

**BEFORE THE INDEPENDENT COMMISSIONERS APPOINTED BY WAIKATO  
REGIONAL COUNCIL**

**In the matter of** the Resource Management Act 1991

**And** a submission and further submissions on Proposed Waikato  
Regional Plan Change 1 – Waikato and Waipā River  
Catchments (PPC1)

**Submitter's Name:** Hamilton City Council

**Submission Number:** 74051

**Hearing Topic:** **BLOCK 2**  
**Parts C1-C6: Policies, Rules and Schedules (most)**

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**LEGAL SUBMISSIONS  
ON BEHALF OF HAMILTON CITY COUNCIL – BLOCK 2**

**Dated 4<sup>th</sup> July 2019 (for hearing appearance on 8<sup>th</sup> July 2019)**

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**TOMPKINS | WAKE**

Solicitor: Marianne Mackintosh  
Marianne.Mackintosh@tompkinswake.co.nz

Westpac House  
430 Victoria Street  
PO Box 258  
DX GP 20031  
Hamilton 3240  
New Zealand  
Ph: (07) 839 4771  
Fax: (07) 839 4913  
tompkinswake.co.nz

## **MAY IT PLEASE THE HEARING PANEL**

### **SCOPE AND PURPOSE OF SUBMISSIONS**

1. These submissions are made on behalf of Hamilton City Council (“HCC”). HCC made a submission and further submissions on Proposed Plan Change 1 (“PPC1”).<sup>1</sup> In accordance with the format of the hearings schedule, these submissions only address those aspects of HCC’s submissions (and further submissions) relating to the Block 2 topics. These submissions rely on the expert planning evidence of Mr Ryan who proposes amendments to the section 42A<sup>2</sup> author’s recommendations in response to the relief sought by HCC in its original submission.

### **INTRODUCTION**

2. Mr Ryan has prepared and lodged a statement of evidence in chief on Block 2 which sets out in detail the relief that is sought by HCC in response to the s42A report and the notified PPC1. Mr Ryan provides a comprehensive evaluation and rationale in support of the relief being sought by HCC, the basis of which is anchored in the mandatory requirement for the Waikato Regional Plan to give effect to the Waikato Regional Policy Statement, the National Policy Statement on Urban Development Capacity (“NPS-UDC”), the National Policy Statement on Freshwater Management (“NPS-FM”) and the Vision and Strategy for Waikato River (“Vision and Strategy”).
3. Considering the statutory framework within which PPC1 is being promulgated, the relief being sought by HCC as set out in Mr Ryan’s evidence is the most appropriate to give effect to the objectives of PPC1<sup>3</sup>. Accordingly, HCC seeks that the Commissioners accept the relief that is detailed in Mr Ryan’s evidence for the reasons set out in therein, and as outlined in these submissions.

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<sup>1</sup> Submission number 74051.

<sup>2</sup> Section 42A of the Resource Management Act 1991 (“RMA”).

<sup>3</sup> As sought to be amended in the relief sought by HCC.

4. These submissions:
  - (a) Briefly re-caps HCC's position on PPC1 and its original submission and the key issues for HCC;
  - (b) Briefly addresses the legal framework in relation to the amendments supported and/or proposed by Mr Ryan in his evidence;
  - (c) Briefly summarises the relief sought by HCC as detailed in Mr Ryan's evidence; and
  - (d) Concludes by reiterating HCC's position on the matters addressed in its submission and evidence on Block 1 and Block 2.

#### **BACKGROUND TO HCC'S POSITION**

5. By way of background, the position of HCC in relation to Block 1 and PPC1 is summarised as follows:
  - (a) The HCC original submission sets out its position on PPC1. HCC has not challenged the overall framework of PPC1 or the process of its development. Indeed, HCC acknowledges that it will need to make significant funding provision for the necessary upgrades to its three-waters infrastructure, including its wastewater treatment plant and stormwater network. The submission is narrowly focused on matters essentially relating to municipal point source discharges, (except for the amendment sought to Schedule C to exclude Hamilton Zoo animals from its application).
  - (b) Regarding the Block 1 topics, HCC proposed amendments, supported by the evidence of Mr Ryan, which are considered to give effect to the relevant higher order documents. Accordingly, to the extent that there may be "tensions" between the objectives, policies and purpose of each, the relief sought seeks to reconcile such differences. As the Commissioners know, the relevant high order documents are the NPS-UDC, the NPS-FM and the Vision and Strategy.

