

**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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**REPLY SUBMISSIONS FOR THE APPLICANT**

**DATED 4 DECEMBER 2019**

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## **1. INTRODUCTION**

- 1.1. These reply submissions are made in support of Perry Group Limited ("**Perry Group**") on Proposed Plan Change 2 to the Operative Hamilton City District Plan ("**ODP**"): Te Awa Lakes ("**PPC2**").
- 1.2. We provided the Hearing Panel with detailed opening submissions and do not propose to cover matters addressed sufficiently there. During the course of the hearing a high degree of agreement has been reached with the Hamilton City Council ("**HCC**") and almost all other parties. The Panel has also just heard from the HCC with their legal submissions and final section 42A response.

## **2. VISION FOR TE AWA LAKES**

### **Perry Group's vision**

- 2.1. Perry Group's vision of the site is for a master planned, mixed use development. That concept, with its focus on reconnecting the land to the Waikato River and using recreational lakes as key features deserves support.
- 2.2. The proposal adds a whole new offer for Hamilton and the Region. Dr Fairgray and Mr Broekhuysen say that the range of housing proposed sets it apart from the market. It not only incorporates the ability to live on the lake or River edge,<sup>1</sup> but also provides a wider choice of housing through its medium density. This enables smaller properties in lower value bands, along with the voluntary offer of affordable housing. This is in sharp distinction to the housing stock currently available and planned at the northern end of Hamilton and the lower Waikato District.<sup>2</sup>
- 2.3. There are two related themes that arose through the engagement and consultation process which became clear at the hearing.
- 2.4. The first, perhaps with the benefit of hindsight and put simply, is who in their right mind in nearly 2020 would propose building factories, warehouses, yard-based businesses and similar on this riverfront land? It is not sensible planning at all.

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<sup>1</sup> Reply evidence of Mr Broekhuysen at p 6.  
<sup>2</sup> Primary evidence of Dr Fairgray at [4.14]-[4.16] and [6.14].

- 2.5. As Simon Perry said, along the whole stretch of the Te Awa River Ride there appeared to be only a handful of industrial uses bordering the River, of which Fonterra and AFFCO appear to be the main examples.
- 2.6. The second theme is the overwhelming evidence that industrial use of this site is not viable under any circumstances whether now or in the future. The evidence of Messrs Lentfer, Morton, Millard, Udale and Ms Rhynd supported by Mr Anderson for HCC, was emphatic on this point. Fonterra delved into this area and all that can be said of Mr Martin, with respect, is that almost nothing he put forward survived scrutiny. Worse, even adopting his own figures Mr Udale and Mr Anderson were both adamant that no developer would ever proceed with industrial use.<sup>3</sup>
- 2.7. Finally on this point, the extensive work undertaken at the HCC's request by Market Economics firmly established that there is more than ample industrial land supply available from operative or deferred zoned land to meet the City and Region's needs going forward into the long term,<sup>4</sup> without any reliance being needed on the Te Awa Lakes land – even if it had been feasible, and even if riverfront land were thought to be appropriate.

#### **Mana whenua's vision**

- 2.8. If that were not enough, the impassioned message the Hearing Panel received from mana whenua was the same – this land should not be used for industrial purposes and Perry Group's proposal to develop the site for mixed uses *"restores the mauri...to the awa, restores mana whenua's connection to the awa and whenua in a way that would not have been possible had the site remained an industrial zone"*.<sup>5</sup> Given the importance of the Te Ture Whaimana – the Vision and Strategy for the Waikato River, the support across the different mana whenua groups represented cannot be taken lightly.<sup>6</sup> As Cmr Hill observed, you could see how strongly these groups felt about it in the evidence of Ms Hopa. She contrasted prior experience of dealing with development projects at Tauhei to this one, and described this process as *"mauri*

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<sup>3</sup> Reply evidence of Mr Udale at [3.7]; Summary statement of Mr Anderson at p 3.

<sup>4</sup> Primary evidence of Dr Fairgray at [4.50]-[4.57].

<sup>5</sup> Evidence of Wikitoria Tane for Waikato-Tainui at [8.3].

<sup>6</sup> Above.

*enhancing*” with every aspect having the “*seal of cultural authenticity*” from mana whenua themselves.

