BEFORE THE HEARING PANEL ON PROPOSED PLAN CHANGE 43 TO THE OPERATIVE TAUPO DISTRICT PLAN

IN THE MATTER of the Resource management Act 1991 (the Act)

AND

IN THE MATTER of a Proposed Plan Change 43 to the Taupo District Plan

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Legal submissions on behalf of the Taupo Industrial Estate Limited ("TIEL") in relation to PC43 – Site 7
Dated: 8 September 2023

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MAY IT PLEASE THE HEARING PANEL

1. These legal submissions are filed on behalf of Taupo Industrial Estate Limited ("TIEL"). TIEL made a submission in support of Proposed Plan Change 43 to the Taupo District Plan ("PC43"), specifically in relation to "Site 7".

INTRODUCTION

2. TIEL has filed two statements of evidence in relation to PC43, namely:
   (a) Statement of evidence of Judith Makinson (Transportation); and
   (b) Statement of evidence of Gareth Moran (Planning).

3. These statements of evidence support PC43 insofar as it relates to Site 7. Mr Moran essentially concurs with the section 42A Report ("s42A") author, on behalf of the Taupo District Council ("TDC").

4. As noted in the evidence for TIEL, TIEL owns Site 7 in its entirety and has lodged resource consents for mixed "industrial" use activities with TDC. TIEL supports the proposed re-zoning of Site 7 as this will address an anomaly in the operative Taupo District Plan due to the current rural zoning of Site 7.

PURPOSE AND SCOPE OF SUBMISSIONS

5. These submissions will:
   (a) Briefly address the statutory framework for considering PC43.
   (b) Set out TIEL's position, with reference to the evidence filed on behalf of TIEL.
   (c) Address the issues arising from the relevant submissions, specifically:
      (i) The consent notices on the title for Site 7;
      (ii) Trade competition;

(iii) Industrial Zone/Residential Zone interface;

(iv) Submission on behalf of Climate Action Taupo; and

(v) Submission on behalf of the Waikato Regional Council.

(d) Provide a conclusion and introduce the witnesses for TIEL.

STATUTORY FRAMEWORK

6. Counsel anticipates that legal counsel for TDC will provide advice to the Hearing Panel as to the relevant statutory framework applying to PC43 and the relevant legal tests. For completeness, a summary of the statutory framework is noted as follows.

7. The decision in *Colonial Vineyard Limited v Marlborough District Council,*[1] which amended (and expanded on) the list of mandatory RMA requirements identified in the earlier decisions of Long Bay-Okura Great Park Society Incorporated v North South *City Council*[2] and *High-Country Rosehip Orchards Ltd v Mackenzie District Council,*[3] summarised the statutory requirements for a plan change. These requirements are set out as follows (footnotes in original decision are not reproduced):

> A. General requirements
>
> 1. A district plan (change) should be designed to accord with – and assist the territorial authority to carry out – functions so as to achieve the purpose of the Act
>
> 2. The district plan (change) must also be prepared in accordance with any regulation (there are none at present) and any direction given by the Minister for the Environment.
>
> 3. When preparing its district plan (change) the territorial authority must give effect to any national policy statement or New Zealand Coastal Policy Statement
>
> 4. When preparing its district plan (change) the territorial authority shall:
>
> (a) have regard to any proposed regional policy statement;
> (b) give effect to any operative regional policy statement.
>
> 5. In relation to regional plans:

[1] [2014] NZEnvc55, para [17].
[2] Decision A78/2008 at para [34].
[3] [2011] NZEnvC 387.

(a) the district plan (change) must not be inconsistent with an operative regional plan for any matter specified in section 30(1) or a water conservation order; and

(b) must have regard to any proposed regional plan on any matter of regional significance etc.

