

**BEFORE THE HEARING COMMISSIONERS AT WAIKATO DISTRICT
COUNCIL**

UNDER the Resource Management Act 1991
IN THE MATTER of hearing submissions and further submissions on the
Proposed Waikato District Plan

**SUBMISSIONS OF COUNSEL FOR SUBMITTER #368 IAN MCALLEY:
INFRASTRUCTURE
14 OCTOBER 2020**

Next Event Date: Hearing 22 - Tuesday 20 October

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Te Kauwhata Structure Plan and Te Kauwhata West Residential Area:

- 1 The (operative) TKWLZ and relevant provisions, including Urban Design Guide, were established following a Council-led Structure Planning process and the resolution of two appeals to the former Proposed Waikato District Plan.¹ The Environment Court granted the rezoning of the majority of the Structure Plan area, incorporating a new Te Kauwhata West Living Zone into the framework of the OWDP, Living Zone and Te Kauwhata West Ecological Zone. We have previously provided a timeline of events relevant to that planning process and a copy is **attached**² to these submissions for ease of reference.
- 2 The references to the TK Structure Plan currently sit under Chapter 21, Schedule 21B and Appendix A of the OWDP.
- 3 The PWDP as notified does not include the Structure Plan. The majority of provisions previously applying to the Structure Plan area have been removed in the notified version of the PWDP (along with the Structure Plan itself), however specific reference to the TK Structure Plan is retained in some rules and provisions. For example in the Infrastructure Chapter (14) Rule 14.12.1.6(1)(f) and Figures 14.12.5.19, 14.12.5.20, 14.12.5.21.
- 4 Waikato District Council (**Council**) has provided no assessment as to why the Te Kauwhata West area should be treated any differently from the standard residential zone. The s 32 report does not include any evaluation about the Structure Plan and/or about the Te Kauwhata West Residential area. The submitter argues that the Structure Plan should be removed and Te Kauwhata West should now be fully integrated into the general Residential Zone.

¹ *Te Kauwhata Action Group Incorporated v Waikato District Council* [2012] NZEnvC 83, *Te Kauwhata Action Group Incorporated v Waikato District Council* [2012] NZEnvC 192

² Attachment 1.

- 5 Structure plans do not have any explicit legal status or statutory effect unless they are incorporated in a statutory planning document such as a district plan through policies, rules, or specific zoning.³ Structure plans that are not included in the district plan may otherwise be considered as “non-statutory” plans but will carry less legal weight as they have not been subject to the public consultation process that a district plan change or variation is subject to. The Environment Court in *Auckland Memorial Park Ltd v Auckland Council*⁴ considered the Silverdale South Structure Plan and its non-statutory origin. In this case the appellant had appealed a district plan change introduced by Auckland Council to rezone a parcel of land from countryside living rural to industrial. The Court balanced the proposed plan change against the current statutory documents at the time, in particular, the operative district plan and held that the structure plan was of little significance or help, especially as it was some 14 years old.⁵ The Court also noted that the non-statutory origin of the plan also meant that it was not a document to be considered under s 74(2)(b)(i) of the RMA.⁶
- 6 The TK Structure Plan is 10 years old and although it is present in the WODP and currently has statutory effect, the failure of the TK Structure Plan (or a variation of it) to be notified in the WPDP effectively means that the TK Structure Plan has been demoted to a “non-statutory” plan, which has considerably less weight than if a structure plan was to be included in the District Plan.
- 7 This gives rise to the point of uncertainty in the WPDP insofar as the TK Structure Plan is concerned. The Courts have consistently directed that if a rule is unclear it may be void for uncertainty.⁷ Having rules in a District Plan, which have statutory effect, which reference a plan which no longer has statutory effect by virtue of not being notified, does not give the public

³ See *Malory Corporation v Rodney District Council* [2010] NZRMA 392 at [13].

⁴ *Auckland Memorial Park Ltd v Auckland Council* [2014] NZEnvC 9

⁵ At [70(f)].

⁶ At [70(f)].

⁷ See for example *Murray v Tasman DC* W058/94 (PT).

confidence that a system exists which can achieve clear environmental outcomes.

- 8 The process set out in Schedule 1 of the RMA must be followed to incorporate a structure plan into a district plan. Furthermore, it must be supported by a robust s 32 evaluation that explains its inclusion. The main purpose of the s 32 evaluation is to ensure that the Council has adequately assessed that the particular proposal is the 'most appropriate' way to achieve the purpose of the Act.
- 9 The notification of a proposed district plan also allows local authorities to facilitate a consultative procedure whereby submitters in the District have a chance to comment on proposed provisions before they become effective. We are not aware that any submitter seeks to have the TK Structure Plan introduced into the PWDP and we argue that it is a document that was not formulated in accordance with the regional or national policy direction that now applies in relation to the provision of housing.

