

**BEFORE THE INDEPENDENT HEARING PANEL**

**IN THE MATTER** of the Resource Management Act 1991

**AND**

**IN THE MATTER** of Proposed Plan Change 12 to the Operative Hamilton  
City District Plan

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**MEMORANDUM OF COUNSEL FOR HAMILTON CITY COUNCIL IN RESPONSE TO  
SUBMISSIONS ON DEFERRAL REQUEST**

**Dated 7 July 2023**

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## **MAY IT PLEASE THE INDEPENDENT HEARING PANEL**

### **INTRODUCTION**

1. This memorandum is filed on behalf of Hamilton City Council (**HCC**) in accordance with paragraph 5(b) of the Hearing Panel's Direction #16 dated 30 June 2023. It responds to the submissions provided by submitters addressing HCC's request to defer the substantive hearing on Plan Change 12 (**PC12**).
2. Of the 350 individual submitters on PC12, only three oppose the deferral request.

### **SUBMISSIONS IN SUPPORT**

#### **Director-General of Conservation**

3. The Director-General of Conservation (**DOC**) supports the deferral request on the basis that the revised flood hazard modelling will assist the Hearing Panel when it considers buffers and setbacks for ecological habitat. HCC agrees with DOC's submission.

#### **Waikato Heritage Group**

4. Waikato Heritage Group (**WHG**) agrees that PC12 should be paused on the basis that there is insufficient information currently before the Panel to make informed decisions<sup>1</sup>. WHG's support for the deferral is subject to confirmation that:<sup>2</sup>

- a) Expert conferencing planned for July 2023 is paused until

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<sup>1</sup> Memorandum on behalf of Waikato Heritage Group dated 4 July 2023, para 9.

<sup>2</sup> Memorandum on behalf of Waikato Heritage Group dated 4 July 2023, para 6.

notification of Plan Change 14 (flooding) (**PC14**);

- b) Integration is maintained between Proposed Plan Change 9 (**PC9**) and PC12; and
  - c) The deferral allows sufficient time to fully consider additional qualifying matters such as Special Character Overlay without the excuse of time pressure caused by the deferral.
5. The deferral of PC12 will not impede the Panel's ability to hear PC9 (as scheduled) and make decisions on submissions. Nor will it impede the proper integration of the plan changes. Indeed, the more advanced PC9 is in the First Schedule process, the greater level of certainty there is in PC12 as to the extent of s 6 qualifying matter areas, including with respect to Historic Heritage.
6. If the Panel grants the deferral request, the current conferencing and evidence exchange timetable can be vacated. A direction to vacate the current timetable is sought in this memorandum.

## **RESPONSE TO SUBMISSIONS IN OPPOSITION**

### **Jean Dorrell**

7. Jean Dorrell opposes the deferral request, taking issue with the timing of the availability of the flood hazard information.
8. Ms Dorrell's concern about HCC's flood modelling programme timetable is irrelevant to the Hearing Panel's decision on the deferral request. It is sufficient to state that the information will not be available by September.
9. On the fundamental issue, that the "flood risk assessment information is

needed for PC12”, Ms Dorrell and HCC are in agreement<sup>3</sup>.

### **Kāinga Ora and Foodstuffs**

10. Kāinga Ora – Homes and Communities and Foodstuffs North Island Ltd (**KO/FS**) are commonly represented and have presented close to identical legal submissions to support their opposition. They rely on ‘process matters’ and ‘resource management issues’. Their positions are addressed below.

#### *Process matters*

11. Heavy reliance is placed on the fact that the Minister has not yet approved the extension request, and that any deferral will likely see the current deadline compromised.
12. It is contended by KO/FS that without the extension, were the Hearing Panel not to release its recommendations in time for HCC to notify its decision by 31 March 2024, it would “no doubt be subject to criticism (including from Council).”<sup>4</sup> KO/FS go on to state that the decision on the timing of the hearing is a matter for the Hearing Panel and that HCC cannot direct the Hearing Panel to defer the hearing, and that HCC cannot “absolve you of responsibility for the consequences of your decision”.<sup>5</sup> These assertions are disconnected to the facts and the Hearing Panel should disregard them.
13. HCC’s position on this point is made clear in the memorandum of Counsel for HCC dated 29 June 2023 where it states:

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<sup>3</sup> Submission of Jean Mary Dorrell dated 5 July 2023, para 29.

