BEFORE THE INDEPENDENT HEARING PANEL
APPOINTED BY HAMILTON CITY COUNCIL

IN THE MATTER	the Resource Management Act 1991 (RMA)
AND	
IN THE MATTER	of hearing submissions on Plan Change 12 to the Hamilton City District Plan
BETWEEN	**THE ADARE COMPANY LIMITED**
	Submitter #243
AND	**HAMILTON CITY COUNCIL**
	Local authority

LEGAL SUBMISSIONS FOR THE ADARE COMPANY LIMITED

30 August 2024

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MAY IT PLEASE THE HEARING PANEL

1 The Adare Company Limited (**Adare**) is a family-owned company with development interests in the Peacocke area, including its notable subdivision known as Amberfield.

2 Adare made a submission and further submissions on Plan Change 12 – Enabling Housing Supply (**PC12**) on a number of issues, including the interface between PC12 and the recently approved Plan Change 5 – Peacocke Structure Plan (**PC5**).

3 Adare's principle remaining interest in PC12 is the proposed financial contributions regime. Adare opposes the financial contributions and seeks that they are expressly excluded from greenfield areas like the Peacocke Precinct.

4 These submissions:

(a) provide an overview of HCC's proposed financial contribution regime;

(b) address the relevant legal framework; and

(c) address the legality of the regime, its applicability to greenfield areas and the inadequacy of the section 32 analysis; and

(d) summarise relief sought by Adare.

5 Adare will call one witness: Mr Ben Inger, Director and Senior Planner of Monocle Consulting.

A specific financial contributions regime for a specific purpose

6 PC12 deletes and replaces Chapter 24 and Appendix 18 of the District Plan relating to financial contributions. The new provisions require developers of residential land to pay the Council (in money, land or a combination) a contribution to:

(a) avoid, remedy or mitigate adverse effects of the activity on the environment;

(b) give effect to Te Ture Whaimana; or

(c) offset the adverse effects of subdivision and development on infrastructure not otherwise addressed by development contributions under the Local Government Act 2002.

7 As notified, the purpose of the proposed financial contributions regime was clear and specific. As described in the Council's section 32 evaluation for PC12:[1]

> Through PC12 Council proposes changes to Chapter 24 that will offset the adverse effects of the scale of intensification enabled by the plan change, and will fund the installation of soft infrastructure necessary for growing communities.

8 In the provisions notified by the Council, the financial contributions were levied city-wide, at a proposed cost of approximately $4,900 per Projected Unit of Demand.

9 Adare raised a concern with the blanket application of financial contributions targeted at addressing intensification. The reality is that greenfield development will not create the adverse effects that the financial contributions regime targets. Adare sought that the provisions of PC12 be amended to clarify that the financial contribution regime does not apply to greenfield development.

10 This was not an extreme position. The notified financial contributions regime appeared to anticipate there would be a distinction between infill intensification and greenfield development. As notified Chapter 24 included a definition of "greenfield development",[2] however, it was not referred to in the key provisions for financial contributions.

11 There was clearly merit in this approach: the Council made its own submission on PC12 seeking that Chapter 24 recognise the different characteristics of greenfield development. The submission is summarised as follows:[3]

> Chapter 24 could be clearer in articulating its application to greenfield development areas. Greenfield developments generally have high development contribution fees, and it is not Council's intention to create barriers to development by imposing unrealistic development

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1 HCC Section 32 Evaluation, Appendix 3.2 Financial Contributions, page 3.

2 The definition provided as follows: "Greenfield development means subdivision and/or urban development of previously undeveloped rural land."

3 Submission 270.23.

> fees. To this extent, more thought should be given to how Chapter 24 applies to greenfield development areas.

12 The relief sought was:

> Include a provision that clearly articulates the application of the financial contribution rules to greenfield development areas.

13 It is disappointing that the Council did not see the wisdom in its own submission. As expanded on in these submissions, there is a genuine distinction between infill intensification and greenfield development that warrants a different approach. The clearly stated purpose of the financial contribution regime is to offset the effects of intensification and fund soft infrastructure – that purpose is inapplicable to greenfield areas where development is addressing its adverse effects, either through developer-funded infrastructure (constructed and vested through conditions of consent) or through development contributions.

14 Respectfully, little analysis has been provided on this issue in the Council's evidence. Ms Douglas suggests that the issue can be resolved by allowing case-by-case remission and in her rebuttal proposes a definition of "discount factor" to clarify this. This "solution" is inefficient and ineffective.

