BEFORE THE INDEPENDENT HEARING PANEL

UNDER	the Resource Management Act 1991
IN THE MATTER	of proposed Plan Change 12 to the Operative Hamilton City District Plan

LEGAL SUBMISSIONS

SIR WILLIAM AND LADY JUDI GALLAGHER AND TREVOR MCKEE

30 AUGUST 2024

Solicitor acting:
A Ferguson
Dempsey Ferguson Law
Level 10, 63 Albert Street
Auckland 1010
andrew@dempseyferguson.co.nz

Counsel instructed:
J Campbell / P Senior
Bankside Chambers / FortyEight Shortland Barristers
88 and 48 Shortland Street
Auckland 1010
janette@campbell.legal /
patrick@pseniorbarrister.co.nz

MAY IT PLEASE THE HEARING PANEL:

1. EXECUTIVE SUMMARY

1.1 Lake Rotoroa is a jewel of inner-city Hamilton. Sir William and Lady Judi Gallagher and Mr Trevor McKee (**Submitters**) are fortunate to live on land surrounding the Lake. There are many others that live near the Lake, or visit the Lake to enjoy its cultural, ecological and amenity and recreational values. However, the Lake's values are declining. Permitting medium density residential development around the Lake risks its further degradation and the destruction of the values for which it is known and enjoyed.

1.2 The Submitters seek Plan Change 12's (**PC12**) provisions are less enabling of residential intensification than the medium density residential standards (**MDRS**) on the land around the Lake. In particular, the land to the west of Pembroke Street and north of Lake Crescent (as shown in the plan below) should remain as General Residential Zone (**GRZ**).[1] The relief sought by the Submitters is enabled by qualifying matters.

1.3 The Submitters' approach is supported by expert planning evidence from Mark Chrisp and in large part by the Council. The Council supports the land around the Lake being GRZ. Only a small number of differences remain between the Submitters and the Council's approach. The Submitters' approach should be preferred by the Panel because it will:

(a) Better protect the values of the Lake;

(b) Better give effect to Te Ture Whaimana o Te Awa o Waikato (the Vision and Strategy for the Waikato River) (**Te Ture Whaimana**); and

(c) Better give effect to National Policy Statements on Urban Development and Freshwater, the Waikato Regional Policy Statement (**RPS**) and the objectives of PC12 itself.

