

BEFORE THE INDEPENDENT COMMISSIONER

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of an application for resource consent for the construction and establishment of a storage and distribution facility, warehouses, ancillary offices and site remediation at 16A Wickham Street, Hamilton

OPENING LEGAL SUBMISSIONS ON BEHALF OF HAMILTON CITY COUNCIL

Dated 21 November 2023

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MAY IT PLEASE THE COMMISSIONER

INTRODUCTION

1. These legal submissions are presented on behalf of Hamilton City Council (**HCC**).
2. HCC opposes the grant of consent for the construction and operation of a storage and distribution facility and three warehouses and ancillary offices (**application**) at 16A Wickham Street (**site**).
3. The site is located in the Rural Zone within Waipa District, sitting immediately adjacent to the territorial boundary with Hamilton City. The only road access to the site is via the Hamilton City transportation network.
4. The proposed storage, warehousing, distribution and office activities at the site (**proposal**) have nothing whatsoever to do with rural activities in Waipa District, and are instead a non-strategic, un-serviced *de facto* extension of commercial and industrial activities in Hamilton City. The proposal represents the opposite of sustainable urban planning.
5. The proposed development of this rural zoned land for commercial and industrial land uses must be declined because:
 - a) It is contrary to the higher order strategic land use settlement pattern established in Future Proof and as required under the Waikato Regional Policy Statement (**WRPS**);
 - b) It is contrary to the relevant objectives and policies in the Waipā District Council (**WDC**) Operative District Plan (**ODP**);
 - c) It will give rise to more than minor adverse effects relating to three waters infrastructure and transportation infrastructure;

- d) It fails to pass either of the gateway tests in s 104D of the Resource Management Act 1991 (**RMA**) and therefore cannot be granted consent; and
- e) Even if it does pass one of the s 104D gateways, an overall evaluation under the broader considerations set out in s 104 of the RMA must lead to a decline of consent.

EVIDENCE TO BE PRESENTED

- 6. Statements of evidence have been prepared by the following witnesses on behalf of HCC:
 - a) Mr Johannes van Rooy, addressing Three Waters issues;
 - b) Mr Vinish Prakash, appearing on behalf of HCC and Waka Kotahi, assessing traffic effects; and
 - c) Mr Mark Davey, giving evidence on the strategic and planning issues arising from the proposal.

KEY ISSUES

Contrary to sub-regional land use settlement pattern

- 7. The site is part of a highly strategic land resource, located within an area identified for future inclusion into Hamilton City. This area is referred to as 'SL1' and is in-part bounded by the Southern Links Designation. To allow for a successful and sustainable future land-use pattern that efficiently utilises the land resource of SL1, land must be preserved for the ultimate land-use settlement pattern and supported by integrated infrastructure funding and delivery.

8. WDC and HCC have entered into an agreement which sets out the framework for how the two Councils will work together to transfer the subject land and manage the land-use and infrastructure activities in the area while this process occurs. The agreement notes that land uses within the Southern Links Land Area will continue to be “strategically managed and retained for rural use, in accordance with the existing WDC District Plan, Future Proof and other plans to protect the land resource for its ultimate potential urbanisation”¹. The agreement records at Section 7 that all strategic land use decision making in this area should take into consideration the terms of the agreement as another matter under s 104(1)(c) of the RMA.

9. The Future Proof Strategy 2022 recognises the land around Southern Links as a future ‘Strategic Industrial Node’ and is included as a possible future urban enablement area for industrial purposes. The fundamental principles² which guide the settlement pattern are:
 - a) Align growth with infrastructure and investment.

 - b) Protect existing and future infrastructure from development constraining or compromising its efficiency.

 - c) Integrate planning with infrastructure and funding decisions.

 - d) Have a holistic and integrated land use approach.

10. In addition to the above listed principles, the Future Proof Strategy provides growth management directives³ concerning current and future growth areas. These directives seek to limit growth in non-urban areas

¹ Evidence of Dr Mark Davey dated 15 November 2023; paragraph 24, and Strategic Boundary Agreement 2022, para. 5 Also referred to at section 1.5 and 5.5 of the s 42A report.

