IN THE MATTER of the Resource Management Act 1991 ("the Act")

AND

IN THE MATTER of an application to **HAMILTON CITY COUNCIL** for private plan change 7 to the operative Hamilton City District Plan by **GREEN SEED CONSULTANTS LIMITED**

STATEMENT OF EVIDENCE OF BERNIE MILNE

1. INTRODUCTION

1.1 My name is Bernard Jack Milne and I am the Survey Manager at Bloxam Burnett and Olliver Ltd.

Qualifications and experience

1.2 I have a Bachelor of Surveying Degree from Otago University (1994) and I am a licensed Cadastral Surveyor (2005). I am a full member of Spatial and Survey New Zealand.

1.3 I have 18 years' experience in land development and cadastral Surveying. I have been the survey manager at Bloxam Burnett and Olliver for nearly 15 years, prior to that I ran my own survey consultancy. I have been involved in a wide variety of industrial and residential land development projects. I am involved in projects from concept, through civil design and construction as well as legal survey.

Involvement in the Project

1.4 I was engaged by Green Seed Consultants Limited ("**GSCL**") to provide advice covering land tenure options for the proposed future development of the Plan Change 7 ("**PC7**") area, particularly in relation to the privately owned rear lanes. Specifically, I have been asked to comment on the rear lane ownership provisions recommended in Hamilton City Council's ("**HCC**") section 42A report for PC7 ("**section 42A report**").

Purpose and scope of evidence

1.5 The purpose of my evidence is to address that specific issue of rear owned lanes, as a licensed cadastral surveyor. To that end, by evidence covers the following:

(a) Outline of the recommended PC7 provisions (from the section 42A report) which I have been asked to address (Section 3);

(b) The rationale for using rear lanes and land tenure options available for the purposes of rear lane ownership (Section 4);

(c) Issues with requiring ownership of rear lanes under the Unit Titles Act 2010 ("**the Act**") (Section 5); and

(d) Concluding comments (Section 6).

1.6 I provide a brief summary of my evidence in Section 2 below.

Expert Witness Code of Conduct

1.7 I have been provided with a copy of the Code of Conduct for Expert Witnesses contained in the Environment Court's 2014 Practice Note. I have read and agree to comply with that Code. This evidence is within my area of expertise, except where I state that I am relying upon the specified evidence of another person. I have not omitted to consider material facts known to me that might alter or detract from the opinions that I express.

2. SUMMARY OF EVIDENCE

2.1 In the revised PC7 provisions provided with the section 42A report, HCC has indicated a preference that rear lanes within the PC7 land are held under the Act. It appears the main rationale for this concern is to ensure there is visible responsibility for maintenance of the rear lanes.

2.2 In my opinion and experience:

(a) There are a range of tenure options that could be applied to rear lanes, including fee simple subdivision. Of all the available options, I would consider ownership under the Act to be the least preferable. Indeed, for the reasons I outline below, it may well render the use of rear lanes within the PC7 land impracticable. It does not appear this was a possibility that HCC even considered, or would consider desirable, in making its recommended amendments to the PC7 provisions.

(b) It is not necessary to impose a preference that rear lanes be held under the Act in PC7, in order to address HCC's concern to ensure ongoing maintenance of these facilities.

2.3 In light of the above and for the reasons outlined in more detail below, I accordingly support the revisions to the PC7 provisions recommended by Mr Tollemache/Ms Fraser-Smith regarding this issue, as outlined in their joint evidence.

3. RECOMMENDED PROVISIONS REGARDING REAR LANE OWNERSHIP

3.1 The recommended provision for PC7 from Appendix B of the section 42A report regarding rear lane ownership is as follows (as a clean version and with those parts that are relevant to this evidence shown in bold):

Rule 23.7.8 (which is a subdivision development standard)

c) All rear lanes and roads:

i. Minimum legal width of a two-way rear lane	7m
ii. All rear lanes to be formed and drained with a permanent sealed or paved all-weather, dust-free surface and in a manner suitable for the type and quantity of vehicles using the site, except permeable pavements are permitted where hydraulic connectivity of the soil, the depth of the water table below ground level and the freeboard available at the site are appropriate.	
iii. **Each rear lane shall be**: • Connected to a transport corridor at each end. • Designed to provide access and egress for large rigid trucks such as fire, furniture removal, refuse and recycling-collection trucks. • **Privately-owned as common property under the Unit Titles Act (or similar legal mechanism) and the owner(s) shall be responsible for its operation and maintenance.**	

3.2 I understand from Mr Tollemache/Ms Fraser-Smith that this same provision is repeated verbatim in Chapter 25 (Rule 25.14.4.1hvi) of the operative Hamilton City District Plan ("**District Plan**").

