

**BEFORE AN INDEPENDENT HEARINGS PANEL
OF THE WAIKATO DISTRICT COUNCIL**

IN THE MATTER of the Resource
Management Act 1991

AND

IN THE MATTER of the proposed Waikato
District Plan (Stage 1)
Hearing 19

LEGAL SUBMISSIONS ON BEHALF OF THE RALPH ESTATES

Dated: 9 September 2020

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1. INTRODUCTION AND SUMMARY

1.1 These submissions are made on behalf of the Ralph Estates, a further submitter on the Proposed Waikato District Plan (**Proposed Plan**).¹ The Ralph Estates' further submission opposes the relief sought in the submissions lodged by:

(a) Ambury Properties Limited (**APL**);

(b) Planning Focus Limited;

(c) Ohinewai Land Limited; and

(d) Ribbonwood Family Trust.

1.2 The Ralph Estates holds extensive mineral titles around Rotowaro, Huntly and Ohinewai, including under and adjacent to some of the land that is the subject of the above submissions. These mineral titles provide unfettered rights of access to the surface land to mine their minerals, subject to providing reasonable compensation for land damage.

1.3 In particular, the Ralph Estates opposes the relief sought in APL's submission. APL seeks a range of industrial and residential zonings and associated amendments to the provisions of the Proposed Plan that apply to an area of land north of Tahuna Road (**APL Proposal**).

1.4 The Ralph Estates opposes this submission because their mineral interests would be effectively sterilised if the properties were rezoned to provide for urban uses.

1.5 Turning to the other submitters on which the Ralph Estates lodged a further submission, the Ralph Estates wants to ensure that any amendments to the Proposed Plan to give effect to the relief sought in Ohinewai Land Limited and the Ribbonwood Family Trust's submissions do not adversely affect the ability for the Ralph Estates to utilise their mineral rights in the future. Planning Focus Limited has now withdrawn its submission.

¹ Further submitter number 1396.

2. THE RALPH ESTATES

2.1 Anthony and Margaret Ralph established the Taupiri Coal Mine Company (**TCMC**) in 1874 and over the next 30 years the Ralph family purchased extensive land titles that included the rights to minerals in the Waikato District. Most of the surface land was subsequently sold, but the Ralph Estates retained the mineral titles and the right to enter the land to mine the minerals. Minerals owned by the Ralph Estates have been mined for almost 150 years and mining continues today in the Rotowaro Coalfield under a renewed mineral lease and mining agreement.

2.2 Today the Ralph Estates are administered by the Public Trust and are comprised of 3 separate entities: William Joseph Ralph, Sarah Margaret Ralph and Margaret Reilly Schlinker Trust.² There are now over 80 beneficiaries of the Ralph Estates.

3. WITNESSES

3.1 Two witnesses have filed evidence on behalf of the Ralph Estates. They have also filed written summaries of their evidence in accordance with the Panel's directions and will address the Panel at the hearing:

(a) Mr Dean Fergusson – a minerals, resources and mining consultant with over 35 years of experience. Mr Fergusson's evidence describes the Ralph Estates' mineral interests in Ohinewai and provides an overview of the extensive mining studies and technical assessments that have been undertaken, most recently by Solid Energy in 2015, in relation to these mineral interests. His evidence also provides an overview of what would be involved in an open cast mining operation in this location and attaches a draft Information Memorandum which has been prepared to present to prospective investors; and

(b) Mr Gary Gray – a mining consultant and qualified mining engineer with over 35 years of experience. Mr Gray's evidence provides a valuation of the mineral interests that would be sterilised if APL's rezoning request were approved by the Panel. Mr Gray's evidence is that the

² The beneficial interest in the Margaret Reilly Schlinker Trust is held by the WJ Ralph Estate, SM Ralph Estate and the Robert Ralph Estate.

estimated Market Value of the sterilised Ralph Estates coal ranges from \$4,087,810 to \$7,000,000.

4. THE RALPH ESTATES' MINERAL INTERESTS

The minerals

- 4.1** The Ralph Estates' mineral titles include all minerals including coal, aggregates (sands, gravels etc), peat, fireclay, greywacke and other minerals not reserved to the Crown that may be present in the land. The titles provide unfettered rights of access to the surface land to mine their minerals, subject to providing reasonable compensation for land damage.
- 4.2** Mr Fergusson's evidence provides a map and a detailed description of the Ralph Estates' mineral interests. In short, these mineral interests under and adjacent to the land that is the subject of the APL Proposal include a very substantial quantity of coal resources in the Ohinewai Opencast and Ohinewai Sectors of Waikare Coalfield. These coal resources, and the related geotechnical and mining challenges, environmental effects and economics have been extensively explored, investigated and assessed over the past 40 years, first as part of the New Zealand Coal Resources Survey (**NZCRS**) and then by Solid Energy.
- 4.3** In summary, the Ohinewai Opencast Sector contains a resource of between 17 and 22 Mtonnes of coal.³ Approximately 75% of this coal is owned by the Ralph Estates.⁴
- 4.4** A series of opencast mine proposals have been developed. The most recent proposal was developed by Solid Energy in 2015. In Mr Fergusson's opinion an opencast mine at Ohinewai is technically feasible. His expert opinion is that it appears it would be economic at the mine scale proposed by Solid Energy and anticipated production level, even when capital requirements are considered. In his opinion there is a sufficient long term market for this coal.
- 4.5** It is recognised that resource consents would be required to realise the economic value. While Mr Fergusson, and Mr Lines on behalf of APL agree that opencast mining at Ohinewai would pose a number of technical challenges, Mr

³ Evidence of Dean Fergusson (13 August 2020) at [5.15].