² Future Proof (2022), Section A, Guiding Principles, pg. 18.

³ Future Proof (2022), Section B, Our Growth Management Approach, pg. 63.

around the Hamilton periphery, and promote integrated land use, funding, and infrastructure through tools such as structure planning.

11. These Future Proof directives are now embedded in the WRPS via Plan Change 1 (National Policy Statement on Urban Development and Future Proof Strategy Update), for which a decisions version was publicly notified on 15 November 2023. Relevantly, it includes the following policy directives in the Urban form and development section:
 - a) **UFD-O1: Built Environment** which requires that development of the built environment (including transport and other infrastructure) and associated land use occurs in an integrated, sustainable and planned manner which enables positive environmental, social, cultural and economic outcomes.
 - b) **UFD-P1: Planned and co-ordinated subdivision, use and development** which requires that subdivision, use and development of the built environment, including transport, occurs in a planned and co-ordinated manner, having regard to APP11 principles.
 - c) **APP11: General development principles** which call for a clear delineation between urban and rural areas, not compromise the safety of transport infrastructure, and connect well with existing and planned development and infrastructure.
 - d) **UFD-P2: Co-ordinating growth and infrastructure** which requires that the nature, timing and sequencing of new development is co-ordinated with the development, funding, implementation and operation of transport and other infrastructure, including additional infrastructure.
 - e) **UFD – P11 Adopting Future Proof land use pattern** which requires that new industrial development should predominantly be located in the strategic industrial nodes in Table 35 (APP12) and in accordance

with the indicative timings in that table (2) and that new industrial development outside the strategic industrial nodes must avoid, remedy or mitigate adverse effects on the transport system and on other infrastructure (6);

- f) **UFD-PR11 – Adopting Future Proof land use pattern which explains that** UFD-P11 enables urban development consistent with the land use pattern and sequencing that has been established through the Future Proof process. Clauses (3) to (8), along with Table 35, provide clear guidance on where industrial development should occur in the Future Proof area. The explanation notes; *This is very important to ensure integrated planning of industrial land use and infrastructure. Future industrial development should focus on the support and protection of identified industrial nodes.*
12. The planning evidence of Dr Mark Davey for HCC highlights how these regional policy directives are not being met by the proposal. He also identifies the related higher order planning instruments, such as the National Policy Statement for Urban Development 2020 (**NPS-UD**), and non-statutory instruments such as the Hamilton-Waikato Metropolitan Spatial Plan (**HWMSP**) and Hamilton Urban Growth Strategy (**HUGS**), all of which call for strategic land use planning which is integrated with infrastructure funding and planning.⁴
13. The proposal is contrary to these higher order planning directives. It seeks to enable urbanisation of rural zoned land ahead of any strategic land use planning for the wider area, and without any integration with existing or planned infrastructure.
14. The general premise underpinning the application is that the area is already compromised in terms of non-rural land use, and its continuing evolution

⁴ Evidence of Dr Mark Davey dated 15 November 2023; paragraphs 37-54.

should be accepted on a consent by consent basis, provided conditions can adequately address all non-strategic adverse effects.

15. HCC's position is that this piecemeal approach to the urbanisation of this land resource must be avoided.

Contrary to relevant objectives and policies in the ODP

16. Key objectives and policies from the Strategic Policy Framework section of the ODP seek consolidated development around existing settlements of the Waipā District, while supporting the operation of regionally significant infrastructure. Within this direction, Policies 1.3.1.1 and 1.3.2.1 seek to give effect to the Future Proof Strategy and WRPS and the anticipated settlement pattern. Policy 1.3.2.6 calls for development and infrastructure to be integrated and co-ordinated.
17. The Strategic Policy Framework chapter in the ODP sets development expectations for the Rural Zone. Under Objective 1.3.1 which addresses the district's settlement pattern, Policy 1.3.1.5 on subdivision and development within the Rural Zone seeks to ensure the rural zone continues to be used for rural activities.
18. The Rural Zone objectives and policies enable anticipated rural activities and address effects, including cumulative effects, on the environment. Outcomes expected within the Rural Zone, including the maintenance of rural character, are set out in Objective 4.3.7 and its associated policies 4.3.7.1-2.
19. Non-farming activities are addressed in Objective 4.3.12, and Policy 4.3.12.1 which provide:

Objective - Non-farming activities

- 4.3.12 Only non-farming activities that have a functional and compelling requirement to locate in the Rural Zone should be enabled to locate in the Rural Zone.