3.3 Also relevant is the associated "Information Requirement" and "Assessment Criteria", as recommended in Appendix B of the section 42A report. The relevant parts of those provisions for the purposes of my evidence (again as a clean version) are as follows:

Appendix 1 – Information Requirements

1.2.2.23 – Rotokauri North

b) Subdivision creating a rear lane…..

ii. Provide evidence of the establishment of appropriate legal mechanisms for ownership and ongoing maintenance of the lane proposed private legal entity established to own the lane will ensure the lane's on-going management and maintenance, enable indemnity for collection of solid waste and recycling, and provide for maintenance of any public assets installed in the rear lane.

Appendix 1 – 1.3.3 Assessment Criteria (clean version from the 42a recommendations)

O2		For the creation of a private rear lane, the extent to which:

	a)	The establishment of proposed private legal entity to own the lane and to ensure the lane's on-going management and maintenance, Including indemnity for collection of solid waste and recycling (where these are proposed to enter the rear lane), and provide for maintenance of any public assets installed in the rear lane.

4. RATIONALE AND LAND TENURE OPTIONS FOR REAR LANES

4.1 I understand that PC7 introduces the concept of "rear lanes", which is a feature that is not currently addressed (or provided for) in the District Plan. I briefly explain the rationale for this concept, and the potential tenure options available for rear lanes, as follows.

Rationale for proposing rear lanes

4.2 Rear lanes are essentially a version of a private way. The primary difference between rear lanes and private ways is that the lots being served by the rear lane (for rear vehicle access) still have direct frontage to a legal road (for pedestrian access to the front door of a dwelling). I understand that this may be the preferred option to utilise as part of the subdivision design process for PC7, where direct access to the street frontage for vehicles is not desirable, because the street has cycle way and multiple vehicle crossings to the street would therefore cause a safety risk.

4.3 In these cases, the "rear lane" would be created behind the lots providing for vehicle access and manoeuvring. As these access lots are below the minimum width to be vested as a road, they must remain privately owned. The question then arises as to the appropriate way of providing for this private ownership.

Tenure options for rear lanes

4.4 There are a range of tenure options that could facilitate the private ownership of rear lanes, including the following:

(a) As a fee simple freehold title which is held in shares by the relevant allotments it would serve. From my experience, this is most common approach to any form of privately owned access and is ideal for a rear lane arrangement.

(b) As part of the fee simple title to which it serves, and with all other properties having a right of way over the use of the land. From my experience this type of ownership is more common with smaller scale subdivision and typically occurs in rear lot situations (i.e. the accessway is from the lot frontage). I have not seen this applied to a private way situation like a rear lane which would potentially service a large number of properties.

(c) A variation of scenario (a), with additional right of way easements for each allotment over the private way, and/or additional right of way easements to allow access for council waste services and or other utilities as required.

(d) A combination of (a) and/or (c) and in addition the registration of a private Residents Society (registered under the Incorporated Societies Act 1908) or similar. In my experience the obligations to the private entity are registered outside of the resource consent process.

(e) As a fee simple title wholly owned by a private Residents' Society, with easements in favour of lots served and service providers.

(f) As common property under a unit tile subdivision. However, I note as outlined further below that this can only occur where there are buildings which form part of the unit title arrangement (i.e. they are a form of integrated residential development, for example for apartments).

4.5 In my experience, a fee simple title (i.e. sub-paragraph (a) above) would be the preferable option to use for a greenfields subdivision This provides a guaranteed title to a fixed piece of land that can be physically marked on the ground with survey pegs. In comparison, a unit title subdivision is only shown on a diagram, generally with boundaries defined by offsets from physical features such as buildings. Boundaries in unit titles are not pegged and are much more difficult to physically define. This can lead to issues during construction of dwellings or fences, if used in a greenfield or standalone dwelling situation.

4.6 Further, as the boundaries of unit title subdivisions are only defined on a diagram, they would not be part of the LINZ cadastral framework. They therefore would not be visible on the Council GIS, or other property tools. By contrast, a fee simple title is well understood and trusted by the general public and lending institutions. It is also free from the administrative burdens imposed by the Act.

5. ISSUES WITH REQUIRING OWNERSHIP OF REAR LANES UNDER THE ACT

5.1 In my view, there are a several potential issues with HCC's preference for the rear lanes to be owned in accordance with the Act, as specified in the section 42A report. I address each of those as follows.

Provision may render use of rear lanes impossible as a design solution

5.2 First, as per HCC's recommended amendments to the PC7 provisions outlined in Section 2 above, HCC has specified a clear preference to have the rear lanes within PC7 be owned as common property under the Act (or similar legal mechanism). I share the concerns of Mr Tollemache/Ms Fraser-Smith, that the explicit reference to the Act in the

PC7 provisions will set the expectation that this is the only option for ownership of the rear lanes that can be used.

