

**BEFORE THE INDEPENDENT HEARING PANEL**

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of Variation 3 to the Proposed Waikato District Plan

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**OPENING SUBMISSIONS ON SCOPE FOR HOROTIU FARMS LIMITED**

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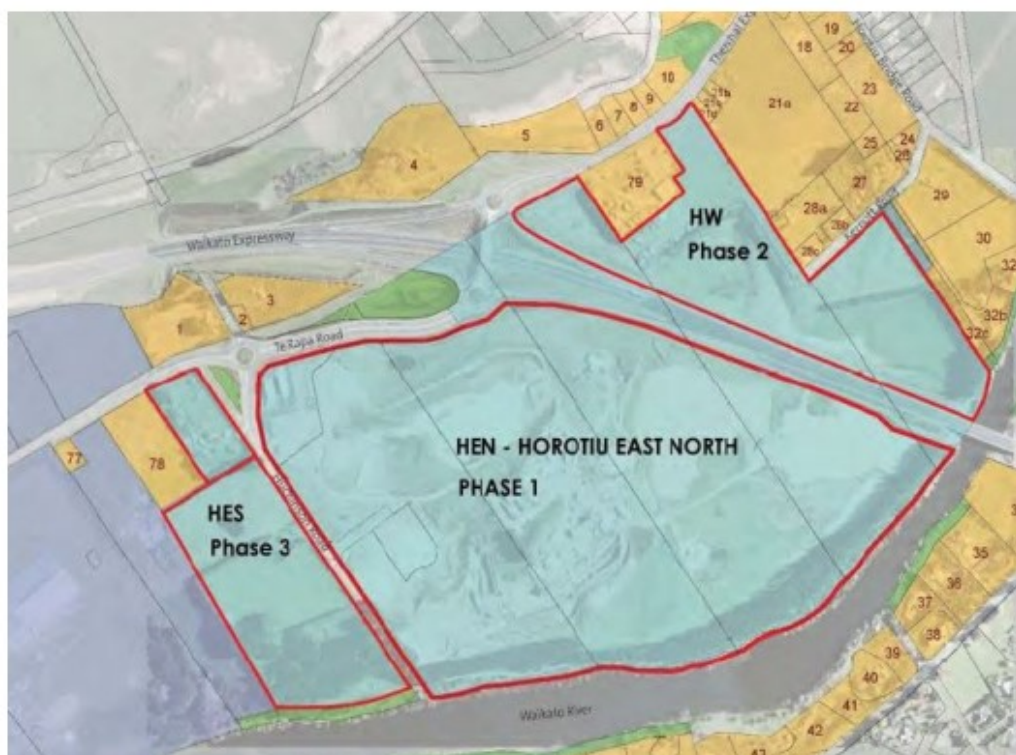
## MAY IT PLEASE THE PANEL

### Procedural Comments

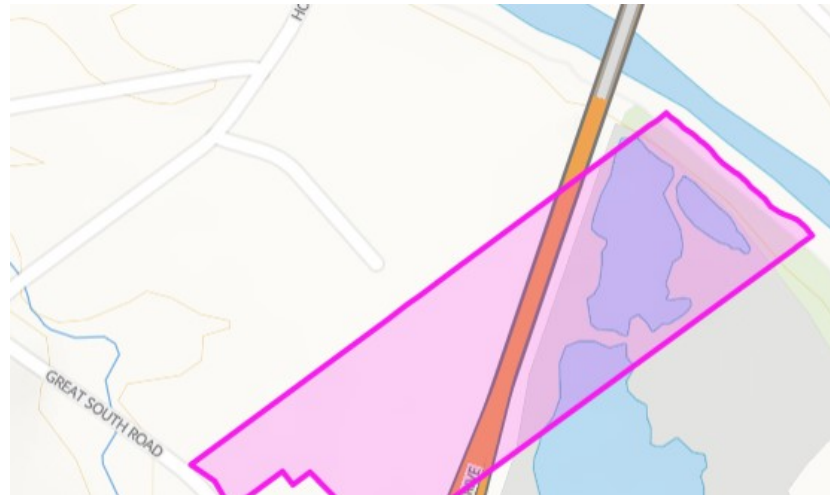
1. This submission responds to Direction #10 for Waikato District Council dated 3 March 2023. The submissions are made on behalf of Horotiu Farms Limited (HFL). HFL has been directed to provide submissions as to whether their proposed rezoning is within scope by 15 March 2023.

