

## **Future Proof Implementation Committee**

### **Agenda**

**Date:** Thursday, 14 April, 2022

**Time:** 3:00 pm

**Location:** Council Chambers

Level 1

160 Ward Street, Hamilton

**Members:** Bill Wasley (Future Proof Independent Chair)  
Mayor Allan Sanson (Waikato District Council - Future Proof Deputy Chair)  
Deputy Mayor Aksel Bech (Waikato District Council)  
Cr Russ Rimmington (Chair, Waikato Regional Council)  
Cr Kataraina Hodge (Deputy Chair, Waikato Regional Council)  
Mayor Paula Southgate (Hamilton City Council)  
Cr Dave Macpherson (Hamilton City Council)  
Mayor Jim Mylchreest (Waipā District Council)  
Deputy Mayor Liz Stolwyk (Waipā District Council)  
Mayor Ash Tanner (Matamata-Piako District Council)  
Cr Neil Goodger (Matamata-Piako District Council)  
Linda Te Aho (Waikato-Tainui)  
Parekawhia McLean (Tainui Waka Alliance)  
Nanaia Rawiri (Ngā Karu Atua o Te Waka)  
Hon Nanaia Mahuta (Minister, Local Government)  
Hon Dr Megan Woods (Minister, Housing)  
Hon Michael Wood (Minister, Transport)  
Deputy Mayor Bill Cashmore (Auckland Council)  
Andrew Baker (Chair, Franklin Local Board)  
Karen Wilson (Mana Whenua Kaitiaki Forum)  
Gavin Anderson (Mana Whenua Kaitiaki Forum)  
Ngarimu Blair (Mana Whenua Kaitiaki Forum)  
David Spiers (Waka Kotahi NZ Transport Agency, non-voting)  
Margaret Wilson (Deputy Commissioner, Waikato District Health Board, non-voting)

**Alternates:** Cr Pamela Storey (Waikato Regional Council, alternate)  
Cr Angela Strange (Waikato Regional Council, alternate)  
Cr M Gallagher (Hamilton City Council, alternate)

Notice of Meeting:

Notice is given that an ordinary meeting of the Future Proof Implementation Committee will be held as detailed above.

CDA McLay  
**Chief Executive**

1.	<u>Apologies</u>	
2.	<u>Confirmation of Agenda</u>	
3.	<u>Disclosures of Interest</u>	
	Members are reminded of the need to be aware of maintaining a clear separation between personal interests and duties and their role as an elected member appointed to this Committee. If any member has an interest that creates an actual, or could be perceived to create, a conflict in relation to any item on the agenda, it is recommended that this be disclosed.	
4.	<u>Confirmation of Open Minutes - 16 September 2021</u>	6
5.	<u>Te Ture Whaimana Legal Advice</u>	10
6.	<u>Resolution to exclude the public</u>	39
7.	<u>Public Excluded Session</u>	
7.1.	<u>Confirmation of Public Excluded Minutes - 16 September 2021</u>	
7.2.	<u>Priority Development Area Tracker Report</u>	
7.3.	<u>Hamilton-Waikato MSP Transport Programme Business Case</u>	
7.4.	<u>Back to Open Session</u>	
8.	<u>Implementation Advisor Report</u>	40

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**Future Proof Implementation Committee**  
**Terms of Reference<sup>5</sup>**

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**Future Proof Implementation Committee (FPIC) - Future Proof Specific**

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**Purpose:** Pursuant to Section Clause 30 Schedule 7 of Government Act 2002, a joint Committee of Hamilton City Council, Waikato District Council, Waipā District Council, Waikato Regional Council, Matamata-Piako District Council and tangata whenua be retained to implement the Future Proof Strategy and Implementation Plan.

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**Delegations:** The Future Proof Implementation Committee be delegated authority to progress and implement the Future Proof Strategy in accordance with the following functions:

- Providing leadership on growth management and spatial planning in the sub-region.
  - Overseeing the implementation of the Future Proof Strategy and undertaking any reviews or updates of the Strategy, including adopting any draft strategies for public consultation.
  - Taking responsibility for progressing those actions specifically allocated to the "Future Proof Implementation Committee" in the strategy and making sure the implementation does occur.
  - Monitoring the Future Proof Strategy and ensuring a joined-up approach to implementation, this includes monitoring and reporting progress against milestones.
  - Reviewing and recommending adjustments to the strategy if circumstances change.
  - Addressing cross-boundary matters within the Future Proof sub-region, as well as with other neighbouring regions that are consistent with the agreed settlement patterns.
  - Approving submissions to Local Authorities, Central Government and other agencies on Future Proof related matters.
  - Identifying and resolving any consultation inconsistencies between the Future Proof Strategy and subsequent public consultation processes of the partner Councils.
  - Facilitating consultation with the community.
  - Implementing the Memorandum of Understanding to provide and maintain partnership relationships.
  - Champion integration and implementation through partner strategies, programmes, plans and policy instruments and through partnerships with other sectors such as health, education and business.
  - Advocating to Central Government and other organisations on relevant Future Proof growth management matters.
  - Selecting and appointing an Independent Chairperson and a Deputy Chairperson.
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<sup>5</sup> These Terms of Reference replace those contained in Section 10.2.2 of the Future Proof Strategy.

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<b>Membership:</b>	<p>That representation be comprised of:</p> <ul style="list-style-type: none"><li>■ Two elected member representatives as appointed by the contributing authorities, including the Mayors and Regional Council Chairperson</li><li>■ Three representatives to be nominated by Waikato tangata whenua - one from the Tainui Waka Alliance, one from Waikato- Tainui and one from Nga Karu Atua o te Waka</li><li>■ That an Independent Chairperson, to be appointed by the Committee, chair the Committee.</li></ul> <p>That the standing membership be limited to 14 members, but with the power to co-opt up to a maximum of four additional non-voting members where required to ensure the effective development and implementation of the Future Proof Strategy.</p> <p>That the NZTA be represented through its Director of Regional Relationships as an observer with speaking rights but in a non-voting capacity.</p> <p>That the Waikato DHB be represented by a person to be nominated by the Board, as an observer with speaking rights but in a non-voting capacity.</p>
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<b>Meeting frequency:</b>	Bi-monthly, or as necessary and determined by the Independent Chairperson.
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### **Future Proof Implementation Committee (FPIC) - Hamilton to Auckland Corridor**

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<b>Purpose:</b>	Pursuant to Section Clause 30 Schedule 7 of Government Act 2002, an expanded Future Proof Implementation Committee which includes Auckland Council, Central Government and representatives of the Auckland Mana Whenua Kaitiaki Forum to progress and implement the Hamilton to Auckland Corridor Plan.
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<b>Delegations:</b>	<p>The expanded Future Proof Implementation Committee be delegated authority to progress and implement the Hamilton to Auckland Corridor Plan and associated work streams in accordance with the following functions:</p> <ul style="list-style-type: none"><li>■ Overseeing the development and implementation of the Hamilton to Auckland Corridor Plan and associated work streams, including adopting any drafts for public consultation.</li><li>■ Ensuring organisation systems and resources support implementation of the Hamilton to Auckland Corridor Plan.</li><li>■ Addressing cross-boundary matters between Auckland and the Waikato, and within the Future Proof sub-region, as well as with other neighbouring regions.</li><li>■ Monitoring the implementation of the Hamilton to Auckland Corridor Plan and associated work streams.</li><li>■ Reviewing and recommending changes to the Hamilton to Auckland Corridor Plan if circumstances change.</li></ul>
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- Ensuring alignment with existing council plans, strategies and policies, and with existing evidence, for example around climate impacts and emissions.
  - Ensuring alignment with initiatives already underway such as the Crown and Auckland Council Joint Programme of Work on Auckland Housing and Urban Growth.
  - Facilitating consultation with the partners and the wider community where relevant.
  - Facilitating consultation with the partners and the wider community where relevant.
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**Membership:**

For Hamilton to Auckland Corridor matters, the Future Proof Implementation Committee will be expanded to include:

- Up to three Ministers of the Crown - voting
- Up to three mana whenua representatives from the Auckland Mana Whenua Kaitiaki Forum - voting
- An Auckland Council Governing Body representative and a Franklin Local Board representative<sup>6</sup> - voting
- Additional Ministers and Auckland local government elected members if and when relevant and required - non voting

That the standing membership be limited to 22 members, but with the power to co-opt up to a maximum of four additional non-voting members where required to ensure effective planning and implementation.

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**Meeting frequency:**

Bi-monthly, or as necessary and determined by the Independent Chairperson.

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<sup>6</sup> Auckland Council participation in the Future Proof Implementation Committee for Hamilton to Auckland Corridor matters is limited to growth management issues relating to central government's Urban Growth Agenda; cross-boundary issues; specific project initiatives relevant to Auckland and any other matters that Auckland Council wishes to specifically table with the authorisation of the Independent Chairperson.

