

**BEFORE A PANEL OF INDEPENDENT HEARING COMMISSIONERS IN THE
WAIKATO REGION**

I MUA NGĀ KAIKŌMIHANA WHAKAWĀ MOTUHEKE WAIKATO

UNDER the Resource Management Act 1991 (RMA)

AND

IN THE MATTER of Proposed Variation 3 to the Waikato Proposed
District Plan (PDP)

**LEGAL SUBMISSIONS ON BEHALF OF WAIKATO DISTRICT COUNCIL
FOR HEARING # 3 - 5 DECEMBER 2023**

21 November 2023

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INTRODUCTION

1. These legal submissions are presented on behalf of Waikato District Council ('Council') to address the submissions on Variation 3 to Waikato Proposed District Plan ('PDP') that were not considered at hearing #2 held between 26 July to 2 August 2023.
2. The matters to be addressed in this hearing relate to:
 - (a) The submission by Horotiu Farms Ltd ('HFL') to rezone approximately 34 hectares of land between Great South Road and State Highway 1C in Horotiu ('Horotiu West Land') from General residential zone ('GRZ') to Medium residential zone 2 ('MRZ2');
 - (b) The submissions by KiwiRail and Waka Kotahi which seek the same relief as their appeals against the PDP relating to noise, vibration and setback controls from the rail corridor and State Highways respectively;¹ and
 - (c) Updates on any PDP appeals that touch on Variation 3.

HOROTIU FARMS LIMITED

3. In our legal submissions on scope dated 24 March 2023 we submitted the HFL submission was not within the scope of Variation 3 because it was:
 - (a) Not within the scope of an Intensification Planning Instrument ('IPI') defined in section 80E of the Resource Management Act 1991 ('RMA') (the first question); or
 - (b) Not 'on' the plan change in accordance with the established bipartite test in *Clearwater*² (the second question).

¹ These submission points were deferred by the Hearing Panel in Direction #17 dated 12 June 2023.

² *Clearwater Resort Limited v Christchurch City Council*, HC Christchurch AP34/02, 14 March 2023.

4. In direction #12, the Hearing Panel determined that the submission be allowed to continue through the substantive hearing process with both scope and merit considerations to be addressed at that time.

Council's Current Position on Scope

5. The Council has reconsidered the question of scope in light of direction #12. This section addresses the first and second questions on scope.

Scope of IPI

6. Of relevance to the HFL submission, section 80E(1)(a) of the RMA requires that an IPI must incorporate the Medium Density Residential Standards ('MDRS'). Pursuant to 77G(1), the MDRS must be incorporated into every relevant residential zone which is defined in section 2(1). Council is now satisfied the HFL submission is within the scope of an IPI defined in Section 80E.
7. Variation 3 as notified did not include the GRZ in Horotiu as a 'relevant residential zone'. The relevant residential zones were limited to the towns of Tuakau, Pookeno, Huntly and Ngaaruawaahia.

Urban Environment

8. As the population of Horotiu was less than 5,000 residents at the 2018 Census, the GRZ in Horotiu can only meet the definition of a 'relevant residential zone' if Council *intends* the area to become part of an urban environment.
9. Ms Hill's planning evidence for Council carefully assesses whether the Horotiu GRZ is an urban environment as defined in section 77F RMA:

Urban Environment means any area of land (regardless of size, and irrespective of territorial authority or statistical boundaries) that –

- (a) is, or is intended by the specified territorial authority to be, predominantly urban in character; and
- (b) is, or is intended by the specified territorial authority to be, part of a housing and labour market of at least 10,000 people.

10. Ms Hill's assessment has looked at the existing land uses and intended future urban character of Horotiu and how it is provided for in the relevant planning documents. These include the PDP, Waikato 2070, Future Proof 2022 and the Waikato Regional Policy Statement ('WRPS').
11. In terms of the first test, 'is or is intended to be predominantly urban in character', Ms Hill concludes that parts of the residential area already *is* and other parts are *intended* to be an urban built character.³ She further considers the existing industries and continued planned industrial development add to the built and functional urban character of Horotiu.⁴
12. Ms Hill's only reservation relates to the restricted range of commercial services and community activities within Horotiu but concludes the identification of a commercial centre on HFL's master plan in its submission is important to the consideration of Horotiu as an urban environment.⁵ She also notes the PDP anticipates neighbourhood centres being identified and delivered through structure plans and master plans within the GRZ and MRZ.⁶
13. In terms of the second test, 'is or intended to be part of a housing and labour market of 10,000 people', Ms Hill concludes that due to Horotiu's location on the very edge of Hamilton City and its role in the productive economic corridor, Horotiu is part of a housing and labour market of more than 10,000 people.
14. The section 42A report author ('Reporting Planner') is satisfied that Horotiu meets the definition of urban environment and that the MDRS must, in accordance with section 77G(1) RMA, be incorporated into the relevant residential zones at Horotiu.⁷

³ Evidence in Chief, Fiona Hill, paragraph 37.

