within Area 1, should be included as a qualifying matter in Variation 3, and has reached the following conclusion:<sup>15</sup>

*The EPA was intended to provide for the enhancement and protection of wetlands and streams and ecological features in accordance with s6(a) and (c) matters of national importance. Therefore, in my opinion the EPA is a qualifying matter under s77I(a).*

- 5.4 PVHL also notes the conclusions reached by Hynds' planning consultant, Ms Nairn, who has concluded that:<sup>16</sup>

*...Whilst I agree that Area 1 should not be built on and I am supportive of applying an EPA generally, I do not think that an EPA is the appropriate mechanism to stop the MDRS applying. I consider that a qualifying matter is the only mechanism that can exclude the application of the MDRS...*

15 Statement of Evidence of Melissa McGrath, at paragraph 8.3.

16 Statement of Evidence of Sarah Nairn dated 4 July 2023, at paragraph 9.1.

- 5.5 Ms Nairn considers that the 'reverse sensitivity' qualifying matter already proposed in Variation 3 should also apply to Area 1, with the Pōkeno Industry Buffer extended to cover Area 1.<sup>17</sup>
- 5.6 Both proposed qualifying matters are supported by Ms de Lambert, who concluded:<sup>18</sup>

*It is clear from the findings of the Independent Commissioners in their decision on the PWDP that they considered all of Area 1 should be excluded from residential development, due to the potential for reverse sensitivity effects on the adjoining Heavy Industrial Zone. To be consistent with the findings of its decision on the PWDP and to apply the Variation 3 qualifying matter in a way that will minimise reverse sensitivity effects of residential activities on industrial operations within the Havelock Precinct, it is my opinion that the Havelock Industry Buffer (identified with the purple dashed line in Figure 3 above) should be extended to cover the full extent of Area 1.*

*In addition, the EPA, which is applied in this location, should be included as an additional qualifying matter amending the MDRS. It is not clear to me why the EPA has not been included as a qualifying matter given that it applies to MDRZ land to which the MDRS apply and appears to be intended to limit the extent of residential development in the areas that it is applied to.*

- 5.7 Regardless of the planning tool used, PVHL agrees that it is appropriate for a qualifying matter to be applied over Area 1 to provide surety that the area will not be developed, as intended by the Independent Hearings Panel.

## 6. **PRINCIPAL SUBMISSION**

- 6.1 In summary, PVHL submits that it is appropriate and necessary for limits to be placed on the application of the MDRS on the HVL site. This means:
- (a) Ensuring that any qualifying matters and their associated controls are only applied to land within the scope of Variation 3;

17 Statement of evidence of Sarah Nairn, at paragraph 11.3.

18 Statement of Evidence of Rachel de Lambert dated 4 July 2023, at paragraph 9.3 - 9.4.

- (b) The inclusion of a qualifying matter to manage water and wastewater capacity constraints rather than through the Bylaws; and
- (c) Ensuring that residential development is precluded in Area 1 through the use of qualifying matters, to give effect to the PWDP Independent Hearing Panel's clear intention that residential development be restricted within this area.

6.2 PVHL is grateful for the Panels attention to these submissions.

**DATED** at Auckland this 24th day of July 2023

**PŌKENO VILLAGE HOLDINGS LIMITED**

by their solicitors and duly authorised agents

**BERRY SIMONS**



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**Kate Storer / Steph Macdonald**

**Counsel for Pōkeno Village Holdings Limited**