**Waikato Regional Council**  
**Future Proof Implementation Committee**  
**MINUTES**

**Date:** Thursday, 16 September, 2021, 4:01 pm

**Location:** Virtual Meeting Via Teams

**Members Present:** Bill Wasley (Future Proof Independent Chair)  
Mayor Allan Sanson (Waikato District Council - Future Proof Deputy Chair)  
Deputy Mayor Aksel Bech (Waikato District Council)  
Cr Pamela Hodge (Waikato Regional Council)  
Cr Russ Rimmington (Chair, Waikato Regional Council)  
Cr Martin Gallagher (Hamilton City Council alternate)  
Cr Dave Macpherson (Hamilton City Council) (from 4.12pm)  
Mayor Jim Mylchreest (Waipā District Council)  
Deputy Mayor Liz Stolwyk (Waipā District Council)  
Linda Te Aho (Waikato-Tainui)  
Nanaia Rawiri (Ngā Karu Atua o Te Waka)  
Parekawhia McLean Tainui Waka Alliance)  
Wikitoria Tane (Ngā Karu Atua o Te Waka - Alternate)  
Hon Nanaia Mahuta - Minister Local Government (from 4.15pm)  
Hon. Dr Megan Woods - Minister Housing  
Hon. Michael Wood - Minister Transport  
Andrew Baker (Chair, Franklin Local Board)

**Non-voting observers present:** David Spiers (Waka Kotahi NZ Transport Agency - non-voting)  
Margaret Wilson (Deputy Commissioner, Waikato District Health Board)

**Staff Present:** P Winder - Future Proof  
G Ion - Waikato District Council  
B Bowcott – Hamilton City Council  
L Balsom - Waikato Regional Council  
S J Edgar - Future Proof Co-ordinator  
L Bartley - Democracy Advisor

The meeting opened with a karakia from Nanaia Rawiri.

1. **Apologies**

FP21/25

**Moved by:** Cr R Rimmington

**Seconded by:** Mayor J Mylchreest

**That the apologies of Cr Bill Cashmore (Auckland City) for absence; Cr K Hodge (Waikato Regional Council) for lateness; Mayor Paula Southgate (Hamilton City Council) for absence and Cr Dave McPherson (Hamilton City Council) for lateness be received.**

carried

2. **Confirmation of Agenda**

FP21/26

**Moved by:** Mayor A Sanson

**Seconded by:** Deputy Mayor A Bech

**That the agenda of the Future Proof Implementation Committee of 16 September 2021, as circulated, be confirmed as the business of the meeting.**

carried

3. **Disclosures of Interest**

There were no disclosures of interest noted.

4. **Confirmation of Minutes - 27 July 2021**

Amendments

Minutes to clearly record Ministers did not participate in Item 8.4 on Discussion of Infrastructure Acceleration Fund expression of interest. Apologies from Margaret Wilson noted for the last meeting. Martin Gallagher - attended as alternate.

FP21/27

**Moved by:** Deputy Mayor A Bech

**Seconded by:** Cr M Gallagher

**That the minutes of the Future Proof Implementation Committee meeting of 27 July 2021, as amended, be confirmed as a true and correct record.**

carried

5. **Resolution to Exclude the Public**

FP21/28

**Moved by:** Mayor J Mylchreest

**Seconded by:** Mayor A Sanson

In accordance with section 48(1) of the Local Government Official Information and Meetings Act 1987 (Act) and the interests protected by section 6 and 7 of that Act it is moved that the public be excluded from the parts of this meeting set out below. The general subject of the matters to be considered while the public is excluded, the reason for passing this resolution in relation to each matter, and the specific grounds for excluding the public, as specified by s48(1) of the Act are set out below:

6.1 Confirmation of Public Excluded Minutes – 27 July 2021	1. Enable any local authority holding the information to carry out, without prejudice or disadvantage, commercial activities (section 7(2)(h) of the Act)2. Enable any local authority holding the information to carry on, without prejudice or disadvantage, negotiations (including commercial and industrial negotiations) (section 7(2)(i) of the Act)	Section 48(1)(a)(i) – the public conduct of the relevant part of the proceedings of the meeting would be likely to result in the disclosure of information for which good reason for withholding would exist under section 7 of the Act.
6.2 Draft Future Proof Strategy – for Adoption for Public Consultation		

**carried**

4.08pm The meeting moved into public excluded session.

4.25pm The meeting returned to open session.

## **7. Future Proof - Public Consultation Process**

Report presented by Mr P Winder providing an overview of the process for the public consultation process of the approved Draft Strategy. It was noted that representatives do not need to be named today.

### Members Comments/Questions:

Minister Woods acknowledged the unique way this is being done but believes it is sound. Looking for assurances of cross regional council participation including Auckland Council or Franklin Local Board and Tamaki Makaurau iwi on the hearings panel. The Minister also confirmed that in addition to a Waka Kotahi representative, there will also be a senior official from the Housing official participating.

Members noted that the recommendation for representatives from each Future Proof Local Authority does include either Auckland Council or Franklin Local Board.

FP21/32

**Moved by:** Mayor J Mylchreest

**Seconded by:** Mayor A Sanson



1. That the report **Draft Future Proof Strategy – Public Consultation Process (Future Proof Implementation Committee 16 September 2021)** be received; and
2. That **Future Proof Implementation Committee:**
  - a. Approves consultation on the **Draft Future Proof Strategy** under s83 of the **Local Government Act 2002** using the **Special Consultative Procedure** as set out in this report.
  - b. Agrees to establish a **Hearing Panel** comprising:
    - i. the **Independent Chair of FPIC**, who will chair the **Hearing Panel**
    - ii. a representative from each of the **Future Proof local authorities**
    - iii. representatives appointed by **iwi partners** under the agreement
    - iv. a representative appointed by **Waka Kotahi**
    - v. a representative appointed by the **Waikato District Health Board**
    - vi. a senior official appointed by **government**.
  - c. Requests partners to confirm their representative on the **Hearing Panel**.
  - d. Agrees that the quorum for the **Hearing Panel** comprise each of the members appointed under resolution b) i, ii, iii, and vi above.
  - e. Delegates to the **Hearings Panel** responsibility to hear and consider submissions and to make recommendations to the **Future Proof Implementation Committee** on changes to the **Future Proof Strategy** and decisions in response to the submissions.
  - f. That the **Committee** approves the **Terms of Reference** for the **Hearings Panel (attachment 4)**.
  - g. Agrees to a consultation period of at least six weeks.
  - h. Delegates to the **Independent Chair** authority to set the date for the public release of the **Draft Strategy** for consultation, the deadline for submissions, hearing dates and additional hearing dates as may be required.
  - i. Delegates to the **Independent Chair** authority to extend the period for submissions if **Covid-19** restrictions have, or are likely to impact on the ability of people or groups to make submissions.

**carried**

The Chair acknowledged the recent passing of Mr Luke O'Dwyer, Hamilton City Council staff member who had a long involvement and made significant contributions to the Future Proof project.

4.32pm The meeting closed with a karakia.

# Report to Future Proof Implementation Committee

**Date:** 14 April 2022

**Author:** Peter Winder, Future Proof Implementation Advisor

**Authoriser:** Bill Wasley, Future Proof Independent Chair

**Subject:** **Advice on the application and standing of Te Ture Whaimana**

**Section:** A (Committee has delegated authority to make decision)

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## Purpose

1. The purpose of this report is to provide FPIC with the advice commissioned in relation to the interpretation, application and standing of Te Ture Whaimana.

### Staff Recommendation:

1. That the report Advice on the application and standing of Te Ture Whaimana (Future Proof Implementation Committee 14 April 2022) be received.
2. That the Future Partners be encouraged to consider the advice and how their decisions recognise and reflect their obligations with respect to Te Ture Whaimana and contribute to achieving the vision and strategy for the awa.

## Background

2. Two recent events have prompted the need to reconsider the standing and application of Te Ture Whaimana – the vision and strategy for the Waikato River. They are:
  - a. The Board of Inquiry Decision in relation to the WaterCare application to take water from the Waikato River
  - b. The enactment of the Resource Management (Enabling Housing Supply and Other Matters) Amendment Act (**the Act**).
3. The Watercare decision directly addresses the standing and role of Te Ture Whaimana. Since the Board of Inquiry was chaired by the Chief Judge of the Environment Court this decision is important jurisprudence in the interpretation of Te Ture Whaimana.
4. The provisions of the Act provide for Te Ture Whaimana to be a qualifying matter that could result in the application of lesser standard for medium residential housing zones than is otherwise required by the legislation.
5. Given the centrality of the Te Ture Whaimana to the Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010 and the role of Te Ture Wahimana as the primary direction setting document for the region it is essential that the Future Proof Partners understand the vision and strategy and give effect to it through their decisions. Restoring and protecting the health and wellbeing of the Waikato River for future generations will require long-term and deep-seated efforts by the Future Proof Partners and all those who live, work and do business within the catchment of the awa.
6. In response to the two events noted above, the Policy and Planning Working Group sought legal advice in relation to the standing of Te Ture Whaimana, the lessons from the recent WaterCare Board on Inquiry decisions, and the considerations that apply in addressing Te Ture Whaimana as a qualifying matter in

terms of the Medium Density Residential Requirements arising from the Resource Management (Enabling Housing Supply and Other Matters) Amendment Act. Lachlan Muldowney was commissioned to provide advice addressing these issues. It was intended that the advice would be broad and public in order to contribute to the understanding of Te Ture Whaimana by all of those who are involved in decision-making.

