

**IN THE MATTER** of the Resource Management Act 1991 (“**the Act**”)

**AND**

**IN THE MATTER** of the hearing of submissions on Variation 3 to the Proposed Waikato District Plan

**LEGAL SUBMISSIONS OF COUNSEL FOR PŌKENO VILLAGE HOLDINGS LIMITED FOR THE JOINT OPENING HEARING**

**Dated 13 FEBRUARY 2023**

**1. INTRODUCTION**

1.1 These submissions are made on behalf of Pōkeno Village Holdings Limited (“PVHL”).

1.2 PVHL is a wholly owned subsidiary company of Dines Group and Fulton Hogan. It is the architect and developer of the Pōkeno Village Estate and Pōkeno Gateway Business Park, which have transformed Pōkeno from a small settlement to a vibrant urban village.

1.3 Although PVHL is close to completing its development in Pōkeno, it still retains a keen interest in the future of the town. PVHL’s particular concern is that the Havelock Village site at Pōkeno South (“HVL site”) is not an appropriate location for urban expansion.

1.4 While questions of zoning will be a matter for the Environment Court to determine on the Proposed Waikato District Plan (“PWDP”) appeals, in terms of Variation 3 PVHL’s interest is in the extent to which there are qualifying matters which justify not applying the Medium Density Residential Standards (“MDRS”) to the HVL site.

**Purpose and scope of submissions**

1.5 The purpose of these submissions is to address two preliminary matters concerning how Variation 3 may amend the planning provisions applying to the HVL site.

1.6 Specifically, these submissions address:

- (a) First, a brief overview of PVHL's interest in Pōkeno and in Variation 3 (Section 2);
- (b) The application of qualifying matters to the HVL site, having regard to Waikato District Council's indication that it will not call evidence on the Urban Fringe Qualifying Matter (Section 3); and
- (c) The relationship between the appeals on the PWDP and Variation 3 (Section 4).

## 2. **PVHL'S INTEREST IN VARIATION 3**

### **Background**

2.1 PVHL was the proponent of Plan Changes 24 and 21<sup>1</sup> which provided the planning framework for Pōkeno's urban transformation. The structure planning process that preceded those plan changes was the result of many years of rigorous technical analysis, stakeholder consultation and community building. Some of the particular considerations were:

- (a) The need to make good provision for heavy industrial activities which would be the economic "lifeblood" of the town, with adequate separation from residential areas to avoid reverse sensitivity issues; and
- (b) The need to protect Pōkeno's rural backdrop (particularly areas above RL100), to maintain the identity of the town as an "urban village in a rural setting" and the visual amenity this bestows.

### **PVHL involvement in PWDP process**

2.2 PVHL lodged a submission on the PWDP because of a concern that as notified, the PWDP had failed to properly acknowledge and build on this planning history in favour of simply enabling as much development capacity as possible.

2.3 PVHL's particular concerns about the HVL site arose because of the visual impact of development on the ridgelines that form Pōkeno's rural backdrop, and because of the potential reverse sensitivity issues arising from the location of residential development overlooking heavy industry.

1 To the Franklin District Plan and Waikato District Plan: Franklin section respectively.

2.4 The Decision on the PWDP took into account those concerns, to a certain extent, insofar as it provided for:

- (a) Rural zoning on the land on the HVL site above RL100 to maintain the rural backdrop; and
- (b) Precinct provisions which are intended to exclude development in certain areas, including the Pōkeno Industry Buffer, in order to manage reverse sensitivity and visual effects.

### **Involvement in PWDP appeals**

2.5 PVHL is a section 274 party to a number of appeals on the PWDP concerning the appropriate zoning and precinct provisions for the HVL site. In particular, it is a party to:

- (a) The appeal by Hynds Pipe Systems and the Hynds Foundation (“Hynds appeal”) which seeks that either the Residential zoning of the HVL site is rejected in its entirety or that the precinct provisions that are intended to prevent development in the Pōkeno Industry Buffer” are strengthened; and
- (b) The appeal by Havelock Village Limited (“HVL” and “HVL appeal”), which seeks to delete some of the controls applying to development on the HVL site and to extend the General Residential zoning across the site to include the area above RL100.