- (c) HCC was and remains concerned that PPC1 does not give effect to the NPS-UDC. HCC signalled at the Block 1 hearing that HCC's evidence on Block 2 will set out the basis for its position regarding the NPS-UDC.

#### **Key issues for HCC**

- 6. As outlined in legal submissions on Block 1, in accordance with its role and functions as a territorial authority, HCC undertakes a range of municipal activities relating to "three-waters". This includes water treatment processes, wastewater treatment discharges, wastewater conveyance, closed landfills, leachate discharges and stormwater discharges. HCC holds a suite of resource consents from WRC authorising point source discharges resulting from these activities. It is critical that HCC is enabled to continue to perform its functions to provide "three-waters" services to the City, which necessarily includes renewal of the relevant resource consents it currently holds.
- 7. Accordingly, the staged approach to the achievement of the Vision & Strategy as provided for in PPC1 is critical for HCC to enable it to achieve the outcomes sought through the implementation of PPC1. The "policy settings" for municipal discharges are the focus of HCC's relief in Block 2, following on from the relief it seeks on the objectives as addressed in Block 1.
- 8. Three key issues for HCC arise from PPC1:
  - (a) PPC1 provides no specific recognition of the requirements the Waikato Regional Policy Statement ("RPS") and the NPS-UDC places on HCC to accommodate urban growth; it does not give effect to the NPS-UDC or the urban growth components of the RPS.
  - (b) HCC seeks PPC1 provisions that will provide it flexibility regarding how it fulfils its various statutory responsibilities and functions

while also meeting PPC1's challenging water quality targets. In this regard, HCC seeks retention of provisions allowing four things:

- (i) Continuation of municipal point source discharges under existing consent terms until the consents expire;
  - (ii) A staged approach to achieving the 80-year targets;
  - (iii) Employment of the Best Practicable Option; and
  - (iv) Employment of offset measures.
- (c) HCC is concerned about the certainty of the drafting of the provisions in PPC1 and how those provisions will be implemented.

#### **LEGAL FRAMEWORK FOR CONSIDERING THE RELIEF SOUGHT BY HCC**

9. In all respects, Mr Ryan's evidence provides a very detailed analysis of the section 42A recommendations and the evidential bases for the relief sought by HCC. This includes the legal and planning framework, and a section 32/32AA evaluation. I do not intend to repeat that analysis, except to highlight the key issues with respect to the hierarchy of documents and to make the point that the amendments proposed by Mr Ryan are considered to be the "most appropriate" to achieve the objectives of PPC1 and give effect to the NPS-UDC, NPS-FM and the Vision and Strategy.
10. In that regard, having heard the various submitters' evidence on Block 1, following the Block 2 (and Block 3) hearings, the Commissioners must determine what objectives are the most appropriate to give effect to the NPS-UDC, NPS-FM and the Vision and Strategy. HCC has presented its evidence on the relief it seeks in relation to the proposed objectives of PPC1. In my submission, for the reasons outlined in Mr Ryan's evidence on Block 1, the relief sought by HCC is the most appropriate to give effect to the higher order documents cited above.
11. Mr Ryan's evidence addresses the requirements of the NPS-UDC. In summary, the NPS-UDC recognises the national significance of urban

environments and the need to enable such environments to develop and change; and the national significance of providing sufficient development capacity to meet the needs of people and communities and future generations in urban environments. This necessarily means that HCC (and, indeed, Waikato Regional Council) must provide sufficient development capacity in resource management plans, supported by infrastructure, to meet demand for housing and business space.

12. It obviously follows that such additional growth and the mandatory directive to provide capacity for the same places greater demand and pressure on “3-waters” services. Simply put, more people mean more volumes of the “3 waters” which must be reticulated and consented. This includes wastewater and stormwater. Therein lies the tension – how to ensure that the NPS-UDC, NPS-FM and the Vision and Strategy are given effect to.
13. As outlined in legal submissions on Block 1, to the extent that there may be tension or conflict in reading together or reconciling the directives of the NPS-FM and Vision and Strategy with those of the NPS-UDC, in my submission two of the caveats described in *King Salmon* apply – namely, incompleteness and/or uncertainty. Relevantly, while it has the status of a National Policy Statement as provided for by the settlement legislation, it is nevertheless relevant that the Vision and Strategy is not a document that was promulgated under the RMA. It therefore follows that the Vision and Strategy does not set “environmental bottom lines” in the sense that the Coastal Policy Statement did in the context of the decision of the Supreme Court in *King Salmon*<sup>4</sup>. Furthermore, the Vision and Strategy was passed into legislation prior to the decisions of the Courts in the *King Salmon* line of authority – as was the Waikato Regional Policy Statement.
14. That is not intended to undermine the critical importance of the Vision and Strategy and the significant weight that must be attributed to it.