## The Advice

7. The advice received from Lachlan Muldowney is attached to this report. We note that this is his opinion and there may well be other possible interpretations in relation to both areas of the advice.
8. It is important to note that the advice:
  - a. Is a timely reminder of the significance of Te Ture Whaimana and its primacy as a National Policy Statement within the catchment of the Waikato River.
  - b. Reminds us that Te Ture Wahimana is seeking betterment and that this is a higher and different test than the standard avoid, remedy, or mitigate test that is the norm when dealing with matters under the RMA.
  - c. Underlines that the health of the river is not just about the physio-chemical properties of the water or the volume and flow of water in the awa. The health is a far more wholistic concept, including its metaphysical health and the relationship between the Awa and tāngata whenua.
  - d. Establishes a framework and a necessary evidentiary threshold for the consideration of Te Ture Whaimana as a qualifying matter under the Act.
9. It is intended that the opinions be widely circulated amongst the Future Proof Partners and across all Future Proof Working Groups. The advice will also be provided to the Future Proof Strategy Hearings Panel. This will mean that all those who will be involved in the consideration of both the Future Proof Strategy and responses to the MDRS provisions benefit from the advice and the insights into Te Ture Whaimana.
10. It is timely for both Future Proof and all Future Proof Partners to reflect on how they are giving effect to Te Ture Whaimana in their decision-making.

## Attachments:

Future Proof Opinion – Update on legal recognition of Te Ture Whaimana.

Future Proof Opinion – Giving effect to the Resource Management (Enabling housing and other matters) Amendment Act 2021 in the Future Proof area.

## LACHLAN MULDOWNEY

BARRISTER

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16 March 2022

Future Proof  
C/-Peter Winder  
Level 6, AIG Building  
41 Shortland Street

For: Peter Winder  
By email: Peter@mcgredywinder.co.nz

### **RE: UPDATE ON LEGAL RECOGNITION OF TE TURE WHAIMANA**

#### **Introduction**

1. You have sought advice on the correct application of Te Ture Whaimana – the Vision and Strategy for the Waikato River (**Te Ture Whaimana** and the **Vision and Strategy**) in the Future Proof context. You have asked that the advice focus on the recent Board of Inquiry decision on the Watercare Services Limited water take application from the Waikato River (**Watercare BOI**), and the learnings to be derived from that decision, which is the most recent binding judicial pronouncement on the topic since 2014.

#### **Executive Summary**

2. The Watercare BOI heard and in January 2022 determined an application for resource consent to abstract water from the Waikato River. A central issue in the hearing was determining the status and impact of Te Ture Whaimana in the consent evaluation process.
3. The following issues and key messages can be derived from the Board's decision;

#### **Issue 1: Status of Te Ture Whaimana**

**Key message:** Te Ture Whaimana is the primary direction -setting document for the Waikato River and activities which affect it. It sits ahead of any other subordinate legislation or planning documents under the Resource

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Management Act 1991 (RMA). All decision makers exercising functions under the RMA, including policy and plan making, must have particular regard to it.

## **Issue 2: The requirement for restoration and protection of the River**

**Key message:** The health and wellbeing of the River is of paramount concern and requires restoration and protection of the River. These requirements involve an element of betterment, which must be proportionate having regard to the activity and its location within the catchment. The concept must embrace both the biophysical and metaphysical elements.

## **Issue 3: The requirement to restore and protect relationships**

**Key message:** Te Ture Whaimana is not just about the physical restoration and protection of the Awa. It is also about the restoration and protection of the relationship between Waikato-Tainui, and other river iwi, and the Awa. These relationships are central to restoring and protecting the mauri of the Awa. While these relationships can potentially be restored through consent conditions, the more effective means is through early and meaningful engagement in plan making processes where tāngata whenua are directly involved in higher order strategic decisions affecting the Awa.

## **Issue 4: Status of planning instruments giving effect to Te Ture Whaimana**

**Key message:** There can be no assumption that simply because a planning instrument has been prepared and made operative after the commencement of the Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010 and establishment of the Vision and Strategy, that it gives effect to Te Ture Whaimana. That question requires a substantive evaluation.

## **Issue 5: Significance of territorial or regional boundaries**

**Key message:** 'Boundaryless planning' is an inherent feature of the sustainable management of natural and physical resources.

4. Turning to Future Proof, these key messages are consistent with the direction signaled in the most recent review of the strategy, in particular the intention to make transformational change which prioritize iwi aspirations to enhance the health and wellbeing of the Waikato River in accordance with Te Ture Whaimana, and by putting the Waikato River at the heart of planning.
5. The Watercare BOI decision illustrates that there has been a slow and gradual emerging recognition of the significance of Te Ture Whaimana in the Waikato planning context. As plans, policies and consents are reviewed

and updated that recognition of Te Ture Whaimana as the primary direction setting instrument becomes more apparent.

6. The current review of the Future Proof strategy is the next step in that evolution. My reading of the consultation documents indicate Future Proof is correctly positioning Te Ture Whaimana at the centre of its strategy in a manner consistent with judicial expectations.
7. Acknowledging that Te Ture Whaimana is to be positioned at the centre of the strategy is the starting point, what is now required of Future Proof, and its participants, is meaningful engagement with Waikato- Tainui on how the strategy should give effect to Te Ture Whaimana.

## Analysis

### *Future Proof context*

8. In order to address the questions raised by you it is necessary to first put Future Proof into context. Given your familiarity with this topic I have kept the description relatively high level.
9. The Future Proof Strategy (**strategy**) is a 30 year growth management and implementation plan specific to the Hamilton, Waipā and Waikato sub-region within the context of the broader Hamilton-Auckland Corridor and Hamilton -Waikato Metropolitan areas. The strategy provides a framework for managing growth in the sub-region and corridor in a collaborative, staged and coordinated manner to address complex planning issues, especially across territorial authority boundaries.<sup>1</sup>
10. The sub-region includes the territorial boundaries of Waikato District, Waipā District and Hamilton City, and covers takiwaa (districts /regions) of tāngata whenua and mirrors the Raupatu (land confiscation) boundary.
11. The population of the sub-region is projected to increase by around 30% over the next 30 years, which gives rise to a range of complex growth management issues affecting future urban and rural land use, the management of natural and physical resources, transport and essential infrastructure provision, and cross boundary issues with neighbouring local authorities.
12. The strategy was first established in 2009, updated in 2017 and is currently the subject of a further update which was released for public consultation in October 2021. The updated strategy factors in key national planning instruments such as the National Policy Statement on Urban Development (**NPS-UD**) and the Government's Urban Growth Agenda. The recent

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<sup>1</sup> FP updated p 12

consultation materials state that the updated strategy incorporates seven transformational moves for change, being:

- a) Iwi aspirations: enhancing the health and wellbeing of the Waikato River in accordance with Te Ture Whaimana, the Vision and Strategy, and iwi place-based aspirations;
  - b) Putting the Waikato River at the heart of planning;
  - c) A radical transport shift to a multi-modal transport network shaped around where and how communities will grow;
  - d) A vibrant metro core and lively metropolitan centres;
  - e) A strong and productive economic corridor at the heart of the metro area;
  - f) Thriving communities and neighbourhoods including quality, denser housing options that allow natural and built environments to co-exist and increase housing affordability and choice;
  - g) Growing and fostering water-wise communities through a radical shift in urban water planning, ensuring urban water management is sensitive to natural hydrological and ecological processes.
13. In terms of its governance structure Future Proof and the development of the strategy is governed by the Future Proof Implementation Committee (**FPIC**) which is constituted under clause 30 of Schedule 6 to the Local Government Act 2002.<sup>2</sup> FPIC is comprised of two elected members from each partner council and three representatives nominated by tangata whenua - one from the Tainui Waka Alliance, one from Waikato-Tainui and one from Ngā Karu Atua o te Waka. FPIC has additional representation from the New Zealand Transport Agency and the Waikato District Health Board, and also has membership for the Hamilton to Auckland Corridor Plan programme. This membership includes Central Government, Auckland Council and Tāmaki Makaurau iwi representation from the Auckland Mana Whenua Kaitiaki Forum.
14. FPIC has a clear implementation strategy which is led by the preparation and change of the Regional Policy Statement (RPS) and the respective district plans of the participating territorial authorities. Through these planning instruments the strategy achieves statutory effect. The strategy is also given effect to through a range of other statutory instruments, such as

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<sup>2</sup> Clause 30 sets out the powers of each local authority to appoint committees, subcommittees other subordinate decision-making bodies, and joint committees

Long-Term Plans, Land Transport Plans, and 30 Year Infrastructure Strategies.

