

BEFORE THE HEARING PANEL

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of Proposed Plan Change 26 to the Operative Waipā District Plan, Proposed Plan Change 12 to the Operative Hamilton City District Plan and Variation 3 to the Proposed Waikato District Plan

**MEMORANDUM OF COUNSEL FOR WAIKATO DISTRICT COUNCIL ON
PROCEDURAL MATTERS**

Dated 23 February 2023

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INTRODUCTION

1. This memorandum responds to the procedural matters relating to Waikato District Council's (**Waikato DC**) Variation 3 arising from the strategic opening hearing of the Waikato IPIs held in Hamilton from 15 to 17 February 2023 (**Joint Hearing**).
2. A procedural matters conference is scheduled for 24 February 2023 as part of the Joint Hearing.
3. This memorandum addresses the following procedural matters relevant to Variation 3:
 - (a) A timetable to determine the scope of identified rezoning submissions;
 - (b) A timetable to determine the scope of Inclusionary zoning submissions;
 - (c) Options to address resolution of the Urban Fringe Qualifying Matter (**Urban Fringe QM**);
 - (d) Topics suitable for expert conferencing prior to the substantive hearing, including a proposed timetable;
 - (e) The overlap between the Proposed District Plan appeals and submissions on Variation 3 and the position regarding the jurisdiction of the Environment Court and Panel respectively; and
 - (f) Directions sought in relation to (a) to (d) above.

OUT OF SCOPE REZONING SUBMISSIONS

4. The Joint Memorandum of Counsel dated 22 December 2022 (**December Memorandum**)¹ and Waikato DC's Legal Submissions for the Joint Hearing dated 10 February 2023 identified the following five rezoning submissions (or submission points) as being out of scope and therefore capable of a determination on the papers:
 - (a) Halm Fan Kong (submission 13);
 - (b) Greig Developments Limited (submission 20);
 - (c) Howard Lovell (submission 27);
 - (d) Horotiu Farms Limited (submission 49); and
 - (e) Kāinga Ora (submission point 106.15).

5. Pursuant to sections 96(3) and (4) and 98 of the RMA, the Panel has the power to determine scope matters. Kāinga Ora has indicated that they will be withdrawing submission point 106.15, with formal confirmation to follow.

6. The Council wishes to have a determination on these rezoning submissions prior to the circulation of the section 42A Report for the substantive hearing. Accordingly, the Council proposes the following timetable for the determination of these rezoning submissions:
 - (a) Legal submissions on behalf of the submitters in support of their relief being within scope to be lodged by 15 March 2023;
 - (b) Legal submissions by the Council in response to be lodged by 24 March 2023;

¹ Paragraphs 9-12, and Appendix 2 pages 8-10.

- (c) Reply submissions on behalf of the submitters in support of their relief being within scope to be lodged by 31 March 2023
- (d) Subject to the need for a scope hearing, the Panel will issue its determination by 21 April 2023.

INCLUSIONARY ZONING SCOPE MATTER

- 7. Waikato DC supports the proposal of the three Waikato IPI Councils for a joint determination on whether the submissions made on each IPI seeking inclusionary zoning and affordable housing are within the scope of the Waikato IPIs.
- 8. The following timetable is proposed by the Councils in their respective procedural memoranda:
 - (a) Any party who considers that submissions seeking inclusionary zoning are beyond the scope of the Waikato IPIs to provide written legal submissions by 10 March 2023;
 - (b) Submissions on behalf of the submitters in support of their relief being within scope to be lodged by 17 March 2023;
 - (c) Submissions by the Councils (joint or separate) and any other party in response to be lodged by 24 March 2023; and
 - (d) Subject to the need for a scope hearing, the Panel will issue its determination by 31 March 2023.
- 9. If inclusionary zoning is determined to be within scope, Waikato DC will discuss the process for addressing those submissions with Hamilton CC and Waipā DC to determine whether a joint hearing may be appropriate.

