

BEFORE THE INDEPENDENT HEARINGS PANEL

UNDER the Resource Management Act 1991

AND

IN THE MATTER of Proposed Plan Change 26 to the Operative Waipā District Plan, Proposed Plan Change 12 to the Operative Hamilton City District Plan and Variation 3 to the Proposed Waikato District Plan (**the Waikato IPIs**)

LEGAL SUBMISSIONS FOR SYNLAIT MILK LIMITED

ON THE STRATEGIC HEARING

10 February 2023

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- 1 These legal submissions are filed on behalf of Synlait Milk Limited (**Synlait**). Synlait made a submission on Variation 3 to the Proposed Waikato District Plan (**Variation 3**)¹.
- 2 Synlait filed a memorandum dated 31 January 2023 (**the memorandum**) seeking directions from the Panel on how it proposed to address inter-related issues arising from Variation 3 and the Proposed District Plan (**PDP**) appeals. These legal submissions refer to that memorandum. They should be read together.
- 3 The response from the Panel acknowledged the potential problems that the two processes running concurrently could cause, and advised that the Council would be addressing the issue in opening legal submissions. As the Panel will be aware, there is a contemporaneous filing date for legal submissions from all parties on Hearing 1 – Strategic Issues. On that basis, these legal submissions address the issues as viewed from Synlait’s perspective. Additional submissions may be presented to the Panel once we have the opportunity to review the legal submissions for the Council, and other parties.

Overview of issue

- 4 The key issues were raised in the memorandum, however they are summarized here:
 - 4.1 Variation 3 is a change to the PDP. Variation 3 is made on the Decisions version of the PDP, with appeals on the PDP (particularly to the extent of rezoning from rural to residential land and the detail of the precinct provisions that may apply to particular residential zoned land) yet to be heard and resolved by the Environment Court. The appropriate zoning and associated precinct provisions of some areas of the district² is therefore uncertain.
 - 4.2 The PDP Decision to rezone some of the land at Pokeno South to residential was contingent on a “package” of mitigation measures, which limit areas or density of development where land is subject to particular constraints. These were detailed in the Havelock Precinct Plan (**HPP**) and associated rules.

¹ Submission number 46

² In particular, the Havelock Village Land (**HVL**) sometimes referred to as “Pokeno South”, and subject to submission 105

- 4.3 Currently, Variation 3 proposes that the Pokeno South land be excluded from the Medium Density Residential Standards (**MDRS**), due to the qualifying matter of “Urban Fringe”.
- 4.4 In addition, part of the Pokeno South land is additionally excluded from the MDRS due to the qualifying matter of “reverse sensitivity”, which aligns with the Pokeno Industry Buffer.
- 5 HVL has sought the removal of the urban fringe qualifying matter, and in its submission considers that no additional qualifying matters need be implemented, as the HPP provisions and rules will continue to apply. The HVL submission is silent on the Pokeno Industry Buffer qualifying matter, which (although remaining an issue for evidence and determination by the Panel) indicates that the general view is that the proposed qualifying matter is justifiable.

Legal considerations

- 6 As outlined in our memorandum, Synlait considers that the V3 process running alongside the PDP Appeal process results in a level of complexity that requires consideration at the Strategic Hearing stage.
- 7 Clause 80F of the Resource Management Act 1991 (**RMA**) sets out how the Council must notify the IPI. It references clause 95 which specifically refers to clause 16A (authorising the variation of a proposed plan), but does **not** incorporate clause 16B, which states that:
- 7.1 the variation shall be merged with the proposed plan as soon as the two (variation and proposed plan) are at the same procedural stage;
- 7.2 where the variation includes a provision to be substituted for a provision in the proposed policy statement or plan against which a submission or an appeal has been lodged, that submission or appeal shall be deemed to be a submission or appeal against the variation; and
- 7.3 From the date of notification of a variation, the proposed policy statement or proposed plan shall have effect as if it had been so varied.
- 8 This establishes a critical difference between the “normal” process that a variation would follow, and the current version that this Panel is working

within as a result of the Resource Management (Enabling Housing Supply and Other Matters) Amendment Act 2021 (**the Amendment Act**).