⁴ *Ibid*, paragraph 37.

⁵ *Ibid*, paragraph 58.

⁶ *Ibid*, paragraph 58.

⁷ Section 42A Report, dated 15 September 2023, paragraph 24.

15. However, both Ms Hill and the Reporting Planner correctly acknowledge that due to the scope of the HFL submission, the MDRS can only be incorporated into the land identified in that submission, being the Horotiu West Land. This includes the adjoining 5.6 hectare block of land located at 6257 Great South Road identified in the further submission by Korris Limited.⁸
16. A future variation or plan change will be required to incorporate the MDRS into the remaining GRZ land in Horotiu. For that reason, the section 42A report and evidence only assesses the application of any qualifying matters to the Horotiu West Land.

'On' the Variation

17. The second scope question is whether the HFL submission is 'on' Variation 3. Ms Hill and the Reporting Planner's evidence is that the GRZ in Horotiu is a 'relevant residential zone'. Accordingly, Council now accepts that the HFL submission meets the first *Clearwater* test. Accordingly it is not necessary to analyse the first test any further.
18. The key remaining scope issue is therefore whether the submission meets the second *Clearwater* test, known as the natural fairness test. The question to be determined is whether there is a real risk that those potentially affected by the rezoning of the Horotiu West Land would be denied an effective opportunity to participate in Variation 3.
19. Four further submissions were received on the HFL submission, three in support⁹ and one in opposition by Ports of Auckland Limited ('POAL'). Our legal submissions on scope¹⁰ noted that other large industrial operators in the area who might have been concerned about reverse sensitivity arising from more intensive residential development in the

⁸ Further submitter number 201.

⁹ Submissions in support from Korris Limited, W and H Parker and C Merritt.

¹⁰ Legal submissions of Counsel for Waikato District Council on scope (excluding inclusionary zoning/affordable housing), dated 24 March 2023.

vicinity of their operations (including Fonterra and AFFCO) did not lodge a further submission.¹¹ We questioned whether the absence of those companies in the process indicated that more intensive residential development in Horotiu may not have been contemplated by interested parties in the community. This was a possibility because all Council communications concerning Variation 3 in the lead up to notification and post notification focused on its application to the four towns.¹²

20. Reply submissions on scope were filed on behalf of HFL.¹³ In response to the absence of submissions by other parties, including Fonterra and AFFCO, the reply submissions stated:

[12] Rather, this Horotiu West land was identified by WDC for residential zoning, through WDC's fully notified public plan review. This extensive and recent full plan review was recently undertaken in 2019-2020 and... neither Fonterra nor AFFCO put in any opposing submission or further submission to HFL land being rezoned through the proposed plan, nor did any submitter that was opposed to its rezoning file an appeal against the HFL land being rezoned to residential. Once residential, as the proposed plan provides, it is entirely in accordance with the intent of the Amendment Act that the land be MDRZ.

21. Further, the HFL reply submissions state it could equally be inferred the reasons for a lack of submissions opposing HFL's submission is due to:
- (a) An acceptance, following the extensive Te Awa Lakes private plan change process by all interested parties such as Fonterra and AFFCO, that its industrial activities in Horotiu are part of a mixed residential/commercial and industrial area.¹⁴

¹¹ Ibid, paragraph 34.

¹² Ibid.

¹³ Reply submissions on scope for Horotiu Farms Limited, dated 30 March 2023.

¹⁴ Ibid, paragraph 13(a).