15 Counsel appreciates the temptation of the Panel to defer to case-by-case assessment for each residential development, including in greenfield areas. While this approach was recommended for Waipā, that is in the context of a different district, different plan and different financial contributions regime. For greenfield development in the Peacocke growth cell, there will be no need for financial contributions to offset the adverse effects of intensification. The touchstone for plan provisions is section 32 and whether the provisions are the most appropriate way to give effect to the objectives, having regard to efficiency and effectiveness.

16 We urge the Panel to exercise caution when considering imposing a regime intended for infill intensification on greenfield areas and hoping that Council officers will reach the right decision on a case-by-case assessment. The need for caution is amplified in the context of an Intensification Planning Instrument, where submitter appeal rights are curtailed.

Financial contributions are limited at law

17 Section 77E of the RMA enables a local authority to make a rule requiring a financial contribution for any class of activity other than a prohibited activity. Such a rule must specify in the relevant plan:[4]

(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.

18 Section 77E of the RMA was introduced by the Resource Management (Enabling Housing Supply and Other Matters) Amendment Act in 2021 (**Amendment Act**). While section 77E provides flexibility for councils by enabling them to levy financial contributions for permitted activities (as well as for activities requiring resource consent), there is no suggestion in the Amendment Act that it otherwise displaces the previous case law on financial contributions.

19 It is well-established that there are limits to a council's ability to impose financial contributions. At its core, the power to levy financial contributions is coercive and can only be applied where it is consistent with the purpose and principles of the empowering legislation. Case law has established that:[5]

(a) financial contributions can only be imposed for a purpose specified in the plan;

(b) financial contributions must be determined in a manner described in the plan;

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4 RMA, s 77E(2). Financial contribution provisions may be included or changed by specified territorial authorities through an intensification planning instrument – see s 77T of the RMA.

5 *Tauranga City Council v Minister of Education* [2019] NZEnvC 032 at [61], citing *McNally v Manukau City Council* [2007] NZEnvC 76 at [5].

(c) the *Newbury* tests must be satisfied. The *Newbury* tests require financial contributions – like all consent conditions – to:[6]

(i) be imposed for a resource management purpose (not an ulterior one);

(ii) fairly and reasonably relate to the development authorised; and

(iii) be reasonable; and

(d) any financial contribution must be fair and reasonable on its merits.

20 The courts have emphasised the importance of a link between financial contributions and the development enabled by a resource consent that is subject to them. In *Remarkables Park Ltd* the Environment Court found that financial contributions must (at least approximately) relate to the effects caused on public services and facilities by the activity.[7] In other words, a consent condition requiring payment of a financial contribution for a purpose entirely separate from the activity enabled by the resource consent would be unlawful.

21 These limitations are important in a plan-making context. We submit that endorsing a financial contribution regime that could result in contributions being levied beyond their purpose would be an error of law.

The proposed financial contribution regime is unlawful

22 As noted above, the purpose of the proposed financial contribution regime is to offset the adverse effects of the scale of the intensification enabled by PC12.

23 PC12 does not enable any additional density in the Peacocke Precinct beyond what was enabled through PC5 (which also implements the Medium Density Residential Standards). PC5 was promulgated without a

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6 *Remarkables Park Ltd v Queenstown Lakes District Council* [2004] NZRMA 433 at [37], referring to *Newbury District Council v Secretary of State for the Environment* [1981] AC 578; [1980] 1 All ER 731.

7 See *Remarkables Park Ltd v Queenstown Lakes District Council* [2004] NZRMA 433 at [5] - note that the Court did not however need to make a finding on that point. See also *Alexandra District Flood Action Society Inc v Otago Regional Council* [2005] ELHNZ 328 at [250].

financial contribution regime for intensification, on the basis that development would address its own effects and that infrastructure would be developer funded or funded through development contributions.

24 Accordingly, there can be no link between the purpose for which the financial contributions have been imposed (to offset the adverse effects of intensification) and greenfield development in Peacocke.

25 However, because the proposed financial contribution regime applies city-wide, on the face of PC12 Adare (and other developers in Peacocke) will be liable to pay financial contributions, despite not contributing to the adverse effects that the regime seeks to manage. Because this critical link is missing, HCC is essentially proposing to levy a payment on greenfield development areas for a purpose entirely unrelated to the activity to be enabled by resource consent.

26 In respect of three waters/transport network infrastructure, developers in Peacocke will either deliver infrastructure or fund it through development contributions. That infrastructure has been, or will be required to be, sized and designed to meet the demand of the development in Peacocke and so development will not cause adverse effects.

27 In respect of "residential amenity" open spaces will be developer and development contribution funded and there are provisions in place to ensure that streetscape amenity is provided.