6. When preparing its district plan (change) the territorial authority must also:
   - have regard to any relevant management plans and strategies under other Acts, and to any relevant entry in the Historic Places Register and to various fisheries regulations to the extent that their content has a bearing on resource management issues of the district; and to consistency with plans and proposed plans of adjacent territorial authorities;
   - take into account any relevant planning document recognised by an iwi authority; and
   - not have regard to trade competition" or the effects of trade competition;

7. The formal requirement that a district plan (change) must also state its objectives, policies and the rules (if any) and may state other matters.

B. Objectives [the section 32 test for objectives]

8. Each proposed objective in a district plan (change) is to be evaluated by the extent to which it is the most appropriate way to achieve the purpose of the Act.

C. Policies and methods (including rules) [the section 32 test for policies and rules]

9. The policies are to implement the objectives, and the rules (if any) are to implement the policies;

10. Each proposed policy or method (including each rule) is to be examined, having regard to its efficiency and effectiveness, as to whether it is the most appropriate method for achieving the objectives of the district plan taking into account:

    (i) the benefits and costs of the proposed policies and methods (including rules); and

    (ii) the risk of acting or not acting if there is uncertain or insufficient information about the subject matter of the policies, rules, or other methods; and

    (iii) if a national environmental standard applies and the proposed rule imposes a greater prohibition or restriction than that, then whether that greater prohibition or restriction is justified in the circumstances.

Rules

11. In making a rule the territorial authority must have regard to the actual or potential effect of activities on the environment.

12. Rules have the force of regulations.

13. Rules may be made for the protection of property from the effects of surface water, and these may be more restrictive than those under the Building Act 2004.

14. There are special provisions for rules about contaminated land.

15. There must be no blanket rules about felling of trees in any urban environment.

E. Other statutes:

16. Finally territorial authorities may be required to comply with other statutes.

F. (On Appeal)

17. On appeal the Environment Court must have regard to one additional matter the decision of the territorial authority.

8. In my submission, PC43 insofar as it relates to Site 7 satisfies these tests, on the basis that it:

(a) Accords with and assists the Council to carry out its functions to achieve the purpose of the Act.[4]

(b) Gives effect to relevant National Policy Statements.[5]

(c) Has regard to a proposed regional policy statement[6] and gives effect to the operative Waikato Regional Policy Statement.[7]

(d) Has regard to the Waikato Regional Plan, including proposed Plan Change 1 to the same.

(e) Proposes rules which have regard to the actual or potential effect of the activities on the environment.

(f) Satisfies the requirements of section 32 by achieving the objectives of PC43 (Site 7) and implementing the relevant policies; and

(g) Achieves the purpose of the RMA.

TAUPO INDUSTRIAL ESTATE

9. TIEL owns Site 7 ("Site"). It has lodged resource consent to develop the Site in a manner which aligns with an industrial zoning. As part of that application, TIEL has sought to remove the consent notices which refer to the 2008/2009 land use consent held by TDC ("TDC LUC").

[4] RMA sections 31, 72, and 74(1).
[5] RMA section 75(3).
[6] Change 1 to the Waikato Regional Policy Statement.
[7] RMA section 75(3)(c).

10. The TDC LUC will not be implemented. As Mr Moran states in his evidence, the so-called "campus" precinct will never be realised.[8] There are no plans for a tertiary development at the Site and TDC does not own the land even if such a proposal were to be considered.

11. In my submission, the current rural zoning of the Site is an anomaly. It is not suitable for productive use.[9] The consent notices on the title are essentially redundant and the resource consent application on behalf of TIEL will remove that notice. It simply makes sense to re-zone the Site to Industrial Zone.

12. Mr Moran summarises the anomaly in his evidence[10]:

> Accordingly, the development for the Site, intended by the Masterplan of 2008 (14+ years ago), is no longer being progressed. Indeed, while the residential development anticipated by the Masterplan has progressed following the "master plan" land use consent being granted, the Site has remained undeveloped (except for the existing Westervelt commercial building). It is TIEL understanding that there are no plans by TDC to develop the Site for "campus" use. The feasibility of a tertiary institute/University or similar, for the Site marginal at best. Relevantly, TDC has no plans to facilitate a similar development. The consent notices are essentially redundant. TIEL intends to apply for the removal of these consent notices in due course.

