

**BEFORE INDEPENDENT COMMISSIONERS**

**UNDER**

the Resource Management Act 1991

**IN THE MATTER**

Waipā District Council Plan Change 26

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**LEGAL SUBMISSIONS ON BEHALF OF FONTERRA LIMITED**

**21 APRIL 2023**

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**Russell  
McAugh**

D J Minhinnick / P G Senior  
P +64 9 367 8714  
F +64 9 367 8163  
PO Box 8  
DX CX10085  
Auckland

**MAY IT PLEASE THE HEARING PANEL:****1. INTRODUCTION**

- 1.1 These submissions are made on behalf of Fonterra Limited ("**Fonterra**") on Plan Change 26 ("**PC26**") to the Waipā District Plan ("**District Plan**").
- 1.2 Fonterra supports urban growth and on-going economic development of the Waipā District. Fonterra agrees that enabling housing supply through appropriate housing intensification is a necessary step. However, Fonterra does not support housing intensification at all costs and submits the Panel should appropriately provide for existing Regionally Significant Industry.
- 1.3 One of the key methods of providing for existing Regionally Significant Industry is to protect it from the effects of reverse sensitivity. It is a basic planning principle that incompatible activities should not be located in close proximity to one another. Failure to manage the location of incompatible activities will ultimately cause conflict between those land uses and result in reverse sensitivity effects. In the case of Regionally Significant Industry, reverse sensitivity effects must be avoided or minimised.
- 1.4 Fonterra seeks a range of changes to PC26 to ensure that the residential intensification provided for by PC26 is appropriate. Most importantly, Fonterra seeks a new Qualifying Matter be included in PC26 to protect the future of the dairy factory at Te Awamutu ("**Reverse Sensitivity Qualifying Matter**"). Qualifying Matters allow the Panel to deviate from the Medium Density Residential Standards ("**MDRS**") where appropriate. The Reverse Sensitivity Qualifying Matter is appropriate and meets the relevant tests in the RMA.

**2. EVIDENCE TO BE PRESENTED**

- 2.1 Fonterra has pre-circulated two briefs of evidence:
- (a) **Ms Suzanne O'Rourke** (Corporate) – National Environmental Policy Manager for Fonterra's New Zealand Operations. Ms O'Rourke will provide background on Fonterra's key manufacturing interests in the Waipā District and Fonterra's existing approach to managing land use incompatibility and reverse sensitivity effects.
- (b) **Mr Mark Chrisp** (Planning) – a Partner and a Principal Environmental Planner in the Hamilton Office of Mitchell Daysh Limited. Mr Chrisp will focus on the changes Fonterra is seeking

through PC26 to maintain adequate protection against reverse sensitivity effects. In particular, Mr Chrisp's evidence includes details of the new Reverse Sensitivity Qualifying Matter sought by Fonterra and analysis of how the qualifying matter meets the statutory tests in ss 77J and 77L of the Resource Management Act 1991 ("**RMA**").

### 3. FONTERRA'S INTEREST IN THE WAIPĀ DISTRICT

3.1 Fonterra has eight dairy factories located within the Waikato Region. Two of these, Te Awamutu and Hautapu are located in the Waipā District and will be affected by PC26 ("**Dairy Factories**"). Further details regarding the Dairy Factories are provided in the evidence of Ms O'Rourke and Mr Chrisp. However, there are some key facts the Panel should be aware of:

- (a) The Dairy Factories were each lawfully established many years ago.<sup>1</sup>
- (b) The factories were originally established in rural or industrial areas, well away from residential or other sensitive activities.<sup>2</sup>
- (c) The Dairy Factories now face varying degrees of residential encroachment.<sup>3</sup>

3.2 In particular, the Te Awamutu Dairy Factory will be significantly affected by PC26. The Te Awamutu Dairy Factory has operated on site for almost 140 years.<sup>4</sup> The factory is now located within the urban area of Te Awamutu and is surrounded by residential activities as a result in the growth and development of former dairy workers accommodation.<sup>5</sup> The existing residential area surrounding the Te Awamutu Dairy Factory constrains its processing capacity through restrictions on noise limits and restrictions on vehicle numbers entering and exiting the property.<sup>6</sup>

3.3 As the Panel will be aware, the Dairy Factories make very significant contributions to Waipā's and Waikato's economy.<sup>7</sup>

3.4 That economic importance is recognised in the Waikato Regional Policy Statement ("**Waikato RPS**"), which identifies the Dairy Factories as Regionally

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<sup>1</sup> Ms O'Rourke's evidence at [3.3] and [3.10].

