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
	Hearing 18 – Rural Topic
PARTIES REPRESENTED	**MIDDLEMISS FARM HOLDINGS LTD**
	BUCKLAND LAND OWNERS GROUP

MIDDLEMISS AND BUCKLAND LEGAL SUBMISSIONS

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1. INTRODUCTION

1.1 These submissions have been prepared on behalf of Middlemiss Farm Holdings Limited (**Middlemiss**), which owns a property at 95 Jericho Rd, and the Buckland Landowners Group (**Buckland Group**). The Buckland Group is seeking a zone change to a countryside living zone and has an interest in supporting the Middlemiss submissions because if the relief it is seeking is not granted, it will remain a general rural zone and would benefit from the Middlemiss relief, if it is granted. The Buckland area, because it adjoins the expanding Auckland area, is also appropriate as a location to receive the transferrable lots from the method that Middlemiss is seeking to introduce into the Proposed Waikato District Council Plan (**Proposed Plan**).

1.2 In summary the submissions and the robust technical evidence that supports them, are seeking to introduce objectives, policies, and rules, to enable the ecological restoration of the District through enhancement subdivision and transferrable development opportunities. The relief being sought is an extension of the subdivision opportunities that the Proposed Plan provided for the protection of existing Significant Natural Areas (**SNAs**), and would provide for;

a) In-situ lots to be created from the establishment, maintenance, and protection, of new areas of wetlands and terrestrial ecology.

b) Lots to be created and transferred to facilitate the amalgamation of fragmented titles created historically on elite soils; and

c) Lots to be created and transferred from the establishment, maintenance and protection of new areas of wetlands and terrestrial ecology.

1.3 The submitters are disappointed that the s 42A Reports, while accepting of some of the relief sought, have largely recommended declining in-situ new enhancement subdivision and transferrable development rights (**TDRs**). Regrettably, the narrow focus of the technical and planning responses to the

Middlemiss evidence, in the s 42 A Reports, has drawn attention away from the key principles of the methodology, and the higher order statutory and regulatory framework, that the Proposed Plan must "give effect" to (s 75).

1.4 With respect to those that have contributed to the s 42 A Reports, they cite no case law to support their recommendations. In this regard the Panel has not been provided with recommendations that have been informed by over 20 years of jurisprudence, and the weeks of hearings in multiple divisions of the Environment Court and the High Court, that have carefully examined the evidence and legal submissions, of dozens on technical expert witnesses and legal counsel. This must carry weight in these proceedings over the opinions of the writers of the recommendation reports, because they are findings from higher order judicial bodies.

1.5 In these legal submissions I will identify the key principles from case law and the higher level statutory framework, and address the reasons that it is claimed in the s 42 A Reports that the Middlemiss Relief should not be adopted in full by the Panel. I have also **attached** a revised set of Rules that Middlemiss and Buckland are seeking that has been updated from the set of Rules that was attached to the primary evidence of Mr Hartley. These have been updated following the recent release of the *Cabra v Auckland Council* [2020] NZEnvC 153 (**Cabra 2020**) decision (attached as an Appendix to the s 42A Rebuttal Report) and further technical work on the economic viability of enhancement subdivision and TDRs.

1.6 It is submitted that while the proposed provisions for SNAs are a step in the right direction to protect biodiversity in the district, the current policy and rules will not ensure that there is "no net loss" and the enhancement and expansion of biodiversity over time. Therefore, the Proposed Plan will not maintain and restore biodiversity and ecosystem services, to achieve sustainable management, and meet the needs of future generations. While land-owners are usually motivated to protect and restore degraded land and waterways,

most simply cannot afford to do so at the scale required. This is particularly the case when faced with new regulatory compliance burdens. The methods being sought are a "win win" as they provide essential financial capital for restoration works at a District-wide scale. This generates economic productivity and employment and satisfies s 32 of the Act. It is a superior tool to those in the Proposed Plan which provide subdivision rights for little or no environmental benefit.

2. STATUTORY REQUIREMENTS

Resource Management Act 1991:

2.1 In general terms it is submitted that the Proposed Plan does not:

a) Promote the sustainable management of natural and physical resources as required by s 5 of the Act;

b) Sustain the potential of the natural and physical resources of the Waikato District to meet the reasonably foreseeable needs of future generations that will be reliant on rural resources;

c) Safeguard the life supporting capacity of soil, water, and ecosystems;

d) Avoid, remedy and mitigate the significant adverse effects of farming, and other primary industry activities, on rural natural resources;

e) Enable people and communities to provide for their social, cultural and economic well-being, by living, working, recreating, and undertaking ecological restoration activities in rural areas;

f) Adequately protect areas of significant indigenous vegetation, habitats, and fauna, to meet the requirements of s 6(c) of the Act;

g) Demonstrate the principles of kaitiakitanga and stewardship regarding the protection and enhancement of biodiversity and water resources, especially the degraded Waikato River and its tributaries (s 7(a)(aa));

h) Acknowledge the intrinsic values of ecosystems other than if they qualify as SNAs (s 7(d));

i) Maintain and enhance the quality of the environment in rural areas. The background s 32 ecology report from Mr Kessells highlighted significant environmental degradation and loss of biodiversity values since 1840. However, the regulatory framework in the Proposed Plan is only focussed on protection/maintenance of existing areas and not on "enhancement" more broadly, as is required by s 7 (f) of the Act and the Waikato Regional Policy Statement (**WRPS**), and in particular Policy 11.1;

j) Adequately taken into account the principles of the Treaty of Waitangi because the methods adopted, for the use and development of natural physical resources in the District, will not substantially assist to restore the mauri of the Waikato River and indigenous biodiversity taonga valued by Maori (s 8) and now also incorporated in to the WRPS as Chapter 2;

