BEFORE THE INDEPENDENT HEARING PANEL

IN THE MATTER of the Resource Management Act 1991 and Resource Management (Enabling Housing Supply and Other Matters) Amendment Act 2021

AND

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

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REPLY SUBMISSIONS ON SCOPE FOR HOROTIU FARMS LIMITED('HFL')

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MAY IT PLEASE THE PANEL

Overview

1 These reply submissions are on behalf of Horotiu Farms Limited (HFL) and respond to the scope matters by Waikato District Council ("WDC") as set out in legal submissions dated March 23, 2023. WDC are seeking the Panel strike out a number of submissions on Variation 3, including the HFL submission (#49.1) on the grounds the relief it seeks is outside of scope of Variation 3 as notified. WDC is asking the Independent Hearing Panel (**Hearing Panel**) to determine whether the appeals are out of scope and should be struck out under section 41D of the Resource Management Act 1991 (the **RMA**) in advance of the hearings.

2 HFL maintains that its submission is "on" the plan change (Variation 3), and that its submission is within scope in accordance with relevant caselaw and based on the purposive intent of plan change Schedule 1 processes set out in the Resource Management Act 1991 (the **Act)**.

3 Horotiu Farms Limited's (HFL) submission is to amend maps to rezone areas in Horotiu West between Great South Road and State Highway 1 from GRZ to MRZ2. The land was rezoned residential (GRZ) through a recent extensive full plan review. It is land that is part of an "urban environment" and within a relevant residential zone[1].

4 The HFL submission seeks its residential zoned, urban land be incorporated into the MDRS residential zoning, thereby ensuring the Council's mandatory compliance requirements of the Resource Management (Enabling Housing Supply and Other Matters) Amendment Act 2021 ("Amendment Act") set out in ss77J-77L have been met. It is clearly within scope to have this issue addressed through Variation 3 hearing, given the intention of Variation 3 as a statutorily directed plan is meant to "rapidly accelerate the supply of housing" in this District/Waikato Region.

[1] Note that there are no appeals of WDC PP opposing the residential rezoning of HFL site, and there were no submissions or further submissions to the WDCPP opposing HFL residential zoning other than from Ports of Auckland (who are also the only further submitter to HFL submission on Variation 3 seeking MDRZ zoning.

Waikato District Council Legal Submissions on Scope-Factual Assumptions

5 WDC states on its website in answer to whether Variation 3 will enable more development:

> "*The existing medium density residential zone (MDRZ) is very similar to the level of development enabled by the Act so the differences between the new zone and existing zone are modest. The existing medium density residential zone (MDRZ) allows 3 houses of 3 storey height on each site (if they meet the standards) which is the same as the Act requires."*[2]

6 WDC legal submissions state that MDRZ zoning has only been notified in four of its settlements, and therefore takes the position that any submission seeking the Amendment Act's requirements be extended to other residential zoning is out of scope. This position ignores the obvious point that Variation 3 as notified has significantly limited the spatial extent of MDRZ to its relevant residential zones, and that this approach is arguably contrary to what the Amendment Act 's purpose seeks, which is to require Tier 1 Councils to deliver, through urgent Plan Change processes, plan change provisions to rapidly enable MDRZ housing across its District within its urban areas and relevant residential zones. There are a number of submissions on Variation 3, that have raised this issue, including Crown agencies such as Kainga Ora (submitter #106). The HFL submission is consistent with this same principle, albeit that it relates to its specific site in Horotiu West only.

7 WDC states at para 32 of its legal submissions that the scope of Variation 3 is limited by the requirements of section 80E of the RMA and those areas in the Waikato District that meet the definition of a "relevant residential zone" under the RMA. Neither of these limitations prevent the HFL land from being within scope of Variation 3 as this land is within an urban area, near Hamilton City jurisdictional boundary, significant transport infrastructure, Horotiu school, employment and commercial areas. This proximity to Hamilton City and other development makes this a 'relevant residential zone.'