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<sup>4</sup> *Environmental Defence Society v New Zealand King Salmon Company Limited* [2014] NZSC 38.

Rather, it is relevant to the Commissioners' evaluation of whether the proposed provisions of PPC1 achieve the purpose of the RMA. Taking this point a step further, it is noted that the Waikato Regional Policy Statement was updated on 17 December 2018 to incorporate the minimum targets for sufficient, feasible development capacity for housing which, in turn, gave effect to the NPS-UDC.<sup>5</sup> Both have been developed within the statutory framework of the RMA and together post-date the Supreme Court's decision which was made in 2014.

15. It is therefore important that the Commissioners consider the purpose of the RMA when making decisions on PPC1. In doing so, the outcomes are more likely to provide a decision-making framework for the subsequent resource consent applications to follow, that can be accurately described as "competently prepared".<sup>6</sup> In short, the achievement of the Vision and Strategy cannot be predicated on doing so "at any cost".
16. Bearing this in mind, Mr Ryan's evidence on Block 2 nevertheless demonstrates that the "higher order" policy documents in play can be reconciled, in the sense that the relief sought gives effect to both the Vision and Strategy as well as the Waikato Regional Policy Statement and the NPS-UDC. He provides an analysis of the relevant planning documents that establishes a comprehensive evidential basis upon which the Commissioners can rely to grant the relief sought by HCC.
17. The evaluation for determining what is most appropriate is prescribed by section 32/section 32AA of the RMA. Mr Ryan has also provided an evaluation under section 32 of his proposed amendments. Whether the Commissioners consider this to be a section 32AA evaluation or not, the key aspects of section 32 nevertheless apply. Mr Ryan will be able to address the Commissioners in response to questions of his evaluation.

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<sup>5</sup> Evidence in chief of Mr Ryan (Block 2) dated 30 April 2019, at paragraph 35, page 5.

<sup>6</sup> *R J Davidson Family Trust v Marlborough District Council* [2018] NZCA 316.

18. To conclude, in my submission the relief sought by HCC (detailed in Mr Ryan's evidence) - that seeks amendments to proposed policies of PPC1 and seeks additional policies – is the most appropriate to achieve the purpose of the RMA. That proposition is discussed in the evidence of Mr Ryan.

## **EVIDENCE OF MR RYAN**

### **Why the amendments are most appropriate to achieve the objectives of PPC1**

19. As the Commissioners will be well-aware, the RMA sets out the statutory functions of regional councils and the need for a section 32/32AA evaluation for any proposed plan change pursuant to Schedule 1 of the RMA. The Commissioners will be familiar with the line of authorities regarding the requirements of section 32 in the context of a proposed plan change.<sup>7</sup> I do not repeat those here. The critical point when considering the policies of PPC1 is to determine what is the “most appropriate” method. Case law has determined that the “most appropriate” method does not need to be the superior method.<sup>8</sup>
20. Rather, section 32 requires a value judgment as to what, on balance, is the most appropriate when measured against the relevant objective(s). Case law has determined that “appropriate” means “suitable.”<sup>9</sup> In *Royal Forest and Bird Protection Society of New Zealand Inc v Whakatane District Council*,<sup>10</sup> the Court held that where the purpose of the RMA and the objectives of the plan can be met by a less restrictive regime then that regime should be adopted. Such an approach reflects the requirement to examine the efficiency of the provision. It also achieves the purpose of the RMA by enabling people to provide for their well-being while addressing the effects of their activities.

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<sup>7</sup> *Long Bay-Okura Great Park Society Inc v North Shore City Council*(A078/2008).

<sup>8</sup> *Rational Transport Society Incorporated v New Zealand Transport Agency* [2012] NZRMA 298 (HC), 30.

<sup>9</sup> *Rational Transport Society Incorporated v New Zealand Transport Agency* [2012] NZRMA 298 (HC) at 45.

