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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OPENING SUBMISSIONS ON SCOPE FOR TE AWA LAKES UNINCORPORATED JOINT VENTURE, PERRY GROUP, AND HOROTIU FARMS LIMITED

Thomas Gibbons
thomas@gibbonslaw.co.nz
021 675 091
Panama Square, 14 Garden Place, Hamilton

Thomas Gibbons Law

MAY IT PLEASE THE PANEL

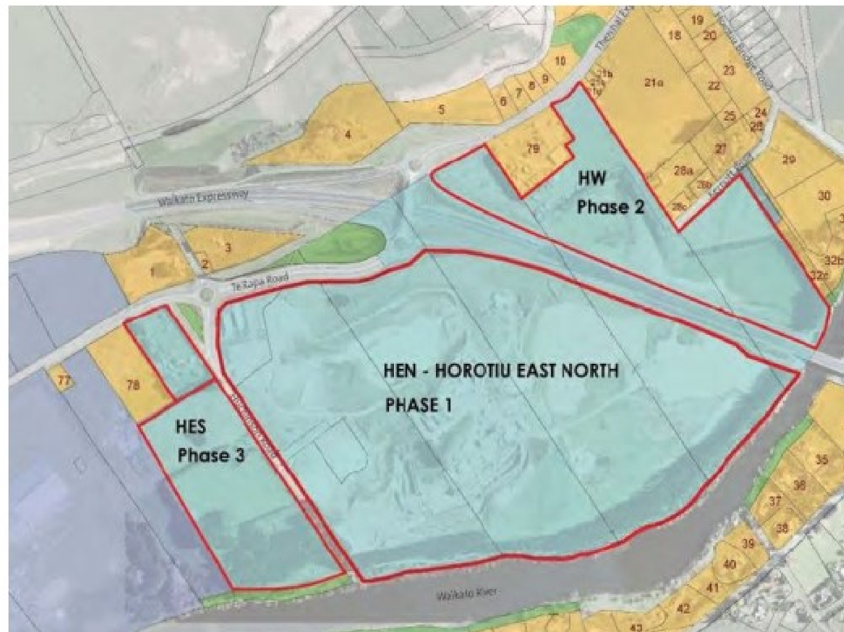
Procedural Comments

1. This submission responds to Direction #9 for Hamilton City Council dated 3 March 2023. The submissions are made on behalf of Te Awa Lakes Unincorporated Joint Venture, Perry Group, and Horotiu Farms Limited, here called "TAL", though the main scope issue concerns land owned by Horotiu Farms Limited. TAL has been directed to provide submissions as to whether their proposed rezoning is within scope by 6 April 2023.

2. This submission is only addressed to rezoning, as HCC's challenge to scope seems only directed to rezoning. Other matters covered in TAL's submission and further submission are treated as within scope.

The Sites

3. Broadly, two sites are involved. Te Awa Lakes is an integrated and master planned mixed use development comprising three broad areas or phases. Two of these – Horotiu East North ("HEN") and Horotiu East South ("HES") are within HCC boundaries.



4. In terms of rezoning, the submission includes:

   a. Part of HEN, currently zoned Major Facilities Zone, to be rezoned to Medium Density Residential.

   b. Consequentially, part of HES, currently zoned Te Rapa North Industrial (Deferred Industrial), to Major Facilities Zone and complementary commercial and light industrial.

Statutory Background

5. The Joint Memorandum of the Councils dated 22 December 2022 challenges the scope of some but not all submissions that seek rezoning (para 10). It is not clear on what basis the Councils determined that some submissions seeking rezoning were within scope, while others were not, which raises issues of consistency. Rezoning is clearly contemplated by the Resource Management (Enabling Housing Supply and Other Matters) Amendment Act 2022 (the "Amendment Act") and by the IPI process, including by the Panel.

6. Section 77G(4) of the RMA (as amended by the Amendment Act) enables a specified territorial authority such as HCC to "create new residential zones". In addition, the statutory powers of the Panel include the ability to make recommendations that "are not limited to being within the scope of submissions made on the IPI (clause 99(2) of Schedule 1, RMA). The powers of the Panel support rezoning being within scope, in light of the specific statutory process at play.

7. HCC has a duty under section 77(3) of the RMA to give effect to Policy 3 of the National Policy Statement on Urban Development 2020 (NPS-UD). HCC also has a duty under section 77N of the RMA to give effect to policy 3 of the NPS-UD in each urban non-residential zone, and is permitted to amend existing urban non-residential zones for this purpose: see section 77N(2)-(3). When policy 3(d) of the NPS-UD comes to be considered further, evidence will be brought about the proximity of the existing MFZ within HEN to the HEN town centre, and the advantages of relocating the MFZ to HES. As such, evidence will show that further medium density residential development within HEN is commensurate with commercial activity and commercial services in close proximity to the site, as policy 3(d) of the NPS-UD requires.

8. The purpose of the Amendment Act is of course "enabling housing supply", a purpose recognised in HCC's section 32 report. The rezonings sought in the submission will enable more housing supply in an area adjacent to other medium density residential development, a town centre, within a master planned community.

