Before an Independent Hearings Panel

The Proposed Waikato District Plan

IN THE MATTER OF the Resource Management Act 1991 (**RMA**)

IN THE MATTER OF hearing submissions and further submissions on Variation 3 Enabling Housing Intensification to the Proposed Waikato District Plan (Stage 1)

LEGAL SUBMISSIONS ON BEHALF OF HAVELOCK VILLAGE LIMITED [Submitter 105] FOR JOINT HIGH LEVEL ISSUES HEARING

Dated 10 February 2023

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MAY IT PLEASE THE COMMISSIONERS

1. INTRODUCTION AND SUMMARY

1.1 These submissions are filed on behalf of Havelock Village Limited[1] (**HVL**) in relation to Variation 3: Enabling Housing Supply (**Variation 3**) to the Proposed Waikato District Plan (**PWDP**).[2] HVL has no interest in Plan Change 12 for Hamilton City or Plan Change 26 for the Waipa District.

1.2 HVL's primary outcome for Variation 3 is deletion of the Urban Fringe Qualifying Matter and the appropriate incorporation of the Medium Density Residential Standards (**MDRS**) in the PWDP. It does not consider that the Urban Fringe Qualifying Matter has the necessary legal or planning merit to meet the requirements of the Resource Management (Enabling Housing Supply) Act 2021 (**Amendment Act**).

1.3 HVL understands that the purpose of this opening or high-level hearing is for the councils to explain their approaches to the identification of qualifying matters and the related planning rationale.[3] Submitters are being provided with their opportunity to respond to those matters.[4]

1.4 Given that scope, HVL has lodged expert planning evidence from Mr Tollemache responding to the planning rationale for the inclusion of the Urban Fringe Qualifying Matter in the notified version of Variation 3 and these legal submissions to outline why the qualifying matter is contrary to the requirements and intent of the Amendment Act.

1.5 HVL acknowledges that the Waikato District Council (**WDC**) no longer supports the Urban Fringe Qualifying Matter and will not be filing evidence in support.[5] However, there are a number of submissions on Variation 3 that seek the Urban Fringe Qualifying Matter is retained, so the issue remains live, notwithstanding WDC's position.

1.6 Based on the Joint Opening Legal Submissions it is clear that all three councils understand the central legal requirement in the Amendment Act that it is mandatory to implement the MDRS in relevant residential zones in urban environments, such as Pōkeno, subject to listed qualifying matters or site specific matters of equivalent policy value that met the relevant tests. It is therefore disappointing that the notified version of Variation 3 failed in the

[1] Submitter 105.
[2] Submitter 105.
[3] Hearing Direction #4, paragraph 2.
[4] Above, note 4, paragraph 3.
[5] Evidence of Jim Ebenhoh, paragraph 91.

application of those mandatory standards and we are now left in a somewhat awkward position between the notified version of Variation 3 and the opening of this fast track IPI process, in a relative state of flux as it relates to the Urban Fringe Qualifying Matter.

1.7 HVL considers that the Urban Fringe Qualifying Matter is directly contrary to the requirements and intent of the Amendment Act and should be deleted entirely. The Amendment Act does not contemplate or provide for a blanket exemption based on a nominated walking distance from an existing town centre. The approach adopted by WDC in applying the MDRS in this way assumes a level of discretion that is not provided by the Amendment Act.

1.8 The lawfulness of the Urban Fringe Qualifying Matter cannot be justified under section 77L for all of the excluded residential areas of Pōkeno. The costs exceed the potential benefits and implementing the Qualifying Matter would reduce the urban development capacity of Pōkeno and its ability to enable varied, affordable housing, as directed by the National Policy Statement on Urban Development (**NPS-UD**).

1.9 HVL agrees with the evidence from the Council that:

> the deliberately constrained wording of the Enabling Housing Act makes it very challenging for a qualifying matter under section 77(I)(j) to meet the additional legal requirements set out in section 77L.

1.10 Amendments will need to be made to Variation 3 to adjust the spatial extent of General Residential Zone 2 or adjust the General Residential Zone (**GRZ**) assuming the Urban Fringe Qualifying Matter is removed. HVL will provide detailed evidence on those changes in the second round of hearings or is happy to participate in conferencing or ADR to progress these matters.

1.11 HVL understands WDC's opening legal submissions will address the parallel process between Variation 3 and the appeals on the PWDP raised in the memorandum of counsel from Synlait Milk Limited. Counsel for HVL therefore anticipates addressing the Panel further on this matter at the opening hearing. In summary, HVL's current position is that the PWDP already contains a mechanism to address the site-specific characteristics and potential effects through the Havelock Precinct. The PWDP appeal process provides the appropriate forum to resolve the ultimate zoning of the Havelock development. All relevant parties and their experts (including

Synlait) can be involved and contribute to this process through negotiation, mediation and hearing. This will ensure nothing "slips through the cracks".