- (b) The possibility that Fonterra and AFFCO were advised to anticipate residential intensification of existing residential zones through the mandatory government directives.¹⁵
 - (c) Fonterra and AFFCO being actively involved in RMA plan processes and having extensive legal and planning consultant teams, so it is unrealistic to suggest these parties were not aware of the plan change process.¹⁶
 - (d) POAL was the only party who opposed the HFL land being rezoned through the PDP process and is the only party opposed to HFL's relief in Variation 3.¹⁷
 - (e) Variation 3, along with other IPI's around the country, received much publicity, were publicly notified and the public were informed to participate.¹⁸
 - (f) Directly affected landowners to the rezoning of the Horotiu West Land could have further submitted. POAL, potentially one of the most affected landowners, did further submit, confirming there was an opportunity for interested parties to submit on Variation 3.
22. Mr Coventry, CEO of Te Awa Lakes, has filed evidence for HFL. His evidence outlines the consultation Perry Group has undertaken with key stakeholders since 2017 regarding the Horotiu West Masterplan, including its decision in late 2022 to seek a medium density rezoning on the land through Variation 3. According to his evidence, consultation has occurred with Iwi, The Tangata Whenua Working Group, Horotiu Primary School and immediate neighbours.¹⁹

¹⁵ Ibid, paragraph 13(b).

¹⁶ Ibid, paragraph 14.

¹⁷ Ibid, paragraph 13(c).

¹⁸ Ibid, paragraphs 35 and 43(b).

¹⁹ Evidence in Chief, Richard Coventry, dated 7 November 2023, paragraph 5.4.

23. Mr Coventry's evidence is that neighbours to Horotiu West Land were invited to a consultation session with the project delivery team on 15 December 2022.²⁰ This was prior to the close of further submissions on 19 December 2022. Appendix C to his evidence identifies that the neighbours who attended included six from Kernott Road, Keith Hay Homes, W & H Parker and C Merrit. Mr Coventry notes three further submissions were filed following that meeting. Two of those further submitters attended the meeting.
24. It should be noted that unlike a normal plan change process, a person who chooses to participate in an IPI under the Act (either by way of a submission or further submission) has some significant limitations due to the mandatory requirements of the Act. A submitter cannot seek to remove or even change the MDRS in Schedule 3A. For the large part, subject to scope, submitters are limited to seeking changes to zoning, qualifying matters under section 77I, changes to better give effect to Policy 3 of the NPS-UD in section 80E and related provisions under section 80E, or more lenient provisions than the MDRS where required by Policy 3 of the NPS-UD. In that sense, even if Variation 3 was notified to include Horotiu and attracted a greater number of further submissions opposing the HFL submission, those submissions could not prevent the application of the MDRS to the site.
25. In my submission, it is difficult to see how an increased number of further submissions would have resulted in any material change to the qualifying matters or related provisions recommended for the site by the Reporting Planner. In my view it is also significant that the one opposing submitter, POAL, has elected not to file evidence. Council understands POAL were comfortable with the recommendations in the s42A report which carried through the Horotiu Acoustic Area overlay from the PDP.

²⁰ The evidence incorrectly records the date as 2023.

26. Having had the benefit of reviewing the HFL reply submissions on scope and Mr Coventry's evidence on consultation, including the meeting with immediate neighbours prior to the close of further submissions, I submit that on balance, the persons potentially affected by the relief sought in the HFL submission did have an opportunity to participate in the process.
27. Ultimately however, the decision on scope is to be made by the Hearing Panel and you may require further information from the submitter witnesses to satisfy the natural justice test.

Merits of HFL Submission

28. Having found the Horotiu West Land to be a relevant residential zone, the Reporting Planner recommends it be rezoned to MRZ2.
29. The Reporting Planner has considered potential qualifying matters and recommends one qualifying matter for the Horotiu West Land, being:
 - (a) A Flood Density QM for areas identified in the Te Miro Water model (November 2023) as being subject to the 1% AEP flood plain.
30. These areas within the Horotiu West Land will be identified on the planning maps as the Flood Density QM and the rules for the qualifying matter will apply. The same approach has been recommended for the other four towns.²¹
31. The Reporting Planner considered whether it was appropriate to apply a reverse sensitivity qualifying matter for the existing industrial operations in Horotiu. However, Council's noise expert, Mr Hunt, concluded that the existing noise standards included in the PDP, including the Horotiu Acoustic Area, are sufficient to avoid potentially significant reverse sensitivity noise effects on permitted industrial activities.²²

²¹ Section 42A Report, 15 September 2023, paragraph 41.

²² Ibid, paragraph 34.