9. This purpose is recognised in HCC's section 32 report.[1] The section 32 report acknowledges a new zoning framework to achieve the intent of the legislation (summary at 1.2). It also recognises the benefits of medium density close to centre zones, and the extent of Hamilton's growth and housing need. However, these housing needs cannot in HCC's view be met by wholesale introduction of the MDRS. A key qualifying matter referred to by HCC is Te Ture Whaimana, and the introduction of an Infrastructure Overlay is proposed, which will require an Infrastructure Capacity Assessment in various instances (see summary at 1.2, 1.3, section 3, and appendix 2.5). The Te Awa Lakes development has of course already been through Te Ture Whaimana considerations as part of Plan Change 2.

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[1] HCC's section 32 report is entitled "Plan Change 12 – Enabling Housing", and iterates that the purpose of PC12 is to "rapidly accelerate the supply of housing" (para 1.1).

10. The section 32 report pays considerable attention to infrastructure capacity, and recent media has indicated that HCC has concerns about capacity in certain areas.[2] These more recent concerns appear to post-date the section 32 report, though that pointed towards the difficulties of aging infrastructure, and highlight that "enabling housing" will not necessarily be able to occur consistently across the city. Evidence will be presented that highlights the suitability of the MFZ within HEN for residential development, in light of the constraints that exist elsewhere, the new infrastructure that will service Te Awa Lakes, and the manner in which constraints in other areas impede the key notion of enabling housing, while shifting this MFZ to HES will better achieve the objectives and policies of the District Plan, including the IPI, and the purpose and principles of the RMA.

Scope and Case Law

11. Case law has iterated that a submission must be "on" the plan change to fall within the bounds of clause 6(1) of the RMA and so within scope. Broadly, *Clearwater*[3] required (1) an analysis of whether the submission addressed the change to the status quo advanced by the proposed plan change; and (2) whether there was a risk that affected persons would not have an opportunity to participate. The *Motor Machinists*[4] case suggested that a precautionary approach is required where a submission proposes more than incidental or consequential further changes to a proposed plan change, including whether issues in the submission were contemplated by the section 32 RMA report. In *Bluehaven Management,*[5] the Court noted that it is important to look beyond the four corners of the section 32 report, to what that report should have included, and that it is important to avoid undue narrowness on scope.

12. While *Clearwater* is one of the leading authorities, and the Councils place considerable weight upon the issue of public awareness in their Joint Memorandum, the breadth of the Panel's statutory powers under clause 99(2) of Schedule 1 mean this element of the *Clearwater* decision must be approached carefully. As the Panel has the statutory ability to make recommendations beyond the scope of submissions within this specific process, then it is inherent in the process that there is the potential for recommendations to be made without the input of directly affected parties. This power has been granted by Parliament with this in mind. This highlights that existing case law must be considered through the lens of the bespoke process at hand, and the underlying purpose of the Amendment Act in "enabling housing supply".

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[2] See eg the comments at https://hamilton.govt.nz/property-rates-and-building/water-services/three-waters-capacity/ (updated 29 March 2023); and the news article at https://www.stuff.co.nz/waikato-times/news/300840726/the-city-where-new-housing-is-in-doubt-due-to-old-sewer-pipes, which post-date the section 32 report.

[3] *Clearwater Resort Ltd v Christchurch City Council,* HC Christchurch, AP34/02, 14 March 2003.

[4] *Palmerston North City Council v Motor Machinists Ltd* [2014] NZRMA 519.

13. Further, within the context of a bespoke planning process such as the IPI, *Albany North Landowners* expands on the nature of the test. *Albany North* supports the Panel departing from a strict reading of *Clearwater*, as it highlights that non-standard planning processes (in *Albany North*, the PUAP; here, Plan Change 12 and its IPI context) are distinct from discrete variations or plan changes of the kind considered in cases such as *Clearwater*.[6] While the PUAP was broader than Plan Change 12, Plan Change 12 is much broader than the variation in *Clearwater. Albany North Landowners* also emphasises that a section 32 report is only one relevant consideration among many in weighing whether a submission is on a plan change,[7] and that a "multilayered" approach to scope is correct.[8] It is submitted that scope must be considered in the round, and contextually. *Albany North Landowners* supports HFL's submission being considered by the Panel in substantive hearings, rather than it being struck out on the grounds of scope.

14. To the extent the issue is one of procedural fairness, TAL submits that interested parties will already be aware that medium density residential development is a key part of the integrated Te Awa Lakes development, will have been aware of the publicity surrounding the IPI process, and will understand that land adjacent to land already zoned for housing and supported by services is entirely suitable for further housing. Shifting the MFZ to enable more housing is therefore an entirely logical and foreseeable consequence of the IPI process given the existing zoning within Te Awa Lakes.

15. In this instance, the context of the MFZ part of HEN being within a master planned community, the aim of enabling housing (supported by Te Awa Lakes infrastructure), and the consequential shifting of the MFZ to HES, are logical consequences of the IPI process, and "incidental or consequential" in terms of existing case law.

Conclusion

16. TAL seeks confirmation of scope so that the issues of rezoning can be considered further in substantive hearings with further evidence.

Dated 6 April 2023

Thomas Gibbons
For Te Awa Lakes Unincorporated Joint Venture, Perry Group, and Horotiu Farms Ltd

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[5] *Bluehaven Management Limited and Rotorua District Council v Western Bay of Plenty District Council* [2016] NZEnvC 191 at [39].
[6] *Albany North Landowners v Auckland Council* [2017] NZHC 138 at [129].
[7] *Albany North Landowners v Auckland Council* [2017] NZHC 138 at [131].
[8] *Albany North Landowners v Auckland Council* [2017] NZHC 138 at [135].