Policies - Non-farming activities

- 4.3.12.1 To limit non-farming activities in rural areas except for activities that:
- a) Have a functional and compelling reason to establish in a rural area; and
 - b) Do not result in any further loss of land from primary production purposes; and
 - c) Maintain rural character. Activities that do not meet these criteria should be accommodated in urban areas.

20. Dr Davey's planning evidence for HCC undertakes a review of these and other relevant objectives and policies in the ODP and concludes that the proposed land use is contrary to these objectives and policies. His view is aligned with that of the s 42A author, who sets out a detailed analysis and concludes the proposal is contrary to the objectives and policies of the ODP.⁵

Adverse effects more than minor

21. The proposal will generate effects that cross two territories, and two respective zones, generating adverse effects on rural character, the transportation network, and three waters infrastructure. Effects on the transportation network will be more than minor.

Effects on rural amenity and rural land resource

22. The site is zoned rural, and HCC accepts that to an extent, the rural amenity has been eroded through adjacent peri-urban development. However, HCC strongly contends that this compromise to the rural amenity is no reason

⁵ Section 42A report; paragraph 11.24.

to simply 'let it go' and is in fact a reason to hold on and preserve the remaining rural amenity.

23. This need to preserve the rural amenity and characteristics of the zone is also fundamental to the preservation of the land resource for its long-term strategic use. Retrospective urbanisation is far more challenging and expensive compared to a greenfield opportunity taking a rural land resource to a master-planned urban outcome.
24. The current consented environment at the site, albeit non-rural, does enable preservation of the land resource for future development. The proposal however has significant capital improvements which will be uneconomic to retrofit if master planning calls for a different outcome.
25. Accordingly, compromising the rural nature of the site adversely affects the rural amenity and character, and adversely impacts the developability of the land resource in the longer term.

Effects on transportation network

26. In relation to transportation effects, both HCC and Waka Kotahi consider that the activity will give rise to adverse transportation effects which cannot be appropriately mitigated through consent conditions.
27. All site access is via the HCC road network, which includes a section of State Highway 1c, at Kahikatea Drive. The intersection at that point is a recognised safety risk, with 38 crashes (10 injury) between 2018-2023.⁶ Neither HCC nor Waka Kotahi have current committed plans for safety improvements and the intersection, but recognise that a safe system transformation would likely involve a change to a roundabout or traffic signals.⁷

⁶ Evidence of Vinish Prakash dated 15 November 2023; paragraphs 27-32.

⁷ Ibid; Paragraph 31.

28. Both HCC and Waka Kotahi are concerned about the additional traffic loads on the intersection resulting from the development, with Mr Prakash noting that the site could generate 90 veh/hr and 215 veh/day as per Table 6 of Ms Makinson's Statement of Evidence.⁸
29. The applicant has proposed a condition of consent requiring a Traffic Management Plan (**TMP**) to address the potential adverse effects on the transport network. The TMP would prohibit right turns out onto SH1c, which is one of the most crash prone.⁹ Mr Prakash considers that without physical restrictions to right turn treatments, it will be difficult to ensure that vehicles from both stages of the development do not right turn out at this intersection. He states:
42. In my opinion, the proposed TMP does not mitigate the safety risk associated with right turns out of the SH1c/Kahikatea Drive intersection. I am concerned that the proposed TMP will not be effective in managing the risk, as the disciplinary/enforcement action associated with non-compliance is outside of the RCA's control, and driver behaviour will only be captured during spot checks which do not account for non-compliance outside of spot check times.
30. He goes on to conclude that even with the TMP in place, unacceptable adverse safety effects will remain:
19. Overall, I consider that with the proposed TMP conditions in place, there remains a likelihood of a residual adverse transport safety effect which, due to the inherent safety risk at the SH1C/Kahikatea Drive intersection, is unacceptable. The only way this could be properly mitigated would be for physical interventions on the network, which are not able to be imposed as effective conditions without road controlling authority approval, which has not been secured. Accordingly, the proposal will give rise to unmitigated adverse transport effects.

