

Before Hearing Commissioners
at Waikato District Council

under: the Resource Management Act 1991

in the matter of: the Proposed Waikato District Plan

Between: **Mercury NZ Limited**

Submitter 730

and: **Waikato District Council**

Consent Authority

Opening Legal Submissions on behalf of Mercury NZ Limited

Dated: 26 September 2019

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OPENING LEGAL SUBMISSIONS – PROPOSED WAIKATO DISTRICT PLAN STAGE 1: MERCURY NZ LIMITED

May it please the Commissioners:

Introduction

- 1 These opening legal submissions are given on behalf of Mercury NZ Limited (*Mercury*) (submitter number 730), on the Proposed Waikato District Plan (*PWDP*). Mercury made primary and further submissions on Stage 1 of the *PWDP*.
- 2 The broad concerns raised in Mercury's submissions relate to Waikato District Council's (*Council's*) staged approach to the plan review. Mercury is concerned to ensure that decisions on the management and control of land use in the District (particularly change in land uses and intensification) are based on an accurate understanding of natural hazard risks, particularly flooding risks. Such an approach is obviously sound planning practice, but is also required under the Resource Management Act 1991 (*RMA*).
- 3 In a nutshell, while it does not directly impact Mercury, the staged approach towards the *PWDP* has resulted in Stage 1 proposing changes to the planning regime which may, after Stage 2 is released, turn out to be inappropriate.
- 4 For example, Stage 1 proposes that various areas be up-zoned for residential intensification. However, Stage 2 (Natural Hazards and Climate Change) may result in that land needing to be subject to controls to address flooding risk. The proponent of the up-zoning, Council, and ultimately the Commissioners, will all need to 'reassess' the Stage 1 proposal in that circumstance. Further, the Stage 2 provisions themselves will at that point also still be subject to submissions, which will need to be heard and considered. Quite how the reassessment, and integration between the two stages, will be undertaken jurisdictionally is not at all clear. At best, an inefficient process is proposed, at worst, it runs the risk of decision-making without full consideration of all relevant issues.
- 5 As the Commissioners may have seen from the evidence of Mr Stephen Colson circulated for Hearing 2 recently, Mercury understands that the Council proposes to effectively 'hold' relevant parts of the Stage 1 hearings and decisions until they can catch-up with Stage 2.
- 6 Mercury seeks that an additional step is added, so as to minimise inefficiencies and natural justice issues for submitters. This would involve, once the Stage 2 provisions are notified, the Council in conjunction with WRC, reconciling the Stage 1 and Stage 2 provisions on a catchment-wide scale, and depicting the potential conflicts on a spatial overlay. That overlay would be made available

to all Stage 1 submitters and the Commissioners. Such an approach would be consistent with those councils' statutory functions with respect to managing natural hazard risks under section 30 and 31 of the RMA.

- 7 Given the potential scale and importance of this issue, and the scope of Mercury's submissions which flow from it (including relief sought to withdraw Stage 1 in its entirety and re-notify with Stage 2), Mercury considers it fairest to raise this in the opening submissions hearing, so that all relevant parties are aware of it.

Mercury's role in the Waikato

- 8 Mercury owns and operates the Waikato Hydro Scheme. As part of the management of the Scheme, Mercury works closely with the Waikato Regional Council (WRC) (which is the Statutory Flood Manager) during periods of high flows.
- 9 The operation of the Hydro Scheme (largely through the Taupo Gates, but also through the hydro reservoirs further down the system) can alleviate some flood risk to downstream areas, as up to a certain level of inflow can be withheld for a period. However, at times during a high flow event, the volume of inflows into the system can be more than the design capacity, and therefore the Scheme is not physically able to prevent all flooding. The Waikato River, its catchment and tributaries are a major waterway, with significant inflows - flooding during times of high flows is a natural and expected occurrence. There will always be a need for the Waikato River to utilise the natural floodplains that exist downstream of Lake Taupo.
- 10 Flooding risk therefore remains. This risk needs to be well understood prior to designing a planning policy framework that manages and controls land use, and in particular, when undertaking the re-zoning of land.
- 11 Because of its role in the Waikato Hydro Scheme, Mercury is keen to ensure that urban growth in the Waikato District only occurs in locations where there is an acceptable or tolerable level of flooding risk exposure. However, ultimately, the responsibility for ensuring this lies with the Council and WRC.