13. The section 32 evaluation reflects this where it states:

> Area 7 Napier Road is not identified in these strategic planning documents, nor would it constitute 'significant development capacity' for the purposes of Policy 8. However, as a rurally zoned site, bounded on three sides by Taupō's urban area, and the eastern boundary is demarcated by the East Taupō Arterial, the site is seen as being a co-ordinated and continuous extension of the existing Crown Road Industrial Area, it is therefore considered that rezoning this area to support Business (Industrial) capacity would achieve Objective 1 and Policy 1 of the NPS-UD.[11]

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[8] Statement of Evidence of Gareth Moran, 30 November 2022, paragraph 16.

[9] The Site has multiple constraints in the context of productive use: it is very small, the soil has a very low land use capability, obtaining resource consent for a productive use would be challenging at best, it is located near residentially zoned land thereby raising reverse sensitivity issues, there is an established commercial office facility on the site, and a resource consent has been applied for and development is underway.

[10] Statement of Evidence of Gareth Moran, 30 November 2022, paragraph 16.

[11] Section 32 Evaluation Report, Taupo Industrial Rezoning Plan Change 43, page 16.

14. The section 42A Report on Plan Change 43 comprehensively addresses the merits of the Plan Change and why it is appropriate to give effect to the NPS-UD 2020. As Mr Moran states:

> 21. The Plan Change from Rural Environment to Taupo Industrial aligns with Taupo District Council's strategic direction to create additional Industrial Zoned land.
>
> 22. From a transportation perspective, the proposed rezoning of Site 7 provides opportunities to maximise the investment value in the existing and planned transport networks. It allows for the relocation of industrial and 'big box' car-based retail outlets to locate adjacent to the arterial road network, potentially removing these activities and their associated high car use and commercial vehicle needs from the town centre.
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> 23. Site 7 has potential to connect to the existing walking and cycling network along the Eastern Taupo Arterial and is well located in relation to other similar activities, existing and planned residential areas to provide employment opportunities as well as some everyday supporting services which reduces people's overall need to travel
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> 29. Site 7 does not contain any natural features of significance; thus, the proposed rezoning will not contribute to any loss in ecological values.
>
> 33. Well-functioning urban environments as required by Policy 1 of the National Policy Statement for Urban Development (NPS-UD), are environments that, as a minimum have good accessibility for all people between housing, jobs, community services, natural spaces, and open spaces, including by way of public or active transport. The rezoning of Site 7 aligns with this key directive identified in the NPS-UD.

15. This is supported by Ms Makinson's evidence which concludes:

> 11. It is my opinion, there are no traffic or transportation reasons why Site 7 should not be rezoned to Taupo Industrial as part of Plan Change 43.[12]

16. The evidence for APGL reflects a contrary position. However, in my submission the statement of evidence of Ms Joanne Lewis incorrectly characterises the potential effects of the interface between residential zoned land and industrial zoned land, and her reliance on the underlying "masterplan" consent together with the consent notice is, with respect, flawed. This analysis appears somewhat

[12] Statement of Evidence of Judith Makinson, 7 August 2023, paragraph 11.

contrived and intended to deflect the issue of trade competition. These points are addressed later in these submissions.

17. In my submission, the evidence for the Council and TIEL should be preferred. It follows that based on the TDC's section 32 evaluation, section 42A Report, and the evidence on behalf of TIEL, the Plan Change should be allowed.

