BEFORE THE INDEPENDENT HEARING PANEL

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of Proposed Plan Change 12 to the Operative Hamilton City District Plan

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CLOSING LEGAL SUBMISSIONS ON BEHALF OF HAMILTON CITY COUNCIL

Dated 20 September 2024

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MAY IT PLEASE THE HEARING PANEL

INTRODUCTION

1. These closing legal submissions are presented on behalf of Hamilton City Council (**HCC**) in its capacity as proponent of Plan Change 12 (**PC12**) to the Operative Hamilton City District Plan (**ODP**), HCC's Intensification Planning Instrument (**IPI**). The submissions address the key legal and planning issues arising during the course of the hearing of submissions on PC12.

FINANCIAL CONTRIBUTIONS

2. Section 77T of the Resource Management Act 1991 (**RMA**) empowers HCC to review its financial contribution provisions, or change them, as part of its IPI. Section 77E allows financial contributions to be required in relation to any activity other than a prohibited activity, so that power now extends to permitted activities. Section 77E provides:

> **77E Local authority may make rule about financial contributions**
>
> (1) A local authority may make a rule requiring a financial contribution for any class of activity other than a prohibited activity.
> (2) A rule requiring a financial contribution must specify in the relevant plan or proposed plan—
> (a) the purpose for which the financial contribution is required (which may include the purpose of ensuring positive effects on the environment to offset any adverse effect); and
> (b) how the level of the financial contribution will be determined; and
> (c) when the financial contribution will be required.
> (3) To avoid doubt, if a rule requiring a financial contribution is incorporated into a specified territorial authority's district plan under section 77G, the rule does not have immediate legal effect under section 86B when an IPI incorporating the standard is notified.
> (4) In this section and section 77T, financial contribution has the same meaning as in section 108(9).

3. Section 108(1) provides that, subject to s 108AA,[1] a resource consent may be granted on any condition the consent authority considers appropriate including, subject to subsection (10), one requiring that a financial contribution be made. Subsection (10) provides:

> …
> (10) A consent authority must not include a condition in a resource consent requiring a financial contribution unless—
> (a) the condition is imposed in accordance with the purposes specified in the plan or proposed plan (including the purpose of ensuring positive effects on the environment to offset any adverse effect); and
> (b) the level of contribution is determined in the manner described in the plan or proposed plan.

4. The existing caselaw on financial contributions remains applicable. Financial contributions imposed as a condition of consent must satisfy the classic *Newbury* principles. They must:

a) Be imposed for a resource management purpose;

b) Fairly and reasonably relate to the activity; and

c) Be reasonable.

5. The law does not require a direct causal nexus between the effects of the development and the proposed conditions. The Supreme Court in *Waitakere CC v Estate Homes Ltd* [2] rejected that notion and held that the application of common law principles in the planning context does not require a greater connection between the proposed development and conditions of consent beyond that they must be logically connected to the development, not unrelated to it and not relating to external or ulterior concerns. That limit does not, however, require the condition to

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[1] Section 108AA provides, inter alia, that a consent authority must not include a condition in a resource consent for an activity unless the applicant agrees, or the condition is directly connected to an adverse effect on the environment, or an applicable rule in a district plan. Section 108AA(5) states that nothing in the section affects section 108(2)(a) which enables a resource consent to include a condition requiring a financial contribution.

[2] [2007] 2 NZLR 149; (2007) 13 ELRNZ 33; [2007] NZRMA 137 (SC).

be restricted to the exclusive purpose of the development. There is no requirement under s 108(2) for a direct causal connection.

6. It is critical to recognise that the present task of this Panel is plan-making. It is not the task of the Panel to determine whether it will be reasonable to impose consent conditions requiring a financial contribution. Much of the arguments presented by submitters focussed on the reasonableness of such a condition, arguing that in their specific circumstances, due to plan provisions or some other feature, their development is already addressing the purpose of the financial contribution. This is the wrong forum for that argument and is a debate to be had at the consenting stage, which carries with it appeal rights if a developer is not satisfied with the conditions imposed. Remember, imposing a financial contribution condition is not mandatory. It is an available tool, to be used within the confines of s 108 and the relevant caselaw guiding the lawfulness of consent conditions.

7. Accordingly, arguments relating to 'double dipping', improper purpose, and insufficient causal nexus are premature. These are not matters that the Panel can or should resolve, because they belong in another forum.

8. Instead, the Panel should be concerned with the question of whether, in s 32 terms, it is appropriate to include an objective which states:

> **24.3.1**
> Financial contributions are required in accordance with the Financial Contributions Rules in order to:
>
> i. Avoid, remedy, or mitigate adverse effects of the proposed activity or development on the environment where these cannot be managed on site;
>
> ii. Give effect to Te Ture Whaimana, including the requirement for betterment; and
>
> iii. Offset the adverse effects of subdivision and development on infrastructure.

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9. The Panel must also determine whether the policies, rules, and methods

are the most appropriate to serve that objective. That evaluation must be set within the framework established under s 77E and reflected in s 108(10), which requires a rule in the ODP to set out:

a) The purpose for which the financial contribution is required (which may include the purpose of ensuring positive effects on the environment to offset any adverse effect);

b) How the level of the financial contribution will be determined; and

c) When the financial contribution will be required.

10. The Panel's evaluation must be focussed on whether the financial contribution purpose, as reflected in the objective, serves the RMA's purpose as set out in s 5. The evaluation must examine the rule establishing how the level of the financial contribution will be determined and when it will be required, and whether it is sufficiently clear to enable the necessary calculation required at the consenting stage under s 108(10)(b).

