

Before the Whangarei District Council Hearings Panel

In the Matter of the Resource Management Act 1991 (RMA)

And

In the Matter of the hearing of submissions by the Whangarei District Council on Plan Changes 85C and 85D and Consequential Amendments to the Whangarei District Plan

Legal Submissions for Blue Moon Limited

26 July 2017

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May it please the Panel:

Introduction

1. These legal submissions are presented on behalf of Blue Moon Limited (**Blue Moon**) in relation to submissions lodged on Proposed Plan Changes 85C and 85D to the Whangarei District Plan (**District Plan**).
2. Evidence has been lodged on behalf of Blue Moon by:
 - a. Adam Thompson (economic and property market);
 - b. Mark Shaw (engineering); and
 - c. Russell Mortimer (planning).
3. As set out in the submission lodged by Blue Moon¹ and the planning evidence of Mr Mortimer, Blue Moon owns land on Cove Road at Langs Beach.² In summary that land is made up of:
 - a. 5.9 ha block of land currently zoned Living 1 Environment; and
 - b. 72 ha block of land currently zoned Countryside Environment.
4. The notified zoning proposes part of Blue Moon's land be rezoned Rural Village Residential Environment (**RVRE**)³, with the balance Rural Production Environment (**RPE**).⁴ In essence the notified zoning simply rolls over existing zonings – broadly equivalent zone provisions are applied to the same geographic areas.
5. The Blue Moon submission seeks that a larger portion of its property be zoned RVRE than notified (an extension of the RVRE zone), with part of the balance⁵ zoned Rural Living Environment (**RLE**) (applied instead of the RPE zone). The relief sought is based upon a comprehensive body of assessment and analysis, much of which is summarised in the submission itself.

¹ Submission 396/1.

² Lot 3 DP 27812 and Lot 2 DP 193435.

³ Being that land currently zoned Living 1 Environment.

⁴ Being that land currently zoned Countryside Environment.

⁵ Approximately 27ha

Legal framework – Plan Change /Review

6. The matters requiring consideration in law will be well known to the Commissioners, and I presume will have been addressed in detail before the Panel earlier in the process.
7. The key provisions for consideration of a District Plan change are sections 32, 75 and 76 of the RMA, Part 2 and the second Part of the First Schedule to the RMA. I do not propose to address them further - with the exception of section 32.
8. As you are aware, section 32 seeks to ensure that the costs and benefits of proposed plan provisions are considered and that the proposed controls are justified.
9. Each objective that is proposed has to be examined with regard to the extent to which it is the most appropriate way to achieve the purpose of the RMA. Any rules or methods should be aimed at achieving the objectives and policies. This assessment must take account of the benefits and costs of the proposed policies, rules or other methods and the risk of acting, or not acting, if there is uncertain or insufficient information about the subject matter of those policies, rules or other methods.
10. You must consider the Proposed Plan changes in terms of the requirements of section 32 RMA, including in terms of section 32(3):
 - a. The extent to which each objective is the most appropriate way to achieve the purpose of the RMA; and
 - b. Whether, having regard to their efficiency and effectiveness, the policies, rules, or other methods are the most appropriate for achieving the objectives.

And in terms of section 32(4):

- c. The benefits and costs of policies, rules, or other methods; and
- d. 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.

Council Summary Position

11. The Council position as represented by the planner's recommendation, can be summarised as:
 - a. with respect to the RVRE zone, opposition to additional zoning sought because:
 - i. no demand for additional dwellings;
 - ii. lack of capacity in the existing wastewater network;
 - iii. more appropriate to focus growth in Waipu;
 - iv. requested zone is not consistent with the Structure Plan.
 - b. with respect to the RLE zone:
 - i. RLE proposed is too close to the rural village.

Blue Moon summary position

12. Blue Moon's response is set out in the evidence lodged on its behalf.
13. The evidence of Mr Thompson illustrates:
 - a. demand for dwellings in Waipu Cove/Langs Beach is substantially higher than estimated by the Whangarei District Growth Strategy, and the Council modelling is demonstrably unreliable;⁶
 - b. reference to core principles of housing economics illustrate undersupply for Waipu Cove/Langs Beach;⁷
 - c. commercially feasible supply is significantly less than numbers derived using theoretical potential yield of additional sections based on crude application of subdivision minimum areas;⁸

⁶ Thompson, at [10] – [30]

⁷ Thompson, at [31] – [43]