<sup>2</sup> Ms O'Rourke's evidence at [3.7] and [4.8].

<sup>3</sup> Ms O'Rourke's evidence [3.7] and [4.3].

<sup>4</sup> Ms O'Rourke's evidence at [3.3].

<sup>5</sup> Ms O'Rourke's evidence at [3.6] and [3.7].

<sup>6</sup> Ms O'Rourke's evidence at [3.8].

<sup>7</sup> Ms O'Rourke's evidence at [3.1] and [3.2].

Significant Industry.<sup>8</sup> The importance of the Dairy Factories is also recognised in the District Plan.<sup>9</sup>

#### 4. REVERSE SENSITIVITY

##### Reverse sensitivity as a concept

4.1 Reverse sensitivity is a well-established planning principle,<sup>10</sup> and is an adverse effect for the purposes of the Resource Management Act 1991 ("**RMA**").<sup>11</sup> It refers to the susceptibility of established, effects-generating activities (which often cannot internalise all their effects) to complaints or objections arising from the location of new sensitive activities nearby. Such complaints can place significant constraints on the operation of established activities, as well as their potential for future growth and development. In extreme cases, reverse sensitivity effects can force established activities to relocate elsewhere.

4.2 Managing reverse sensitivity falls within the ambit of district councils.<sup>12</sup>

4.3 Fonterra seeks to manage reverse sensitivity concerns around its manufacturing sites principally through the use of buffer zones or setbacks and accompanying rule frameworks within district planning frameworks.<sup>13</sup> Those setbacks demarcate an area of lesser amenity for sensitive activities and require steps to be taken to mitigate reverse sensitivity effects for example the use of noise insulation for buildings that accommodate sensitive activities (eg dwellings).<sup>14</sup>

##### Recognition of reverse sensitivity in the planning framework

4.4 Reverse sensitivity is recognised throughout the applicable planning framework.

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<sup>8</sup> Mr Chrisp's evidence at [3.8].

<sup>9</sup> Mr Chrisp's evidence at [3.9].

<sup>10</sup> See for example *Independent News Auckland Ltd v Manukau City Council* (2003) 10 ELRNZ 16 (EnvC) at [57]; *Affco New Zealand v Napier City Council* NZEnvC Wellington W 082/2004, 4 November 2004 at [29]; *Tasti Products Ltd v Auckland Council* [2016] NZHC 1673 at [60].

<sup>11</sup> See for example: *Ngatarawa Development Trust Ltd v Hastings District Council* EnvC W17/04, 14 April 2008 at [22]; and *Kombi Properties Ltd v Auckland Council* [2021] NZEnvC 62 at [53].

<sup>12</sup> RMA, s 31.

<sup>13</sup> Mr Chrisp's evidence at [5.1](c).

<sup>14</sup> Mr Chrisp's evidence at [5.1](c).

- 4.5 Objective 1 of the National Policy Statement for Urban Development 2020 ("**NPS-UD**") requires urban environments to be "well-functioning".<sup>15</sup> Mr Chrisp considers "well-functioning" urban environments are those that separate incompatible activities from each other.<sup>16</sup>
- 4.6 The Waikato RPS sets out an extensive range of strongly-worded policy directives in relation to the importance of Regionally Significant Industry, and the need to avoid or minimise reverse sensitivity effects.<sup>17</sup> For example:<sup>18</sup>
- (a) Enhancing access to natural and physical resources to provide for Regionally Significant Industry;
  - (b) Minimising land use conflict by minimising the potential for reverse sensitivity;
  - (c) Recognising the value of Regionally Significant Industry and avoiding or minimising the potential for reverse sensitivity;
  - (d) Discourage sensitive activities from locating close to effects-generating activities;
  - (e) Maintaining industrially-zoned land for industrial activities; and
  - (f) Directing new development away from Regionally Significant Industry.