⁸ Ibid; Paragraph 24.

⁹ Ibid; Paragraph 27.

Adverse effects on three waters infrastructure and related effects

31. WDC has no reticulated three waters infrastructure network available to service the site. Similarly, there is no available capacity within HCC's three waters network.¹⁰ As a result, the site is required to be serviced as a standalone site. Potable water is proposed to be collected via on-site rainwater harvesting tanks, and trucked in when additional water is required. Wastewater is proposed to be collected in a central holding tank on site, emptied as necessary to a tanker and then transported off site to a wastewater disposal plant, via the transport network.¹¹
32. This failure to integrate the proposed land use with strategic infrastructure is contrary to the objective and policy framework. It also gives rise to three distinct adverse effects.
33. The first effect is of a strategic nature. Infrastructure funding and planning requires scale, and participation. When activities 'opt out' they undermine the collective business case, and cumulatively, this can mean a growth project never acquires the critical mass needed for the business case. It undermines strategic planning in infrastructure, like the Southern Waste Water Treatment Plant (**SWWTP**), which is in a planning phase. The SWWTP relies on growth and development of the Southern Links area, including the site, to create the demand on the wastewater network which justifies the project. Piecemeal stand-alone servicing solutions have the effect of undermining the feasibility of the integrated solution.
34. The second set of relevant effects are the environmental and health related risks arising from the non-reticulated servicing of the site. Rainwater harvesting may be unreliable and may generate risks in terms of fire fighting capability, with Mr van Rooy noting there is no ability for a cross

¹⁰ Evidence of John van Rooy dated 15 November 2023; paragraph 20.

¹¹ Section 42A report: section 5.5.

lot supply under the Waste Management arrangements with HCC. Transporting waste along the transport corridor may lead to an increased risk of an uncontrolled spill.

35. Finally, and related to these solutions, are the additional heavy traffic movements which would not otherwise arise if a reticulated connection was able to be implemented.

FAILED SECTION 104D GATEWAY TESTS

36. The key decision-making steps under ss 104, 104B and 104D can be summarised as follows:¹²

- a) Decide whether the proposal passes one or both of the threshold tests in s 104D;
- b) If it passes, consider the application and submissions, subject to Part 2, having regard to s 104(1) and s 77M:
 - i. The actual and potential effects of the activity on the environment;
 - ii. Any relevant plan or policy statement or environmental standard; and
 - iii. Any other relevant consideration;
- c) Decide the weight that should be given to the matters in subsections 104(1)(a), (b), (c); and
- d) Having regard to effects in the context of properly weighted objectives and policies under s 104(1) and any other relevant

¹² *Blueskin Energy Limited v Dunedin City Council* [2017] NZEnvC 150.

consideration, arrive at a judgment whether the proposal promotes the sustainable management of natural and physical resources and decide to grant or refuse consent accordingly (s 104B).

37. The proposal is a non-complying activity under the ODP, being an industrial activity that is not provided for in the Rural Zone. Being non-complying, s 104D of the RMA provides that the activity may only be consented if the consent authority is satisfied that either (relevantly):
- a) The adverse effects of the activity on the environment (other than any effect to which s 104(3)(a)(ii) applies) will be minor; or
 - b) The application is for an activity that will not be contrary to the objectives and policies of the relevant plan.
38. In relation to the second gateway test, for an activity to be “contrary” to the objectives and policies, it must be “opposed to” or “repugnant to” the objectives and policies of the relevant plan¹³. In undertaking an assessment of the activity against the relevant objectives and policies, these provisions are to be considered in their entirety or “as a whole”¹⁴.
39. As detailed in these submissions and in the evidence of Dr Davey, overall:
- a) The adverse traffic effects of the proposal will be more than minor; and
 - b) The proposal is in direct conflict with the relevant objectives and policies of the ODP.