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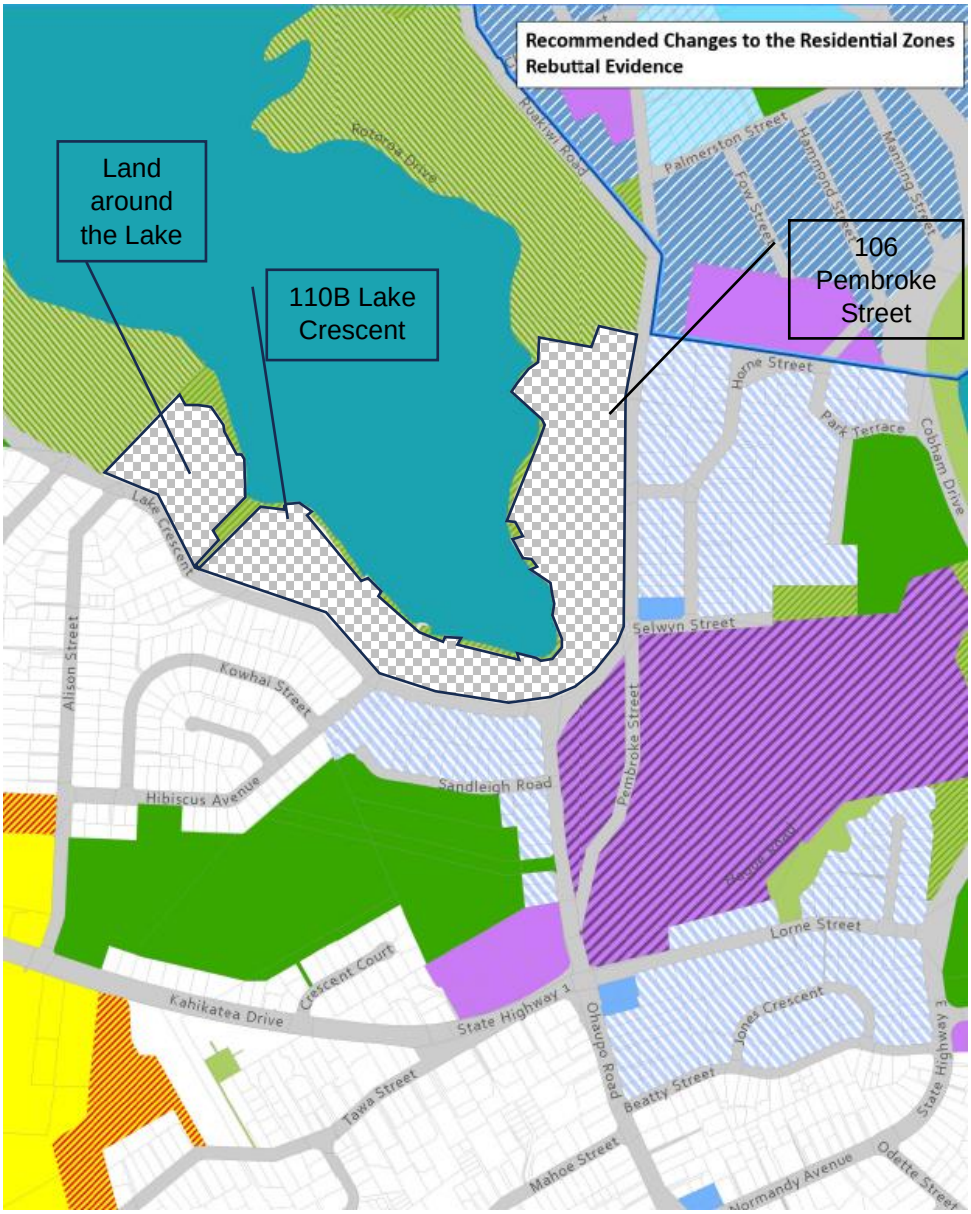
[1] Adapted from Roberts rebuttal at Appendix D.

1.4 For these reasons, the Panel should recommend the submissions of Sir William and Lady Judi Gallagher and Mr McKee be accepted.



2. INTRODUCTION

Nature of interest in PC12

2.1 Sir William and Lady Judi Gallagher live at 106 Pembroke Street. Mr McKee lives at 110B Lake Crescent. Both properties overlook Lake Rotoroa.

2.2 Mr McKee made a submission and Sir William and Lady Judi made a further submission on PC12.

Evidence

2.3 Mr Chrisp has provided expert planning evidence in support of the submissions.[2] Mr Chrisp's evidence supports the General Residential Zone (May 2024) applying around the Lake.[3] Mr Roberts, the Council's expert planner, largely supports Mr Chrisp's evidence and only a small number of discrete differences remain.

Structure of submissions

2.4 Our submissions provide the reasons why Mr Chrisp's evidence should be preferred according to the following structure:

(a) The high-level legal framework applying to PC12;

(b) The appropriateness of the proposed provisions; and

(c) The role of higher order planning documents.

2.5 All of the above reasons support the Panel making its recommendation in favour of the provisions proposed by Mr Chrisp.

3. THE LEGAL FRAMEWORK

3.1 PC12 is an Intensification Planning Instrument.[4] The Council may make the provisions of PC12 less enabling than the medium density residential standards (**MDRS**) or Policy 3 of the NPS-UD if a qualifying matter applies.[5] For the Submitters, the relevant qualifying matters are:

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2 Evidence in chief dated 29 July 2024 and rebuttal evidence dated 14 August 2024.

3 PC12 was notified in 2022. Subsequent versions of the GRZ were released by the Council in May 2024 and August 2024. The Submitters support the GRZ (May 2024) applying around the Lake.