5.3 In this regard, I do not consider that the addition of (or similar) creates sufficient flexibility to allow for consideration (or use) of fee simple titles. Put simply, this is because fee simple titles have a number of differences from (and therefore cannot be 'similar to') unit tiles. There would be no point in having both mechanisms available, if that were not the case.

5.4 Further, I note that the unit title subdivision (as specified in the section 42A report) is suitable for developments that have common physical structures, such as flats or apartments. However, in my opinion, it is not appropriate (and generally should not be considered) for stand-alone, privately-owned dwellings and lots. In addition, I note that in accordance with the Act, unit title subdivisions *cannot* apply to vacant lot subdivision. There must be buildings in place and/or 1 or more "car parks" to meet the definition of a principal unit under section 7 of the Act. I do not consider a scenario where vacant lots were assigned as "car parks" in order to meet this definition just so that the lane would be held in common is practical or even feasible.

5.5 The effect of the above is that recommendations from the section 42A report regarding use of the Act "or similar mechanism" could actually have the perverse outcome of effectively removing rear lanes as a design option for the PC7 land. This is because the title arrangements associated with fee simple subdivision (the most appropriate tenure for such rear lots) could not be achieved.

Unit title subdivision less desirable for some purchasers

5.6 Second, from a land tenure perspective, the Act has a number of provisions that potential purchasers are unlikely to be aware of, such as the need for a common insurance policy for all buildings within the development. In my experience, this makes using unit title subdivision far less desirable for the end purchaser.

Provision not required to ensure maintenance of rear lots

5.7 Third, from my review of the provisions, it appears that HCC's underlying concern is to ensure appropriate maintenance of the rear lots and surrounding facilities, in a situation where the title could be held by a large number of owners. As I have outlined above, there are other, more appropriate options available to manage these risks.

5.8 For example, I am aware of several examples where a Residents' Society (registered under the Incorporated Societies Act 1908) is formed for the development and all landowners are a required to be members. As well as overseeing any rules as to what

activities can be undertaken on each property, the Residents' Society is responsible for maintenance of private infrastructure, including the lanes.

5.9 Again, as outlined above, this is just one option. The lanes could also be jointly owned by the owners of the land which they serve or by the society itself, or a combination of the two. Regardless of the ownership model, maintenance obligations would be contained within the Residents' Society rules and funding to enable the work would be collected and managed by the society. These are common ownership methods which I regularly recommend be used for appropriate subdivisions. In my view, there is nothing unusual or different to these approaches that would raise any concern with applying these approaches to the ownership and management of rear lanes.

5.10 As a result, I do not consider that the PC7 provisions need to specify any particular type of ownership tenure, in order to appropriately achieve the outcomes that HCC seeks. In particular, it is not appropriate for the District Plan to require the use of the Act "or similar legal mechanism" to provide certainty of maintenance on shared access ways. Rather, in my view, the District Plan simply needs to require that a suitable legal entity is created that can manage maintenance of rear lanes.

Inappropriate to require "evidence" of ownership at resource consent stage

5.11 Fourth, I also have concerns with the recommendations in the section 42A report which require "evidence" that such societies or common ownership have been "set up" at resource consent stage. Unless an overarching Residents' Society already exists (and this was the method proposed to be used to manage maintenance), any entity would not be set up at resource consent stage. Thus, it would effectively be impossible for any applicant to comply with these requirements. A more appropriate requirement would be for this evidence to be provided as a condition of consent to obtain approval under section 224(c) of the RMA.

Summary – Issues with requiring ownership of rear lanes under the Act

5.12 I am of the opinion it is likely that HCC did not intend to require the use of the Act for ownership of rear lanes for any technical or property law reason. Rather, the concern appears to be making sure that the proposed ownership and maintenance mechanism is identified. It is also unlikely that HCC considered, or even realised, the range of issues that may arise from their recommendation, as I have outlined above. In this regard, it does not appear from the section 42A report that expert surveyor or property advice was sought with respect to HCC's recommendations in this regard.

5.13 For the reasons I have outlined above, I do not support the recommended amendments to PC7 which would require (or indicate a preference) for rear lanes to be owned under the Act. I have reviewed the further changes to the PC7 provisions in this regard

recommended by Mr Tollemache/Ms Fraser-Smith (and attached to their evidence). I consider these appropriately address the issues I have raised above and that they will also address the issues around rear lots that are of concern to HCC.

6. CONCLUSION

6.1 In conclusion it is not appropriate for a rule within the District Plan to limit what land tenure structure (fee simple or unit title) should be used to provide for maintenance of rear lanes. I consider that there are more appropriate methods to achieve this outcome, as outlined in the evidence of Mr Tollemache/Ms Fraser-Smith. I support the recommendations from their evidence in this regard.

Bernie Milne
24 September 2021