k) Meet the functions of the Council under s 31(1)(a) of the Act to achieve the integrated management of the effects of the use, development and protection of land and associated natural and physical resources. The Proposed Plan does not recognise the importance of re-establishing lost indigenous vegetation and wetlands to that overall sustainability of ecosystem services and the relationships/linkages between habitats. It does not recognise the ecological evidence that isolated small SNAs, even if "protected", are not sustainable in the long term unless they are connected to other larger areas so that there are enough seed sources etc;

l) Provide a robust regulatory framework to manage the adverse effects of some rural activities on surface water and lakes and rivers, including the Waikato River. For example, by not incentivising the protection and restoration of riparian margins and managing stock access to waterways, indigenous vegetation, and erosion prone land, that should be permanently retired (s 31(e));

m) Considered all the relevant matters that are required under s 74 of the Act or have not given them sufficient weight and emphasis in the Proposed Plan; or

n) Give effect to key higher order regulatory instruments as required by s 75, and as explained further below.

2.2 The s 32 analysis undertaken for the Proposed Plan has not properly evaluated incentive subdivision as an objective, policy, and method, to enhance biodiversity in the District, and achieve environmental outcomes that meet the Purpose of the Act. The s 42 A report rightly acknowledges that the examples highlighted in the evidence of Mr Forrester for The Surveying Company are successful but cite other alleged poor implementation examples (not specified though) as a reason to reject the relief sought. Auckland Council tried to run a similar argument in the Auckland Unitary Plan Hearings and the Cabra cases, and it was of course rejected. Councils are responsible for monitoring under s 35, the granting of consents and for ensuring consent compliance, and can cost recover for this work. A failure to always properly implement a policy and rule is not a reason to abandon it, especially when it is conceded that it has been working in the Legacy Franklin District part of the Waikato District.

3. Issue – Significant Ecological Degradation – Principle 30% Biodiversity

3.1 The work undertaken by Kessels Ecology for both the Waikato Regional Council (TP 2017/36), and the District Council (SNAs – Summary of Inputs from the Community Consultation Process – 22 Dec 2016), records some alarming facts about the loss of natural habitat since 1840 (as determined by Leathwick – Landcare 1995) including:

a) Indigenous vegetation is "highly underrepresented" with only 10.72 % of primary forest and wetland remaining – down from 53.6% Primary Forest, 28.5% secondary forest scrub and 15.8% wetlands.

b) In the LINZ "Threatened Environment Categories" 77.96% of the land area is between "Critically Unprotected" and "Acutely Threatened".

c) The Franklin part of the District, where the Submitters land is located, once had 84.5% primary indigenous cover, 7.2% secondary and 5.9% wetlands.

d) In the "Hill Country Management Zone", that the Submitters land is located in, the Report concludes that: "….there is little indigenous or riparian vegetation remaining" (p 14).

e) The Report also highlights the need for "stepping stones" to connect different large hill areas and that also sustain indigenous populations themselves (p 15).

3.2 The s 42 Rebuttal Report dismisses the relevance of the Cabra 2020 case, which is a concern that I will address later, but in *Cabra and ors v Auckland Council* [2018] EnvC 90 decision (**Cabra 2018**) the following finding was made after the testing of evidence of a number of ecologists:

> *[162] We saw no analysis that satisfied us that at least 10 percent of the natural extent of the habitat in each ecological district had been retained. For the most part, we conclude that many of these ecosystems are endangered or under threat because of the shortage of particular ecotones within each ecological district.*

> *[163] We conclude that the words "at least 10 percent" do not indicate that this is the maximum, but that this is a **minimum.** We saw no evidence that any of the ecosystem types we had spoken of, even those of least concern, were at a quantitative level above 10 percent in all ecological districts or overall. To the contrary, we had evidence from most ecologists that modern ecological thinking was that 30 percent of the natural extent was an appropriate target.*

3.3 In this finding the Court has outlined key principles of representativeness of ecotones and that a majority of ecologists (in the case) agreed that 30% of the natural extent was an appropriate target. Based on the Councils own research the District falls well short of this target for most ecotones and the Proposed Plan, as modified in the latest provisions, will not address this shortfall.

3.4 It is important to point out that in the latest report from Mr Turner (Memo dated 24 September) he was asked to only address relatively narrow questions about the assessment of qualifying SNAs and the merits of dropping the wetland size for protection to 0.5 ha. He was not asked to properly address the Middlemiss submission and evidence in the round, nor the Cabra cases, including;

a) Does he agree with his colleagues and the Environment Court that in the Waikato a target of 30% ecotone representativeness is appropriate?

b) Does the Proposed Plan need a method to achieve that (other than just protection of SNAs)?

c) Do some of the qualifying SNAs need new linkages to connect existing isolated and vulnerable pockets of indigenous vegetation/habitats, or to establish “steppingstones” for species to move between exiting habitats thereby fostering genetic resilience?

d) Do examples such as Tiri tiri matangai, that took a largely grazed island, and within 10 years turned it into an ecosystem supporting Takahe and Bellbirds, prove that enhancement works?

3.5 Dr Vaughan Keesing has provided evidence to the Panel that was not constrained and he and supports the Middlemiss relief that incentivises this positive environmental work. Mr Goodwin, also an ecologist, has provided examples of the relief being sought working on the ground in Rodney. No ecologist in this hearing has provided evidence that opposes, or does not support, the Middlemiss relief, and regrettably it appears the Council ecologists have not been asked the key questions. The Environment Court in Cabra visited many sites and concluded that in-situ and TDR enhancement works, notwithstanding claims to the contrary by the Auckland Council. This is a compelling basis for the Panel to endorse the Middlemiss relief.