11. Provided the calculation methodology is sufficiently clear, the Panel's further inquiry into quantum should be confined to the matters set out in s 32. The Panel should not move to a consideration of whether it is reasonable or otherwise to then impose it in any particular situation. That is a matter for the consent authority.

12. Ultimately, the Panel is concerned only with whether to establish this funding tool and make it available to the consenting authority to deploy at is discretion, having regard to the relevant RMA provisions and caselaw.

13. Objective 24.3.1 is self-evidently serving the purpose of the RMA, and

the broader considerations relevant to plan-making under s 74 of the RMA. The associated policy set is supportive of, and gives effect to, the objective. The rules and methods determining how the financial contribution will be calculated are clearly articulated.

14. Questions to Ms Douglas on behalf of HCC focussed on how HCC arrived at its formula. This is relevant but again, the ultimate question of whether it is reasonable to impose a financial contribution condition is a consenting one. Nevertheless, the formula is explained and is reasonable.

15. The preliminary costings for the financial contributions are included in Appendix 3.2 of the Section 32 Report. This allocated a cost of $36,005,500 for residential amenity split over 12,011 projected dwellings to be built over the next 10 years. These charges are derived from the costs of procuring and planting street trees and the costs of designing, constructing and landscaping of upgrades to neighbourhood parks set out in the Draft Long-Term Plan (**LTP**). The allocated cost to Te Ture Whaimana purpose was $47,247,288.74 split over 26801.71 units of demand projected to be built in the next 10 years. These costs were developed for the Nature in The City programme.

16. The costings are preliminary only and give an estimate of what HCC may need to spend over a 10 year period to offset the effects of intensification. These costings guide the maximum capped rate that has been incorporated into the recommended provisions. For network connections, it is actual cost recovery at 100%.

17. For residential amenity and Te Ture Whaimana, HCC's estimated total spend over a 10 year period (being the duration of plan provisions until review is required (s 79(1)), the formula adjusted them of producer price index of 14% to $41M for residential amenity and $53.3 for Te Ture Whaimana over the 10 year period.

18. The formula then divides this by the estimated units of residential

growth over the 10 yr period to get a projected unit of demand (**PUD**) figure. To give certainty, these numbers were used to create a maximum cap. The growth rate is set out in Appendix 18.

19. To illustrate:

    a) Residential amenity: $36M divided by 12011 PUDs = $2997 per PUD, to a max of $3400.

    b) Te Ture Whaimana: $44m divided by all growth (not just residential) is 26801 PUD equivalents = $1641, to a max of $2000 per PUD.

20. This background calculation shows how the PUD cost is established. The RMA does not prescribe how any financial contribution formula is arrived at, only that it exists and is clear and certain. With the maximum charges set, clarity and certainty is established. If the fact that the financial contribution charge could be less than the maximum leads to uncertainty, HCC would support a simple maximum rate per PUD. In her supplementary evidence dated 20 September 2024, Ms Douglas proposes to amend Appendix 18 to show how the rate could be applied. Halved the TTW quantum by allocation of only 50% to growth rather than the full amount. This includes a reduction of the Te Ture Whaimana quantum by allocation of only 50% to growth to take into account what ratepayers may contribute.

21. The calculation formula is clear and straightforward. Each residential unit is a PUD. The total financial contributions per development requires a calculation of the number of PUDs in the development multiplied by the financial contributions charge for residential amenity and Te Ture Whaimana, and the actual connection charges.

22. Some submitters argue the discount factor is uncertain. That is accepted and it may benefit from a clearer set of criteria. Again, if the uncertainty

associated with a discount renders the proposed regime too uncertain, HCC would support removal of the discount factor.

23. Associated with the discount factor is the potential distinction between brownfield and greenfield development. HCC accepts that there may be a justification for the distinction in relation to the residential amenity and Te Ture Whaimana financial contribution charges. It preferred that distinction to be reflected in a discount assessed on a case-by-case basis, but again accepts that greater certainty may come from a clear differential between greenfield and brownfield rates.

Kainga Ora – Homes and Communities

24. Kainga Ora – Homes and Communities (**Kainga Ora**) contends that:

    a) HCC's Development Contributions Policy (**DC Policy**) is adequate as "it already recovers extensive monetary contributions towards the costs of growth";[3]

    b) The PC12 financial contributions provisions duplicate the charges recovered under the DC Policy; and

    c) The PC12 financial contributions 'additional public space' and 'streetscape amenity' purposes fall within the ambit of the DC Policy.

25. These assertions are rejected. There is no double dipping under the DC Policy and the financial contributions provisions. HCC rejects the submission that the financial contributions provisions are therefore unlawful. Contrary to Kainga Ora's submission at paragraph 6.4(d), the provisions are not based on an assumption that intensification reduces current streetscape amenity. The provisions recognise that with

[3] Legal submissions of Kainga Ora dated 30 August 2024 at paragraph 6.4.

intensification, comes a need to improve and increase public space amenity for higher densities to enjoy.