Scope of these Submissions

1.12 These submissions will address:

(a) A brief introduction to HVL and its interests;

(b) Relevant provisions and intent of the Amendment Act;

(c) Lack of planning rationale for the Urban Fringe Qualifying Matter;

(d) Response to the Memorandum of Counsel for Synlait Milk Limited and Hearing Direction #8; and

(e) Conclusion.

2. HVL'S INTEREST IN VARIATION 3

2.1 HVL's original submission[6] and Mr Tollemache's evidence[7] outline the background to HVL's interest in Variation 3. HVL has extensive landholdings and development interests in Pōkeno.

2.2 HVL is intending to develop a comprehensive integrated residential development on land adjoining the existing urban area of Pōkeno to the south-west (**Havelock**). It also has related interests in a comprehensive resort and tourism proposal which adjoins the site connecting to the Waikato River now known as the Tata Valley Resort zone.

2.3 Havelock has been identified as a location for urban growth in the most relevant strategic growth documents including:

(a) Waikato 2070 as a future residential growth area in the 3–10-year time period; and

(b) The Updated Future Proof Strategy 2022 identifies Havelock as a location of residential growth (referred to as an urban enablement area) in the medium term (5-10 years).

2.4 The Council decision on the PWDP rezoned the majority of the Havelock site to General Residential Zone with Precinct Provisions, to manage variations in development typology within Havelock as appropriate (**Decision**). A key part of this Decision was that the rezoning was required to meet WDC's NPS-UD growth projections for Pōkeno. HVL has appealed

[6] Submission 105, at section 2.
[7] Evidence of Mark Tollemache, section 4.

part of the Decision to the Environment Court seeking that the remaining part of the Havelock site be zoned for residential development subject to appropriate Precinct Provisions. Other parties have appealed the Decision opposing the rezoning of Havelock, or have joined the appeal as interested parties. Direct discussions amongst the parties are underway but no Court-assisted mediation has been scheduled yet.

2.5 The application of the Urban Fringe Qualifying Matter means than none of the land owned by HVL in Pōkeno is upzoned under Variation 3 or benefits from the MDRS in the Amendment Act. This directly contravenes the mandatory obligations in section 77G of the Amendment Act.

2.6 Pōkeno has been recognised as an area with significant opportunity for residential growth. Its proximity to Auckland means that it has already experienced the most rapid growth of any Waikato District centre in the last decade. Limiting the application of the MDRS to Pōkeno fails to recognise the significant development opportunities which have already been acknowledged during numerous earlier planning processes.

3. LEGAL REQUIREMENTS OF THE AMENDMENT ACT AND QUALIFYING MATTERS

3.1 The relevant legal framework contained in the Amendment Act is discussed in Mr Tollemache's evidence and the Joint Opening Legal Submissions of Counsel for the Councils, dated 8 February. On an initial review there appears to be little debate as to the statutory requirements as outlined in those submissions, but HVL will provide further submissions on this at the next hearing, if necessary, including the parallel process between the PWDP and the IPI process.

Application of MDRS

3.2 Based on the pre-circulated material, there seems general agreement that for the Waikato District the Amendment Act applies to at least the towns of Pōkeno, Tuakau, Huntly and Ngaruwahia. HVL agrees that Pōkeno qualifies as an urban environment under the Amendment Act. It does not offer a view about whether it should apply to other towns in the district.

3.3 Section 77G of the Amendment Act requires that every relevant residential zone of a specified territorial authority **must** have the MDRS incorporated, subject to the proper application of any qualifying matters. The relevant zones include the General Residential Zone (**GRZ**) and the Medium Density Zone in those towns. HVL is zoned GRZ.

3.4 A number of submitters have requested that the MDRS not apply at all to towns in the Waikato District such as Pōkeno. This would be directly contrary to the express obligation in section 77G and is not a lawful option for the Hearing Panel, unless a legitimate qualifying matter exists.

Qualifying matters

3.5 There is general agreement that the statutory process to identify and justify qualifying matters are set out in sections 77I and 77L. The Joint Opening Legal Submissions of Counsel for the Councils, dated 8 February, outline these statutory provisions. HVL agrees that these are the relevant provisions and so does not repeat them in full but highlights key matters.