⁸ Thompson, at [44] – [53]

- d. return on public infrastructure investment is an important consideration in the context of balancing benefits and costs;⁹
- e. from an economic perspective, none of the issues raised in the section 42A report (based as they are upon unreliable foundations) could accurately be characterised as resulting in adverse economic effects,¹⁰ and
- f. the proposed zoning, from an economic perspective, offers no adverse effects and significant economic benefits.¹¹

14. The evidence of Mr Shaw establishes:

- a. with respect to RVRE zoning proposed;
 - i. residential development on the land in question is not constrained by development infrastructure limitations;
 - ii. a possible 50 – 60 lot development can be accommodated within the current capacity of the system;¹²
 - iii. a number of programmed upgrades to infrastructure will be completed before any development enabled by the zoning changes sought was market ready;¹³
 - iv. even if there were short-term capacity issues in the existing public wastewater system (which in Mr Shaw’s expert opinion is not the position), a range of additional options to mitigate capacity issues are available.¹⁴
- b. with respect to the RLE zoning proposed, it can be appropriately serviced by on-site solutions as the zone anticipates.¹⁵

⁹ Thompson, at [54] – [65]

¹⁰ Thompson, at [67] – [75], and [78]

¹¹ Thompson, at [66] and [79]

¹² Shaw, at [33] – [34]

¹³ Shaw, at [35] – [36]

¹⁴ Shaw, at [39] – [49]

¹⁵ Shaw, at [24] – [27]

15. The evidence of Mr Mortimer (inter alia) is that:

- a. the specific geographic areas proposed for rezoning, and the type of zoning proposed, are underpinned by detailed site-specific expert investigation;¹⁶
- b. the bulk of the land proposed as RVRE was identified in the Waipu Cove/Langs Beach Structure Plan as suitable for residential use;¹⁷
- c. the land notified as RPE has relatively poor soil quality, and is not able to be used for that activity on an economically viable basis;¹⁸
- d. from the perspective of objectives and policies, the rezoning proposed is appropriate, and in particular does not undermine core outcomes sought (in particular consolidated development based upon identified nodes – beads on a string concept);¹⁹
- e. no infrastructure constraints inhibit the rezoning sought, and further from the perspective of efficient use of public infrastructure including amortisation of costs of that infrastructure, the rezoning sought has positive effects;²⁰
- f. shortcomings in Councils growth and demand analysis are evident;²¹
- g. the Waipu Cove/Langs Beach Structure Plan is generally supportive of the rezoning sought;²²
- h. in the context of rezoning where undersupply or oversupply may result, the more appropriate approach is to err on the side of enabling provisions because the market can respond if oversupply eventuates, in contrast to undersupply;²³

¹⁶ Mortimer, at [11] – [20]

¹⁷ Mortimer, at [17] and [25]

¹⁸ Mortimer, at [30] – [33]

¹⁹ Mortimer, at [39] – [49]

²⁰ Mortimer, at [52] – [55]

²¹ Mortimer, at [56] – [59]

²² Mortimer, at [61] – [69]

²³ Mortimer, at [60]

- i. from a cost benefit perspective the proposed zoning is the most appropriate way to achieve the objectives and policies in the District Plan and proposed new zone provisions.²⁴

Growth, demand modelling and associated supply principles

16. The core of Council's opposition to Blue Moon's proposed zoning is driven by modelled growth and demand outputs resulting in consequential opinions as to costs, benefits and risks. In that context you must address those growth pressures by reference to section 32.
17. The recent Auckland Unitary Plan process encompassed growth and demand modelling with respect to new plan provisions. Whilst aspects of the process were unique and bespoke, and the geographic location is different, the findings with respect to relevant principles in the context of growth and modelling are of broad application.
18. In addition although growth pressures in Whangarei may not be as significant as Auckland, nonetheless there is demand expected (some of which ironically results from price pressure in Auckland coupled with Whangarei's proximity to Auckland and its lifestyle attributes).
19. The Auckland Unitary Plan Independent Hearings Panel (IHP) addressed the issue of enabling growth in its overview report.²⁵ Of interest, and relevance here, is the IHP's emphasis on ensuring assessments of capacity are estimated on the basis of what is "feasible", not just theoretically achievable.²⁶ If the analysis in question is to underpin decision-making about the proposed zoning in the context of:
 - a. whether it is most appropriate to achieve the purpose of the RMA,
 - b. whether it is efficient and effective,
 - c. what its benefits and costs may be, and
 - d. what the risk of acting or not acting might be,

²⁴ Mortimer, at [79]

²⁵ *IHP Report to Auckland Council – Overview of Recommendations on the proposed Auckland Unitary Plan, 22 July 2016.*

²⁶ The Panel stated that it preferred an assessment of feasible enabled capacity taking into account physical and commercial feasibility, rather than simple assessment based on theoretical capacity enabled by plan provisions – refer *IHP Report to Auckland Council – Overview of Recommendations*, page 49 .

then the analysis should as far as possible represent a real world assessment of the development which may occur.