### 3. FONTERRA

- 3.1. At the outset of this case the two primary parties in opposition, who had retained experts to participate in caucusing, were Fonterra and Ports of Auckland Ltd (“**POAL**”). Both alleged there would be reverse sensitivity effects of such a nature that PPC2 should not be upheld.
- 3.2. Uncomfortably for Fonterra, since they shared the same legal counsel, as a result of the caucusing and additional discussions POAL agreed on amendments that “*address [its] concerns*”.<sup>7</sup>
- 3.3. That leaves Fonterra and its witnesses clutching at the straw of reverse sensitivity.
- 3.4. Perhaps the most unexpected argument by Fonterra over its claim of reverse sensitivity effects was its legal counsel describing Perry Group’s argument as “flawed” because, in their view, “*Fonterra’s off-site effects are not the issue*”.<sup>8</sup> If there were ever a flawed view, that must be it.
- 3.5. Approaching the matter from first principles, the foundation of any reverse sensitivity investigation is the need to scrutinise the effects of the existing industry on the land at issue. That is the “forward” step which you have to undertake, to get to the bottom of whether or not those effects are sufficiently adverse that they could generate a “reverse” reaction by the new sensitive activity to constrain the existing industry.
- 3.6. That is the nub of the issue here and it is why Perry Group has examined Fonterra’s off-site effects to see whether they are adverse such as to generate reverse sensitivity effects. Having carried out that examination, the evidence is that Fonterra’s effects on the Te Awa Lakes land will not be sufficiently adverse to generate any reverse reaction. Or worst case, any potential for reverse sensitivity is minimised.

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<sup>7</sup> Legal submissions for POAL at [1.3].  
<sup>8</sup> Legal submissions for Fonterra Ltd at [4.5](a).

- 3.7. To use another analogy, airports are concerned about potential reverse sensitivity from new housing in their vicinity. How that gets examined is first, to model the existing noise from operation of the airport and aircraft movements and to model the potential noise effects from expected growth in aircraft movements in the years ahead. That exercise identifies what land beyond the airport would experience adverse noise impacts. Those are the off-site effects of the existing industrial land use being identified and examined as the first step, which Fonterra's counsel says is supposedly not the issue. But you have to do that first to determine whether and where on the affected land those noise impacts would be sufficiently adverse as to create reverse sensitivity impacts and for the affected people to be likely to seek constraints on the airport. Conversely where beyond that point such effects will not occur or will be minimised. Mr Bell-Booth in his reply evidence provided that very example when he discussed the high noise levels that do result in reverse sensitivity effects, but beyond those levels where that is not considered to be the case.
- 3.8. That is why Perry Group, through its experts, has carefully examined Fonterra's off-site effects, now and in the future, on the Te Awa Lakes site as that essential first step. Their finding is that the "reverse gear" never gets engaged at all, or any such potential for reverse sensitivity would be minimised. Examples:
- (a) James Bell-Booth: the noise effects from Fonterra on the Te Awa Lakes land "will not create any potential reverse sensitivity effects on Fonterra's operations".<sup>9</sup>
  - (b) Steve Pearce: "it is my opinion that the Fonterra Te Rapa site will not be impacted by odour related reverse sensitivity effects from the proposed Te Awa Lakes development".<sup>10</sup>
  - (c) John Mckensey: "there is no technical basis to support a conclusion that lighting effects from the Te Rapa Dairy Factory will result in anything more than low effects on Te Awa Lakes, nor for any potential for reverse sensitivity caused by such impacts to be more than low-nil".<sup>11</sup>

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<sup>9</sup> Primary evidence of Mr Bell-Booth at [5.43]; reply evidence at [3.15].  
<sup>10</sup> Primary evidence of Mr Pearce at [6.29]; see also reply evidence at [4.1].  
<sup>11</sup> Reply evidence of Mr Mckensey at [3.5].

- 3.9. In our submission, the Hearing Panel should find on the evidence that in this particular case any actual or potential reverse sensitivity effects are avoided or minimised.
- 3.10. To do otherwise would create a paradigm shift in the whole concept of reverse sensitivity effects. For example, on the issue of noise effects, it would be saying that an industry creating less than 40 dB on land proposed for residential use makes that land unsuitable for such a use on reverse sensitivity grounds. That would have no parallel that we are aware of anywhere. Likewise, in relation to odour it would be saying, beyond the 350 m separation distance which itself is conservative and where the unchallenged evidence of Mr Pearce is that "odour discharged from Fonterra...will not cause adverse impacts on the Te Awa Lakes land",<sup>12</sup> that Te Awa Lakes' land should still not be able to be used for sensitive activities. Sterilisation of land use on such a scale has no rational basis and should not be accepted.
- 3.11. For completeness, the assertion by Mr Chrisp that the residential activities in Te Awa Lakes would be "incompatible land use[s]" with Fonterra's operations falls on the same sword. Fonterra's effects on the Te Awa Lakes land are so low that there is no incompatibility.