### Horotiu West

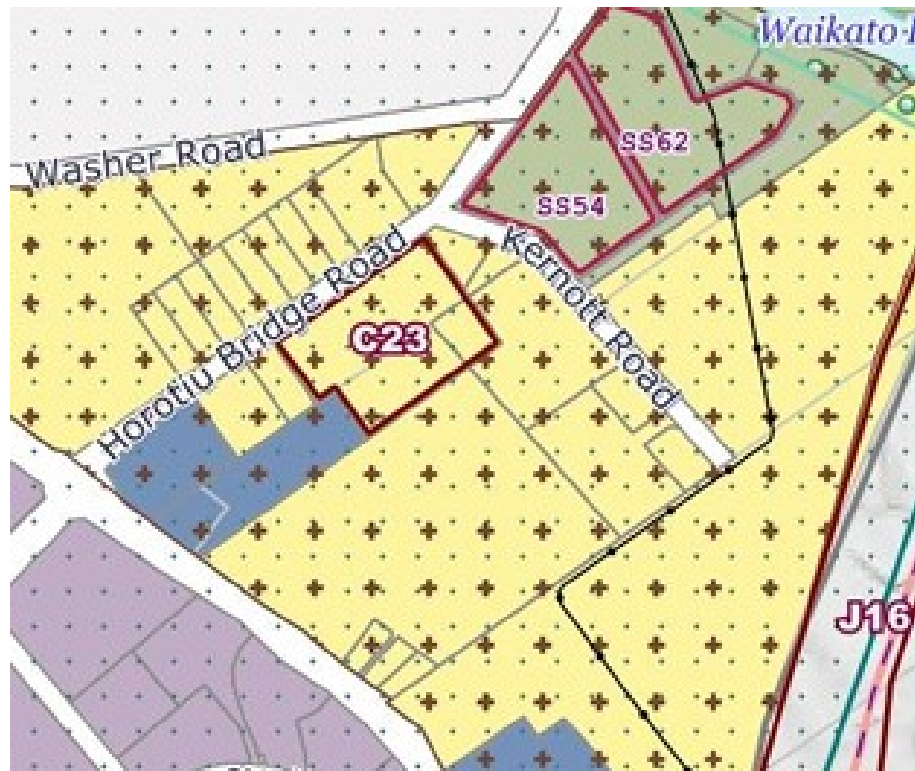
2. Scope has been raised as a potential issue by Waikato District Council. HFL maintains that its submission is “on” the plan change and within scope.
3. By way of background, the site is part of a master planned development known as Te Awa Lakes, with this part of the overall development referred to as “Horotiu West” (or “HW”, as below).



4. As the submission notes, Horotiu West is part of the overall Te Awa Lakes development, that straddles both Hamilton City and the Waikato District. The relevant title boundaries cross both sides of the expressway and span both the territorial authorities: by way of example, see outline boundaries for record of title SA30C/689 below: the eastern part of the title is Waikato District, and the western part Hamilton City.



5. Horotiu West is zoned residential under the Waikato PDP: Waikato District Council has earmarked the site for residential uses: see planning map below.



6. It is important to reiterate that we are not dealing with a site with deferred zoning, nor future residential zoning, nor with an isolated site: we are dealing with a site that sits among others with live residential zoning under the Waikato PDP.
7. A submission to apply MDRS to a site that has live residential zoning is clearly “on” the plan change and within scope.

### Clause 99(2) of Schedule 1

8. Clause 99(2) of Schedule 1 of the RMA says that the Panel's recommendations to the Councils must be related to a matter identified by the panel or another person during the submission, but "are not limited to being within the scope of submissions made on the IPI". That is, the Panel can make recommendations that go beyond submissions, which supports the view that it would be untimely to disregard submissions at an early stage.
9. This is a site that is zoned residential under the Waikato PDP, that is across the road from other land zoned medium density residential, which is to be developed as part of an integrated master-planned community, and which serves the Hamilton urban environment. This is not an isolated site seeking spot zoning, but a site that is within an integrated master-planned community and that is clearly within the scope of Variation 3 to Waikato's PDP.