26. Kainga Ora submits that levying financial contributions on a per dwelling basis has a disproportionate effect on it because it needs to deliver a high proportion of smaller dwellings. Kainga Ora submits that bedroom numbers provide a fairer and reasonable proxy for anticipated resident numbers. Kainga Ora's position is that if the PC12 financial contributions provisions are to be retained, then a charging mechanism like that used in the DC Policy whereby "standard" dwellings pay a Household Unit Equivalent (**HUE**) contribution, but smaller units pay a reduced rate (e.g. 0.3 or 0.6 x the HUE). HCC is open to that alternative approach. In her supplementary evidence, Ms Douglas proposes to amend Appendix 18 to include a reduced charge for:[4]

    a) A residential unit with a single bedroom or a studio unit of 0.33 of a residential unit; and

    b) A two bedroom residential unit at 0.66 of a residential unit.

27. Ms Douglas explains that the adjusted charge is based on the conversion factor from the notified version of Appendix 18.

The Adare Company Ltd

28. The Adare Company Ltd (**Adare**) contends that the PC12 financial contributions regime is unlawful because there is no sufficient link between the purpose for which the financial contributions have been imposed (to offset the adverse effects of intensification) and greenfield development in Peacocke.

29. Adare seeks that the financial contributions provisions be amended to

[4] Supplementary evidence of Clare Douglas dated 20 September 2024.

exclude greenfield developments, or at least the Peacocke Precinct, from their application. Adare considers that this exclusion is warranted as:

a) The Medium Density Residential Standards (**MDRS**) were introduced to the Peacocke Precinct under Plan Change 5 (**PC5**) without financial contributions and with all effects properly mitigated;

b) PC5 gave effect to Te Ture Whaimana; and

c) There is no link between development in Peacocke and adverse effects that financial contributions are addressing.

30. Adare's fundamental point is that the provisions of PC5 adequately address the residential amenity and Te Ture Whaimana financial contributions purposes and therefore should not apply. Adare is also critical of HCC raising financial contributions in PC12 and not PC5. The context and timing of PC5 provides the explanation for HCC's approach.

31. PC5 was notified on 24 September 2021. The notified provisions did not incorporate MDRS because the Resource Management (Enabling Housing Supply and Other Matters) Amendment Act 2021 (**HSSA**) was not enacted until 21 December 2021. Submissions on PC5 closed on 5 November 2021 and HCC lodged a submission reflecting what it understood to be the incoming MDRS. So when HCC notified PC5, there were no new financial contributions provisions in the RMA. HCC did its best to ensure PC5 was not left behind by PC12. For better or for worse, financial contributions were not incorporated into the submission.

32. Adare asserts that because the critical link for charging financial contributions for adverse effects that the development creates is missing, the financial contributions provisions are unlawful in respect of the

Peacocke Precinct. [5] This position overstates the causal nexus requirement. This 'critical link' need not be as direct as Adare asserts, as set out earlier. Nevertheless, Adare also submits that the PC5 provisions, enabling growth in a greenfield area, address residential amenity and Te Ture Whaimana better than any other area. HCC acknowledges this and sought to recognise this via the discount factor.

33. Because Adare remains critical of the discount regime, claiming it is too uncertain, HCC acknowledges that reduced financial contributions for Peacocke may be appropriate if a discount factor is not favoured by the Panel. In her supplementary evidence, Ms Douglas proposes to amend Appendix 18 to include an automatic 50% discount on financial contribution charges applying to the Peacocke Precinct. The proposed discount for the Peacocke Precinct reflects that the newly minted PC5 provisions do address, to an extent, residential amenity and Te Ture Whaimana. The discount does not extend to other greenfield areas which do not.

Conclusion on financial contributions

34. In response to the matters raised by submitters and the Panel during the course of the hearing (including those discussed above), the supplementary evidence of Ms Douglas dated 20 August 2024 proposes additional amendments to the financial contributions provisions.

35. Fundamentally, the PC12 financial contributions provisions, including those additional amendments proposed by Ms Douglas, satisfy the requirements of section 77E.

[5] At paragraph 25.

LEGAL ISSUES RAISED BY SUBMITTERS

Kainga Ora

Universal Access

36. HCC seeks to introduce a standard across the residential zones requiring developments with 10 or more units, to provide 10% of those units with "convenient wheelchair access".[6] Specifically, these units are to have wheelchair access from the street to an entry door with a maximum gradient of 1:20 and a level transition, doorway widths of at least 810mm, and the kitchen, dining room and at least one bedroom on the ground level.

37. Kainga Ora contends that this universal access provision is ultra vires because it introduces development controls that, contrary to s 18 of the Building Act 2004 (**Building Act**), are more restrictive than those provided in the building code.[7]

38. Kainga Ora cites caselaw, including *Building Industry Authority v Christchurch City Council*[8] (incorrectly cited as *Christchurch International Airport Ltd v Christchurch City Council*) and *Petone Planning Action Group Inc v Hutt City Council*[9], which it says hold "that the purpose of the control is key. If the objective/purpose of the control is a resource management one, then it is not a performance criterion in terms of s 18 of the Building Act".[10]

39. In other words, you cannot include a building work control in a district plan that is additional to or more restrictive than the building code unless

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[6] Standard 4.2.5.15 (GRZ); 4.3.4.16 (MDRZ); 4.3.4.5.16 (HDRZ).
[7] Legal Submissions on behalf of Kainga Ora dated 30 August 2024, paragraphs 5.1-5.5.
[8] [1997] 1 NZLR 573; [1997] NZRMA 145; (1996) 3 ELRNZ 96.
[9] ENC, Wellington, W020/2008, 2 May 2008.
[10] Legal submissions of Kainga Ora dated 30 August 2024, paragraph 5.3(c).

the control is for a different resource management purpose and therefore is distinct from the code and the Building Act.

