# Concluding Hearing Report

## Hearing 25
## Te Kauwhata – Zone Extents

Report prepared by: Jane Macartney

23 July 2021

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# 1 Executive Summary

1. Hearing 25 relating to zone extents at Te Kauwhata was held via Zoom video-conference on 5 July 2021.

2. This concluding hearing report responds to queries from the hearings panel on the following three matters:

   a. Whether there have been any timing changes in respect to the staged upgrading of Te Kauwhata's wastewater system;
   b. Whether the proposed Reserves zoning of part of the property at 75 Te Kauwhata Road is equitable; and
   c. Whether the removal of the 'Te Kauwhata West Overlay' from properties in the Residential Zone would enable new developments to integrate with developments that already exist or are in the process of being established.

# 2 Staged upgrading of Te Kauwhata's wastewater system

3. Paragraph 33 in my section 42A hearing report states this:

   *33. The completion of Stage 2A in Lakeside (involving 400 lots) is the critical trigger for the necessary wastewater upgrade. Despite this trigger, Council's contractual arrangement in the Lakeside Development Agreement is to provide a solution to ensure that new titles can still issue. This has involved agreements for:*

   *(a) an immediate solution - the operation of additional UV treatment in mid-2021*

   *(b) an interim solution - construction and operation of a membrane aerated bioreactor package plant in December 2021*

   *(c) an ultimate solution - construction and operation of additional membrane aerated bioreactor components in December 2024.*

4. Commissioner Te Ao queried whether there had been any change to this schedule since my April 2021 s42A hearing report.

5. On 6 July 2021, Council's Northern Infrastructure Programme Manager provided this update:

   - The immediate solution has now moved to December 2021 completion
   - The interim solution has now moved to April 2022 completion
   - The ultimate solution is on track for December 2024 completion

# 3 Proposed Reserves zoning of part of property at 75 Te Kauwhata Road

6. Section 4.10 in my s42A hearing report addressed the extent of proposed Reserves zoning within the property owned by Clyde Juices Limited at 75 Te Kauwhata Road. As discussed, the extent of the proposed Reserves zoning mirrors what is shown as an existing Recreation Zone in this location in the Operative Waikato District Plan (OWDP).

7. Both the OWDP and PWDP signal the existence of notable trees (shown by blue triangle symbol numbered 1 and 41 respectively) in this location. In terms of the PWDP, there are 7 proposed notable trees within the proposed Reserves Zone.

8. To assist the panel, the maps on page 50 of my s42A hearing report are copied below. These maps illustrate the northern part of the property at 75 Te Kauwhata Road which is bordered by a red line. This property contains a number of zones, although only the existing Recreation/proposed Reserves Zone (coloured green) with frontage to Te Kauwhata Road is subject of the submission lodged by Clyde Juices Limited [943.39].

**Operative Recreation Zoning - 75 Te Kauwhata Road**

**Proposed Reserves Zoning - 75 Te Kauwhata Road (PWDP)**


9. The submission lodged by Clyde Juices Limited [943.39] claims that the existing Reserve-zoned land '*was taken by Council when the OWDP was notified*' (in 2004). However, my s42A report confirmed that this land remains in the submitter's ownership and that it has never been vested in Council. The submitter requests a reduction in the amount of proposed Reserves zoning, so that it only captures land within the dripline of the mature notable trees. They do not challenge the proposed Reserves zoning outright. The submitter also requests that the balance of the land (i.e. land outside of the dripline of all notable trees) be rezoned Residential.

10. To correct a statement I made in my hearing report, the submission does not request that Council purchase the whole of the area that is proposed to be zoned Reserves. Instead, this request was conveyed in my discussions with Cheal who lodged the submission on behalf of Clyde Juices Limited. My report also noted the advice from Council's Open Spaces Team that they are unaware of any negotiations to purchase and that there is presently insufficient funding available for this to occur.

11. My section 42A recommendation to reject submission [943.39] was a direct response to the submitter's request to reduce the extent of proposed Reserves zoning, rather than considering the issue of equity where private land is zoned for a public reserve without the landowner's request or consent. This is because I made my recommendation on the basis of scope made available by the submission – that is, the submission enables the merits of reducing the amount of proposed Reserves-zoned land to be considered, but it does not go so far as to enable the wholesale removal of this zoning. At the time I made my recommendation, I had not considered the lawfulness of rezoning private land for open space purposes. If the zoning is found to be unlawful, then my view about the limits around scope do not apply.

