BEFORE HEARING COMMISSIONERS
IN TAURANGA

UNDER THE	Resource Management Act 1991 ("**Act**")
IN THE MATTER OF	A submission on Plan Change 92 - Ōmokoroa and Te Puke Enabling Housing Supply and Other Supporting Matters
BETWEEN	**THE NORTH TWELVE LIMITED PARTNERSHIP**
	Submitter
AND	**WESTERN BAY OF PLENTY DISTRICT COUNCIL**
	Planning authority

REPRESENTATIONS OF 7 SEPTEMBER 2023 ON BEHALF OF THE NORTH TWELVE LIMITED PARTNERSHIP

Before a Hearing Panel: Chairperson Greg Carlyon, and Commissioners Alan Withy, Lisa Mein and Pia Bennett

INTRODUCTION AND OVERVIEW

1. I am a Project Manager for the submitter ("**North12**"), including, in particular, on matters relating to financial contributions. I file these representations[1] on behalf of North12.

2. While North12 raised some urban design matters in its original submission, the focus of its case in evidence and before the Panel is on Financial

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[1] Noting that the term "representation" has commonly been adopted by the Environment Court, Boards of Inquiry, etc when non-lawyers are addressing the Court. I have recently made representations in a number of Council-level processes, including: Plan Change 19 to the Central Otago District Plan before Deputy Mayor Gillespie and Councillors McPherson and Cooney (decision pending); "The Clearing" consent application for a subdivision in Amberley before Commissioners Mr Dean Chrystal and Mr Dave Smith (application granted on 16 August 2023); an electronic billboard consent application before Commissioners Bell and Kensington recently determined on 14 April 2023 (LUC60374063) with the decision acknowledging: aspects of what "*Mr Gardner Hopkins opined*" and "*the representations of Mr Gardner-Hopkins*"; and in the 15 November 2022 Decision of Commissioners Ms Gina Sweetman and Ms Jane Taylor in respect of an application (RM 220327) by Cardrona Cattle Company Limited for a storage facility at Victoria Flats in Queenstown, which stated, in respect of a particular issue: "*We are grateful to Mr Gardner-Hopkins for his helpful representations on behalf of the Applicant in this respect*".

Contributions ("**FINCOs**"), specifically the changes proposed to FINCOs for Te Puke.

3. Developing and updating FINCOs (and their counterpart, Development Contributions ("**DCs**")), and the assumptions, inputs, models and formula, etc, behind them can be challenging and technically, if not legally complex.

4. While I will need to address some framework matters, the nub of the North12's case, in respect of the proposed changes proposed under Plan Change 92 ("**PC92**") to FINCOs applying to Te Puke, is as follows:

   (a) FINCOs are imposed to recover the costs of new or improved infrastructure from developers, so that those costs of development are not subsidised by existing ratepayers.

   (b) If there is no increase in the planned new or improved infrastructure required, then there is no basis for FINCOs to be increased.

   (c) Western Bay of Plenty District Council ("**WBOPDC**") has not identified any increase in its planned new or improved infrastructure required for development occurring in Te Puke, for example it has not identified:

      (i) new or improved infrastructure projects for Te Puke;

      (ii) the potential for additional development to occur, as all zoned greenfield land is consented already for development.

   (d) Accordingly, there is no basis for FINCOs at Te Puke to be increased.

5. It will only be if WBOPDC can demonstrate to the Panel that there is *additional* planned new or improved infrastructure required (to what was previously assumed when setting the previous FINCOs) that a change can be justified. It will then require a forensic enquiry as to what the consequences are for the FINCOs provisions. Should the Panel reach this point, North12 considers that it would be appropriate to then require expert conferencing. This is particularly the case as there are no merit appeals

(or indeed, any appeals) allowed through this process. The only way to correct a mistake would be by way of judicial review.

FRAMEWORK FOR FINCOS

6. The importance of the provisions of the District Plan in respect of FINCOs cannot be underestimated. This is because FINCOs can only be imposed as a condition of consent, for the purposes specified in the plan and at a level determined in the manner described in the plan. This follows from sections 108(2)(a) and 108(10), which state:

> **108 Conditions of resource consents**
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> (1) Except as expressly provided in this section and subject to section 108AA and any regulations, a resource consent may be granted on any condition that the consent authority considers appropriate, including any condition of a kind referred to in subsection (2).
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> (2) A resource consent may include any 1 or more of the following conditions:
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> (a) subject to subsection (10), a condition requiring that a financial contribution be made:
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> …
>
> (10) A consent authority must not include a condition in a resource consent requiring a financial contribution unless—
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> (a) the condition is imposed in accordance with the purposes specified in the plan or proposed plan (including the purpose of ensuring positive effects on the environment to offset any adverse effect); and
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> (b) the level of contribution is determined in the manner described in the plan or proposed plan.

7. With these strict requirements in mind, North12 has some fundamental concerns with the lawfulness of the District Plan's general approach to FINCOs. While it may be outside the scope of PC92 to resolve these issues, the Panel should be aware of those concerns and, if it shares those concerns, should not compound them. Put another way, the Panel should not make an existing unlawful state of affairs more unlawful.

8. The crux of North12's concerns as to the lawfulness of the District Plan's FINCO regime is that it effectively incorporates by reference external material in WBOPDC's Long Term and Annual Plans, which goes outside the scope of what is permissible under the Act. This follows from the Act

prescribing in a very specific and limited way which material can be included by reference.