### Case Law and Section 32 Report

10. Scope submissions in respect of Waipā's Plan Change 26 have canvassed existing case law. In summary, *Clearwater*<sup>1</sup> and *Motor Machinists*<sup>2</sup> are key cases on the test on whether a submission is "on" the plan change under traditional RMA processes, noting that there are bespoke elements to this process, as discussed below.
11. *Clearwater* required (1) an analysis of whether the submission addressed the change to the status quo advanced by the proposed plan change; and (2) whether there was a risk that affected persons would not have an opportunity to participate. The *Motor Machinists* case suggested that a precautionary approach is required where a submission proposes more than incidental or consequential further changes to a proposed plan change, including whether issues in the submission were contemplated by the section 32 RMA report. In *Bluehaven Management*,<sup>3</sup> the Court noted that it is important to look beyond the four corners of the section 32 report, to what that report should have included, and that it is important to avoid undue narrowness on scope.
12. It is submitted that the tests identified in the *Clearwater* and *Motor Machinists* cases should be approached with caution in the context of a bespoke planning process, given the Panel's extensive powers of recommendation under clause 99(2) of Schedule 1, and given the clear intent of the Amendment Act creating this bespoke process in "enabling housing supply".
13. The section 32 report for Variation 3 has some focus on what it describes as "existing urban areas in the towns of Huntly, Ngaaruawaahia, Pookeno and

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<sup>1</sup> *Clearwater Resort Ltd v Christchurch City Council*, HC Christchurch, AP34/02, 14 March 2003.

<sup>2</sup> *Palmerston North City Council v Motor Machinists Ltd* [2014] NZRMA 519.

<sup>3</sup> *Bluehaven Management Limited and Rotorua District Council v Western Bay of Plenty District Council* [2016] NZEnvC 191 at [39].

Tuakau” (paragraph 1.3). However, this assessment ignores that Horotiu West is a relevant residential zone within an urban environment, as outlined below. Indeed, the section 3.2 report notes at paragraph 2.13.1 that Horotiu has been earmarked for further intensification by FutureProof. Further FutureProof updates will also have to factor in planning instruments such as the NPS on Highly Productive Land, enhancing the desirability of further intensification of a site such as this.

14. Further, paragraph 4.7 highlights that consideration has been given to applying MDRS in various “urban areas” including Horotiu. From the section 32 report, it seems that this analysis was undertaken so the implications of MDRS could be understood, so that Council could further assess its qualifying matters. Paragraph 4.7 of the report goes on to note that applying MDRS to all residential zones in urban areas “would result in a supply of residential that well exceeds demand”.
15. This is exactly what the Amendment Act is designed to achieve: the intent of “enabling housing supply” through the Amendment Act is clear. As the report goes on to note at 4.7, in the short-term “higher density development enabled by the MDRS will be more feasible on the periphery of the towns where large sites have been zoned for residential development but are yet to develop”. That is, the intent of the Amendment Act and MDRS can be properly achieved in a site such as Horotiu West, which borders Hamilton and in particular other medium density zoned land.
16. The section 32 report canvasses an “option 2” of replacing all residential zones with an amended medium density residential zone (see Table 10). As Table 10 notes, this option would be “fully compliant” with the RMA amendments. The comments in Table 10 are that this “*may not achieve*” a well-functioning urban environment (emphasis added), because development will occur away from town centres. But in the context of the present site, this ignores its proximity to Hamilton and the other medium density residential development to occur within Te Awa Lakes. Evidence will be brought that incorporating the MDRS into the Horotiu West site will contribute to “well-functioning urban environments”, as planning decisions must under Policy 1 of the NPS-UD.
17. Overall, enabling the MDRS within a site that is zoned residential would achieve compliance with the Amendment Act, as the section 32 report acknowledges, and as such is on the plan change and within scope.
18. Further, within the context of a bespoke planning process such as the IPI, *Albany North Landowners* expands on the nature of the test. *Albany North* supports the Panel departing from a strict reading of *Clearwater*, as it highlights that non-standard planning processes (in *Albany North*, the PUAP; here, Variation 26 and its IPI context) are distinct from discrete variations or plan changes of the kind considered in cases such as *Clearwater*.<sup>4</sup> *Albany North Landowners* also emphasises that a section 32 report is only one

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<sup>4</sup> *Albany North Landowners v Auckland Council* [2017] NZHC 138 at [129].

relevant consideration among many in weighing whether a submission is on a plan change,<sup>5</sup> and that a “multilayered” approach to scope is correct.<sup>6</sup>

19. That is, *Albany North Landowners* supports HFL’s submission being considered by the Panel in substantive hearings, rather than it being struck out on the grounds of scope.
20. Further, in this case, the situation of the land, its residential zoning under the Waikato PDP, and its proximity to other medium density residential land, all contribute to the incorporation of MDRS being “incidental or consequential” in terms of existing case law.