4 RMA, s 80E.

5 RMA, s 77I.

(a) Lake Rotoroa being considered as a matter of national importance that decision makers are required to recognise and provide for under s 6 RMA[6], because it:

(i) Is a lake that, together with its margins, has natural character that should be preserved and protected from inappropriate subdivision, use and development;[7]

(ii) Is a significant natural area.[8]

(b) Lake Rotoroa being protected by the National Policy Statement for Freshwater Management (**NPS-FM**) and the Lake's health and wellbeing prioritised above other needs including the ability of people and communities to provide for their economic wellbeing;[9] and

(c) Lake Rotoroa being protected by Te Ture Whaimana o Te Awa o Waikato—the Vision and Strategy for the Waikato River (**Te Ture Whaimana**).[10]

3.2 It is therefore open to the Panel to recommend provisions for the land around the Lake that are less enabling of development than the MDRS. In fact, the strong directions in above require it.

3.3 Policy 3 of the NPS-UD does not apply to the land around the Lake.[11]

4. PROPOSED PROVISIONS SOUGHT BY SUBMITTERS

Provisions agreed with the Council

4.1 Mr Chrisp supports, and the Council agrees with:

(a) The GRZ applying to the land around the Lake;

(b) The Infrastructure Capacity Overlay and associated density controls in the GRZ (one residential unit per 200m^2);

(c) The maximum number of dwellings per site (two) that can occur as a permitted activity in the GRZ;

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6 RMA, s 77I(a).
7 RMA, s 6(a).
8 RMA, s 6(c).
9 RMA, s 77I(b).
10 RMA, s 77I(c).
11 Chrisp at [10.2].

(d) The maximum height of dwellings (10 metres) that can occur as a permitted activity in the GRZ;

(a) Retaining the 4m + 60^0 height in relation to boundary standard in the GRZ; and

(b) The maximum building coverage (45%) as a permitted activity standard in the GRZ.

4.2 Kainga Ora sought in its submission the Medium Density Residential Zone (**MDRZ**) apply around the Lake.[12] Waka Kotahi sought in its submission that "consideration should also be given to expanding the High Density Residential Zone to the south of the Central City towards the Waikato Hospital" to include the land around Lake Rotoroa.[13] Compared with its submission, Kainga Ora has taken a much narrower approach in its evidence and no longer appears to seek the MDRZ applying around the Lake.[14] Waka Kotahi has not produced any evidence at all supporting what was already a vague submission.[15]

Provisions not yet agreed with the Council

4.3 Mr Chrisp supports but the Council does not yet agree with:

(a) Policy 4.2.2.2c of the GRZ, which supports higher density development around open spaces, being amended to exclude the land around Lake Rotoroa; and

(b) Retaining the expectation of 1-2 storey developments in the objectives and policies of the GRZ.

Summary

4.4 The relief sought by the Submitters and supported by Mr Chrisp reflects the GRZ (May 2024). Those are the most appropriate provisions for the land surrounding the Lake. In the event the Panel considers the provisions above are not appropriate for the GRZ as a whole, then an overlay containing specific additional provisions for the land surrounding the Lake would be appropriate.

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12 Chrisp at [4.4].
13 Chrisp at [4.4].
14 Chrisp rebuttal at [3.1]-[3.6].
15 Chrisp rebuttal at [3.8].

5. POTENTIAL EFFECTS ON THE VALUES OF THE LAKE

The Values of the Lake

Lake Rotoroa has important cultural and ecological values. Lake Rotoroa is protected by Te Ture Whaimana.[16] The overarching vision of Te Ture Whaimana is for a healthy Waikato River and its catchment that sustains abundant life and prosperous communities, who in turn are all responsible for restoring and protecting the health and wellbeing of the Waikato River for future generations.[17] Te Ture Whaimana requires ongoing improvements be made to the health of the Lake, which is located within the catchment of the Waikato River.[18] Avoiding, remedying and mitigating effects on the Lake is insufficient.[19] The Lake is also protected by the NPS-FM (see [7.3] below).

5.1 Lake Rotoroa is in a degraded state.[20] Unlike the Waikato River, the Lake is a closed system.[21] It does not drain or "flush". This means it is particularly vulnerable to contaminant discharges.