## *The Settlement Act*

15. The Vision and Strategy is derived from the Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010 (**Settlement Act**). The Settlement Act, which was enacted in May 2010, gave effect to the terms and conditions of the Crown's settlement of Waikato Tainui's raupatu claim in respect of the Waikato River.
16. The overarching purpose of that settlement is to restore and protect the health and wellbeing of the Waikato River for future generations.<sup>3</sup>
17. The purposes of the Settlement Act are multifaceted, including to give effect to the settlement, to recognise the significance of the Waikato River to Waikato-Tainui, and to recognise the Vision and Strategy for the Waikato River.<sup>4</sup>
18. The Settlement Act establishes the significance of the Vision and Strategy as a key statutory planning tool, first pursuant to s 5 where it states:

### **5 Guiding principles of interpretation**

- (1) The vision and strategy is intended by Parliament to be the primary direction-setting document for the Waikato River and activities within its catchment affecting the Waikato River.
19. Secondly, through various sections which establish the place of the Vision and Strategy within the hierarchy of planning instruments sitting within the RMA framework. Those sections include requirements that:
    - a) From commencement of the Settlement Act the Vision and Strategy in its entirety is deemed to be part of the Waikato Regional Policy Statement without the use of the process in Schedule 1 of the RMA;<sup>5</sup>
    - b) The Regional Policy Statement must remain consistent with the Vision and Strategy, and in the event of any inconsistency the Vision and Strategy will prevail;<sup>6</sup>

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<sup>3</sup> Section 3

<sup>4</sup> Section 4(c)

<sup>5</sup> Section 11(1)

<sup>6</sup> Section 11(3) and (4)



- c) The Vision and Strategy prevails over any inconsistent provisions in a national policy statement, NZ coastal policy statement or national planning standard;<sup>7</sup>
  - d) Every local authority must review and amend its district or regional plan to ensure it gives effect to the Vision and Strategy;<sup>8</sup> and
  - e) Every person carrying out functions or exercising powers under the RMA must have particular regard to the Vision and Strategy.<sup>9</sup>
20. Turning to the content of the Vision and Strategy, this is set out at Schedule 2 to the Settlement Act, and for convenience is reproduced at **Appendix 1** to this opinion. Te Ture Whaimana sets the following vision from which flow thirteen objectives and twelve strategies to achieve those objectives:

Our vision is for a future where a healthy Waikato River sustains abundant life and prosperous communities who, in turn, are all responsible for restoring and protecting the health and wellbeing of the Waikato River, and all it embraces, for generations to come.

#### *Watercare BOI*

- 21. As discussed recently, while Te Ture Whaimana has been an operative part of the Waikato Regional Policy Statement since May 2010 there has not been a substantial body of jurisprudence addressing its significance or application. Until the Watercare BOI decision was released in January 2022 the leading authority on Te Ture Whaimana (in a consenting context) was *Puke Coal Ltd v Waikato Regional Council*<sup>10</sup> (***Puke Coal***). In *Puke Coal* the Court recognised that Te Ture Whaimana was a primary environmental objective guiding policy and outcomes under the RMA, and was consistent with Part 2 of the RMA.<sup>11</sup>
- 22. The decision of the Board in the Watercare BOI, which was chaired by Chief Environment Court Judge Kirkpatrick, endorses the approach in *Puke Coal*, but goes further in its exploration of Te Ture Whaimana in a number of respects. Set out below is an account of the main issues addressed relating to Te Ture Whaimana, and the key messages derived from the Watercare BOI decision which will have relevance to Future Proof.

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<sup>7</sup> Section 12(1)

<sup>8</sup> Section 13(4)

<sup>9</sup> Section 17(3)

<sup>10</sup> [2014] NZEnvC 223

<sup>11</sup> *Ibid*; paragraphs [144]–[146]

## Issue 1: Status of Te Ture Whaimana

23. At page 19 of the decision, under the executive summary, and repeated at paragraph 183 of the decision the Board noted:

The provisions of the River Settlement Act are clear in requiring the Board to have particular regard to Te Ture Whaimana as the primary direction-setting document for the Waikato River and activities which affect it, ahead of any other subordinate legislation or planning documents under the Resource Management Act.

24. This status was reaffirmed throughout the decision, for example:

65. The River Settlement Act, at Schedule 2, sets out Te Ture Whaimana which applies to the Waikato River and activities within the catchment affecting the Waikato River. Mr McNamara observed that the Board must have “particular regard” to Te Ture Whaimana, under section 17(3) of the River Settlement Act. The Board notes the more directive language in the River Settlement Act to “have particular regard” to Te Ture Whaimana, compared with Section 104(1) of the RMA which requires a decision-maker to “have regard” to a national policy statement (which reflects the status of Te Ture Whaimana as being that of a national policy statement). In addition, section 11 of the River Settlement Act directs the vision and strategy in its entirety to be part of the RPS, and accordingly it is included in Section 2.5 of the RPS.

...

69. There is a hierarchy of planning documents relevant to this application, and Dr Mitchell in his planning evidence recognised that Te Ture Whaimana is the predominant and overarching statutory document, a view that was shared by the other planners in the expert planning conference and also in their respective evidence. Section 12 of the River Settlement Act states that Te Ture Whaimana prevails over any inconsistent provision in a national policy statement [s12(1)(a)], a New Zealand coastal policy statement [s12(1)(b)] and a national planning standard [s12(1)(c)]. The importance of Te Ture Whaimana has been articulated in several Environment Court decisions on designations, plan changes, regional and district resource consent applications and road stopping applications, including the appeals to Variation 6.

...

170. In this case, the central issue is whether the proposed take of water from the river is appropriate under the RMA and the statutory planning documents by which the purpose of the RMA is to be achieved, most notably Te Ture Whaimana under the River Settlement Act and the WRP.

**Key message:** Te Ture Whaimana is the primary direction-setting document for the Waikato River and activities which affect it. It sits ahead of any subordinate legislation or planning documents under the RMA. All decision-makers exercising functions under the RMA, including policy and plan-making, must have particular regard to it.

**Issue 2: The requirement for restoration and protection of the River**

25. The Board clarified the very wide definition of *River* in this context, drawing on s 6 of the Settlement Act, which includes references to survey plans, by observing:

169. References to “the river” in the material before us use the word in a number of different ways. The breadth of the meaning of the Waikato River in law is partly explained by the definition in section 6 of the River Settlement Act where in various contexts the river means:

- the Waikato River and its catchment;
- the body of water known as the Waikato River flowing continuously or intermittently from the Huka Falls to the mouth of the Waikato River;
- all tributaries, streams, and watercourses flowing into the Waikato River;
- lakes and wetlands within certain areas;
- the beds and banks of the water bodies of the river.

26. Addressing the requirement for restoration and protection of the Awa, the Board recognised the health and wellbeing of the Awa as the paramount concern, and noted that its health and wellbeing was not just in biophysical terms, but also in terms of the metaphysical elements such as its mana and mauri. It held:

193. Reading Te Ture Whaimana as the primary direction-setting document for the river and activities affecting it in the context of the overarching purpose of the settlement and the principles of the Kiingitanga Accord, it is clear that the health and wellbeing of the river, including its mana and mauri, are of paramount concern. This is reflected in the first objective: the restoration and protection of the health and wellbeing of the Waikato River. The words “restoration” and “protection” are used in many of the succeeding objectives and even where those words are not used, the sense of the objectives is fully consistent with the first objective. This is the background to objectives which acknowledge that the river is degraded and that its water quality must be restored so that it is safe for people to swim in it and take food from it.

27. The Court in *Puke Coal* also made important observations addressing the directive within the Vision and Strategy to *restore and protect*, and noting that this was a higher obligation than the requirement to avoid certain effects stated:

[92] Implicit in the Supreme Court decision was the matter of workable practicality thus any protection or restoration must be proportionate to the impact of the application on the catchment. However, it is clear that it intends to go further than avoiding effects. We have concluded protection and restoration includes preservation from future and restoration from past damage.

Restoration can only involve recreation of a past state. Thus some element of betterment is intended.

28. This statement on the meaning and effect of restore and protect was expressly endorsed in the Watercare BOI decision, where the Board stated;

211. On the matter of betterment, we acknowledge and adopt what was said in the Puke Coal decision [at [92]].

29. Accordingly, strategic planning instruments which are required to give effect to Te Ture Whaimana must move past a policy framework of effects avoidance alone, and provide for the concept of betterment in a manner which is proportionate having regard to matters such as the nature, scale and location of activity, and the timeframe over which restoration and protections of the River can be achieved. That restoration and protection of the awa must address the physical and cultural health of the Awa.

**Key message:** The health and wellbeing of the River is of paramount concern and requires restoration and protection of the River. These requirements involve an element of betterment, which must be proportionate having regard to the activity and its location within the catchment. That concept must embrace both the biophysical and metaphysical elements.

### **Issue 3: The requirement to restore and protect relationships**

30. The Board recognised that while the overarching focus of the Settlement Act was on the health and wellbeing of the river, including its mana and mauri, the concepts of restoration and protection were use throughout the objectives contained within the Vision and Strategy. At paragraph 194 it recorded:

194. The submissions made to us placed weight on the second, third and fourth objectives:

- a) the restoration and protection of the relationships of Waikato-Tainui with the Waikato River, including their economic, social, cultural, and spiritual relationships:
- b) the restoration and protection of the relationships of Waikato River iwi according to their tikanga and kawa with the Waikato River, including their economic, social, cultural, and spiritual relationships:
- c) the restoration and protection of the relationships of the Waikato Region's communities with the Waikato River, including their economic, social, cultural, and spiritual relationships:

31. The significance of these relationships was recognised by the Board in its explicit acknowledgment of the historic injustices that gave rise to the Settlement Act, noting:

195. It is very clear from the evidence of Waikato-Tainui that their relationships with the river were violently affected by the wars with Crown troops and the subsequent raupatu. The Crown has apologised for doing those things and others, as referred to in the Waikato Raupatu Claims Settlement Act 1995. Under that Act the Crown seeks on behalf of all New Zealanders to atone for those acknowledged injustices so far as that is now possible and, with the grievance settled, to begin the process of healing and to enter a new age of co-operation with the Kiingitanga and Waikato. The River Settlement Act in relation to the river is clearly part of that process of healing. Accordingly, actions which are affected by the River Settlement Act must be taken in that spirit.

196. There are several aspects of this application which need to be considered in this context, including the potential effects of the proposal on the health and wellbeing of the river and on the relationships of Waikato-Tainui, Waikato River iwi and the region's communities with the river.