<sup>10</sup> *Royal Forest and Bird Protection Society of New Zealand Inc v Whakatane District Council* [2017] NZEnvC 51 at [59].



21. The amendments sought by Mr Ryan are, in my submission, the most appropriate in achieving the objectives of PPC1 and the purpose of the RMA, for the reasons explained in Mr Ryan's evidence. In that regard, HCC wishes to emphasise the need for PPC1 to reflect the reality of the urban growth in the Waikato Region. HCC has statutory obligations to provide sufficient infrastructure for the City's population, including the provision of reticulated networks, which necessarily include point source discharges. Hamilton City is experiencing significant population growth and is currently implementing its Pukete 3 project to expand the wastewater treatment plant's capacity to accommodate predicted urban growth and maintain compliance with its discharge consent until it expires in 2027.<sup>11</sup>
22. In that regard, HCC seeks that the applicable policies in PPC1 are amended as sought in Mr Ryan's evidence (including the addition of new policies, where relevant), to achieve the Vision and Strategy while also enabling HCC to meet its statutory obligations as a territorial authority.
23. I now address Mr Ryan's proposed changes.

#### **Policy 5: Staged approach**

24. Mr Ryan on behalf of HCC seeks the following change to Policy 5:

*To recognise that:*

...

*b. Changes in practises and activities that discharge nitrogen, phosphorus, sediment and microbial pathogens need to start ~~immediately~~ by 2026, unless provided for otherwise in this plan;*  
*and*

*c. ~~The rate of~~ These changes will need to be staged over the coming decades to minimise social, economic and cultural*

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<sup>11</sup> Evidence in chief of Mr Ryan (Block 2) dated 30 April 2019, at paragraph 73, page 11

*disruption and enable innovation and new practices to develop;  
and...*

25. The relief sought by HCC is more appropriate as it is more effective and efficient at achieving the objectives than the policy as proposed by the section 42A report. It is critical to HCC that any planning framework provided for by PPC1 is realistic to implement. In that regard, staging the implementation of measures, changing from “immediately” to “by 2026” provides clear policy guidance that is consistent with Objective 4 and is more realistic for HCC to achieve, monitor and implement. I do not intend to repeat the reasons provided in Mr Ryan’s section 32 analysis of the proposed amendments however draw the Commissioners attention to the need for any planning framework of PPC1 to be realistic and achievable for local authorities to implement.
26. These submissions in conjunction with the evidence of Mr Ryan filed on behalf of HCC set out the basis for this position.

**New Policy 5a: New urban development**

27. HCC’s original submission seeks for Policy 6 to be amended by including reference to a new Policy 5a that the submission seeks to allow new urban development. The section 42A report recommends that Policy 6 is deleted, and its text included without reference to any new policy regarding new urban development. While HCC now agrees that this recommendation is appropriate, it considers that a new policy 5a is still required to ensure PPC1 gives effect to the NPS-UDC and RPS.
28. The NPS-UDC requires all local authorities to ensure that at any one time there is sufficient development capacity available within the next thirty years to meet demand for work and business places and dwellings. The RPS gives effect to the NPS-UDC by setting minimum targets for sufficient, feasible development capacity for housing in the Waikato Region. HCC

considers that PPC1 needs to recognise the requirements within the RPS for it to accommodate urban development.

29. HCC considers that new Policy 5a is the most appropriate method to achieve the objectives of PPC1. In that regard, Mr Ryan's section 32 assessment of new Policy 5a concludes that:

"The proposed new Policy fills a gap in the policy framework recommended in the s 42A report. By providing policy direction for decisions about new urban development it is more effective than the recommended framework at achieving Objective 2. It is also more efficient, because it enables the environmental, social and economic benefits of the new urban development to be realised. Accordingly, the addition of new Policy 5a will make the policy framework introduced by PPC1 more appropriate to achieve the objectives"

30. In my submission, the relief sought by HCC - in that Policy 5a enhances flexibility by allowing new urban development – is the most appropriate to achieve the purpose of the RMA and gives effect to the NPS-UDC. These submissions in conjunction with the evidence of Mr Ryan filed on behalf of HCC set out the basis for this position.