4. Enhancement Subdivision Promotes Sustainable Management

4.1 It is concerning that no case law has been cited by the S42A Report writers to support their contention that the Middlemiss submission should be largely rejected, and there was no analysis or acknowledgement, of the case law that was provided in the original submission. It would appear the authors consider that their opinions should be preferred over the findings of the Courts, who as expected, have made significant inquiry regarding both the facts and the law. 24 years ago, in *Di Andre Estates Ltd v Rodney District Council*, W187/96 Judge Treadwell found that enhancement subdivision can meet the Purpose and requirements of Part 2 of the Act.

> *"It can therefore be seen that any subdivisional design based on replanting and restoration of areas by means of native revegetation planned and/or supervised by Mr Scott deserves a great degree of respect and attention particularly as s 5 directs us to consider promoting sustainable management. That includes development of natural resources while sustaining the potential of such resources to meet the reasonably foreseeable needs of future generations. That primary concept of the Act is of course allied to the provisions of s 7 also contained in Part II which is a section relating back to the main purpose of the Act."*

4.2 Regarding the methodology the Court found that the catchment based concept *"….works on the basis that the sustainable management of natural and physical*

resources if possible should be associated with the opportunity to repair and enhance landscapes and to maintain such landscapes for the future. This underlying philosophy forms the basis for establishing the lot layout and lot size was supported by the appellant." The Court noted that "…. *subdivision provides an opportunity to encourage and initiate positive landscape changes has also been implemented successfully on Waiheke Island.*"

4.3 Judge Treadwell was so impressed with the method that he suggested that if a district plan did not contain enhancement incentive subdivision provisions, it should be amended to included them because they meet the Purpose of the Act. This is exactly what Middlemiss is trying to achieve in the Waikato District Plan.

4.4 Twenty years later the Waikeke example of planting at Matiatia/Church Bay have become iconic (Cable Bay Winery for example) and multi-award winning locally and internationally, but is just one example of many successful subdivision/restoration projects. The Waiheke outcome started with bonus incentive provisions in the Gulf Islands Plan (Barry Kaye and Dennis Scott), that landowners then implemented. Not only were extensive areas restored and enhanced but a highly valued network of public walkways has been created that have more usage than the publicly owned reserve network. In the AUP Hearings Stephen Brown, often briefed by Auckland Council to oppose such projects, conceded that the Waiheke example promoted the Purpose of the Act and achieved sustainable management, notwithstanding the new residences introduced into in the coastal environment.

5. Rural Production is Broader that Primary Production & s 32

5.1 An important finding from the high profile *Arrigato Investments v Auckland Regional Council* 2001 cases , upheld in subsequent appeals, is the question of what a "productive" use of rural land is. The councils submitted that lifestyle/residential use was not "productive", but this was rejected by the

Court, preferring economic evidence that a residential use in a rural area can generate a significant amount of productivity per annum.

5.2 This finding has been ignored in the rebuttal response from Mr Fairgray to the evidence of Mr Thompson and Mr Hartley, and he narrowly defends the plan term of "rural production". It is clear from the way that "production" is used in the Proposed Plan that it has been interpreted in a very narrow way to predominantly mean "primary production", presumably dairy, sheep, beef, horticulture and forestry etc and associated servicing and processing industries.

5.3 The Act does not prefer one form of economic activity over another and is an effects-based statute. As the Court did, in the case cited above, the effects are to be assessed without bias regarding certain forms of economic production. Otherwise, for example, a teacher living on a lifestyle block and teaching in a rural school is deemed to be "unproductive", and this is not an outcome that is intended by the Act.

5.4 Also, s 32(2)(a) requires assessment of opportunities for economic growth and employment. It cannot be disputed that there will be more economic activity and jobs created from the Middlemiss relief than the Proposed Plan rules that allow subdivision without the requirement to restore degraded land (both approaches equally protect SNAs). There will also be benefits in excess of the status quo landuse, because the areas to be targeted for restoration are degraded and with low primary productivity, e.g. the areas at 95 Jericho Rd beside the streams as per the photos of Mr Pryor and the drone footage of Mr Forrester.

6. It's Not About the Forecast Numbers of Lots

6.1 In the s 42A Rebuttal and particularly the rebuttal evidence of Dr Fairgray, there is a fixation with concern that allegedly Middlemiss has not accurately enough calculated the number of lots from this method. This is what the Environment Court said about this approach from Mr Fairgray in Cabra 2018:

> *[239] So far as the growth issues are concerned, we consider that the fundamental failure of the witnesses Dr Fairgray and Ms Fuller to acknowledge Mr Balderton's clear statement, that his assessment of capacity was not either possible or expected outcome even over a 30-year period, leads us to put little weight on their evidence. We prefer the evidence of Mr Thompson, although in practical terms, our view is that no witness has been able to properly assess the likely outputs of this regime over the life of this Plan or over the following 30 years.*
>
> *[257] Overall, we have concluded that the Council's assumption of yield based upon a computer analysis of areas has no basis in fact or actual outcomes. In fact, we have concluded that the evidence of other Council witnesses, particularly Dr Fairgray and Ms Fuller, misunderstood Mr Balderton's evidence which clearly stated it was not a yield calculation.*

6.2 While this was of course in response to a different set of numbers, the Court found that it did not really matter about how many lots were estimated to be created. It found that notwithstanding the previous provisions in the legacy Rodney Plan, the take-up had been relatively modest, and there was no flood of applications. Yield calculations are difficult as there are many assumptions regarding who will apply and when, the activity status, and consenting processes.

