IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of Proposed Private Plan Change 2 to the Hamilton City Operative District Plan: Te Awa Lakes Private Plan Change

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OPENING LEGAL SUBMISSIONS FOR THE APPLICANT

DATED 25 NOVEMBER 2019

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1. INTRODUCTION

1.1. These opening legal submissions are made in support of Perry Group Limited ("**Perry Group**", also referred to in this case as "**PGL**" and "**the Applicant**") which has requested a private plan change to the Operative Hamilton City District Plan ("**PPC2**") for its Te Awa Lakes development ("**Te Awa Lakes**").

1.2. Te Awa Lakes provides an opportunity for a master planned mixed-use tourism, commercial and residential community.[1] Strategically placed at the northern gateway to Hamilton City, Te Awa Lakes will provide an attractive, coherent and high quality entrance to Hamilton.[2] It incorporates a regionally significant tourism attraction with a residential component which the City needs.[3] Of significance to mana whenua, the proposal will also enhance links between the site and the Waikato River.[4]

Figure 1: Birds' eye view of indicative development of Te Awa Lakes

1.3. Te Awa Lakes has received strong support from the Hamilton community. A significant number of submissions on PPC2 seek that it be approved. The Commissioners will also hear evidence from a number of key members of the Hamilton and Waikato communities, including the Future Proof Implementation Committee and mana whenua including Waikato-Tainui and other members of the Tangata

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1 Evidence of Simon Perry at [5.1].
2 Evidence of Jonathan Broekhuysen at [1.2] and [1.5].
3 Evidence of Simon Perry at [5.1].
4 Evidence of Lale Ieremia at [5.10].

Whenua Working Group established for this plan change process, who strongly support Perry Group's vision for the site.

1.4. Perry Group has worked hard with representatives of the Hamilton City Council ("**HCC**") to ensure that PPC2 provides the most efficient and effective means of achieving HCC's strategic objectives in its Operative District Plan ("**ODP**") as they relate to the site, by providing a comprehensive suite of supporting information to the planning analysis provided by Bloxam Burnett & Olliver. That information, which commenced with the original plan change documentation in July 2017 and was substantially updated in the Updated Request for Plan Change documentation provided in August 2019, has demonstrated that there is both high-level strategic and technical support for Perry Group's vision. The provision of that information has gone a long way to resolving the matters outlined in HCC's submission on PPC2.[5] Perry Group is committed to continuing to work with HCC through the future land development processes to ensure that PPC2 enables a fruitful and lasting contribution to the City.

1.5. Through the initial plan change process and the Special Housing Area process which intervened during the course of 2018, Perry Group has always been aware of its obligations to its neighbours and has ensured that any potential reverse sensitivity effects are appropriately addressed. In the Updated Request for Plan Change, Perry Group included additional provisions to further address potential reverse sensitivity issues. Perry Group has continued to work constructively through both formal and informal expert caucusing to resolve the residual concerns of industrial operators in the sub-region, including Ports of Auckland Ltd ("**POAL**"). Perry Group and POAL have now reached agreement on provisions which resolve its concerns in relation to PPC2.[6]

1.6. Perry has not yet been able to reach agreement with its major commercial neighbour, Fonterra Ltd. That is despite Perry Group providing comprehensive expert evidence of the lack of potential reverse sensitivity effects on Fonterra's operations and the extensive engagement on the part of Perry Group extending back over three

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5 As demonstrated in the table annexed to the evidence of Paula Rolfe on behalf of HCC as submitter.

6 As annexed to the evidence of Mr Arbuthnot for POAL.

years. The landscape and visual, noise and odour evidence for Perry Group categorically establishes that the potential effects on Fonterra from the introduction of sensitive activities to the Te Awa Lakes site will be "avoided...[or] minimised",[7] will not be created,[8] and can be "avoided and / or substantially mitigated",[9] such that Fonterra will not be impacted by Te Awa Lakes. There is no basis for the concerns raised by Fonterra, a point which has also been accepted by the HCC's reporting officer.

1.7. Mr Olliver for Perry Group has concluded that PPC2 meets all of the statutory tests for a proposed plan change under Part 2 of Schedule 1 to the Resource Management Act 1991 ("**RMA**"). The Updated Request for Plan Change includes a detailed section 32 analysis which demonstrates that Te Awa Lakes is the most appropriate way to achieve the purpose of the RMA and the objectives of the ODP in relation to this gateway site into Hamilton. The provisions in PPC2 ensure that Te Awa Lakes gives effect to the Waikato Regional Policy Statement ("**WRPS**") and the Future Proof Strategy for growth in the Waikato Region, a point acknowledged by Mr Tremaine on behalf of the Future Proof Implementation Committee.

1.8. The evidence of Dr Fairgray for Perry Group establishes that PPC2 will not have any material impact on the supply of industrial land in the City district, sub-region, and Region;[10] and that PPC2 can be supported on economic grounds, especially given the dynamic planning environment in which PPC2 sits, with the Government's recent announcements in relation to its Urban Growth Agenda and the proposed Hamilton to Auckland Corridor.[11]

1.9. In summary, Te Awa Lakes reflects Perry Group's strong vision for a masterplanned mixed-use community, combining adventure tourism, commercial activities and residential uses in a unique gateway location to Hamilton City.[12] Perry Group believes that Te Awa Lakes will be a

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7 Evidence of Rachel de Lambert in respect of landscape and visual effects at [4.14], and reply evidence of Ms de Lambert at [3.7].
8 Evidence of James Bell-Booth in respect of noise effects at [5.43].
9 Evidence of Steve Pearce in respect of odour effects at [6.20] and [11.2].
10 Evidence of Douglas Fairgray at [4.72] and [4.73].
11 Above at [9.9] and [9.10].
12 Evidence of Simon Perry at [7.1].

real game-changer for the City and the Region, and align with its values of win-win, community, people, excellence and pride.[13]

2. BACKGROUND TO PERRY GROUP AND PPC2

Perry Group

2.1. The Commissioners will hear evidence from Simon Perry, the chairman of Perry Group since 2007 and son of the company's founder and Waikato legend, Brian Perry.

2.2. Perry Group has a long record of successful commercial and community projects which are reflective of its values and objectives, including the advance of health, sport and recreation, and recognising the importance of the River to the Waikato Region. These include the Avantidrome in Cambridge, the Te Awa River Ride, and the Perry Bridge.

Te Awa Lakes and PPC2

2.3. Perry Group has long had ambitions for Te Awa Lakes since it purchased the land nearly 25 years ago. A lake-style development was first drawn up in plans annexed to Mr Perry's evidence in 2007. Following the implementation of the original Future Proof Growth Strategy, Perry Group has progressively sought to achieve a better end outcome for the site than remediation to rural pasture under the conditions of its existing quarry resource consent. Stage 1 of the Indicative Development Plan consent ("**IDP**"), which was obtained in 2014, included provision for the now-constructed service station, commercial and industrial lots, and bike park on the south-western corner of the Te Awa Lakes site.

2.4. Following Stage 1, the Perry Group board considered that industrial development was not the most appropriate use for the balance of the land at Te Awa Lakes given its location beside the Waikato River, and an alternative, masterplanned development should be pursued. They were supported in that view by mana whenua, who collectively believe that Perry Group's vision will not only restore the mauri and reconnect mana whenua to the site to a better extent than industrial development, but also create a number of positive effects from a cultural,

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[13] Above at [5.7].

environmental and social perspective that will enhance the holistic well-being of mana whenua in both the short and long terms.[14]

2.5. While Perry Group has signalled that industrial use on its land is a non-starter, the evidence it has provided also establishes conclusively that the proposed change in land use will not have adverse effects on the supply of industrial land within the City and Region, and will not result in any material loss of agglomeration benefits to the Horotiu and Te Rapa North Strategic Industrial Nodes.

2.6. It was against that background, and with the necessary technical support obtained, that Perry Group put the quarry operations into care and maintenance in 2016 and began preparations for PPC2.

2.7. In order to achieve its vision, Perry Group retained Lale Ieremia to act as its Development Director.[15] Mr Ieremia has a strong background in leading large projects.[16] He leads a team of over 20 experts who provided input into the masterplanning process, incorporating design features from other similar developments at Hobsonville Point in Auckland, the Lakes in Tauranga, the Water Ways in Whitianga, as well as overseas examples.[17]

2.8. Perry Group consulted early and widely through the concept development phase, including regulatory authorities and potentially affected or interested parties, the latter including community groups, companies (of all sectors), government organisations, charities and mana whenua.[18]

2.9. The resulting period from August 2016 to July 2017 involved the formation of the masterplan design, based around the use of the site's remnant water bodies and its connection to the River, as shown in Appendix 1 to the Updated Plan Change Request.

2.10. PPC2 was accepted for processing on 21 September 2017.

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14 Evidence of Norm Hill at [1.3].
15 Evidence of Simon Perry at [6.1].
16 Evidence of Lale Ieremia at [2.6]-[2.7].
17 Above at [5.6].
18 Above at [5.4].

Submissions on PPC2

2.11. As noted by the HCC's reporting officer, the majority of submissions lodged on PPC2 were in general support of it, for a range of reasons including that:

(a) The development will assist with providing additional housing and recreational opportunities in Hamilton, create an attractive gateway to Hamilton, and support the Te Awa River Ride

(b) Industrial activity is not the best use of the site.

(c) The water park and associated visitor facilities will support tourism and employment and thus generate economic benefits.

(d) The proposed uses on the site are more compatible with the Waikato River environment.

(e) Cultural effects will be positive, provided the matters set out in the Cultural Impact Assessment annexed to the plan change documentation are adhered to.

2.12. Importantly for Perry Group, the Future Proof Implementation Committee, a joint committee of representatives from the HCC, Waikato District Council, Waipa District Council, the Waikato Regional Council ("**WRC**"), mana whenua, and the New Zealand Transport Agency ("**NZTA**") amended its submission following the provision of further information in August 2018, to a position of support for PPC2. The key evidence of Mr Tremaine for the Committee confirms that "Te Awa Lakes represents a significant sub-regional and regional opportunity" and that PPC2 aligns with Future Proof Strategy principles, gives effect to the WRPS, and is consistent with the strategic framework of the ODP.[19]

2.13. A comprehensive submission originally filed by the HCC has largely been resolved, as demonstrated by the evidence of Ms Rolfe on behalf of HCC as submitter. The remaining issues identified in that evidence

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19 Evidence of Ken Tremaine on behalf of Future Proof Implementation Committee at [9.2] and [9.5].

will be addressed later in these submissions or Perry Group's evidence. However for now we note that the "fundamental matters" on which HCC's submission was based, especially the relationship between Te Awa Lakes and strategic land use policy in the Waikato Region, have been addressed to HCC's satisfaction.

