

**BEFORE AN INDEPENDENT HEARINGS PANEL
APPOINTED BY WAIMAKARIRI DISTRICT COUNCIL**

UNDER the Resource Management Act 1991

IN THE MATTER of submissions on the Proposed Waimakariri District Plan and Variation 1 by Woodwater Limited (Submitter ID 215)

AND Hearing Stream 12E – Rangiora, Kaiapoi, Woodend, Variation 1

LEGAL SUBMISSIONS ON BEHALF OF WOODWATER LIMITED

Date: 02 August 2024

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1 INTRODUCTION

- 1.1 In its submission on the Proposed District Plan, Woodwater Limited sought the rezoning of land on Judsons Road, Woodend Beach Road, Copper Beach Road and Petries Road (the Land) from Rural Lifestyle to residential. The submission was broad in scope in the sense that it sought a range of different residential zones, a matter that is relevant to the issue of scope in the context of Variation 1.
- 1.2 In its submission on Variation 1, Woodwater sought that the Land be rezoned as Medium Density Residential Zone (MRZ), this being the sole option available.
- 1.3 The Land subject to the submission includes land owned by another submitter (Cheryl Judson) and a further submitter (Perforated Sheet Specialists Limited). Ms Judson sought a rezoning to General Residential Zone (GRZ), and the further submission by Perforated Sheet Specialists Ltd supported the relief sought by Woodwater.
- 1.4 The matters to be addressed in these submissions are:
- (a) The Officer's Report;
 - (b) The Issue of Scope; and
 - (c) A legal perspective on the issue of wetlands.

2 OFFICER'S REPORT

- 2.1 The rezoning sought by Woodwater is addressed at Section 9.4 of Mr. Wilson's s 42A Report. Mr. Wilson has assessed the proposed rezoning against the relevant provisions of the National Policy Statement on Urban Development 2020 and the Canterbury Regional Policy Statement, his conclusion being, amongst others, that the proposed rezoning will provide significant development capacity and will contribute to a well-functioning urban environment.
- 2.2 Mr. Wilson's overall recommendation is that the Land be rezoned to MRZ subject to some amendments, including appropriate rules that address existing transport network constraints. Changes to the ODP and associated narrative were also sought by Mr. Wilson to respond to expert urban design advice received from Mr. Jolly.
- 2.3 The matters identified in Mr. Wilson's s 42A Report have been addressed in supplementary evidence filed on behalf of Woodwater by:
- (a) David Smith- Transportation
 - (b) David Compton-Moen – Urban Design

- (c) Andrew Hall – Engineering; and
- (d) Ivan Thomson – Planning.

- 2.4 Mr. Thomson's supplementary planning evidence includes an amended ODP/ narrative, together with a set of specific transportation related rules directly applicable to what is to be referred to as the South Woodend Development Area. In brief, these rules apply to development of the Land beyond 170 dwellings, this being the extent of development which can be enabled without any requirement to upgrade the transportation network.
- 2.5 Mr Smith's evidence discusses progress with the Woodend Bypass project which is identified by the Government as a Road of National Significance. Mr. Smith also identifies other upgrades to the transportation network which could enable further development should there be any unexpected delays to the Woodend Bypass project. The efficacy and appropriateness of the alternative upgrades would be tested through a restricted discretionary activity consent process.
- 2.6 As matters currently stand, it is understood that the supplementary evidence satisfactorily addresses all the matters identified in Mr. Wilson's s 42A Report. It is expected that this will be confirmed by Mr. Wilson at the commencement of Hearing Stream 12E.

3 THE ISSUE OF SCOPE

- 3.1 In his parallel report on Variation 1, Mr Wilson reached the view that a rezoning of the Land to MRZ was not "on" Variation 1. As such, he concluded that there is no scope under Variation 1 to rezone the land to MRZ.
- 3.2 There are two separate scope tests to consider in order to determine whether a rezoning of the Land to MRZ is within the Panel's jurisdiction. Only one of these tests needs to be satisfied.
- 3.3 The first test is whether a rezoning to MRZ is within the scope of the Woodwater submission on the Proposed District Plan. On this question, the approach adopted by the Courts is summarised in *General Distributors Ltd v Waipa* DC (2008) 15 ELRNZ 59:

[58 In relation to amendments proposed to plan changes, the Court in Countdown Properties formulated the following test at 166:

“The local authority or Tribunal must consider whether any amendment made to the plan change as notified goes beyond what is reasonably and fairly raised in submissions on the plan change. ... It will usually be a question of degree to be judged by the terms of the proposed change and of the content of the submissions.”

[59] In Royal Forest and Bird Protection Society Inc, Pankhurst J at 413 adopted the Countdown Properties test and went onto comment as follows:

“... it is important that the assessment of whether any amendment was reasonably and fairly raised in the course of submissions, should be approached in a realistic workable fashion rather than from the perspective of legal nicety.”