6.3 An orderly utilisation of the provisions being sought is also expected in the Waikato, and the lifestyle demand has been in the order of 200 lots/yr according to Mr Thompson. It is crucial to note that even though the take-up had been modest the Court in Cabra 2018 found it was still a valuable method worthy of introduction into the AUP: *"…it* [the incentive provisions] *may see us gradually climb up to and above 10% of the original natural vegetation.".*

6.4 A further important conclusion in Cabra 2018 was that the Auckland Council opposed the subdivision enhancement method due to growth management reasons irrespective of the beneficial environmental outcomes of the method. This narrow framing, also being advanced in the s 42A Rebuttal with concerns about the number of lots, and under valuing of the benefits, did not survive in Cabra. In my submission this Panel is required to consider the methods in the round.

7. *Cabra* Case Law Principles Are Relevant to the Waikato

7.1 The s 42 Rebuttal Report states that:

> *My view on these provisions discussed in the Environment Court decision are that firstly relate to the Auckland area which covers an extensive and diverse area of land from Rodney in the north to Franklin in the south, with much higher densities of development than the Waikato District. Secondly their provisions are responding to a different Regional Policy framework to the Waikato District; and thirdly, if the Waikato District were to take a similar approach, the consequences on the rural environment could be potentially detrimental. I have not had time to compare what their provisions would generate in terms of potential lot yield, but imagine the figures to be significantly more than what I have demonstrated through my S42A report and rebuttal evidence.* (par 157)

7.2 And then regarding TDRs and the issues of concern to the Report writer:

> *However, I do not consider that it is either appropriate or helpful to draw parallels with this final decision because it involves an objective and policy framework for Auckland Council's jurisdiction which is different from that proposed for Waikato District. Of note, the notified Auckland Unitary Plan specifically identified the existing Country Living Zones as receivers of TDR generated in the Rural Zone, and rules were designed to enable that outcome. Significantly, the Auckland Unitary Plan does not identify receiver locations in the Rural Zone which are now being promoted in Mr Hartley's evidence (par 233).*

7.3 This is how the Environment Court described the issues of concern of the Auckland Council in the Cabra 2018 decision:

> *[5] ….. In large part, the concern of the Council is that the adoption of the IHP provisions would lead to an untoward and uncontemplated level of subdivision within the Rural Area. Most importantly, they are concerned at the potential for continued subdivision development in the Rural Areas other than the Countryside Living Zone, and the consequential adverse impact on the rural productive land resource.*

7.4 The issues that the Court addressed in Cabra are essentially the same as the concern expressed in the s 42A Rebuttal Report. The Environment Court rightly refrained from using the pejorative term "ad hoc" but is was certainly used by Auckland Council as it has been by the s 42 A Report writer. The Auckland Council lost in the Cabra cases on the merits, and there are in-situ and TDR enhancement provisions in the AUP.

7.5 I can see the motivation for the s 42A Rebuttal Report writer to try and distinguish the Cabra cases, because essentially the same concerns they have

raised were rejected by the Court. Mr Thompsons evidence was also preferred by the Court in Cabra. However, this Panel in my submission, must not be misdirected, and should abide by the principles established in Cabra, and previous cases, and the findings on the facts and the law.

7.6 The main difference in the final **Attachment C** provisions in Cabra 2020, from what Middlemiss is now seeking, are the thresholds, and the reasons for the modifications is to ensure that projects can been economically viable so that the ecological benefits will be realised (refer to evidence of Mr McCowan, Mr Thompson and Mr Hartley).

7.7 It is of course understood that the Waikato District is different to Auckland Council geographically, ecologically and in terms of higher order RPS provisions. Furthermore, it is fully accepted that provisions from another jurisdiction should be carefully considered, and modified as appropriate, before any adoption. However, there is no point in reinventing the wheel and:

a) The Acts requirements are the same. E.g., it is alleged that Middlemiss has failed to satisfy the s 32AA requirements. Middlemiss is seeking similar provisions to those approved in the Cabra cases, so considering this matter went on appeal to the High Court and back, are Dr Fairgray and the s 42 A Report writers really suggesting that Judge Smith failed to comply with the requirements of s 32 of the Act?

b) The national policy statement and standards framework is the same.

c) It is alleged that the respective RPSs are too different for Cabra to be relevant, and while they are of course differnet, as will be seen below, the overall policy direction on biodiversity protection and enhancement is similar.

d) It is claimed that regarding the distribution of lots the Hartley approach does not accord with the Proposed Plan overall strategy. However, that is not the appropriate test (comparing the plan to itself) and the relief sought gives effect to the higher order documents, meets the Purpose of the Act, and satisfies s 32 requirements.

e) It is claimed that differences in growth rates distinguish the two regions, however, growth is variable within both districts and, for example, the Northern part of the Waikato District has far more growth pressure than Kaipara South Head, where the examples of Mr Goodwin, and the Webbers (in the Opening Hearing), prove the methods are working.

f) There is no doubt that even though there is a difference in biodiversity, the Waikato District, like the Auckland Region, has suffered significant loss and degradation of indigenous biodiversity and wetlands etc, which are now only approximately 10% in both jurisdictions. Much is contained in just a few large parcels. Arguably, the Waikato is even more degraded and vulnerable because it does not have the remnants for natural succession re-vegetation that the gully systems of Rodney can often precipitate. The Waikato also has the precious Waikato River taonga that is significantly degraded.

7.8 Finally, both regions have a legitimate demand for rural residential and lifestyle living, and if not provided for with incentive subdivision, it will be provided without any required ecological or environmental benefits (apart from SNAs) and this is an inferior environmental outcome. Without provision it also means that there is more pressure on blocks used for primary production which makes those activities uneconomic.