The Special Housing Area process

2.14. The Commissioners will be aware that PPC2 was put on hold following the development by HCC of its Special Housing Area Policy, so that an application could be made for a Special Housing Area under the legislative framework provided by central Government ("**HASHA**"). An application to schedule the site under the HASHA was lodged with HCC in October 2017. At a meeting of the full governing body of HCC on 21 June 2018, the HCC passed a resolution recommending that the Special Housing Area for Te Awa Lakes be approved by the relevant Minister. This was seen as a major milestone for the Te Awa Lakes project.[20] Ultimately, the Associate Minister for Housing did not accept HCC's recommendation and encouraged Perry Group to continue through the Schedule 1 process.

2.15. A number of features from the Special Housing Area proposal have been carried through into PPC2, including the commitment by Perry Group to the delivery of affordable housing – despite Perry Group being under no obligation to do so.[21]

2.16. However, it is important to note that despite the two processes having previously been run in parallel, and despite having obtained political support at the highest level of HCC during the Special Housing Area process, the two processes remain distinct. Given the fast-track nature of the HASHA legislation, Perry Group worked with key players "up front", including HCC and Fonterra.[22] This led to, for example, the development of a Private Developer Agreement with HCC for the particular Special Housing Area proposal, and a draft Heads of Agreement between Perry Group and Fonterra which covered matters beyond the current PPC2 site. However, limited reliance can be placed on the contractual arrangements that Perry Group was willing to

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20 Evidence of Lale Ieremia at [6.11].
21 Evidence of Lale Ieremia at [6.15].
22 Above at [6.7] and [6.13]-[6.14].

entertain through that process in return for the greater certainty and expedited timeframes it provided. While Perry Group will continue to work collaboratively with key players, it is not appropriate to say that all matters entered into through that process should apply or be treated alike for PPC2. As procedures, they are quite different.

Mana whenua engagement and consultation on PPC2

2.17. One of the pleasing aspects of both the plan change and Special Housing Area processes for Perry Group has been the close association formed with mana whenua groups, many of whom have submitted in support of PPC2. Perry Group has a history of working closely with mana whenua, more recently through its residential development in Ngāruawāhia, the River Terraces.[23] Perry Group recognised the significance of the site's aspect to the Waikato River and its proximity to Mangaharakeke Pā in deciding to engage from an early stage with mana whenua.[24] The Tangata Whenua Working Group ("**TWWG**") established in September 2017 and comprising 5 Waikato-Tainui hapū, helped provide important cultural input into the project. As Mr Ieremia describes, the conversation with mana whenua also explored the broader aspirations of mana whenua for employment, cultural tourism and housing and found common ground with Perry Group.[25] The support given by mana whenua to the Special Housing Area proposal and to PPC2 remains a highlight of the engagement process. Members of the TWWG were also able to provide a mana whenua perspective during expert witness caucusing, which is reflected in the joint witness statements which emanated from that process.

3. PPC2 – THE CONCEPT

3.1. As Mr Olliver describes, the planning approach to PPC2 has been broadly modelled on the Ruakura Structure Plan and rezoning that was inserted into the ODP in 2017 following a Board of Inquiry process earlier in 2014.[26] In order to support the masterplan, more appropriate zonings, overlays, objectives and policies are required within the ODP.

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23 Evidence of Lale Ieremia at [5.10].
24 Above at [6.8].
25 Above.
26 Above at [5.11].

3.2. PPC2 seeks to replace the current Te Rapa North Industrial (Stage 1B) and Deferred Industrial zoning with four new zonings:

Figure 2 – Figure 2-19 from evidence of John Olliver

(a) To the southwest, the Major Facilities Zone (the blue shaded area above), incorporating the new Te Awa Lakes Adventure Park Precinct which formed the "seed" for the initial Te Awa Lakes concept, and the Visitor Accommodation Overlay (the hatched area to the north and east).

(b) Surrounding the Major Facilities Zone to the north and east, the new Te Awa Lakes Medium Density Residential Zone (showing in light yellow), which is largely modelled on the existing Ruakura Medium Density Residential Zone,[27] and includes the new Riverside Interface Overlay.

(c) The new Te Awa Lakes Business 6 Zone to the south of the residential area and bordering the northern edge of Hutchinson Road, including both Mixed Use and Tourism Precincts (shown in orange on the plan above).

(d) Finally, the inclusion of Natural Open Space zoning which applies to various areas of open space within Te Awa Lakes,

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27 Above at [6.14].

(shown in teal on the plan above), including beside the Waikato River a minimum 20m esplanade reserve.

3.3. Within the Te Awa Lakes Medium Density Residential Zone are new residential precincts:[28]

Figure 2-20: Land Use

Figure 3: Figure 2-20 from the evidence of John Olliver

(a) The Medium Density Residential Precinct (area D on the plan above),[29] containing some blocks of higher density residential development, orientated for solar access and frontage to the

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28 Evidence of Jonathan Broekhuysen at [5.20].
29 Above at [5.20(d)].

linear lake, with the balance of the zone being a more general residential precinct.[30]

(b) The Riverside Residential Precinct (area F on the plan above), a larger lot / lower density area orientated towards the River to taper out along the open space edge it adjoins.[31]

3.4. Within the Business 6 Zone, the Mixed Use Precinct (area A on the plan above) incorporates the existing service centre and an adjoining mixed-use area,[32] including a 'live-work-play' concept with the potential for approximately 100 upper-level apartments to be constructed above ground floor. The Tourism Precinct (area G on the plan above) provides access and frontage opportunity for a tourism and cultural hub, along with the potential for some visitor accommodation towards the River edge.[33]

3.5. An important aspect of PPC2 is the requirement for further consenting processes before any development can take place.[34]

3.6. For the Medium Density Residential Zone, the concept of "land development plans" ("**LDPs**") and land development consents first introduced through the Ruakura plan change and variation have also been adopted.[35]

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30 Area E, described in the evidence of Mr Broekhuysen as the General Residential Precinct, is not shown in Figure 2-20 above. The reasons for this will be addressed in more detail in Mr Olliver's evidence, however for now, we note that the existing Precinct in Area D will incorporate aspects of the General Residential Precinct and the typologies described in Mr Broekhuysen's evidence where appropriate.

31 Above at [5.20(f)].

32 Evidence of Jonathan Broekhuysen at [5.20(a)].

33 Above at [5.20(g)].

34 Evidence of John Olliver at [5.12].

35 Above at [5.11].

3.7. The Medium Density Residential Zone is divided into 19 LDP areas, as shown on the figure below.

Figure 2-21 Land Development Plan Areas

Figure 3: Fig 2-21 from evidence of John Olliver

3.8. Each area will require its own LDP consent, before any development can take place. In addition, LDP consents for Areas I and J (which form the linear lake to be constructed on the Te Awa Lakes site) must be obtained prior to consents for any of the other LDP areas.[36] A point of contention, which we will return to later, is the appropriateness of the Te Awa Lakes Medium Density Residential zoning over Areas Q & R identified on the plan above, on what has become known as the 'landform dam', and the Business 6 zoning land to the east of the

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36 Rule 3.8.5.2 a). This excludes Area A, which has already been earthworked pursuant to Stage 1 of the IDP consent obtained in 2014.

Natural Open Space zoned land bordering Hutchinson Rd (known as Area X, and which forms part of the proposed "Hutchinson Road dam").

3.9. Activities within the Te Awa Lakes Major Facilities Zone and Business 6 Zones will require resource consents depending on the type of activity that is proposed to be undertaken. No activities (other than Public Art) are permitted, by virtue of proposed Rule 3.6.1. In addition, Area X will be subject to the same resource consent requirements as Areas Q & R, discussed further below.

3.10. The consenting requirements for each of the zones in the Te Awa Lakes Structure Plan Area have been set out in Table 1 of Mr Olliver's evidence.[37]

3.11. The general approach (outside Areas Q & R, Area X, and other parts of the site which are subject to the Waikato Riverbank and Gully Hazard Overlay)[38] has been to apply Restricted Discretionary status. Mr Olliver's opinion is that this is appropriate as the site is well-understood and concept design has been undertaken which is sufficient to support the proposed zonings, subject to further design at the consenting stage.[39] In addition to the existing Information Requirements, Matters of Discretion and Assessment Criteria in the ODP, PPC2 proposes a comprehensive suite of additional provisions to ensure that all relevant matters are adequately addressed as further design develops, including through the use of management plans (where appropriate).[40]

3.12. Areas Q & R within the Te Awa Lakes Medium Density Residential Zone, and Area X within the Te Awa Lakes Business 6 Zone, will be full Discretionary activities. As we will touch on later in these submissions, this reflects a desire by Perry Group to provide HCC with the broadest possible scope to assess more detailed consent applications for development in those areas, while still zoning them for that development based on the strength of the assessments currently to hand. In addition to the criteria applying for Restricted Discretionary Activities, Assessment Criteria N14 provides specific direction to

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37 Evidence of John Olliver at [5.12].

38 As shown in Appendix 17 to the original plan change request, along the border of the property with the Waikato River and in an area close to Hutchinson Rd.

39 Evidence of John Olliver at [5.13].

40 See eg Information Requirements 1.2.2.16 and 1.2.2.28, and Assessment Criteria 1.3.3.

processing planners assessing applications in Areas Q, R & X sufficient to inform them as to the geotechnical matters which should be considered as part of those applications.

3.13. As PPC2 requires a structure plan to achieve the goals of the masterplan, corresponding amendments including a new suite of objectives and policies are proposed to be included within Chapter 3 of the ODP.[41] As the proposed Te Awa Lakes Medium Density Residential Zone differed from the existing ODP residential zones, one new objective and new policies have been inserted into Chapter 4 of the ODP specific to that Zone.[42]

3.14. The outcome is a cohesive, relatively narrow set of amendments to the ODP which have been comprehensively assessed to give effect to the Te Awa Lakes masterplan. No amendments are required to the Strategic Framework Objectives and Policies in section 2.2 of the ODP, as Te Awa Lakes, in Mr Olliver's opinion, is already consistent with them.[43] As such, PPC2 slots into the existing ODP with minimal impact, while contributing at the same time to the achievement of wider objectives within it.[44]

4. LEGAL FRAMEWORK

4.1. The request for a private plan change was notified for public submissions on 1 November 2017. As such, the provisions of the RMA applying as at 18 October 2017 (when it was last amended prior) apply to PPC2.[45]

4.2. Under cl 29(1), and except as provided in subclauses (1A) to (9) of that clause, Part 1 of Schedule 1 applies with all necessary modifications to PPC2.