Mercury's concerns with the staged approach to the PWDP

- 12 In its submissions on Stage 1, Mercury raised concerns about the staging of the PWDP. Mercury has been discussing this issue with the Council for many years (since 2004).
- 13 The staged approach that Council has elected to take, despite Mercury's opposition, means that the land use provisions of the PWDP (in Stage 1) are effectively being promulgated 'in isolation' from consideration of natural hazard issues such as flooding. In

particular, Stage 1 of the PWDP seeks to re-zone land without determining whether the uses contemplated are appropriate in light of:

- 13.1 Flood hazard modelling; and
 - 13.2 Planning provisions developed to manage the risks presented by such hazards (e.g. spatial layers, policies and rules).
- 14 While Mercury understands that the WRC flood modelling is now available via the Waikato Regional Hazards portal, it is not currently clear how the PWDP will respond. This will likely not be evident until Stage 2 is notified, which Mercury understands is not likely until March 2020.
- 15 Mercury is especially concerned that the outcomes of flood hazard modelling and mapping may require 'retrospective' amendments to the Stage 1 provisions, to ensure integration across the two stages. For example, up-zoning proposed in the PWDP or sought by a submitter, may, in simple terms, be in the wrong place. In particular, re-zoning downstream of flood-prone areas may be necessary (including potential further re-zoning of land that has only recently been re-zoned in Stage 1), to ensure that there is not unacceptable risk from identified flood hazards.
- 16 Mercury considers that the above scenario:
- 16.1 Is not an efficient use of time or resources, as it will likely result in unnecessary complexity and potential duplication of effort; and
 - 16.2 Risks creating avoidable opposition and challenges to the PWDP. Specifically, submitters' expectations as to the planning framework for the Waikato District, and anticipated uses of land may be set through Stage 1, and subsequently adjusted or overridden (only a short time later) through Stage 2.
- 17 Mercury is sensibly and properly raising this potential issue, primarily due to its role in operating the Waikato Hydro Scheme. It is not however, Mercury's responsibility to rectify this issue, in the event of conflict between the two stages. The Council elected to proceed with a staged plan review process, and the obligation now sits with the Council to ensure that the two stages come together in an integrated fashion.
- 18 Mercury recognises that as we embark on the first of the PWDP hearings, it would assist the Commissioners if Mercury could identify the scale of this potential problem. However, without the Stage 2 natural hazard provisions before us, it simply is not possible now for

Mercury to determine the extent of land use areas that may be affected, and whether potential flooding risk can be mitigated via the planning policy framework.