URBAN FRINGE QUALIFYING MATTER

10. All parties recognise the need for certainty on whether the Urban Fringe QM is a lawful qualifying matter and the need for the substantive hearing to identify and evaluate evidence in support of any other qualifying matters that may be required if the Urban Fringe QM is determined not to be a qualifying matter.

No ability to withdraw Urban Fringe QM

11. Following the Joint Hearing, it remains our clear view that Waikato DC has no lawful power to withdraw the Urban Fringe QM from Variation 3. The general power of a Council to withdraw a variation (or part thereof) in Schedule 1 clause 8D does not apply to the ISPP,² and specifically under RMA section 80G, Waikato DC must not withdraw the IPI.
12. In legal submissions filed for the Joint Hearings, counsel for MHUD raised the potential for the Urban Fringe QM to be withdrawn under clause 8D of Schedule 1. Following discussions at the hearing, counsel for MHUD now accepts there is no power of withdrawal (either in part or whole) of an IPI, and in particular, no ability on the part of Waikato DC to withdraw the Urban Fringe QM from the IPI.
13. As discussed at the Joint Hearing we consider there are two possible approaches for the Panel to provide certainty to the parties, either issuing guidance to the parties or making an early recommendation (and Council making an early decision).

Option 1: interim guidance

14. In relation to interim guidance, this approach does not provide sufficient certainty. While we acknowledge that interim guidance is unlikely to

² RMA Schedule 1 clause 95(2).

create a judicial review risk (as there is no decision or pre-determination), we note the following:

- (a) It will remain unclear whether there are any parties proposing to support the Urban Fringe QM until the exchange of evidence at the end of June;
 - (b) If the Panel's guidance is simply that it is unlikely the Urban Fringe QM meets the statutory requirements, it will remain a 'live issue' for both Council and submitters to address at the substantive hearing. This could lead to an inefficient hearing process;
 - (c) If parties support the Urban Fringe QM (including as a mechanism for opposing intensification in general), they may elect not to be involved in pre-hearing meetings, conferencing or mediation on other qualifying matters and site-specific features that would be beneficial for them to be involved in; and
 - (d) We consider any judicial review risk is very low.
15. In the case of interim guidance issued on the Auckland Unitary Plan ("AUP"), in all cases that guidance was issued after the exchange of evidence, legal submissions and in many cases a hearing. The AUP Panel had the benefit of hearing the breadth of argument before issuing interim guidance, to assist parties with later hearings. Parties who may support the Urban Fringe QM in Variation 3 may not have been aware that the matter was discussed in detail at the Joint Hearing, and may wish to address the Panel ahead of any interim guidance being issued.

16. If the Panel is minded to issue interim guidance, we suggest the following:
 - (a) Submitters who support the Urban Fringe QM to advise the Panel whether they wish to pursue the matter and identify the subject matter of evidence to be provided at the substantive hearing by 10 March 2023;
 - (b) Council and any submitters in opposition to the Urban Fringe QM to respond to any matters raised in step (a) by 17 March 2023;
 - (c) The Panel to issue interim guidance before end of March 2023.
17. This timetable will inform the Panel and the parties as to whether any party will support the Urban Fringe QM at the substantive hearing, and allow parties to prepare accordingly in line with the interim guidance. Havelock Village Limited has indicated that they do not consider the timetable proposed is strictly necessary for the Panel to issue interim guidance but they would not oppose the approach. It is a matter for the Panel to decide whether they adopt the proposed timetable if option 1 is elected. The Panel may wish to issue interim guidance more quickly, either without the timetable or with a shorter timeframe.

Option 2: early recommendation and decision

18. The second option open to the Panel is to make an early recommendation on the Urban Fringe QM, and for Waikato DC to make an early decision on that recommendation prior to the substantive hearing. Section 100 allows the Panel to “provide its recommendations to a specified territorial authority in 1 or more written reports”. It is clearly anticipated that a panel may need to produce multiple written reports to address the matters raised in a council’s IPI. There is nothing in the RMA to suggest that those reports need to be provided simultaneously or that Councils cannot make decisions to accept or reject those recommendations at different times.