4.3. This includes provisions for the making of submissions, decisions, and appeals. Other provisions of the RMA, including sections 31, 32, 72, 74 and 75, and Part 2 of the RMA, including the purpose and principles of the RMA, apply to changes to a district plan, regardless of whether

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41 Evidence of John Olliver at [6.13].
42 Above.
43 Above at [6.12].
44 Above at [6.14].
45 RMA, sch 12, cl 13(1).

it is a Council-initiated or adopted change or an accepted private plan change request.

4.4. In addition to the provisions in the RMA, the Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010 includes mandatory relevant considerations when changing a planning document that applies to the Waikato River and activities within its catchment affecting the Waikato River.

4.5. We now turn briefly to these provisions referred to above. We note for now that the expert opinion of Mr Olliver is that PPC2 complies with all of the statutory obligations imposed under Part 1 of Schedule 1 to the RMA.

Section 31

4.6. Under s 31(1) of the RMA, HCC as a territorial authority has a number of functions for the purpose of giving effect to the RMA in its district. Many of those functions are relevant to PPC2 as they include:

(a) the establishment, implementation, and review of objectives, policies and methods to achieve integrated management of the effects of the use, development, or protection of land and associated natural and physical resources of the Hamilton City district; and

(b) the control of any actual or potential effects of the use, development, or protection of land, including for the purpose of:

(i) the avoidance or mitigation of natural hazards;

(iia) the prevention or mitigation of any adverse effects of the development, subdivision, or use of contaminated land

(iii) the maintenance of indigenous biodiversity

(c) the control of the emission of noise and the mitigation of the effects of noise:

(d) the control of any actual or potential effects of activities in relation to the surface of water in rivers and lakes; and

(e) any other functions specified in this Act.

Section 32

4.7. Under cl 22(1) of Schedule 1 to the RMA, a private plan change request must "contain an evaluation report prepared in accordance with section 32 for the proposed plan...change".

4.8. Section 32 provides that an evaluation report required under cl 22 above must examine the extent to which the objectives of the proposal being evaluated are the most appropriate way to achieve the purpose of the RMA under subsection (1)(a), and whether the provisions in the proposal (i.e. policies, rules and other methods) are the most appropriate way of achieving the objectives under subsection (1)(b).

4.9. The evaluation must also consider the efficiency and effectiveness of a proposal, taking into consideration its benefits and costs and the risk of acting or not acting where there is uncertainty.

4.10. PPC2 is an 'amending proposal' under s 32(3) because it seeks to amend the existing ODP. As an amending proposal, therefore, the evaluation of the proposal against the "objectives" is limited to new objectives that are part of the proposal and any objectives of the ODP that are relevant to the proposed new objectives.

4.11. A detailed section 32 analysis was provided at section 2 of the Request for Plan Change, which was updated in the documentation filed in August 2019 in the same section. We return to these matters later in our submissions when addressing Areas Q, R & X.

Section 74

4.12. Section 74 outlines the matters which must be considered by HCC when changing the ODP.

4.13. HCC must change its ODP "in accordance with", among other things, its functions under s 31 above, the provisions of Part 2, its obligation to have particular regard to the s 32 analysis discussed above, and any national policy statements or national planning standards.

4.14. Under s 74, the HCC must also "have regard to", among other things, any proposed regional policy statements or proposed regional plans, management plans and strategies prepared under other Acts, and the extent to which the ODP needs to be consistent with the plans or proposed plans of adjacent territorial authorities. Waikato District

Council is the only adjacent territorial authority. There are no proposed regional policy statements or regional plans currently notified. In this case, the relevant management plans and strategies include Future Proof, the Hamilton Urban Growth Strategy, HCC's Access Hamilton Strategy, the Hamilton City River Plan and the Waikato-Tainui Environmental Plan – Tai Tumu, Te Pari, Tai Ao.

Section 75

4.15. In addition to setting out what the ODP must and may state, s 75(3) says that the ODP must "give effect to" (relevantly):

(a) any national policy statement;

(b) a national planning standard; and

(c) any regional policy statement.

4.16. The relevant National Policy Statements in this case are the National Policy Statement for Urban Development Capacity 2016 ("**NPS-UDC**") and the National Policy Statement for Freshwater Management 2014 ("**NPSFM**").

4.17. The relevant regional policy statement is the WRPS, which became operative in 2016 and was most recently updated on 19 December 2018 to insert Objective 3.27 as directed by the NPS-UDC. Te Ture Whaimana o Te Awa o Waikato (the Vision and Strategy for the Waikato River) is part of the WRPS. We return to this matter later in our submissions.

4.18. The first set of National Planning Standards were approved under s 58E of the RMA and gazetted on 5 April 2019. They specify the structure and form for policy statements and plans, specify definitions, and other administrative requirements. Implementation Standard 17 provides that the requirements to amend district plans do not apply to plan changes, and must only take place within district plan reviews. As such, the proposal is giving effect to the National Planning Standards as it does not conflict with Hamilton City's obligations to review and update its ODP in due course in accordance with the mandatory directions. At that point, PPC2 will potentially be part of the ODP which is reviewed against the National Planning Standards, but not before.

4.19. In addition, the ODP must not be inconsistent with (relevantly) a regional plan for any matter specified in s 30(1) of the RMA, which relates to the functions of regional councils under the RMA. Mr Olliver will confirm that, in his opinion, PPC2 is not inconsistent with the Waikato Regional Plan, in relation to any of the matters specified in s 30(1).

Part 2 – Purpose and Principles

4.20. As identified above, the ODP must be changed in accordance with the provisions of Part 2 of the RMA. The Te Awa Lakes site is a natural resource and therefore it is incumbent on PPC2 to demonstrate how that resource will be sustainably managed. The Supreme Court in *Environmental Defence Society Inc v the New Zealand King Salmon Co Ltd* said that the definition of sustainable management in s 5(2) of the RMA should be read as an "integrated whole",[46] and that the use of "while" between the parts of the provision that are seen to be enabling, supporting growth, development and improvement of facilities and people's way of life and the restrictions inherent in subsections (a) – (c), means that they must be achieved "at the same time as" each other.

4.21. The Supreme Court in *King Salmon* also held that there was no need to refer back up the hierarchy of plan provisions to Part 2 to determine a plan change, absent invalidity, uncertainty, or incomplete coverage in the documents promulgated under it, because other high level planning instruments were deemed to have given effect to Part 2 at the national, regional and district level.

4.22. One possible challenge to validity is where a plan was prepared prior to the release of a higher-order planning instrument, so it cannot be assumed to give effect to it and recourse back up through the planning hierarchy (and, potentially, to Part 2) is permitted. The reference to "incomplete coverage" above acknowledges that there may be instances where the higher-order planning document does not "cover the field", and so a decision-maker will have to consider whether Part 2 provides assistance in dealing with the matters not covered. To the extent that any provisions in a higher-order planning document are also

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46 *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593 at [24](c).

uncertain, reference to Part 2 may well be justified to assist in a full and purposive interpretation of that provision.

4.23. Both Mr Olliver and Mr Eccles conclude that the WRPS and the ODP have generally been prepared in accordance with the matters listed in Part 2. Mr Olliver notes that one exception to this is the implementation of the NPS-UDC, which has not yet been fully given effect to within either document. Mr Olliver's Updated Plan Change Request provides a detailed assessment against the purpose and principles of the RMA in Part 2 at section 7.3, and concludes that PPC2 demonstrates a high level of consistency with Part 2 because of the significant contributions it can make through the economic benefits of the new tourist attraction, the housing supply it provides, enhancing access to the Waikato River and improving the amenity of the existing site into a gateway location for Hamilton. At paragraph 7.3.2 and following of the Updated Plan Change Request, Mr Olliver confirms that PP2 achieves each of the criteria in s 5 (a), (b) and (c) at the same time.

Te Ture Whaimana – Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010

4.24. The Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010 ("**Settlement Act**") gives effect to the Deed of Settlement entered into in relation to the Waikato River on 17 December 2009. The Settlement Act has the overarching purpose of restoring and protecting the health and wellbeing of the Waikato River for future generations.

4.25. Section 9(2) of the Settlement Act confirms that Te Ture Whaimana / the Vision and Strategy for the Waikato River, applies to the Waikato River and activities within its catchment affecting the Waikato River.

4.26. Section 11(1) of the Settlement Act deems that Te Ture Whaimana is part of the WRPS. As such, it must also be given effect to by PPC2.

4.27. Under s 15(2), any person (including HCC) who changes a resource management planning document to which ss 9 to 14 of the Settlement Act apply (including the ODP) must make an explicit statement in the document on how the Vision and Strategy has been given effect to. That statement is included within the Updated Plan Change Request at paragraph 4.8.50 and following, and paragraph 7.11 of Mr Olliver's evidence, as well as in Section 3.8 a) i) of PPC2.

Conclusion on legal framework

4.28. The evidence for Perry Group, including that of Mr Olliver, is that PPC2 complies with all of the statutory obligations imposed under Part 1 of Schedule 1 to the RMA. We will return later to his findings in relation to some of the key areas of contention below.

5. REMAINING ISSUES FROM SECTION 42A REPORT

5.1. The Section 42A Report produced by Mr Eccles made an interim recommendation that PPC2 be accepted in part, with the proposed zoning of the areas within the Major Facilities and Business 6 zones to be approved. In doing so, he noted that he saw "no impediment to full acceptance of PPC2 on bigger picture strategic landuse and reverse sensitivity grounds".[47]

5.2. The only part of PPC2 that Mr Eccles was not able to recommend at the time of the Section 42A Report was the Residential zoning component. The Section 42A Report identified the following remaining areas of contention, as at that date, regarding the suitability of the site for residential development:

(a) The risks, effectiveness and efficiency of zoning the land for residential development in light of geotechnical risks associated with the subject land.

(b) The geotechnical risks associated with zoning the landform dam (Areas Q & R) for residential development.

(c) The appropriateness of the proposed wetland devices for both stormwater treatment and water quality improvement.