32. The Board put these injustices into context by acknowledging the evidence of various submitters who spoke of the relationship between the Awa and tāngata whenua. It observed that the Waikato River Deed of Settlement recorded<sup>12</sup>:

Waikato have a special relationship with the Waikato River since the Waikato River is the ancestor of Waikato and the water is the life blood of the ancestor.

....

To Waikato-Tainui the Waikato River is a tupuna (ancestor) which has mana (prestige) and in turn represents the mana and mauri (life force) of the tribe. The River has its own mauri, its own spiritual energy, its own powerful identify. It is a single indivisible being.

33. The Board examined the relationship between the biophysical effects of an activity and the metaphysical effects and held:

250. Of particular note is the limited consideration (some submitters would say absence) of the cultural components of Te Ture Whaimana, particularly the 8 objectives that belong to Te Taniwha / Waikato-Tainui. It is clear that there is a tension between the minor biophysical effects of the take and its cultural effects. Minor biophysical impacts do not always entail or otherwise align with minor cultural effects.

34. In its criticism of Watercare's failure to adequately engage and consult with Waikato-Tainui and river iwi the Board stated:

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<sup>12</sup> Decision at para 130

223. We have significant concerns about the ability of the proposal, as applied for, to provide adequately for the cultural well-being of people and communities in terms of section 5(2). Our concerns are also relevant to the matters which we must recognise and provide for in terms of section 6(e), being the relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga, have particular regard to in terms of section 7(a), being kaitiakitanga, and take into account in terms of section 8, being the principles of the Treaty of Waitangi (Te Tiriti o Waitangi). We consider that the cultural effects of the Application have not been explored adequately by Watercare in its decision not to prepare (or to have prepared on its behalf) a cultural impact assessment. More fundamentally, we consider this has resulted in a lost opportunity for Watercare to engage meaningfully with taangata whenua and actively involve them in the management of a highly culturally significant taonga. Both the River Settlement Act and Te Ture Whaimana describe the indivisible relationship between Waikato-Tainui and the awa, and the connection between the two. We consider that the approach taken by Watercare did not appropriately provide for the relationship of taangata whenua and river iwi with the awa, or have particular regard to kaitiakitanga, or take into account the principles of the Treaty of Waitangi (Te Tiriti o Waitangi), and in particular the principle of rangatiratanga or self-management.
35. The Board concluded, with Commissioner Manukau dissenting, that these failures could be addressed through consent conditions which would engage tāngata whenua in consent monitoring and review processes and move them from a submitter/participator in decisions affecting the Awa, to a decision-maker:
323. From all that we have read and seen and heard during this process, a fundamental issue is that the consenting framework envisaged by Watercare does not give Waikato-Tainui a place in caring for the river through the operation of consents such as these. The majority of the Board wish to use the power of imposing appropriate conditions of consent to move Watercare from being an applicant to being a partner with taangata whenua, and to enable taangata whenua to be able to move from being submitters on an application to having a direct role in investigating and guiding decisions on the future of the river.
327. We consider that the requirement to take into account the principles of the Treaty of Waitangi (Te Tiriti o Waitangi) under section 8 of the RMA requires consideration of, in broad terms, a partnership approach. The consequence of Te Ture Whaimana being the highest policy document in the planning framework is that a partnership is a meaningful way to achieve its objectives and advance its strategies. We consider that an executive committee or board will be more effective at enabling the active participation of taangata whenua, while promoting the relationship of iwi and hapuu with their awa.
36. It is clear from the decision that the Board considered the restoration and protection of the river not just in biophysical terms, but also in respect of its metaphysical elements. These metaphysical elements are intrinsically linked to the relationship between the Awa and tāngata whenua.

Restoration and protection of these relationships is a critical component of Te Ture Whaimana, as it is through these relationships that the mauri and mana of the river is protected.

**Key message:** Te Ture Whaimana is not just about the physical restoration and protection of the Awa. It is also about the restoration and protection of the relationship between Waikato-Tainui, and other River iwi, and the Awa. These relationships are central to restoring and protecting the mauri and mana of the Awa. While these relationships can potentially be restored through consent conditions, the more effective means is through early and meaningful engagement in plan making processes where tāngata whenua are directly involved in higher order strategic decisions affecting the Awa.

#### **Issue 4: Status of planning instruments giving effect to Te Ture Whaimana**

37. The Board addressed submissions from Te Whakakitenga o Waikato and the Waikato River Authority suggesting that the Waikato Regional Plan (**WRP**) did not give effect to Te Ture Whaimana nor the NPS-FM. The Board observed that:

95. The consequence of the WRP being found not to give effect to either of these documents would be that the allocation framework in the WRP may be revisited when consenting decisions are made in light of higher order planning instruments, as confirmed by the decision of the Court of Appeal in *RJ Davidson Family Trust v Marlborough District Council*.

38. Rejecting those submissions the Board held that the allocation rules in the WRP were subject to appeals to the Environment Court which were determined with explicit consideration of the Vision and Strategy. More importantly, the Board observed that the question of whether a planning document gives effect to another is not a simple date checking exercise, but instead requires a substantive evaluation. At paragraph 201 it stated:

201. Second, the question whether one planning document gives effect to another or has some other substantive relationship as required under the relevant statute is not to be answered simply by checking the dates when either document was prepared or promulgated. The question of giving effect to something is a substantive issue rather than merely a procedural one. It is possible that an earlier document has been prepared and expressed in a way which demonstrates that its consideration of or conclusion on a particular substantive issue does give effect to what may be expressed in a later document. Identical wording is not required to achieve that. The progress of human thought and the development of planning policy are not always linear, nor do they always demonstrate that a later statement is superior to an earlier one merely because of the effluxion of time.

39. Accordingly, this observation cuts both ways. It cannot be assumed that documents promulgated before the establishment of Te Ture Whaimana

will fail to give effect to it, and that those promulgated after will give effect to it. What is required is a substantive evaluation of the provisions.

**Key message:** There can be no assumption that simply because a planning instrument has been prepared and made operative after the commencement of the Settlement Act and establishment of the Vision and Strategy, that it gives effect to Te Ture Whaimana. That question requires a substantive evaluation.

## **Issue 5: Significance of territorial or regional boundaries**

40. Finally, it warrants noting that the Board addressed the concept of boundaryless planning when faced with some submissions which sought to draw a clear distinction between the Waikato and Auckland regions in the context of water allocation. The Board rejected that distinction, and went on to make a number of observations that endorse the current approach of Future Proof in terms of 'boundaryless planning'. It stated:

188. An issue was also raised about the location of the take and the location where the water would be used. Some of the written submissions were bluntly parochial in their tone, suggesting that the difference between Waikato and Auckland is a resource management issue. We do not accept that suggestion. We start by observing that local and regional boundaries as set under the Local Government Act 2002 are not determinative of resource management issues. The planning framework of the RMA clearly contemplates the need to identify and provide for cross-border issues in the sustainable management of resources. While regional boundaries in New Zealand have been established largely according to higher level river catchments, different regions have different characteristics with different issues. It is unreal and therefore unhelpful to the promotion of sustainable resource management to treat abstract and often arbitrary artificial boundaries as more than matters of administration or some other political purpose.

**Key message:** 'Boundaryless planning' is an inherent feature of the sustainable management of natural and physical resources.

## **Conclusions and recommendations**

41. The key messages identified above are consistent with the direction signaled in the most recent review of the Future Proof strategy, in particular the intention to make transformational changes which prioritize iwi aspirations to enhance the health and wellbeing of the Waikato River in accordance with Te Ture Whaimana, and by putting the Waikato River at the heart of planning.



42. My reading of the consultation documents indicate Future Proof is correctly positioning Te Ture Whaimana at the centre of its strategy in a manner consistent with judicial expectations. The key messages arising from the Watercare BOI decision will help guide Future Proof in the execution of the strategy.
43. Acknowledging that Te Ture Whaimana is to be positioned at the centre of the strategy is the starting point, what is now required of Future Proof, and its participants, is meaningful engagement with Waikato- Tainui on how the strategy should give effect to Te Ture Whaimana.

Yours faithfully,



Lachlan Muldowney  
Barrister

DRAFT

LACHLAN MULDOWNNEY

BARRISTER

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16 March 2022

Future Proof  
C/- Peter Winder  
Level 6, AIG Building  
41 Shortland Street

For: Peter Winder  
By email: Peter@mcgredywinder.co.nz

Dear Peter,

**RE: GIVING EFFECT TO THE RESOURCE MANAGEMENT (ENABLING HOUSING AND OTHER MATTERS) AMENDMENT ACT 2021 IN THE FUTURE PROOF AREA**

**Introduction**

1. You have sought advice on how to give effect to the Resource Management (Enabling Housing and Other Matters) Amendment Act 2021 (**Amendment Act**) within the Future Proof area. In particular, you wish to have clarified the practical implications of the vision and strategy for the Waikato River - Te Ture Whaimana (**Vision and Strategy** or **Te Ture Whaimana**) as a *qualifying matter*, and how it may affect residential density provisions within territorial authority district plans.

**Executive Summary**

2. The Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010 (**Settlement Act**) requires that the Vision and Strategy for the Waikato River be given effect to by territorial authorities through their district plans (**district plan** or **plan**). Plan provisions which fail to give effect to the Vision and Strategy are unlawful.
3. The Amendment Act introduces mandatory changes to district plans which increase residential development densities. These mandatory requirements

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can be departed from, and less enabling development densities may be imposed in their place, but only to the extent necessary to accommodate a matter required to give effect to Te Ture Whaimana.

