BEFORE HEARING COMMISSIONERS AT HAMILTON CITY COUNCIL

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

AND

IN THE MATTER OF a private plan change request by Waikato Racing Club Incorporated to the Hamilton District Plan ("PC13")

SUPPLEMENTARY LEGAL SUBMISSIONS ON BEHALF OF CHARTWELL INVESTMENTS LIMITED

25 August 2023

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Introduction

1. These supplementary submissions are made on behalf of Chartwell Investments Limited ("Chartwell"). The Panel requested the filing of these submissions as a written record of my oral submissions presented to the Panel on 24 August 2023 on the issue of the the Resource Management (Enabling Housing Supply and Others Matters) Amendment Act and the Medium Density Residential Standards ("MDRS"). Accordingly, these Supplementary Submissions do not address other matters that I spoke to when presenting my Opening Submissions and the Panel is invited to review the hearing recording if necessary on those other matters.

Resource Management (Enabling Housing Supply and Others Matters) Amendment Act and Application of the MDRS

2. I wish to respond to the Supplementary Submissions of Ms Mackintosh dealing with my Opening Legal Submissions on the relevance, or more precisely the lack thereof, of the Resource Management (Enabling Housing Supply and Others Matters) Amendments Act and the Medium Density Residential Standards ("MDRS").

3. In her Supplementary Submissions, Ms Mackintosh addressed you on how PC13 evolved and referenced unspecified advice to the Applicant provided by Hamilton City Council ("HCC") that PC13 should implement density standards for PC12 "*ostensibly for the purposes of satisfying clause 25(4A)*" of the First Schedule to the RMA.[1] No detail of that advice was provided, but in my submission it cannot provide *any* basis whatsoever for reading into clause 25(4A) of the First Schedule that the MDRS can or should apply to the Major Facilities Zone.

4. At paragraph 4 of Supplementary Submissions Ms Mackintosh appears to agree with me that Clause 25(4A) refers back to s77G(1) of the RMA which in turn very clearly is limited to <u>a relevant residential zone</u>.

5. A relevant residential zone is defined in s2 as:

   "(a) means all residential zones; but

   (b) does not include—

[1] Supplementary Submissions for the Applicant at 4.

(i) a large lot residential zone:

(ii) an area predominantly urban in character that the 2018 census recorded as having a resident population of less than 5,000, unless a local authority intends the area to become part of an urban environment:

(iii) an offshore island:

(iv) to avoid doubt, a settlement zone".

6. A relevant residential zone clearly does not include Business, Commercial, Industrial, Rural, County Living, Settlement Zones or any other zones such as the Major Facility Zone. While it appears that the Applicant (and HCC) sought to align PC13 with PC12 (on the assumption that PC13 would be approved) that preference does not mean that the PC13 Subject Site can take the benefit of the MDRS.

7. Clause 25(4A) of the First Schedule to the RMA provides "[a] *specified territorial authority must not accept or adopt a request if it does not incorporate the MDRS as required by section 77G(1)*". As noted in my Opening Submissions, s77G of the RMA relates to the duty of specified territorial authorities to incorporate MDRS and give effect to policy 3 or 5 of the NPS UD in residential zones. S77G reads:

"*(1) Every relevant residential zone of a specified territorial authority must have the MDRS incorporated into that zone.*

(2) Every residential zone in an urban environment of a specified territorial authority must give effect to policy 3 or policy 5, as the case requires, in that zone.

(3) When changing its district plan for the first time to incorporate the MDRS and to give effect to policy 3 or policy 5, as the case requires, and to meet its obligations in section 80F, a specified territorial authority must use an IPI and the ISPP.

(4) In carrying out its functions under this section, a specified territorial authority may create new residential zones or amend existing residential zones.

(5) A specified territorial authority—

(a) must include the objectives and policies set out in clause 6 of Schedule 3A:

(b) may include objectives and policies in addition to those set out in clause 6 of Schedule 3A, to—

(i) provide for matters of discretion to support the MDRS; and

(ii) link to the incorporated density standards to reflect how the territorial authority has chosen to modify the MDRS in accordance with section 77H.

(6) A specified territorial authority may make the requirements set out in Schedule 3A or policy 3 less enabling of development than provided for in that schedule or by policy 3, if authorised to do so under section 77I.

(7) To avoid doubt, existing provisions in a district plan that allow the same or a greater level of development than the MDRS do not need to be amended or removed from the district plan.