9. Under clause 30(1) of Schedule 1 of the Act it is only technical material that can be incorporated by reference into a District Plan, of the following nature:

> (a) standards, requirements, or recommended practices of international or national organisations:
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> (b) standards, requirements, or recommended practices prescribed in any country or jurisdiction:
>
> (c) any other written material that deals with technical matters and is too large or impractical to include in, or print as part of, the plan or proposed plan.

10. Significantly, clause 31 then provides that, once material is incorporated into the District Plan by reference, an amendment to, or replacement of, that material will only have legal effect through a variation or plan change processes.

11. This weighs considerably against the lawfulness of FINCO provisions in a District Plan providing for their updating through an annual plan or long-term plan process.

12. So too does the existence of the DC regime available to Councils under the Local Government Act 2002. As the High Court has noted, when considering the ability for a Council to "top up" FINCOs with DCs:[2]

> The existence of different statutory processes for development and financial contributions, and different procedures involved in challenging them, is also significant. In respect of financial contributions, the developer has appeal rights. In respect of development contributions, the developer who wishes to challenge the imposition of the required contribution is left only with rights of judicial review. These different procedures make the interpretation of s 200 argued for by the council most unlikely. Were the interpretation suggested by the council to be correct, it could well be the case that a developer who had appealed successfully the financial contribution for the development might simply then face a "top up" development contribution imposed by the council.

13. The DC regime was, in part at least, introduced following difficulties that some Councils experienced when setting FINCO provisions in their District Plans, and the imposition of FINCO conditions on resource consents, because of the appeal rights under the RMA. This further weighs against any particular Council adopting some sort of hybrid system that provides

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2 *Domain Nominee Ltd v Auckland City Council* [2008] NZRMA 503, at [69].

for a FINCO "formula" to be stated in its District Plan, but for the identification and setting of the various "inputs" to be applied under that formula to be set through the Long Term and Annual Plan process. Yet this is precisely the approach that WBOPDC has taken in this instance.[3]

14. This "hybrid" approach of a District Plan and Annual Plan process to the setting of FINCOs simultaneously and unlawfully avoids aspects of the process and scrutiny under both the RMA and LGA regimes.

15. On this basis, North12 considers that any further change that imposes additional an FINCOs burden on developers should not be entertained. It relies on this jurisdictional argument in addition to its substantive and "logical" argument summarised above, to support:

    (a) its primary relief of rejecting the proposed changes to FINCOs, and, in particular, for Te Puke; and

    (b) its alternative lesser relief of including Te Puke in the FINCO Table row with Waihi Beach, and Katikati.[4] This has the function of keeping the FINCOs effectively unchanged for Te Puke, but at a practical level would not "disturb" the balance of WBOPDC's changes, which do not directly impact North12.

EVIDENCE

16. North12 is calling evidence from Mr Shae Crossan and Mr John Dillon.

17. Mr Crossan is an independent expert planner, and, while Mr Dillon is the "developer", he has qualifications and experience as an accountant, and has spent years examining WBOPDC's FINCO models and processes. In this regard, the observations of the Environment Court in *Whitewater New Zealand Inc v New Zealand and Otago Fish and Game Councils* [2013] NZEnvC 131, at [66], are relevant:

> I consider kayakers and fishers (in this case) or developers, environmentalists, and farmers (in others) may give opinion evidence if they have some relevant expertise, even if they do have an interest in the outcome. The court will then assess that evidence according to the usual tests for probative value – including relevance, coherence, consistency, balance, and insight – while taking particular care to consider the nature of the interest the witness has in the outcome.

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3 Refer eg section 11.4.1(b) of the District Plan.
4 Refer evidence of Mr Crossen, p5.

18. I will largely let the evidence speak for itself, but note, in particular:

(a) As mentioned above, Mr Crossan identifies a FINCO "fix" that would satisfy North12's concerns from a practical commercial perspective (at his p5). That would be a pragmatic outcome in the circumstances, and remove the need for, or risk of, a future challenge by way of judicial review.

(b) Mr Crpssan has also identified some particular items in the Te Puke Structure Plan that are questionable as being new or improved infrastructure projects for Te Puke for the currently anticipated development to a population of 13,000 (his [28]-[33]). It is only works that are required development to this level that should be included. Works for development beyond that to accommodate further growth (to a population of, say, 16,000) should be removed as there is no current "plan" to grow Te Puke in that way, and it would require additional zoning. Any updates to the FINCOs to accommodate that future growth should be made at that time. Mr Manihera has accepted removal of one of those items identified by Mr Crossan. The Panel may wish to explore each of the items further, but also understand, if any works are removed, what the consequences are in terms of a reduction in FINCOs.

(c) Mr Dillon steps through the "logic" of what WBOPDC has done (or not done) in respect of its proposed changes to FINCOs, and what it means in practical terms. Mr Clow has responded to this, and Mr Dillon and Mr Crossan will need to address this response at the hearing. WBOPDC appears to be taking the simplistic approach that because there is now going to be a greater population at Te Puke (13,000) compared to when the previous FINCOs were adopted (11,360) that it must follow that the FINCOs be increased. That only follows if the additional development results in *additional* planned new or improved infrastructure required (to what was previously assumed when setting the previous FINCOs). WBOPDC has still not demonstrated this. Nor has it addressed the fact that all zoned land is now consented, and so there is little prospect of it collecting more FINCOs; until more land is zoned. While that

might beg the question “what is all the fuss about then”?; the updated FINCOs will be relevant – for any reassessment that might occur should a consent take longer than two years to be exercised; for any variations to consents; and will form the starting point for any further update of FINCOs in the future. It is critical to get this right, now.

7 September 2023

James Gardner-Hopkins
Project Manager