#### **4. REGIONAL POLICY STATEMENT**

- 4.1. The only other substantive matter we wish to raise in this reply relates to the Waikato Regional Policy Statement ("WRPS").
- 4.2. There is no material disagreement between the planners as to the particular WRPS provisions that need to be considered by the Hearing Panel, nor that PPC2 must give effect to the WRPS.
- 4.3. In our opening submissions, we addressed the WRPS at some length and see no need to repeat the points made there.
- 4.4. In essence, when the Hearing Panel works its way through those provisions to reach its own conclusions on whether or not PPC2 gives effect to the WRPS, we suggest that the evidence essentially reduces down to four broad factual themes which permeate their way through all those provisions.

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<sup>12</sup> Primary evidence of Mr Pearce at [6.8]-[6.18; reply evidence at [3.7].

- 4.5. They are:
- (a) The safe and efficient function of infrastructure.
  - (b) Recognising regionally significant industry, minimising land use conflicts and the potential for reverse sensitivity.
  - (c) Urban form, design and location, including public transport, car dependency and alternative modes such as walking and cycling.
  - (d) The Vision and Strategy for the Waikato River (as that forms part of the WRPS).

#### **Infrastructure**

- 4.6. The evidence on infrastructure included that on the “three waters”. Bronwyn Rhynd, Neill Raynor and Keith Hamill provided evidence for Perry Group in this area and confirmed that PPC2 could be efficiently accommodated within the existing bulk networks, and would not compromise the safe, efficient and effective operation of that infrastructure.
- 4.7. In regard to transport infrastructure, the Hearing Panel heard comprehensive evidence from Mark Apeldoorn, supported by Alisdair Gray in the section 42A report and his evidence. Their view is that the key transport infrastructure associated with PPC2, namely the Waikato Expressway, the Horotiu Interchange, Te Rapa Road (including key intersections at Hutchinson Rd, the Fonterra ramps, McKee Street and so on), and the Te Awa River Ride, can safely, efficiently and effectively accommodate the anticipated development with the planned infrastructure improvements set out in the plan change and evidence.
- 4.8. While there is disagreement over some aspects of the transport infrastructure referred to above and how it will perform, such as between Mr Apeldoorn and Mr Smith for Fonterra, the transport infrastructure implications of the plan change have been conservatively modelled and designed to provide for every reasonable eventuality, including the suggested “hold point”. There has also been rigorous sensitivity analyses. The evidence of Mr Apeldoorn, supported by the HCC, in our submission should be preferred.

**Regionally significant industry, land use conflicts and reverse sensitivity**

- 4.9. We have addressed these matters at length both in our opening submissions and again in section 3 above.
- 4.10. The evidence for Perry Group on these matters has clearly established that on the facts there will not be conflict, nor incompatibility of land use, between the various industrial activities (especially Fonterra, POAL, AFFCO and the like) and Te Awa Lakes. Nor will there be reverse sensitivity effects, or if there are any, they will be minimised.

**Urban form, car dependency and alternative modes**

- 4.11. These matters were also addressed at length in the opening submissions for Perry Group and in particular in the evidence of Ms de Lambert, Mr Broekhuysen, Dr Fairgray, Mr Apeldoorn and Mr Olliver.
- 4.12. Two sub-themes arose. First, it is important to view the site in a regional context, because this is the WRPS we are dealing with, which brings into play not just the urban areas in Hamilton City but also the existing and planned development at Horotiu and across the River in HT1. That context also includes employment areas, retail, and other amenities in the vicinity of Te Awa Lakes, including Northgate, The Base, and the local Horotiu Primary School, and not just the connectivity between Te Awa Lakes and the Hamilton CBD – which was very much the focus of Fonterra’s evidence.
- 4.13. Secondly, and this was dealt with comprehensively by Mr Apeldoorn in particular, the plan change *“has been designed to establish a high degree of integration and connectedness for walking, cycling, rideshare and public transport movement”*.<sup>13</sup> As Mr Apeldoorn describes, the intent behind the infrastructure improvements prior to any development on the site is to set the culture and environment for people who move in from day one.<sup>14</sup> Even with no change to the current public transport service, PPC2 is positively aligned with the goals in the Regional Public Transport Plan. This will only improve with an initial first-stage loop public transport service.<sup>15</sup> Walking and cycling opportunities, in

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<sup>13</sup> Primary evidence of Mr Apeldoorn at [56].

<sup>14</sup> Primary evidence of Mr Apeldoorn at [36].

<sup>15</sup> Reply evidence of Mr Apeldoorn at [34]-[40].



particular the upgrades to the Te Awa River Ride as the preferred off-road link, were also dealt with by Mr Apeldoorn in his evidence. All these initiatives, along with the proposed travel demand management, will minimise car dependency and maximise opportunities for greater uptake of public transport and alternative modes.