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[2] https://www.waikatodistrict.govt.nz/your-council/plans-policies-and-bylaws/plans/waikato-district-plan/district-plan-review/variations/variation-3-enabling-housing-supply/1

8 WDC's other grounds to seek HFL submission be struck out for being out of scope are based on tenuous factual assumptions. For example, WDC state the lack of submissions opposing HFL submission is due to the parties such as Fonterra and AFFCO reviewing and relying on Variation 3 as notified to remain the same through the plan change process, that is, excluding any other MDRZ zoning extensions beyond the four MDRZ settlement areas of the District WDC as notified[3].

9 WDC state that as Fonterra and AFFCO were submitters/appellants opposing the Te Awa private plan change area, that this is tellingly significant that they were not aware of HFL submission to Variation 3 seeking MDRZ zoning, as if they were, they would have put in a submission opposing it.

10 This does not hold up to any factual scrutiny as grounds of potential prejudice or real risk that the public are prevented from participation in outcomes sought from the HFL submission to Variation 3.

11 Firstly, the HFL rezoning of its land to residential was not part of the Te Awa Lakes plan change for Horotiu East land to which legal counsel refers (which Fonterra and AFFCO were submitters and appellants against but the zoning to residential was confirmed by an Environment Court order.

12 Rather, this Horotiu West land was identified by WDC for residential zoning, through WDC's fully notified public plan review. This extensive and recent full plan review was recently undertaken in 2019-2020 and as stated at footnote 1, neither Fonterra nor AFFCO put in any opposing submission or further submission to HFL land being rezoned through the proposed plan, nor did any submitter that was opposed to its rezoning file an appeal against the HFL land being rezoned to residential. Once residential, as the proposed plan provides, it is entirely in accordance with the intent of the Amendment Act that the land be MDRZ.

13 It could equally be inferred the reasons for a lack of submissions opposing HFL's submission is due to:

a. After the extensive Te Awa Lakes private plan change process including appeals, all interested parties such as AFFCO and Fonterra now accept that its industrial

[3] WDC legal submissions on scope paras 33-35.

activities in Horotiu area are part of a mixed residential /commercial and industrial area,. And/or

b. Parties with expert advice, such as Fonterra or AFFCO, were advised to anticipate that through the Amendment Act 2021 legislation, residential intensification of existing residential zones was 'a given', that District Councils were directed to give effect to, unless specific qualifying matters applied. And/or –

c. Just as Ports of Auckland were the only interested party opposing HFL land being zoned residential through the WDC PDP process, so too are Ports of the Auckland the only party interested in HFL relief sought in Variation 3 to be MDRZ zoned. These matters can be covered at the substantive hearing[4].

14 Further, as noted by WDC in their submissions, both Fonterra and AFFCO are "actively involved", for want of a better phrase, in RMA plan processes not just in Horotiu but across NZ and the Waikato, so it is unrealistic to suggest that these parties, with extensive legal and planning consultant teams, were not aware of the plan change processes and changes to RMA plans that may occur. The fact those parties did not submit on the residential intensification proposed on this site (or others) through either the submission or further submission stages as grounds for finding "procedural unfairness" does not hold up.

15 To reject HFL's submission as being outside of scope on grounds that these parties haven't submitted against it would be a breach of natural justice and unfair to HFL that has adhered to all deadlines set down by the Act and WDC.

16 As referenced in several cases on scope already cited in others legal submissions, ultimately scope is a question of procedural fairness. Procedural fairness extends not just to the public but also to the submitter and the territorial authority. The issues raised in the submissions relating to further residential intensification within an already identified residential zone was clearly flagged to the public, including all adjacent industrial landowners or large public corporate operators such as the Ports of Auckland, Fonterra and AFFCO.

[4] Ports of Auckland submission through WDC PDP sought for strong reverse sensitivity and noise related provisions.

17 Arguably, there have few other policy changes to the RMA to which the public has been made aware of in recent times through media and other channels. There has been a signalled, well publicised, significant Central Government change in policy related to intensification for all residential zoned land in Tier 1 Councils. In addition to that, there has then been the specific Schedule 1 publicly notified process undertaken by Waikato Council together of which WDC is one of, in a coordinated manner which has increased the public awareness of Variation 3.

WDC Submissions on Scope-case law and legal principles

18 The Panel has now had the benefit of legal submissions from both Council and submitters, which have set out the legal framework and key legal tests relevant for consideration of whether a submission is within scope of the Plan Change as notified.