- 9 Generally, clause 16B would provide appellants on the PDP scope so that submissions on a provision that was amended by the variation are deemed to be an appeal against the variation. As the Panel is aware, clause 107 of the Amendment Act means there is no right of appeal available to submitters on Variation 3. Clause 16B has presumably been excluded from applying to the Variation 3 process so as not to “open a door” to appeal rights and to meet timeframes for implementation.
- 10 It’s important for the Panel to be mindful of this change. It is my submission that the Environment Court is to make decisions on the scope of the appeals before it, as Variation 3 does not automatically “merge” with those appeals. In saying that, any decision from the Variation 3 process will be relevant to the Environment Court’s consideration.

Practical considerations

- 11 Paragraph 8 of our memorandum established that there was considerable evidence before the PDP Panel which ultimately impacted the decision on where residential rezoning was appropriate, provided the various controls (included in the HPP) managed the effects of that rezoning.
- 12 As indicated above, the Urban Fringe qualifying matter is opposed by HVL. The below submissions are only relevant if the Panel on Variation 3 concludes that the Urban Fringe qualifying matter **is not** appropriate to apply to the HVL land.
- 13 The HVL submission considers (at paragraph 3.24) that no additional qualifying matters need to apply, as appropriate controls on residential density are addressed through the HPP and associated rule framework.
- 14 The HPP includes several matters which act as a control on residential development. In particular, the HPP and associated rules introduces the following constraints on residential density:
- 14.1 Pokeno Industry Buffer and associated rules makes dwellings non-complying within that area;
- 14.2 Residential density is limited within the ‘Residential Slope’, to reflect the development constraints of that land;

- 14.3 Subdivision standards requiring a legal mechanism to retain Environmental Protection Areas (which have residential zoning) in perpetuity and prevent further subdivision;
- 14.4 Discretion over lot aspect and size at the subdivision stage to ensure views are not orientated over the industrial activities, particularly relevant for houses in "Area 2".
- 14.5 Building height restrictions for any building or structure within 50m of the Hilltop Parks identified on the Havelock Precinct Plan.
- 15 All of the above HPP matters, if retained through Variation 3, would limit the application of the MDRS standards on the HVL land. This is explicitly barred by section 77I which states:
- A specified territorial authority may make the MDRS and the relevant building height or density requirements under policy 3 less enabling of development in relation to an area within a relevant residential zone only to the extent necessary to accommodate 1 or more of the following qualifying matters that are present.*
- 16 Therefore, the approach recommended by HVL in its submission (to rely on the HPP and associated rules to constrain MDRS development in particular areas) is not consistent with the legislation. The proposed reverse sensitivity/Pokeno Industry Buffer goes some way to align the MDRS with the HPP, however additional qualifying matters would be required to introduce the other HPP controls. HVL appears to accept that these controls are appropriate, by referring to their ongoing applicability in its submission.
- 17 The issue of applicable qualifying matters (or not) is one of evidence, and more appropriately addressed in the substantive hearing rather than the Strategic Hearing. However, the issue of *what level of evidence* is relevant to this Strategic Hearing, is an issue that we seek directions on from the Panel. In particular, if alternative qualifying matters are to be supported by submitters, will the Variation 3 Panel accept the evidence that was before the PDP Panel that informed the HPP? Is further geotechnical evidence (for example) required to be adduced to support an argument that the physical constraints on the land should be considered a qualifying matter under s77I(j), or does this Panel accept that the matter was determined by the PDP Panel and found to be a limitation on development?

- 18 Synlait (and others, we suspect) have a desire to reduce duplication in evidence (noting that this has already been heard at the PDP Panel, and will be heard again by the Environment Court), but accepts that there is a need to provide the Panel with evidence that allows it to determine whether or not a qualifying matter is appropriate.

Decision sought

- 19 As mentioned above, the approach below is **only** required if the Panel considers that the Urban Fringe qualifying matter is not appropriate and should be removed, meaning the HVL land is a “relevant residential zone”. For efficiency’s sake (and to save evidence where it may not be required) Synlait considers that the ‘Urban Fringe’ qualifying matter should be considered and decided first. If the Panel determined the qualifying matter was appropriate, parties would be saved the time and expense of presenting “in the alternative” arguments requiring considerable evidence.
- 20 Synlait seeks that the Panel provide guidance to the parties in its Strategic Hearing decision on the following:
- 20.1 How to proceed with evidence for alternative qualifying matters; and
 - 20.2 What jurisdiction the Panel considers it does or does not have to consider the HPP as restrictions on the MDRS standards, were they to apply.

Dated 10 February 2023



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