### **The Vision and Strategy for the Waikato River**

- 4.14. Not only is the Vision and Strategy part of the WRPS itself, but it is also expressly mentioned in the Development Principles in Section 6A,<sup>16</sup> which requires new development to support it. The Development Principles also require consideration of “*effects on the unique tāngata whenua relationships, values, aspirations, roles and responsibilities with respect to an area*”.<sup>17</sup>
- 4.15. Mana whenua have spoken for themselves in this regard. There cannot be any question as to their support for PPC2 and the way in which Te Awa Lakes will have strongly positive effects on their unique relationships, values, aspirations, roles and responsibilities to the land and to the River.

### **Conclusion on the WRPS**

- 4.16. When the Hearing Panel comes to consider the evidence on these four themes, which are directly relevant to the WRPS provisions in this case, it should find that the plan change will give effect to, or “implement” in the *King Salmon* sense, the WRPS.

## **5. PROCEDURAL ISSUE**

- 5.1. We refer to the memorandum filed yesterday by counsel for Fonterra relating to the reply evidence of Perry Group’s industrial feasibility experts and that by Mr Apeldoorn.
- 5.2. We disagree with the arguments put forward.
- 5.3. Firstly, you are experienced Commissioners and know in small cases at Council-level, a reply by an applicant will usually take place at the end of the hearing and by counsel only.

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<sup>16</sup> Development Principle 6A r).  
<sup>17</sup> Development Principle 6A q).

- 5.4. However, for larger cases, where there is significant factual evidence and competing views of experts, and as counsel cannot give evidence but rather only make submissions, Commissioners are assisted far more at the reply stage by an applicant's experts advising the Commissioners of matters of agreement or disagreement and their reasons. Counsel then can be focussed in a more limited way in their reply. This PPC2 hearing is clearly in this larger case category.
- 5.5. Secondly, and this is where Fonterra has the natural justice point the wrong way around, this is a case where the Applicant's witnesses went first and exchanged their primary evidence. Fonterra's experts went second and were able to prepare their evidence knowing already what the Applicant had said and were able to and did reply to it in the course of their evidence. The Applicant's experts had never seen what Fonterra's experts had to say until it was exchanged (four working days before the hearing) and so their reply evidence was their opportunity to respond.
- 5.6. Rather than follow the normal course for large hearings, and present that reply evidence as part of an applicant's normal right of reply at the end of the hearing, the Applicant sought to accommodate the Hearing Panel's preferred block-by-block approach and present its reply evidence as it went. In the first block, the Applicant's witnesses were heard on Monday and Tuesday of last week and would not be present later on Wednesday after Fonterra's witnesses had presented. They therefore presented their reply evidence immediately after they summarised their primary evidence. This led to Fonterra seizing the opportunity (rather unfairly, but which we did not complain about), to present "reply to reply" evidence. Subsequently, when the blocks were being dealt with on the same day, the Applicant was able to present its reply evidence in the chronological way in which it was exchanged – its primary evidence, followed by Fonterra's evidence in response including its reply to that primary evidence, then the Applicant's experts' reply. That is natural justice, because each witness has had an opportunity to respond to the other.
- 5.7. We accept that reply evidence should just be that. On this point, some criticism is made of Mr Apeldoorn's reply evidence. Leaving aside his paragraph 60, where he makes some general comments about his disappointment with Mr Smith's evidence which are neither here nor

there, from his paragraph 61 onwards he is very clearly providing direct reply evidence, identified paragraph-by-paragraph to the extensive evidence filed by Mr Smith. It cannot possibly be described as anything other than reply evidence and is in no way "fresh" or "new" evidence. It sets out why he agrees or does not agree with Mr Smith and his reasons for that position. Fonterra complains about the length of Mr Apeldoorn's reply evidence, but the section of his evidence responding to Mr Smith is the same length as Mr Smith's evidence.

- 5.8. In our submission, therefore there is no basis on which to discount the weight to be given to Mr Apeldoorn's evidence.

## 6. CONCLUDING REMARKS

- 6.1. Perry Group is one of the most well-known and leading entities in the Waikato. In addition to being a highly successful business which has benefited the Region, the company and the Perry family are also well known for their philanthropic initiatives. That commitment to the wellbeing of the Waikato Region lies behind this special and exciting opportunity at Te Awa Lakes. It has been embraced wholeheartedly by mana whenua and supported by the community at large, as witnessed by the considerable number of submissions in support and through the representatives who spoke to you today.
- 6.2. PPC2 for Te Awa Lakes has both the political and professional support of the HCC. The Hearing Panel has received extensive evidence that it gives effect to the relevant higher order documents and meets all of the other relevant statutory obligations. On the merits we submit it deserves your full support and accordingly, on behalf of Perry Group, we request that you approve the request for the plan change.

DATED 4 December 2019



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