⁴ Evidence of Dean Fergusson (13 August 2020) at [5.15].

Fergusson's evidence is that those technical challenges are not insurmountable and there are in fact feasible solutions to the issues raised in Mr Lines' evidence.

Sterilisation of the Ralph Estates' mineral interests

- 4.6** The APL Proposal seeks to rezone land directly above two of the Ralph Estates' mineral titles north of Tahuna Road. Clearly the APL Proposal would have a direct impact on the Ralph Estates' ability to access its mineral interests. Once the land is converted from rural to industrial, business and residential land uses practically the Ralph Estates would not be able to enter the land and mine the minerals beneath the surface.
- 4.7** The restriction the rezoning places on opencast mine development will also impact the Ralph Estates' mineral resources further to the south. As is outlined in Mr Fergusson and Mr Gray's evidence, the APL Proposal would mean that any opencast mine that sought to extract minerals owned by the Ralph Estates would have to be significantly smaller, limiting the amount of coal that the Ralph Estates could access.
- 4.8** Furthermore, any rezoning of land that is adjacent to land in which the Ralph Estates have mineral interests would also practically hamper the Ralph Estates' ability to mine the minerals, because of the likelihood of reverse sensitivity effects.
- 4.9** As is outlined in the evidence of Mr Fergusson, approximately 8 to 10 Mtonnes of coal owned by the Ralph Estates would be sterilised by the APL Proposal.⁵ The evidence of Mr Gray is that a total of 7.5 Mtonnes of coal would be sterilised (7.43 Mtonnes that would be mined via opencast methods,⁶ and 0.63 Mtonnes of underground coal⁷).
- 4.10** As is set out in Mr Gray's evidence, the sterilised coal has a value of between \$4.1 and \$7.0 million.⁸

5 Evidence of Dean Fergusson (13 August 2020) at [7.7].

6 Evidence of Gary Gray (13 August 2020) at [30].

7 Evidence of Gary Gray (13 August 2020) at [39].

8 Evidence of Gary Gray (13 August 2020) at [76].

5. RESOURCE MANAGEMENT ACT 1991

5.1 It is my submission that the proposed rezoning:

- (a) Would render the Ralph Estates' mineral interests incapable of reasonable use (in terms of s 85 of the RMA);
- (b) Will not promote sustainable management of natural and physical resources;
- (c) Is not the most appropriate way to achieve the purpose of the RMA and is contrary to the principles in Part 2 of the RMA; and
- (d) Does not represent the most appropriate way of exercising the Council's functions, having regard to the efficiency and effectiveness of the provisions, and in particular the assessment of the benefits and costs of the environmental, economic, social, and cultural effects that are anticipated from the implementation of the provisions in terms of s 32(2) of the RMA.

5.2 The assessment that is required when making a decision on proposed plan provisions has been broadly summarised by the Environment Court to distil down to an evaluation of which provisions are the most appropriate.⁹

5.3 In my submission, changes to the rural zoning to provide for residential, industrial, and business uses cannot be the most appropriate, when these changes will effectively prevent the owner of the minerals beneath the surface from being able to make reasonable (or indeed any) use of their interest in the land in question. Retaining the sites' rural zoning will allow the land to continue to be put to economic use, in a manner that is appropriate in the context of the small rural village that it neighbours. It would not preclude the ability for those that own the minerals underneath the surface to exercise their rights in the future to obtain the necessary authorisations (including resource consents) and access the land to remove those minerals.

⁹ For example, see *Royal Forest & Bird Protection Society of NZ v Whakatane District Council* [2017] NZEnvC 051.

6. SECTION 85

6.1 As I have noted above, it is my submission that the proposed rezoning would render the Ralph Estates' mineral interests incapable of reasonable use (in terms of s 85 of the RMA).

6.2 It is acknowledged that s 85(1) of the RMA practically means that property owners have no right to money in lieu of their interests in property if those interests are in effect taken away or otherwise adversely affected by rules or provisions in a plan. However, ss 85(2) and (3) provide the opportunity for a submitter on a proposed plan to challenge the provisions on the basis that they would render the submitter's interest in land incapable of reasonable use.

Section 85(2)

6.3 Section 85(2) provides that any person having an interest in land to which any proposed provision of a proposed plan applies, and who considers that the proposed provision would render that interest in land incapable of reasonable use, may challenge that provision in a submission made under schedule 1 in respect of a proposed plan.¹⁰

6.4 The Ralph Estates supports the zoning in the notified version of the Proposed Plan. It is the provisions (and zoning) sought by other submitters that the Ralph Estates challenges under s 85(2).