19. In our view, an efficient approach for an early recommendation is to request submitters who have supported the Urban Fringe QM to advise the Panel whether they wish to continue to pursue the matter, and if so to impose a timetable, before the Panel issues an early recommendation. If no party wishes to pursue the Urban Fringe QM, we suggest the Panel make a recommendation on the papers without any additional evidence or legal submissions. We consider this is appropriate because during the Joint Hearing, the Panel heard from legal counsel for Council and other parties as to why the Urban Fringe QM did not meet the statutory requirements.³ By contrast, no party appearing presented legal submissions or evidence in support of the Urban Fringe QM.
20. If the Panel elects Option 2 to make an early recommendation, we suggest the following timetable would ensure a cost effective, fair, and efficient process for all parties:
- (a) Submitters who support the Urban Fringe QM to advise the Panel whether they wish to pursue the matter by 6 March 2023;
 - (b) If submitters do wish to pursue the matter, Council to provide legal submissions by 10 March 2023;
 - (c) Any submitters in support of the Urban Fringe QM to provide evidence and legal submissions by 22 March 2023;
 - (d) If any evidence and/or legal submissions are filed in support accordance with clause (c) above, any submitters in opposition to the Urban Fringe QM to either:
 - (i) provide evidence and legal submissions by 31 March 2023;or

³ Relying on the evidence and legal submissions provided for the Opening Strategic hearing. In particular evidence of Mark Tollemache and legal submissions on behalf of Havelock Village Limited.

- (ii) indicate by 31 March 2023 that they rely on the evidence and legal submissions lodged as part of the Joint Hearing and/or Council's legal submissions to be filed in accordance with clause (b) above.
 - (e) If no evidence or legal submissions in support of the Urban Fringe QM are filed in accordance with clause (c) (despite an indication that they would be under clause (a)), the Panel proceed to make a recommendation on the papers from 31 March 2023 without the need for a hearing-
 - (f) If evidence or legal submissions in support of the Urban Fringe QM are filed by 22 March 2023, the Council is to consult with the parties and advise the Panel by 5 April 2023 whether the parties agree to the matter being determined on the papers.
21. Counsel for MHUD and HVL have indicated that they do not have a preference on which option that Panel elects and no other parties had provided a view on the options when this memorandum was filed. We will address the Panel on these options at the procedural conference on Friday, including in response to any other views presented at the hearing. Council acknowledges that the advantage of option 1 is that the status of the Urban Fringe QM will be known more quickly, allowing the parties to move forward.

CONFERENCING PRIOR TO THE SUBSTANTIVE HEARING

22. The Council supports the Panel's suggestion that prior conferencing, or mediation of identified topics may assist in an efficient hearing process. In particular, the following topics would usefully benefit from conferencing or mediation:

- (a) Infrastructure capacity and qualifying matters to give effect to Te Ture Whaimana (district-wide but excluding Pookeno stormwater);
 - (b) Stormwater effects in Pookeno;
 - (c) Havelock Precinct addressing any site-specific controls that may be necessary to accommodate a qualifying matter;
 - (d) Tuurangawaewae Marae and cultural viewshafts to Taupiri Maunga and Hakarimata Ranges; and
 - (e) Other matters relating to giving effect to Te Ture Whaimana such as setbacks from river, wetlands and waterways (not already addressed in the infrastructure specific conferencing).
23. Once Council has completed its assessment of whether any other additional qualifying matters are necessary and discussed these with submitters, it may be beneficial for additional topics to be scheduled for conferencing or mediation.
24. In relation to economic conferencing, we do not understand there to be any disagreement in the modelling approach per se, and therefore we do not consider conferencing is necessary. If it is agreed at a later date that there would be benefit in conferencing occurring, we will seek further directions from the Panel.
25. We propose the following timetable for the circulation of information from Council and proposed dates for conferencing or mediation:
- (a) Council to circulate qualifying matters and controls for the Havelock Precinct (excluding infrastructure capacity and stormwater) by 24 April 2023;