- 4.7 Mr Chrisp concludes that:<sup>19</sup>

In my opinion, the Waikato RPS provides a clear directive that the WDP (including PC26) must include measures to avoid or minimise the potential for reverse sensitivity effects on established Regionally Significant Industry, such as the Te Awamutu Site. The WDP must 'give effect' to the Waikato RPS, and this policy direction, in my opinion, provides strong policy support for the proposed [Reverse Sensitivity Qualifying Matter].

- 4.8 Protection against reverse sensitivity is provided for in the Waipā District Plan through objectives, policies and rules.<sup>20</sup> These provisions include a Dairy

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<sup>15</sup> National Policy Statement on Urban Development 2020 – Updated May 2022; Mr Chrisp's evidence at [3.3](a).

<sup>16</sup> Mr Chrisp's evidence at [7.9](a).

<sup>17</sup> Mr Chrisp's evidence at [3.13]. The WDP identifies Te Awamutu as a regionally important site (see Mr Chrisp's evidence at [3.9]).

<sup>18</sup> Mr Chrisp's evidence at [3.13].

<sup>19</sup> Mr Chrisp's evidence at [3.15].

<sup>20</sup> Ms O'Rourke's evidence at [4.21].

Manufacturing Noise Contour on the planning maps and associated rules recognising elevated noise levels around Te Awamutu Dairy Factory.<sup>21</sup>

### Examples of reverse sensitivity effects

- 4.9 Despite the supportive existing planning framework, reverse sensitivity is still a serious concern for Fonterra. Ms O'Rourke's evidence sets out a recent example at the Hautapu Dairy Factory demonstrating the impact of reverse sensitivity. The background is:

[4.8] ...Reverse sensitivity was demonstrated recently in respect of the Hautapu Dairy Factory through a resource consent application process that sought to authorise the discharge of odour to air from a proposed wastewater treatment facility located at the Hautapu Site.

- 4.10 Ms O'Rourke's evidence refers to the comment made by a member of the Hautapu Residents Group in a newspaper article demonstrating reverse sensitivity at play:

[4.8] ...We know the factory has been there for more than 100 years and it's in a long-time industrial zone... But there are now more than 50 homes as its neighbours and some are just a few hundred metres away from the site. Maybe this is not the right place for the factory anymore.

- 4.11 This is but one example demonstrating the potential effects of reverse sensitivity. Ms O'Rourke has many more.<sup>22</sup>

- 4.12 A further example of misunderstanding the nature of reverse sensitivity effects is the planning evidence of Mr Campbell for Kainga Ora in this hearing. Mr Campbell does not support the Reverse Sensitivity Qualifying Matter and, with respect, seems to have misunderstood the nature of reverse sensitivity effects because:

- (a) The RMA does not require full internalisation of environmental effects.<sup>23</sup>

<sup>21</sup> Mr Chrisp's evidence at [3.16](a).

<sup>22</sup> Ms O'Rourke's evidence at [4.6]-[4.18].

<sup>23</sup> See for example: *Ngatarawa Development Trust v Hastings District Council* NZEnvC Wellington W 17/08, 14 April 2008 at [23]; and *Poutama Kaitiaki Charitable Trust v Taranaki Regional Council* [2020] NZHC 3159 at [245]. In response to Mr Campbell's evidence at [6.9].

- (b) Reverse sensitivity is a concept that is strongly recognised and provided for in the Waikato RPS.<sup>24</sup> There is strong policy support in the Waikato RPS and WDP for protecting Regionally Significant Industry from reverse sensitivity effects.<sup>25</sup> This is not acknowledged in the evidence of Mr Campbell at all.<sup>26</sup>
- (c) Reverse sensitivity is not limited to health and safety effects.<sup>27</sup> Instead, reverse sensitivity can be caused by a range of effects.<sup>28</sup>
- (d) Also, reverse sensitivity is as much about the perception of effects as it is the actual environmental effect.<sup>29</sup>
- (e) Fonterra has numerous examples of where reverse sensitivity has adversely affected its operations.<sup>30</sup>
- (f) Fonterra focusses on improving environmental performance at its factories, including assessing its performance against independent standards and a commitment by Fonterra to Waipā District Council through a Memorandum of Understanding to make improvements and upgrades to continuously reduce and minimise noise generated at the Dairy Factories.<sup>31</sup>
- (g) The s 42A author now agrees the Reverse Sensitivity Qualifying Matter is an appropriate planning response.<sup>32</sup>

## 5. FRAMEWORK FOR INTENSIFICATION PLANNING INSTRUMENTS

### Relevant legal test

- 5.1 The Council must incorporate the MDRS into residential zones.<sup>33</sup> However, the Council can make the requirements of the MDRS less enabling of development if a qualifying matter applies.<sup>34</sup> There are a range of possible qualifying matters. There is also a catch-all qualifying matter in s 77I(j) RMA:

<sup>24</sup> Mr Chrisp's evidence at [3.8]-[3.15].