3.6 Section 77I states that a territorial authority may only make the MDRS less enabling if one or more of the stated qualifying matters apply. Qualifying matters should be supported by a strong evidential basis to ensure there is no potential loss of additional development capacity. Specific evidence should be provided to justify why higher density is inappropriate.[8]

3.7 Unsurprisingly there is no case law on qualifying matters. However, the scope and intent of what is an appropriate qualifying can be inferred from the specific examples in section 77I:

(a) There is a high threshold to establishing a qualifying matter. For example, matters of national importance[9] and matters to give effect to national policy statements or Te Ture Whaimana o Te Awa o Waikato – the Vision and Strategy for the Waikato River.[10] Only matters akin to that policy significance or hierarchy can outweigh the competing demand for urban development and capacity (ie, a competing matter of national significance);

(b) Alternatively, a site-specific matter can be applied, for example, the need to give effect to a designation or heritage order. Similarly, these site-specific matters must have a policy value of significance to outweigh the urban growth directive.[11]

3.8 A site-specific qualifying matter can be implemented under section 77I(j) but only if the requirements of section 77L are met. These require a section 32

[8] Ministry for the environment *Medium Density Residential Standards A guide for territorial authorities* (July 2022).
[9] RM-EHS, Section 77I(a).
[10] As above, Section 77I(c).
[11] As above, Section 77I(g). The one exception to these principles is the ability to impose a qualifying matter based on the provision of open space.

assessment of the merits of the qualifying matter and detailed consideration of:

(a) The specific characteristics that make it inappropriate to apply the MDRS, in light of the national significance of urban development;

(b) A site-specific analysis of the characteristics and an evaluation of a range of options that would implement the greatest heights and densities permitted by the MDRS.

3.9 The language of the Act continually refers to individual sites and a detailed assessment of those individual sites. Importantly, even if a site specific assessment identifies a value that should be protected (such as notable trees), the least amount of change should be made to the MDRS.

3.10 The Act does not contemplate a blanket exemption based on a nominated walking distance that fails to implement any of the MDRS at all.

3.11 HVL considers that only qualifying matters that meet the threshold of national importance or national significance that can be demonstrated on a site-by-site basis can justify a departure from the MDRS.

Urban Fringe Qualifying Matter

3.12 HVL considers that the Urban Fringe Qualifying Matter is not such a matter, is contrary to the requirements and intent of the Amendment Act and fails to meet the standards of the very limited and specific qualifying matters.

3.13 The Amendment Act was enacted in response to New Zealand's housing crisis by removing barriers to development, allowing more homes to be built in urban areas.[12] It is intended to accelerate intensification of New Zealand's urban areas and increase housing supply and typologies improving opportunities for access to jobs, transport, and community facilities like schools and hospitals.[13]

3.14 In this way the MDRS provides a new "baseline" of suburbia or urban centres providing a wider range of development opportunities, across all residential areas in the relevant urban areas. It is deliberately intended to have broad application with only limited exceptions provided through qualifying matters.

[12] Resource Management (Enabling Housing Supply and other Matters) Amendment Bill: Approval for Introduction at [24].
[13] As above.

3.15 The Urban Fringe Qualifying Matter is directly contrary to this intent of the Amendment Act as it seeks to materially limit the application of the MDRS over large areas and not deliver the expected development opportunities. It applies to a broad area and is based on generic assumptions about walkable catchments and urban form. These are not matter of national importance or the consequence of carefully assessed site specific constraint or value.

3.16 The Council has undertaken an assessment of different options in the section 32A reports, but that is insufficient by itself to meet the statutory requirements of section 77L. That assessment was not site specific and instead based on a generic application of a walking catchment. The spatial extent of the Urban Fringe Qualifying Matter in the notified variation was based on a purported walkable catchment around each town centre. In this respect, the Council appears to have confused and conflated the use of walking catchments to identify suitable areas of upzoning around centres and rapid transport stations under the NPS-UD with the ability to impose site-specific qualifying matters.[14]

3.17 Given this context, HVL agrees with the Council's current hearing position that it is restricted by the terms of the Amendment Act and could not realistically defend the notified Urban Fringe Qualifying Matter. It is difficult to see how any submitter could logically defend it either.

4. URBAN FRINGE QUALIFYING MATTER – LACK OF PLANNING MERIT

4.1 If the Panel decide that the Urban Fringe Qualifying Matter can be considered legitimately in terms of section 77L of the Amendment Act as a qualifying matter, Mr Tollemache's evidence outlines his assessment of the planning merits, or lack thereof, for the benefit of the Panel and any merits based evaluation.