- (b) Council to circulate information on infrastructure capacity and any additional controls to give effect to Te Ture Whaimana by 5 May 2023;⁴
 - (c) Council to circulate any other qualifying matters required as a result of removing the Urban Fringe QM (other than those related to (a) and (b) above) by 19 May 2023;
 - (d) Havelock Precinct – week of 15 May 2023;
 - (e) Infrastructure capacity – week of 22 May 2023;
 - (f) Pookeno stormwater – week of 22 May 2023;
 - (g) Tuurangawaewae Marae and cultural viewshafts to Taupiri Maunga and Hakarimata Ranges – week of 29 May 2023;
 - (h) Conferencing or mediation on any other topic, including Te Ture Whaimana – week of 29 May.
26. For the Havelock Precinct, the Council will seek to hold informal meetings with the parties in advance of the formal conferencing to ensure the conferencing is efficient as possible.
27. For completeness, the Council will be proposing the following timetable for the substantive hearing:
- (a) Council’s section 42A report: 13 June 2023
 - (b) Council’s expert evidence-in-chief: 20 June 2023
 - (c) Submitters evidence-in-chief: 4 July 2023
 - (d) Any rebuttal evidence: 11 July 2023

⁴ It is likely that some of this information will still be in draft form at this date, but that information will still enable conferencing to occur.

- (e) Legal submissions: 18 July 2023
- (f) Hearing commencing 26 July 2023.

RELATIONSHIP BETWEEN PDP APPEALS AND VARIATION 3

28. The following section of this memorandum addresses procedural matters arising from the Joint Hearing. We do not consider any additional directions are required from the Panel at this stage.

Principles

29. As set out in our Opening Legal Submissions, we consider the following principles apply to the potential overlap between Variation 3 and the PDP appeals. The Panel must:

- (a) Determine the relevant residential zones within the Waikato district;
- (b) Incorporate the MDRS into those zones;
- (c) Apply rules that are less enabling of the development in the MDRS to the extent necessary to accommodate a qualifying matter; and
- (d) Give effect to Policy 3 of the NPS-UD.

30. Where the above statutory requirements potentially overlap with the PDP appeals, in our view the Panel:

- (a) Has no scope to determine any rezoning sought in the PDP appeals (as that rezoning is not on Variation 3);
- (b) Can only impose qualifying matters within the four towns subject to Variation 3; and

- (c) Has no scope to determine whether an area of significance (eg SNA) should be deleted in its entirety, the scope of the Panel is limited to the rules that would make development less enabling than the MDRS.
31. The Council agrees with submitters who presented at the Joint Hearing that the Panel is not required to determine or comment on the residual or overlapping jurisdiction of the Environment Court (for example, if the Court can reconsider any qualifying matters as part of the PDP appeals after the ISPP process).

Scope on noise, ventilation and vibration submissions (KiwiRail and Waka Kotahi)

32. In our Opening Legal Submissions on the relationship between the PDP appeals and Variation 3, we addressed the issue of noise and vibration measures from the rail network (KiwiRail) and the state highway (Waka Kotahi). In our submission these controls were not less enabling than the MDRS and can therefore only be within the scope of Variation 3 if determined to be 'related provisions'.
33. The relief sought by KiwiRail and Waka Kotahi in their Variation 3 submissions is a duplication of the relief sought in their PDP appeals. The PDP relief is not limited to the four towns, but throughout the district.
34. We undertook to consult with KiwiRail and Waka Kotahi. KiwiRail has advised the Council that it considers the noise and vibration controls are clearly within the scope of Variation 3 as they relate to the density of development (operating as permitted activity standards, allowing intensified development where compliance is achieved) and at the very least are related provisions that support or are consequential on the MDRS.