19 The Panel must be satisfied any for matters raised in submissions, that there is scope to make any such amendments to the WDC Variation 3 IPI as sought by HFL. In doing so, the Court must consider whether submissions received are "on" the PC; and if so, any amendments are within the scope of a submission such that the Court has jurisdiction to make the amendments.

20 There is some consensus that the leading authority on whether a submission is "on" a plan change is *Clearwater Resort Ltd v Christchurch City Council*[5]. In that case, William Young J established the following bipartite test:

a. A submission can only fairly be regarded as being "on" a plan change if it is addressed to the extent to which the variation changes the pre-existing status quo; and
b. If the effect of regarding a submission as "on" a plan change would be to permit a planning instrument to be appreciably amended without real opportunity for participation by those potentially affected, this is a powerful consideration against finding that the submission was "on" the plan change.

21 In *Palmerston North CC v Motor Machinists*[6] the High Court clarified that the first limb of the *Clearwater* test requires that the submission must "*reasonably be said to fall*

[5]*Clearwater*, [2017] NZHC 138.at [66]
[6]Palmerston North City Council v Motor Machinists Limited [2013] NZHC 1290, [2014] NZRMA 519

within the ambit of the plan change" as one way of determining whether changes are within the ambit of the plan change is to ask whether the management regime in a district plan for a particular resource is altered by the plan change. If it is not, then a submission seeking a new management regime for that resource is unlikely to be "on" the plan change, unless the change is merely incidental or consequential.

22 In the High Court summed up the first limb of the *Clearwater* test in these terms:

> *"[91] (d) The first limb of the Clearwater test requires that the submission address the alteration to the status quo entailed in the proposed plan change. The submission must reasonably be set to fall within the ambit of the plan change*[7]*"*

23 HFL submission is within scope as it meets the criteria applied in *Motor Machinists:*[8]

> *Incidental or consequent extensions of zoning changes proposed in a plan change are permissible, provided that no substantial further section 32 analysis is required to inform affected person of the comparative merits of that change*.

24 WDC submissions at para 32 state that while the section 32 report for Variation 3looked at options for residential intensification broadly across its residential zones including Horotiu, "it did not address the actual or potential effects, or the servicing requirements, of including Horotiu as a relevant residential zone and incorporating the MDRS". The submissions then acknowledge at para 32(b) "*These matters were not required to be addressed in the section 32 report as they are not a mandatory element of an IPI under section 80E*". It is submitted that based on the specific statutory directive overlay of Section 80E of the Amendment Act which makes incorporation of the MDRS mandatory, the Section 32 report sufficiently meets the criteria as applied in *Motor Machinists.* Further, "servicing requirements" are not stated as a qualifying matter under section 77I of the RMA (as amended by the Amendment Act) and are properly a matter for evidence in substantive hearings, rather than scope, given the site has residential zoning under the PDP. What the Section 32 report should have done is as important as what it covers.

25 Para 31 of the WDC legal submissions states "*With regard to question 1, when notified Variation 3 did not include the GRZ in Horotiu as a relevant residential zone. The relevant residential zones were limited to the towns of Tuakau, Pookeno, Huntly and Ngaaruawaahi*a."

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[7]Motor Machinists para 91[d]
[8] Motor Machinists at 82

26 With respect, this appears to miss the very point of HFL submission and relief sought. Within the definitions of the Amendment Act, HFL land does falls within the scope of being a "relevant residential zone", as discussed at para 27-29 of HFL's opening legal submissions[9]. WDC just chose not to include it.

27 It is entirely reasonable and foreseeable that a member of the public would question the merits of a Councils restrictive approach to Variation 3 as notified, and if in support of residential housing supply being rapidly addressed, would make a submission on the IPI to extend the MDRZ to all of its relevant residential zones. If land was deliberately excluded from MDRZ zoning by WDC, when it fell within "a relevant residential zone", it is entirely foreseeable that person would submit for it to be included. The issue of scope for those submitters with land holdings currently zoned rural is an entirely different set of circumstances, and I submit HFL submission is in a not the same legal or factual situation given the underlying basic public expectation and understanding of future intensification requirements for all Tier 1 Council residential zoned areas when the Amendment Act was enacted.

