**BEFORE THE INDEPENDENT HEARINGS PANEL**

**THE PROPOSED WAIKATO DISTRICT PLAN (STAGE 1)**

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| **UNDER** | the Resource Management Act 1991 ("**RMA**") |
| **IN THE MATTER OF** | hearing submissions and further submissions on the Proposed Waikato District Plan (Stage 1)<br>**Topic 22: Infrastructure and Energy** |
| **BY** | **WATERCARE SERVICES LIMITED**<br>Submitter |

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# OPENING LEGAL SUBMISSIONS OF COUNSEL FOR WATERCARE SERVICES LIMITED

**Dated: 20 October 2020**

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## 1. INTRODUCTION

**1.1** These legal submissions are presented on behalf of Watercare Services Limited (**Watercare**) in support of its submission and further submission on the Proposed Waikato District Plan (**PWDP**).

**1.2** Watercare is a council-controlled organisation (**CCO**) of Auckland Council that is:

(a) Auckland's municipal water and wastewater supplier, with a number of important water and wastewater assets serving Auckland and the North Waikato, located in the Waikato District;

(b) the provider of bulk water and wastewater services to the Tuakau and Pokeno communities through a bulk supply agreement with Waikato District Council (**WDC**); and

(c) responsible for the operation and maintenance of WDC's water, wastewater and stormwater services (including the re-consenting of existing assets and the consenting of new assets) under an agreement with WDC.

**1.3** Watercare's legal submissions and evidence for this hearing are presented in its capacity as Auckland's municipal water and wastewater supplier and as the supplier of bulk water and wastewater services to Tuakau and Pokeno only. The submissions and evidence are not presented in Watercare's capacity as the manager of WDC's water, wastewater and stormwater assets.

**1.4** Watercare considers that the provisions of the PWDP as currently proposed[1] are likely to result in significant difficulties consenting water treatment plants, wastewater treatment plants and above ground reservoirs in Identified Areas.[2]

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1 As set out in the section 42A Report.

2 Identified Areas are defined in 14.1 of the PWDP to include Significant Natural Areas, Outstanding Natural Features, Outstanding Natural Landscapes, Outstanding Natural Character Areas and Heritage Precincts.

**1.5** Watercare seeks:

(a) amendments to the policy framework to enable infrastructure to locate in Identified Areas where there is a functional or operational need for this. It seeks a strong policy directive to first avoid, then mitigate or remedy adverse effects on the values of the Identified Area to the greatest extent practicable, and offset any remaining significant residual adverse effects that cannot practicably be avoided, remedied or mitigated;[3]

(b) the activity status of water treatment plants, wastewater treatment plants and above ground reservoirs within Identified Areas under Rule 14.11.4 be changed from non-complying to discretionary; and

(c) the Panel adopt the permitted activity thresholds for vegetation clearance within SNAs proposed in the evidence of Ms Foley on behalf of the Waikato Regional Council.[4]

## 2. EVIDENCE

**2.1** The following evidence has been lodged on behalf of Watercare:

(a) a statement of primary evidence by Ms Ilze Gotelli, Head of Major Developments at Watercare; and

(b) a statement of primary evidence and a statement of rebuttal evidence by Mr Christopher Scrafton, a consultant planner.

**2.2** Ms Gotelli and Mr Scrafton have both prepared brief highlights packages to assist the Panel.

3 See Appendix 2 to the Evidence of Mr Scrafton.
4 See paragraphs 3.3-3.5 of Mr Scrafton's Statement of Rebuttal Evidence, where he indicates his support.

## 3. WATERCARE AND ITS INTERESTS IN THE WAIKATO DISTRICT

**3.1** As explained in greater detail in the evidence of Ms Gotelli, Watercare:[5]

(a) is a CCO 100% owned by Auckland Council, responsible for the provision of municipal water and wastewater services;

(b) owns and operates the following key water and wastewater infrastructure in the Waikato District, used to service Auckland and the North Waikato:

(i) the Waikato Water Treatment Plant at Tuakau, and the associated resource consents to take water from the Waikato River for municipal supply;

(ii) the Mangatangi and Upper Mangatawhiri dams and storage lakes in the Hunua Ranges; and

(iii) the Pukekohe Wastewater Treatment Plant which receives and treats wastewater from Pukekohe, Patumahoe and Buckland in Auckland, as well as Pokeno and Tuakau;

(c) provides bulk water and wastewater services to Tuakau and Pokeno under a bulk supply agreement with WDC; and

(d) manages all WDC water, wastewater, and stormwater assets under an agreement entered into with WDC in October 2019. Under this agreement WDC maintains ownership of the assets and is (unless otherwise agreed) the consent holder. Watercare is responsible for all customer facing activity, and the operation, maintenance and renewal of all existing WDC water and wastewater assets – including consenting.