5.3. There was also disagreement at that time as to the most appropriate 100 year flood level for the development.

Developments following the Section 42A Report

5.4. Since the Section 42A Report was released, Perry Group and its expert consultants have continued to work to narrow and / or resolve matters

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47 Section 42A Report at [8.3].

of contention between itself and the HCC, and between itself and other submitters.

5.5. In particular, further informal caucusing of Perry Group's and the HCC's geotechnical experts and planners resolved that the Te Awa Lakes Medium Residential Zone (excluding Areas Q, R & X, discussed later in these submissions) "can be developed through a range of site-wide and project-specific remedial works and foundation designs".[48] This resolved point (a) above, on the basis that additional provisions were required to inform the preparation and assessment of resource consent applications for residential development in the Zone. Those provisions were included in the version of the updated plan change annexed to the evidence of Mr Olliver. See, in particular, new Assessment Criteria N13, which requires consideration of, *inter alia*, appropriate building platforms, ground stability, and sediment and stormwater controls.

5.6. Item (c) above, regarding the extent of the proposed wetland and its use for both stormwater management and water quality treatment has been resolved through further informal caucusing. This advice was provided by Mr Eccles to Perry Group via HCC's legal counsel on 7 November 2019, following receipt of Perry Group's evidence. The evidence establishes, and HCC's experts Ms Woods and Dr Cox now agree that the wetland sizing is sufficient to provide the dual function described above.

5.7. The issue of the 100 year flood level has also been agreed between Perry Group's expert, Ms Rhynd, and the HCC. This is recorded in Ms Rhynd's paragraph 6.19, and the new flood level of 16.13m RL has been incorporated within the PPC2 provisions at rule 4.5.6 f) in relation to minimum freeboard standards above the 1% AEP event.

Geotechnical

5.8. That leaves the issue in paragraph 5.2 (b) above, namely the suitability of residential zoning of just Areas Q & R and the Business 6 zoning of Area X, as the only remaining substantive issues of contention between Perry Group and Mr Eccles on behalf of HCC.[49]

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48 Appendix 2 to the evidence of John Olliver at [2].

49 Issues regarding Area X arose out of the further informal caucusing after the section 42A report was produced. The geotechnical considerations applying to

5.9. In our submission, Perry Group has demonstrated at a level of detail consistent with a plan change process that there is no risk to HCC in acting to *zone* Areas Q & R for residential development, or Area X for business development (including potential visitor accommodation). That is in light of the extensive body of knowledge developed over many years regarding the geotechnical risks associated with the site and the available measures at the LDP, resource consent and subdivision stages to ensure that those risks will be avoided, remedied or mitigated through available ground improvement techniques and appropriate controls on post-development activities.

5.10. On this matter, the HCC's approach in Ms Rolfe's evidence to weighing the risk of acting versus not acting under s 32(2)(c):

(a) does not accord with case law regarding the treatment of risk through RMA processes;

(b) goes beyond taking a precautionary approach towards requiring the level of certainty now which could only be available at the consenting stage, and also at the detailed design stage of an individual lot; and

(c) is based on a misunderstanding of the actual geotechnical risks posed and their consequences.

Case law – the RMA is not a 'no risk' statute

5.11. Firstly, as a statement of principle, the RMA is not a no-risk statute.[50] It is not the role of this Panel, especially at this particularly early stage in the planning process, to ensure that Areas Q, R & X can operate with absolute safety and absolute certainty. A no-risk approach is logically impossible.

5.12. Resource management processes are well-equipped to deal with questions of risk as they arise: a common definition of risk is the chance of an event occurring multiplied by the adverse consequences that

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Area X are the same as those that apply to Areas Q & R, and so it is assumed that Mr Eccles holds the same view in relation to Area X as he does for Areas Q & R.

50 *Shirley Primary School v Telecom Mobile* [1999] NZRMA 66 at 97. See also *Sawmill Workers Against Poisons Inc v Whakatane District Council (No 2)* [2006] NZRMA 500 (HC) at [28] per Heath J.

would result if it did in fact occur,[51] which fits neatly within the concept of a potential effect under s 3, including one of low probability but high potential impact.[52]

5.13. The real risk, if too narrow an approach is taken, is that quoted by the Environment Court, citing United States Supreme Court authority, namely that "regulation must not strangle human activity in the search for the impossible".[53] The Panel must take a practical and robust approach to both the risk itself and its prevention.[54]

The context

5.14. As Whata J is prone to say, "context is everything".[55] Ordinarily, that might sound trite but in this context it is worth the Commissioners keeping it at the forefront of their minds when hearing the evidence on this case. A plan change such as this is inherently a "concept design" approach. A significant amount of investigation has been undertaken to determine (at a concept level) the suitability of the site, including Areas Q & R, for residential development, and Area X for business development. The expert geotechnical engineers for Perry Group have been involved with this site for over 20 years, from quarry remediation work, through to various stages of potential site development including the Stage 1 IDP consent obtained in 2014, and now the current proposal.[56] They know it backwards. Mr Lentfer is confident, based on his 10 years' experience in working the site, that it, including Areas Q, R, is suitable for the range of activities proposed, including residential development,[57] and that the same applies to Area X. Mr Morton, who has 20 years' experience working with the site, agrees.

5.15. Having established at a concept level that Areas Q & R are suitable for residential development, and Area X for business development, the question then is what are the risks which might be identified through

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51 Judge Kirkpatrick and Mark Christensen "Scientific uncertainty and environmental decision-making" NZLS Environmental Intensive, 2019 at 111.
52 RMA, s 3(f).
53 *Land Air Water Association v Waikato Regional Council* EnvC Auckland A110/01, 23 October 2001 at [518] citing *AFLCIO v American Petroleum Institute* 1980 448 US 607.
54 *Envirowaste Services Ltd v Auckland Council* [2011] NZEnvC 130 at [65].
55 In a somewhat similar context, see Whata J's decision in *Akaroa Marine Protection Society Inc v Minister of Conservation* [2012] NZHC 933, [2012] NZRMA 343 at [63].
56 Evidence of Kori Lentfer at [2.5].
57 Above at [10.6].

further investigation and can those risks (or potential effects) be adequately avoided, remedied or mitigated through a process for subsequent resource consenting? This is where the structure of the plan change, discussed earlier above, is crucial.

5.16. As Mr Olliver notes at his paragraph 5.12, no development will be able to take place on the Te Awa Lakes site without a resource consent. So the Commissioners in this plan change hearing are not authorising residential development on Areas Q & R, or visitor accommodation (or other business development) on Area X as of right. Rather, you are setting up a zoning framework for an application to be made for a future decision by HCC and ensuring that it has the tools and information it will need to make a fully-informed decision on specific proposals, with detailed engineering work done.

5.17. This follows because for the residential areas, including Areas Q & R, all development will require an LDP consent. The information requirements at Rule 1.2.2.28 of Volume 2 of PPC2 set out the matters which must be provided with any consent application for an LDP area. They include information requirements specific to Areas Q & R, including, *inter alia*, identification of building platforms, site contours, and landscaping.[58] To provide HCC with the widest possible scope to consider and address geotechnical risks associated with land development, Perry Group has volunteered that Areas Q & R should be subject to Full Discretionary status. Notwithstanding that, and again specifically in relation to Areas Q & R, PPC2 provides an extensive list of assessment criteria against which any LDP application is to be considered as set out at N13 and N14. The same resource consent requirements apply equally for Area X, including the same information requirements under rule 6.3.2.

5.18. Messrs Lentfer and Morton for Perry Group will describe the further information-gathering and investigation procedures that will support the LDP consent applications for Areas Q & R, and any resource consent for Area X, and briefly summarise just some of the many different options available to Perry Group to improve ground conditions at the consenting stage.

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[58] Information Requirements 1.2.2.28 t) and v).

Section 32(2)(c) – no risk in acting to zone land now

5.19. In considering the risk of acting or not acting to zone land now for residential or business use, Mr Eccles accepts that appropriate controls can be designed to mitigate geotechnical risks through to the subdivision stage. However, he sees that risks remain *post-development and post-subdivision* of subsequent breaches "as a result of landowner activities or Council maintenance works".[59] Those later-in-time risks are the ones the HCC's consultant engineer Ms Williams has expressed concern over, which Mr Eccles is picking up on. With respect, that assessment ignores the multi-layered and multi-faceted approach to the management of those risks through the further consenting stages:

(a) The first step, at the LDP or resource consent stage, is to demonstrate that the land can be safely built on and developed. That will require further work, including additional site investigation, ground modelling, engineering analyses and specific design.[60] When the HCC has all of that information, it will be in a position to decide whether consent should be granted at all (it might decline at that later point if not satisfied on the type of risks posed by Ms Williams), or should be granted subject to conditions.

(b) For residential development, the next step is to apply to subdivide the land, acknowledging that subdivision in advance of an LDP consent is effectively prohibited by the amendment to Rule 23.6.8 (which provides that an LDP consent must come first or at the same time), and Objective 23.2.3 and Policy 23.2.3a, which together require that subdivision "does not occur" without an approved LDP consent.[61]

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59 Appendix A to the Section 42A Report at p 36.

60 Evidence of Kori Lentfer at [10.4].

61 Failure to comply with Rule 23.6.8 results in subdivision being a non-complying activity. It is highly likely that any application for a subdivision consent for residential development in advance of an LDP consent would be "contrary to the thrust" of the directive Objective and Policy and fall foul of the Court of Appeal's formation of the s 104 test in *R J Davidson Family Trust v Marlborough District Council* [2018] NZCA 326, [2018] 3 NZLR 283 at [74]. For the Business 6 zoned land in Area X, there is a separate requirement for Restricted Discretionary consent for fee simple or unit title subdivision at Table 23.3a.

(c) Through the LDP, resource and subdivision consent process, if approved, appropriate building platforms, ground improvement measures, and any other measures necessary to avoid and / or mitigate post-development risks will be identified,[62] and can be incorporated within the conditions of any resource consent, including in the form of restrictive covenants (so as to bind future owners) pursuant to s 108(2)(d), and as consent notices pursuant to s 221 on any subdivision consent.