28 The two staged test established in ***Clearwater Resort Ltd v Christchurch City Council***, largely endorsed in the High Court case of ***Albany North Landowners***, are referenced in both WDC and HFL legal submissions. I agree with WDC legal submissions that both Clearwater and Motor Machinists are key cases, but also submit that the case cited in HFL earlier submission, ***Bluehaven v Western Bay of Plenty District Council***[10] and also Judge Kirkpatrick's Section 279 decision on scope ***Te Tumu Kaituna v TCC*** decision [*2018] NZEnvC 9*[11]are other relevant caselaw examples of where the Courts have repeatedly applied the caselaw on scope in a purposive and "realistically workable fashion"[12], The question as to whether amendments sought are fairly and reasonable raised in the course of submissions, must be with the overriding principles of the Act in mind rather than a strict legal approach which WDC is seeking the Panel apply to strike out HFL submission.

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[9] HFL opening legal submissions dated 15 March 2023, para 15-18…

[10] *Bluehaven Management Limited and Rotorua District Council v Western Bay of Plenty District Council* [2016] NZEnvC 191 at [39] cited HFL opening submissions para-11

[11] *Te Tumu Kaituna v TCC* Section 279 Judge Kirkpatrick decision [*2018] NZEnvC 9*

[12] See for example *Royal Forest & Bird Protection Society Inc v Southland District Council [1997] NZRMA 408 at 413,* cited at paragraph [59] in High Court case *General Distributors v Waipa District Council (2008) 15 ELRNZ 59 and at paragraph [17] of Environmental Defence Society v Otorohanga District Council [2014] NZEnvC* 70

[12] *Te Tumu Kaituna v TCC* Section 279 Judge Kirkpatrick decision [*2018] NZEnvC 9*

[12] See for example *Royal Forest & Bird Protection Society Inc v Southland District Council [1997] NZRMA 408 at 413,* cited at paragraph [59] in High Court case

29 As set out by the Full Court of the High Court in *Countdown Properties (Northlands) Limited v Dunedin City Council:*[13]

> "…w*hether any amendment made to the plan change as notified goes beyond what is reasonably and fairly raised in submissions on the plan change...It will usually be a question of degree to be judged by the terms of the proposed change and of the content of the submissions".*

30 That is the correct legal approach to take here. The Panel's decision on scope should be read in light of the expansive statutory policy intent of the Amendment Act, which directs Councils to notify plan changes within a strict timeframe to enable more housing supply effectively to upzone all existing residential zones to MDRZ. The Amendment Act provides broader powers of discretion to the decisionmaker regarding a plan change process than that in a standard plan change Schedule 1 purpose, to achieve that directive purpose.

31 The bespoke nature of this plan change was referenced in HFL opening submissions as reasons to apply the scope caselaw principles set out in *Clearwater* more expansively than in a standard plan change. WDC legal submissions reject that approach, and state that *Albany Landowners* does not provide any legal authority to support that approach[14].

32 However, the interpretation to the caselaw approach suggested in HFL opening submissions[15] is clearly supported by the policy and purpose of the Amendment Act, which is the only reason for Variation 3, and this is also underscored by the more expansive and specific powers given to the Panel and to the Minister(including as to scope) in relation to these plan changes.

33 To that extent, WDC proposed decision to consider and then exclude any MDRZ from all other residential zones in the district plan beyond the four settlement areas does form part of the scope of Variation 3 and supports the HFL argument. WDC proposal not to apply an MDRZ zoning to its other residential zones does afford scope to the HFL to seek an amendment to the maps to include its residential zoned land as part of its submission.

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[13] [1994] NZRMA 145

[14] WDC submissions, para 11-18

[15] HFL opening legal submissions dated 15 March , para 11 and 12

34 Cases such as *Clearwater* limited the scope of appeals on variations to focus on the extent to which they change the pre-existing ‘status quo,” and to ensure they are squarely based on submissions so that the key foundational aspects of the Resource Management Act relating to public participation and procedural fairness are protected.