7.9 The following conclusions of the Court in *Cabra* 2018 are instructive regarding the veracity of the method and the most appropriate activity status, and in my submission can, and should, be relied upon in these proceedings:

> *[327] We do not consider that the IHP provisions would allow for fragmentation or inappropriate subdivision. Any application for in-situ development outside the Countryside Living zone must be scrutinised, and will require detailed evidence addressing a number of significant issues in terms of the various supporting documents. As we have noted, this is already occurring as non-complying activities, with the majority of those having been granted……*
>
> *[329] We have concluded that the use of the approach under the restricted discretionary activity will assist Council in focusing on the critical issues we have identified relating to overlays, elite soils, rural production, rural character and amenity and provision of infrastructure. Overall, we have concluded that the IHP provisions, with a modification to staging, are more efficient in achieving the outcomes of the Plans in that:*
>
> *(a) they are focused on achieving the outcomes in respect of overlays and rural character and amenity we have discussed;*
>
> *(b) there is the potential for increases in indigenous biodiversity through the region;*
>
> *(c) enhancement of connection between existing biodiversity sites, pathways and ecotones is supported; and*
>
> *(d) long-term protection of significant indigenous biodiversity can be achieved.*
>
> *[330] Provided subdivisions can be achieved without affecting the overlay or rural production character and amenity issues, they should be considered on their merits. In our view, this is a more efficient process than relying on applicants preparing extensive applications for non-complying use in circumstances where most, but not all, of those applications are granted (often subject to modification or additional conditions).*

7.10 Furthermore, the Court stated at page 93 of Cabra 18:

> *"We have concluded that the incentivisation within Rodney, and to a lesser extent in the Manukau area, has at least reduced the level of reduction in significant indigenous vegetation, and has improved the existing stands of indigenous vegetation and resulted in wetland gain."*

7.11 Surely the s 42 A Report cannot be suggesting that if the Court investigated the results from the Legacy Franklin provisions, as per the examples of Mr McCowan at 95 Jericho Rd and those of Mr Forrester, that it would come to a

different conclusion on the merits? The Panel needs to be aware that Auckland Council raised all of the arguments that are cited in the s 42A Reports, as reasons not to have these provisions in the Waikato, in the Cabra cases including;

a) a lack of understanding about TDRs;

b) difficulty implementing the policies and poor outcomes;

c) it is ad hoc;

d) lots being created in the wider rural areas;

e) loss of distinction between town and country; and

f) adverse effects on open space and rural amenity values.

7.12 The Court heard all the arguments and evidence, and yes it tweaked the details, but it found the councils concerns were unjustified. The benefits of the policies outweigh the costs and any risks. There should be no need in my submission to have to re-argue these matters in the Waikato.

8. Middlemiss Relief Gives Effect to Higher Order Instruments

<u>New Zealand Coastal Policy Statement</u>

8.1 The Middlemiss relief largely pertains to rural areas, but to the extent that it is relevant, the Proposed Plan does not give effect to the NZCPS, including;

a) Policy 7 (often overlooked) that contemplates appropriate subdivision in the coastal environment and requires the Proposed Plan to identify where and how this can occur.

b) Incentive subdivision, with appropriate rules and assessment criteria, can help to achieve the outcomes of Policy 11 (indigenous biological diversity), Policy 13 (preservation of natural character) and Policy 14 (restoring natural character); and

c) If public access is included as an incentive for subdivision, the approach in this submission could also help achieve Policy 18 (public open space) and 19 (walking access).

National Policy Statement for Freshwater Management – 2020

8.2 The National Policy Statement for Freshwater Management, in response to significant public concern about degraded water quality, came into force on 3 September. This NPS is to essentially give it more regulatory teeth about issues such as sedimentation arising from landuse. In the *Cabra* case the Environment Court heard evidence that the Hoteo River in Rodney has one of the highest sediment loadings in NZ because of inappropriate rural landuse activities.

8.3 Regarding the NPS, it is submitted that the Proposed Plan does not give effect to objective 2.1(1), and its supporting polices that are intended to achieve outcomes for Maori and the integrated management of fresh water and land management.

Waikato River Settlement Act

8.4 Schedule 2 of the Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010 (Waikato River Settlement Act) contains Te Ture Whaimana o Te Awa o Waikato – the Vision and Strategy for the Waikato River as now incorporated into Section 2 of the WRPS.

2.51. Vision and strategy for Waikato River

Vision

Tooku awa koiora me oona pikonga he kura tangihia o te maataamuri.

The river of life, each curve more beautiful than the last.

Our vision is for a future where a healthy Waikato River sustains abundant life and prosperous communities who, in turn, are all responsible for restoring and protecting the health and wellbeing of the Waikato River, and all it embraces, for generations to come.

2.5.2 Objectives

1. In order to realise the vision, the following objectives will be pursued:

a) *The restoration and protection of the health and wellbeing of the Waikato River:*
b) *The restoration and protection of the relationships of Waikato-Tainui with the Waikato River, including their economic, social, cultural, and spiritual relationships:*
c) *The restoration and protection of the relationships of Waikato River iwi according to their tikanga and kawa with the Waikato River, including their economic, social, cultural, and spiritual relationships:*
d) *The restoration and protection of the relationships of the Waikato Region's communities with the Waikato River, including their economic, social, cultural, and spiritual relationships:*
e) *The integrated, holistic, and co-ordinated approach to management of the natural, physical, cultural, and historic resources of the Waikato River:*
f) *The adoption of a precautionary approach towards decisions that may result in significant adverse effects on the Waikato River and, in particular, those effects that threaten serious or irreversible damage to the Waikato River:*
g) *The recognition and avoidance of adverse cumulative effects, and potential cumulative effects, of activities undertaken both on the Waikato River and within the catchment on the health and wellbeing of the Waikato River:*
h) *The recognition that the Waikato River is degraded and should not be required to absorb further degradation as a result of human activities:*
i) *The protection and enhancement of significant sites, fisheries, flora, and fauna:*
j) *The recognition that the strategic importance of the Waikato River to New Zealand's social, cultural, environmental, and economic wellbeing requires the restoration and protection of the health and wellbeing of the Waikato River:*
k) *The restoration of water quality within the Waikato River so that it is safe for people to swim in and take food from over its entire length:*
l) *The promotion of improved access to the Waikato River to better enable sporting, recreational, and cultural opportunities:*
m) *The application to the above of both maatauranga Maaori and the latest available scientific methods.*

