BEFORE THE HAMILTON CITY COUNCIL

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of Variation 1 to the Hamilton City Council Proposed District Plan

---

CLOSING SUBMISSIONS OF COUNSEL FOR HAMILTON CITY COUNCIL

Dated 2 September 2016

Solicitor: L F Muldowney
lmuldowney@tomwake.co.nz

Counsel: L F Muldowney
lmuldowney@tomwake.co.nz
Fax: (07) 839-4855

WESTPAC HOUSE
430 VICTORIA STREET
PO BOX 258, DX GP20031
HAMILTON 3240
NEW ZEALAND
PH: 07 839 4771
www.tomwake.co.nz

TOMPKINS WAKE LAWYERS

MM-348176-1545-214-V1:crg

INTRODUCTION

1. At the conclusion of the hearing of submissions it was agreed that the most efficient means by which Hamilton City Council ("Council") section 42A reporting officers could advise of updated positions on the Ruakura Variation to the Hamilton City Proposed District Plan ("Variation 1") was to provide the independent hearing commissioners ("Commissioners") with a further update of Variation 1 ("Updated Variation") which would set out the reporting officers' recommended positions.

2. The Updated Variation represents the final position of the Council section 42A reporting officers, following consideration of the evidence presented at the hearing and the questions and comments from the Commissioners as expressed during the hearing of submissions. This is **attached** to these submissions and marked **Appendix 1**.

3. These submissions, together with Appendix 1, represents Council's final position with respect to Variation 1 and the submissions and further submissions on Variation 1. In that regard, these submissions provide commentary on the key aspects of the Updated Variation including the limited range of matters which remain in contention whereby Council's reporting officers have not accepted changes which were sought in submissions and evidence presented by key stakeholders in the process. In addition, the submissions address a limited number of legal issues which were identified by the Commissioners during the course of the hearing, or which have arisen in the context of finalising the Updated Variation.

APPENDIX 1 – UPDATED VARIATION DOCUMENT

4. All of the relevant chapters and parts of the Updated Variation are subject to the same colour coding and tracked changes which are described as follows:

   (a) Black font represents the appeals version of the PDP;

   (b) Red underlined font represents the Variation 1 as notified; and

   (c) Blue underlined and strike through font represents the further amendments as recommended by Council section 42A report authors.

5. In conjunction with these colour coded fonts the Updated Variation sets out a series of "comment boxes" in the margin which relate to the further amendments recommended by the section 42A authors. These are highlighted in blue in the text and categorised as follows:

   (a) Category 1 – further clause 16 amendments/improvements to drafting and consequential amendments considered necessary following the conclusion of the hearing;

   (b) Category 2 – amendments to the Variation 1 as set out in the version dated 3 August 2016 which was handed up at the outset of the hearing (these amendments include clause 16 amendments/improvements to drafting and s42A recommendations);

   (c) Category 3 – further section 42A report author reconsiderations in light of the evidence presented during the hearing; and

   (d) Category 4 – the key contested provisions or provisions which raise any issues as to scope.

6. Counsel notes that there are also some rare examples of comment boxes which relate to appeals against the PDP that are awaiting consent orders to be issued by the Environment Court. This is due to the word version master copy of the PDP chapters being the basis for the document which is overlaid by the Variation 1. These specifically refer to the appeal and the Environment Court reference number. For example, on page 25-107 and page 25-108 there are references to the appeals by HJV, Waikato Institute of Technology, the Waikato District Health Board and Fonterra. The PDP is being updated as the Court makes the final Orders to resolve the appeals. These may be ignored by the Commissioners for the purposes of the Updated Variation.

OVERVIEW OF AMENDMENTS

7. The majority of the changes shown in the Updated Variation document are self-explanatory. Drafting improvements have been made where this is appropriate to provide better certainty in the wording of provisions and some formatting improvements have been made. These changes

generally fall within categories 1 and 2 and, where relevant, may include some category three amendments. An example of drafting improvement are the amendments to the rule heading and numbering structure in chapter 3.7.4 which provide better clarity as to the rule status of provisions.

8. A key example of a category 3 (section 42A report writer reconsiderations) is set out in chapter 3.7, rule 3.7h)vi). This reflects an amendment to the provisions for the Ruakura Open Space network to provide for both indicative and fixed areas. These are shown on Figure 2-14 which has also been amended. Rule 3.7h)vi) is on page 3-51 of the Updated Variation. A further example are the amendments to the notification rule for Land Development activities (rule 3.7.4.2) which respond to submitter evidence and provide greater clarity regarding the circumstances when applications will be considered without notification.