12. In response to Commissioner Cooney's query as to whether I had considered the matter of equity when applying a Reserves Zone over private land, I have researched this issue further.

13. There is a variety of case law on the subject of whether it is appropriate to zone privately owned land as public open space. I have found the following three cases which differ somewhat, depending on the specific circumstances.

(a) Capital Coast Health Limited v Wellington City Council (Interim Decision W101/98 and Final Decision W4/2000)

This case involved a proposal by the Council to zone private land as open space in circumstances where the land was capable of residential development. The Court endorsed the appellant's request for residential zoning and stated that if a Council wishes to protect land for open space, that purpose should be achieved by designation or acquisition.

However, the Court also stated that this general principle is always subject to Part 2 of the RMA and, where particular land has such significance in terms of any of the factors listed in sections 6 and 7 of the RMA that its use or development ought to be substantially limited or precluded, then land use controls which may have that effect may be appropriate regardless of the ownership of that land (but subject to sections 32 and 85 of the RMA).

The Court held that private landowners would be unable to make reasonable use of land zoned for open space and therefore such zoning was inappropriate for private use which was capable of other uses.

(b) Hastings v Auckland City Council (Decision A068/2001)

This decision observed that the RMA modifies the general principle that a landowner's right to use land in its natural state should not be taken away without compensation and that section 85 (reasonable use) allows a person with an interest in land to challenge the provision in a submission on the plan or apply for a change to the plan.

The Court considered whether the proposed plan provisions were unlawful and found that there was no general legal principle that private land should not be zoned for open space purposes unless agreed to by the owner, or the land is unsuitable for development. The RMA does not provide anything to this effect.

In this case, the appellant (Hastings) acquired the site at a time when there were already controls restricting its use under the operative plan and the provisions of the proposed plan did not result in a dimunition of development rights or 'down-zoning', as was the case in Capital Coast. The Court therefore held that the proposed zoning and provisions were not unlawful.

(c) Golf (2012) Limited v Thames-Coromandel District Council [2019] NZEnvC 112

This more recent case involved the Council's proposal to apply an Open Space zone to land at Matarangi occupied by a golf course. The appellant/landowner (Golf (2012) Limited) sought a Residential zone instead.

The Court considered the appropriateness of the proposed zoning under section 85 of the RMA and stated that the test '*must be based on all the evidence and assessed on the merits with a focus on the public interest'*. It stated that while residential activities were not provided for at the site, they were provided for on neighbouring land and that, on the face of it, this could amount to an unfair and unreasonable burden on the appellant in terms of the section 85 test.

However, the Court also stated that the planning history of Matarangi was relevant and that the design and construction of the golf course was the method which enabled appropriate development and protection of the natural character of the Matarangi peninsula simultaneously.

Also, when the golf course was developed, the owner at that time voluntarily undertook arrangements to provide for open space and it was presumed that subsequent owners acquired their interests on that basis. The Court therefore stated it is relevant to ask who

made the land open space. If it was the Council, then it may be unreasonable without agreement from the owner. However, if it was the choice of the landowner, or their predecessor, then it is not unreasonable. The Court concluded that the test under s85 was not met solely on the basis of the proposed change in zoning.

It is also worth noting that, prior to this appeal, the hearing panel's decision (on behalf of the Council) included their recommendation that the Council and Matarangi Community make it a priority to formally acquire the land in the golf course which was zoned open space.

14. In summary, I have taken the following principles from the above case law:
    (a) The starting point is that there is no general legal principle that private land should not be zoned for open space purposes unless the landowner gives consent or if the land is unsuitable for development
    (b) In each case, the planning history of the property is relevant
    (c) In considering the planning history, it is relevant to consider whether the landowner agreed to the open space zoning
    (d) it is relevant to ask who requested the zoning – Council or the landowner?
    (e) At the time the landowner acquired the property, were there already controls restricting its use under the relevant district plan?
    (f) Is the land in question capable of other reasonable uses in light of the existence of the notable trees?