8.5 The Vision is adopted into the WRPS by law (s 12) and the Vision takes precedence if there is any conflict with the WRPS. It is submitted that the Proposed Plan does not sufficiently give effect to the Vision as quoted above, for reasons including;

a) There is a strong emphasis in the Vision on "restoration", but the Proposed Plan does not adequately require and incentivise ecological restoration. It is primarily focussed on "protection" of existing SNA habitats and has overlooked the Court endorsed incentive subdivision method to achieve restoration of the values of the Waikato River and catchments;

b) The Proposed Plan does not adopt an integrated and holistic approach to the management of landuses to achieve the health and well-being objectives for the river, including safe swimming and food gathering. For example, there are insufficient incentives to retire erosion prone land in upper catchments (LENZ 4 land), and to reduce the significant adverse effects of non-point pollution from animals/fertilizer, by incentivising the permanent protection and restoration of degraded stream margins.

Waikato Regional Policy Statement (WRPS)

8.6 The Proposed Plan does not give effect to the Waikato Regional Policy Statement (WRPS) as required by s 75 of the Act, as demonstrated by the following examples.

8.7 The Middlemiss relief will achieve the integrated management of natural and physical resources in accordance with the following Objectives:

> **3.1 Integrated management**
> **Natural and physical resources** are managed in a way that recognises:
> a) the inter-relationships within and values of **water body catchments**, **riparian areas** and **wetlands**, the coastal environment, the Hauraki Gulf and the Waikato River;
> b) natural processes that inherently occur without human management or interference;
> c) the complex interactions between air, water, land and all living things;
> d) the needs of current and future generations;
> e) the relationships between environmental, social, economic and cultural wellbeing;
> f) the need to work with agencies, landowners, resource users and communities; and
>
> g) the interrelationship of natural resources with the built environment.

8.8 The design led Middlemiss approach is intended to be based on a systems wide, whole farm planning, response to biodiversity protection, maintenance and

enhancement. In my Opening Legal submissions, I proposed the idea of a "confluence" – komititanga – being the linkages between the broader issues, to achieve "integrated management", that are relevant to these proceedings including;

a) 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 Triti o te Waitangi is being better reflected in an increasing number of co-governance arrangements.

b) Accelerating climate change and increasing scientific evidence urging far more significant responses to reduce greenhouse gas emissions and increase sequestration. The ability to trade internationally is increasingly having to withstand carbon emission scrutiny.

c) Unequivocal Central Government policy to address the perceived adverse effects of "traditional" rural landuse practices e.g. the new Freshwater Standards and regulations affecting new irrigation schemes and land management such as winter grazing.

d) Increasing concern about biodiversity loss, mass extinctions, and the need to maintain and enhance "ecosystem services". Sir David Attenborough's latest plea is to "re-wild" rural areas in response to mass extinctions and ecosystem collapse.

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, particularly in the largely non-mammalian, predator free Aotearoa.

f) Increased interest and 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 new Water Quality Standards, and 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 reflected in almost daily media coverage regarding the same in the lead up to the election.

h) Increasing financial pressure on the rural productive sector with tighter bank lending policies, Fonterra's variable performance, "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. For example, it is hard for local growers to fund regulatory compliance when competing with imports that may not be produced with the same protections (refer to evidence of Mr McCowan).

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 re-establishing natural patterns and linkages <u>between</u> 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. This includes providing a supply of houses for workers in the rural areas where they work so that it helps stabilise what can otherwise be a very transient workforce. This will also help build and strengthen rural communities, and Covid 19 has highlighted the vulnerability of the productive rural sector being so dependent on migrant labour.

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. Various iwi led training initiatives for restoration work are emerging and this is a sector that will be able to significantly expand with the Middlemiss relief.

Objective 3.8 Ecosystem services
The range of **ecosystem services** associated with natural resources are recognised and maintained or enhanced to enable their ongoing contribution to regional wellbeing.

8.9 As explained in the technical evidence, the enhancement subdivision approach will maintain and enhance ecosystem services. The subdivision promoted in the Proposed Plan does not require any enhancement, apart from the protection of SNAs and qualifying wetlands. The Middlemiss relief will give effect to this RPS Objective and the Proposed Plan is a lost opportunity to use the development process for ecological improvements.

Objective 3.14 Mauri and values of fresh water bodies
Maintain or enhance the mauri and identified values of **fresh water bodies** including by:
a) maintaining or enhancing the overall quality of freshwater within the region;
b) safeguarding ecosystem processes and indigenous species habitats;
c) safeguarding the outstanding values of identified outstanding freshwater bodies and the significant values of wetlands;
d) safeguarding and improving the life supporting capacity of freshwater bodies where they have been degraded as a result of human activities, with demonstrable progress made by 2030;
e)….;

f) enabling people to provide for their social, economic and cultural wellbeing and for their health and safety;
g) recognising that there will be variable management responses required for different catchments of the region

8.10 The quality of water is largely a result of landuse activity. The Middlemiss relief incentivises the protection and enhancement of waterways on a significant scale that cannot be funded in any other way, at the level desperately required.

Objective 3.19 Ecological integrity and indigenous biodiversity
The **full range of ecosystem types**, their extent and the indigenous biodiversity that those ecosystems can support exist in a healthy and functional state.

8.11 The Proposed Plan provisions, largely focussed on existing SNAs, have not ensured that there is a full range of sustainable ecosystem types in the District. Mr Kessells has highlighted that there is underrepresentation of certain ecosystems across the District and the Proposed Plan does not address how this will be rectified. There is no evidence that SNAs alone will achieve this objective. This is a key reason why the Court found in favour of enhancement subdivision in the Cabra cases.