¹³ *NZ Rail v Marlborough District Council* [1994] NZRMA 70 (HC) at [80]. *Re Waiheke Marinas* [2015] NZEnvC 218 at [584].

¹⁴ *Dye v Auckland Regional Council* [2002] 1 NZLR 337 (CA) at [25]; *R J Davidson Family Trust v Marlborough District Council* [2018] NZCA 316 at [73].

40. As neither gateway is satisfied, the application fails¹⁵. The matter must be taken no further.
41. However, even if the Commissioner disagreed, Dr Davey has also assessed the proposal under s 104 in detail in his evidence and concludes that:

101. Overall, I believe that the application is not consistent with the OWDP, in addition to being inconsistent with Future Proof, the WRPS, the HUGS, the NPS-UD, and Part 2 of the Act. In addition, the actual and potential effects generated by the proposal are incapable of being addressed by consent conditions and therefore remain significant and unacceptable. As such, under a s 104 assessment, I do not consider the proposed application could be granted.

SECTION 42A REPORT

42. The s 42A report recommends the application for resource consent be refused.¹⁶ HCC supports this outcome and conclusion but does not fully agree with the reasoning provided.
43. The s 42A report records that the proposed TMP is not likely to mitigate the potential safety effects at the state highway intersections and notes that if there is further evidence that results in the effects being managed *to an acceptable level*, the conclusion may be revisited.¹⁷ This conclusion is repeated in Section 15 which again records that there is an inability to mitigate traffic safety at a known high risk intersection.¹⁸
44. It is impossible to reconcile these factual findings in the s 42A report regarding adverse traffic safety effects, which indicates they are currently deemed *unacceptable*, with the following finding in Section 14.3 of the s

¹⁵ *Dye v Auckland RC* [2002] 1 NZLR 337 at [5].

¹⁶ Section 42A report; section 16.

¹⁷ *Ibid*; Para 10.13.

¹⁸ *Ibid*; Paragraph 15.8.

42A report that they are no more than minor, and therefore pass the first gateway test in s 104D(1):¹⁹

14.3 Further assessment in Section 10 of this report concluded that the proposed traffic safety effects of the activity have not been demonstrated to be appropriately avoided, remedied or mitigated to an acceptable level. Based on this assessment, the adverse effects limb of the threshold test (i.e. the effects will be minor) is met.

45. HCC agrees that even after deploying the TMP, there are unacceptable residual adverse traffic safety effects arising, but considers that these residual effects must be more than minor, particularly given they relate to traffic safety.
46. The s 42A report author may have felt constrained by her earlier s 92 decision which concluded that the adverse effects were no more than minor, and which led to limited notification. However, the consent authority must not be constrained in this way, and may reach a different conclusion based on the evidence at this hearing. Section 104D(1) expressly addresses this by stating: *Despite any decision made for the purpose of notification in relation to adverse effects....*²⁰
47. The s 42A report then records that under the second limb of the threshold test, the proposed activity is deemed to be contrary to the objectives and policies of the ODP and therefore that limb is not met. With one limb met, the report concludes that the proposal can be considered in a full evaluation under the matters prescribed in s 104.²¹
48. HCC considers that the application fails to pass either of the gateway tests in s 104D and therefore cannot be considered further under s 104. However, even if one of the threshold tests in s 104D are met and a full

¹⁹ Ibid; Paragraph 14.3.

²⁰ RMA, s 104D(1).

²¹ Ibid; Paragraph 14.4.

evaluation under s 104 is made, the consent should be declined. This is the recommendation in the s 42A report, and on that issue, HCC agrees.

CONCLUSION

49. Controlling the non-strategic proliferation of urban development on the immediate periphery of Hamilton City is a key strategic land use issue for HCC and its Future Proof partners, including WDC.
50. Giving effect to the agreed settlement pattern, in a manner integrated with infrastructure planning, as required under the WRPS, is a key function of WDC as a regulatory decisionmaker on resource consent applications.
51. The regulatory task here is not simply to condition out the effects to an acceptable level. It is to ensure that a sustainable management outcome is achieved. The proposal is inherently contrary to this outcome.
52. HCC requests that WDC refuse the grant of consent.

Dated 21 November 2023



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