**Policy 10: Provide for point source discharges of regional significance**

31. The amended policy proposed by Mr Ryan on behalf of HCC fills the gap in the policy recommended by the s 42A report. The amendments have the effect of providing for new, and the modification of existing, regionally significant facilities. This is critical for HCC to ensure it can meet its statutory obligations to provide necessary infrastructure and continually provide for the growth experienced in Hamilton City by obtaining updated or renewed resource consent for point source discharges.
32. The amendments proposed satisfy the requirement of section 32 that the policies are the "most appropriate" to meet the objectives of PPC1. In that regard, Mr Ryan on behalf of Council has considered that the amendments are more effective at achieving PPC1's objectives 1,2,3 and 4 and concludes that the Policy is "more efficient because it enables the

environmental, social and economic benefits that will be realised from the upgraded, developed and new facilities". It follows that the amendments also meet the purpose of the RMA in that it enables people and communities within the Hamilton City to provide for their social, economic and cultural wellbeing.

**New policy 10a: revision of existing municipal and industrial point source discharge**

33. In its original submission, HCC sought an additional Policy to secure the proposition from the section 32 Report and PPC1<sup>12</sup> that existing point source discharge consents will be allowed to run their course on their current terms until they expire and only when those consents are renewed would those consented discharges be required to comply with PPC1. This was not recommended by the s 42A report. HCC considers that without the inclusion of the proposed Policy 10a, HCC may be required to comply with PPC1 at an earlier stage, which would be an inequitable and unacceptable outcome, given the cost it would impose on Council and the necessary resources HCC would need to expend to comply with PPC1 at an earlier date.
34. Furthermore, Mr Ryan's evidence on behalf of HCC provides a detailed s32 assessment concluding that such a situation, whereby HCC's existing resource consents were required to comply before their expiry date, would add to the cost, and result in a loss of efficiency in achieving Objectives 1, 2 and 4. Mr Ryan considers that the addition of Policy 10a will make the policy framework recommended in the s 42A Report more appropriate to achieving the objectives.

**Policy 11: Application of Best Practicable Option and mitigation or offset of effects to point source discharges**

35. The amendments proposed to Policy 11 by Mr Ryan on behalf of HCC clarify the required location and effect of offset measures relative to the

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<sup>12</sup> Evidence in chief of Mr Ryan (Block 2) dated 30 April 2019 at Attachment E, pages 38 and 39.

point source they are offsetting. This is critical to HCC as it avoids unnecessary expense that would be involved in avoiding all minor adverse effects. The alternative is unrealistic for HCC as it would be difficult to implement, monitor and enforce. In that regard, Mr Ryan's section 32 analysis further concludes that the proposed amendments are more efficient and effective at achieving Objectives 1, 2 and 3 and is accordingly more appropriate.

**Policy 12: Considering point source discharges**

36. The amendments to Policy 12 seek to clarify decision-making, which is critical for HCC to ensure effective and efficient compliance with PPC1. As set out in Mr Ryan's evidence, the amendments sought will significantly improve the efficiency and effectiveness of achieving objectives 1 to 4. The amendments optimise the environmental, social and economic outcomes and therefore better meet the purpose of the Act.

**Policy 13 Point source consent duration**

37. The amendments proposed by Mr Ryan on behalf of HCC clarify that providing certainty for investment in offset measures will be considered when determining the appropriate duration for point source discharge consent. If expenditure on offset measures were ignored, these consents may be issued for unreasonably short periods. This would limit the appeal of offset measures and the speed and efficiency of progress towards achieving Objectives 1 to 4.
38. Furthermore, Mr Ryan in his section 32 assessment concludes that the amended Policy will be more efficient and effective at achieving Objectives 1, 2, 3 and 4 and is therefore more appropriate to achieve the objectives.

## CONCLUSION

39. HCC accepts that it will be required to invest significant capital expenditure to upgrade and manage its “3-waters” infrastructure to give effect to the NPS-FM and Vision and Strategy. However, this mandate must be reconciled with the NPS-UDC requirement for HCC to provide sufficient feasible development capacity for urban growth.
40. PPC1 is required to give effect to the “higher order” planning documents described above, and to achieve the purpose of the RMA. The relief sought by HCC, as detailed in the evidence of Mr Ryan, which provides a comprehensive evidential basis and section 32 evaluation, will both give effect to the relevant planning documents and achieve the purpose of the RMA. Accordingly, it is submitted that the relief is the most appropriate and should be accepted by the Commissioners.



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**M Mackintosh**  
Counsel for Hamilton City Council

4<sup>th</sup> July 2019