Mercury's current position

- 19 Mercury appreciates that the Council has elected to continue with the staged approach and is cognisant that there has been a long and drawn out process to reach the current stage of the PWDP. Many parties are understandably frustrated at delays and wish to ensure that the PWDP process is not delayed further.
- 20 Mercury supports any Council attempt to find a pragmatic solution that provides for integrated planning decisions around flood hazard issues. The Council's approach (as explained in paragraphs 23 and 24 of Ms Parham's opening legal submissions for the Council (dated 23 September 2019)) appears to be as follows:
- 20.1 Sequence the hearing of submissions relating to urban growth and land use intensification so that they follow the close of further submissions on Stage 2. These Stage 1 provisions can then be considered alongside the Stage 2 provisions;
- 20.2 If Stage 1 provisions require amendment as a result of Stage 2, and there is no scope within submissions to make those amendments, the Council will notify a variation to Stage 1 at the same time it publicly notifies Stage 2; and
- 20.3 Hold off on making any decisions on Stages 1 and 2 of the PWDP until the completion of hearings on both Stages (with the exception of Ohinewai), to enable integrated decision-making.
- 21 While this approach will help to reduce some of the issues with the staged approach, it glosses over the very real practical issues that submitters will face in reconciling new Stage 2 provisions with what they have already submitted on in Stage 1. Submitters have relied on the notified Stage 1 provisions, and may also have sought to change those provisions.
- 22 It is submitted that an additional step is needed in the Council's sequencing approach, so as to minimise inefficiencies and natural justice issues for submitters.
- 23 Once the Stage 2 provisions are notified, the Council, in conjunction with WRC, should reconcile the Stage 1 and Stage 2 provisions on a catchment-wide scale, and depict the potential conflicts on a spatial overlay. That overlay should be made available to all Stage 1 submitters and the Commissioners. Such an approach would be consistent with the councils' statutory functions with respect to managing natural hazard risks under sections 30 and 31 of the RMA.

- 24 It is through this exercise that Mercury and other submitters will get a better handle on the scale of potential flooding risk, which will help them to best respond (i.e. through evidence given at the relevant Stage 1 hearings, and/or via submissions made on Stage 2, for example). It is conceivable that the impact of Stage 2 provisions may be such that there are other parties who did not make a submission on Stage 1 that may have done so if the natural hazard and climate change provisions had been notified at the same time. The Commissioners will need to be alive to the potential natural justice issues that may arise here.

Mercury’s position with respect to the Stage 1 provisions

- 25 Overall, Mercury considers that, as currently formulated, and in the absence of the Stage 2 provisions, the PWDP:
- 25.1 Does not adequately discharge Council’s obligation under s6(h) of the RMA to recognise and provide for the management of significant risks from natural hazards;
 - 25.2 Does not achieve the Council’s ‘integrated management’ function and natural hazard functions, as required under sections 31(1)(a) and 31(1)(b) of the RMA;
 - 25.3 Does not meet requirements of s75(3)(c) of the RMA, which requires the Council to give effect to the requirements of the Operative Waikato Regional Policy Statement (*WRPS*);
 - 25.4 Is not consistent with s32 of the RMA to the extent that:
 - (a) The Stage 1 objectives do not achieve the purpose of the RMA, for the reasons above (s32(1)(a) RMA); and
 - (b) Accordingly, the Stage 1 provisions, as currently formulated, would not give effect to the (properly developed) objectives of the PWDP (s32(1)(b) RMA); and
 - 25.5 As a result of the above, does not accord with sound planning and resource management practice.
- 26 I address each of the above grounds in turn.

Section 6(h) RMA

- 27 The Council is required to recognise and provide for the management of significant risks from natural hazards, as a matter of national importance under section 6(h) RMA. This requirement has been in effect in the RMA since April 2017. The phrase “recognise and provide for” identifies the nature of the obligation on

the Council when implementing the principle of sustainable management.¹

Section 31 - Integrated management

28 Under sections 31(1)(a) and 31(1)(b) of the RMA, the Council also has the functions of establishing and implementing policies to achieve the integrated management of the effects of the land and resources in their district, and the control of the actual or potential effects of use, including the avoidance or mitigation of natural hazards.

29 The Environment Court has identified that the function of managing the effects of natural hazards is to be recognised by both regional councils and territorial authorities when preparing their respective plans.

30 There is a strong potential for 'dislocation' between the land use provisions in Stage 1, and future Stage 2 natural hazard provisions, particularly if the Council does not carefully reconcile the two stages, in the manner proposed by Mercury.

Giving effect to the Waikato Regional Policy Statement

31 The PWDP is required to give effect to the WRPS (section 75(3)(c) RMA). The Supreme Court has held that "give effect to" simply means "implement". It is a strong directive, creating a firm obligation.²

32 The WRPS contains a number of objectives and policies that clearly prescribe what is required in order to manage land use so as to reduce natural hazard risks.