(8) The requirement in subsection (1) to incorporate the MDRS into a relevant residential zone applies irrespective of any inconsistent objective or policy in a regional policy statement." (my emphasis)

8. Self-evidently, the Major Facilities Zone is not a relevant residential zone; the Panel is not the IPI; and PC13 is not an ISPP process. The obligations in s77G therefore do not apply.

9. The Applicant has, in simple terms, got well and truly ahead of itself. The Subject Site is not subject to PC12 and the fact that the District Plan has elsewhere a Medium Density Residential Zone lends precisely no support to applying the MDRS to PC13 as suggested by Ms Mackintosh at paragraph 6 of her Supplementary Submissions.

10. As explained in my Opening Submissions, on the clear wording of s77G – the Subject Site does not fall within the MDRS.

11. I strongly disagree with the submission made at paragraph 5 of Ms Mackintosh's Supplementary Submissions that "this is not material" to your consideration of PC13. It is <u>fundamental</u> that you apply the law correctly and base your decision on evidence that correctly applies that law. As I noted, the Applicant has elected not to amend its evidence.

12. I also strongly disagree with the suggestion that my Opening Submissions on this issue do not undermine the substantive components of PC13 under s32 and 32AA. It is clear that those assessments are fundamentally flawed and deficient.

13. You have been invited to remedy any flaws by 'backfilling' through your own s32AA evaluation. That is clearly highly unsatisfactory in that it (a) devolves responsibility for a fundamental part of the Applicant's assessment, and (b) removes an important part of the assessment of PC13 from submitters. In my submission any support from the MDRS should not <u>any form</u> part of that analysis. You also are also limited in the evidential basis

to undertake that evaluation as the Applicant elected not to provide any economic and/or land supply evidence and has presented evidence which is based on a misapprehension of the law.

Summary

14. Ms Mackinson submits that PC13 should be considered on its merits. That has not been the approach taken in the Applicant's evidence. The Applicants evidence, especially that of Mr Olliver, has taken support from a matter that it not available to it. For example, Mr Olliver's s32AA report assesses provisions through the qualifying matter filter of ss77L and 77I(j) (which do not apply). Mr Olliver also rejects submitter relief for example Table 3 of his EIC on the basis that the relief is beyond the MDRS. Managing effects of PC13 is not subject to the limitation of Qualifying Matters. The Applicant and its team has frankly got well ahead of itself and PC12 for that matter. These are not slight or minor errors – they are fundamental and go to the heart of the PC13 provisions, and the Applicant's evidence and indeed legal submissions.

Implications for Submitters including Chartwell

15. The Applicant's evidence/assessments and the PC13 provision architecture has been predicated on the incorrect assumption that the MDRS applies to PC13 – your task of unpicking that evidence and determining what is left is a significant challenge for you. A more appropriate response is to reject the PC.

16. At para 8, Ms Mackintosh submits quite remarkably that "*Regardless of the criticism from Mr Welsh, this has no relevance to the merits or otherwise of the relief sought by Chartwell Investments*" and others and that none of the submitters challenge the density.

17. With respect, the density of PC13 is critical to some of Chartwell's reverse sensitivity concerns – the higher the density, the higher the potential for complaints. Similarly, the higher the height of dwellings needed to respond to the density aims of the Applicant, the less effective the fencing mitigation for example. The introduction of more sensitive activities (residential dwellings) can as a matter of logic only increase the potential for reverse sensitivity effects.

18. While the NPS-UD supports residential and business land supply, it does not lend support density for PC13 and the introduction of MDRS.

19. While PC13 seeks to facilitate a Medium Density Residential Development, this is not Hamilton City's Intensification Planning Instrument; as noted earlier PC13 does not relate to a relevant residential zone under s77G(1) within which the MDRS must be incorporated; and this Panel is not empanelled to consider the Enabling Housing Supply Amendment Act – that is the PC12 Panel and their timeframes for delivering a decision has been pushed out to December 2024. The Applicant has elected to press on with its Plan Change request.

S77I, J and L evaluation

20. At paragraph 92 Ms Mackintosh's Opening Submissions she criticizes Mr Houlbrooke for not providing a s32AA evaluation of the 60m setback and for not providing an assessment against ss77I, J and L of the RMA. Her criticism of Mr Houlbrooke is rather ironic given the constructive nature of Mr Houlbrooke's engagement with the Applicant's team inviting them to remedy their own significant deficiencies in the plan change provisions. Many of the changes to PC13 – right through to those in the rebuttal statements are as a result of the submitters' experts identifies errors or flaws in the assessments and/or provision drafting.