Objective 3.25 Values of soil
The soil resource is managed to safeguard its life supporting capacity, for the existing and foreseeable range of uses.

Objective 3.26 High class soils
The value of **high class soils** for primary production is recognised and high class soils are protected from inappropriate subdivision, use or development.

Policy 14.2

a) *Avoid a decline in the availability of high class soils for primary production due to inappropriate subdivision, use or development.*

8.12 It is submitted that these objectives and policy do not require absolute protection of all elite soils because of the qualification of "inappropriate", which is derived from the Act, and is an important word as per the *King Salmon* decision.

8.13 Having stated that, the Middlemiss relief is intended to maintain the productivity of high-class soils by encouraging the amalgamation of titles through the TDR mechanism. This is as per the example of the Balle transferrable lot consent in the evidence of Mr Forrester. This project was however not commercially viable, which is why Middlemiss is seeking 2 transfer titles for every title amalgamation.

Chapter 11 – Indigenous Biodiversity

8.14 **Policy 11.1** the most relevant policy to the maintenance and enhancement of indigenous biodiversity

Promote positive indigenous biodiversity outcomes to maintain the full range of ecosystem types and maintain or enhance their spatial extent as necessary to achieve healthy ecological functioning of ecosystems, with a particular focus on:

a) working towards achieving no net loss of indigenous biodiversity at a regional scale;

b) the continued functioning of ecological processes;

*c) **the re-creation and restoration of habitats and connectivity between habitats**;*

d) supporting (buffering and/or linking) ecosystems, habitats and areas identified as significant indigenous vegetation and significant habitats of indigenous fauna;

e) providing ecosystem services;

f) the health and wellbeing of the Waikato River and its catchment;

g) contribution to natural character and amenity values;

h) tāngata whenua relationships with indigenous biodiversity including their holistic view of ecosystems and the environment;

i) managing the density, range and viability of indigenous flora and fauna; and

j) the consideration and application of biodiversity offsets.

Implementation methods

11.1.1 Maintain or enhance indigenous biodiversity

> *Regional and district plans shall maintain or enhance indigenous biodiversity, including*
>
> *by:*
>
> *a) providing for positive indigenous biodiversity outcomes when managing activities including subdivision and land use change;*
>
> *b) having regard to any local indigenous biodiversity strategies developed under Method 11.1.11; and*
>
> *c) creating buffers, linkages and corridors to protect and support indigenous biodiversity values, including esplanade reserves and esplanade strips to maintain and enhance indigenous biodiversity values.*
>
> ***Explanation***
>
> *Policy 11.1 of the RPS guides Waikato Regional Council and territorial authorities to maintain indigenous biodiversity wherever it occurs. An important component of the policy direction is to work towards no net loss for all indigenous biodiversity at a regional scale. The policy is also important where ecosystems have been depleted and fragmented, such as coastal and lowland ecosystems, and where maintaining indigenous biodiversity in the long term requires enhancement and restoration. The Policy will be implemented through a combination of both regulatory and non-regulatory mechanisms. This provides the flexibility to manage the varying local contexts and take into account the positive effects that some activities may have on indigenous biodiversity. Examples of this include positive effects from riparian planting.* (Emphasis added)

8.15 It is accepted that the SNA policy is intended to try and achieve no nett loss of biodiversity and Middlemiss fully supports this policy, but it clearly does not go far enough, and therefore does not give effect to the RPS Policy 11.1. There is also no assurance that the Proposed Plan will maintain and enhance biodiversity as required by 11.1.1 and the deliberate use of the directive word "shall".

8.16 Firstly, in my submission the SNA policy will not achieve **no net loss** because protection is only triggered by an application and there is no compulsion to protect otherwise. Mapped SNAs will continue to be grazed and destroyed, and this is a concern that has been highlighted by the Council's own ecologists.

8.17 Therefore, to achieve "no nett loss" there must be an enlargement and expansion of biodiversity. The bucket will continue to leak with the SNA policy

alone, so we need to turn on the biodiversity tap. The District needs the 95 Jericho Rd and other future plantings to offset the losses that will still occur. This is why despite past SNA type protection and regulations, biodiversity loss has still occurred and it cannot be assumed that this provision alone will give effect to this key Regional Policy.

8.18 It is also better to focus on expanding the quality and quantity of biodiversity overall, than being overly concerned with what qualifies as an SNA at any particular point in time. Today's degraded area or pasture, can be tomorrows valuable biodiversity resource, as numerous examples have proven.

8.19 However, more fundamentally this Policy requires: ***the re-creation and restoration of habitats and connectivity between habitats***. The WRPS properly recognises that there is a difference between "protection" of what exists today, and the "re-creation" of habitats and the "connectivity" between them. This is exactly what the Middlemiss relief will achieve and this WRPS policy is arguably more enabling of enhancement, and the active creation of new biodiversity, than the AUP-RPS policy framework (again making the *Cabra* cases relevant).

8.20 As indicated previously, regrettably the Council's ecologists do not appear to have been asked to comment on the merits of the Middlemiss relief in the round and whether it gives effect to Policy 11.1? Dr Keesing can comment further in the Hearing in this regard and provide his opinion on this policy and the Middlemiss outcomes. What is clear is that the Legacy Franklin and Rodney plan examples, from Mr Forrester and Mr Goodwin, are re-creating connections and corridors between habitats, and doing exactly what Policy 11.1 requires.

Policy 11.2 Protect significant: indigenous vegetation and significant habitats of indigenous fauna

8.21 This Policy is partly given effect to by the SNA protections but there are questions regarding;

a) The criteria used to select sites being too conservative;

b) Only isolated small pockets are protected with no provision for linkages and questionable long-term viability; and

c) Whether the provisions are sufficiently generous to be taken up by landowners.