4. The relationship between residential development densities enabled by district plans and public infrastructure capacity is one such matter. The relationship between these factors must be balanced in a manner that gives effect to the Vision and Strategy.
5. If the imposition of the MDRS and Policy 3 provisions enable development densities that create effects which cannot be managed by existing or planned 3 waters infrastructure, unacceptable effects may arise which are contrary to Te Ture Whaimana, particularly the requirement for the protection and restoration of the Awa.
6. The MDRS and Policy 3 provisions may be amended to the extent necessary to accommodate this matter. This may include reduced or less *enabled* densities in some areas of a district. The extent of these amendments will require a robust evidential basis and be tailored to reflect the infrastructure capacity.
7. Capacity constraints in public infrastructure will vary from Council to Council. Each will require its own capacity assessment and response, noting that any overreach of amendments to the MSRS beyond what is necessary to give effect to Te Ture Whaimana will likely face challenge, and not survive the IPI hearing process.
8. In general terms however, preparation of the evidence base to support any departure from the MDRS will need to address:
  - a. The current infrastructure capacity for each of the 3 waters networks based on spatial considerations. This will need to identify where the network has no capacity, and where capacity exists, and to what extent;
  - b. The current rates of residential development and how those rates will be affected by development densities enabled under the MDRS;
  - c. How those development rates and densities will impact each Council's infrastructure networks, including where network failures will, or are likely, to occur;
  - d. How these failures will affect compliance with each Council's comprehensive stormwater consent, wastewater consent and water take consent;

- e. How these failures, and all other adverse effects on the networks compromise each Council's ability to control land use in a way that contributes to the restoration and protection of the Awa;
- f. The details of the proportionate and tailored changes to the MDRS and Policy 3 requirements that are necessary to restore the balance in the relationship between enabled residential densities and public infrastructure so that each Council is giving effect to Te Ture Whaimana.

## Analysis

### *Application of the Amendment Act*

- 9. The Amendment Act gained Royal Assent on 20 December 2021 and came into effect on 21 December 2021 (**commencement date**). The Amendment Act introduces a series of changes to the Resource Management Act 1991 (**RMA**) which are intended to drive changes to urban residential densities which in turn will contribute to additional housing supply.
- 10. The Amendment Act affects territorial authorities differently, depending on how it categorises each territorial authority. Under the Amendment Act, Hamilton City Council (**HCC**), Waipa District Council (**Waipa DC**), and Waikato District Council (**WDC**) (collectively **the Councils**) are each categorised as a *tier 1 territorial authority*.<sup>1</sup>
- 11. The Amendment Act recognises all tier 1 territorial authorities as a *specified territorial authority*.<sup>2</sup> As a specified territorial authority, each of the councils are required to incorporate medium density residential standards (**MDRS**) and intensification policies into their district plans within certain timeframes, using certain prescribed processes under the Amendment Act.<sup>3</sup>

### *Intensification requirements in residential zones*

- 12. Under s 77G(1) of the Amendment Act every relevant residential zone of a specified territorial authority must be amended to incorporate the MDRS and, in the case of the Councils, each must also give effect to Policy 3 of the National Policy Statement on Urban Development Capacity (**NPS-UD**). Section 77G provides:

**77G Duty of specified territorial authorities to incorporate MDRS and give effect to policy 3 or 5 in residential zones**

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<sup>1</sup> Section 2 RMA

<sup>2</sup> Section 2 RMA

<sup>3</sup> Subpart 2 of the Amendment Act; now ss 77G- 77R of the RMA

- (1) Every relevant residential zone of a specified territorial authority **must have the MDRS incorporated** into that zone.
- (2) Every residential zone in an urban environment of a specified territorial authority **must give effect to policy 3** or policy 5, as the case requires, in that zone.
- (3) When changing its district plan for the first time to incorporate the MDRS and to give effect to policy 3 or policy 5, as the case requires, and to meet its obligations in section 80F, a specified territorial authority must use an IPI and the ISPP.
- (4) In carrying out its functions under this section, a specified territorial authority may create new residential zones or amend existing residential zones.
- (5) A specified territorial authority—
  - (a) must include the objectives and policies set out in clause 6 of Schedule 3A:
  - (b) may include objectives and policies in addition to those set out in clause 6 of Schedule 3A, to—
    - (i) provide for matters of discretion to support the MDRS; and
    - (ii) link to the incorporated density standards to reflect how the territorial authority has chosen to modify the MDRS in accordance with section 77H.
- (6) A specified territorial authority may make the requirements set out in Schedule 3A or policy 3 less enabling of development than provided for in that schedule or by policy 3, if authorised to do so under section 77I.
- (7) To avoid doubt, existing provisions in a district plan that allow the same or a greater level of development than the MDRS do not need to be amended or removed from the district plan.
- (8) The requirement in subsection (1) to incorporate the MDRS into a relevant residential zone applies irrespective of any inconsistent objective or policy in a regional policy statement.

13. The mandatory requirement in s 77G(1) links to a new Schedule 3A to the RMA which sets out the various provisions which comprise the MDRS. These includes a series of objectives and policies<sup>4</sup>, notification rules<sup>5</sup>, subdivision rules<sup>6</sup> and density standards<sup>7</sup> which the Councils must incorporate into their respective district plans. The overall effect of the MDRS is to enable a significant uplift in residential densities within existing and new residential zones, including 3-storey attached and detached dwellings and low-rise apartments.<sup>8</sup>

14. In addition to the MDRS provisions, pursuant to s 77G(2) the Councils will also be required to ensure their respective residential zones within urban environments<sup>9</sup> give effect to Policy 3 of the NPS-UD which provides:

**Policy 3:** In relation to tier 1 urban environments, regional policy statements and district plans enable:

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<sup>4</sup> Clause 4A to Schedule 3A

<sup>5</sup> Clause 4

<sup>6</sup> Clauses 2A, 5, 6 and 7

<sup>7</sup> Part 2; Clauses 9AA -17

<sup>8</sup> See for example mandatory Objective 2 and Policy 1

<sup>9</sup> See definition at s 77F RMA

- (a) in city centre zones, building heights and density of urban form to realise as much development capacity as possible, to maximise benefits of intensification; and
- (b) in metropolitan centre zones, building heights and density of urban form to reflect demand for housing and business use in those locations, and in all cases building heights of at least 6 storeys; and
- (c) building heights of at least 6 storeys within at least a walkable catchment of the following:
  - (i) existing and planned rapid transit stops;
  - (ii) the edge of city centre zones;
  - (iii) the edge of metropolitan centre zones; and
  - (d) within and adjacent to neighbourhood centre zones, local centre zones, and town centre zones (or equivalent), building heights and density of urban form commensurate with the level of commercial activities and community services.

*Intensification planning instruments and intensification streamlined planning processes*

15. Rather than applying the standard RMA First Schedule process, the amendments to each territorial authority's district plan are required to be made under a process set out in the Amendment Act, now incorporated into Schedule 1 to the RMA.<sup>10</sup> This process, described as the intensification streamlined planning process (**ISPP**) requires the Councils to appoint an independent hearing panel which must conduct a hearing on submissions and make recommendations back to Council.<sup>11</sup> Council must consider and may accept or reject those recommendations. Rejected recommendations are referred to the Minister for a final determination.<sup>12</sup>
16. The plan change required to give effect to the Amendment Act is an intensification planning instrument (**IPI**).<sup>13</sup> Pursuant to s 80 the IPI is required to be publicly notified on or before 20 August 2022, and must then proceed in accordance with the ISPP.

*Qualifying matters*

17. While the requirements of s 77G(1) and (2) are cast in mandatory terms, there is an exclusion set out in s 77G(6) which allows a specified territorial authority to introduce plan provisions which are less enabling of development than required under the MDRS and Policy 3, if authorised to do so under section 77I.
18. Section 77I provides:

**77I Qualifying matters in applying medium density residential standards and policy 3 to relevant residential zones**

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<sup>10</sup> RMA First Schedule new Part 6

<sup>11</sup> RMA First Schedule; clause 96

<sup>12</sup> RMA First Schedule; clause 101

<sup>13</sup> RMA; Section 80E

A specified territorial authority **may make the MDRS and** the relevant building height or **density requirements under policy 3 less enabling** of development in relation to an area within a relevant residential zone **only to the extent necessary to accommodate** 1 or more of the following qualifying matters that are present:

- (a) a matter of national importance that decision makers are required to recognise and provide for under section 6:
- (b) a matter required in order to give effect to a national policy statement (other than the NPS-UD) or the New Zealand Coastal Policy Statement 2010:
- (c) **a matter required to give effect to Te Ture Whaimana o Te Awa o Waikato—the Vision and Strategy for the Waikato River:**
- (d) a matter required to give effect to the Hauraki Gulf Marine Park Act 2000 or the Waitakere Ranges Heritage Area Act 2008:
- (e) a matter required for the purpose of ensuring the safe or efficient operation of nationally significant infrastructure:
- (f) open space provided for public use, but only in relation to land that is open space:
- (g) the need to give effect to a designation or heritage order, but only in relation to land that is subject to the designation or heritage order:
- (h) a matter necessary to implement, or to ensure consistency with, iwi participation legislation:
- (i) the requirement in the NPS-UD to provide sufficient business land suitable for low density uses to meet expected demand:
- (j) any other matter that makes higher density, as provided for by the MDRS or policy 3, inappropriate in an area, but only if section 77L is satisfied.