2.6 Those appeals are at an early stage, with direct discussions between the parties having just commenced.

### **3. HVL SITE - QUALIFYING MATTERS**

3.1 The PWDP Decision to rezone some of the land at Pōkeno South to residential was contingent on a “package” of mitigation measures, including limiting height and density in certain areas of the site to manage visual effects and reverse sensitivity. These are detailed in the Havelock Precinct Plan and associated precinct provisions.

3.2 The urban fringe qualifying matter had the effect of excluding the HVL site from the MDRS, with the effect that the Havelock precinct provisions were not affected by Variation 3.

3.3 PVHL acknowledges the difficulties identified by the Council concerning the urban fringe qualifying matter, but PVHL’s submission is that there are other

qualifying matters which will justify departure from the MDRS for at least parts of the HVL site.

### **Requirements for qualifying matters**

- 3.4 PVHL intends to address the requirements of sections 77I and 77L in terms of what is a qualifying matter at the substantive hearing. At the outset, however, we record that we disagree with HVL's submission that only a matter which meets the threshold of national importance or national significance can justify a departure from the MDRS.<sup>2</sup>
- 3.5 First, section 77I expressly identifies matters of national importance under section 6 as *one type* of qualifying matter - i.e., there are others. The provision of public open space, which is not a matter of national importance or significance, is another type of qualifying matter.
- 3.6 Section 77I(j) provides that "*any other matter that makes higher density...inappropriate in an area*" can be a qualifying matter. This is broad language: if it was intended to be limited only to matters of national importance or significance, such qualifiers would have been included.
- 3.7 Finally, section 77I(j) and 77L are focussed on site-specific or case by case assessment. In our submission, the intent of these provisions is to direct that *any* matter or characteristic may, depending on the particular characteristics of a site, be a qualifying matter provided that it can meet the threshold set out in section 77L.
- 3.8 Section 77L(b) requires assessment of the characteristic with reference to the national significance of urban development, but it does not follow that the characteristic under assessment must be a matter of national importance: the question is whether it is sufficiently important on *the site in question* to outweigh the urban development imperative.
- 3.9 As discussed further below, HVL appears to support the inclusion of the Pōkeno Industry Buffer qualifying matter on the HVL site. It follows from HVL's reasoning that it must consider that the reverse sensitivity issues arising are a matter of national significance. Reverse sensitivity is not necessarily a matter of national significance, and its importance will vary on a case by case basis.

2 HVL submission and legal submissions of counsel for HVL, 10 February 2023, paragraph 3.11.

### **Qualifying matters in the Havelock precinct**

- 3.10 The qualifying matters and associated provisions applying to the HVL site will be addressed at the substantive hearing. At the very least, however, all of the precinct provisions that were included in the decisions version of the PWDP which concern height and density will need to be the subject of consideration. As notified, Variation 3 identifies reverse sensitivity considerations arising in respect of the Pōkeno Industry Buffer as a qualifying matter, but only references one of relevant precinct provisions.<sup>3</sup>
- 3.11 Waikato District Council (“the Council”) has acknowledged that “*with the removal of the Urban Fringe QM, there are likely to be other rules and controls that could be included.*”<sup>4</sup> To assist, other precinct provisions included in the PWDP which control height and/or density on the HVL site comprise:
- (a) PREC4-S1 – Building height limited to 5m within 50m of the Hilltop parks;
  - (b) SUB R19 PREC4 – Non complying activity status for subdivision in the Pōkeno Industry Buffer;
  - (c) SUB R20 PREC4 - restricted discretionary activity status for subdivision of lots which (*inter alia*) have a min net site area of 2,500m<sup>2</sup> in the Havelock Slope Residential Area;
  - (d) SUB R21 PREC4 - discretionary activity status for subdivision in the Havelock Precinct if it does not comply with requirements including (*inter alia*) the provision of the Hilltop Park, the creation of the Pōkeno Industry Buffer and Environmental Protection Areas.
- 3.12 The submission by HVL appears to be premised on the basis that these provisions would remain in the PWDP, unaffected by Variation 3. Given that these rules control height and density, that cannot be correct. Nevertheless, HVL’s position does suggest that the retention of the provisions on the basis that they are appropriate to accommodate a qualifying matter may not be contentious.