40. Kainga Ora also refers to the decisions of the Independent Hearing Panel on the Auckland Unitary Plan which it says rejected universal access rules that overlap with controls in the building code and cover the same aspects of buildings works.[11]

41. Section 18 of the Building Act provides:

> (1) A person who carries out any building work is not required by this Act to-
> (a) Achieve performance criteria that are additional to, or more restrictive than, the performance criteria prescribed in the building code in relation to that building work; or
> (b) Take any action in respect of that building work if it complies with the building code.
> (2) Subsection (1) is subject to any express provision to the contrary in any Act.

42. Clause D1 of the building code provides (relevantly):

> **Clause D1 - Access routes**
> **Provisions**
> **Objective**
> D1.1 The objective of this provision is:
> …
> (c) Ensure that *people with disabilities* are able to enter and carry out normal activities and functions within *buildings*.
> …
> **Performance**
> …
> **D1.3.2** At least one *access route* shall have features to enable *people with disabilities* to:
> (a) Approach the *building* from the street boundary or, where required to be provided, the *building* car park,
> (b) Have access to the internal space served by the principal access, and
> (c) Have access to and within those spaces where they may be expected to work or visit, or which contain facilities for personal hygiene as required by Clause G1 **Personal hygiene.**

43. Clause D1 of the building code expressly limits the application of Objective D1.1(c) to those buildings to which s 47A of the Building Act applies. Section 47A of the Building Act has been replaced by s 118,

[11] Legal Submissions on behalf of Kainga Ora dated 30 August 2024, paragraph 5.4(a).

however the reference to s 47A in the Building Code has not been updated to reflect the correct reference to s 118. Section 118 of the Building Act is about public buildings and the requirement for public buildings to be accessible.

44. Clause D1 expressly excludes the application of D1.3.2 from "housing, outbuildings, backcountry huts, ancillary buildings, and to industrial buildings where no more than 10 people are employed".

45. The building code provisions identified by Kainga Ora **do not apply** to residential buildings. Kainga Ora accepts this, but says that by omission, it is addressed. That inference cannot be made and intuitively has no limits. Accordingly, there is no double up between the PC12 universal access standard and the building code. The standard is therefore not contrary to s 18 of the Building Act.

46. HCC acknowledges the caselaw principle established in *Building Industry Authority v Christchurch City Council*[12] and *Petone Planning Action Group Inc v Hutt City Council* [13] that the control must have a purposive difference, however, in the absence of an overlap with the building code, the principle has no application to PC12.

47. The relevant provisions are Objective 4.3.2.1, 4.3.2.1b and Rule 4.3.4.15. They provide:

> 4.3.2.1
> Promote comprehensive and integrated development for the development of 4 or more residential units within the Medium Density Residential Zone.
>
> 4.3.2.1b Incorporate universal access principles into any development.

[12] [1997] 1 NZLR 573; [1997] NZRMA 145; (1996) 3 ELRNZ 96.
[13] ENC, Wellington, W020/2008, 2 May 2008.

4.3.4.15 Universal Access

For applications including 10 or more residential units

a. At least 10% of residential units on a site shall be designed to provide convenient wheelchair access including:

   i. Access from a street to an entry door (which may be a front, back or side door) using gradients no greater than 1:20 and has a level (stepless) transitions from inside to outside.

   ii. Doorways that are at least 810mm (door leaf 860mm) wide to fit a wheelchair.

   iii. At least one bedroom and accessible bathroom be located at ground level and on the same level as the kitchen and living room.

   Note: Where the assessment of the number of accessible units results in a fractional number, any fraction under one-half shall be disregarded and fractions of one-half or greater shall be considered as one residential unit.

48. Consistent with Objective 1 and Policy 4 in Schedule 3A, the universal access standard seeks to create a well-functioning residential environment with housing that meets day to day needs and good social and community outcomes for the able as well as those with disabilities. While it is acknowledged that the objective is not particularly well defined, it is not *ultra vires* as contended by Kainga Ora, as it addresses an RMA purpose, and is not otherwise replicated or addressed in the building code.

Electricity line separation

49. WEL Networks Limited (**WEL**) seeks to introduce new rules which reflect the requirements of ECP 34 – New Zealand Electrical Code of Practice for Electrical Safe Distances (**ECP34**). Rather than introduce rules, HCC's initial response to the WEL submission was to include an advice note that

refers to the requirements of ECP34. In response to WEL's evidence, Mr Roberts proposes to introduce new Policy 4.1.2.6l and amendments to the building setback provisions in the GRZ, MDRZ and the HDRZ.[14]

50. Kainga Ora's legal submissions state that it is unclear if these amendments apply to the corresponding provisions in the Subdivision Chapter. When presenting her evidence in the hearing, Ms Laura Thompson clarified that they do not.[15]

51. Kainga Ora considers that an advice note is sufficient to alert a landowner to the requirements of ECP34.

52. This is not a legal issue. Having considered the evidence and submissions concerning the planning merits of WEL's proposed relief, HCC maintains its support for the provisions proposed by Mr Roberts.

