

**BEFORE THE HEARINGS COMMISSIONERS FOR THE WAIKATO DISTRICT
COUNCIL**

UNDER the Resource Management Act 1991

AND

IN THE MATTER of hearing submissions and further submissions
on the Proposed Waikato District Plan

PARTIES REPRESENTED **ANNIE CHEN SHIU (97)**

CSL TRUST AND TOP END PROPERTIES (89)

CHEN, CSL AND TOP END OPENING LEGAL SUBMISSIONS

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MAY IT PLEASE THE PANEL

Introduction

1. These opening legal submissions have been prepared on behalf of, ANNIE CHEN SHIU (97), and CSL TRUST AND TOP END PROPERTIES (89) in support of the urbanization of Pokeno West. In summary,
 - (a) The Chen submission is in support of the live residential zoning that the Council has notified in the Proposed Plan (refer to plans to be provided in the Hearing). The layout has been designed to integrate with the existing and planned developments at Pokeno and to avoid, remedy, and mitigate, any adverse effects.
 - (b) The CSL and Top End submission is preferably seeking a live residential zone, but in the alternative, a “future urban” type zoning that can converted into a live residential zoning, following a future plan change (refer to plans to be provided in the Hearing). The CSL and Top End properties are the upper catchment for the Chen land and form a natural boundary to the extension of Pokeno.
2. These opening submissions also address some of the main points raised by Pokeno Village Holdings Limited (**Holdings**) in opposition to the proposed re-zonings. In summary, the claims that Holdings makes for the relief sought to be rejected/deferred are overstated and are not grounded in the legitimate assessment criteria under the Act.

Background to Submissions

3. As the Panel will be aware from the submissions, Sir William Birch, who needs no introduction, prepared the submissions and coordinated the supporting evidence for Pokeno West. Regarding the Chen property, the submission is in support of the Proposed Plan, and the Council notified the zone change from Rural to Urban after undertaking an adequate analysis. Regarding the CSL and Top End properties, it is understood from Sir William that these owners initially approached the Council about

rezoning and it was a Council officer who initially suggested they could work with Sir William, and the Chen property, to develop a comprehensive and integrated catchment-wide planning approach for Pokeno West.

4. It is acknowledged, that due to timing issues, more specific technical work has been undertaken for the Chen land, than the CSL and Top End properties, at this point in time. However, it will be almost a year before the zone change hearings and during this time further work will be completed by both the Council and the submitters.
5. It is important for the Panel to appreciate therefore, that after hearing the counsel for Holdings presentation to the Panel, there appears to be a concession from Holdings that the Panel could at least determine that Pokeno West has a Future Urban Zone (FUZ), similar to the Auckland Unitary Plan zone of the same name. While there is no such zone in the Proposed Plan, in my understanding there is relief in the submissions of the parties to create a FUZ in the Proposed Plan. This is a useful zone to include in the Proposed Plan and does not suffer from the legal issues of a suspended zone.
6. Therefore, it appears from the exchanges between Holdings and the Panel last week, that the main focus of Holdings concerns is the live residential zoning and this is addressed in the sections below. The main concern appears to be a “timing” issue, rather than outright opposition to urbanization, with Holdings seeking a deferral of the consideration or a FUZ zone. It is also apparent from counsel’s presentation that they do not appear to be opposed to development on the land *per se* but are concerned about the level of supporting technical information. That concern appears to be mainly directed at the Council than the Pokeno West owners.

Holdings Historical Interest in West Pokeno is Irrelevant

7. Holdings has disclosed that it had a prior interest in the Pokeno West land. The consortium that are now developing the Holdings land previously considered developing Pokeno West and undertook some investigations over the properties. In my submission this history is as relevant to the matter for determination by the Panel, as the historical fact that the writer

obtained the urban use for the original Helenslee Block. I acted for Tony Gillion and Ray Lambers, and worked with Franklin District Council, to get this block identified for urban use. They later sold it to the Holdings consortium.

8. The short point is that just because a block may have been considered by one party and then rejected, this is irrelevant to the criteria under the Act, and superior planning instruments, that the Panel will have to take into account in its determinations.