15. With these principles in mind, it is important to carefully investigate the planning history of the (existing) Recreation-zoned parcel of land at 75 Te Kauwhata Road. My investigations have confirmed the following:

    (a) Zoning of specific parcel of land at the time of purchase

    Clyde Juices Limited purchased this property in April 1992. The property's zoning at that time was Rural A in terms of the Waikato Section of the Operative Waikato District Scheme. There were no notable trees or other features identified on the operative planning maps for this land at that time.

    (b) Zoning of specific parcel of land as a result of previous district plan review (2004)

    Council's records indicate that this specific parcel of land was proposed to be rezoned from Rural A to Country Living when the previous review of the district plan was publicly notified in 2004. The decision version of the planning maps indicated a change to a Living Zone. The planning maps in the notified and decision versions of this reviewed district plan also confirm that various trees on this land were assigned notable status at that time.

    (c) Zoning of specific parcel of land as a result of Variation 13 to the PWDP (V13)

    V13 was notified in 2009. The proposed planning maps for V13 indicated the rezoning of this specific parcel of land to Recreation and reflected the zoning shown in the Te Kauwhata Structure Plan. Another notified map, that showed the various heavy traffic bypass options for a parallel process involving a notice of requirement, also indicated a Recreation Zone in this location. The planning map in the decision version of V13 confirmed the Recreation zoning and this was not challenged with any appeal. V13 did not change the notable status of various trees on this land that resulted from the 2004 district plan review.

    While Clyde Juices Limited lodged a submission to V13, they only opposed the proposed Light Industrial Zone on their property. I have found no submission that supported or opposed any extent of Recreation zoning on their property. This appears unusual given the significance of rezoning this parcel of land from a Living Zone to a Recreation Zone.

    I have read the section 32 report and s42A report for V13, neither of which addressed the Council's proposal to apply a Recreation Zone to this location to facilitate the

implementation of the Te Kauwhata Structure Plan. I also contacted Council's Consultant Planner (Mr Chris Dawson) who prepared both reports and he expressed surprise that neither report addressed such a significant change in zoning from a Living Zone to a Recreation Zone over private land.

Mr Dawson advised that there were a number of consultation meetings that occurred with the landowner (Mr John Wheeler) as part of the V13 process. While consultation documents record discussions about the proposed notable trees, industrial zoning, a heavy traffic bypass, and the possible need for a small reserve, all of which had some effect on the Wheeler property, the s32 evaluation was completely silent on the proposed Recreation Zone on the Wheeler property. There is no record of Mr Wheeler requesting a Recreation Zone or of Council informing Mr Wheeler prior to notification of V13 that part of his land would be rezoned from a Living Zone to a Recreation Zone.

Furthermore, the decision on V13 did not consider the equity or fairness of rezoning private land for public purposes.

In my opinion, this history raises a question as to the lawfulness of applying a Recreation Zone to Mr Wheeler's private property, regardless of this zoning being operative since 2013. The Recreation Zone was initiated by Council, constituted a 'down-zoning', and was not requested by Mr Wheeler.

16. For completeness, I note that Clyde Juices Limited obtained subdivision consent in 2017 to create a new residential lot (from the operative Living Zone) immediately to the east of the existing Recreation-zoned land. Title has now issued in the name of Glen Innes Park Village Limited for the corner block immediately to the east of the existing Recreation Zone (25 Te Kauwhata Road). The conditions of subdivision consent included a requirement for development contributions but there was no requirement to vest land in Council for recreation purposes.