<sup>25</sup> Mr Chrisp's evidence at [3.8]-[3.17].

<sup>26</sup> Mr Chrisp's rebuttal evidence at [3.7].

<sup>27</sup> Mr Chrisp's rebuttal evidence at [2.1]. In response to Mr Campbell's evidence at [6.14].

<sup>28</sup> Mr Chrisp's rebuttal evidence at [4.1].

<sup>29</sup> Mr Chrisp's evidence at [5.6] and Ms O'Rourke's evidence at [4.2].

<sup>30</sup> In response to Mr Campbell's evidence at [6.14].

<sup>31</sup> Ms O'Rourke's evidence at [3.9] and [3.14]-[3.16].

<sup>32</sup> In response to Mr Campbell's evidence at [8.40].

<sup>33</sup> RMA, s 77G(1).

<sup>34</sup> RMA, s 77G(6).

**77I Qualifying matters in applying medium density residential standards and policy 34 to relevant residential zones**

(j) any other matter that makes higher density, as provided for by the MDRS or policy 3, inappropriate in an area, but only if section 77L is satisfied.

5.2 In evaluating whether s 77I(j) applies, the criteria in both ss 77J and 77L RMA must be met as well as the usual criteria in s 32 RMA. Full versions of ss 77J and 77L are included as an Appendix to these legal submissions. In summary ss 77J and 77L require an analysis of the following matters:<sup>35</sup>

The evaluation report prepared under section 32 of the Act in relation to the proposed amendment must:

- (a) demonstrate why the territorial authority considers that:
  - (i) the area is subject to a qualifying matter; and
  - (ii) the qualifying matter is incompatible with the level of development directed by Policy 3 for that area; and
- (b) assess the impact that limiting development capacity, building height or density (as relevant) will have on the provision of development capacity; and
- (c) assess the costs and broader impacts of imposing those limits.

A matter is not a qualifying matter under clause 3.3.2(1)(h) in relation to an area unless the evaluation report also:

- (a) identifies the specific characteristic that makes the level of development directed by Policy 3 inappropriate in the area, and justifies why that is inappropriate in light of the national significance of urban development and the objectives of this National Policy Statement; and
- (b) includes a site-specific analysis that:
  - (i) identifies the site to which the matter relates; and
  - (ii) evaluates the specific characteristics on a site-specific basis to determine the spatial extent where intensification needs to be compatible with the specific matter; and

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This summary is provided in the NPS-HPL at 3.33.



- (iii) evaluates an appropriate range of options to achieve the greatest heights and densities directed by Policy 3, while managing the specific characteristics.

5.3 Mr Chrisp's evidence assesses the Reverse Sensitivity Qualifying Matter in forensic detail against ss 77J and 77L.<sup>36</sup> The next section of these submissions focuses on the key aspects of the statutory tests above.

#### **Application of legal test to Reverse Sensitivity Qualifying Matter**

5.4 PC26 will triple the potential density of residential dwellings allowed as permitted activities around the Te Awamutu Dairy Factory.<sup>37</sup> This would triple the number of residents in close proximity to the dairy factory, tripling the risk of reverse sensitivity effects on the dairy factory.<sup>38</sup> This is not an appropriate planning outcome under ss 77J and 77L for the reasons outlined below.<sup>39</sup>

#### *Specifically identifying the Reverse Sensitivity Qualifying Matter and the area to which it relates*

5.5 The properties to which the Reverse Sensitivity Qualifying Matter would apply are shown in Figure 4 in Mr Chrisp's evidence.<sup>40</sup> There are 21 properties in total.<sup>41</sup> The Reverse Sensitivity Qualifying Matter will therefore apply to a small number of properties within a discrete area.

