

29 September 2020

Proposed Waikato District Plan – Independent Hearings Panel
Sent via email: districtplan@waidc.govt.nz
Attention: Fletcher Bell (Hearing Coordinator/DP Administrator)

Letter to be tabled at Hearing 22: Infrastructure

Dear Fletcher

The purpose of this letter is to provide a response on behalf of Annie Chen (89) (submitter) to the recommendations made in the s42A report for Hearing 22 (Infrastructure). It is sought that this letter is tabled for the Hearing Commissioners' consideration.

It is acknowledged that no submission points were made that were specifically coded to the infrastructure chapters but notwithstanding this, the submitters have an interest in rezoning a significant portion of their land on Munro/Helenslee Road in Pokeno to Residential. Whilst this will be fully addressed at Hearing 25 (Zone Extents), the future development of the area is significant and will strongly interact with the surrounding land transport network.

The relevant infrastructure provision is addressed below:

s42A report recommendation

Chapter 6: Infrastructure and Energy

6.4.4 Policy – ~~Road and rail~~ Land transport network

- (a) ~~Discourage~~ Avoid effects of subdivision, use and development that would compromise:
- (i) ~~The road function, as specified in the road hierarchy, or the safety and efficiency of the roading network;~~
 - (ii) The access by emergency services and their vehicles; and
 - (iii) The safety and efficiency, including the maintenance, upgrading, development and operation of the ~~railway~~ land transport network
- (b) Avoid reverse sensitivity effects on the land transport network through setbacks and design controls for new residential and other noise sensitive activities established in proximity to existing or planned transport corridors.

Our response

Of particular interest to the submitters is the recommended amendments to the policy to replace the word 'discourage' with 'avoid' in (a) and the new insertion in (b) which also contains the word 'avoid'. The reasons for the submitters opposition to these changes is based on the following:

Case law

There is established case law on the impact of 'avoid' provisions in the planning instruments most notably in *King Salmon* but more recently in *Environmental Defence Society v Otago Regional Council* [2019] NZHC 2278. The outcome of both cases confirms that the weighting of the word 'avoid' in avoidance provisions is absolute. In the case of Policy 6.4.4 (b) this would mean that any reverse sensitivity effect (regardless of scale) would have to be avoided otherwise the activity would be contrary to the policy.

Whilst the need to protect the land transport network from adverse effects is acknowledged, the insertion of avoidance policies into planning instruments is not something to be done lightly. In this instance, such a change would be overly burdensome on neighbouring landowners and how they use their land with any reverse sensitive effect on the land transport network going against the policy as currently drafted in the s42A report.

Alternative amendments

Policy 6.4.4 would be better served containing a qualifier as to the scale of effects that should be avoided. This could be easily achieved as shown below with the insertion of the word 'significant'. This makes it clear that only significant reverse sensitivity effects are those which are sought to be avoided through the stated mechanisms and not just any reverse sensitivity effects that may arise.

Chapter 6: Infrastructure and Energy

6.4.4 Policy – ~~Road and rail~~ Land transport network

- (a) ~~Discourage~~ Avoid effects of subdivision, use and development that would compromise:
- (i) The road function, as specified in the road hierarchy, ~~or the safety and efficiency of the roading network;~~
 - (ii) The access by emergency services and their vehicles; and
 - (iii) The safety and efficiency, including the maintenance, upgrading, development and operation of the ~~railway~~ land transport network
- (b) Avoid significant reverse sensitivity effects on the land transport network through setbacks and design controls for new residential and other noise sensitive activities established in proximity to existing or planned transport corridors.

There are other examples that also show this approach to drafting. A number of the planning provisions from the Auckland Unitary Plan (Operative in Part) (AUP-OP) infrastructure chapter are provided below with key phrasing underlined:

Examples from the AUP-OP

Chapter E26 Infrastructure

Objective E26.2.1 (6)

- 6) Infrastructure is appropriately protected from incompatible subdivision, use and development, and reverse sensitivity effects.

Policy E26.22 (3)

Adverse effects on infrastructure

- 3) Avoid where practicable, or otherwise remedy or mitigate adverse effects on infrastructure from subdivision, use and development, including reverse sensitivity effects, which may compromise the operation and capacity of existing, consented and planned infrastructure.

Policy E26.22 (14)

Road network

- 14) Require road network activities to:
- a) avoid, remedy or mitigate adverse effects on residential or other sensitive activities, including effects of vibration, noise, glare and vehicle emissions;
 - b) avoid, remedy or mitigate adverse effects on amenity values of adjoining properties and the streetscape; and
 - c) maintain or enhance the safety and efficiency of the transport network.

As the examples show, the use of the word 'avoid' is present in objectives and policies but it is not used in isolation. It is either followed by 'where practicable' to highlight that avoiding adverse effects is not always feasible/practicable or it is followed by 'remedy or mitigate' which are commonly used RMA terms allowing for these processes to be followed instead of avoidance.

Alternatively, the use of the word 'avoid' could be removed entirely with the Policy 6.4.4 amended to provide a more targeted management approach. This could include an amendment as below which swaps avoid for 'manage' which is a more flexible term that is not absolute in its effect.

Chapter 6: Infrastructure and Energy

6.4.4 Policy – ~~Road and rail~~ Land transport network

- (a) ~~Discourage~~ Avoid effects of subdivision, use and development that would compromise:
 - (i) The road function, as specified in the road hierarchy, ~~or the safety and efficiency of the roading network;~~
 - (ii) The access by emergency services and their vehicles; and
 - (iii) The safety and efficiency, including the maintenance, upgrading, development and operation of the ~~railway~~ land transport network
- (b) Avoid ~~Manage significant reverse sensitivity effects on the land transport network through setbacks and design controls for new residential and other noise sensitive activities established in proximity to existing or planned transport corridors.~~

Conclusion

The submitters appreciate the need for infrastructure to be sufficiently protected from adverse effects however, managing the relationship between the effects on infrastructure and the effects of infrastructure is a balancing act.

The planning provisions cannot be completely favourable towards infrastructure providers and vice-versa for infrastructure users/the general public who might otherwise impact infrastructure. Notwithstanding this, if the provisions were to be slightly more favourable to any one party one would suspect it would be the general public.

If you have any questions on this matter, please do not hesitate to contact Sir William Birch on (09) 237 0787 or via email sirwilliam@bslnz.com

Yours faithfully,



Sir William Birch

Registered Professional Surveyor

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