Urban Tree Canopy

53. Schedule 3A of the RMA includes, as a MDRS, a requirement that residential units at ground floor level have a landscaped area that is a minimum of 20% of a developed site, which can comprise grass or plants or tree canopy. Kainga Ora contends that HCC's proposed urban tree canopy rule, which imposes additional requirements for urban trees, restricts development, increases costs and administrative burdens.[16]

54. In addition, Kainga Ora raises a jurisdictional issue with the rule, asserting that it goes beyond making a MDRS "less enabling of development than provided for", and is an additional restriction on existing development rights.[17]

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[14] Rebuttal evidence of Mark Roberts, paragraphs 35-38.
[15] Oral evidence in the hearing on 5 September 2024.
[16] Legal submissions of Kainga Ora dated 30 August 2024, paragraph 8.1.
[17] Legal submissions of Kainga Ora dated 30 August 2024, paragraph 8.3.

55. When the landscaped area standard in Schedule 3A is compared with Rule 4.2.5.3b, it is clear that the Rule does not impose anything more than the Schedule 3A standard:

> Rule 4.2.5.3 Impermeable surface and Landscaping
> …
> b. A residential unit at ground floor level must have a landscaped area of a minimum of 20% of the total site area.

> **Schedule 3A**
> **MDRS to be incorporated by specified territorial authorities**
> …
> **Part 2**
> **Density Standards**
> …
> **18 Landscaped area**
>
> (1) A residential unit at ground floor level must have a landscaped area of a minimum of 20% of a developed site with grass or plants, and can include the canopy of trees regardless of the ground treatment below them.

56. Rule 4.2.5.3b is not more onerous than the landscaped area standard, so no *Waikanae* issue arises. More importantly, these provisions assist in the overall stormwater management approach adopted under PC12 and, by serving the Te Ture Whaimana QM, are lawful.

Te Awa Lakes Unincorporated Joint Venture and Fonterra

57. Te Awa Lakes Unincorporated Joint Venture (**TAL**) submits that the amendments to the PC12 provisions sought by Fonterra Limited (**Fonterra**) to address its reverse sensitivity concerns are unnecessary because Plan Change 2 extensively considered reverse sensitivity and provided adequately for it. TAL submits that these amendments offend the principle established in *Waikanae* as they limit the level of development previously permitted.

58. This is not quite the case. PC12 introduces some additional enablement for residential activities above grade in the Business Zone. On the basis that the level of enablement shifts, so too might the provisions regarding

reverse sensitivity. If PC12 made no change to residential enablement within the Te Awa Lakes development, HCC accepts that no change would be justified.

59. The amendments proposed by HCC in response to Fonterra's concerns are limited to the introduction of assessment criteria C2e and Policy 4.1.2.2.d. Mr Roberts' supplementary evidence dated 12 September 2024 confirms that he does not support any further amendments in response to Fonterra's submissions and evidence.

60. HCC does not support, nor does it propose any changes to restrict activities previously permitted. Accordingly, no *Waikanae* issues arise under the relevant PC12 provisions proposed by HCC.

KiwiRail Holdings Limited

5m setback

61. KiwiRail Holdings Limited (**KiwiRail**) seeks a 5m building setback in the GRZ, the MDRZ, the HDRZ and the LLRZ for sites adjoining rail corridors.

62. As explained in HCC's opening legal submissions, KiwiRail's setback relief does not meet the *Waikanae* test, as it imposes land use restrictions greater than the current ODP provisions.

63. Rule 4.4.6 in the ODP sets the building setbacks for the GRZ, Residential Intensification Zone and the LLZ. Rail is addressed under (g) and sets a 1.5m setback. Under the ODP, buildings setback between 1.5-5m are permitted. Under PC12, if a build in this area infringes the standard it defaults to a Restricted Discretionary activity under Rule 1.1.8.2a. As this is less enabling than the ODP, the setback rule sought by KiwiRail is contrary to *Waikanae* and cannot be granted.

Noise sensitive activity controls

64. The same issue with *Waikanae* applies to the amendment KiwiRail seeks to the noise standards to make them apply to noise sensitive activities within 100m of a railway corridor. Rule 25.8.3.10 in the ODP controls noise sensitive activities in the residential zones. Rule 25.8.3.10.a.iii. specifies that Rule 25.8.3.10.e, f. and g. apply to all sites "near a railway line" as defined in Rule 25.8.3.10.d. That standard provides that "near a railway line" applies to noise sensitive activities within 40m of the boundary of a designation for Railway Purposes".

65. So noise sensitive activities are permitted if they meet the relevant standards (e.g. Rule 25.8.3.10.e provides that any habitable room in the building containing a noise sensitive activity shall be protected from noise arising from outside the building by ensuring the building is designed and constructed to meet specified indoor design sound levels in bedrooms and habitable rooms). Beyond 40m, they are not required to meet these standards. However, the amendments sought by KiwiRail would mean that noise sensitive activities between 41m-100m of a railway corridor would need to meet these standards. If they do not comply, they would default to Restricted Discretionary status under Rule 1.1.8.2a. Again, as this reduces ODP enablement, and does have the effect of reducing previously permitted activities, the amendments fail the *Waikanae* test.

66. The only way that KiwiRail could overcome these matters is if the Panel accepts KiwiRail's request to consider its rail infrastructure a QM. HCC does not support that treatment.

Dr John Gallagher, Sir William and Lady Judi Gallagher and Trevor McKee

Application of Te Ture Whaimana

67. In response to the planning evidence on behalf of Sir William and Lady Judi Gallagher (**the Gallaghers**), Trevor McKee and the legal submissions of Dr John Gallagher (**Dr Gallagher**) asserting that Te Ture Whaimana QM applies to Lake Rotoroa, the Panel sought confirmation from HCC that the application of Te Ture Whaimana extends to Lake Rotoroa (a closed Lake system that does not drain or flush).