5 Evidence of Ms Gotelli, paragraphs 3.1 - 3.14.

## 4. AMENDMENTS TO THE PWDP SOUGHT BY WATERCARE

**4.1** Watercare considers that the PWDP provisions covered by Hearing 22, if not amended, are likely to result in significant difficulties when consenting water and watewater infrastructure given that:

(a) as outlined in Ms Gotelli's evidence, water and wastewater infrastructure often has a functional need to locate next to rivers, lakes, the coastal marine area or in forested catchments.[6] These are areas which the PWDP has often proposed be mapped as Identified Areas;[7]

(b) under Rule 14.11.4 water treatment plants, wastewater treatment plants and above ground reservoirs within Identified Areas require resource consent as non-complying activities;

(c) with the policy framework currently proposed, and given the potential for infrastructure in Identified Areas to result in more than minor adverse effects, Mr Scrafton considers such applications will "generally struggle" to pass either of the gateway tests for non-complying activities in section 104D of the RMA.[8]

**4.2** To address this, Watercare seeks the amendments to the PWDP set out in Attachment 2 to Mr Scrafton's evidence, and summarised below.

***Proposed amendments to the policy framework***

**4.3** Mr Scrafton generally supports the intent of Identified Areas. However, given their extent, he considers amendment is required to the policy framework to provide greater recognition of the functional and operational needs of infrastructure to locate in Identified Areas. Amending the policy framework in this way will, in his view, avoid the unintended consequence of hindering the provision of essential

6 Statement of Evidence of Ms Gotelli, paragraph 4.5.
7 Statement of Primary Evidence of Mr Scrafton, paragraph 4.3.
8 Statement of Primary Evidence of Mr Chris Scrafton, paragraph 8.3.

infrastructure, such as that associated with water and wastewater services.[9]

**4.4** Mr Scrafton recommends:[10]

(a) An additional policy (his proposed Policy 6.1.X) to "*Enable infrastructure in Identified Areas where there is a demonstrated functional or operational need*";

(b) A further policy (his proposed Policy 6.1.Y) to require infrastructure that has a functional or operational need to be located within an Identified Area to first avoid adverse effects on the values of the Identified Area to the greatest extent practicable; where adverse effects cannot be practicably avoided, then remedy or mitigate those effects to the greatest extent practicable; and then offset any remaining significant residual adverse effects that cannot be practicably avoided, remedied or mitigated; and

(c) That similar policies be included in Chapter 2 Tangata Whenua, Chapter 3 Natural Environment and Chapter 7 Historic Heritage, given Chapter 14 provides that the objectives and policies of those Chapters apply to infrastructure activities undertaken in Identified Areas.[11]

***Discretionary Activity Status for Infrastructure in Identified Areas***

**4.5** Rule 14.11.4 requires water treatment plants, wastewater treatment plants and above ground reservoirs located in Identified Areas to obtain a resource consent as a non-complying activity.

**4.6** Mr Scrafton considers such applications are likely to "generally struggle" to pass either of the gateway tests under section 104D of the RMA.[12]

9 Statement of Primary Evidence of Mr Chris Scrafton, paragraph 4.5.
10 His full recommended changes are set out in Appendix 2 to his Statement of Primary Evidence.
11 The changes proposed by Mr Scrafton are set out in full in Appendix 2 to his Statement of Primary Evidence.
12 Statement of Primary Evidence of Mr Scrafton, paragraph 8.3.

**4.7** He considers the activity status for water treatment plants, wastewater treatment plants, and above ground reservoirs located in Identified Areas should instead be fully discretionary because:

(a) with fully discretionary activity status, applications would not be subject to the gateway tests in section 104D of the RMA. However, they would still be subject to assessment against a "full suite" of effects and other considerations under section 104 of the RMA;

(b) water treatment plants, wastewater treatment plants and above ground reservoirs are regionally significant infrastructure under the Waikato Regional Policy Statement (**RPS**), and there is a clear direction in the RPS to have particular regard to the benefits of regionally significant infrastructure;

(c) the National Policy Statement on Urban Development Capacity 2020 (**NPS-UD**) requires that councils provide sufficient development capacity. The ability to do this is contingent on there being adequate development infrastructure in place;

(d) non-complying activity status is inconsistent with the higher order policy direction in the NPS-UD and RPS;

(e) with his proposed policy amendments, the protective requirements of objectives and policies relating to Identified Areas can generally be achieved while providing for the functional and operational needs of infrastructure; and

(f) Overall, the objectives and policies of the plan can be achieved by discretionary activity status. This is a more efficient and effective approach than non-complying activity status in terms of section 32(1)(b)(ii) of the RMA.[13]

13 Statement of Rebuttal Evidence of Mr Scrafton, paragraph 5.4, and his Statement of Primary Evidence, paragraphs 8.1 to 88.