33 Objective 3.24 of the WRPS provides that:

The effects of natural hazards on people, property and the environment are managed by:

...b) reducing the risks from hazards to acceptable or tolerable levels;...

34 Objective 3.24 is supported by Policy 13.1 Natural Hazard Risk Management Approach, which provides:

Natural hazard risks are managed using an integrated and holistic approach that:

a) ensures the risk from natural hazards does not exceed an acceptable level;

¹ See *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2-14] NZSC 38, at [26].

² Ibid, at [77].

- b) protects health and safety;
- c) avoids the creation of new intolerable risk;
- d) reduces intolerable risk to tolerable or acceptable levels;...
- h) recognises natural systems and takes a 'whole of system' approach; and
- i) seeks to use the best available information/best practice.

35 Implementation Method 13.1.1 Risk Management Framework then requires that the district plan incorporates a risk-based approach into the management of subdivision, use and development in relation to natural hazards. New development is to be managed so that natural hazard risks do not exceed acceptable levels, intolerable risk is reduced to tolerable or acceptable levels, and the creation of new intolerable risk is avoided.

36 Part of the explanation to Policy 13.1 and the Implementation Method above states:

It is expected that district plans will further define what is acceptable and tolerable risk in their community and for particular land uses. For example, residential development in a high risk flood zone is likely to exceed acceptable levels of risk due to the risk to life and property given the nature of the land use; however the risk to other types of development in the same area, for example farming, may be acceptable. Intolerable risk is where the risk to people, property or the environment cannot be justified.

37 Policy 13.2 - Manage Activities to Reduce the Risks from Natural Hazards uses similar language about managing subdivision, use and development so as to reduce risks to an acceptable or tolerable level.

38 In order to implement this Policy, the WRPS requires district plans to identify the locations of areas affected by high risk flood hazard and floodplains, and to ensure that use and development in these areas avoid development where these would place a community at intolerable risk (Implementation Method 13.2.5).

39 Mercury's primary concern is that the PWDP, as notified (without the natural hazard provisions), does not give effect to the WRPS.

Section 32 RMA

40 Without natural hazard and climate change provisions, the PWDP is currently not consistent with s32 of the RMA to the extent that:

40.1 The Stage 1 objectives do not achieve the purpose of the RMA, for the reasons set out above (s32(1)(a) RMA); and

40.2 Accordingly, the Stage 1 provisions, as currently formulated, are not the most appropriate way to achieve the (properly developed) objectives of the PWDP (s32(1)(b) RMA).

41 Mercury notes that there will be a need to undertake a further section 32 evaluation for any changes that become necessary to Stage 1 (section 32AA).

Background: Mercury's engagement with Council and Waikato Regional Council to resolve its concerns

42 Mercury is disappointed that the PWDP is proceeding in this manner. It has done everything it could to prevent the issues now of concern to it. Mercury has been raising these concerns with the Council since 2004 (as explained in Mr Stephen Colson's Hearing 2 evidence).

43 Mercury (then Mighty River Power) submitted on this very issue at the time of the last District Plan review and lodged an appeal on the subject in 2007. The appeal was settled in 2010 following a resolution being passed by the Council that it would notify a district-wide plan change relating to flood hazards by late 2011.

44 That plan change never eventuated.

45 With this in mind, since June 2018, Mercury has been regularly engaging with the Council to seek a resolution that will allay Mercury's concerns with respect to flooding hazard matters being left to Stage 2. That engagement has included regular contact with the Council, and various meetings to discuss concerns and a possible way forward.

46 Mercury remains eager to engage with the Council on addressing the concerns it has and will continue to liaise with the Council and the WRC on these matters.

Signed for and on behalf of Mercury NZ Limited by its solicitors and authorised agents Chapman Tripp



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