28 For example, in relation to three waters, transport and amenity items for Amberfield, through conditions of consent Adare is required to:

(a) construct all roads and three waters infrastructure (including wastewater pumpstations and stormwater treatment ponds) within the 105 hectare subdivision to the Council's standards;

(b) vest four neighbourhood reserves with associated improvements (playgrounds, park furniture etc);

(c) vest one heritage reserve;

(d) vest approximately 27 hectares of esplanade and ecological reserves with extensive native planting and an extensive public path network; and

(e) include open space that is designed to accommodate anticipated densities in accordance with best practice requirements.[8]

29 In respect of financial contributions to give effect to Te Ture Whaimana, the Council's position through PC5 was explicit that the provisions gave effect to Te Ture Whaimana.[9] The Panel that determined PC5 confirmed that provisions did so.[10] No explanation has been given for why financial contributions for development in Peacocke are now needed for that same purpose.

30 In her rebuttal evidence, Ms Douglas suggests that that the ability to include financial contributions was not assessed or considered in PC5, implying that a financial contributions regime may still be required under PC12.[11] Respectfully, that comment is hard to reconcile with the fact that HCC was empowered to pursue financial contributions under PC5 but chose not to. There is no suggestion in the evidence or submissions on PC5 that a gap was left in relation to the effects of intensification, nor was that issue assessed in the section 32 report for PC12. The more credible conclusion is that the PC5 provisions (in combination with development contributions) address the effects of development and no financial contribution regime was, or is, needed.

31 In our submission, the law is clear that the power to impose a financial contribution should only be used where there is an adverse effect that needs to be offset. For the Peacocke Precinct, there is no adverse effect arising from PC12 which justifies the financial contributions being levied.

32 Because Adare is already required to give effect to the purposes for which HCC seeks to impose financial contributions, to require it to do the same under PC12 would be "double dipping" and would be unlawful.

33 Section 200 of the Local Government Act 2002 (**LGA**) provides that a territorial authority must not require a development contribution if it has

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8 For example, best practice requirements set out in the Peacocke Structure Plan, Integrated Catchment Management Plans, the Waikato Regional Infrastructure Technical Specifications and the Waikato Regional Council's Stormwater Guidelines.

9 Opening Legal Submissions for Hamilton City Council on PC5, at [55].

10 Decision on PC5, at [336].

11 Clare Douglas – Rebuttal – 14 August 2024 at [9].

imposed a condition on a resource consent requiring a financial contribution to be made in relation to the same development for the same purpose. The High Court in *Neil Construction Ltd* noted that this section acts as a safeguard against "double dipping". A development contribution may not be required if the capital expenditure is otherwise funded by a financial contribution under the RMA or if the developer will otherwise fund or provide for the same reserve or infrastructure.[12]

The Council's section 32 analysis is deficient

34 An evaluation of a proposed rule under section 32 of the RMA involves an examination, to a level of detail that corresponds to the scale and significance of any anticipated effects, of whether the rule is the most appropriate way to achieve the objectives by:

(a) identifying other reasonably practicable options for achieving the objectives; and

(b) assessing the efficiency and effectiveness of the provisions in achieving the objectives; and

(c) summarising the reasons for deciding on the provisions.

35 In assessing the efficiency and effectiveness of the provisions, an evaluation must:[13]

(a) identify and assess the benefits and costs anticipated from implementation of the provisions (and if practicable, quantify the benefits and costs); and

(b) assess the risk of acting or not acting if there is uncertain or insufficient information about the subject matter of the provisions.

36 An evaluation under section 32 must be reasonably comprehensive[14] and not "merely colourable".[15] There is a limit to how perfunctory it can be.[16]

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12 *Neil Construction Ltd v North Shore City Council* HC Auckland CIV-2005-404-4690, 21 March 2007 at [61].

13 RMA, s 32(2).

14 *Lindis Catchment Group Inc v Otago Regional Council* [2019] NZEnvC 166 at [438].

15 *Foodstuffs v Dunedin City Council* (1993) 1A ELRNZ 454 at 457.

16 *Lindis Catchment Group Inc v Otago Regional Council* [2019] NZEnvC 166 at [439].

37 Alternatives must be properly considered before choosing the preferred option. While the most appropriate option need not to be the most optimal or best option, it must be "suitable" by demonstrating that it will meet the objectives in an efficient and effective way.[17] Further, where the purpose of the Act and the objectives of the plan can be met by a less restrictive regime, that regime should be adopted.[18]

38 The section 32 analysis by the Council on financial contributions is clearly inadequate. It lacks meaningful analysis and does not properly address the costs and benefits, or the appropriateness of applying the proposed financial contribution regime to greenfield development areas.

39 The section 32 evaluation provides one page of text in the "Overview Report" on the proposed financial contributions regime, brief analysis in Appendices 2.1 – 2.3 and an appendix (Appendix 3.2) that describes the purpose and how the Council came up with the values for the proposed financial contributions regime (which have now been superseded).