5.2 The Lake and the domain are also recognised for their amenity and recreational values in the Hamilton Lake Domain Management Plan 2017.[22] This document not only requires management of the domain itself, but the land around the domain.[23] There would be little point protecting the Lake and the domain, only to choke it with intense residential development around the balance of the land surrounding the Lake which does not form part of the domain. That would defeat the purpose of protecting the Lake in the first place. Surrounding development should be sympathetic to the values of the Lake.

The potential effects on the values of Lake Rotoroa

5.3 Stormwater from the land around the Lake all currently drains to the Lake.[24] The Council's evidence states that its three waters infrastructure is already overloaded and underfunded.[25] What three waters funding is

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16 Chrisp at [7.1].
17 Chrisp at [7.2].
18 Williams (26 June 2024) at [84] cited by Chrisp at [7.1].
19 Williams (26 June 2024) at [84] cited by Chrisp at [7.1]. See also *Puke Coal Ltd v Waikato Regional Council* [2014] NZEnvC 223 at [92].
20 Chrisp at [8.1]-[8.3].
21 Chrisp at [8.4].
22 Chrisp at [9.1].
23 Chrisp at [9.4].
24 Chrisp at [6.8] and Appendix 2.
25 Chrisp at [6.1]-[6.7] citing Davey (26 June 2024) at [6] and [8], Colliar (26 June 2024) at [117], [146], [149] and [150] and Junqueria (26 June 2024) at [46].

available is not planned for the land around the Lake.[26] This infrastructure deficit would be made worse through residential intensification.[27] The Council's evidence states that the adverse effects arising from allowing growth without adequate infrastructure include:[28]

(a) Increased contaminated stormwater run-off impacting water quality, ecology, public health, cultural activities and the relationship between people and the awa; and

(b) Increased number, locations and volume of wastewater overflows impacting on water quality, ecology, public health, cultural activities and the relationship between people and the awa.

5.4 Residential intensification of the kind permitted by the MDRZ risks the amenity and recreational values of the Lake.

6. THE PROVISIONS OF THE GRZ (MAY 2024) ARE THE MOST APPROPRIATE

6.1 If any intensification of the land surrounding the Lake should be permitted at all, it should be according to the provisions of the GRZ (May 2024). The provisions specifically supported by the Submitters and Mr Chrisp are below.

The Infrastructure Capacity Overlay and density controls

6.2 The purpose of the Infrastructure Capacity Overlay is to avoid adverse effects of urban development on the Waikato River where there are known three waters infrastructure capacity constraints.[29] The Overlay manages the constraints on three waters infrastructure by putting in place a density control of a minimum of one residential unit for every 200m^2 of net site area. Where residential units are built at a density higher than 1:200m^2, resource consent and an Infrastructure Capacity Assessment will be required.[30] This approach is more appropriate than:

(a) The minimum density control in the MDRZ of one residential unit per 150m^2 of net site area; and

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26 Chrisp at [6.7].
27 Chrisp at [6.1]-[6.7] citing Davey (26 June 2024) at [6] and [8], Colliar (26 June 2024) at [117], [146], [149] and [150] and Junqueria (26 June 2024) at [46].
28 Chrisp at [6.4] citing Colliar (26 June 2024) at [117].
29 Chrisp rebuttal at [4.4].
30 Chrisp rebuttal at [4.4].

(b) Removing the density controls altogether as proposed by Kainga Ora.[31]

6.3 Removing the overlay and associated density controls would enable, without the need for a developer to assess infrastructure capacity:

(a) In the GRZ, two new dwellings to be built as permitted activities in a high density arrangement; and

(b) In the MDRZ, three new dwellings to be built as permitted activities in a high density arrangement.[32]

6.4 The overlay and density controls are effective because they enable greater scrutiny over developments in areas where there are known infrastructure capacity constraints.[33] Increasing housing density in an area with known infrastructure constraints without special attention to those constraints will inevitably result in an increase of wastewater and thus additional stress on already strained existing infrastructure.[34]

6.5 Contrary to Kainga Ora's evidence, the density controls play an important and effective role. It is insufficient to rely solely on the maximum number of new residential units per site. That type of control does not take into account the size of the site. For example, in the GRZ it is possible for two new residential units to be built on a very small site. That could be replicated across a large area. That kind of infill housing would place significant demands on wastewater infrastructure. However, this would be a permitted activity if Kainga Ora's relief is adopted. An infrastructure capacity assessment should be required before this kind of infilling can occur.