35. Waka Kotahi considers the noise and vibration provisions should be considered by the Panel as related provisions because they:
- (a) address the effects of increased density in terms of the health of the occupants of new residential development close to the state highway; and
 - (b) are an alternative to the 25 metre no build setback rule in the notified provisions of Variation 3, which was clearly set out in the Waka Kotahi submission.
36. KiwiRail has advised the Council its view is that if there is a divergence of views on scope their preference would be for a preliminary hearing to determine the scope issue.
37. The Council accepts that it is arguable that the controls are related provisions, but the Panel should address the scope and merit question as part of the substantive hearing, in the context of the evidence as a whole.
38. In relation to the principles above, Waka Kotahi and KiwiRail accept that the relief in their PDP appeals that goes beyond the four towns the subject of Variation 3 is not within the scope of the Panel.

Gas pipeline setback

39. Firstgas lodged a late primary submission on Variation 3 on 22 February 2023. As previously advised, the Council does not oppose this being accepted as a late submission.
40. The Council seeks a direction from the Panel that this late submission be accepted. The Council will then notify the submission in accordance with clause 7 of Schedule 1 of the Act.

Havelock Precinct

41. In relation to the Havelock Precinct all counsel agree:
- (a) The Panel has no scope to determine any rezoning sought in the PDP appeals (as that rezoning is not sought in a submission on Variation 3 and is not 'on' the variation); and
 - (b) Variation 3 must incorporate the MDRS into the General Residential zoned land within the Havelock Precinct, and only provide for the MDRS to be less enabling to the extent necessary to accommodate a qualifying matter. Any qualifying matters applying to the Havelock Precinct are within the jurisdiction of the Panel.
42. It is acknowledged that years of work have gone into considering the appropriateness of urban development within the Precinct, and that those discussions continue now under a new legislative regime, in parallel with the usual Environment Court appeals process.
43. We have proposed a timetable above to resolve the Urban Fringe QM and circulate information on any possible infrastructure constraints. This timetable will then provide the opportunity for the Havelock Precinct Variation 3 parties to participate in conferencing specific to the Precinct.
44. With discussions with all PDP appeal parties continuing in the meantime, the parties to Variation 3 are hopeful that by the time of the Council's s42A report (or substantive hearing) there will be agreement on the qualifying matters that should apply in the Havelock Precinct and those provisions would be jointly presented to the Panel.⁵ In the absence of full agreement the principles set out above at paragraph 39 will apply, and parties will provide evidence to the Panel in accordance with those principles.

⁵ Without prejudice to the Environment Court determining the zoning PDP appeal points.

45. For the Panel's information, the following parties are involved in the PDP appeal topic on the Havelock Precinct but are not submitters or further submitters to Variation 3:
- (a) Gareth Harris;
 - (b) Ngāti Tamaoho Trust;
 - (c) Ngāti Te Ata;
 - (d) Yashili NZ Dairy Co. Ltd;
 - (e) Craig Hall; and
 - (f) Steven and Teresa Hopkins.
46. The Council will not oppose any late *further* submissions from these parties on Variation 3.
47. We have incorporated feedback from HVL, Pōkeno Village Holdings Limited, Synlait, Hynds and Noakes into this memorandum.

CONSULTATION WITH PARTIES

48. Waikato DC has circulated this memorandum to all submitters on Variation 3, Firstgas who up until 22 February had not lodged a submission on the variation, and those parties identified in paragraph 45 above who are parties to the Havelock Precinct appeal but not a submitter on Variation 3.
49. Where feedback has been received, we have sought to include that in the memorandum. Parties will also have an opportunity to attend the procedural conference on 24 February and present their alternative views.

DIRECTIONS SOUGHT

50. Waikato DC respectively seeks the following directions:

- (a) In relation to the out of scope rezoning submissions identified in paragraph 3 above, the directions in paragraph 6 are to apply.
- (b) In relation to inclusionary zoning submissions, the directions in paragraphs 8 are to apply.
- (c) In relation to the provision of information and pre-hearing conferencing, the directions in paragraph 25 are to apply.
- (d) In relation to the substantive hearing dates and circulation of evidence and legal submissions, Council will file a separate memorandum with the Panel seeking the directions set out in paragraph 27 above.
- (e) The late submission from Firstgas be accepted.

Signed this 23rd day of February 2023



B A Parham / J A Gregory
Counsel for Waikato District Council