CONSENT NOTICE

18. The submission on behalf of Mr Ladbrook/APGL refers to the consent notice on the title of Site 7 as reason to reject PC43. This is unjustified and does not acknowledge the fact that Site 7 will not be developed for "campus" or tertiary use. This use is also at odds with the underlying Rural Zoning of Site 7 – which is one of the reasons why Plan Change 43 is appropriate.[13]

19. The Commissioners know that planning evolves, and the environment changes over time. Councils need to be responsive to this. Taking a "real world" approach to what constitutes the environment is appropriate.[14] Reliance on a resource consent which is now 15 years old and an essentially redundant consent notice to oppose a plan change seeking to do this will result in an inappropriate planning outcome.

20. Consent notices may be removed on application for a discretionary resource consent. The High Court in *Ballantyne Barker Holdings Ltd v Queenstown Lakes District Council*[15] observed that in considering applications to vary consent notices, the High Court has previously

[13] Relevantly, the Commissioner decision on the historic resource consent application by Taupo District Council in 2008 states that the parties to the resource consent application overlooked the fact that the land encompassing "Site 7" was Rural Zone.
[14] *Queenstown Central Ltd v Queenstown Lakes DC* [2013] NZHC 815 (19 April 2013).
[15] [2019] NZHC 2844.

emphasised that "good planning practice should require an examination of the purpose of the consent notice and an inquiry into whether some change of circumstances has rendered the consent notice of no further value" (referring to *Green v Auckland Council* [2013] NZHC 2364). In my submission, the circumstances surrounding Site 7 are such that the consent notice serves no further value.

21. The submitter does not own the land and has no authority to determine its use. Furthermore, the Council is the "consent holder" of the historic 2008 "master plan" consent. It is entitled to promulgate a plan change to change the zoning of land within its district. Counsel is not aware of any legal principle or rule which states that a consent notice on a title precludes a plan change.

22. Accordingly, the Hearing Panel should prefer the evidence for TIEL[16] and the TDC section 42A Report. The submission should be rejected.

TRADE COMPETITION

23. The section 42A Report for PC43 raises concerns about the submission on behalf of APGL and Mr Ladbrook:

> 109) The area of land to the immediate north of Napier Road Rezoning, is also zoned Taupō Industrial Environment. That site currently consists of a number of large format Trade Suppliers, including Mitre10 (also a Trade Supplier). That land is owned by Caboo Properties Ltd, with Warren Ladbrook as a Director.
>
> 110) The matter I wish to raise with the Panel is that the Submission from APGL states (and confirms) that *'it could not gain an advantage in trade competition through this submission'*. Plaintively this is incorrect, and the Submitter has a responsibility not to contravene the provisions in the RMA that proscribe the involvement of a Trade Competitor.

[16] Statement of evidence of Gareth Moran, 7 August 2023, paragraphs [40] to [47].

> 111) I have noted the restraints on Trade Competition enshrined within the Resource Management Act in Section 2 of this report, including s74(3) and clause 6(3) of the First Schedule.

24. It is apparent that the submissions by APGL and Mr Ladbrook are grounded in concerns about trade competition – not environmental effects. In that regard, the evidence for TIEL demonstrates that there are no transportation effects which would preclude re-zoning and that the consent notices on the title is redundant. Moreover, the concern about the interface between the residential zoned land and industrial zone does not present an effect on APGL or Mr Ladbrook. In any event, this interface can be effectively managed to ensure appropriate mitigation controls including screening/landscaping, noise controls, creating a "buffer" between zones to mitigate any potential effects.[17]

25. The Courts have considered this issue in numerous decisions.[18] The term was described by the Environment Court in *Bunnings v Hastings District Council*[19] as follows:

> [30] It is apparent from the above discussions and descriptions that the term trade competition is constrained in its meaning and **relates to those matters arising directly out of rivalrous behaviour occurring between those involved in commerce and does not extend to wider effects on the market or the environment.**
>
> [Emphasis added.]