32. Instead, the Reporting Planner recommends that existing noise standard, GRZ-S24 Building-Horotiu Acoustic Area, be duplicated in the MRZ 2. This is considered a related provision under section 80E(2) rather than a qualifying matter under section 77I as this standard does not impact on density.²³
33. For consistency with all GRZ land proposed to be rezoned to MRZ in the four towns, the Reporting Planner also recommends the Outer Intensification Area overlay apply to the Horotiu West Land.²⁴

Outstanding Issue

34. Following the exchange of HFL's evidence and further discussions between the Reporting Planner and HFL's planner, it appears the only outstanding issue relates to the non-complying activity status for subdivision, earthworks and development within the High Risk Flood areas on the Horotiu West Land. Mr Collier's evidence seeks a restricted discretionary activity status.²⁵ This is not supported by the Reporting Planner.
35. However, Mr Boldero, Council's stormwater expert, in his second statement of rebuttal evidence acknowledged there are instances where High Risk Flood areas (e.g isolated ponding areas) can be removed through filling or other engineering solutions. His view is that a less onerous resource consent pathway could be available where the flood hazards have been mitigated.²⁶ The Reporting Planner has recommended an exemption to the High Risk Flood rules (NH-19, NH-20 and NH-21) where a detailed hydraulic analysis undertaken by a suitably qualified person, and approved by Council, determines that the site is not within the definition of a High Risk Flood area.

²³ Section 42A Report, dated 15 September 2023, paragraph 37.

²⁴ Ibid, paragraph 48.

²⁵ Evidence in Chief, Aaron Collier, dated 7 November 2023, paragraph 6.7.

²⁶ Second statement of rebuttal evidence of Andrew Boldero, dated 14 November 2023, paragraph 9.

36. This means if a site- specific analysis demonstrates that the area is not a High Risk Flood area, the Flood Plain management provisions instead apply. For HFL, the activity status would instead be Discretionary.²⁷²⁸
37. I understand Mr Collier confirmed to the Reporting Planner after the exchange of rebuttal evidence that the recommended exemption approach is acceptable. Mr Lester' planning evidence for Korris Limited supported the Flood Density QM and did not raise any concerns with the existing or proposed Natural Hazard provisions.

WAKA KOTAHI AND KIWIRAIL DEFERRED SUBMISSIONS

Background

38. The relief sought by Waka Kotahi and KiwiRail in their submissions to Variation 3 is consistent with their respective appeals against the PDP.²⁹ Their submission points on Variation 3 relating to noise, vibration and setback controls from State Highways and the rail corridor respectively were deferred to this hearing by the Hearing Panel in Direction # 17³⁰ to enable settlement discussions to progress.
39. The section 42A report³¹ for the July hearing addressed the remaining submission points by both submitters. At the July hearing it was decided to defer a further 7 submission points by KiwiRail³² and one submission point by Waka Kotahi (FN Waka Kotahi submission point 29.4) to this hearing as they overlapped with the subject matter of the appeals.

²⁷ Section 42A Rebuttal Report, dated 14 November 2023, paragraph 17.

²⁸ Non-compliance with the other provisions could make the activity non-complying.

²⁹ KiwiRail appeal ENV-2022-AKL-000044 and Waka Kotahi appeal ENV-2022-AKL-000048.

³⁰ Direction #17 dated 12 June 2023.

³¹ Section 42A Report, dated 15 June 2023.

³² KiwiRail submission points 54.2, 54.11 – 54.15 and 54.17.

Noise, vibration and safety setback

40. The Council, KiwiRail, Waka Kotahi and Kāinga Ora have now reached agreement to resolve the KiwiRail and Waka Kotahi appeals on the PDP relating to noise, vibration and a setback control from the rail corridor.
41. The parties agree that the provisions for the noise effects area for the rail corridor and State Highways³³ and the vibration alert areas for the rail corridor³⁴ are not required to be implemented through Variation 3 because those provisions do not:
- (a) Affect density and therefore do not constitute a qualifying matter under section 77I RMA; and
 - (b) Support and are not consequential on the MDRS or Policy 3 of the NPS-UD and therefore do not constitute a related provision under section 80E RMA.³⁵
42. The agreed noise and vibration provisions are district wide rules and will automatically apply to the zones that are subject to Variation 3 once a consent order is issued by the Environment Court.
43. In contrast, the agreed 2.5m safety setback from the rail corridor will need to be provided for in Variation 3 as a qualifying matter under section 77I(e) because it may make development less enabling within the MRZ2.
44. Ms Butler's evidence for KiwiRail³⁶ sets out the need for the safety setback from the rail corridor and the required distance. She explains it is required to provide sufficient space within a site adjoining the rail corridor for the homeowner or occupier of that building to maintain

³³ Being a range of acoustic insulation and ventilation requirements, and construction standards as summarised in the section 42A Report dated 15 September 2023 at paragraph 56(iii).

