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 25 – Zoning Extents** **Tuakau**
PARTIES REPRESENTED	**MIDDLEMISS FARM HOLDINGS LTD** **BUCKLAND LAND OWNERS GROUP**

BUCKLAND AND MIDDLEMISS LEGAL SUBMISSIONS ON REZONING TUAKAU

12 May 2020

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MAY IT PLEASE THE PANEL

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 Country Living Zone (**CLZ)** and/or, a precinct overlay to be a receiver area for Transferrable Development Rights (**TDRs**).

2. Support for the relief sought is provided in the statements from the landowners and the expert evidence of Mr McCowan, Mr Thompson, Mr Forrester and Ms Nairn. The Buckland area, because it adjoins the expanding Auckland urban area, is an appropriate location to receive TDRs from the method that the submitters are seeking to introduce into the Waikato District Council Plan (**Plan**).

3. To briefly recap previous legal submissions (Opening and Rural Hearing 18) and the robust technical evidence that supported them, the parties seek to introduce objectives, policies, and rules to enable the ecological enhancement of the District through 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, and would provide for:

    a) Lots to be created and transferred to facilitate the amalgamation of fragmented tiles created historically on elite soils.

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

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

4. In terms of the detailed rules, the relief sought in the original Middlemiss submission requested provisions similar to those recommended by the Auckland Unitary Plan Hearings Panel in 2016. Mr Hartley **attached** his own “Draft” revised set of provisions to his evidence for the Rural Hearing

and I then **attached** an updated version as an Appendix to my legal submissions for Hearing 18.

5. Since the Rural Hearing, we now have the benefit of the Environment Court's final decision on the AUP provisions, in the *Cabra* Case, as **attached** to the Summary Statement of Mr Forrester (10 May 2021).

6. The identification of the Buckland area as a receiver for TDR titles is requesting no more than has been approved for similar land, and planning circumstances, in the Auckland Region. The Buckland Group land is literally a "stones throw" from the Auckland boundary. The final set of AUP objectives, policies, and rules, are the result of exhaustive examination by the AUP Hearings Panel and several Judges and Environment Court expert Commissioners, in multiple hearings at different jurisdictional levels. This inquiry lasted over 7 years and had benefitted from rulings on points of law, and robust cross examination of expert witnesses, for example.

7. The overwhelming conclusion that can be drawn, from this highly relevant precedent, is that the relief that Middlemiss/Buckland are seeking in these proceedings was found to meet the purpose of the Act. The arguments and evidence advanced by the Auckland Council in the *Cabra* case, that there should be no in-situ enhancement subdivision, and a restriction on TDR mechanisms, was rejected by the Courts.

8. However, virtually the same arguments and reasons against the Buckland proposal, as the Auckland Council unsuccessfully advanced in the *Cabra* case, have been used as justification in the s 42A Report recommendation to reject the Middlemiss/Buckland relief. This applies to the original Framework Report that recommended no additional Country Living zones, the Tuakau s 42A and the Rebuttal s 42A. Unfortunately this is not surprising considering the author of the s 42A Reports was a key adviser to the Auckland Council during the AUP Hearing process.

9. Regrettably, rather then update and modify her position, based on the *Cabra* enquiry and findings of the Environment Court, she has repeated what have been found to be "deficient" arguments. Her latest Rebuttal

post-dates the release of the *Cabra* final decision and I would have expected it to have been brought to the Panel's attention and referred to.

10. This is also not a "one off" decision of the Environment Court, and I previously traced a lineage of cases finding in favour of the relief sought stating with the *Di Andre* case from 1996, now 25 years ago (please refer to the Middlemiss original submission).

11. The s 42A Report author is recommending that the Panel effectively reject the rationale of the *Cabra* case. This raises the question of how the Environment Court would view the Council, if the relief sought is rejected, and this matter were appealed and ended up before the Court, quite probably with the same Judge as determined the *Cabra* case. Is the Council so confident that an area of land that boarders the Auckland Council, can be distinguished from land within the Auckland Region, that a completely different set of objectives, policies and rules should be applied to meet the purpose of the Act?

12. I could argue at length about the merits of the relief being sought, and provide a full RMA legal analysis, supported by the evidence of the witnesses for the submitters. However, both the Panel and I can share in the relief that this is not necessary, because there is a much simpler and more authoritative answer: *Cabra*.

13. The *Cabra* case addressed all the relevant legal and factual issues and arguments, including all of the matters claimed in the s 42A Report as reasons to reject the relief being sought. And if the Panel is wondering, in the AUP Hearings and in *Cabra*, the Auckland Council also argued that there was sufficient capacity of vacant lots in rural areas not to need any further entitlements. A figure of 10,000 was cited, which is more than the estimated vacant capacity in the Waikato (8,000).

14. As the Court in *Cabra* ruled, approaching the issue from the perspective of "capacity" was inappropriate as it overlooked the demonstrable environmental benefits arising from properly managed enhancement incentivized development in rural areas. These benefits include protection and restoration of degraded land and the amalgamation of titles on elite soil.

15. In my submission this Panel should not be misdirected by reasoning that has been found wanting by, respectfully, higher level jurisdictional decision makers. The s 42A Report author has not addressed the *Cabra* cases and the final provisions the Court endorsed. She has not explained how, presumably, the Environment Court erred in its decision, or, at least, provided some basis for distinguishing land on one side of a TA boundary from land on the other.

16. However, there are insufficient physical and planning differences to upset the *Cabra* findings on the law, and the facts, to the extent that the final provisions are not also applicable to the Waikato District. As per the previous submissions and evidence in Hearing 18, the need in the Waikato for restoration and enhancement is in fact higher than in the Auckland Region.

17. Regarding the Summary Statement of Mr Forrester, if it were considered by the Panel that the area of CSL sought at Buckland was too large, it could be reduced in the manner he suggests. Otherwise, the Panel is invited to consider the relief sought on its merits and even include it in the Plan as a "trial" area for the District to test the provisions, including TDRs, and monitor the outcomes to better inform future plan reviews.

18. *Di Andre* made it clear 25 years ago that if a district plan does not have provisions of the nature sought, it "should be amended to include them." The *Cabra* final provisions, and the extensive reasoning and evidence supporting them, are commended to the Panel for guidance, and as the most relevant precedent authority, for the relief being sought at Buckland.

19. The statements from landowners and the expert evidence of the witnesses for the submitters, I will not repeat as they are appearing before the Panel today. The submitters wish to call the statements and evidence from:

    a) Pire Brown

    b) Annabelle Johnson

    c) Nigel Tilley

    d) Steve McCowan – Rural Production

e) Adam Thompson - Economics

f) Craig Forrester – Surveying

g) Sarah Nairn – Planning

DATED at **AUCKLAND** this *12th* day of May 2021

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

Peter Fuller

Peter Fuller
Barrister
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