

**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 **MIDDLEMISS FARM HOLDINGS LTD (794)**

MIDDLEMISS OPENING LEGAL SUBMISSIONS

4 August 2019

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MAY IT PLEASE THE PANEL

Introduction

1. These submissions have been prepared on behalf of Middlemiss Farm Holdings Limited (794) (**Middlemiss**) which owns a property at 95 Jericho Rd. Middlemiss is now supported by other parties including The Survey Company and some of its clients. The submissions are seeking to introduce objectives, policies and rules to the Waikato District Council Proposed Plan (**Proposed Plan**) to support ecological enhancement subdivision and transferrable development opportunities.
2. Middlemiss attempted to assist the Panel, Council and other parties, by providing a fulsome original submission that provided detailed track changes to the Issues, Objectives, Policies and Rules of the Plan. In terms of the detailed Rules, the relief sought in the submission requested provisions similar to the ones recommended by the Auckland Unitary Plan Hearings Panel in 2016. The submissions also made it clear that other and consequential relief may be sought and, for example, in the planning expert evidence of Mr Shane Hartley on the Issues, he has suggested some further modifications for the Panel's consideration.
3. In the supporting information for the relief that Middlemiss is seeking, the submission also contained near 20 pages of legal and merit reasoning to support the changes sought. Counsel refers the Panel to that material as it largely addresses the "opening" position of Middlemiss and it is not intended to repeat that material in these submissions. It would be appreciated if the Middlemiss original submission, and the track changes appendix, were to hand for the Hearing on 8 October.
4. The legal and planning context is very dynamic, as we are all aware, and it is appropriate that I update the Panel on matters that I consider are relevant to its deliberations since the submission was prepared over a year ago.

Legal Framework

5. I have read, and was present for, the opening legal submissions of counsel for the Council and I largely concur with her assessment of the legal framework for the consideration of submissions and evidence. I do not intend to repeat her submissions, and only make the following brief further comments:
 - a) The submissions of Middlemiss are very focused on s 5 and Part 2 of the Act;
 - b) The Proposed Plan is required to achieve the integrated management of natural and physical resources in the District (s 31(1)(a)). The Middlemiss submissions attempt to “join some dots” to help the Council achieve integrated management over the life of the Plan.
 - c) The Middlemiss submission is also very focused on meeting the requirements of s 32 and in particular the amendments regarding consideration of economic growth and employment.

Confluence – Komititanga

6. At this early stage in the hearing process I have been struggling to think of how to capture the essence of task at hand as far as Middlemiss is concerned. The scope ranges from the most challenging issues humanity is facing to how many plants to require per m² for a wetland restoration. The best I have come up is the idea of a “confluence” – komititanga – unabashedly inspired by the mighty Waikato River taonga. The broader influences that I see bearing on these proceedings include, but are by no means limited to:
 - a) Accelerating climate change and increasing scientific evidence urging far more significant responses to reduce greenhouse gas emissions and increase sequestration.
 - b) Mana whenua values being increasing reflected in regulatory instruments and the need to restore the mauri of wai and reverse degradation of the whenua. Black letter “law” is now also reflecting lore in the examples of the attribution of separate legal personalities to natural resources, and the partnership principle of Te Tiriti o te Waitangi

is being better reflected in an increasing number of co-governance arrangements.

- c) Unequivocal Central Government policy to address the perceived adverse effects of “traditional” rural landuse practices e.g. the new Freshwater Standards.
- d) Increasing concern about biodiversity loss, mass extinctions, and the need to maintain and enhance “ecosystem services”.
- e) Increasing awareness that the “lock up and leave” conservation/preservation paradigm of the last century is no longer fit for purpose. Active human intervention to manage indigenous flora and fauna is increasingly recognized as being essential to the survival of native plants and animals in the face of introduced pests and climate change.
- f) Increased participation from lay people in active restoration and pest control work. E.g. Kiwi Coast from Bream Head to the Bay of Islands where the kiwi population at Bream Head has increased from 60 to over 600. The most motivated people to protect the environment are generally those that have the strongest connections to the physical environment.
- g) Increasing regulatory compliance pressure on the farming community e.g. the Waikato Regional Plan Change 1 limitations on new vegetable production due to nitrate leaching. It is not an understatement to say that the rural sector is feeling targeted, and under siege, as made clear at a recent meeting of growers in Pukekohe to discuss the drafts NPSs and National Freshwater Standards.
- h) Increasing financial pressure on the rural productive sector with tighter bank lending policies, Fonterra losses and “peak dairy”, high levels of debt, increasing labour and other costs, and consumer resistance to paying higher prices for primary produce. Arguably, consumers are not currently prepared to pay for the costs of internalizing the external environmental costs of food production, except at the fringes. In any event, cheap imported food is generally not subject to the same

environmental requirements so local producers are competing on an uneven playing field.