(d) If HCC has been fully satisfied and has granted LDP and subdivision consents which have been given effect to, then the final step, which is the only point at which the individual lot owner in Areas Q & R becomes responsible for ongoing compliance, is if a section is purchased and a plan developed to construct a dwelling as a permitted activity (or a restricted discretionary consent in the case of duplex dwellings and apartments). By that point, the land will have been through preliminary and detailed geotechnical investigations dating back over 20 years, LDP and subdivision consenting processes, engineering and detailed design, and depending on the extent of any residual risk identified, be subject to a clearly identifiable rules for post-development consistent with commonplace measures applied development on geotechnically complex soils across New Zealand. We reiterate that no development can occur as of right on Area X either without a resource consent, with the same close geotechnical scrutiny and the opportunity for conditions.

5.20. The approach adopted by HCC's witnesses on these issues has gone beyond the precautionary approach encouraged under s 32(2)(c) to a position of requiring absolute certainty and avoidance of any risk at the very first hurdle that this proposal is seeking to clear– namely, zoning the land to allow further investigation and design work to be done and future consent applications to be made. There is no authority for the

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62 Assessment Criteria N14 l) and Information Requirement 1.2.2.28 v).

proposition that "any risk at all is unacceptable", even at the later consenting stage.[63]

5.21. It is inconsistent with the purpose of sustainable management in s 5 of the RMA, which is inherently enabling and forward-looking (whilst also being protective, within reason).[64] HCC's witnesses are, in effect, predicting physical outcomes without enabling any of the more detailed engineering work to even be undertaken, and for HCC to consider, in an informed manner, whether or not the proposed detailed design of house lots (etc) could be at risk or not, and if so, the nature or magnitude of the particular risks identified included those contended by Ms Williams.

Conclusion on geotechnical matters

5.22. On these geotechnical matters in relation to Areas Q, R and X, the staged approach and evidence of Perry Group's expert witnesses should be preferred. Based on that evidence, residential zoning of Areas Q & R, and the Business 6 zoning for Area X, with the detailed consent processes set out in PPC2, is the most appropriate way of achieving the relevant objectives and policies of the ODP and the purpose of sustainable management under s 5 for that land.

6. ISSUES RAISED BY SUBMITTERS

The WRPS

6.1. In his planning evidence on behalf of Fonterra Ltd, Mr Chrisp put in issue the consistency of PPC2 with the WRPS. Mr Chrisp contends that PPC2 does not give effect to the WRPS as it is required to do. This opinion sits in stark contrast to the opinions of all the other experienced planners in this case who have addressed the WRPS, namely John Olliver for Perry Group,[65] Catherine Heppelthwaite for the Waikato Regional Council and the New Zealand Transport Agency,[66] Ken Tremaine for the Future Proof Implementation Committee,[67] and

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63 *Contact Energy v Waikato Regional* Council (2000) 6 ELRNZ 1 (EnvC) at [305].
64 RMA, s 5(2).
65 Evidence of John Olliver at [1.8], [1.10], [7.1], [7.11], [7.43], [7.46], [7.49], [7.50], [13.2], [13.3], and [13.5].
66 See in particular her evidence at [9.13].
67 See in particular his evidence at [6.8] and [9.5]

Messrs O'Dwyer and Eccles for HCC as regulatory authority,[68] and Mark Arbuthnot of Ports of Auckland Ltd,[69] on the basis of agreed relief with Perry Group.

The case law

6.2. As identified earlier, PPC2 must "give effect to" the WRPS pursuant to s 75(3) of the RMA. The Supreme Court held in *King Salmon* that "give effect to" means "implement".[70] The Supreme Court noted that the hierarchy of plans in the RMA "makes it important that objectives and policies at the regional level are given effect to at the district level".[71] However, the Supreme Court also noted that the "give effect to" requirement:[72]

> will be affected by what it relates to, that is, what must be given effect to. A requirement to give effect to a policy which is framed in a specific and unqualified way may, in a practical sense, be more prescriptive than a requirement to give effect to a policy which is worded at a higher level of abstraction.

6.3. This acknowledges that, outside the area of environmental bottom lines, the scheme of the RMA does give local authorities "considerable flexibility and scope for choice" as to *how* to implement such policies.[73]

6.4. The Supreme Court also identified a three-step approach for determining whether a plan change gives effect to a higher-order planning document:

(a) First, the decision-maker must "identify those policies that are relevant, paying careful attention to the way in which they are expressed".[74] "Those expressed in more directive terms will carry greater weight than those expressed in less directive terms". It may be that a provision is stated in such directive terms that the decision-maker will have no option but to implement it.

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68 See in particular Mr O'Dwyer's evidence at [83]-[84] and Mr Eccles' Section 42A Report at [4.19], [4.23], [4.25] and Appendix H.
69 See in particular his evidence at [7.18], [7.24], [7.30] and [9.1].
70 *New Zealand King Salmon,* above n 46 at [77].
71 *New Zealand King Salmon*, above n 46 at [77].
72 *New Zealand King Salmon*, above n 46 at [80].
73 *New Zealand King Salmon*, above n 46 at [91], [127] and [152].
74 *New Zealand King Salmon*, above n 46 at [129].

(b) Secondly, there may be instances where particular policies "pull in different directions".[75] This "should occur infrequently, given the way that the various policies are expressed and the conclusions that can be drawn from those differences in wording". It might be that "an apparent conflict between particular policies will dissolve if close attention is paid to the way in which the policies are expressed". A "thorough-going attempt to find a way reconcile them" should be made.[76]

(c) Finally, and only if the conflict remains, can the decision-maker justify a determination that one policy should prevail over another.[77] The area of conflict (if any) "should be kept as narrow as possible". The necessary analysis should be informed by the relevant higher-order planning document, albeit also informed by the sustainable management purpose in s 5 of the RMA.

6.5. While those comments were made in the context of the New Zealand Coastal Policy Statement, the High Court has held that the Supreme Court's reasoning in (a) to (c) above is "equally applicable to documents lower in the planning hierarchy", including a regional policy statement.[78] The High Court has also warned that regarding "specific words" within policies "in isolation" when undertaking the assessment above is contrary to the approach in *King Salmon* and a number of other leading decisions of the Court of Appeal.[79]

6.6. From the above, it is plain that whether or not PPC2 "gives effect to" the WRPS will be a matter of weight to be afforded between different policies. If conflict remains, one policy might prevail over another. However, it is not simply a "numbers" game, or a question of which policies are consistent, which are inconsistent, and which are contrary. An attempt must be made to reconcile the policies, before any decision can be made to prefer one over the other.

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75 *New Zealand King Salmon*, above n 46 at [129].
76 *New Zealand King Salmon*, above n 70 at [131].
77 *New Zealand King Salmon*, above n 70 at [130].
78 *Royal Forest and Bird Protection Society of New Zealand Inc v Bay of Plenty Regional Council* [2017] NZHC 3080, [2019] NZRMA 1 at [98].
79 *Equus Trust v Christchurch City Council* [2017] NZHC 224 at [76], citing *Powell v Dunedin City Council* [2004] 3 NZLR 721 (CA) and *J Rattray & Son Ltd v Christchurch City Council* CA 29/84, 11 April 1984.

The evidence in support

6.7. The Updated Request for Plan Change contained a detailed assessment of PPC2 against the provisions of the WRPS at sections 4.8 and 7.5.

6.8. The Section 42A Report provided by Mr Eccles included his own full assessment of the relevant WRPS provisions at Appendix H. Mr Eccles concluded at paragraphs 4.19, 4.23 and 4.25 of his Report that, in his view, acceptance of PPC2 would give effect to the WRPS.

6.9. Mr O'Dwyer conducted a separate analysis in which he found that he generally agreed with the findings of Mr Olliver that PPC2 "can be accommodated when assessed against the relevant [WRPS] provisions applicable to the site".[80]

6.10. Mr Olliver confirmed his earlier assessment at paragraphs 7.21 to 7.50 of his primary evidence, and found that PPC2 gives effect to the relevant policies in the WRPS.[81]

6.11. That assessment was confirmed in the expert evidence for submitters by:

(a) Ken Tremaine on behalf of the Future Proof Implementation Committee, the party charged with responsibility for the Future Proof Growth Strategy, who found that "PPC2 aligns with Future Proof Strategy principles" and gives effect to the the WRPS;[82]

(b) Catherine Heppelthwaite for the Waikato Regional Council and the New Zealand Transport Agency, both Future Proof partners themselves, where she found that PPC2 "has been prepared in a manner which meets as many of the elements of the [WRPS] as practical" and that her own assessment confirmed that she was reasonably closely aligned with Mr Eccles;[83] and

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80 Evidence of Luke O'Dwyer at [84].
81 Evidence of John Olliver at [1.8], [1.10], [7.1], [7.11], [7.43], [7.46], [7.49], [7.50], [13.2], [13.3], and [13.5].
82 Evidence of Ken Tremaine at [9.5].
83 Evidence of Catherine Heppelthwaite at [9.12]-[9.13].

(c) Mark Arbuthnot for Ports of Auckland Ltd, who found that subject to agreed amendments being incorporated within PPC2, the proposal would "not be inconsistent with the Future Proof Guiding Principles to the extent it would make it contrary to the outcomes that are intended by Policy 6.14 of the WRPS",[84] and that any residual concerns regarding the Development Principles in Section 6A had been "appropriately addressed within the planning provisions".[85]

6.12. All of those assessments, in our submission, and despite the differing language used, demonstrate a consistent position amongst almost all of the planning witnesses that PPC2 as amended gives effect to the WRPS.

Fonterra's position

6.13. Mr Chrisp for Fonterra is the only planning witness who has determined that PPC2 does not give effect to the WRPS. He says it conflicts with what he claims are the "most applicable policy directives" set out at his paragraph 5.8. The two policies he refers to in detail are Policy 4.4 in relation to reverse sensitivity effects and the criteria for alternative land release pursuant to Policy 6.14.

Reverse sensitivity

6.14. There does not seem to be any dispute about the law applying to reverse sensitivity effects. The difference between the parties appears to be grounded in the application of that test and the different emphasis placed on parts of the test, as we will discuss further below.

6.15. The generally accepted definition of "reverse sensitivity" is:[86]

> The legal vulnerability of an established activity to complaint from a new land use. It arises when an established land use is causing adverse environmental impact to nearby land, and a new, benign activity is proposed for the land. The "sensitivity" is this: if the new use is permitted, the established

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84 Evidence of Mark Arbuthnot at [7.18].
85 Above at [7.30].
86 Nolan (ed) *Environmental and Resource Management Law* (6th edition, Lexis Nexis, Wellington, 2018 at [13.32], citing *Affco New Zealand v Napier City Council* EnvC Wellington W082/2004, 4 November 2004 at [29].

use may be required to restrict its operations or mitigate its effects so as not to adversely affect the new activity.