68. The Vision and strategy for the Waikato River/Te Ture Whaimana is set out in Schedule 2 to the Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010 (**Settlement Act**). The vision is stated in Schedule 2 as being "for a future where a healthy Waikato River sustains abundant life and prosperous communities who, in turn, are all responsible for restoring and protecting the health and wellbeing of the Waikato River, and all it embraces, for generations to come". Section 6 of the Settlement Act defines the Waikato River as follows:

> (a) in sections 3, 4, 8, and 88, means the Waikato River and its catchment:
> (b) in sections 9, 16, 17, 20, 22, 23, 26, 32, and 44 and Schedules 1 to 6, means—
> (i) the body of water known as the Waikato River flowing continuously or intermittently from the Huka Falls to the mouth of the Waikato River shown as located within the areas marked "A" and "B" on SO plan 409144; and
> (ii) all tributaries, streams, and watercourses flowing into the part of the Waikato River described in subparagraph (i), to the extent to which they are within the areas marked "A" and "B" on SO plan 409144; and
> **(iii) lakes and wetlands within the areas marked "A" and "B" on SO plan 409144;** and
> (iv) the beds and banks of the water bodies described in subparagraphs (i) to (iii):
> (c) in sections 35 to 38, 40, 42, 45, 47, 56 to 64, 66, 69, 72, 80, and 93 and Schedule 7, means—
> (i) the body of water known as the Waikato River flowing continuously or intermittently from Karapiro to the mouth of the Waikato River shown as located within the area marked "A" on SO plan 409144; and

> (ii) all tributaries, streams, and watercourses flowing into the part of the Waikato River described in subparagraph (i), to the extent to which they are within the area marked "A" on SO plan 409144; and
> (iii) lakes and wetlands within the area marked "A" on SO plan 409144; and
> (iv) the beds and banks of the water bodies described in subparagraphs (i) to (iii)
>
> [Emphasis added].

69. As Te Ture Whaimana is contained in Schedule 2 to the Settlement Act, the relevant part of the definition is subparagraph (b)(iii):

> lakes and wetlands within the areas marked "A" and "B" on SO plan 409144.

70. Lake Rotoroa is located within the area marked "A" on SO plan 409144, which is included as **Attachment 1** to these submissions. Accordingly, Te Ture Whaimana applies to Lake Rotoroa.

71. Supporting this interpretation, the Waikato Regional Council, Waikato River Authority and DairyNZ, have published a guidance document for the restoration of the Waikato River in accordance with Te Ture Whaimana, called the Waikato and Waipa River Restoration Strategy.[18] The Strategy covers the combined Waikato River and Waipa River catchments as defined by the Settlement Act (as well as other relevant settlement legislation[19]).[20] The Strategy identifies Lake Rotoroa as a 'Very High Priority' restoration project.[21]

Zoning

72. HCC does not seek MDRZ for the residential zones on the southern/eastern side of the Lake as requested by the Gallaghers. The Panel sought justification for the distinction in the treatment of the

[18] Waikato and Waipa River Restoration Strategy dated May 2018.
[19] Ngati Tuwharetoa, Raukawa, Te Arawa River Iwi Waikato River Act 2010 and Nga Wai o Maniapoto (Waipa River) Act 2012.
[20] Waikato and Waipa River Restoration Strategy dated May 2018.
[21] See Figure 9 and page 17.

residential zones to the north, which are the subject of the Dr Gallagher submission opposing HDRZ. These areas do not drain directly to the Lake, there being road and stormwater infrastructure between the residential land and the Lake. These areas are also contained within Stage 1, which is intended to be served by Three Waters network infrastructure investment which supports these higher densities.

Foodstuffs North Island Limited

73. Foodstuffs North Island Limited's (**Foodstuffs**) submission sought amendments to the Business Height Overlay to include its Glenview and Heaphy Terrace sites where it operates New World Glenview (in the Business 5 Zone) and Four Square Heaphy Terrace (in the Business 6 Zone). In its evidence and legal submissions, in addition to those amendments, Foodstuffs now seeks that the Floor Area Ratio (**FAR**) in Rule 6.4.4 on these sites be deleted or increased. In response, rather than delete it, Ms Reu Junqueira has recommended increases to the FAR.

74. The Panel queried whether any other submission on PC12 sought deletion of the FAR control. HCC has reviewed the submissions and confirms that the submission of Stride Investment Management Ltd (#200) sought deletion of the FAR control but only for Business Zone 3. Accordingly, HCC submits that the Stride submission provides scope to delete the FAR control from Rule 6.4.4 in respect of Business Zone 3 only. Deletion of the FAR in respect of any Business Zones other than Business Zone 3 would require the Panel to make a recommendation under clause 99 of Schedule 1 to the RMA.