6.6 Removing the density control, or allowing a higher minimum density control, increases the probability of more occupants on a site, and thus increases wastewater flows – without an infrastructure capacity assessment. As Mr Chrisp states:[35]

> The adverse effects that could result from an overloaded wastewater system include increases in overflows of untreated wastewater from the wastewater network and combined wastewater/stormwater flows to freshwater bodies, and onto private and public property during wet and dry weather. In the case of the land around Lake Rotoroa, there

31 Campbell (24 July 2024) at [4.8].
32 Chrisp at [4.5].
33 Chrisp at [4.7].
34 Chrisp at [4.8].
35 Chrisp at [4.12].

> would be a risk of combined wastewater and stormwater flows into Lake Rotoroa when the wastewater system is overloaded.

6.7 This increases the risk of adverse cultural, environmental and social costs arising. Economic benefits should not be promoted above those costs.

Permitted number of dwellings

6.8 The GRZ (May and August 2024) allows for two residential units to be built on a single site as a permitted activity. The MDRZ allows for three residential units to be built on a single site as a permitted activity. If the permitted activity standard is exceeded, resource consent would be required as a restricted discretionary activity. The matters of discretion for properties located in the Overlay include the need to assess infrastructure capacity.

6.9 The GRZ compared with the MDRZ provides better scrutiny over infrastructure capacity and a form of intensification that is lower risk in terms of its adverse environmental, cultural and social effects.[36] This is important because the Lake is in such a poor state that any further discharges of contaminants will continue to impact its health in a serious and cumulative manner. Those potential effects outweigh the benefits of applying the MDRZ to the land around the Lake.

6.10 The Submitters and Mr Chrisp's proposed approach does not prohibit medium density development around the Lake. Those wishing to undertake such developments can still do so, but they must apply for resource consent and have any proposal of that nature assessed on its merits.

Other provisions

6.11 The Submitters oppose the Council's August 2024 version of Objective 4.2.2.2.ii and seek the May 2024 version be reinstated:[37]

(a) May 2024:

> The neighbourhood's planned urban built character, <u>comprising</u> ~~including~~ 1 to ~~3~~2 storey single, duplex, and terrace housing residential units ~~buildings~~.

(b) August 2024:

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36 Chrisp rebuttal at [4.24].

37 Chrisp rebuttal at [5.12].

> The neighbourhood's planned urban built character, ~~comprising including 1 to 3 2 storey~~ of single, duplex, and terrace housing residential units ~~buildings~~ that are predominantly 10m in height.

6.12 Mr Chrisp and the Council agree on the following permitted activity standards in the GRZ (May and August 2024):

(a) Residential developments of up to 10 metres compared with 18 metres in the MDRZ;

(b) Height in relation to boundary of 4m + 45^0 compared with 6m + 60^0 as proposed by Kainga Ora for the MDRZ or 4m + 60^0 as proposed by the Council in the notified version of the GRZ; and

(c) Maximum site coverage of 45% compared with 50% in the MDRZ.

6.13 Mr Chrisp's approach should be preferred because it is more compatible with the recreational and amenity values of the Lake including the objectives of open space natural character and limited built environment within the Hamilton Lake Domain Management Plan 2017.[38] For example:

(a) Allowing 18 metre high residential development is contrary to almost every aspect of the objectives sought in relation to the amenity and recreation values set out in the Management Plan;[39] and

(b) An expectation of 1-2 storeys better provides for the Lake's values than 10 metres because of the likely bulk and visual dominance effects of 3 storeys crammed into a building 10 metres high.[40]

6.14 The GRZ (May 2024 and August 2024) also contains Policy 4.2.2.2.c (and a similar statement in 4.2.1 Purpose), both of which should be amended to exclude Lake Rotoroa, as follows:[41]

> Higher-density residential development is located close to neighbourhood centres, parks, open spaces, and other areas of high social amenity (except in the case of Lake Rotoroa).