20. In addition the IHP in the context of its Unitary Plan recommendation about making provision for growth through rezoning, the IHP considered it should “...err toward over-enabling, as there is a high level of uncertainty in the estimates of demand and supply over the long-term, and the costs to individuals and the community of under-enabling capacity are much more severe than those arising from over enabling capacity”.²⁷
21. The above statement applies equally in this District. The costs of under enabling capacity are much more severe because “... the implications for individuals and the community from an under-supply of enabled residential capacity (e.g. house price escalation, over-crowding, extended commuting distances, and migration out of the region) are much more severe than those of an over-supply of enabled capacity... Property markets are able to respond to the over-supply of enabled capacity by, for example, deferring the development of some land zoned for future urban, whereas markets are not able to remove the constraints and distortions from the under-supply of enabled capacity. Thus the Auckland region can be expected to perform more efficiently if the Unitary Plan errs toward an over-supply of enabled capacity than toward an under-supply. Given the level of uncertainty in the projections of demand and supply for the long-term, it is neither practical nor prudent to try and target a precise level of enabled capacity”.²⁸
22. The issues identified above are not limited to Auckland – they apply wherever undersupply occurs.
23. As for levels of uncertainty in estimates of demand and supply, I readily accept modelling demand is inherently challenging. Whilst the challenge is recognised, steps can be taken to lessen potential distortions and acknowledge limitations which might apply in certain circumstances. In this scenario key factors include:
 - a. difficulties arising from the attempt to assess likely demand at a relatively small scale (Waipu Cove/Langs Beach) in the context of datasets applying to a broader area;

²⁷ IHP Report to Auckland Council – Overview of Recommendations, Page 47.

²⁸ Ibid, Page 51

- b. in addition to the issue of scale above, the market drivers for Waipu Cove/Langs Beach are different to those for Waipu, and for much of the broader District;
 - c. consequent upon the above factors, attempts to manipulate broadly derived datasets and apply it at a refined level result in an elevated potential for significant inaccuracy and unreliability.
24. Mr Thompson has undertaken an alternative analysis of the anticipated demand. His method is based upon consideration of physical counts of housing rather than relying upon Statistics NZ data manipulation informed by assumptions. This approach is preferable for reasons he details.
25. Mr Thompson explains that separating data as between Waipu township and the Waipu Cove/Langs Beach area is not possible which has consequential implications for the accuracy and usefulness of Statistics NZ data. In addition due to the significant proportion of holiday residents, assessments of population are inherently unreliable in attempting to accurately capture housing demand or housing growth. This is best illustrated by Mr Thompson's observation that the Whangarei District Growth Strategy has underestimated future demand for new housing in Waipu Cove/Langs Beach by a minimum of 300%.²⁹
26. In addition Mr Thompson has looked at some fundamentals, in particular pricing, which confirm that demand greatly exceeds supply for Langs Beach. Elevated land value at Langs Beach over and above by way of example values at Waipu, represent an excess of demand over supply. This market analysis is a helpful and powerful cross check.
27. The demand assessment undertaken by Council has failed to accurately identify that deficit. Instead it suggests that there will be no capacity shortfall until approximately the year 2052 as a minimum – which is completely divorced from market reality.³⁰ In part this failure on the part of Council's analysis reflects theoretical modelling which does not properly engage with the concept of feasible development, taking into account all applicable real-world constraints.

²⁹ Thompson, at [25]

³⁰ Council's section 32 analysis determines that Waipu Cove/Langs Beach have residential capacity until (at a minimum) 2052, and potentially until 2106 – refer *Section 32, 85 C, Evaluation prior to Notification, Part 5*, at [25] – [26]

28. In addition (entire) District growth rate averaging in model formulas fails to engage with the particular demand drivers for Langs Beach. The evidence on behalf of Blue Moon is that Waipu Cove/Langs Beach have some particular demand/growth attributes.