6.5 "Reasonable use" is defined in s 85(6):

"reasonable use, in relation to land, includes the use or potential use of the land for any activity whose actual or potential effects on any aspect of the environment or on any person (other than the applicant) would not be significant."

6.6 The Ralph Estates' mineral titles are an interest in land, and the APL Proposal would render that interest incapable of reasonable use. As discussed in the evidence of Mr Fergusson, while obtaining a resource consent for an opencast coal mine is not straight forward, it is nevertheless possible.¹¹ The APL Proposal would have the kind of "all or nothing quality" that the Courts have associated

¹⁰ RMA, s 85(2).

¹¹ Evidence of Dean Fergusson (13 August 2020) at [8.3].

with proposals that render land incapable of reasonable use,¹² particularly in relation to the mineral interests under land directly affected by the APL Proposal.

- 6.7** Therefore in our submission, the Ralph Estates has grounds to challenge the APL Proposal under s 85 through this hearings process. The Panel should not approve provisions that will have this effect on the Ralph Estates' interests.

Section 85(3)

- 6.8** In the event that the Panel is minded to allow the relief sought by APL, the Ralph Estates will have no option but to lodge an appeal with the Environment Court, to pursue the remedies provided in s 85(3A) as part of the relief sought. This section of the submissions discusses the process, in the context of amendments made to the RMA in 2017 to broaden the remedies available to affected landowners.

- 6.9** Put simply, in an appeal to the Environment Court on a provision of a proposed plan, if the Environment Court is satisfied that the plan provision makes any land incapable of reasonable use and places an unfair and unreasonable burden on any person who has an interest in the land, the Environment Court can direct a local authority under s 85(3A) to do whichever of the following the authority considers appropriate:

- (a) Modify, delete or replace the provision in the manner directed by the Court; or
- (b) Acquire all or part of the interest in the land under the Public Works Act 1981.

- 6.10** Prior to the amendments made to the RMA in 2017, local authorities were excluded from liability for compensation payments when restrictions were imposed on land use. The only remedy for affected landowners was to try to obtain a direction from the Environment Court to modify, delete, or replace a plan provision that rendered the land incapable of reasonable use and placed an unfair burden on persons with interests in the land. The procedural steps for obtaining this direction were not clear in the legislation.

12 *Steven v Christchurch City Council* [1998] NZRMA 289 (EnvC).

- 6.11** The 2017 amendments made two key changes:
- (a) Clarified that an appellant can seek relief under s 85 in an appeal on a proposed plan¹³; and
 - (b) Introduced the ability for a local authority to elect to acquire the interest in land rather than amending the provision in question.¹⁴
- 6.12** To some extent this is a codification of the common law position. Prior to the 2017 amendments the Courts had held that in some circumstances, a council may designate and/or acquire land or compensate a land owner in order to make reasonable an otherwise unreasonable zoning”.¹⁵
- 6.13** As discussed above at paragraph 6.6, in my submission the Ralph Estates’ mineral interests would be rendered incapable of reasonable use as a result of the APL Proposal. Whether the APL Proposal represents an unfair and unreasonable burden would be considered by the Court in the context of the RMA with particular reference to:¹⁶
- (a) The natural and physical resources in the case;
 - (b) That no reasonable use can be made of the land;
 - (c) Part 2 of the RMA;
 - (d) Part 3 of the RMA and the inference in section 9 that real property rights prima facie meet the purpose and principles of the RMA;
 - (e) The relevant provisions of the proposed plan;
 - (f) The rebuttable presumption that the proposed plan is effective and efficient; and
 - (g) The personal circumstances of the property owner looked at objectively.

13 RMA, s 85(3)(b)

14 RMA, s 85(3B).

15 *Hastings v Auckland City Council* A068/01 at [97].

16 *Brookers Resource Management* (online looseleaf ed, Thomson Reuters) at [A85.05].

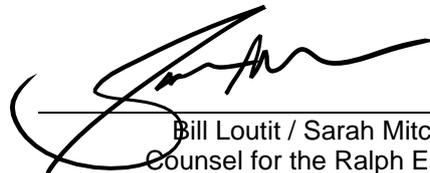
6.14 In my submission the APL Proposal does amount to an unfair and unreasonable burden on the Ralph Estates.

7. CONCLUSION

7.1 The submitters (and APL in particular) seek to change the operative rural zoning (which has been carried through in the notified Proposed Plan) to residential, industrial, and business zoning (and associated changes to the provisions of the Proposed Plan). It is the Ralph Estates' position that the changes sought by the submitters are not the most appropriate planning provisions.

7.2 The relief sought in the submissions will effectively prevent the Ralph Estates from being able to make reasonable (or indeed any) use of their interests in the land in question. It should be rejected.

DATED at Auckland this 9th day of September 2020



Bill Loutit / Sarah Mitchell
Counsel for the Ralph Estates