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38 Chrisp rebuttal at [5.2], [5.7]-[5.8], [5.13]-[5.15].
39 Chrisp rebuttal at [5.3].
40 Chrisp rebuttal at [5.12].
41 Using policy 4.2.2.2.c as the specific example in this case.

6.15 Should the Panel be reluctant to recommend GRZ-wide changes to accommodate the unique environs of Lake Rotoroa, then it could impose an overlay specific to the land around the Lake containing the changes above.

7. ASSESSMENT AGAINST STATUTORY AND PLANNING DOCUMENTS

7.1 PC12 is required to give effect to Te Ture Whaimana, national policy statements and the RPS.[42]

Te Ture Whaimana, the NPS-FM and the RPS

7.2 Te Ture Whaimana requires not only protection but improvement of the mauri of Lake Rotoroa.[43] In the absence of infrastructure funding to improve three waters infrastructure on the land around the Lake, the more restrictive set of planning provisions proposed by the Submitters is required to ensure the mauri of the Lake is at least protected.

7.3 Similarly, the NPS-FM and the RPS contain directive objectives and policies prioritising the protection and restoration of freshwater bodies.[44] Mr Chrisp's proposed PC12 provisions better give effect to those policies because they provide greater protection against the risk of discharges of contaminants to Lake Rotoroa.

7.4 It is insufficient to rely on "alternative mechanisms" to do PC12's batting. Kainga Ora has suggested infrastructure connections policies, bylaws, asset owner rights, the Local Government Act 2002 or the Building Act 2004 be used in the place of sound planning provisions in PC12 to manage infrastructure capacity and potential adverse effects.[45] Kainga Ora's approach is irresponsible because it invites resource consents being granted, which can never be implemented.

7.5 Kainga Ora's approach is also not supportable at law because it fails to give effect to Te Ture Whaimana[46] and the NPS-FM.[47]

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42 RMA, s 75(3)(a). Te Ture Whaimana has equivalency to a national policy statement, but takes precedence over other national policy statements in the event of conflict: *Puke Coal* at [88].
43 *Puke Coal* at [92].
44 Chrisp at [10.5] and [10.7].
45 Jaggard (26 July 2024) at [6.2].
46 Chrisp rebuttal at [4.17]. *Puke Coal* at [88].
47 RMA, s 75(3).

NPS-UD

7.6 Applying the MDRZ around the Lake is:

(a) Not supported by Policy 3(c) of the NPS-UD. As identified by Mr Chrisp and the Council's own documents, the land around the Lake is not located within a walkable catchment of existing or planned rapid transit stops or the edge of the City Centre Zone.[48]

(b) Contrary to Objective 6(a) of the NPS-UD requiring development to be integrated with infrastructure planning and funding.

(c) Contrary to Policy 1(f) of the NPS-UD, as climate change will increase three waters infrastructure capacity issues.

8. ASSESSMENT AGAINST THE OBJECTIVES OF PC12

8.1 The overarching objective of PC12 is to give effect to central government direction for increasing housing growth.[49] However, the objectives of the GRZ do not require intensification *en masse*, nor do they require increases in the number or density of residential units. This is entirely appropriate given there is more than sufficient housing supply in Hamilton already. In light of this, there is simply no need to risk residential intensification now on the land around the Lake. That approach is more consistent with the three waters objectives and policies of PC12.[50]

9. CONCLUSION

9.1 The Submitters seek the Panel make recommendations to support its preferred provisions.

Janette Campbell / Patrick Senior
Counsel for Sir William and Lady Judi Gallagher and Trevor McKee
30 August 2024

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48 Chrisp at [10.2]. Council's Walkable Catchment Assessment Report, dated June 2024, 3.1.1 and 3.2.1.
49 Chrisp at [10.9].
50 Chrisp at [10.10]. Objective 25.13.2.1 and Objective 25.13.2.2.