National Policy Statement on Urban Development 2020

- 10 In particular we note that the National Policy Statement on Urban Development 2020 (NPS UD) came into force on 20 August and identifies Waikato District as a Tier 1 local authority. Part 4 of the NPS UD which relates to timing states that every Tier 1 local authority must amend its district plan to give effect to the provisions of the NPS as soon as practicable.
- 11 The NPS UD has specific policies (for example Policy 3d) requiring plans to enable density of urban form commensurate with the relative housing demand in a location. It is not logical that there are different levels of housing demand in Te Kauwhata that warrant residential subzones with different density limits. When that outcome is matched with a density that

falls below that anticipated in the RPS,⁸ in our submission it is clear that the TK West Structure Plan and the resulting separate provisions for the TK West Residential Zone are no longer relevant to the planning environment or to the PWDP. A table showing the Density Rules and Outcomes applying to the TKL site is **attached**.⁹

- 12 Policy 7 of the NPS UD requires Tier 1 and 2 local authorities to set housing bottom lines for the short-medium and long-term in their regional policy statements and district plans. Again there is no evidence to explain why a lower density target is anticipated in the TK West Residential area and it is unclear whether that density is intended to be a housing bottom line for the district or area.
- 13 District plans are required to give effect to all national policy statements.¹⁰ The phrase “give effect to” means “implement”. It is a strong directive that creates a firm obligation on the part of those subject to it.¹¹ The requirement to “give effect to” national policy statements means that they are more than a list of “potentially relevant considerations, which will have varying weight” under different circumstances.¹² As a result, the direction of the NPS UD should be given weight when considering provisions in the WPDP which direct urban development.
- 14 We reject the comment in the s 42A report that this is an attempt to re-litigate road standards and the requirement for swale drainage. The point of these submissions is to bring TK West into line with the provisions that apply within Residential Zones in the district instead of having an arbitrary and unnecessary subset that applies only in Te Kauwhata West.

⁸ RPS Policy 6.15 sets a target of 12-15 households per hectare in Te Kauwhata. The TK West Residential Zone allows a maximum of 8 households per hectare using the TKL site as an example.

⁹ Attachment 2.

¹⁰ Resource Management Act 1991, s 75(3).

¹¹ *Environmental Defence Society Inc v The New Zealand King Salmon Company Ltd* [2014] NZSC 38 at [77].

¹² At [83].

- 15 As mentioned above, the s 32 report does not include any evaluation about the Structure Plan and/or about the Te Kauwhata West Residential area. In our submission, there is no basis to treat the Te Kauwhata West area differently from the general residential zone.
- 16 This is a new District Plan. Making submissions to the Proposed District Plan is not only expected as part of the normal planning process, it is the only way that people can challenge and change the PDP between notification and rules taking effect. The Submitter is challenging the road standards that apply to TK West because:
- (a) There is no rationale for them in the PDP;
 - (b) There is no rationale for them in the s 32 report; and
 - (c) There is no rationale in the s 42A report.
- 17 Just because there was formerly a Structure Plan in place to guide the transition of land from rural to residential does not mean that the provisions of that Structure Plan get frozen for all time irrespective of changes to the superior planning documents. The District Plan review process is precisely the time and mechanism for change of development controls that apply to specific sites if the policy and planning environment has also changed. We say that it has.
- 18 We have previously noted that the Residential Zone provisions as notified are contrary to the requirements of the Waikato Regional Policy Statement (**WRPS**), in particular, policy 6.15 – density targets for Future Proof area of the WRPS. Policy 6.15 sets out 12 – 15 households per hectare as the average gross density target for Te Kauwhata. The Te Kauwhata West Residential Area proposed minimum and average lot size will not achieve the applicable outcomes sought in terms of residential density under policy 6.15 of the WRPS. As a result, the PWDP will not give effect to the WRPS.
- 19 In our submission, the outcomes identified in Future Proof and incorporated in the WRPS of achieving a minimum residential density of

12 – 15 households per hectare in the Residential Zone must be achieved to enable growth across the region to be adequately managed and provided for. We can find no consideration or reasoning within the PWDP of the associated s 32 as to why in Te Kauwhata West the clear density direction of the Regional Policy Statement (and the NPS UD) should not be given effect to.

20 We also note that any reference to the Structure Plan is referring to a document that is now 10 years old. The Structure Plan does not align with the WRPS and as such, it is a document that is out of date and should not be relied upon.