21. In terms of the 60m setback, Mr Houlbrooke has included a s32AA evaluation in his Summary Statement.

22. Ms Mackintosh's criticisms of Mr Houlbrooke in respect of ss77I J and L are specious and highlight the fundamental misapprehension of the law of the relevance of the Resource Management (Enabling Housing Supply and Others Matters) Amendments

23. In response , I note:

- S77I relates to qualifying matters in applying the MDRS — if the PC13 site were a relevant residential zone (which it is in not) then PC12 is the forum for evaluating qualifying matters not the planning evidence for a submitter on a private plan change.
- S77J(1) reads "*this section applies if a territorial authority is amending its district plan (as provided for in s77G)*". S77J(2) provides is the evaluation report is "from the specified territorial authority". HCC is amending its plan as provided for in s77G – the Applicant for PC13 is not. Mr Houlbrooke is not undertaking an assessment for HCC in its IPI capacity.

- S77L provides a matter is not a qualifying matter under s77I(j) in relation to an area unless the evaluation report identifies, justifies and evaluates certain listed matters. Again, this is not the forum for assessing those matters and Mr Houlbrooke has quite rightly not considered irrelevant matters. The criticism of him are entirely misplaced.

24. Again, this highlights the misapprehension of the law by the Applicant and its team. While the intention may have been to align PC13 with PC12, the reality is that PC13 has now got well ahead of PC12 by a considerable margin, and depending on the election results may well have got ahead of the legislation with further amendments possibly on the horizon.

Principal Submission

25. It is my submission that PC12 offers no relevant support to PC13 including its objectives and Policies which Mr Olliver notes in his summary (at paragraph 9) that he has considered in the context of PC13 and opined that they have been given effect to in PC13, and should decline PC13 because of a lack of evidential foundation for the Panel to complete a robust s32AA evaluation. As noted, the reverse sensitivity effects identified by the submitters also provide a sufficient basis for rejecting PC13.

26. In summary I noted the Applicant's misapprehension of the law as follows:

- PC13 facilitates a development of a scale and density that has been informed (wrongly) by the MDRS and PC12. This has permeated throughout the PC13 provisions.

- Mr Olliver's evidence confirms he has ensured that PC13 gives effect to the objectives and policies of PC12. These provisions have no relevance to PC13.

- The s32 and s32AA assessments have been prepared through the entirely wrong lens as they have been informed/influenced by the MDRS. That is wrong at law. The error is compounded by the absence of any economic and land-supply evidence.

- The Applicant has rejected submitter relief on the basis that the MDRS applies including Qualifying Matters. Simply put, the Applicant has been using the MDRS to note only advance a density based on provisions of the RMA that do not apply, but also as a 'shield' to submitter concerns.

- While the NPS-UD provides support for business and residential land development, it remains unclear how it directs the density advanced by the Applicant.

- The Panel does not have a sufficient evidentiary basis to 'back-fill' the evaluations to remedy the defects.
- The fact that s77G relates only to a relevant residential zone is not a lacuna as argued by counsel for the Applicant. Parliament clearly envisaged the MDRS only applying to existing residential zones.
- Arguments that it is efficient for the Panel to applying the MDRS for PC13 are misplaced.
- The suggested analogy that this is a 'chicken and egg' is misplaced – there is no chicken.

27. I also addressed Mr Olliver's suggestion the PC5 provided a precedent to applying the MDRS. I noted that this is misplaced as PC5 was dealt with land that was already a relevant residential zone. The PC5 Decision noted that the Plan Change involved:

    "The rezoning of approximately 690 ha from General Residential Zone and Peacocke Special Character Zone to Peacocke Medium Residential Zone. This will enable up to 7,800 residential units comprising a mixture of single dwellings, duplex dwellings, terraced houses and apartments".[2]

    "*Plan Change 5 to the Hamilton City Operative District Plan seeks to replace the Peacocke Structure Plan with its General Residential and Special Character Zoning with a new Peacocke Structure Plan providing a new Medium Density Residential Zone."* [3]

28. I understand the issue in PC5 with the MDRS was that HCC submitted to align PC5 with the Amendment Act whist it was still in the Select Committee stage. The Bill was subsequently passed. PC5 has little bearing on PC13.