4.2 Mr Tollemache cannot identify any specific characteristics of the towns in the Waikato District that mean they are not suitable for the level of development and "*walkability is not in itself a specific characteristic that can justify a limitation on intensification*".[15]

4.3 The walkable catchment used to set the spatial extent of the qualifying matter is not robust. Although 800 metres is often accepted as representing a convenient 10 minute walk, it is not definitive. Research

[14] Evidence of Mark Tollemache at paragraph 7.1.
[15] As above, paragraph 6.7.

suggests that many people will walk much longer distances.[16] Additional variables, such as point of origin, destination and transport mode (e.g. cycling and e-scooters) mean that the application of an 800 metre catchment is inappropriate when applied so broadly.[17]

4.4 The Council's analysis takes a narrow view of what constitutes a well-functioning environment and lacks the necessary contextual assessment to justify a blanket limitation on intensification particularly in light of the additional stringent statutory thresholds of the Amendment Act.[18] A walkable catchment does not wholly define a well-functioning urban environment.[19] Rather, accessibility must be considered in relation to destinations which are outside main streets and based on a range of active transport modes. These are also signs of well-functioning urban environments.

4.5 The Urban Fringe Qualifying Matter would constrain housing supply and typology in areas outside the Medium Density Residential Zone 2, including where the largest growth opportunities are in the greenfield areas of Pōkeno West and Havelock.[20] These are the most likely locations for future residential growth in Pōkeno and yet are being unduly restricted. It appears counter intuitive to limit opportunities for housing variety and typology in Pōkeno in areas which have yet to be infilled by the existing 800 sqm settlement pattern.

4.6 HVL acknowledges that the Council's latest residential capacity assessment indicates that the PWDP, with Variation 3 as notified, provides for sufficient housing capacity to meet the necessary targets in the NPS-UD and the PWDP. This is neither relevant nor a determinative factor for assessing whether a qualifying matter is appropriate. There are still significant benefits to provide additional housing capacity and choice, in appropriate locations to better implement Policy 1 of the NPS-UD.[21]

4.7 It is not appropriate for the Council to refer to changing urban character as a reason for not applying the MDRS. If intensification was proposed, the MDRS, and relevant matters of discretion and consenting requirements for four or more units, would manage effects on character and amenity.[22] In

[16] As above, paragraph 7.3.
[17] As above, paragraph 7.7.
[18] As above, paragraph 6.7 - 7.1.
[19] As above, paragraph 8.5.
[20] As above, paragraph 8.12.
[21] As above, paragraphs 10.6 – 10.10.
[22] As above, paragraph 8.18.

addition the NPS-UD expressly contemplates changing urban amenity and confirms such changes are not in themselves an adverse effect.[23]

4.8 Mr Tollemache's assessment is that Variation 3 with the Urban Fringe Qualifying Matter fails to have adequate regard to section 7 relating to the efficient use of land and does not allow opportunities for all people and communities to provide for their wellbeing.

5. MEMORANDUM OF COUNSEL FOR SYNLAIT MILK LIMITED

5.1 HVL has reviewed the memorandum of counsel from Synlait Milk Limited dated 31 January and Minute #8 from the Hearing Panel. Synlait's memo relates directly to HVL's interests and Havelock. In light of paragraph 4 of Minute #8, HVL understands the Council's opening legal submissions will address the parallel process between Variation 3 and the appeals on the PWDP. Counsel for HVL therefore anticipates addressing the Panel further on this matter at the opening hearing.

5.2 However, in the interim, to clarify its current position:

(a) HVL's participation in Variation 3 is to ensure the proper and lawful application of the MDRS, including to the Havelock GRZ. Development at Havelock is already subject to a site specific Precinct Plan and provisions that guides development and addresses site specific effects. As a result, the PWDP already contains a mechanism to address the site-specific characteristics and potential effects.

(b) HVL remains of the view that the PWDP appeal process provides the appropriate forum to resolve the ultimate zoning of the Havelock development. If an urban residential zoning is applied, then the MDRS should apply subject to any site-specific qualifying matters identified via the PWDP appeal process that warrants reduced intensification opportunities (in particular, the Havelock Precinct provisions). Given the number of parties involved in that process, HVL considers that it remains the most appropriate and transparent forum for resolving a holistic package of plan provisions for the Havelock development with the benefit of Environment Court oversight. All relevant parties and their experts (including Synlait) can be involved and contribute to this process through negotiation,

[23] Policy 6.

mediation and hearing. This will ensure nothing "slips through the cracks".

6. CONCLUSION

6.1 HVL considers that the notified Variation 3 Urban Fringe Qualifying Matter is unjustified and should be deleted. It appears that the Council now agrees with this position and will not be supporting it. Some indication from the Panel and its position would be useful to inform next steps. It seems likely that additional changes will need to be made to Variation 3. HVL intends to outline its proposed changes in evidence for the Variation 3 hearing or ideally in advance via conferencing or other forums as the Panel sees fit. It may also be efficient for HVL and its planning expert to engage with Council and other affected parties to conference potential provisions in light of the anticipated removal of the Urban Fringe Qualifying Matter.

Dated 10 February 2023

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Signed on behalf of Havelock Village Limited

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