- i) The NPS expectation that every farm will have a farm management plan in the future, is an opportunity to also have a land use management design plan, that is responsive to the individual characteristics of each property. Furthermore, integrated catchment and resource management can then be achieved by reestablishing natural patterns and linkages between properties.
 - j) The urgent need to for more housing to meet the shortfall that has built up over the last 20 years, and the Government making this a top priority.
 - k) The need for more jobs in the emerging “green economy” as we move away from a carbon dependent economy. It is submitted that what a town like Ngaruawahia needs most, to revitalize it, is more people with surplus resources, and more jobs.
7. There are many other factors that the Panel members will be aware of that make this a challenging, yet in my submission “opportune”, time to be developing a new district plan. The Waikato Plan could be one of the first in the country to be prepared taking into account a whole new raft of higher order policy initiatives, and new science, on how to sustainably manage the natural and physical resources on the Waikato District.
8. In essence, the Middlemiss submission is intended to reverse biodiversity loss and restore ecosystem services, through the introduction of native planting enhancement/restoration/subdivision provisions. New residential lots to be created could be quite small – e.g. 2000 to 4000 m² as in the Whangarei plan. New lots could be clustered to achieve a smaller footprint into hamlets/papakiangas if there is a concern about “ribbon” development.
9. Reverse sensitivity risks can be managed with no-complaints covenants. These provisions could provide the much-needed resources (labour, capital and expertise) for this essential restoration work, at the necessary scale, through a conditional subdivision opportunity, in the general rural areas. It is important to note that Middlemiss is not seeking “traditional”

rural residential zoned development where no ecological benefit is provided.

10. More detailed evidence will be supplied in due course, but to undertake the work at the scale that scientists and ecologists say is required will cost \$ billions. Mr Kessels, the Council ecologist, has rightly acknowledged, that generally farmers want to do this work, but they simply cannot afford to do it at the scale and quality required to really make a significant ecological difference. This is especially the case in the Waikato where there are large areas with little remnant native vegetation. In my submissions I will table some plans to help illustrate what Middlemiss and its supporters consider to be the critical “big picture” issue for the District.
11. It is recognized that a considered and careful approach to rural subdivision must be adopted in the Waikato. The relief sought, including transferable development rights (TDR's), are tools that can expedite ecological enhancement, while ensuring that fragmentation of larger parcels of land is minimized, and carefully designed development is allowed to occur in appropriate locations.
12. The ecological enhancement subdivision/TDR relief is acknowledged to be additional to the limited Significant Natural Area (**SNA**) protection focused subdivision opportunity in the notified plan. However, it submitted that the Middlemiss relief does not take the Proposed Plan in a different direction. The analogy I propose is that the method(s) will make the waka go much faster, by adding more paddlers, rather than plotting a new course. Yes, there may be some eddies to negotiate on the way to formulating the best policy possible, but there is a lot of knowledge and expertise, old and new, that can ensure a safe and speedy passage.

Supportive Jurisprudence and *Cabra* Update

13. Regarding the legal and factual basis for enhancement subdivision provisions, and transferrable title provisions, there is now solid jurisprudence that these methods do promote the Purpose of the Act, as outlined in the Middlemiss Submission. Similar provisions to those sought by the submitter have been recently the subject of appeals to the Environment Court and the High Court regarding the Proposed Auckland

Unitary Plan in the *Cabra* cases. The case is now back before the Environment Court and it is expected that a final decision will issue in the coming months. I can delve into the cases further in the Hearing, if it assists the Panel, but the short point is that in my submission the merits of the method were not disturbed by the High Court appeal.

14. The legal and factual findings of the Courts provide a reliable framework for the Panel and could potentially reduce the hearing time that may otherwise be required. For example, in Auckland, the Council tried to run an argument that there was poor compliance with bush protection covenants and therefore the method should not be available. Setting aside the obvious response, that the Council itself is responsible for compliance and has all the tools it needs to enforce covenants (including recovery for costs), the Council was invited to identify sites for the Court to visit to supposedly prove the Council's point. A helicopter trip was organized to several sites in the Region, including Dennis Scott's now internationally recognised project at Matiatia/Church Bay. The clear finding on the facts by the Court was that the method was working.
15. It also became clear to the Court that the Auckland Council was trying to limit the method in order to try and put a cap on rural residential housing growth. However, the evidence that the Court accepted was that the actual historical growth in the number of sites created was relatively modest and did not justify the level of Council fear. The Court also distinguished the growth management cap Council agenda, from the environmental effects focus in the Act and concluded that the method promoted the Purpose of the Act.

Cross Boundary Consistency

16. Under the Act this Panel is encouraged to consider the benefits of uniform, or at least similar, provisions across both Auckland and Waikato plans regarding ecological enhancement. Compatible provisions would help facilitate a clear regulatory and consenting pathway for both Councils and landowners, many of whom have properties in both jurisdictions.

Higher Order Statutory Provisions

17. 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.
18. 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.

Evidence

19. The submitter understands that it is its duty to make its case, supported by evidence, and participation in the Hearings of the most relevant topics over the next year is currently intended. However, the Panel will be aware that resourcing long planning processes is challenging, especially when a few individuals end up funding a campaign that will arguably benefit the whole District. While Middlemiss, and its supporters, may potentially benefit from the relief sought, in my submission there is a significant wider “public benefit” in the case it is running.
20. For the first Issues Topic, the Panel will already have evidence from:
 - a) Ross and Eleanore Webber – a South Head award winning example of ecological enhancement subdivision
 - b) Shane Hartley – Planning Expert Evidence
21. Subject to resourcing going forward, Middlemiss and its supporters plan to produce evidence on the following;
 - a) Planning
 - b) Ecology

- c) Economics and development
- d) Primary production
- e) Other expert evidence as is helpful to the Panel

22. Counsel would welcome questions.

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

Middlemiss Farm Holdings Ltd
by their barrister and duly authorised agent

Peter Fuller



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