6.16. It is worth unpacking that quote into its constituent parts to identify the area of dispute between Perry Group and Fonterra:

(a) Perry Group does not dispute the established nature of the Te Rapa Dairy Factory. The Factory, and any lawfully permitted expansion to it under its current zoning, was part of the existing environment against which PPC2 was assessed.

(b) Nor does Perry Group dispute that the type of activities proposed include some which could, in principle, be "sensitive" to operations at the Te Rapa Dairy Factory.

(c) The dispute is whether, in the context of the existing environment, which includes expansion permitted by the ODP, the Te Rapa Dairy Factory is or would be likely to cause an "adverse environmental impact" on the Te Awa Lakes land.

6.17. The evidence for Perry Group, including expert noise, odour, and lighting opinion,[87] establishes that the existing and likely environmental effects of Fonterra's operations on the Te Awa Lakes land are no more than minor. For example, Mr Bell-Booth of Marshall Day assesses that compliant noise emissions from the Te Rapa Dairy Factory will result in no more than 43 dB L_{Aeq} in the Te Awa Lakes Business 6 Zone, and no more than 40 dB L_{Aeq} in the Te Awa Lakes Medium Density Residential Zone, "so as not to create any potential for reverse sensitivity effects on Fonterra's operations".[88] That is before any mitigation provided by PPC2 is considered. This position is supported by Mr Hunt, the reporting officer's noise consultant, who has found that potential reverse sensitivity effects will be less than minor, due in part to the buffers provided from emitting activities,[89] and that any residual effects will adequately addressed through the PPC2 provisions.

6.18. Mr Mckensey, Perry Group's lighting consultant, assesses the lighting effects from the Factory to be low, and that local lighting within the site will be "considerably more obvious" than any lighting associated with

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87 Cf the activities listed in Implementation Method 6.1.2 in relation to discharges that might lead to reverse sensitivity effects.

88 Evidence of James Bell-Booth at [5.43].

89 Section 42A Report, Appendix F, evidence of Malcolm Hunt at section 7.

Fonterra's operations.[90] He assesses the potential for reverse sensitivity effects to be "low-nil". Mr Pearce, Perry Group's odour consultant, assesses that the Dairy Factory "will not be impacted by odour related reverse sensitivity effects" from Te Awa Lakes.[91]

6.19. As such, one of the core constituent parts of a reverse sensitivity effect, namely sensitivity to an adverse environmental impact of the Dairy Factory's operations, is altogether missing from Fonterra's case. Notably, it has not put up any expert evidence to rebut the noise, odour and lighting assessments undertaken by Perry Group. The statements in Ms Buckley's evidence which assert "significant adverse reverse sensitivity effects", on which Mr Chrisp and Mr Copeland in particular rely upon, have absolutely no foundation in the evidence.[92] In a court of law, statements to that effect would be prima facie inadmissible as they would not be substantially helpful to a fact-finder under s 25 of the Evidence Act 2006. Although not bound by the rules of evidence, the Commissioners are in the same position.

6.20. Mr Chrisp asserts that it is not always the actual (or potential) effects of industry which give rise to reverse sensitivity, but rather the perception of an adverse effect by residents. We disagree. In order to qualify as an adverse effect, such a perception must be grounded in fact.[93] Mere perceptions alone are not adverse effects.[94] The effects of industry must actually result in an "adverse environmental impact" on the receiver in order to bring about the potential for reverse sensitivity.

6.21. This has important flow-on consequences for Mr Chrisp's assessment of PPC2 against Policy 4.4 of the WRPS.

6.22. The requirement in Policy 4.4 is that the management of the Te Awa Lakes land as a physical resource "provides for the continued operation and development of" the Te Rapa Dairy Factory by "avoiding or minimising the potential for reverse sensitivity". Firstly, it is apparent

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90 Evidence of John McKensey at [5.5].
91 Evidence of Steve Pearce at [6.29].
92 This point is also picked up in the evidence of Mr O'Dwyer in the Section 42A Report, where he notes that there is "no substantive evidence of the degree of the [alleged] impact, and the scale and dimensions of perceived reverse sensitivity effects are not known or quantified" at his [150].
93 *Shirley*, above n 50 at [193].
94 *Contact Energy Ltd v Waikato Regional Council*, above n 63 at [254], referred to in *Minister for Children v Auckland Council* [2019] NZEnvC 131, [2019] NZRMA 585 at [66].

that the WRPS does not require the avoidance of all potential for reverse sensitivity effects. That is inherent within the requirement that Perry Group "minimis[e]" the potential for reverse sensitivity effects from its land.

6.23. Under Implementation Method 4.4.1, the need for an adverse environmental impact is also apparent within the statement that plan provisions should "recognis[e] the potential for regionally significant industry...to have adverse effects beyond its boundaries". This is consistent with existing case law that the starting point for an assessment of reverse sensitivity is "to require emitters to take all reasonable steps to internalise effects" *within* its own boundaries.[95] The Court went on to say that "only those effects which cannot be reasonably internalised provide the basis for constraints on nearby land-use activities".[96] What is reasonable depends upon a careful consideration of the evidence, including available mitigation measures and the economics of implementing them.

6.24. The case for Fonterra, neatly summarised in paragraph 5.13 of Mr Chrisp's evidence, is somewhat of a *fait accompli*: the mere addition of residential activities on the Te Awa Lakes site "in an industrial area creates the potential for reverse sensitivity to constrain Fonterra's operations or any future expansion at the Te Rapa Dairy Factory". That approach does not appear to be limited by distance, design, wind direction, or other environmental factors. It could just as equally apply to a hypothetical proposed rezoning of the Te Rapa North Industrial zoned land at the corner of the Te Rapa Bypass and Ruffell Road, some 2 kilometres away, as it would to Te Awa Lakes.

6.25. As noted earlier, Fonterra simply does not establish a evidential foundation for either the likelihood of reverse sensitivity effects, or their consequences, which are both essential parts of the definition of "potential effect" under s 3. Mr Chrisp is correct to say at his paragraph 5.13 that the test is to analyse "whether there is potential reverse sensitivity", rather than having to prove an actual adverse effect. However, other than the bare assertions in Ms Buckley's evidence,

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95 *Winstone Aggregates Ltd v Papakura District Council* EnvC Auckland A49/2002, 26 February 2002 at [46], in the context of the imposition of a buffer zone.

96 *Winstone Aggregates*, above n 95 at [46].

Fonterra's case does not provide any evidence as to what that potential effect is.

6.26. The only example Fonterra relies upon is a submission by Perry Group on Fonterra's current application for renewal of its stormwater, wastewater, and air discharge consents. The submission provides conditional support subject to confirmation that Fonterra internalises its adverse effects through conditions. With respect to Ms Buckley and Mr Chrisp, that is no more than a reflection of the existing case law referred to above. That submission is not any demonstration of a reverse sensitivity effect. Futhermore, Mr Ieremia will advise the Commissioners that Perry Group's submission came about, not because of any concern over Te Awa Lakes, but because Perry Group owns other land immediately adjoining the Te Rapa Dairy Factory, so understandably was interested in Fonterra's approach to managing its effects at that boundary, and it has a wider interest in the River.

Conclusion on reverse sensitivity

6.27. In the absence of any evidence at all to support the proposition that there is potential for reverse sensitivity effects, let alone significant adverse effects, the conclusion reached by Mr Chrisp simply cannot be sustained. The evidence of Perry Group's technical experts, such as Mr Bell-Booth, Mr Mckensey, and Mr Pearce, and the planning evidence of Mr Olliver and the other planning witnesses[97] should be preferred on this point.

Alternative land release criteria

6.28. All of the planning witnesses agree that Policy 6.14 allows for some deviation from the Future Proof land use pattern through rezoning of land, provided that the criteria in Implementation Method 6.14.3 can be met.[98] Perry Group agrees with Mr Chrisp that the use of "and" in

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97 Mr Eccles at his [4.24]-[4.25]; Mr Tremaine; at his [6.12], Ms Heppelthwaite at her [9.12] m), and Mr O'Dwyer at his [149].

98 Evidence of Mark Chrisp at [5.16]; evidence of Mark Arbuthnot at [7.18]; evidence of Luke O'Dwyer at [83]; evidence of Ken Tremaine at [3.11] in relation to Future Proof and [6.19] – [6.20]; evidence of Paula Rolfe at Attachment A, relying on the evidence of Mr O'Dwyer; Section 42A Report at [4.30] – [4.31] and Appendix H; evidence of Catherine Heppelthwaite at [9.12], relying on the Section 42A Report; and the evidence of Mr Olliver at [7.30].

Method 6.14.3 means that all criteria must be met before Policy 6.14 can be properly given effect to.

6.29. The case for Perry Group, as established in Mr Olliver's evidence at paragraph 7.43, is that all of the criteria are met. This is a view shared by all of the other planning witnesses who address the WRPS, except Mr Chrisp.

6.30. Mr Chrisp's three criticisms of that analysis are limited to:

(a) The traffic effects of PPC2 on Te Rapa Road. These matters are fully addressed in the evidence of Mr Apeldoorn.

(b) Alleged inconsistency with Development Principles 6A g), requiring that new development: "be directed away from regionally significant industry", namely the Te Rapa Dairy Factory; and o), that it "not result in incompatible adjacent land uses (including those that may result in reverse sensitivity effects)". We refer to our earlier response to Fonterra's reverse sensitivity complaints in this regard, which are unfounded.

(c) Alleged inconsistency with Development Principle 6A i), requiring that new development "promotes compact urban form, design and location to", inter alia, "minimise the need for private motor vehicle use".

6.31. As to point (c), the expert evidence of Ms de Lambert, Mr Broekhuysen, and Mr Apeldoorn for Perry Group demonstrates that PPC2 is consistent with this Development Principle.

6.32. As Ms de Lambert and Mr Broekhuysen will say, it is important when considering this Development Principle that a medium to long-term outlook is taken, consistent with the broader context of future urban development for Hamilton City.[99] This includes the proposed residential zoning under the Proposed Waikato District Plan on the western side of the Expressway at Horotiu, the Hamilton – Auckland Corridor Plan, or H2A, and the future growth cell HT1 identified in the

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99 Evidence of Jonathan Broekhuysen at [6.3]-[6.4].

