

BEFORE THE INDEPENDENT HEARING PANEL

IN THE MATTER of the Resource Management Act 1991 and Resource Management (Enabling Housing Supply and Other Matters) Amendment Act 2021

AND

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

LEGAL SUBMISSIONS FOR HOROTIU FARMS LIMITED('HFL')

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MAY IT PLEASE THE PANEL

OVERVIEW

- 1 These submissions are on behalf of Horotiu Farms Limited (HFL) (#49.1).
- 2 The Independent Hearings Panel (IHP) considered the issue of scope regarding this submission earlier this year. Waikato District Council (WDC) and HFL filed legal submissions regarding matters of scope of its submission. The IHP subsequently determined on 11 April 2023 that HFL submission could continue through to a substantive hearing process with both scope and merits considerations able to be addressed as part of that process.
- 3 For the purposes of this hearing and for efficiency, HFL adopts its previous legal submissions in full regarding scope matters. It is understood that WDC has amended its position on scope with respect to HFL submission and in the Section 42A report, it states that their expert planning opinion now agrees that HFL land is part of an “urban environment” and within a relevant residential zone and therefore must be incorporated as a MDRZ zone under Section 77G(I) of the RMA¹. WDC will no doubt address this with the IHP, as well as clarify /confirm its position has also been amended from its position given as the Session One scope hearing about whether HFL submission’s relief is consistent with Clearwater² principles related to fairness to other parties.
- 4 Horotiu Farms Limited’s (HFL) submission seeks for MDRZ zoning to areas in Horotiu West between Great South Road and State Highway 1 from GRZ to MRZ on the basis the land was rezoned residential (GRZ) through a recent extensive full plan review.
- 5 HFLs position is that as set out in its scope submissions, that Council’s mandatory compliance requirements of the Resource Management (Enabling Housing Supply and Other Matters) Amendment Act 2021 (“Amendment Act”) set out in ss77J-77L have been met. It is clearly within scope to have this issue addressed through the Variation 3 hearing, given the intention of Variation 3 as a statutorily directed plan is meant to “rapidly accelerate the supply of housing” in this District/Waikato Region.

¹ WDC Section 42A report, 15 Sept 2023, para 21-23.

² Clearwater Resorts Limited v Christchurch City Council, HC Christchurch AP34/02

LEGAL FRAMEWORK

5. Section 80E RMA specifies matters that must be included in an Intensification Planning Instrument (“IPI”) and that may be included in an IPI.
 - a. Section 80E(1)(a) provides that the IPI *must* incorporate the MDRS and give effect to, in this case, Policies 3 and 4 of the NPS-UD.
 - b. Section 80E(1)(b)(iii) provides that Council *may* amend “*related provisions, including objectives, policies, rules, standards and zones, that support or are consequential on – (A) the MDRS; or (B) policies 3,4 and 5 of the NPSUD*”.
6. The legal interpretation of the word “*including*” identifies that this is not an exhaustive list, but the list does cover the standard type of provisions found in district plans (not non statutory plan methods).
7. The most important aspect in terms of the scope of an IPI, is section 80G(1)(b), which provides that Council may not, “*use the IPI for any purpose other than the uses specified in section 80E*”.
8. It is submitted this confirms the interpretation taken by the Environment Court in the *Waikanae Lands*³ decision, that Parliament is seeking to ensure that an IPI can be used only for purposes related to (or which “*support or are consequential on*”²) the incorporation of the MDRS and giving effect to enabling intensification as sought by Policy 3 and 4 of the NPS-UD.
9. Section 80G(1)(b) is intended to constrain the ability of council to use the IPI to introduce provisions that are independent of the matters addressed in the NPS-UD.
10. A provision that limits the extent to which *additional* intensification beyond that identified in the Operative Plan may occur may be introduced under the IPI, in the limited circumstances where the obligations applying to qualifying matters are complied with.

³*Waikanae Land Company Limited v Heritage NZ Pouhere Taonga and Kapiti District Council* [2023] NZEnvC 056

WAIKATO DISTRICT COUNCIL SECTION 42 REPORT AND EXPERT EVIDENCE

11. HFL accepts the recommendations in the S42A report about reverse sensitivity effects and proposed noise provisions, and incorporation of the same noise provisions as the proposed plan. These have been advised as acceptable by Ports of Auckland as a submitter, and HFL accepts this approach⁴.
12. HFL accepts the recommendations in the S42A report regarding incorporation of the NZTA/WK infrastructure designations being shown on the map, and the gas line transmission setback of six metres (the final setback distances were agreed to through a final settlement through the WDC appeal process).
13. In general, HFL planning expert Mr. Aaron Collier and Council S. 42A report writer and planning expert, Ms. Karin Lepoutre, agree on all matters such as response to other submitters, and incorporation of other provisions applying to MDRZ zoned areas for consistency. HFL is appreciative of WDC and its expert's willingness to review its evidence and legal issues related to scope, to now recommend in its S42A report the relief sought by HFL for MDRZ zoning.
14. The one issue where there is a difference in view, based on site specific assessment of the HFL site, is the appropriateness of a discretionary or non-complying activity status applying to HFL land based on its identification as including "High Risk floodable area" over part of the site.
15. It is understood the legal and evidentiary issues related to the Council introducing flooding as a qualifying matter, which will limit the number of units on a site, was comprehensively traversed at the Session two hearing. HFL supports Kainga Ora's legal submissions on this issue as it relates to MDRZ urban areas.
16. HFL's evidence from Mr. Adamson and Mr. Collier is also consistent with Kainga Ora's evidence on the shortcomings of the Council's approach to making flooding a qualifying matter if it results in MDRZ development on its site becoming a non-complying activity⁵.
17. By making MDRZ land subject to a flooding and stormwater overlay, the number of dwellings permitted on each site as of right will be reduced from three to two.