OTHER MATTERS

Transport amendments

75. The question of whether the proposed transport amendments are within scope is one of statutory interpretation. Section 80E provides:

> **80E Meaning of intensification planning instrument**
> (1) In this Act, **intensification planning instrument** or **IPI** means a change to a district plan or a variation to a proposed district plan—
> (a) that must—
> (i) incorporate the MDRS; and
> (ii) give effect to,—
> (A) in the case of a tier 1 territorial authority, policies 3 and 4 of the NPS-UD; or
> (B) in the case of a tier 2 territorial authority to which regulations made under section 80I(1) apply, policy 5 of the NPS-UD; or
> (C) in the case of a tier 3 territorial authority to which regulations made under section 80K(1) apply, policy 5 of the NPS-UD; and
> (b) that may also amend or include the following provisions:
> (i) provisions relating to financial contributions, if the specified territorial authority chooses to amend its district plan under section 77T:
> (ii) provisions to enable papakāinga housing in the district:
> (iii) related provisions, including objectives, policies, rules, standards, and zones, <u>that support or are consequential on—</u>
> <u>(A) the MDRS; or</u>
> <u>(B) policies 3, 4, and 5 of the NPS-UD, as applicable.</u>
> (2) In subsection (1)(b)(iii), **<u>related provisions</u>** <u>also includes provisions that relate to any of the following, without limitation:</u>
> (a) district-wide matters:
> (b) earthworks:
> (c) fencing:
> (d) infrastructure:
> (e) qualifying matters identified in accordance with section 77I or 77O:
> (f) storm water management (including permeability and hydraulic neutrality):
> (g) subdivision of land.
>
> [Emphasis in underline added].

76. So related provisions must support or be consequential on the MDRS or Policies 3 or 4. Schedule 3A to the RMA sets out the MDRS including the following objectives and policies:

> Objective 1

(a) **a well-functioning urban environment** that enables all people and communities to provide for their social, economic, and cultural wellbeing, and for their health and safety, now and into the future:

Objective 2

(a) a relevant residential zone provides for a variety of housing types and sizes that respond to—

(i) **housing needs** and demand; and

(ii) the neighbourhood's planned **urban built character**, including 3-storey buildings.

Policy 3

(a) encourage development to **achieve attractive and safe streets and public open spaces**, including by providing for passive surveillance:

Policy 4

(a) enable housing to be designed **to meet the day-to-day needs of residents**:

77. The NPS-UD provides:

> **Policy 3:** In relation to tier 1 urban environments, regional policy statements and district plans enable:
>
> a. in city centre zones, building heights and density of urban form to realise as much development capacity as possible, to **maximise benefits of intensification;** and
> b. in metropolitan centre zones, building heights and density of urban form to reflect demand for housing and business use in those locations, and in all cases building heights of at least 6 storeys; and
> c. building heights of at least 6 storeys within at least a walkable catchment of the following:

(i) existing and planned rapid transit stops
(ii) the edge of city centre zones
(iii) the edge of metropolitan centre zones; and

d. within and adjacent to neighbourhood centre zones, local centre zones, and town centre zones (or equivalent), building heights and densities of urban form commensurate with the level of commercial activity and community services.

Policy 4: Regional policy statements and district plans applying to tier 1 urban environments modify the relevant building height or density requirements under Policy 3 only to the extent necessary (as specified in subpart 6) to accommodate a qualifying matter in that area.

78. Drawing these elements together, HCC submits that the transport-related provisions are all directed towards maximising the benefits of intensification, meeting day to day needs, achieving attractive safe streets and well-functioning urban environments.

79. HCC has filed supplementary evidence from Mr Ryan dated 12 September 2024 identifying transport provisions that require further amendment to comply with *Waikanae.*

Lapse period

80. During the presentation of HCC's legal submissions, in response to the concern about land/capacity banking, the Panel queried whether there was merit in introducing lapse dates.

81. HCC does not support the introduction of shorter lapse dates in the Plan through PC12. Standard lapse periods give rise to unintended consequences, including forcing HCC's Planning Guidance Unit to make additional assessments on extensions under s 125 of the RMA, and judgments concerning when consents are given effect to. Ms Colliar has given evidence regarding the draft connections policy and how that will link with the consent lapse periods. Permitted activities will have a connections certificate lapse period of 1 year and an ability to extend to two years. It is intended that land use and subdivision consented activities are preceded by a connections certificate that lasts two years,

to enable consents to be secured, and once consent is secured, the certificate would then line up with the five year lapse under the resource consent. HCC acknowledges that a degree of 'capacity banking' is inevitable, and HCC is satisfied that the issue can be managed without imposing a rule or provision in the ODP which controls consent lapse periods.

Water quality treatment

82. In the hearing of PC12, questions were put to Mr Farrant and other HCC witnesses by Commissioner Nigel Mark-Brown regarding the need for greater clarity in Rule 25.13.4.2A(f)(ii)A concerning water quality treatment. Having conferred with Mr Farrant, Ms Reu Junqueira has provided supplementary evidence dated 20 September 2024 recommending amendments to Rule 25.13.4.2A(f)(ii)A.

SUPPLEMENTARY EVIDENCE

83. HCC has provided supplementary evidence from the following witnesses which address key evidential matters raised during the course of the hearing:

a) Michael Graham: In response to the Panel's questions, Mr Graham's supplementary evidence dated 12 September 2024 proposes definitions for 'deep soils' and 'deep soil areas'.

b) Emily Buckingham: Ms Buckingham's supplementary evidence dated 12 September 2024 identifies a correction to the definitions of 'strategic network infrastructure' and 'local network infrastructure'.

c) Paul Ryan: Mr Ryan's supplementary evidence dated 12 September 2024 addresses compliance of the PC12 provisions with

the test identified in *Waikanae.*

d) Stuart Farrant: Mr Farrant's supplementary evidence dated 12 September 2024 addresses matters raised in the hearing relating to potential public health risks associated with the harvesting of rainwater for non-potable reuse, adverse impacts from modified urban hydrology and the broad requirement under PC12 to require rainwater reuse where discharges are piped direct to the Waikato Awa.

e) Clare Douglas: Ms Douglas' supplementary evidence dated 20 September 2024 proposes additional amendments to the PC12 financial contributions provisions in response to matters raised during the course of the hearing by submitters and the Panel.

f) Juliana Reu Junqueira: Ms Reu Junqueira's supplementary evidence dated 20 September 2024 proposes an amendment to Rule 25.13.4.2A(f)(ii)A.

g) Mark Roberts: Mr Roberts' supplementary evidence dated 12 September 2024 addresses various planning matters raised during the course of the hearing, including his recommendations for additional amendments to the PC12 provisions.