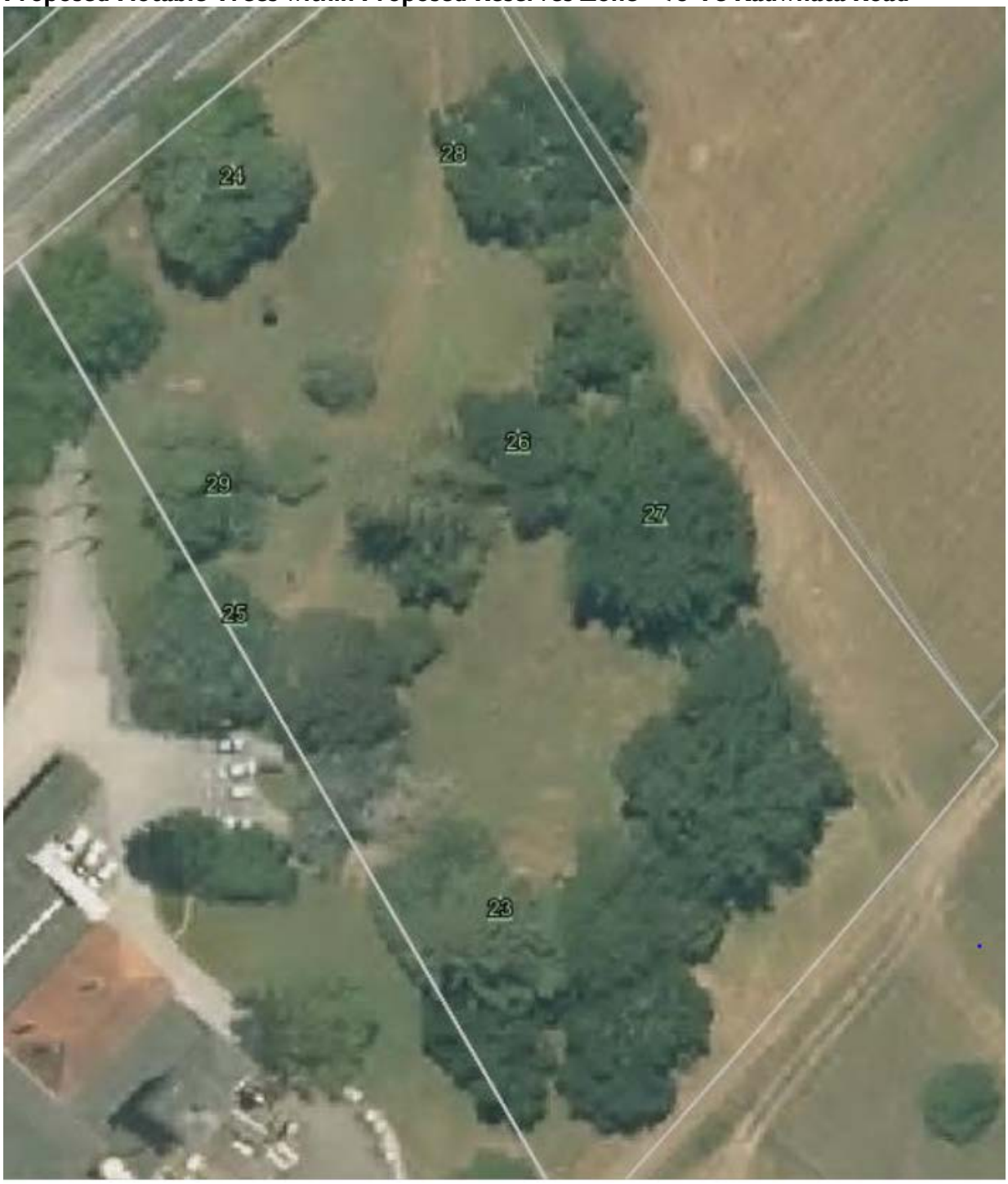
**Merits of the proposed Reserves Zoning under the PWDP**

17. The operative Recreation zoning of part of Mr Wheeler's property was carried over into the PWDP, with the only change involving the renaming to a Reserves Zone. Council's section 32 evaluation for the PWDP did not address the need to roll over this type of zoning on Mr Wheeler's property, despite the necessity for this evaluation to address how the proposed Reserves Zone would achieve the objectives of the PWDP and, in turn, meet the Part 2 requirements of the RMA.

18. Prior to finalising my s42A hearing report, I spoke to the Open Spaces Team who confirmed that Council has no funding available to purchase that part of the Wheeler property.

19. It would appear that the use of the existing Recreation-zoned portion has been limited to grazing purposes. Any building development here would be limited somewhat as a result of 7 proposed notable trees which are numbered 23-29 on the following aerial map. As noted earlier, the OWDP also identifies a number of notable trees in this location.

**Proposed Notable Trees within Proposed Reserves Zone – 75 Te Kauwhata Road**




20. The proposed rules for the Reserves Zone and Residential Zone require resource consent to a restricted discretionary activity for any construction located within the dripline of a notable tree. Unless a notable tree is dead, dying, diseased or unsafe, its removal or destruction requires resource consent to a discretionary activity.