21 For the reasons set out above, it is submitted that the specific set of provisions for Te Kauwhata West Residential Area should be removed and standard residential zone provisions should apply (i.e. 16.3.6 re Building Coverage and 16.4.3 regarding subdivision in Te Kauwhata West – minimum subdivision lot size in this area should be the same as the standard residential zone).

22 We note that the National Planning Standards which came into force on 3 May 2019 have the following provision in Chapter 6: Introduction and General Provisions Standard

How the policy statement or plan works

5. *If the following matters are addressed, they must be located in the Statutory context chapter:*

- a. *a list of all RMA planning documents relevant to the region or district, and how they relate to each other and to the policy statement or plan*
- b. *how Māori and Treaty of Waitangi matters in Part 2 of the RMA including but not limited to sections 6(e), 6(f), 6(g), 7(a) and 8, are addressed*
- c. *information or a reference and link to information, required by any existing or pending Treaty of Waitangi settlement legislation or related statutory documents*
- d. *a list of other plans that are relevant to the context or content of the policy statement or plan under sections 61(2) and (2A), 66(2) and (2A) and 74(2) and (2A) of the RMA.*
- e. *other legislation that directs changes to an RMA policy statement or plan.*

- 23 We accept that the PWDP was not prepared according to the National Planning Standards and does not have a Statutory Context Chapter, however the intent of the NPS is relevant. Where a District Plan proposes to rely on another plan it should specifically reference that plan for clarity and certainty.¹³ The PWDP does not do so and in our submission, to incorporate the TK Structure Plan into the PWDP without consultation and without any submission requesting that outcome would not be consistent with providing certainty. The National Planning Standards essentially articulate the process to be followed as set out in the First Schedule and support our argument that neither the Structure Plan itself nor the sub-zones it refers to should be included purely as a 'roll-over' without proper consideration and assessment against and alignment to higher order policies that have since changed.
- 24 Schedule 1AA RMA was inserted into the RMA by the RMAA 2005. Schedule 1AA specifically allows for the incorporation of documents by reference in National Environmental Standards, National Policy Statements and the New Zealand Coastal Policy Statement.
- 25 In our submission the fact that Schedule 1AA has been inserted into the Act to allow for the incorporation of other documents into these planning instruments implies that that such reference is otherwise not valid, but for other explicit statutory provisions which provide as such. In other words, a structure plan does not become part of the District Plan just because a rule title refers to it. It must be formally included and there is no equivalent to Schedule 1AA to allow for that casual reference.
- 26 Further, the RMA states that material can only be incorporated "by reference" into a plan or a proposed plan if it is:

Schedule 1 Part 3

(30)

¹³ For example, see in the notified version of the WPDP, Appendix 8 – *Rangitahi Structure Plan*.

The following written material may be incorporated by reference in a plan or proposed plan:

(a)

standards, requirements, or recommended practices of international or national organisations:

(b)

standards, requirements, or recommended practices prescribed in any country or jurisdiction:

(c)

any other written material that deals with technical matters and is too large or impractical to include in, or print as part of, the plan or proposed plan.

In our submission the TK Structure Plan does not fall into any of the categories in clause 30. Neither has the requisite consultation been undertaken that is required by clause 34 of the First Schedule: Part 3.

- 27 In summary, the TK Structure Plan is:
- (a) Not formally included in the PWDP;
 - (b) Not referenced in the s 32 Reports supporting the PWDP;
 - (c) Not prepared pursuant to national and regional policies directing residential growth;
 - (d) Not reference material that fits the description in clause 30 of the First Schedule Part 3; and
 - (e) Not part of any separate consultation required for reference material pursuant to Clause 34.

Policy 6.5.2

- 28 The submitter seeks a new policy (ix) that acknowledges the relationship of the long terms goals and advantages of an efficient, effective and integrated land transport network with the likelihood of adverse effects on the environment through the change that construction will bring. The new policy introduces acknowledgement that those short term effects on character, amenity and landscape (in particular) may be mitigated to

provide for long term positive effects. The wording proposed responds to the objective where it requires adverse effects arising from the construction, maintenance and operation of the transport network to be “managed” rather than avoided. There are no policies in 6.5.2 that go to management of adverse effects rather than avoidance.

- 29 The submitter seeks to introduce a new policy and we propose a revised wording that more clearly relates to Objective 6.5.1 as follows:

6.5.2 – Construction and operation of the land transport network

“(ix) Management of temporary adverse effects arising from the construction, maintenance and operation of the transport network in order to give effect to this Policy.”

Conclusion

- 30 In conclusion, Ian McAlley:

- (a) Seeks amendments to the provisions concerning Infrastructure in the WPDP as per these submissions.

Dated: 14 October 2020



J B Forret and P Kaur

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