5.6 In addition, those properties are already within the noise control boundary around the Te Awamutu Dairy Factory as part of the existing District Plan.<sup>42</sup> This recognises that properties within the noise control boundary may be affected by elevated noise by the existing lawful operation of the Te Awamutu Dairy Factory and sensitive activities are required to be acoustically treated.<sup>43</sup>

5.7 Within the area covered by the Reverse Sensitivity Qualifying Matter, Fonterra is not seeking "no intensification" at all. Instead, the Reverse Sensitivity Qualifying Matter will allow development of 2 dwellings per site as a permitted

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<sup>36</sup> Mr Chrisp's evidence at [7.1]-[7.19].

<sup>37</sup> Mr Chrisp's evidence at [6.1].

<sup>38</sup> Mr Chrisp's evidence at [6.1].

<sup>39</sup> Mr Chrisp's evidence at [6.1].

<sup>40</sup> Mr Chrisp's evidence at Figure 4.

<sup>41</sup> Mr Chrisp's evidence at Figure 4.

<sup>42</sup> Mr Chrisp's evidence at [7.14].

<sup>43</sup> Mr Chrisp's evidence at [7.16].

activity.<sup>44</sup> This represents a middle ground, which enables some intensification while minimising the potential for reverse sensitivity.<sup>45</sup>

*The specific reasons for applying the Reverse Sensitivity Qualifying Matter*

- 5.8 Further intensification around the Te Awamutu Dairy Factory has the potential to exacerbate reverse sensitivity effects.<sup>46</sup> Reverse sensitivity effects are critical to the future of the Te Awamutu Dairy Factory. Therefore the level of development permitted by the MDRS is incompatible with the operations at the Te Awamutu Dairy Factory. This is inappropriate.

*Justification in light of the national significance of urban development*

- 5.9 Fonterra acknowledges the need for increased residential development across New Zealand including in the Waipā District. However, this does not mean residential development at all costs.
- 5.10 Objective 1 of the NPS-UD seeks well-functioning urban environments that enable all people and communities to provide for their social, economic, and cultural wellbeing, and for their healthy and safety, now and into the future.<sup>47</sup> This means a range of different types of land use must be available, including for use by businesses.<sup>48</sup> Well-functioning urban environments also means locating compatible activities close to each other and separating incompatible activities.<sup>49</sup>
- 5.11 In addition, the regional and district planning frameworks clearly demonstrate the importance of the Te Awamutu Dairy Factory as Regionally Significant Industry.<sup>50</sup> There are a range of provisions supporting this proposition.<sup>51</sup>
- 5.12 Overall, the Reverse Sensitivity Qualifying Matter is consistent with the NPS-UD and the national significance of urban development.

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44 Mr Chrisp's evidence at [7.3].

45 Mr Chrisp's evidence at [7.17].

46 Mr Chrisp's evidence at [7.2].

47 Mr Chrisp's evidence at [7.9](a).

48 Mr Chrisp's evidence at [7.9](a).

49 Mr Chrisp's evidence at [7.9](a).

50 Paragraph [3.4] above.

51 Paragraph [4.6] above.

*Costs, benefits and the limits on development capacity as a result of the Reverse Sensitivity Qualifying Matter*

- 5.13 The Reverse Sensitivity Qualifying Matter sought by Fonterra does not further limit development capacity. This is because the Infrastructure Constraint and Stormwater Constraint Qualifying Matters apply to the exact same residential properties that the Reverse Sensitivity Qualifying Matter would apply to.<sup>52</sup> The Reverse Sensitivity Qualifying Matter causes no additional loss of housing capacity because they have the same density controls as the Infrastructure Constraint and Stormwater Constraint Qualifying Matters – in fact the practical impact of the Reverse Sensitivity Qualifying Matter (given the presence of the Infrastructure Constraint and Stormwater Constraint Qualifying Matters over the same area) is to include reverse sensitivity as a matter of discretion for development for three or more dwellings.<sup>53</sup> However, even if the Reverse Sensitivity Qualifying Matter did cause loss of housing density on its own, that would be justified given the very small number of properties affected. Mr Chrisp has assessed the effect of the Reverse Sensitivity Qualifying Matter on development capacity as "negligible".<sup>54</sup>
- 5.14 The Reverse Sensitivity Qualifying Matter is still necessary and an appropriate planning control even though the Infrastructure Constraint and Stormwater Constraint Qualifying Matters apply to the same residential properties:<sup>55</sup>
- (a) It is possible that these other two qualifying matters are resolved in the future; and
  - (b) The rules framework applying to developments that exceed the density constraints in the Reverse Sensitivity Qualifying Matter means that the matters of discretion are particularly associated with reverse sensitivity concerns (as opposed to, say, network capacity).