The Future State of the Environment

29. Counsel for the Applicant notes at paragraph 70 and 71 of her Opening Submissions that the future state environment requires a real-world analysis. I note that within a real-world lens of a relatively flat site of 6500m^2 located centrally within a City with a shortage of industrial land, that it is entirely realistic that Chartwell may in the future look to redevelop its site. One of the permitted activities it can undertake in the Industrial Zone

[2] At Paragraph 20 https://storage.googleapis.com/hccproduction-web-assets/public/Uploads/Documents/Content-Documents/Property-Rates-and-Building/PC5-Peacocke-Structure-Plan/Decisions/Commissioners-Decision/Decision-following-the-hearing-of-Submissions-on-Plan-Change-5-Peacocke-Structure-Plan.pdf

[3] Ibid paragraph 1

is Industrial Activities (along with all the effects on sensitive activities such industrial uses will entail). As a permitted activity, industrial uses form part of the future state of the environment and any criticism of Chartwell's evidence is therefore misplaced.

No-complaints Covenant

30. Ms Mackintosh submits at paragraph 98 of her Opening Submissions that a no-complaints covenant "*would achieve nothing to mitigate the effects in question"*. The evidential basis for that submission is unclear. Mr Bell-Booth in his rebuttal statement (at paragraph 35) acknowledges that no complaints covenants are useful for setting expectations of incoming residents", and at paragraph 95 of his EIC he noted "*This [no-complaints covenants] is an additional layer of regulation to address potential noise effect"*.

31. Ms Mackintosh continues at paragraphs 98 and again at 99 that "*there is no evidence to support no-complaints covenants to support its necessity in the context of PPC13*". Patently that is factually incorrect. Ms Mackintosh may not prefer the evidence of Chartwell and others, for example Mr Jacobs at paragraphs 49-50, but it is undeniable that such evidence exists. Again, at paragraph 69 of her Opening Submissions Ms Mackintosh submits that Chartwell and other submitters' concerns are "*unfounded and not supported in evidence*". That is quite wrong and entirely misleading.

32. Ms Mackintosh asserts that no-complaints covenants are administratively burdensome for Council to enforce. As noted in my submissions at 52 the Environment Court in *Kombi Properties* noted that they "*do not contravene the principles of the RMA and are enforceable, albeit in a civil jurisdiction and not by the relevant council*".

33. Ms Mackintosh opines that no-complaints covenants may be an appropriate method in some unspecified specific circumstances, but they are not appropriate for PC13. It is unclear from Counsel's opening submissions why in the context of a plan change that will facilitate circa 200 residential dwellings next to industrial activities, why they are not appropriate.

Acoustic fence

34. Counsel for the Applicant submits that any extension of the proposed 1.8m fence can be considered on a case-by-case basis at the resource consent stage. That submission does not align with the actual PC13 provisions which state in Rule 4.8.12f (pg 38 of

Attachment 1 to Olliver Rebuttal). Given the rule's reference to 1.8m soild fence (not an acoustic fence) it is unclear how that case-by-case assessment would work in practice.

f. Prior to the issue of any code compliance certificates under section 95 of the Building Act 2004 for any noise sensitive activity the indicative open space area shown on Figure 4.5-1 adjoining Industrial zoned land must be established, and legally secured in perpetuity, inclusive of landscaping and a 1.8m high solid fence on the Industrial zone boundary (except no fence is required where existing buildings in the Industrial zone have a 0/nil setback from the boundary), in accordance with the relevant information requirements in Rule 1.2.2.24.

Notes:

Commented [JO17]: Chartwell Investments submission 6.1, 6.4; Ecostream submission 8.1, 8.4; Takanini Rentors submission 7.1, 7.4; McMac submission 1.2.

35. Mr Jacob in his evidence outlines why such an acoustic fence (as opposed to a solid fence) is necessary. Although he disagrees with the need for a 4m high acoustic fence Mr Bell-Booth in his Rebuttal Statement acknowledges at paragraphs 32 and 33 that:

> "*the inclusion of a 4m acoustic barrier would reduce the level of noise incident on the façades of future developments within PC13 - primarily for the bottom two floors.*
>
> *Additional height of an acoustic barrier would reduce the degree of sound reduction required by the façade for parts of the building.*"

Conclusion

36. Chartwell remains opposed to PC13 and seeks it be rejected unless the modifications proposed by Messrs Houlbrooke, Hall and Jacob are adopted.

CHARTWELL INVESTMENTS LIMITED

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