[60] This approach requires that the whole relief package detailed in submissions be considered when determining whether or not the relief sought is reasonably and fairly raised in the submissions — see *Shaw v Selwyn District Council* [2001] 2 NZLR 277 at [44].

- 3.4 In the present case, Woodwater's submission on the Proposed District Plan is very broad in scope. It is summarised in the Council's Summary of Submissions as follows:

*Rezone the identified land on Judsons Road, Woodend Beach Road, Copper Beach Road and Petries Road, Woodend... for residential use such as General Residential Zoning **and/or Medium Density Residential Zone** with [sic] incorporating the Medium Density Residential Standards identified in the Resource Management (Enabling Housing Supply and Other Matters) Bill 2021. Large Lot Residential zoning may also be appropriate for part of the identified land.*
[Emphasis added]

- 3.5 Given that MRZ has been explicitly sought by Woodwater, the test of whether this form of rezoning is fairly and reasonably within the scope of its submission is comfortably met.
- 3.6 That being the case, the alternative test of whether a rezoning of the land to MRZ is "on " Variation 1 does not need to be considered. It is fundamentally moot.

4 IDENTIFICATION OF WETLANDS – A LEGAL PERSPECTIVE

- 4.1 The Panel may have noted that in the original ODP dated 04 March 2024¹ three wetlands were identified, two on the Land (Areas 2 & 3) and a third on LLRZ land to the south (Area 4). This land is owned by an associate company of Urban Estates Ltd, who intend to develop the Land in conjunction with Woodwater.
- 4.2 Areas 2 & 3 have subsequently been reassessed by Mr. Taylor of Aquatic Ecology Limited, the conclusion being that neither of these areas warrant wetland status. Mr. Taylor has concluded that on his original evaluation, these areas were induced wetlands because of a defective irrigation system, which is now in disuse.
- 4.3 Mr. Taylor's original analysis referenced Guidelines issued by the Ministry for the Environment for Environment: *Defining "natural wetlands" and "natural inland wetlands"* (MFE 2021 Guidelines). The MFE 2021 Guidelines set out, amongst others, MFE's opinion as to how the definition of "wetlands" in the RMA should be interpreted. The Guidelines introduced the term

¹ Attached to Mr. Thomson's evidence of that date.

"induced wetlands", being wetlands that have resulted from any human activity including, but not limited to, wetlands induced through stock pugging, overflowing culverts and through roading works.

4.4 In previous legal submissions, I have expressed caution as to the weight, if any, to be given to Government guidelines.²

4.5 In respect of the MFE 2021 Guidelines, the Environment Court in *Federated Farmers v Northland Regional Council* NZEnvC 016 was highly critical of these Guidelines being placed before it in the context of a First Schedule appeal on the provisions of the Northland Regional Plan.

4.6 The Court noted that the Guidelines included a disclaimer which made it clear they did not have any regulatory force:

[20] It does not disclose authorship and is not signed as a regulation or by a Minister. It says it was published in September 2021 by the Ministry for the Environment. The document is attached as "A". The disclaimer makes it clear it has no regulatory force:

(a) "The information does not alter the laws of New Zealand, other official guidelines, or requirements; and

(b) It does not constitute legal advice or take responsibility for its accuracy.

...

[25] If the guideline at A is intended to instruct the Court, then we cannot and should not take it into account. For current purposes, we understand our statutory duty is to determine the case devoid of any sector influence.

....

[29] If jurisdiction is to be removed from the discretion of the Court, then the same should be done clearly rather than by implication. We have put aside any implied directions in the guideline, but the entire Court is uneasy at the implications of the documents and its political ramifications.

4.7 In a nutshell therefore, whether a particular area qualifies as a wetland depends on an interpretation of that term as contained in the Act, and the MFE 2021 Guidelines are not to be given weight in this exercise.

² Legal Submissions on behalf of Survus Ltd, 12 July 2024, Hearing Stream 12C.

4.8 Wetlands are defined in the Act as follows:

***Wetland** includes permanently or intermittently wet areas, shallow water, and land water margins that support a natural ecosystem of plants and animals that are adapted to wet conditions.*

4.9 So, the definition does not refer to induced wetlands which may have resulted as a wholly unintended byproduct of human activity, such as, in the present case, a leaky irrigation system.

4.10 That aside, importantly the definition in the Act requires that for an area to qualify as a wetland it must support a natural ecosystem of plants **and** animals i.e. both must be present.³ Mr Taylor's reassessment of Areas 2 & 3 confirm that neither are present and, accordingly, wetland status does not apply to these areas.

4.11 For completeness, it is noted that the wetland originally identified as Area 4 is not disputed as being a wetland. Indeed, the intention is to enhance its natural qualities as part of a package of environmental measures to be implemented on development of the Land.

Gerard Cleary

12 August 2024.

³ In a prosecution context, these dual requirements were emphasised in *Page & Crosbie v Greater Wellington Regional Council* [2024] NZCA 51.