⁴ Para 35-37 Section 42A report -recommendation to add noise reverse sensitivity provision, not as qualifying matter.

⁵ It is noted the WDC position on this issue has now changed, by suggested inclusion in Ms. Lepoutre's Section 42A rebuttal report for an exclusion to the NC rule, to RDA status if site specific modelling undertaken.

18. This qualifying matter has been considered in the evidence of Mr. Adamson for HFL, who considers the proposed rule mechanism inefficient and problematic for several reasons⁶.
19. From a practical perspective, as stated by Mr. Adamson at para 7.6 of his evidence the rule is unnecessary and inappropriate as *“When development of these greenfield sites on Horotiu West is undertaken it is likely that significant earthworks will be undertaken, and drainage infrastructure will be installed to relieve some of these trapped low points. Therefore, I would recommend that a management approach is more appropriate than an avoidance approach which is more aimed towards brownfield developments. With appropriate management practices for earthworks and stormwater as well as consents, the development of these areas to manage stormwater and avoid flooding risk can be achieved.”*
20. From a broader perspective beyond HFL site, it is submitted that a stormwater and flooding QM applying to this IHP, and not to the rest of the District, will result in an inconsistent approach to address potential flooding and stormwater hazards across the district.
21. If the qualifying matter becomes a non-complying activity, it will unnecessarily constrain existing development rights and urbanization opportunities and affect rights under the operative District Plan provisions. For the reasons stated in *Waikanae Land Company Limited*, it is submitted the Panel should not support this type of approach, given that stormwater and flooding effects can be avoided through management and engineering responses, especially where such matters are controlled primarily at a regional consent level and where an integrated catchment wide approach should be taken.
22. As stated in Kainga Ora’s legal submissions in the Session Two hearing, it is more procedurally and practically logical for the Council to address these matters through a separate, subsequent plan change or variation. That is the approach that Hamilton City, Auckland City and Tauranga City have adopted. This approach would also allow WDC to wait and see what comes from the Environment Court appeal on Tauranga City Council’s PC 27 on the vires of the non-statutory flooding maps approach, should WDC seek to follow that approach.

⁶ Mr. Jaggard for Kainga Ora also covers this in expert evidence for Kainga Ora in Session Two hearing.

23. Mr. Collier's planning evidence identifies the issues as acknowledged in WDC evidence from Mr. Boldera, that there is a lack of accuracy with the Lidar mapping work undertaken, which is broad-brush and applying across all Horotiu.
24. There are also the issues covered in the engineering evidence for HFL by Justin Adamson, which questions the appropriateness of the modelling approach of adopting an urban 80% impermeable surface area, whilst overlaying it onto greenfield landform that has yet to be earth-worked for urban development. Any identification through the modelling work of small "humps and hollows" on the site, in its undeveloped state, do not result in it being a high-risk floodable area for urban development, particularly due to the sandy soil type meaning that surface water is immediately absorbed.
25. Put simply, HFL experts consider that any stormwater/flooding issues are a minor issue affecting the site and are a matter to appropriately address when predevelopment preparatory earthworks are undertaken on the site.
26. It is Mr. Collier's opinion flooding and stormwater should not be a qualifying matter to Variation 3, but rather dealt with as a separate plan change. If the IHP is mindful to include flooding as a QM this would be more appropriately addressed through a restricted discretionary rule requiring an engineering detailed site assessment as part of a subdivision and/or landuse consent.
27. HFL considers that there are site specific reasons why HFLs site MDRZ should not be limited by a High-Risk flooding hazard notation, given the expert engineering analysis and evidence provided by Mr. Adamson.

CONCLUSION

28. Regarding the issue of scope, the extension of the MDRZ to other residential zoned land in the Waikato District (beyond the four settlement areas as notified) was always a logical and potential outcome, fairly and reasonably arising within the general scope of Variation 3 as notified. There is a wide range of outcomes sought through various Variation 3 submissions, not just from HFL.
29. It is understood that the Council now agrees with HFL's position on scope as set out through the Session One hearing.
30. MDRZ zoning on the site enables Perrys Group to carefully consider the nature of the site and a connecting relationship to the medium density residential development enabled in its adjacent Te Awa Lakes Development (Horotiu East North). It will enable

better integration and efficiency with Te Awa Lakes as one master-planned urban development, as covered in the evidence of Richard Coventry.

31. It is submitted that there is no risk that parties directly affected by the additional changes sought by HFL have been denied an effective opportunity to respond to those proposed changes, and HFL submission can safely be viewed by the IHP as anticipated by the RMA Amendment Act and NPSUD Policy 3 and 4, the scope of WDC Variation 3 as notified, and it is within the scope of HFL submission.
32. HFL respectfully seeks the relief sought in its submission be granted, and the Section 42A report recommendations be supported.
33. HFL respectfully submits that flooding and stormwater matters should either be addressed through a specific RDA rule(if IHP accepts this to be a qualifying matter), or preferably, flooding and stormwater matters be left to be addressed under the operative District wide plan provisions, until Council notifies a future plan change on flooding/stormwater for the whole District.

Signed



Kate Barry-Piceno

Barrister for Horotiu Farms Ltd/Perrys Group

21 November 2023