Technical Supporting Information Will Be Adequate

9. A key concern of Holdings is the claim that insufficient technical information has been provided for the land to justify the live residential zoning in the Proposed Plan (a FUZ is supported by Holdings as above). In support of this submission, Holdings cite the 13 technical reports, peer reviewed, and therefore the approximately 30 witnesses, and the 3 week hearing, for their rezoning. In response I submit as follows.
10. If the technical work in support of an urban zone is considered inadequate for Pokeno West, which already has hundreds of pages of reports on traffic and ecology etc, as the Panel will have seen, I invite the Panel to consider how much information was supplied with the original submission of Ambury Properties Limited (**Ambury**)? My understanding is that the original submission was so brief that it was unclear what was being sought. This brevity has not prevented Ambury from participating in these proceedings, and even securing a special early hearing, albeit with a further notification to address procedural participation issues.
11. It is noted that Ambury is represented by Mr Simon Berry, a co-partner of Ms Simons (Holdings) and the Panel is invited to compare the apparently 2 different approaches from the same firm. The Panel will be aware of the need to apply a consistent approach in the Hearings, to achieve a fair and just hearing. In my submission, there is no basis to reject, or defer, the relief sought at West Pokeno due to inadequate information (as sought by Holdings), considering the position of other submitters seeking rezoning, including Ambury. A significant amount of technical work has been

undertaken by Pokeno West including on stormwater (Maven) and geotechnical investigations (Fraser Walsh).

12. In my submission, it is also very important to distinguish the level of information that can be expected from a resource consent application and a plan change process. This was a point appropriately raised in Hearing exchanges last week by a Panel member. The information threshold that Holdings are trying to impose is more akin to a resource consent application than a plan change process.
13. The Panel will be aware itself of examples of where plan changes have been made with similar levels of information to Pokeno West. A plan change is a higher order planning process that is intended to, for example, identify land that may be ruled out for a significant strategic reason, e.g. it is in a flood plain, high natural character area, or significant ecological area. Sometimes indicative infrastructure and green space locations are identified, but often this is left to the detailed design at the consenting stage. Other than that, because it is just a zone change, and therefore, layout and yields for development etc are only indicative, it is essentially a landowner/developer risk, if at the resource consent stage, for example, detailed geotechnical investigation reveals that an area is too unstable to build on. Such land could become a park, or stormwater facility, and these are still “urban uses” that are part of urban zones.
14. The Topic Hearing consideration of the zone changes may almost be a year away and this is an iterative process. The Pokeno West land-owners always intended to furnish the Panel with additional technical information in the zone change hearings, and this can be briefed in response to issues that arise in the earlier Hearings themselves. This is an efficient way to proceed for both the land-owners, the Council, and the Panel, so that the most relevant and helpful information is made available to assist the Panel in its deliberations.
15. Regarding the alleged issue of the duration of hearings etc, there is a difference between full plan reviews and a geographically isolated plan change or resource consent. This is a point that the Auckland Unitary Plan Hearings Panel encountered, and while there was initial concern about the time it may take to address zone changes, as the process

bedded in, the Panel was able to make recommendations on all of the zone change requests it received. The decisions made have generally survived review by subsequent courts.

16. Finally, at a time when there is an urgent need for affordable housing, in my submission it is worth reflecting on just how much information is really required to make a zone change decision that meets the Purpose of the Act? Ultimately all planning, consenting, and development costs, are paid for by the purchaser of a new home, and the rates and charges they pay. At a broad outcome level, one can question whether the Holdings development at Pokeno, with its 13 reports etc, is that much better than the suburbs of Auckland, that were developed a hundred years ago, with I suspect just a survey plan and a basic engineering/infrastructure plan e.g. Ponsonby or Mt Eden. Yes, there were adverse environmental wastewater discharge effects of those previous developments etc, but with minimal technical work they achieved desirable suburbs with high amenity values.
17. I am not suggesting that this is a precedent for development today, or in any way undervaluing the contribution that experts make to plan change decision making, but there is a balance to be struck. In my submission, at the time the Panel is hearing the Pokeno West zone changes it will have robust and adequate technical information to support the relief sought.

Future Proof

18. The Pokeno West landowners and their advisers have been aware of the Future Proof process and it was very helpful to have an update from counsel for the Future Proof Implementation Committee last week. It is now understood that spatial planning outputs from the current review will be received before the zone change hearings.
19. The legal point has been made by other counsel that the only spatial plan in New Zealand that has any statutory weight is the Auckland Plan. Otherwise spatial plans are documents that can be considered but are not statutory instruments in the sense that, for example, they have to be “given effect” to.

20. The Pokeno West landowners intend to engage with the Future Proof process and may well provide feedback on the draft spatial plan. However, whatever is finally in those plans for Pokeno is not determinative for the decisions of this Panel. There are very good reasons for this in that, with respect, the process to develop a spatial plan is broader, and includes non-RMA matters, and is not as robust and independent as a RMA process that requires, for example, a s 32 analysis. Further submissions will be made on the Future Proof spatial plan outcome at the time of the zone change hearing.