26. The Resource Management Act 1991 ("RMA") is clear as to the prohibition on trade competition.[20] As directors and property developers for Mitre 10, Mr Ladbrook and APGL are trade competitors – Person A (trade competitor) and/or Person C

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[17] Statement of evidence of Gareth Moran, 7 August 2023, paragraphs [29] to [35]. In addition, TIEL proposes to implement a landscaping plan and other mitigation measures via conditions of consent, should the consent applications currently with TDC be granted.

[18] *Pre-School Charitable Trust v Waikato District Council* (2006) 1 NZTR 16-008; [2007]; NZRMA 55; *Kapiti Coast Airport Holdings v Alpha Corporation Limited* [2016] NZEnvC 137; [2016] NZRMA 505; *Bunnings Limited v Queenstown Lakes District Council* [2018] NZEnvC 135; *Bunnings Limited v Hastings District Council* [2011] NZEnvC 330

[19] [2011] NZEnvC 330.

[20] RMA, Part 11A – Act not to be used to oppose trade competitors.

(surrogate of trade competitor), referred to in section 308A. Similar circumstances were at issue in the Environment Court's decision on an application to strike out a section 274 notice of a "person" considered to be a trade competitor. The Court considered the meaning of the terms "trade competition" and "trade competitor" as follows:

> The terms "trade competition" and "trade competitor" are not defined in the RMA. The general test as to whether trade competition exists between two entities is whether there is a "competitive activity having a commercial element" (citing *Montessori*). This approach was affirmed by the Environment Court in *Kapiti* Coast *Airport Holdings v Alpha Corporation Limited.*

27. In that decision, the party H&J Smith Limited were deemed to be a trade competitor due to its links to a rival operator and its s274 notice struck out. The Court described this in the following terms:

> [47] The H&J Smith Group is clearly linked with Mitre 10. That store would compete with a Bunnings in Frankton. The purpose of section 308B is to ensure the RMA is not used by trade competitors for commercial gain by keeping competitors out of the relevant market. In light of this, H&J Smith Holdings Limited and HJSL can be considered to be trade competitors of Bunnings on this application.

28. In my submission, the Hearing Panel must disregard the submissions by APGL and Mr Ladbrook. To do otherwise would contravene the Resource Management Act 1991 ("RMA") provisions which preclude consideration of matters relating to trade competition.

Taupo Climate Action Group submission

29. Mr Moran addresses this submission in paragraphs [48] to [54] of his evidence. As he explains, the submitter provides no details which support the contention that PC43/Site 7 is contrary to *Strategic Direction Climate Change* in the District Plan. Mr Moran also addresses the concerns regarding "reverse sensitivity". As he states, this concern is unfounded, given the provisions which address the interface between the proposed Industrial Zone and the Residential

Zone.[21] It follows that the submission should be rejected in relation to Site 7.

Waikato Regional Council submission

30. As Mr Moran states in his evidence, Site 7 does not contain any Significant Natural Aras or Significant Geothermal Areas.[22] The submission should be rejected insofar as Site 7 is concerned.

CONCLUSION

31. There is a need for additional Industrial Zone capacity and rezoning Site 7 to Industrial Zone is the most appropriate outcome pursuant to section 32. The TDC's section 42A Report and section 32 evaluation support the re-zoning.

32. TIEL supports the rezoning of Site 7 to Industrial Zoning and its evidence, together with the TDC section 42A Report and section 32 evaluation, support this proposal. In my submission the Hearing Panel should approve Plan Change 43 insofar as it relates to Site 7.

33. TIEL will present evidence from two expert witnesses, namely:

    (a) Ms Judith Makinson (transportation). Ms Makinson has given evidence which demonstrates that there are no transportation reasons why PC43 Site 7 should not be approved; and

[21] Statement of evidence of Gareth Moran, 7 August 2023, paragraphs [52] to [53].
[22] Statement of evidence of Gareth Moran, 7 August 2023, paragraphs [55] to [57].

(b) Mr Gareth Moran (planning). Mr Moran explains why PC43 Site 7 is appropriate and concurs with the TDC Planning experts.

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8 September 2023.