Strategic Agreement on Future Urban Boundaries to the east of the Te Awa Lakes site.

6.33. When viewed this way, it is apparent that Te Awa Lakes will promote compact urban form, design and location. Mr Broekhuysen says that the medium to long term outlook is for progressive urbanisation of the site's surrounds.[100] The proposed urbanisation referred to above will largely develop around Te Awa Lakes in stages.[101] The masterplan has responded to these proposed and future adjoining land uses (including those across the River in HT1) by proposing complementary land uses within the site. It also responds to the Industrial zoned land to the south, and the State Highway to the west, by providing buffers through the Business 6 Zone and the Major Facilities Zone.

6.34. All of this sits within a wider context of a city that is expanding both "out" and "up". The majority of growth cells identified in the Future Proof Growth Strategy and the Hamilton Urban Growth Strategy are towards the edges of the City's existing urban form. This includes Ruakura to the east, Rotokauri to the west, and Rototuna to the north not far from the Te Awa Lakes site (only a kilometre or so away at its nearest point). This is best shown by Figure 1 to the Folio of Urban Design Figures. Te Awa Lakes is no different, in terms of its proximity to the boundary of Hamilton City as any of the other identified growth areas. As Ms de Lambert will say, proximity to the CBD (a point which is heavily relied upon by Mr Coombs and Mr Chrisp for Fonterra) is seldom, if ever a present day consideration as to the appropriate location for urban growth.

6.35. Rather than measuring distances from the CBD, it is important to consider the compact urban design, form and location of Te Awa Lakes by reference to other centres within Hamilton City that can provide the necessary services and amenities for its residents. Te Awa Lakes is within close proximity to the Te Awa (The Base) shopping centre, being just 5.8 km to the south of the site.[102] That is an eight minute drive or 22 minute cycle away. Slightly further afield, the existing Rototuna Town Centre also provides amenity, including the recently opened Rototuna High School. Another point which is ignored by Fonterra's

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100 Evidence of Jonathan Broekhuysen at [6.4].
101 Evidence of Jonathan Broekhuysen at [6.5].
102 Evidence of Jonathan Broekhuysen at [6.12].

witnesses in this WRPS discussion is the wider context of the Horotiu sub-region, including the residential zoned land at Horotiu and on the opposite side of the River, the proposed residential zoning on the other side of the Expressway, and Horotiu Primary School, which is just 1.6 km from Te Awa Lakes.

6.36. As to the "up", Mr Polkinghorne notes that the proportion of high-density housing out of all building consents has increased to 50% in the last two years.[103] The mix of apartment and duplex-style developments proposed through the Te Awa Lakes Medium Density Residential Zone will assist in contributing to this growth, which is currently underrepresented in housing stocks in the north of Hamilton City, while providing an attractive mixed-use community consistent with the Development Principle of maximising opportunities for people to live, work and play within their local area.[104]

6.37. As to the goal of minimising the need for private motor vehicle use emphasised by Mr Chrisp, Te Awa Lakes has been designed to provide for and deliver a range of high quality multi-modal transport options. In part, this has been necessary to address other aspects of this Development Principle not referred to by Mr Chrisp, namely maximising opportunities to support and take advantage of public transport, and by encouraging walking, cycling and multi-modal connections.[105] As Mr Broekhuysen notes, this offers choice to residents to walk, cycle, catch public transport or drive depending on their destination, needs and weather conditions.[106] That strategy includes proposed improvements to the Te Awa River Ride, a network of cycling and walking pathways which runs along the entire eastern side of Te Awa Lakes. Across its full length, the River Ride connects Ngāruawāhia in the north, through the Hamilton CBD, to Karapiro to the south. The proposed improvements will promote greater use of this corridor for walking and cycling as an alternative to private car use.

6.38. Mr Apeldoorn's Integrated Transport Assessment submitted with the plan change contains a detailed consideration of the public transport benefits provided by the proposal, including provision for integrated bus

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103 Evidence of John Polkinghorne at [5.36].
104 Development Principle 6A i) v).
105 Development Principles 6A i) iii) and iv).
106 Evidence of Jonathan Broekhuysen at [6.16].

services.[107] In addition, the Structure Plan keeps open the opportunity to connect the development to future high-frequency public transport services.[108] The HCC's transport expert in the section 42A report has confirmed he is comfortable with the proposed approach to public transport.[109] Any opportunities to integrate with existing and future public transport opportunities will be considered as part of any Travel Demand Management Plan required with any application for an LDP consent.[110]

6.39. The evidence for Fonterra takes a static view of the current provision of public transport in Hamilton City, and is dismissive of the ability through PPC2 to encourage greater use of multi-modal options. The accessibility analysis undertaken by Mr Smith, which like Mr Coombs' urban design analysis, is CBD-focussed, ignores the fact that the distances from Rotutuna West (an identified growth area) and Te Awa Lakes are relatively similar. Equally, the Journey to Work information relied upon by Mr Smith captures the high car dependency generally within Hamilton (an average of just under 90%) as at 2013, but does not consider any of the wider public transport initiatives under way in Hamilton, including the recently released Regional Public Transport Plan 2018-2028 which confirms the WRC's intent to transition to a mass transit-oriented network over time.[111]

Conclusion on Development Principles and the WRPS

6.40. When those points are considered together, the criticism by Mr Chrisp falls away, and the evidence demonstrates as a whole that PPC2 will be consistent with the development principles set out in Section 6A. Applying the rationale in *King Salmon*, the evidence establishes that PPC2 is consistent with the policies of the WRPS, and is particularly consistent with those provisions expressed in directive language and which carry greater weight, such as Policy 6.14. As such, PPC2 can be said to give effect to the WRPS.

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107 Evidence of Mark Apeldoorn at [44].
108 Evidence of Mark Apeldoorn at [45].
109 Section 42A Report, evidence of Alistair Gray at [35] h).
110 Information Requirement 1.2.2.28 r).
111 Evidence of Andrew Wilson on behalf of WRC at [35].

Alligator weed

6.41. Following the decision to revive PPC2, one of the matters in HCC's further information request to update the plan change material related to the management of alligator weed on the Te Awa Lakes site. The site is currently dealing with alligator weed and parts of the site are subject to a Restricted Place Notice under the Biosecurity Act 1993. This places strict controls on activities that can take place on the site, in an attempt to avoid the further spread of the weed. This includes the current Weed Hygiene Plan.

6.42. Perry Group retained Peter Russell, a key expert in the field who was formerly the Biosecurity Operations Manager at Waikato Regional Council and now in his own consultancy, to address alligator weed management issues. Mr Russell filed a report as part of the updated plan change documentation, and attended expert witness caucusing where matters between himself and Mr Embling for the Waikato Regional Council were largely agreed. Based on Mr Russell's advice, Perry Group intends to eradicate alligator weed from the site, which would be a "first" for the region on this sort of scale.

6.43. On reading Mr Embling's evidence, it became apparent that Mr Embling had mistaken the report Mr Russell had provided as part of the plan change to be the proposed end-use Alligator Weed Management Plan, which will include details as to future management of alligator weed post-development if eradication is not successful. It was not. As such, the areas of dispute between Mr Embling and Mr Russell on the face of their evidence are more apparent than real. As Mr Russell will say, the later management plan process will provide for the outcomes Mr Embling is seeking in the event of eradication not being fully achieved. Other matters raised at caucusing, including who bears the cost for alligator weed management on the site, are outside of the scope of this process. Perry Group is committed to working with the WRC to come to a sensible arrangement in relation to those costs.

6.44. One matter raised in the evidence of Ms Heppelthwaite was a proposed rule that would restrict the removal of soil and other green waste from the site without a resource consent. Mr Russell will respond to this suggestion when he gives evidence, however for now we note that the

proposed rule effectively duplicates the controls which already exist under the Biosecurity Act and the Restricted Place Notice.

6.45. As Mr Olliver will say, duplication of controls through a district plan rule, which is far more rigid than a Restricted Place Notice, is not an efficient and effective way to address the potential effects of alligator weed post-development. It is quite unnecessary to double-up in this way. While the Biosecurity Act explicitly provides (at s 7) that it does not derogate from or affect the provisions of the RMA in any way, that does not mean that it is efficient and effective to incorporate similar controls for the 10-year lifetime of a district plan, especially when those rules might be redundant if total eradication is achieved during construction.

Traffic

6.46. Mr Apeldoorn for Perry Group and Mr Gray for the HCC in its section 42A capacity agreed on all major issues arising from the traffic effects of the Te Awa Lakes proposal. Mr Smith for Ports of Auckland Ltd has also filed a short statement of evidence regarding provisions to be inserted into PPC2 to resolve its submission, which have been agreed to by Perry Group.

6.47. Mr Apeldoorn will provide a response to the separate evidence of Mr Smith for Fonterra. It is the evidence of Mr Apeldoorn and Mr Gray for HCC that the traffic effects of PPC2 can be appropriately avoided, remedied or mitigated through the agreed infrastructure improvements, the proposed staging and the other measures put forward in the plan change.

6.48. A small number of other minor differences arose between Mr Apeldoorn and other submitter witnesses in their evidence:

(a) Mr Wilson for WRC favours a proposed public transport connection through the site which would provide for the opportunity to connect to an existing paper road on the other side of the River in future. Mr Apeldoorn, Mr Ieremia and Mr Broekhuysen for Perry Group will respond to this suggestion, but for now we note that it is their view that the proposed link shown in Mr Wilson's Figure 4 is not an appropriate solution to providing throughput for public transport and it will have adverse urban design and commercial effects.

(b) Mr Swears for the NZTA has proposed that a rule should be included to provide for complete screening of the adventure park from the Waikato Expressway. Ms Heppelthwaite does not adopt Mr Swears' suggestion, and the evidence of Ms de Lambert and Messrs Broekhuysen and Apeldoorn will be that it would have negative urban design and visual effects, is not justified on the basis of low risk of driver distraction, is inconsistent with the NZTA's own approach to "landmark" attractions on or near the State Highway network, and would negate the opportunity for Te Awa Lakes to provide an attractive gateway entrance into Hamilton City.

(c) Ms Rolfe in her evidence also seeks relief on behalf of HCC as submitter for the "full urbanisation" of Te Rapa Road from the subject site to existing pedestrian facilities many kilometres away at the Church Road intersection. In doing so, she relies on the advice of Mr Parsons, a HCC employee. This is not supported by Mr Gray, the Council's section 42A transportation consultant, who instead has agreed with Mr Apeldoorn for the provision of cycle safety improvements along Te Rapa Road, while also improving the Te Awa River Ride to encourage users to make better use of the existing facility. The evidence for Perry Group will establish that there is no foundation in the evidence for this submission point.