<sup>3</sup> PREC4-S2 – non complying activity status for new buildings in the Pokeno Industry Buffer.  
<sup>4</sup> Legal submissions of counsel for Waikato District Council, 10 February 2023, paragraph 8.32.

#### 4. **RELATIONSHIP WITH PWDP APPEALS**

- 4.1 PVHL agrees with Synlait Milk Limited and the Council that the need to run the Variation process alongside the PWDP appeals results in an unfortunate level of complexity that requires careful consideration.
- 4.2 The Resource Management (Enabling Housing Supply and Other Matters) Amendment Act 2021 ("Amendment Act") provides for the MDRS to be incorporated by way of a variation to a proposed plan but, as the Council has observed, unhelpfully provides no guidance about how the Schedule 1 and ISPP processes are intended to work alongside each other.<sup>5</sup>
- 4.3 This becomes a particular issue when the relief sought in an unresolved appeal overlaps with the IPI. In respect of the HVL site, there is substantial overlap between Variation 3 and the relevant appeals.
- 4.4 PVHL has considered the possible implications of this overlap and had some discussions with the Council and other parties on the issue.
- 4.5 First, PVHL agrees with the Council that all questions about zoning of the HVL site are matters for the Environment Court alone to determine.<sup>6</sup>
- 4.6 The issue is more complex in relation to the parts of the PWDP appeals which seek amendments to the precinct provisions. In particular, the Hynds appeal seeks that if any residential zoning is retained on the HVL site, changes should be made to the precinct provisions to better control reverse sensitivity in the Pōkeno Industry Buffer area. The concern, which is shared by PVHL, is that the Industry Buffer provisions as identified in the Decision are insufficient for their intended purpose.
- 4.7 PVHL agrees with the Council that in terms of section 77I the Panel has jurisdiction to consider what are the appropriate rules that are necessary to accommodate a qualifying matter. That could include making the Pōkeno Industry Buffer provisions more restrictive than the PWDP, to ensure that they are effective. In this regard, although the directive in section 77L(c)(iii) is to consider options which achieve the greatest heights and densities while still managing the qualifying matter, in circumstances where there is good reason to exclude all development, such as in the Industry Buffer, that could still result in directive provisions to that effect.

5 Legal submissions of counsel for Waikato District Council, 10 February 2023, paragraph 8.5.  
6 As set out at paragraphs 8.14-8.17 of the legal submissions of counsel for Waikato District Council dated 10 February 2023.

- 4.8 There is a question about whether the Environment Court also has jurisdiction to apply additional or amended height or density-related rules. The Council position is that the Environment Court's jurisdiction will be limited to consideration of only non-height and density-related matters<sup>7</sup> whereas HVL suggests that the Environment Court is the appropriate forum to resolve a holistic package of plan provisions for the HVL site.<sup>8</sup>
- 4.9 In our submission, this is a question that does not need to be resolved by the Panel. Provided that the Panel starts from "first principles" when it considers the Havelock precinct provisions, rather than from the premise that the decisions version of the Havelock Precinct provisions is adequate to manage any identified qualifying matters, then the risk that appeal points will "fall through the cracks" is limited. The Environment Court will subsequently need to consider whether additional/amended precinct provisions are appropriate and the extent of its jurisdiction to impose any such provisions.

**DATED at AUCKLAND this 13<sup>th</sup> day of February 2023**

**PŌKENO VILLAGE HOLDINGS LIMITED**

by their solicitors and duly authorised agents  
**BERRY SIMONS**



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**K A Storer**

**Counsel for Pōkeno Village Holdings Limited**

<sup>7</sup> Legal submissions of counsel for Waikato District Council, 10 February 2023, paragraph 8.19.

<sup>8</sup> Legal submissions of counsel for Havelock Village Limited, 10 February 2023, paragraph 5.2(b).