19. Relevantly, s 77I includes within the list of qualifying matters a *matter required to give effect to Te Ture Whaimana o Te Awa o Waikato—the Vision and Strategy for the Waikato River*.<sup>14</sup>

20. Accordingly, under s 77I, to the extent necessary to accommodate a matter required to give effect to Te Ture Whaimana, the Councils may formulate an IPI which is less enabling of development than would otherwise be established under the MDRS and Policy 3. The basis upon which the Councils can rely on Te Ture Whaimana as a qualifying matter, and the nature and extent of these modified provisions requires careful consideration, and while it will engage issues common to the Councils, each will need to undertake its own evaluation.

21. Before examining the correct approach to that evaluation, which is set out at paragraphs 28 to 44 below, it is helpful to first recount the essential features of the Vision and Strategy.

#### *Te Ture Whaimana*

22. The Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010 (**Settlement Act**) has the overarching purpose of restoring and protecting

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<sup>14</sup> This inclusion responded to the submission made by the Future Proof partners to the Select Committee

the health and wellbeing of the Waikato River for future generations.<sup>15</sup> The Settlement Act recognises the significance of the Waikato River to Waikato Tainui. Section 9 of the Settlement Act provides:

**9 Scope of vision and strategy**

- (1) The Waikato River and its contribution to New Zealand's cultural, social, environmental, and economic wellbeing are of national importance.
- (2) The vision and strategy applies to the Waikato River and activities within its catchment affecting the Waikato River.
- (3) The vision and strategy is Te Ture Whaimana o Te Awa o Waikato.

23. Under s 11 of the Settlement Act the Vision and Strategy is deemed to be part of the Waikato Regional Policy Statement since its commencement in 2010, and the policy statement is required to remain consistent with it at all times. The weight and significance of the Vision and Strategy is further recognised in s 12(1) of the Settlement Act, which states that it shall prevail over any inconsistent provision in a national policy statement or national planning standard.

24. The statutory weight of Te Ture Whaimana is further recognised in s17 of the Settlement Act which requires that for persons carrying out functions or exercising powers under the RMA which relate to the River or activities in its catchment, they must have *particular regard* to the Vision and Strategy. Accordingly, as an overarching planning instrument, its significance cannot be overstated.

25. The Vision and Strategy itself is set out at Schedule 2 to the Settlement Act. It sets the following vision:

Our vision is for a future where a healthy Waikato River sustains abundant life and prosperous communities who, in turn, are all responsible for restoring and protecting the health and wellbeing of the Waikato River, and all it embraces, for generations to come.

26. It then sets out a series of objectives to be pursued, in order to achieve the vision. For present purposes, of most relevance are the following objectives:

- a) the restoration and protection of the health and wellbeing of the Waikato River:
- b) the restoration and protection of the relationships of Waikato-Tainui with the Waikato River, including their economic, social, cultural, and spiritual relationships:

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<sup>15</sup> Settlement Act; section 3



- c) the restoration and protection of the relationships of Waikato River iwi according to their tikanga and kawa with the Waikato River, including their economic, social, cultural, and spiritual relationships:
  - d) the restoration and protection of the relationships of the Waikato Region's communities with the Waikato River, including their economic, social, cultural, and spiritual relationships:
  - e) the integrated, holistic, and co-ordinated approach to management of the natural, physical, cultural, and historic resources of the Waikato River:
  - f) the adoption of a precautionary approach towards decisions that may result in significant adverse effects on the Waikato River and, in particular, those effects that threaten serious or irreversible damage to the Waikato River:
  - g) the recognition and avoidance of adverse cumulative effects, and potential cumulative effects, of activities undertaken both on the Waikato River and within the catchment on the health and wellbeing of the Waikato River.
27. It is clear that the Vision and Strategy set objectives that represent a new bar in terms of managing environmental effects on the Awa. The usual RMA thresholds of *avoid, remedy and mitigate* give way to *restoration and protection* of the Awa and its relationships with Waikato Tainui, Waikato River iwi, and the wider community.

*Reliance on Te Ture Whaimana as a qualifying matter*

28. For a Council seeking to rely on Te Ture Whaimana as a qualifying matter, the statutory scheme set out in s 77I requires that it demonstrate how the proposed less enabling provisions are ... *necessary to accommodate...a matter required to give effect to Te Ture Whaimana.*
29. Under this framework the first issue to address is the extent to which a territorial authority is required, if at all, to give effect to Te Ture Whaimana. Next, the territorial authority must identify the *matter* which is giving effect to Te Ture Whaimana. Finally, the territorial authority must identify the extent to which a departure from the MDRS and Policy 3 is necessary to accommodate that matter. Each step in the statutory scheme is addressed below.

30. Under ss 31 and 73 of the Resource Management Act 1991 (**RMA**), each of the Councils are required to have a district plan which sets out the objectives, policies, rules and methods to achieve the integrated management of the effects of use, development and protection of land and associated natural and physical resources of the district.<sup>16</sup> This is the key instrument through which each of the Councils control land use in their districts.
31. Under s 13 of the Settlement Act, the Councils must review and amend their district plans to ensure that those planning documents give effect to the Vision and Strategy. This is in addition to the requirement under s 75(3) of the RMA to ensure the district plans give effect to the Waikato Regional Policy Statement (which incorporates the Vision and Strategy<sup>17</sup>).
32. Notably however, the Councils' roles and functions do not extend to controlling the discharge of contaminants into or onto land, air or water, or the maintenance of water quality within waterbodies, those responsibilities rest with the Regional Council as regulator.<sup>18</sup> To that extent, through their respective stormwater discharge consents and wastewater discharge consents the Councils are however accountable to the Regional Council, and those consents must be operated within requisite discharge parameters that either align with Te Ture Whaimana, or via any review of conditions or consent renewals, will be updated to achieve alignment.
33. In addition to these requirements, each of the Councils, including Waikato Regional Council, have entered into Joint Management Agreements with Waikato Tainui which commit to giving effect to Te Ture Whaimana across the full range of Local Government Act 2002 (**LGA**) and RMA functions.
34. Accordingly, through multiple means, each of the Councils are required to give effect to the Vision and Strategy, including first and foremost through their respective district plans as specifically required under s 13 of the Settlement Act.
35. Next, each Council must identify the *matter which must be accommodated* in order to give effect to Te Ture Whaimana.
36. While each Council will have a slightly different approach, the overarching and common *matter* will be the relationship between land use enablement and public infrastructure capacity. Each Council is required to balance this relationship so that they give effect to Te Ture Whaimana. That balance comes from the combined effect of the district plan and the extent it enables increased development densities, and the Council's infrastructure strategy as reflected in the LTP and other similar plans. The nature, rate and

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<sup>16</sup> RMA; Sections s31(1)(a) and 73(1)

<sup>17</sup> Settlement Act; Section 11

<sup>18</sup> RMA; Section 30 (1)

extent of development enabled by the district plan must be matched by an infrastructure strategy, particularly in respect of 3 waters, that keeps pace with development and provides sufficient capacity to not only mitigate effects of development, but give effect to a Vision and Strategy calling for restoration and protection of the Awa and its various relationships.

37. That public infrastructure strategy can take account of privately funded and vested public infrastructure. There may be examples where the private sector could be expected and required to fund public infrastructure, such as localized network upgrades and network connections directly linked to a development. The Amendment Act enables the collection of financial contributions for infrastructure costs such as these<sup>19</sup>, where the effects of the development can be mitigated through works of this nature.
38. However, where the plan enables development densities significantly out of step with infrastructure capacity, and to an extent not able to be managed effectively via financial contributions or other private funding, this will give rise to a public infrastructure deficit. If that deficit can be addressed through new investment, which is affordable and planned for by each Council, then the balance in the relationship can be restored over time and potentially in a manner which at least keeps pace with the rate of development.
39. But where the investment required to manage the impacts of the newly enabled development densities are unaffordable, and cannot be programmed in, the deficit remains. In practical terms this could mean increased impermeable surface run off and stormwater flows into the Awa, an increase in unauthorised wastewater and stormwater network discharges in breach of consent conditions, and increased demand for potable water from the Awa - all of which do nothing to protect and restore the health and wellbeing of the Awa.
40. So returning to the statutory context under the Amendment Act, where the *matter* required to give effect to Te Ture Whaimana, in this case the balance in the relationship between development densities and infrastructure capacity, cannot be achieved if the MDRS requirements are imposed, the Councils must then turn to the question of what alternative development densities are necessary to accommodate this matter.
41. It is here that each of the Councils will have a differing approach based on their own infrastructure capacity reports. Section 77I calls for an evaluation of what is *necessary*. The extent to which the proposed provisions are less enabling than the MDRS will be a key focus of the ISPP hearing process, and

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<sup>19</sup> RMA; Section 77E

any overreach beyond the necessary will likely be the subject of challenge by submitters, and ultimately rejected by the independent panel.