Economics

6.49. The economic rationale for PPC2 was and is a key focus for Perry Group's decision to pursue a rezoning of the Te Awa Lakes site. The plan change was supported by a detailed report provided by John Polkinghorne of RCG, however the HCC requested further comfort in relation to industrial land supply and agglomeration benefits. That was provided in two substantial reports prepared by Dr Doug Fairgray of Market Economics Ltd, whose firm was also responsible for the Housing and Business Land Capacity Assessments recently undertaken on behalf of HCC to comply with its obligations under the NPS-UDC.

6.50. Dr Fairgray has concluded that the proposed rezoning will not have any material effect on the supply of industrial land in the Horotiu node, the

City and wider Region, and also that there will be no material loss of agglomeration benefits as the result of the change in land use. Dr Fairgray's work was sufficient to satisfy the HCC in relation to its submission points. Mr Copeland for Fonterra criticises the analysis undertaken by Mr Polkinghorne and Dr Fairgray. They will respond to those criticisms during the hearing, but it is worth noting that Mr Copeland has not provided his own analysis or alternative assessments to support his assertions. Mr Copeland's assessment of the cost of potential reverse sensitivity is equally reliant on the evidence of Ms Buckley and her assertions, which are not supported by any technical evidence. For those reasons, the evidence of Mr Polkinghorne and Dr Fairgray should be preferred over that of Mr Copeland. The economic rationale for PPC2, ie that the land can be rezoned for the mixed use masterplanned development proposed without adverse economic effects, remains strong.

Industrial feasibility

6.51. An allied, but by no means co-dependent point, to the economic rationale for PPC2 was the analysis undertaken by Essentia Consulting Group to demonstrate the lack of feasibility for the development of the current zoning on the Te Awa Lakes site due to geotechnical constraints arising from its previous quarrying. Martin Udale of Essentia, an experienced developer and advisor with extensive experience on similar projects both in New Zealand and overseas, has determined that the site is not feasible for industrial development for the foreseeable future, which extends out (at least) to the next planning cycle in 10 – 15 years. This conclusion has been confirmed by the HCC's peer reviewer, Hamish Anderson.

6.52. As indicated above, PPC2 is not predicated on the basis of the lack of industrial feasibility: rather, as the work of Dr Fairgray has established, PPC2 can stand on its own two feet, regardless of the viability of the current zoning. This is consistent with the enabling aspects of the definition of sustainable management in s 5 of the RMA: a landowner is able to seek a more appropriate (or higher value) outcome for its land than a current zoning. It is not constrained to demonstrating first that the current zoning is not feasible or unachievable.

6.53. Late in the process, in the lead up to its evidence exchange, Perry Group was contacted by a Mr Michael Martin, a civil and geotechnical engineer based in Auckland and engaged on behalf of Fonterra Ltd. Perry Group organised for some of its key personnel to meet with Mr Martin at short notice in relation to the indicative rural remediation and industrial designs costed by Mr Millard to feed into the industrial feasibility analysis undertaken by Mr Udale. Despite their best efforts, Mr Martin obviously holds a contrary view to Perry Group's experts, some of whom have over 20 years' experience working with the site and are experts in fields going beyond Mr Martin's area of expertise, and who know the site's constraints backwards.

6.54. Perry Group's expert witnesses will provide a response to the evidence of Mr Martin, which, due to his late briefing by Fonterra and failure to participate in any earlier caucusing, has meant that Perry Group has had to go to some length, at short notice, to defend the assessment of the inputs into Mr Udale's analysis. The reply evidence for Perry Group continues to demonstrate that Mr Udale's analysis is soundand that the lack of feasibility provides another reason (but by no means one Perry Group relies upon as being required) for the proposed rezoning. The work of Dr Fairgray and other experts continues to provide that strong evidential foundation for the plan change.

Other issues

6.55. Other issues of a minor nature raised by the HCC in its evidence as submitter (but not in its regulatory capacity) are set out below.

6.56. In her evidence, Ms Rolfe sought that the rule framework in PPC2 include provision for Perry Group to fund the costs of all infrastructure. This was a point that was raised in the context of the SHA proposal, where it was a specific requirement of Hamilton's SHA policy that any infrastructure upgrades be fully funded by an applicant prior to obtaining HCC support. As Mr Ieremia will describe, that was based on the significant efficiencies available to Perry Group through the SHA process which, as we discussed earlier in these submissions, is different to the normal Schedule 1 process. It also appears to be the rationale provided behind the request for "full urbanisation" of Te Rapa Road, which was a concession that Perry Group was willing to make in order to achieve the SHA proposal.

6.57. In addition to the points to be raised by Mr Ieremia on this matter, and the existing recognition in the Structure Plan section of PPC2 for the need for some cost-sharing where benefits are equally shared, it is worth noting that funding of infrastructure is normally not a matter which is controlled at the plan making phase. There are all sorts of remedies available to HCC, including financial contributions, development contributions or agreements, and rates to ensure that a fair balance is struck between Perry Group and the ratepayer. In the context of a normal Schedule 1 plan change, it is not appropriate to seek to place that burden entirely on the proponent.

6.58. Ms Rolfe has also suggested a rule which would require Perry Group to provide for 10% of any residential activities within each of the 19 LDP areas in the Medium Density Residential Zone to be affordable housing. Mr Ieremia will affirm that Perry Group is committed to providing a 10% affordable housing component, given its importance to the City, and to spreading that affordable component on different parts of the site to avoid the adverse social effects of concentrating it all in one location. However, the rule proposed is far too rigid (a fixed percentage at each stage) and also therefore appears to go beyond High Court authority for what can be achieved through a district plan process to achieve housing affordability, and instead strays into direct interference in the market.[112] Such interference is ultra vires the Council's functions and powers described above under s 31. It also robs Perry Group of any flexibility to, say, provide 7% in one LDP area and 13% in the other. It would also extend into the Riverside Precinct, which is identified in the Structure Plan as an area of high value, high amenity large lot-style sections where it would not be appropriate to provide for an affordable housing component, and likewise into the lake-edge living intended to be on parts of the linear lake, which are also high-value. Neither area is intended for this voluntary offer of affordable housing. The current proposal, including a more flexible rule,[113] is a more efficient and effective outcome, and more appropriately achieves the sustainable management of the Te Awa Lakes site.

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112 *Infinity Investment Group Holdings Ltd v Queenstown Lakes District Council* [2011] NZRMA 321 (HC) at [51].

113 Rule 4.8.8.

6.59. One other matter raised by Ms Rolfe is her proposal that a 20m wide esplanade reserve be provided around the entire linear lake which is the centrepiece of the Te Awa Lakes Medium Density Residential Zone. Her rationale is based on the assertion that an esplanade reserve will be required under the subdivision provisions of the RMA, and so it is more appropriate in her mind to provide for that now through the Framework Plan and / or rules in PPC2. She relies on internal advice from another employed planner within HCC. These matters were not raised in the section 42A report, and are not required by Mr Eccles.

6.60. As Mr Olliver will describe, Ms Rolfe has misunderstood the fact that there will be no requirement for an esplanade reserve under the RMA, as the proposed size of the lake will be smaller than the definition in s 230(5) of the RMA. However, as Mr Broekhuysen and Mr Ieremia will also go on to say, it is also contrary to the carefully considered and long-planned urban design principles of the masterplan and the intention to create some areas of private lake edge along the linear lake (referred to above in the discussion on affordable housing). These areas provide high amenity, high value choice of residential living for prospective residents. In addition, a uniform requirement for a 20m wide strip where there is intended to be public access, rather than a maximum of 10m, is not supported on urban design grounds.

6.61. Other minor matters will be addressed in evidence or in reply.

7. WITNESSES

7.1. Perry Group will call evidence from the following witnesses, and in the order shown. As there was a sequential evidence exchange, where the Applicant went first, so that the submitters' experts were able to see the Applicant's evidence in advance but not vice versa, Mr Ieremia and other witnesses for Perry Group have helpfully prepared written responses so the Commissioners have the benefit of hearing from them on points of agreement or disagreement. To make it efficient, they will read those out when they present their evidence, so there is no need to appear twice and the same hearing order can be maintained.

Block 1 – strategic / economics

(a) Simon Perry, Chairman of Perry Group;

(b) Lale Ieremia, Development Director, Perry Group;

(c) Jonathan Broekhusen, urban design;

(d) Rachel de Lambert, visual and landscape;

(e) Norm Hill, cultural / mana whenua engagement;

(f) Dr Doug Fairgray, economics;

(g) John Polkinghorne, economics;

(h) John Olliver, strategic planning;

Block 2 – geotechnical and industrial feasibility

(i) Kori Lentfer and David Morton, geotechnical;

(j) Kori Lentfer and Bernie Milne, industrial feasibility inputs;

(k) Andrew Millard, quantity surveying;

(l) Martin Udale, industrial feasibility;

Block 3 – caucused witnesses

(m) Mark Apeldoorn, traffic;

(n) Bronwyn Rhynd, three waters;

(o) Neill Raynor, three waters;

(p) Keith Hamill, water quality;

(q) James Bell-Booth, acoustic;

(r) Peter Russell, biosecurity;[114]

Block 4 – non-caucused witnesses

(s) Ray Mayor, soil contamination;

(t) Caroline Phillips, archaeology;

(u) Chad Croft, ecology;

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[114] Note, due to unavailability either side of the weekend, Mr Russell may give evidence out of order during or following the Block 4 witnesses.

(v) Steve Pearce, air quality; and

(w) John Mckensey, lighting.

7.2. Following the conclusion of Perry Group's technical evidence, and having heard the evidence for the other submitters, Mr Olliver will then give the Panel an updated set of plan provisions to pick up anything that may have occurred during the hearing and briefly address such changes.

7.3. Perry Group's right of reply will respond to the matters raised during the hearing and in the Section 42A Report writer's response in the normal way. We look forward to addressing you again at that point on what Perry Group considers to be a game-changing opportunity for Hamilton City and the Waikato Region. Perry Group is confident that, having heard all of the evidence, you will be able to recommend PPC2 for full approval and on its behalf, we request you to do that.

DATED 25 November 2019

Derek NDan

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D A Nolan QC / A M Cameron
Counsel for the Applicant