***Permitted Activity Thresholds for vegetation clearance in SNAs***

**4.8** Ms Foley on behalf of the Waikato Regional Council proposes amendments to Rule 14.3.1.4(1) of the PWDP to include permitted activity standards for vegetation clearance within SNAs.[14]

**4.9** Mr Scrafton supports these proposed amendments, for the reasons given in Ms Folely's evidence, and in his rebuttal evidence.[15]

## 5. NON-COMPLYING VERSUS DISCRETIONARY ACTIVITY STATUS

**5.1** Ms Burns in her evidence on behalf of the Director-General of Conservation indicates she supports the retention of non-complying activity status for infrastructure within Identified Areas stating that:[16]

> *The current non-complying activity status allows for consideration of a full suite of effects and provides additional triggers on any consent application of this nature. Allowing a less stringent activity status would not appropriately recognise the potential for significant adverse effects on identified areas and be inconsistent with national and regional policy direction.*

**5.1** In my submission, the principles relevant to whether an activity should be a discretionary or non-complying activity are usefully summarised in *Royal Forest and Bird Protection Society of New Zealand Inc v Whakatane District Council* [2017] NZEnvC 051.[17]

**5.2** With respect to the use of non-complying activity status, rather than focusing on more general notions about what the use of non-complying activity status might signal,[18] the Court found the better approach is to focus on the statutory consequences of an activity being classified as non-complying or discretionary. In this regard the Court noted that:

> *While a non-complying activity must first pass one of the thresholds set out in s 104D, if it does so then in terms of s 104B it is to be*

14 As set out in the evidence of Ms Foley, paragraphs 16-18.

15 See paragraphs 3.3-3.5 of Mr Scrafton's Statement of Rebuttal Evidence.

16 Evidence of Ms Burns, paragraph 7.10.

17 An appeal relating to the activity status in the Whakatane District Plan for harvesting of Manuka and kanuka in Significant Biodiversity Sites, and whether this should be non-complying, or discretionary.

18 For example, it providing an indication that an activity ought not occur, and discretionary activity status indicating an activity will usually be acceptable, subject to conditions.

*considered on the same statutory basis as a discretionary activity. At that stage, both types of activities must be considered in terms of the matters set out in section 104 of the Act, including having regard to any effects on the environment of allowing that activity and any relevant provisions of the planning documents listed in s 104(1)(b). Typically, the most relevant provisions will be the objectives and policies which bear most directly on the activity or others of like nature and on the environmental context in which the activity is proposed to be established.*[19]

**5.3** Further, the Court also considered that when deciding what activity status should apply, the least restrictive activity status that will achieve the purpose of the Act and the objectives of the Plan should be adopted. The Court stated that:

> *...where the purpose of the Act and the objectives of the Plan can be met by a less restrictive regime then that regime should be adopted. Such an approach reflects the requirement in section 32(1)(b)(ii) to examine the efficiency and effectiveness of the provision by identifying, assessing and, if practicable, quantifying all of the benefits and costs anticipated from its implementation. It also promotes the purpose of the Act be enabling people to provide for their well-being while addressing the effects of their activities."*[20]

**5.4** In my submission, two key propositions flow from the principles expressed in *Royal Forest and Bird Protection Society*, and the evidence of Mr Scrafton.

**5.5** First, as a matter of law, the Panel is required to adopt the "least restrictive" activity status that will achieve the purpose of the Act and the objectives of the Plan. The evidence before the Panel from Mr Scrafton is that this is fully discretionary activity status. Accordingly, this is the activity status that should be adopted.

**5.6** Second, it is clear from *Royal Forest and Bird Protection Society* that discretionary activity status does not create any presumption that consent will be granted. Discretionary activities require assessment

19 Paragraphs [79] - [80] of the decision.
20 Paragraph [59] of the decision.

against the "full suite" of effects and other considerations under section 104 before a decision-maker may reach a determination as to whether or not consent should be granted.

**5.7** This means if discretionary activity status is adopted, any applications for resource consent for water treatment plants, wastewater treatment plants, or above ground reservoirs in Identified Areas will need to:

(a) Provide a careful assessment of the effects of the activity on the environment under section 104(1)(a) of the RMA; and

(b) Be assessed against all relevant plan provisions under section 104(1)(b), including those relating to the Identified Area. Mr Scrafton's recommended policies would require an application to demonstrate it has a functional or operational need to locate in the Identified Area. It would also need to demonstrate that with respect to adverse effects on values of the Identified Area that the application has avoided, mitigated or remedied adverse effects to the greatest extent practicable; and then offset any remaining significant residual adverse effects that cannot be practicably avoided, remedied or mitigated.

**5.8** Overall, in my submission discretionary activity status, with the policy framework Watercare proposes, sets an appropriately "high bar" for the consenting of water treatment plants, wastewater treatment plants and above ground reservoirs that have a functional or operational need to locate within Identified Areas. This is consistent with the recognition given to those values under Part 2 of the Act. However, it also provides an appropriate consenting pathway for essential infrastructure needed to service existing communities, and provide for growth.

## 6. CONCLUSION

**6.1** Watercare respectfully requests the Panel adopt the amendments sought by Watercare, for the reasons set out in its evidence and in these legal submissions.

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Counsel for Watercare Services Limited
20 October 2020