42. Accordingly, an evidence based, proportionate response to any identified infrastructure deficit is needed. Any Council seeking to rely on Te Ture Whaimana as a qualifying matter will need to produce expert technical evidence identifying the current state of public infrastructure capacity, and how the MDRS densities will lead to an exceedance of that capacity. That evidence will need to be sufficiently detailed to identify, in spatial terms, where the network can accommodate increased densities, and where it cannot.
43. Next, evidence will be required addressing the extent of necessary infrastructure upgrades, and associated costs. Evidence will also be required as to the Council's inability to fund and provide that infrastructure in a timely manner (taking account of any opportunities for private/developer led funding).
44. This evidence will provide the basis for the proposition that if the MDRS densities are introduced into the district plan, development will occur at densities which compromise the capacity in the existing network, giving rise to unacceptable effects on the Awa. Moreover, the investment required to address these matters is unaffordable and will not be made, or at least not at a rate that can keep pace with development. This imbalance in the relationship between land use enablement and infrastructure capacity will lead to outcomes which are contrary to the Vision and Strategy for the Awa, and can be avoided with a proportionate amendments to the MDRS requirements, tailored to the infrastructure networks and their capacity constraints.

## **Conclusions and Recommendations**

45. To summarize the position, the Settlement Act requires that the Vision and Strategy for the Waikato River be given effect to by the Councils through their district plans. Plan provisions which fail to give effect to the Vision and Strategy are unlawful.
46. The Amendment Act introduces mandatory changes to district plans which increase residential development densities. These mandatory requirements can be departed from, and less enabling development densities may be imposed in their place, but only to the extent necessary to accommodate a matter required to give effect to Te Ture Whaimana.
47. The relationship between residential development densities enabled by district plans and public infrastructure capacity is one such matter. These factors must be balanced in a manner that gives effect to the Vision and Strategy.

48. If the imposition of the MDRS and Policy 3 provisions enable development densities that create effects which cannot be managed by existing or planned 3 waters infrastructure, unacceptable effects may arise which are contrary to Te Ture Whaimana and the requirement for the protection and restoration of the Awa.
49. The MDRS and Policy 3 provisions may be amended to the extent necessary to accommodate this matter. This may include reduced densities and less *enabled* densities in some areas of a district. The extent of these amendments will require a robust evidential basis.
50. Capacity constraints in public infrastructure will vary from Council to Council. Each will require a tailored response, noting that any overreach beyond what is necessary will likely face challenge, and not survive the IPI hearing process.
51. In general terms however, preparation of the evidence base to support any departure from the MDRS will need to address:
  - a. The current infrastructure capacity for each of the 3 waters networks based on spatial considerations. This will need to identify where the network has no capacity, and where capacity exists, and to what extent;
  - b. The current rates of residential development and how those rates will be affected by development densities enabled under the MDRS;
  - c. How those development rates and densities will impact each Council's infrastructure networks, including where network failures will, or are likely, to occur;
  - d. How these failures will affect compliance with each Council's comprehensive stormwater consent, wastewater consent and water take consent;
  - e. How these failures, and all other adverse effects on the networks compromise each Council's ability to control land use in a way that contributes to the restoration and protection of the Awa;
  - f. The details of the proportionate and tailored changes to the MDRS and Policy 3 requirements that are necessary to restore the balance in the relationship between enabled residential densities and public infrastructure so that each Council is giving effect to Te Ture Whaimana.

52. If any matter requires discussion please let me know.

Yours faithfully,



Lachlan Muldowney  
Barrister

DRAFT

## Resolution to exclude the Public

1. That in accordance with section 48(1) of the Local Government Official Information and Meetings Act 1987 (Act) and the interest or interests protected by section 6 or 7 of that Act, the public is excluded from the following parts of this meeting. The general subject of the matters to be considered while the public is excluded, the reason for passing this resolution in relation to each matter, and the specific grounds for excluding the public are set out below:

Meeting Item No. and subject	Reason for excluding the public	Grounds for excluding the public
8.1. Confirmation of Minutes – 16 September 2021	<ol style="list-style-type: none"> <li>1. Enable any local authority holding the information to carry out, without prejudice or disadvantage, commercial activities (section 7(2)(h) of the Act)</li> <li>2. Enable any local authority holding the information to carry on, without prejudice or disadvantage, negotiations (including commercial and industrial negotiations) (section 7(2)(i) of the Act)</li> </ol>	Section 48(1)(a)(i) of the Act – the public conduct of the relevant part of the proceedings of the meeting would be likely to result in the disclosure of information for which good reason for withholding would exist under section 6 and 7 of the Act.
8.2. Priority Development Area Tracker Report	<ol style="list-style-type: none"> <li>1. Enable any local authority holding the information to carry out, without prejudice or disadvantage, commercial activities (section 7(2)(h) of the Act)</li> <li>2. Prevent the disclosure or use of official information for improper gain or improper advantage (section 7(2)(j) of the Act)</li> </ol>	
8.3. Hamilton-Waikato MSP Transport Programme Business Case	<ol style="list-style-type: none"> <li>1. Enable any local authority holding the information to carry out, without prejudice or disadvantage, commercial activities (section 7(2)(h) of the Act)</li> <li>2. Prevent the disclosure or use of official information for improper gain or improper advantage (section 7(2)(j) of the Act)</li> </ol>	

# Report to Future Proof Implementation Committee

**Date:** 14 April 2022

**Author:** Peter Winder, Future Proof Implementation Advisor

**Authoriser:** Bill Wasley, Future Proof Independent Chair

**Subject:** **Future Proof Implementation Advisor Report**

**Section:** A (Committee has delegated authority to make decision)

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## Purpose

1. The purpose of this report is to provide FPIC with the quarterly report of the Future Proof Implementation Advisor

**Staff Recommendation: *THIS SECTION IS MANDATORY FOR ALL COMMITTEE REPORTS***

That the report Future Proof Implementation Advisor Report (Future Proof Implementation Committee 14 April 2022) be received.

## Discussion

2. Since the last meeting of FPIC there has been considerable work underway across the four major Future Proof Working Groups.
3. The Transport Working Group has made major progress with the Metro Rapid Transit Programme Business Case. An update on this work is provided elsewhere on the Agenda. This work is on track for completion and presentation to the next FPIC meeting.
4. The Waters Working Group has made significant progress on the elements of the Waters Business Case that they are progressing. A fuller update on this work will be provided to the next FPIC meeting.
5. The Priority Development Areas Working Group has made major progress in developing and completing tracking reports for each area and these are presented elsewhere on this Agenda.
6. The Policy and Planning Working Group has been focused on supporting the Future Proof Strategy Hearings Panel to consider sub missions on the draft strategy and make decisions. In the absence of a separate report a fuller description of this activity is set out below.

## Draft Future Proof Strategy Hearings and Decisions

7. Following the completion of the hearings in December 2021, the Policy and Planning Working Group (PPWG) have undertaken a series of workshops to prioritise responses to submissions received through the consultation of the Draft Strategy and Hearings process. These workshops have identified a wide range of issues including a significant amount of additional work which is required to support sound decision making; to respond to the issues raised in submissions and to address significant changes that have arisen since the notification of the Draft Strategy.



8. The following issues have arisen since the Draft Strategy was published and the Hearings were undertaken in late last year:
  - a. Proposed Waikato District Plan Decisions
  - b. Enactment of the Resource Management (Enabling Housing Supply and Other Matters) Act and consequential Medium Density residential zoning
  - c. Impact of medium density residential zoning on the assessment of development capacity
  - d. Recent Board of Inquiry decision on the Watercare application for water take and related consents and its interpretation of Te Ture Whaimana.
9. In addition to these issues, there are some further anticipated issues that may impact on the Draft Strategy, including:
  - a. Expected announcement of Emissions Reduction Pathways requirements
  - b. Expected announcement of a new Transport GPS reflecting changes to the transport investment framework to implement the transport elements of the Emissions Reduction programme
  - c. the likely announcement of a National Policy Statement on Highly Productive Land
  - d. the conclusions reached through the Metro Rapid Transit PBC
  - e. the outcomes of the detailed business cases for both Southern and Northern sub-regional wastewater treatment
  - f. the broader Three Waters Programme Business Case work.
10. Two Hearings Panel workshops have been held and a third workshop will be held on 13 May. That workshop will consider:
  - a. the advice on Te Ture Whaimana
  - b. a presentation on Transport Business Case
  - c. proposals relating to all matters considered but not resolved in the first two workshops
  - d. proposals relating to the framework for out of sequence development proposals
  - e. proposals relating to out of sequence development proposals.
11. Following the workshops the Hearings Panel will formally deliberate on 2 June and bring proposals to the FPIC meeting of 16 June. If FPIC accepts the recommendations of the Hearing panel the final strategy will then be referred to all partners for formal adoption. This timetable will still allow Waikato Regional Council and Hamilton City, Waipa District and Waikato District to adopt and notify the RPS and district plans in August.
12. The other piece of work that the Policy and Planning Working group has now commenced is the scoping a timing of the work required to meet the NPS UD requirements for a 2024 Future Development Strategy. In order to meet the obligations for integration with Long-Term Plans this work will need to be progressed at pace immediately following the adoption of the Future Proof Strategy.

### **13. Conclusions**

14. The next three months will be very busy and will be challenging if differences between the partners arise in response to submissions on the Draft Future Proof Strategy.
15. The completion and adoption of the Future Proof Strategy and the Transport PBC will be major milestones for Future Proof. However, work will then need to immediately commence on the Future Development Strategy, and the response to expected major government policy decisions. The pace of the work required will not diminish.