35 This issue does not arise in this case. All persons affected by the HFL submission, and the relief it seeks, have had the opportunity to be involved. The public have been fully informed with a high level of public attention and education given to the public to seek their involvement in IPI’s across NZ, as well public notification.mFurther, there is clear legislative intent to extend the MDRS to all relevant residential zones with a high growth council such as WDC.

36 As such, the extension of the MDRZ to other residential zoned land in the Waikato District beyond the four areas as notified was always a logical and potential outcome fairly and reasonably arising within the general scope of Variation as notified, and the range of outcomes sought in various Variation 3 submissions, not just from HFL. The approach to answering this question should be realistic and workable, and take into account the nature of the site, and it proximity to Hamilton City, and the medium density residential development enabled for Te Awa Lakes (Horotiu East North).

37 WDC’s position relies on the proposition that Variation 3 is a "very limited plan change” which is consistent with their deliberate and publicly voiced political opposition to Central Government’s Amendment Act directives. However, the fact that WDC has sought to pick and choose and limit the application of the Amendment Act mandatory planning framework does not mean that Variation 3 as notified is now sacrosanct and cannot be altered.

38 Importantly, this approach would subvert the core purpose of the Amendment Act by denying integrated decision making and preventng more residential housing supply in an existing urban areas zoned for residential use.

39 It is submitted that Variation 3 does, or is meant to, through statutory directives fundamentally alter the status quo of the management regime for residential zones in Waikato District.

40 Turning to the second limb of the ***Clearwater*** test, this limit was elaborated on by the High Court when it noted that[16]:

> *"It may be that the process of submissions and cross- submissions will be sufficient to ensure that all those likely to be affected by or interested in the alternative method suggested in the submission have an opportunity to participate. In a situation, however, where the proposition advanced by the submitter can be regarded as coming out of "left field", there may be little or no real scope for public participation. Where this is the situation, it is appropriate to be cautious before concluding that the submission (to the extent to which it proposes something completely novel) is "on" the variation.*

41 As Kos J put it in *Motor Machinists*:

"[82] ... *To override the reasonable interests of people and communities by a submissional side-wind would not be robust, sustainable management of natural resources.*"

42 It is submitted that the submission by HFL is neither "left field" nor "novel", and no submission 'side-wind' arises in the current statutory context of this Variation and the relief sought for the Council to include further residential zoned land that was considered and rejected through its Section 32 process.

43 This are 5 key reasons HFL is within scope:

a. The fundamental changes to the residential management regime under the Amendment Act not only support the relief sought but are directive in nature to the Council's obligation to give effect to greater intensification in residential zoned areas such as the HFL site;
b. Variation 3 was highly publicised including publicly notification processes, thereby more than adequately meeting the statutory requirements of the Act designed to enable public participation. Many parties interested in these wide-ranging changes to the residential zones could have, or in fact have, made submissions on Variation 3.

[16] Motor Machinists, para 69

c. The HFL submission clearly signalled the relief sought of a MDRZ zoning on its site. Directly affected landowners, such that they have an interest greater than the general public, could have further submitted in opposition at that point through a further submission. .Notably, one of those landowners potentially most directly affected, Ports of Auckland, did lodge a further submission opposing the relief sought by HFL, which confirms that there was opportunity for interested parties to submit.
d. The site is zoned for residential use under the PDP (which is beyond appeal) and is in close proximity to other residential uses.
e. Finally, HFL submission does not seek any changes to the objectives and policies of the Variation 3[17] or the broader planning management regime[18].

CONCLUSION

44 Accordingly, it is submitted that there is no real risk that parties directly affected by the additional changes sought by HFL have been denied an effective opportunity to respond to those proposed changes and HFL submission is within scope.

45 HFL respectfully seeks direction that WDC application for a declaration as to scope by the Panel is dismissed in regard to the HFL submission and that the HFL submission be allowed to continue through the substantive hearing process and to be considered on its merits.

Signed

Kate Barry-Piceno
Barrister for Horotiu Farms Ltd
30 March 2023

[17] *Bluehaven Management Ltd v Western Bay of Plenty District Council* [2016] NZEnvC 191 at [37].
[18] *Mackenzie v Tasman District Council* [2018] NZHC 2304 at [103]