RPS

21. In Opening Submissions, the planner for the Waikato Regional Council has noted that Pokeno West is not identified in the Future Proof plan for urban growth, that is incorporated into the Regional Policy Statement as Map 6C (par 36 of her submissions). She appropriately also noted that there is a process to urbanise land that is not identified providing it meets the criteria in per Policy 6.14.3. Planning and technical evidence will be provided to the Panel in the zone change hearings to satisfy all of the requirements of this Policy.
22. However, it is important to note that, in my submission, the main reason that the RPS/Future Proof does not show an extension of Pokeno into Pokeno West, is due to a local government “administrative” changes. As helpfully explained by other counsel, Future Proof did not previously extend that far north because it was previously part of the Franklin District. To the credit of the Council, it has live zoned the Chen block in the Proposed Plan to address this administrative territorial boundary “gap”, rather than wait potentially another 3 - 5 years for the Future Proof spatial plan, and then RPS changes, to run their course.

Higher Order Statutory Provisions

23. Draft National Policy Statements have recently been released on Highly Productive Land and Urban Development, and a Biodiversity NPS is imminent. Changes to the NPS on Freshwater and new National Standards for water have also been released. The Government has

indicated that these are intended to be made operative in the first half of next year, which is during the hearing process.

24. The Panel will be aware that it is required to “give effect” to these regulations, once operative, and there are legal and procedural issues, that the timing of these respective processes raise. In my submission, any issues that arise regarding higher order instruments can be easily addressed by providing an opportunity for the parties to assist the Panel with submissions, and any relevant evidence, at an appropriate time.

NPS – UDC and Infrastructure Timing

25. I note that Holdings in its original submission and Opening Legal submissions has placed a great deal of weight on the allegation that Pokeno West cannot be serviced by infrastructure now, and that therefore this does not give effect to Policy PA1 of the NPS – Urban Development Capacity. As above, it is unlikely that the NPD – UDC will even be in existence at the time of the zone change hearings for Pokeno West, so it is not worth occupying a lot of Panel time to address Holdings claim.

26. However, briefly, in my submission the Holdings interpretation and application of the NPS – UDC is not correct for the following reasons:

- (a) Holdings have seized upon one isolated policy and ignored the objectives and other policies which are all aimed at increasing the supply of land for housing – which is what Pokeno West will achieve. Deferral of the zoning, which is what Holdings is seeking, is the exact opposite of what the NPS-UDC is intended to achieve.
- (b) The policy identified by holdings is really about how qualifying capacity is to be measured. The real intent of this and other policies is to try and prevent councils counting as “capacity” land that a council knows may not be going to be serviced, for say 15 years, as being short term capacity, to make it look as if they have plenty of serviced land available for development. In my submission this does not prevent land that may still be being planned for servicing being urban zoned. It just could not be counted as, for example “short term development”. Holdings make

an incorrect assumption (at par 5.4) that all land that has a live zone has to be classified as “short term development”.

- (c) It is also incorrect from a planning perspective that an area has to be serviced before it can be live zoned. Timing for planning and development is seldom a perfectly sequenced process. From an infrastructure provider and funder perspective, why should it plan to service an area until it is live zoned, considering the forward planning, costs and risks, of providing infrastructure that has a life of probably at least 50 – 100 years? Even a FUZ zone is not certain as highlighted by the Draft NPS on Highly Productive Land that has not ruled out down-zoning AUP FUZ land around Pukekohe – it is seeking feedback. The Panel members will be aware themselves of zoning that has occurred ahead of infrastructure, and for example, I have clients at Silverdale in a precinct whose full land development opportunity is contingent on the Penlink crossing....
- (d) In my submission there may also even be an inconsistency between the strict servicing requirement that Holdings is trying to persuade the Panel to adopt in these proceedings, and the way its own development has unfolded. Mr Botica indicated to the Panel that the consortium was initially required to self-service for wastewater, but then the position changed, and they were required to reticulate to the wider network. These changes are common and are another reason why zoning should not be inextricably linked to infrastructure.
- (e) In my submission, the main question that the Panel should be attuned to is if an infrastructure provider, that is an essential service, gave evidence at the zone change hearing that, for example, an area was not technically capable of being serviced during the life of the Proposed Plan (setting aside self-servicing options). Despite infrastructure concerns from Holdings, there is no indication that evidence of this nature will be forthcoming at the zone hearings.

- (f) Finally, the consenting process is the ultimate backstop for development. Put simply, there is no way that even with urban or residential zoning, any landowner will obtain a consent to develop until suitable infrastructure is in place to avoid remedy and mitigate adverse effects. The Council/infrastructure providers are in the driving seat and Pokeno West owners understand that notwithstanding an urban zoning, if there is a delay in actual development, due to critical infrastructure sequencing, that is a developer risk that needs to be managed.