9. For completeness counsel submits that the category 3 amendments are within the scope of the submissions on Variation 1.

CONTESTED MATTERS

Chapter 3.7 – Generic infrastructure provisions

10. These issues relate to chapter 3.7 and concern the broad issue raised by Tainui Group Holdings ("TGH") that the provisions are too prescriptive. The specific provisions which are at issue and identified as category 4 provisions are:

    (a) The relief sought to delete the spine road trigger rules (3.7.4.3.1b) and the related Figure 2-16 Land Development Plan Areas;

    (b) The relief sought to amend Figure 2-14 Ruakura Structure Plan – Land Use, to remove the Ruakura Retail Centre "Overlay" and make its location indicative.

11. Other relief which is identified as category 3 relates to the following:

    (a) Amendments to the non-notification rules; and

    (b) Other amendments to text presented in the evidence of Mr Peter Hall, on behalf of TGH.

12. Council does not propose any fundamental changes to its position as presented in the evidence on each of the matters identified above. In particular, it does not support the deletion of the spine road trigger rules and related relief to amend Figure 2-16. However, some drafting amendments have been proposed as part of the category 3 amendments which will improve the readability and clarity of the provisions (for example, correcting syntax and including cross referencing where this is appropriate).

Percival Road/Ryburn Road large lot residential area

Waikato Regional Policy Statement

13. A key issue which is identified in a range of submissions, most notably the submissions from Mr Bill Cowie and the Ruakura Residents Association, is the Ruakura Structure Plan's treatment of the Percival/Ryburn Rd large lot residential area ("LLR area").

14. Figure 2.14 sets out the Ruakura Structure Plan and identifies the intended land uses for Ruakura. For all but one area, the identified land uses are then reflected in the proposed zoning maps. The only area not treated in this way is the enclave. While Figure 2.14 identifies the enclave as "Ruakura Logisitics", the zoning map (Map Number 40A) identifies the enclave as zoned LLR.

15. In the s32 evaluation, the s42A reports, and in response to questions from the Commissioners, Council planners explained that this treatment of the enclave was the most appropriate way to give effect to the objectives and policies in the PDP and Variation, which in turn were giving effect to policy 6.14 of the Waikato Regional Policy Statement ("RPS"). Questions from the hearing panel focussed on whether the Variation's treatment of the enclave in this way, is necessary in order to give effect to the RPS, as required under s 75(3) of the RMA.

16. Council's position is that the RPS is very directive as to the spatial allocation of industrial development within the sub-region, with a total of 405ha of industrial land to be developed at Ruakura by 2061. Policy 6.14 (c) and (d) provide:

> c) new industrial development should predominantly be located in the strategic industrial nodes in Table 6-2 (section 6D) and in accordance with the indicative timings in that table except where alternative land release and timing is demonstrated to meet the criteria in Method 6.14.3;
>
> d) other industrial development should only occur within the Urban Limits indicated on Map 6.2 (section 6C), unless there is a need for the industry to locate in the rural area in close proximity to the primary product source. Industrial development in urban areas other than the strategic industrial nodes in Table 6-2 (section 6D) shall be provided for as appropriate in district plans;

17. This policy position is then reinforced by the directive set out in implementation method 6.14.1 which provides:

> 6.14.1 District plan provisions
> Hamilton City Council, Waipa District Council and Waikato District Council shall, in consultation with Waikato Regional Council, tāngata whenua and the NZ Transport Agency, review or prepare changes to their district plans and structure plans to identify locations and limits for future urban development, including future areas of major commercial and industrial development. The district plans shall ensure that urban development is located and managed in accordance with Policy 6.14.

18. The requirement for 405 ha of industrial land at Ruakura is set out in table 6-2, which establishes a staged release of land; 80 ha up to 2021, aa further 115ha up to 2041, and a final stage of 210ha up to 2061.

19. Council gives effect to this industrial land use strategy by zoning land at Ruakura as industrial, in the form of Ruakura Industrial Park Zone, or Port and Logistics Zone. Under the Variation it has zoned a total of 374 ha (gross) in this manner. A further 40.8ha is represented by the Percival/Ryburn Road LLR area. Given the various staging requirements set out in the Variation, this method will partially give effect to the RPS over time, but not completely (given that the target is 405ha). However, land at Ruakura is finite resource. In order for Council to fully give effect to the RPS, it must manage this finite resource in a way that ensures, over the longer term, that sufficient land is available for this purpose.