<sup>4</sup> Memorandum on behalf of Kāinga Ora dated 5 July 2023, para 4c; Memorandum on behalf of Foodstuffs dated 5 July 2023, para 4c.

<sup>5</sup> Memorandum on behalf of Kāinga Ora dated 5 July 2023, para 4d; Memorandum on behalf of Foodstuffs dated 5 July 2023, para 4d.

28. Compliance with the ministerial direction issued under s 80L of the RMA is a matter for HCC. HCC considers this is a compliance matter for it alone, and not a matter for the Panel to address. HCC takes its statutory compliance seriously, and intends to continue dialogue with MfE to address any necessary extension to ultimately deliver its IPI decision within the required timeframe.
  29. Accordingly, HCC invites the Panel to put aside this issue of compliance when considering HCC's request to defer the hearing on PC12, and instead focus on the resource management issues, and the matters of efficiency and duplication identified above.
14. HCC's position cannot have been made more clear; the timing of its decision on PC12 is a matter for it alone. The Hearing Panel is not responsible for, nor in control of, when HCC makes its decision. If the Hearing Panel approves HCC's request to defer the hearing, and that deferral impacts the timing of the HCC decision, that is not a matter for the Hearing Panel, and there can be no basis for any criticism of the Hearing Panel, least of all from HCC. Meeting the deadline is HCC's statutory responsibility. If it requests a deferral, knowing that it will compromise its ability to meet the current deadline, there can be no basis for criticism of the Hearing Panel. There is simply nothing in this point, it is scaremongering and should be dismissed.
15. KO/Foodstuffs overstate the significance of the current date for HCC to issue its decisions on PC12, suggesting the compressed process and timeframe reflects Parliament's frustration regarding the lack of progress on issues relating to intensification of major urban areas.<sup>6</sup>
16. This asserted urgency is inconsistent with the recent Ministerial direction for Auckland Council's Intensification Planning Instrument (**IPI**), which extended the date for decisions through to 31 March 2025. Auckland City has the greatest housing supply and affordability challenges out of all Tier 1 metropolitan centres. Like HCC, Auckland Council has sought to delay hearings on its IPI until its flood hazard information is brought up

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<sup>6</sup> Memorandum on behalf of Kāinga Ora dated 5 July 2023, para 4b; Memorandum on behalf of Foodstuffs dated 5 July 2023, para 5b.

to a more reliable and comprehensive standard and can properly inform decisions regarding intensification.

17. The Minister has seen the sense in that approach and has extended the deadline for Auckland Council to issue its IPI decision by one year. There is no sensible distinction to be made between that approach and what is now suggested by HCC. To suggest that urgency in relation to the IPI is required in Hamilton, but not in Auckland, is to ignore reality.
18. There is simply no basis to conclude that an urgent decision on Hamilton's IPI is necessary, and to be clear, HCC has no intention of making such an important decision under some false sense of urgency.

*Resource management issues*

19. In respect of the requirement for integrated decision making, KO/FS state that they do not accept that there is any necessary connection between PC12 and the matters that HCC may include in PC14 when, and if, it is notified. They assert the stormwater and flooding issues are distinct from the PC12 issues.<sup>7</sup>
20. This assertion is simply wrong. It ignores the multifaceted functions of HCC under s 31(1) of the Resource Management Act 1991 (**RMA**), and the requirement to achieve integrated management of the effects of land uses in the City and avoid or mitigate natural hazards.
21. They assert that the Hearing Panel should make its decisions on where it will enable higher residential densities and intensification in Hamilton without delay, and then can subsequently add additional consenting obligations or promote managed retreat in a separate and later plan

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<sup>7</sup> Memorandum on behalf of Kāinga Ora dated 5 July 2023, para 7.a.i; Memorandum on behalf of Foodstuffs dated 5 July 2023, para 8.a.i.

change, such as PC14.<sup>8</sup> This assertion ignores the practical reality of the legal rights that flow from operative plan provisions.