Section 32 and 32AA analysis

29. Section 32 AA of the RMA imposes an obligation for further evaluation where changes have been made or are proposed since the earlier evaluation report. In that context, this hearing process forms part of the section 32 analysis.
30. There is an acknowledged need for change in the context of the current District Plan provisions:
- a. data that the District Plan is based upon is over 10 years old.³¹ The plan was drafted in the mid-1990s, and was notified in late 1998, not becoming operative until 2007.³²
 - b. The 30/50 document³³ was adopted in September 2010,³⁴ with the inputs being older.
 - c. There is acknowledgement that 30/50 provides population projections which are not 100% accurate.³⁵
 - d. The Structure Plan for Waipu Cove/Langs Beach was adopted in February 2009.³⁶ Hence it is over eight years old. The analysis underpinning the Structure Plan predates its adoption.
31. I have already referred to Mr Thompson's identification of the shortcomings in the growth/demand analysis undertaken by Council. A summary formula is set out in the section 32 report.³⁷ I don't propose to enter into a detailed assessment of the formula, but it is clear on its face that various assumptions have been adopted which have significant implications for its accuracy. For example historic building consent rates have been adopted and averaged to determine forecasted future building consent

³¹ *Section 32, 85, Evaluation prior to Notification Part 1*, at [18]

³² *ibid*, at [65] – [66]

³³ *Whangarei District Growth Strategy, Sustainable Futures 30/50*

³⁴ *Section 32, 85, Evaluation prior to Notification Part 1*, at [38]

³⁵ *Section 32, 85 C, Evaluation prior to Notification, Part 5*, at [8]

³⁶ *ibid*, at [56]

³⁷ *ibid*, at [94]

rates. Those historic rates reflect a range of different parameters. For example they reflect economic conditions which may or may not apply moving forward. Potentially of more interest, if they represent a built outcome in the context of constrained supply, then their adoption as a forecast becomes self-fulfilling. In addition it appears that growth rates are calculated using a average growth rate figure for the District overall, which ignores variations in demand within the District.

32. The subsequent consideration of existing capacity is based upon an analysis of vacant land parcels.³⁸ Although some biophysical constraints appear to have been considered, other constraints are not (for example slope, or the location of an existing dwelling within the site), and most importantly there does not appear to have been any account taken of the feasibility of development.
33. In my submission the evidence on behalf of Blue Moon adopts a better approach to demand analysis, and then assesses other potential constraints – including infrastructure, terrain, soil type, vegetation and landform. A number of these are not addressed by Council. I say you can rely upon the evidence on behalf of Blue Moon with respect to these matters when undertaking your section 32 AA analysis.

Section 42A report and recommended zoning

34. In line with my earlier submissions, in my view the capacity estimate approach indicated in the section 42 A reports appears to continue with a simplistic method which does not address feasible development.³⁹

RVRE

35. Despite acknowledgement there are portions of Blue Moon land which are relatively constraint free and possess qualities which support rezoning to RVRE, the section 42 A report identifies three reasons the why the rezoning is not supported⁴⁰:

- a. lack of capacity in the existing wastewater network;
- b. more appropriate to focus growth in Waipu;

³⁸ *ibid*, at [95] – [98]

³⁹ *Section 42A report, Part 6 Zoning Submissions*, at [38]

⁴⁰ *ibid*, at [238] – [239]

c. requested zone is not consistent with the Structure Plan.

Infrastructure Capacity

36. The evidence of Mr Shaw addresses wastewater capacity. In my submission his advice should be relied upon. Capacity exists. Even if there were not capacity for an unconstrained connection, there are options available which would enable development to proceed.
37. Of interest is the suggestion that upgrade work planned for 2024/2025 once completed “will be well timed with the next District Plan review at which point... rezoning will be more appropriate”.⁴¹ This suggestion does not reflect the reality of district plan change timing and subsequent development timing, and ignores the financial implications for the community which will result if capacity is not enabled as part of this review.
38. Plan reviews take some time. The current District Plan process is estimated by Council to take approximately two years, as acknowledged through the adoption of a 12 year demand consideration.⁴² Previous plan review experience suggests that at a minimum from completion of hearings of the District Plan review, at least a year will elapse until the relevant provisions are operative (or largely operative). I am advised that development of the land in question would take in the order of 2 years from the point at which the relevant provisions were operative. As a result any resulting lots are unlikely to be available any earlier than 2020 – at which point the upgrade is only 4 – 5 years away. Further the lots are likely to be staged, and will be gradually taken up and developed over time.
39. In contrast, deferring the rezoning proposed until the next plan review means that the upgrade will be completed approximately 4 – 5 years prior to the review commencing (in or around 2028), with a further 2 years to work through the review process. As a result the cost of the completed infrastructure would be borne by the community for in the order of 8 – 9 years⁴³ before any of the development which the upgraded infrastructure was intended to serve came onstream to amortize the costs. That is inefficient and imposes significant carrying costs on the community.