40 While Appendices 2.1 – 2.3 consider the costs, benefits, efficiency, effectiveness, and the risk of acting or not acting, the analysis lacks detail. The assessment does not consider the particular costs that would be faced by developers of greenfield land, or the inefficiency of the Council having to undertake case-by-case analysis of greenfield areas that would never realistically attract a financial contribution. Nor does it consider the inefficiency or cost of developers having to challenge financial contributions on a case-by-case basis.

41 Financial contributions are a coercive tool and, at the figures proposed by the Council, are likely to have an impact on decisions about whether (and how) people undertake residential development. Accordingly, it is important that any financial contributions are clear and certain on their face. That, of course, is also a requirement of permitted activity rules in plans.

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17 *Quieter Please (Templeton) Incorporated v Christchurch City Council* [2015] NZEnvC 167 at [29], citing *Rational Transport Society Incorporated v New Zealand Transport Agency* [2012] NZRMA 298 (HC).

18 *Royal Forest and Bird Protection Society of New Zealand Inc v Whakatane District Council* [2017] NZEnvC 51 at [59].

42 As currently proposed, developers of greenfield land face the prospect of spending significant time and resources to object to, or appeal, decisions by the Council on financial contributions on a case-by-case basis. They also face significant uncertainty as they will not know whether a 'discount' will be given by the Council (and what value of financial contribution may be required) until a resource consent (or building consent) has been granted. Development uncertainty will have consequences for the intensification that is realised in Hamilton in the short, medium and long term. These consequences have only been cursorily addressed in the Council's evaluation.

43 Similar criticisms of the section 32 analysis were made in Mr Inger's independent expert planning evidence. The Council's rebuttal evidence has not revisited the section 32 analysis nor directly rebutted Mr Inger's comments.[19] We can only assume that the criticisms are accepted.

44 The Council clearly contemplates that developers of greenfield land who can demonstrate that they have already contributed to the relevant financial contribution matters will be entitled to discount (or waiver) by way of remission.[20] This will be determined on a case-by-case basis and is dependent on the extent to which a developer offsets the effect.[21]

45 We agree with the Council that developers that do not cause the adverse effects the financial contribution regime targets (or who address those effects in other ways) should not be required to pay the financial contribution. While that view may be clear now, the provisions are likely to be applied by other Council officers in the future. The District Plan should therefore provide certainty now.

46 As the Panel may be aware, Waipā District Council has rejected the recommendation to include financial contributions in its Proposed Plan Change 26 – Residential Zone Intensification (**PP26**). The reasons for the Council's decision included:

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19 See Clare Douglas – Rebuttal – 14 August 2024.

20 Clare Douglas – Evidence in Chief – 26 June 2024, page 4 of Appendix B.

21 Clare Douglas – Evidence in Chief – 26 June 2024, page 4-5 of Appendix B.

(a) the difficulty identifying and quantifying what specific adverse effects are generated by permitted development to the extent that financial contributions are necessary to mitigate those effects;

(b) the difficulty identifying and quantifying what and when discount factors for these financial contributions will be applied by the Council; and

(c) that the only avenue to propose non-payment of or to object to a financial contribution is through the resource consent process (unless agreement can be reached as to the discount factors to be applied).

47 These concerns and the resource management issues behind them are as applicable in Hamilton.

48 The option of taking a more nuanced approach to requiring financial contributions only from the types of activity that actually cause the adverse effects that HCC seeks to address warrants consideration. It would be a more efficient and effective approach to exclude activities that do not contribute to the purpose of the financial contribution regime, rather than impose a blanket obligation and enable exceptions on a case-by-case basis.

Relief sought by Adare

49 Adare seeks that changes are made to the financial contribution provisions to ensure that greenfield developments, or at least the Peacocke Precinct, are excluded from the regime.

50 The proposed changes are set out in detail in the evidence of Mr Inger,[22] but in summary include:

(a) Retaining a definition for 'Greenfield development' in Chapter 24 and amending it as follows:

*"**Greenfield development** means subdivision and/or urban development in the Peacocke Precinct, Te Awa Lakes Precinct, Rotokauri Precinct,*

[22] Ben Inger – Evidence in Chief – 24 July 2024 at [33].

Rotokauri North Precinct, Ruakura Precinct and Rototuna Town Centre Precinct and of any other previously undeveloped rural land".

(b) Amending the objectives, policies, rules and methods in Chapter 24 and Appendix 18 so that financial contributions for residential amenity, Te Ture Whaimana and three waters/transport infrastructure network connections do not apply to greenfield development.

Dated this 30th day of September 2024

M J Doesburg

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