22. Under the KO/FS scenario, operative PC12 plan provisions could be relied on to secure resource consents for high density residential developments, free of any additional flood hazard controls that some later plan change might promote. Development rights could be created which cannot then be subject to retrospective flood hazard related controls. High density residential development may occur in flood prone areas, without any ability to impose new controls, let alone implement some form of 'managed retreat'. Simply put, once the land use rights are created and used, they cannot be taken away.
23. KO/FS make the point that it cannot be assumed that the publicly notified version of PC14 will ultimately be upheld, and reliance on PC14 within PC12 may be misplaced and lead to erroneous conclusions.
24. While it is unhelpful to speculate in this way, as the inverse may equally apply, it is useful to note that the notified version of PC14 will include the most up to date, comprehensive and reliable flood hazard modelling information available. No party will have better information. The First Schedule RMA process for PC14 will likely be focused on the plan provisions and rules, and the land use management strategies which respond to the data. In this respect, HCC considers that the notified version of the flood hazard modelling will be highly reliable and relevant to PC12 decision making.
25. The remaining points concerning the impacts on zoning decisions, Three Waters provisions, and transport provisions, all carry the same theme; that the PC12 provisions can sit independent of any new provisions

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<sup>8</sup> Memorandum on behalf of Kāinga Ora dated 5 July 2023, para 7.a.ii; Memorandum on behalf of Foodstuffs dated 5 July 2023, para 8.a.ii.

introduced by PC14 and plan users must deal with the “full matrix of rules applying to their sites”.<sup>9</sup>

26. Two points arise, both related to efficiency. First, the District Plan should be free of any inconsistency and unnecessary duplication. There is little point zoning an area for high density residential development if new and additional rules make that development impossible to achieve. This is inefficient and it is better to achieve internal alignment within the District Plan. This leads to the second efficiency point; that hearing evidence on PC12 in September, only to need further updated evidence to ensure plan provisions *are* integrated and aligned, is inefficient and costly.

#### **HCC POSITION**

27. While it would be HCC’s clear preference to make the request for deferral after the Minister has approved the extension, it cannot wait.<sup>10</sup> The requirements of evidence preparation and the pre-hearing timetable are immediate. The parties need certainty now.
28. With or without the Minister’s approval of the extension, HCC will not be making decisions on PC12 until properly informed by PC14 as notified. If the September hearing is not deferred, this will inevitably lead to a further hearing. This inefficiency should be avoided.
29. There is no urgency to justify proceeding with the September hearing. There is a substantial level of medium to high density residential enablement under the Operative District Plan which KO/FS can leverage in the meantime. As HCC observed in its opening legal submissions for the strategic hearing on PC12, Hamilton’s housing supply and

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<sup>9</sup> Memorandum on behalf of Kāinga Ora dated 5 July 2023, para 8b; Memorandum on behalf of Foodstuffs dated 5 July 2023, para 9b.

<sup>10</sup> As at the date of this memorandum there has been no Ministerial response.



affordability are less constrained by plan provisions than they are by public infrastructure capacity.<sup>11</sup>

30. Accordingly, HCC requests that the Hearing Panel make a decision now to defer the hearing of PC12.

#### **DIRECTIONS SOUGHT**

31. HCC seeks the following directions:

- a) The PC12 expert conferencing and evidence exchange timetable set by Direction #15 is vacated;
- b) The substantive hearing of PC12 scheduled to commence on 4 September 2023 is vacated; and
- c) Within two weeks of receiving a response to its deferral request from the Environment Minister, HCC is to file via the Hearing Administrator a reporting memorandum which shall include a suggested timetable for the resolution of PC12.

Dated 7 July 2023



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**L F Muldowney / S K Thomas**  
Counsel for Hamilton City Council

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<sup>11</sup> Opening legal submissions for HCC dated 10 February 2023, paras 15-17.