21. The area of the existing Recreation Zone/proposed Reserves Zone is approximately 9700m2. After discounting the areas within the dripline of all these seven notable trees, this leaves approximately 7500m2. Even with a consideration of required boundary setbacks and accessways, this developable area would yield multiple 450m2 lots in terms of the proposed

rules if a Residential Zone were to apply. Therefore, despite the existence of seven proposed notable trees, the land is capable of reasonable uses other than open space purposes.

22. Given the planning history of this property, I do not consider the change in zoning from Living to Recreation under V13 met the criteria for zoning private property. The proposed Reserves zoning is a 'down-zoning' compared to a Living Zone which applied here before notification of V13 (even with the existence of the notable trees).

23. Clyde Juices Limited seeks that the Reserves zoning only applies to the dripline of the notable trees. However, I consider the relief sought by the submitter creates added complexity and cross-over with the rules for notable trees which already manage activities within their dripline.

24. In my opinion, a Residential zoning is the most appropriate to achieve the objectives of the PWDP, and in turn, the purposes of the RMA. This means that the proposed Reserves Zone should be removed in its entirety and reinstated with a Residential Zone. I consider that retaining the Reserves Zone effectively sterilises the use of privately owned land. This is because the permitted activities in the Reserves Zone are limited to those provided in a reserve management plan, informal recreation, conservation activities and temporary events. Any other activities require resource consent for either a discretionary activity or non-complying activity. I do not consider this to be equitable given that the land remains in private ownership and Council does not have sufficient funds to purchase the land in the near future.

## Conclusion

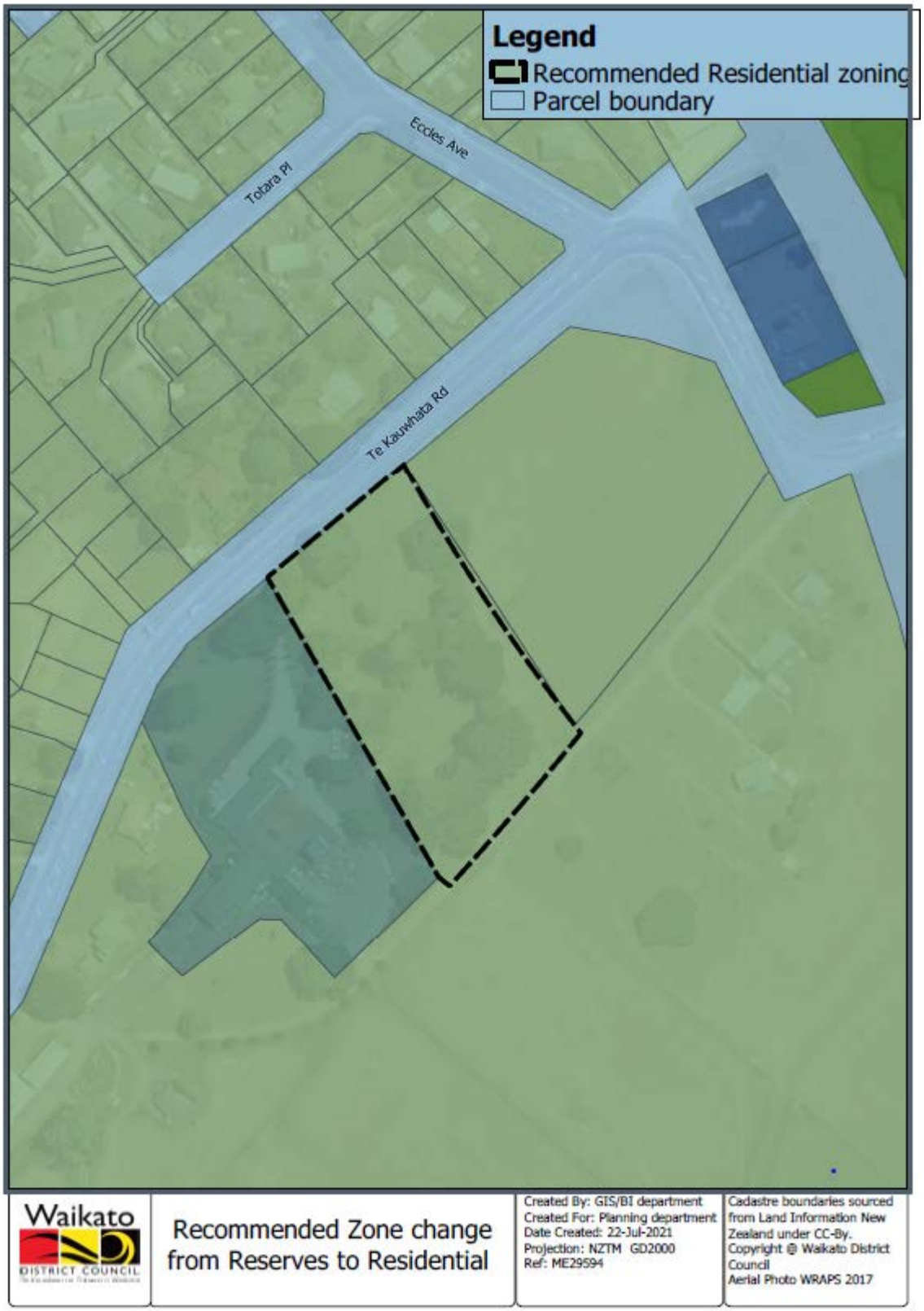
25. As a result of my investigations into the history of this property, I conclude that it is appropriate to remove the proposed Reserves Zone from 75 Te Kauwhata in its entirety and that it be replaced by a Residential Zone.