8.22 This is not an exhaustive consideration of the Objectives and Policies of the WRPS, but it is provided to highlight that there is support for the Middlemiss relief in the WRPS, and that the provisions sought give effect to key objectives and policies that the Proposed Plan does not. It is acknowledged that there is a policy that seeks a distinction between urban and rural areas, but the rural lots that will be created are not small and rural amenity values and open space, can be maintained with appropriate design and assessment criteria in the rules. Mr Pryor is the only landscape expert in these proceedings, and he can address concerns raised in the s 42A Rebuttal Report about the effects of the approach of Mr Hartley on rural amenity values.

9. Middlemiss and Buckland General Relief Sought

9.1 The S 42A Rebuttal Report alleges that the main thrust of the Original Submission was in regard to in-situ enhancement subdivision and states that there is no scope for Middlemiss regarding TDR mechanisms that it is now seeking (par 234). In my submission that is not correct. Middlemiss sought that Rules similar to those in the AUP for enhancement subdivision were included in the Proposed Plan, and these include TDR mechanisms. Additionally, in the back section of the Middlemiss Tracked Relief in its Original Submission it stated:

> *"Chapter 22 – Rules*
>
> *The submitter seeks deletions, amendments and additions, to the Rules in Chapter 22, to give effect to the indicative changes proposed above to the issues, objectives, and policies. Without derogating from the generality of this relief, the Submitter requests;*
>
> *a) Deletion of Rule 22.3.1 and replacement with a more enabling provision.*
>
> *b) Deletion of Rule 22.3.2(b)(ii) requiring a minor dwelling to be no more than 20 m from the main dwelling.*
>
> *c) Deletion of Rule 22.3.7.5 and relaxation of the setback distances.*
>
> *d) Deletion of Rule 22.4.1.1 – Prohibited Subdivision and replacement with more enabling provisions for subdivision.*
>
> *e) Deletion of Rules 22.4.1.2, 22.4.1.4, 22.4.1.5, 22.4.1.6, 22.4.6 and 22.4.9 and replacement with more enabling provisions.*
>
> *f) Inclusion of a new Rule to provide for in situ incentive subdivision for environmental enhancement. The Auckland Unitary Plan provisions could be used for guidance.*
>
> *g) Potential inclusion of a transferrable development right subdivision regime, particularly to relocate small lots from elite soils that are inappropriately located. While not finally determined yet, and with spatial and temporal issues still to be finally addressed through the appeal process, the Auckland Unitary Plan provisions could be used for guidance.* (emphasis added)

9.2 Regarding the claim in the s 42A Report that a submitter would not have known the nature of the relief that Middlemiss was seeking, in my submission they could easily discover these rules and consult them. No party in the proceedings that I am aware of has raised a concern about scope and prejudice for lack of certainty about the relief being sought. The reasons for seeking the AUP Rules with appropriate modifications is simply to benefit from the rigorous process that the AUP rules have been through, and this is a neighbouring local authority, with a shared history, in terms of Franklyn DC and its Legacy Provisions.

9.3 The Legacy and new AUP Provisions have been endorsed by the Courts in *Cabra* and other cases and by the Middlemiss expert witnesses before the Panel. Each

witness has decades of experience their respective fields and, they are familiar with undertaking enhancement subdivision, rural development and land management. The grounds that have been raised by the s 42 A Report writers to reject the relief being sought are not new, and have been well traversed in the Courts for over 20 years, and largely rejected. It is disappointing, and costly, to have to revisit the same old arguments in these proceedings.

9.4 This Panel is in the fortunate position of being able to use as a precedent the findings on the facts and the law, from various Courts, that have endorsed provisions adopting the same principles as the Middlemiss and Buckland relief. Yes, there will be adjustments for the Waikato District, and we have suggested some ourselves. These types of provisions have been found to protect and enhance biodiversity and ecological values, enable people to provide for their social and economic wellbeing and satisfy the requirements of the Act in terms of s 32.

10. Evidence

10.1 In the Opening Hearing for Middlemiss the Panel heard evidence from:

a) Ross and Eleanore Webber – a South Head award winning example of ecological enhancement subdivision. Their property now features on the MfE website as an exemplar of biodiversity management. The Panel will recall that the evidence of the Webbers' was that but for the Legacy Rodney DP enhancement provisions they would not have been able to undertake the scale of work achieved on their property. Unless the Panel approves the Middlemiss relief it will not incentivise more Waikato landowners to be exemplars in the future.

b) Shane Hartley provided expert Planning evidence in the Opening Hearings but has undertaken substantially more analysis and work on the provisions for this hearing.

10.2 Middlemiss and the Buckland Group now call the following experts to provide evidence to the Panel;

a) Farming and land management – Steve McCowan (Middlemiss and Drumlea Farms)

b) Ecology – Dr Vaughan Keesing

c) Rodney enhancement examples – Myles Goodwin

d) Economics and development – Adam Thompson

e) Surveying and local examples – Craig Forrester – The Panel will have heard evidence in the morning of the 30th as part of The Surveying Company submission, and Middlemiss and Buckland formally adopt Mr Forrester's evidence for their own presentation.

f) Landscape amenity values and 95 Jericho Road – Rob Pryor

g) Planning and the detailed rule provisions – Shane Hartley

10.3 Counsel would welcome questions.

DATED at **AUCKLAND** this *28th* day of September 2020

Middlemiss Farm Holdings Ltd
The Buckland Landowners Group
by their barrister and duly authorised agent

Peter Fuller

Peter Fuller
Barrister
Quay Chambers

APPENDIX 1

MIDDLEMISS AND BUCKLAND PROPOSED PROVISIONS – 27 SEPTEMBER 2020