Trade Competition

27. Counsel for Holdings stressed to the Panel in Opening Submissions that it was not a “trade competitor” to Pokeno West. In my submission it is interesting that Holdings felt the need to even raise this issue and defend its position because Pokeno West has not directly raised trade competition at this point in the process. Whether or not Holdings meets the statutory definition of a trade competitor will be clarified by the evidence and legal submissions of the parties in these proceedings. It is an objective factual test not a subjective one so what Holdings may have claimed before the Panel is largely irrelevant.

28. In relation to the competition generally, in my submission it is worth noting a key purpose of the NPS – UDC that Holdings did not highlight for the Panel:

Competition is important for land and development markets because supply will meet demand at a lower price when there is competition. There are several key features of a competitive land and development market. These include providing plenty of opportunities for development. Planning can impact on the competitiveness of the market by reducing overall opportunities for development and restricting development rights to only a few landowners.

29. Pokeno West is in the process of engaging an urban economist to analyze the property development market in Pokeno to determine for example, how many independent developers there are (unrelated companies) and how many sections they have (about 600 left according to Mr Botica), sale prices and trends etc. This will answer various questions, including: to what extent Holdings is a monopoly supplier of sections for housing in

Pokeno? If it is a monopoly supplier, then Pokeno West urbanization will be required in order to give effect to the NPS-UDC (and in my submission its likely successor document).

30. I would expect that the Pokeno West economist will also provide evidence on commercial behaviors in markets where there are limited suppliers, or monopolies. These behaviors will no doubt include taking steps to try and stop, or at least slow down, new entrants to the market with rival similar products.
31. Regarding the Opening Submissions of Holdings, it is noted that they appear quite determined to oppose/delay Pokeno West and even made a LGOIMA request of the Proposed Plan process. This is the first time I have seen a request for a plan change process. The opposition appeared to be tempered somewhat in the oral submissions of counsel before the Panel and no doubt the Holdings position will be further clarified as the Hearings unfold.
32. For the record it is noted that Pokeno West has offered to meet with Holdings, to discuss their alleged issues, but this offer has so far been rejected.

Evidence and Effects

33. Regarding actual alleged adverse environmental effects, in my submission what Holdings has identified in paragraph 8.1 (Opening Legal Submissions) are relatively modest potential adverse effects, and their concerns are not backed up by technical evidence. Responding in summary;
 - a) Erosion and flooding – Pokeno West have undertaken detailed analysis of the catchment and stormwater issues by leading experts (Maven). It is known by the Council, and more widely, that there is currently a bridge capacity constraint. However, the key point is that, as is usual, “hydrological neutrality” must be achieved. Therefore, at the consenting stage neutrality will have to be proven or consent will be refused. This rezoning will not exacerbate existing flooding issues.

In any event, Pokeno West is in discussion with the Council about potentially relocating the Council's active recreation area, which is in a flood plain, to the Pokeno West site so that the lower Council area could be developed into a passive recreation/stormwater facility.

- b) Earthworks and slopes. Ground Consulting (Fraser Walsh) has undertaken investigations on the site and he supports the rezoning. Engineering standards at the time of landuse and subdivision consent will ensure that there are no issues arising from the topography/stability of the land. If the highest classes of soils are to be avoided for urban development (NPS-HPL), more steeper land will have to be developed in the future. It is also noted that the steepness of the land at Orewa West does not seem to be preventing Fulton Hogan (one of Holdings consortium) developing their site on notorious Rodney Onerahi Chaos soils.
- c) "Development occurring in advance of infrastructure" - this is a misconstruction of what is being requested in this process. As above, no "development" will be possible without infrastructure. This is simply a zone change that gives infrastructure providers the certainty they need to plan to provide infrastructure.
- d) "Poor planning and increasing pressure on transport". There is no evidence that the planning has been "poor", to the extent that that word is useful, and Commute have undertaken a thorough traffic assessment.
- e) "Inefficient provision for community, social and other infrastructure". It is unclear if Holdings is concerned with "efficiency" *per se* or the "adequacy" of what can be generally called social infrastructure. Social infrastructure is largely a matter for the Council and Government Departments (Ministry of Education etc) in terms of delivery and evidence can be provided at the hearing if it is helpful. No doubt it will be also a case of having critical mass and enough residents/ratepayers to justify public expenditure on upgrades and new social infrastructure at Pokeno.

I would be pleased to answer any questions.

DATED at **AUCKLAND** this *4th* day of October 2019

Chen, CSL and Top End
by their barrister and duly authorised agent

Peter Fuller



Peter Fuller
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