20. Given the LLR area's location in the centre of the Ruakura structure plan area, immediately adjacent to the rail and State Highway network intersections, and other Port and Logistics areas, this area is the best

strategically located land to add to the current allocation of industrial land at Ruakura, in order to meet the RPS requirements over the long term.

21. Having identified this land as the most appropriate to complete the RPS allocation, the question remains as to how best to sustainably manage the resource. Enabling land uses contrary to the RPS is not sustainable in the long term, because it fails to protect the resource for its ultimate use. Giving effect to the RPS not only requires land to be zoned for industrial purposes, but where that quantum falls short of the total requirement, HCC must also protect the remaining land resource to ensure it is one day available to meet the RPS requirements.

22. Variation 1 strikes this difficult balance by enabling the current land use in the LLR area to continue, through zoning, but also signalling the long term ultimate land use in the Structure Plan Figure 2-14. In doing so, it gives effect to the RPS.

Large lot residential amenity

23. The other key outstanding issues relating to the LLR area concern chapters 3.7, 4.1.4, 4.2.10 and 23.7.1, in particular:

    (a) Chapter 4.1.4 – Ruakura Structure Plan (Percival Road/Ryburn Roads);

    (b) Objective 4.2.10 – "protect" the amenity values of the Percival-Ryburn Road Large Lot Residential enclave;

    (c) Net site area – LLR - Percival Road/Ryburn Roads;

    (d) Landscape buffer provisions; and

    (e) Use of "no-complaints" covenants.

24. Council's position on these matters has not changed. However, some category 3 amendments have been included which improve the drafting. The more substantive drafting issues with respect to the rules in Chapter 10 Logistics Zone and Chapter 11 Industrial Park Zone are addressed below.

Landscape buffer provisions – rule 10.5.4.3 and rule 11.5.3

25. Mr Goodwin filed a further statement of evidence on 23 August 2016 which proposed alternative drafting for the landscape buffer treatment along the boundary north of the East Coast Main Trunk railway. This sought, *inter alia*, to amend the requirement for a "dense evergreen hedge" capable of growing 12m in height to a requirement for a "dense evergreen planting capable of growing to no less than 12m in height" within the proposed 10m Buffer Area (ref Figure 10.5.4.3a) furthest from Percival Road.

26. Council opposes this amendment on the basis that it does not provide certainty that an effective planting screen will be established and which will provide the appropriate amenity protection for the Percival/Ryburn Road residents. While Council has accepted the proposition that the original buffer of 20m be reduced to 10m, this is subject to the requirement that an effective screen is established along the boundary in question.

27. In addition, to ensure appropriate timing for that planting to be carried out and established so that an effective screen is in place once development commences, Council officers have proposed a timing rule in 10.5.4.3 and 11.5.3 (ref pages 10.10 and 11.8 of the Updated Variation document respectively). This rule adopts the mechanism proffered by TGH in Mr Goodwin's statement of 23 August 2016, but adds an alternative "whichever is earlier" trigger mechanism.

Rule 11.4.3 Building setbacks minimum distance

28. The matter at issue is the reference point of the "carriageway" as opposed to the "designation" boundary. Council does not agree to the proposal to amend the reference to "carriageway". Until the expressway is built, there is no certainty as to this reference point. The reference point of the designation boundary is certain and provides a workable rule framework. This is reflected in the Updated Variation document.

OTHER SPECIFIC ISSUES ARISING

Consequential amendment to delete "affordability" from policy 3.7.3.10c

29. An issue of scope to delete the word "affordability" from policy 3.7.3.10b has arisen in the context of the section 42A report writer review of the

Updated Variation. While both TGH (submitter reference 48.19) and Chedworth Property Limited (submitter reference 33.19) specifically sought the deletion of the word "affordability" from policy 3.7.3.1d the same deletion was not specifically sought in relation to policy 3.7.3.10c (amended numbering as per Updated Variation).

30. Council's section 42A report writer supported the deletion of the word "affordability" from policy 3.7.3d. In the report writer's view, the same deletion is appropriate with respect to policy 3.7.3.10c.