### **Requirement to Incorporate MDRS**

21. As Horotiu West is already to be zoned as residential under the Waikato PDP, the Medium Density Residential Standards (MDRS) should be applied to this residential zone.
22. Section 80E(1)(a) of the RMA, as amended, states that an intensification planning instrument (IPI) must incorporate the MDRS. Section 77G(1) of the RMA as amended says that every “relevant residential zone” must incorporate the MDRS.
23. The definition of “relevant residential zone” (as amended) in section 2 of the RMA says this includes all residential zones, but does not include “(ii) an area predominantly urban in character that the 2018 census recorded as having a resident population of less than 5,000, unless a local authority intends the area to become part of an urban environment”.
24. As noted above, Horotiu West is already being rezoned to residential under the Waikato PDP. To avoid any concern that Horotiu might fall under the exclusion described above, on the basis that the population of Horotiu might be under 5,000 people, it is useful to consider the proviso to the exclusion at (ii).
25. Under section 77F, an urban environment means:  
  
*any area of land (regardless of size, and irrespective of territorial authority or statistical boundaries) that—*
  - (a) *is, or is intended by the specified territorial authority to be, predominantly urban in character; and*
  - (b) *is, or is intended by the specified territorial authority to be, part of a housing and labour market of at least 10,000 people*
26. When territorial authority boundaries are disregarded, as section 77F requires (and which current title boundaries and the master planned nature of Te Awa Lakes also disregard), it is clear that Horotiu West is intended to be

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<sup>5</sup> *Albany North Landowners v Auckland Council* [2017] NZHC 138 at [131].

<sup>6</sup> *Albany North Landowners v Auckland Council* [2017] NZHC 138 at [135].

predominantly urban in character: it is to be zoned residential under the Waikato PDP; it is adjacent to Horotiu East North, which includes existing residential (including medium density residential) zoning; and it will serve the housing and labour market of Hamilton which vastly exceeds 10,000. The intentions for Horotiu West underlie that it is an urban environment. The section 32 report also notes the plans of FutureProof (of which this Council is a member) for further growth and intensification in this area. It is objectively clear that Horotiu West is part of the broader Hamilton-metro area serving Hamilton's urban catchment.

### **Power to Amend Residential Zones**

27. Section 77G(4) of the RMA says that:

*"In carrying out its functions under this section, a specified territorial authority may create new residential zones or amend existing residential zones."*

This allows that residential zones may be created or amended under this process.

28. Section 77G is given effect through using an IPI (intensification planning instrument) and the ISPP (intensification streamlined planning process) to incorporate the medium density residential standards into every relevant residential zone of a council. The ISPP includes submissions to the Panel. In addition, section 77N allows for non-residential zones to be amended.
29. The site is within an existing residential zone, per the Waikato PDP. In addition to the requirement to incorporate MDRS discussed above, there is also the discretion to amend this zone.

### **Servicing and Public Participation**

30. While submissions on scope are not the place for substantive evidence, TAL signals that it will bring forward further evidence:
- a. Showing the availability of services; and
  - b. Highlighting the inclusion of affected persons in the process, including through 'open day' sessions, engagement with neighbours, and supporting submissions.
31. Of course, these points should not be seen to alter the legislative requirement that the residential zoning incorporate the MDRS.

## **Conclusion**

32. Horotiu West is land zoned residential that is part of an urban environment. Incorporating the MDRS into this residential zoning accords with the compliance requirements of the Amendment Act and is within scope.

Dated 15 March 2023

A handwritten signature in blue ink, consisting of several overlapping, sweeping strokes that form a stylized, cursive name.

Thomas Gibbons  
For Horotiu Farms Limited