## Recommendation

27. For the reasons above, I recommend that the hearings panel:

(a) **Accept in part** Clyde Juices Limited [943.39] to the extent that the proposed Reserves Zone on property located at 75 Te Kauwhata Road be replaced by a Residential Zone.

**Recommended map amendment**



**Section 32AA evaluation**

28. Given my investigations into the history of this property and conclusion that a Recreation Zone should not have resulted from the V13 decision, a section 32AA evaluation that supports a Residential Zone is not considered necessary in this instance.

# 4 Removal of Te Kauwhata West Overlay

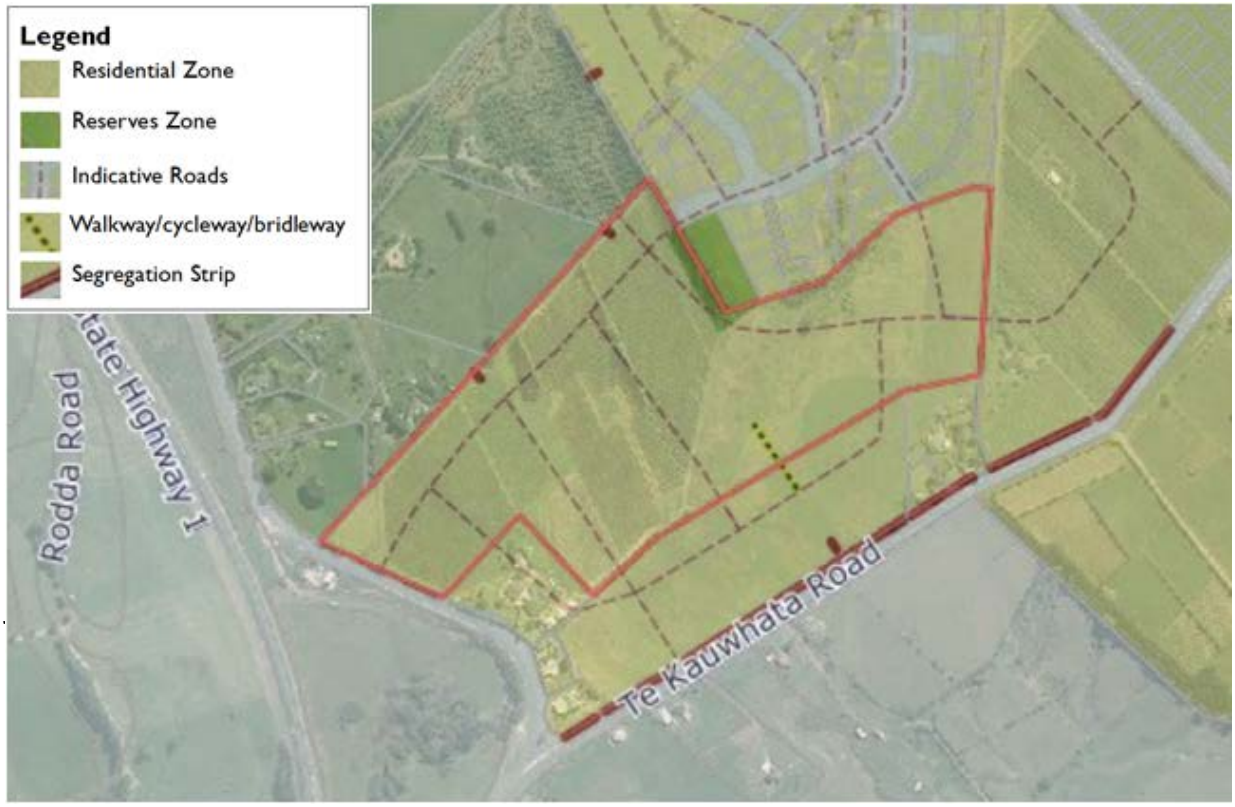
29. This matter was addressed in section 4.9 of my s42A hearing report, section 3.3 of my rebuttal evidence and paragraphs 34-39 of my opening statement. I expressed an alternative view to the recommendation in the earlier Hearing 10 (Residential Zone) which was to reject the submission from Te Kauwhata Land Limited [368] that requested the removal of the Te Kauwhata West Overlay that affects their property at 24 Wayside Road.