⁴¹ *ibid*, at [239]

⁴² *Section 32, 85 C, Evaluation prior to Notification, Part 5*, at [12]

⁴³ District Plan would not be in an operative position to enable development to commence until approximately 6 – 7 years after upgrade work was complete, with a further 2 year delay for development to come on stream.

Growth Focus - Hierarchy

40. Turning to the suggestion that focusing growth on Waipu is more appropriate, the concern appears to relate in part to some of the fundamental growth outcomes sought through the District Plan.
41. The Rural Plan Changes as a whole are intended to provide for growth and development at growth nodes, and in effect avoid sprawling lifestyle development and conflicting land-use.
42. As addressed by Mr Mortimer, the Blue Moon submission seeks zoning within/adjacent to an large village acknowledged to be an area of identified population growth. No adverse consolidation issue arises because the rezoning sought is within/contiguous with the existing village.
43. The recommendation also seems predicated on treating provision for growth at Waipu and at Waipu Cove/Langs Beach as an either/or proposition - which it is not. I acknowledge that Waipu sits in a higher location in the growth hierarchy. However the rezoning proposed by Blue Moon does not challenge this hierarchy. Provision for appropriate growth in Langs Beach has no implications for Waipu in that regard. It is also relevant to record that they are two different markets, as is evident by property values, and their physical attributes.⁴⁴ Providing for appropriate growth in Langs Beach does not undermine Waipu because they attract different buyers.

Consistency with Structure Plan

44. Finally in terms of yield, and consistency with the Structure Plan, fundamentally a residential outcome is anticipated. The issue is simply whether or not the sites are serviced – if they are not they will be larger. If they are, then the land in question can be utilised more efficiently. That does not in my submission undermine the Structure Plan outcomes.

RLE

45. In terms of RLE zoning, the section 42 A report suggests that:⁴⁵

⁴⁴ Langs Beach – no real shops, services or employment opportunities, close to the beach, views of ocean, many holiday homes; Waipu – local service centre, a higher proportion of permanent residents, rural village setting

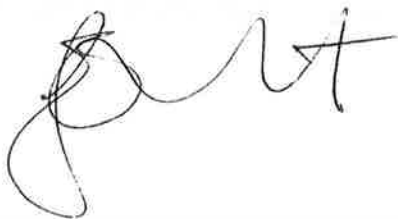
⁴⁵ Section 42 A report, Part 6, Zoning Submissions, at [300]

- a. RLE should be located a “sufficient distance” from Urban zones to make the cost of extending reticulated services less appealing to “discourage” the “perception” that RLE development in proximity to urban areas is a future residential area.
 - b. Avoiding locating RLE close to rural villages reduces potential for future growth to be impeded or constrained.
46. Commencing with the perception proposition, leaving aside whether this anecdotal opinion is true, it is in any event from a resource management perspective of no relevance. The fact that someone purchasing land zoned RLE might hope that it subsequently may be rezoned to a greater (urban) density at some time in the future, is of no consequence. Any subsequent consideration of rezoning would be undertaken, as is required by law, in accordance with the provisions of the RMA.
47. As for the potential risk that RLE adjacent to a rural village may impede or constrain growth, that is only potentially the case if that land has characteristics which would enable more intense development. In this case the land proposed to be rezoned as RLE has been subject to extensive and detailed on-site analysis which has determined that more intense residential development would not be appropriate. As a result any constraint on expansion of the urban area posed by the Blue Moon land is inherent in its physical characteristics. The concern identified does not apply.

Conclusion

48. I submit for reasons set out in Blue Moon’s submission, evidence and in this legal submission, the relief sought by Blue Moon should be granted.

Dated this 26th day of July 2017



J C Brabant

Counsel for Blue Moon Limited