**Overall conclusion**

- 5.15 Mr Chrisp concludes that the amendments sought by Fonterra to PC26 are more effective and efficient than the existing proposed provisions.

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<sup>52</sup> Mr Chrisp's evidence at [7.3] and Figures 3 and 4.

<sup>53</sup> Mr Chrisp's evidence at [7.7].

<sup>54</sup> Mr Chrisp's evidence at [7.3] and [7.4].

<sup>55</sup> Mr Chrisp's evidence at [7.12].

**6. CONCLUSION**

- 6.1 Medium density residential development should not occur in close proximity to the Te Awamutu Dairy Factory.
- 6.2 While Fonterra supports the provisions of PC26 that already seek to avoid reverse sensitivity effects, a number of further changes are required to reduce the likelihood of land use incompatibility arising. In particular, Fonterra seeks the Reverse Sensitivity Qualifying Matter be included in PC26.
- 6.3 The Reverse Sensitivity Qualifying Matter will not mean no intensification around the Te Awamutu Dairy Factory. Instead, Fonterra seeks an appropriate reduction in the enablement of residential intensification around its operations in the Waipā District. This will better achieve a "well-functioning" urban area in Te Awamutu.

**DATED** 21 April 2023

**D J Minhinnick / P G Senior**  
Counsel for Fonterra Limited

**Appendix: Sections 77J and 77L RMA****SECTIONS 77 J AND 77 L****77J Requirements in relation to evaluation report**

- (1) This section applies if a territorial authority is amending its direct plan (as provided for in section 77G).
- (2) The evaluation report from the specified territorial authority referred to in section 32 must, in addition to the matters in that section, consider the matters in subsections (3) and (4).
- (3) The evaluation report must, in relation to the proposed amendment to accommodate a qualifying matter, -
  - (a) demonstrate why the territorial authority considers –
    - (i) that the area is subject to a qualifying matter; and
    - (ii) that the qualifying matter is incompatible with the level of development permitted by the MDRS (as specified in Schedule 3A) or as provided for by policy 3 for that area; and
  - (b) assess the impact that limiting development capacity, building height, or density (as relevant) will have on the provision of development capacity; and
  - (c) assess the costs and broader impacts of imposing those limits.
- (4) The evaluation report must include, in relation to the provisions implementing the MDRS, -
  - (a) a description of how the provisions of the district plan allow the same or a greater level of development than the MDRS;
  - (b) a description of how modifications to the MDRS as applied to the relevant residential zones are limited to only those modifications necessary to accommodate qualifying matters and, in

particular, how they apply to any spatial layers relating to overlays, precincts, specific controls, and development areas, including-

- (i) any operative district plans spatial layers; and
  - (ii) any new spatial layers proposed for the district plan.
- (5) The requirements set out in subsection (3)(a) apply only in the area for which the territorial authority is proposing to make an allowance for a qualifying matter.
- (6) The evaluation report may for the purposes of subsection (4) describe any modifications to the requirements of section 32 necessary to achieve the development objectives of the MDRS.

**77L Further requirement about application of section 77I(j)**

A matter is not a qualifying matter under section 77I(j) in relation to an area unless the evaluation report referred to in section 32 also –

- (a) identifies the specific characteristic that makes the level of development provided by the MDRS (as specified in Schedule 3A or as provided for by policy 3) inappropriate in the area; and
- (b) justifies why that characteristic makes that level of development inappropriate in light of the national significance of urban development and the objectives of the NPS-UD; and
- (c) includes a site-specific analysis that-
  - (i) identifies the site to which the matter relates; and
  - (ii) evaluates the specific characteristic on a site-specific basis to determine the geographic area where intensification needs to be compatible with the specific matter; and
  - (iii) evaluates an appropriate range of options to achieve the greatest heights and densities permitted by the MDRS (as specified in Schedule

3A) or as provided for by policy 3 while managing the specific characteristics.