30. I remain of the opinion that the proposed Te Kauwhata West Overlay, which affects part of the proposed Residential Zone, is now an outdated method which effectively preserves minimum lot size provisions in this location which were the result of V13 to the OWDP. This overlay specifies minimum lot sizes that are more onerous than sites being subdivided outside of this overlay (i.e. a minimum net lot size of 650m2 and minimum average net lot size of 875m2 within the overlay, compared to a minimum net lot size of 450m2 outside of the overlay). If this overlay were to remain, I consider that the restriction on lot yield would not give effect to the WRPS or NPS-UD.

31. Commissioner Sedgwick queried whether I had an opinion as to whether new residential development could easily integrate with existing residential development if the overlay were to be removed.

32. In my opinion, a developer has this choice, unless there are specific district plan provisions that require such integration. For example, the following map indicates that, with the overlay removed, 24 Wayside Road (bordered in red) is affected by a series of indicative roads, a walkway/cycleway/bridleway, segregation strips, and it is near a Reserves Zone. The Chapter 16 rules for the Residential Zone require Council to consider these matters as part of a restricted discretionary activity which is the starting point for any subdivision proposal.

**Subdivision/development provisions in the PWDP for 24 Wayside Road**




33. I consider it important to reiterate that it would be unrealistic to expect absolutely no change to the character of urban settlements over the 10 year life a district plan, and even less so over the next 20 to 30 year time frames. It is also normal to expect such change to be progressive rather than immediate.

34. Te Kauwhata is identified as a key growth node on New Zealand's most intensive transport corridor between Auckland and Hamilton and the district plan must provide at least sufficient capacity over the short term, medium term, and long term (i.e. over a total of 30 years) as directed by the NPS-UD.

35. I mentioned Policy 6(b) of the NPS-UD at the hearing. This essentially requires decision-makers to have particular regard to various matters – including planned urban form which may involve significant changes to urban environments. These changes may detract from amenity values appreciated by some people, but improve amenity values appreciated by other people, communities, and future generations – including the provision of increased and varied housing densities and types. Policy 6(b)(ii) of the NPS-UD states that these significant changes are not, of themselves, an adverse effect.

36. I consider that giving effect to the NPS-UD is challenging in that it requires a careful assessment and balancing of various matters. It is apparent that increases in lot yield should not always be the determinative factor that trumps all other considerations. However, my view in this case is that the basis for first introducing the larger lot sizes in the Te Kauwhata West Zone with V13 does not fall within the ambit of the qualifying matters in clause 3.32 of the NPS-UD. If all Councils in New Zealand were to continue 'holding' the character of their urban environments, this could lead to undue pressure for greenfield developments on the fringe of settlements and calls for additional infrastructure. In my opinion, this potential outcome would undermine the key intent of the NPS-UD which is to solve the country's housing crisis while ensuring that the provision of infrastructure is both effective and efficient. On balance, my preference is for the

Te Kauwhata West Overlay to be removed to facilitate residential development that gives effect to both the WRPS and NPS-UD.

37. This concludes my responses on this topic and am happy to answer any further questions that the hearings panel may have.

Jane Macartney
23 July 2021