³⁴ The vibration alert areas apply to land within 60m of the rail corridor.

³⁵ Section 42A Report, dated 15 September, paragraph 60.

³⁶ Evidence in Chief, Pam Butler, dated 20 October 2023, Section 4.

access to their house or building safely – without encroaching the rail corridor, or getting too close to trains.³⁷

45. It is now agreed by Council, KiwiRail, and Kāinga Ora that the setback control should be included as a separate standard, rather than contained within MRZ2-S15 “Building setback- sensitive land uses” as originally proposed by the Reporting Planner. This better reflects the purpose of the rail corridor setback which is a general setback that applies to all buildings and structures, not just sensitive land uses.³⁸ It will also better distinguish matters of discretion between effects on access and safety, compared to wider considerations around reverse sensitivity for sensitive land uses.³⁹
46. Ms Butler’s evidence provides a supporting section 32AA for the new proposed rule MRZ2-S17 “Building and structure setback - rail corridor.”⁴⁰
47. There is a minor difference between Council and KiwiRail in relation to MRZ2-S15 “Building setback – sensitive land use.” Ms Butler recommends the deletion of matter of discretion (a) “road network safety and efficiency” but the Reporting Planner supports its retention given the rule retains a setback from regional arterial boundaries.⁴¹ It is submitted item (a) should be retained.

Objective and Policies for Reverse sensitivity

48. MRZ2-O6 and MRZ2-P11 both relate to reverse sensitivity. The Reporting Planner and Ms Butler are now agreed that a separate objective and policy framework is appropriate to address the rail corridor setback. This aligns with the above approach to separate the building setback for sensitive land uses (MRZ2-S15) from the setback from the rail corridor (MRZ2-S17) and will provide a complete policy framework. The new

³⁷ Ibid, paragraph 4.3.

³⁸ Ibid, paragraph 4.13.

³⁹ Evidence in Chief, Michael Campbell, dated 20 October 2023, paragraph 1.6.

⁴⁰ Ibid, Appendix B.

⁴¹ Section 42A Rebuttal Report, dated 14 November, paragraph 29.

wording for the rail corridor objective and policy is agreed by Council and KiwiRail.

49. On 14 November, Ms Butler and the Reporting Planner also agreed to an amendment to MRZ2-P11 “Reverse Sensitivity” which is set out in the section 42A Rebuttal Report.⁴² Mr Campbell for Kāinga Ora filed rebuttal evidence opposing Ms Butler’s recommended amendments to MRZ2-P11 as set out in her evidence of 20 October 2023. His rebuttal evidence does not address the latest proposal in the section 42A rebuttal report. The Reporting Planner will discuss this with Mr Campbell in advance of the hearing.

MRZ2-P6 “Qualifying Matters”

50. KiwiRail’s requested amendment to MRZ2-P6 “Qualifying matters” to delete the word “residential” is also agreed by the Reporting Planner.⁴³
51. Accordingly, apart from the minor matter discussed in paragraph 47 above, all of KiwiRail’s submission points deferred to this hearing are now resolved between Council and KiwiRail.

APPEALS UPDATE

52. The Reporting Planner provided an update on the relevant PDP appeals in her rebuttal report dated 14 November 2023. Since then, progress has been made on the Havelock Village Limited consent documents. They have now been reviewed by Council and are expected to be filed with the Environment Court on either 24 November or early the following week, with a request for priority consideration by the Court before the hearing commences on 5 December. Of relevance to Variation 3 is the agreement between the parties to rezone the remaining rural land on the Havelock site to General residential which would then become a relevant

⁴² Section 42A Rebuttal Report, dated 14 November 20023, paragraph 36.

⁴³ Ibid, paragraphs 38 and 39.

residential zone and be subject to Variation 3. If the consent order issues in time, the Hearing Panel will have jurisdiction to consider the balance of the Havelock site as part of its deliberations, ensuring a co-ordinated approach to the site.

53. It is anticipated that a joint planning memorandum will be prepared by Mr Tollemach and the Reporting Planner and submitted to the Hearing Panel following the issue of the consent order so the remaining provisions can be considered at the December hearing.

Dated 21 November 2023



B A Parham
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