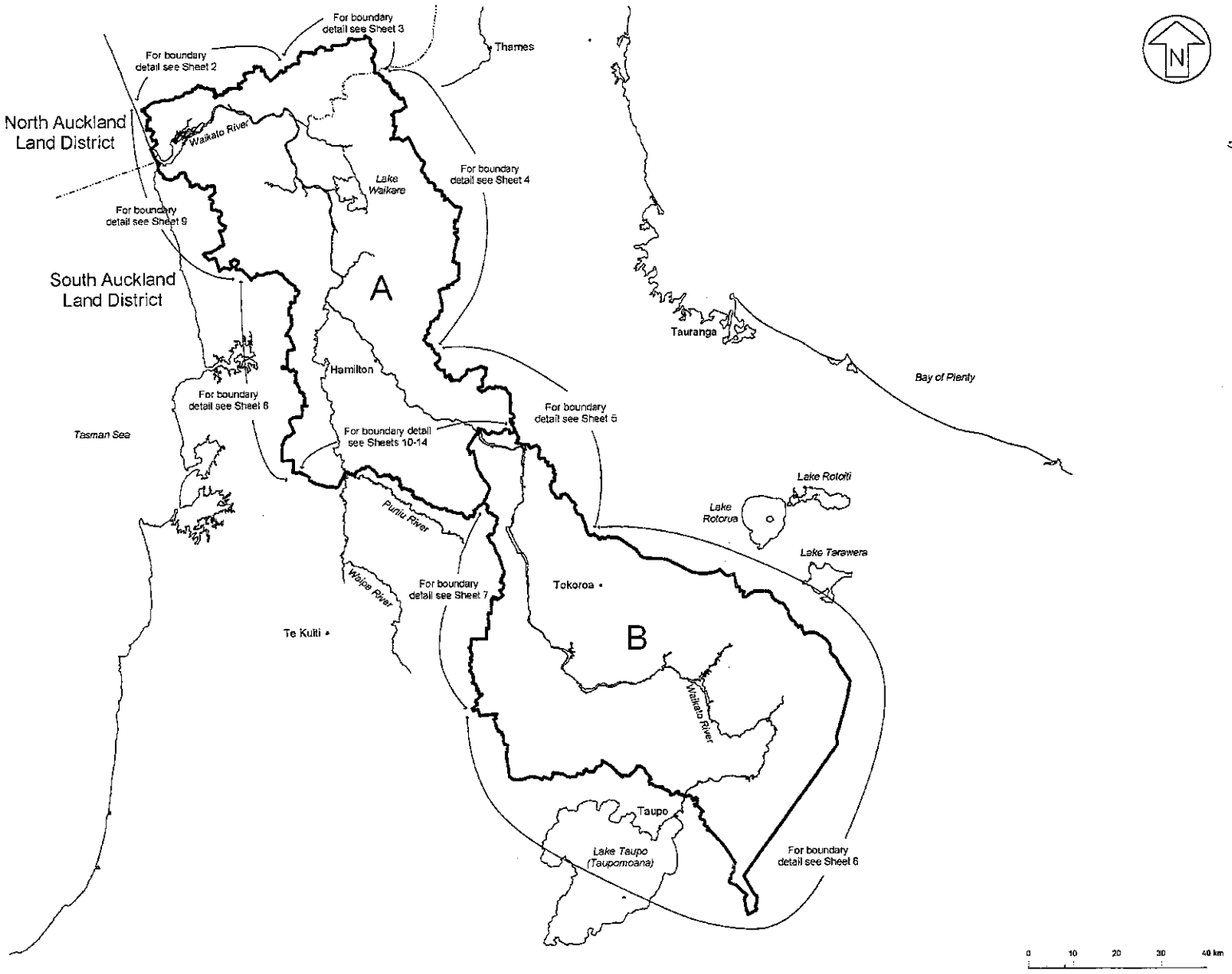
Ngā mihi nui,

Dated 20 September 2024

_____

L F Muldowney / S K Thomas
Counsel for Hamilton City Council

ATTACHMENT 1



Notes:
Where the boundary is shown along a river or road it follows the middle line of legal road or physical river unless shown otherwise.

for and on behalf of Waikato-Tainui

17, 12, 2009
for and on behalf of the Crown

Jurisdiction boundaries are reproduced in terms of the Waikato River and Waipa River Catchment analysis supplied by Environment Waikato. Boundaries have been aligned to the cadastral core record system as at July 2008. Alignment has been made, where possible, to the nearest appropriate legal boundary, road or river.

Land Districts: South Auckland & North Auckland
Regional Authority: Environment Waikato

WAIKATO RIVER AUTHORITY
VISION AND STRATEGY FOR THE WAIKATO RIVER

WAIKATO-TAINUI CO-MANAGEMENT AREA
area marked A hereon
PREPARED BY Sinclair Knight Merz Ltd
DATE August 2008

Sheet 1 of 14

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