31. It is submitted that there is scope to make the same amendment to policy 3.7.3.10c for the following reasons:

(a) The issue of "affordability" was clearly raised in both submissions and sought the same deletion in relation to 3.7a and 3.7.2d;

(b) The "reasons" for the submissions specifically raise the issue of "affordability" and that it is not a "key driver" behind the vision for the Ruakura Structure Plan:

> While the provision of housing choice can provide for more affordable options, affordability is not a key driver behind the vision and should be deleted;

(c) Both submissions include the following consequential relief:

> …seeks such other changes to the Variation as necessary to give effect to the matters raised in this submission and to otherwise achieve consistency in detail and approach with the September 2014 Board of Inquiry Decision…

And:

> …such other consequential changes as necessary to give effect to the relief sought in this submission;

(d) A person reading the submission would be on notice that this term is of concern to the submitters and that the deletion is "sufficiently inferential" to the relief sought in the submissions; and

(e) That the deletion will not cause prejudice to any party.

32. On that basis, the word "affordability" is proposed to be deleted from policy 3.7.3.10c.

AgResearch and Waikato Innovation Park relief regarding Chapter 25 Earthworks and ICMP rules

33. Counsel provided legal advice to Council's section 42A reporting officers prior to the hearing which concluded that the following relief sought in the submissions from AgResearch and Waikato Innovation Park ("WIP") were not "on" Variation 1 and therefore could not be considered by the Commissioners:

    (a) Amend rule 25.2.4.1 – Earthworks to provide an exception to the earthworks provisions where a Concept Plan is in place; and

    (b) Amend rule 25.13.4.1c) – Integrated Catchment Management Plan by including Rule 8.4 in the Knowledge Zone as being excluded from a separate ICMP.

34. Mr Burton on behalf of the submitters provided evidence at the hearing which contended that the submission points were "on" Variation 1. Notably, Mr Burton clarified that the actual relief sought in relation to the ICMP rule in fact concerned the Water Impact Assessment rule 25.13.4.6.

35. Council's section 42A report writer has indicated that the amendments would achieve consistency with the outcomes of the PDP appeal process with respect to the "Major Facilities Zone" and does not oppose the inclusion of the amendments. However, this is subject to there being scope to do so.

36. In light of this, Counsel has reviewed these matters for the purpose of confirming Council's position on scope and whether either submission point may be treated as being "on" the Variation 1.

Relief sought to amend rule 25.13.4.6

37. The position that the relief to amend the ICMP rule is not "on" the Variation 1 is unchanged. While in some circumstances the question of whether a submission is "on" a plan change or variation can be finely balanced, the reference in Mr Burton's evidence to the Water Impact Assessment rule 25.13.4.6 has no relationship to the ICMP rule which was referred to in the original submission. Indeed, even if a persuasive argument was made that the submission was "on" the Variation 1, the relief sought in evidence could not be considered within the scope of the submission. Accordingly,

in my submission the Commissioners should not consider the relief sought in Mr Burton's evidence to amend rule 25.13.4.6.

Relief sought to amend rule 25.2.4.1

38. As noted above, the question of whether a submission is "on" a plan change or variation can be finely balanced in some circumstances. Mr Burton's evidence maintains that no person would be prejudiced by the proposed amendment and therefore the Commissioners may consider the relief sought.

39. Having taken this into account and upon further review of the rule in question, counsel notes that the proposed additional wording to include reference to earthworks in a "concept plan consent" doesn't materially change the effect of the rule as currently drafted. The rule refers to an exception where earthworks are addressed in conditions of a relevant "land use consent". On the basis that a concept plan consent is a "land use consent" no person will be prejudiced by the addition of a reference to a concept plan consent for the Knowledge Zone.

40. Given that the relief is confined to the Ruakura Structure Plan area and that the proposed change doesn't in fact materially affect the rule as currently drafted in the PDP, in my submission the Commissioners may consider the relief as it will not prejudice any person who may have an interest in the matter.[1] However, I do question the necessity for the amendment from a merit point of view given that the outcome sought by the appellant is already achieved in the existing rule.

Dated this 2nd day of September 2016

L F Muldowney
Counsel for Hamilton City Council

[1] The leading decision on the question of whether a submission is "on" a variation/plan change is *Clearwater Resort Ltd v Christchurch City Council* HC Christchurch AP34/02, 14 March 2003. That decision set out a bipartite test for determining whether a submission is on a plan change or variation: A submission can only fairly be regarded as being "on" a variation if it is addressed to the extent to which the variation changes the pre-existing status quo; and If the effect of regarding a submission as "on" a variation would be to permit a planning instrument to be appreciably amended without real opportunity for participation by those potentially affected, this is a powerful consideration against finding that the submission was "on" the variation."