BEFORE THE HEARINGS COMMISSIONERS
AT MATAMATA

IN THE MATTER	of A Private Plan Change to the Matamata-Piako District Plan under Schedule 1 of the RMA by Rings Scenic Tours Limited to introduce new objectives, policies and rules, primarily through a Development Concept Plan, to enable the ongoing operation and growth of tourism activities at Hobbiton Movie Set within an appropriate planning framework
TO	**MATAMATA-PIAKO DISTRICT COUNCIL**
APPLICANT	**RINGS SCENIC TOURS LIMITED**

OPENING LEGAL SUBMISSIONS FOR THE APPLICANT

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May it please the hearings commissioners:

Introduction

1 These submissions are in support of the Private Plan Change application by Rings Scenic Tours Ltd. I have endeavoured to avoid repeating information that is either within the evidence of witnesses for the Applicant or in the s 42A report and instead have focussed on legal issues that arise directly from the Development Concept Plan (DCP) itself and the Plan Change process.

Submissions

2 The Applicant does not oppose acceptance of the late submission from Derry's Farm Ltd. This submission raises issues consistent with other submitters and its lateness didn't contribute any disadvantage to the Applicant or other submitters.

3 The Applicant does oppose the submission by Opal Hot Springs and Holiday Park. The submission is based on trade competition concerns and is therefore not permitted under s 74 RMA and must be disregarded.

4 We note that MPDC lodged a submission and further submission but has elected not to call any expert witness and we understand that there will be no presentation in support of that submission.

5 Mr Black, Mr Hegley and Ms Gilbert have respectively provided transportation, acoustic and landscape expert advice to the reporting planner and there have been recent discussions between Mr Graham and Ms Gilbert regarding landscape mitigation for Precinct 1. We are not aware of any updated position of Council's experts regarding traffic or acoustic matters since the Applicant's evidence was lodged.

DCP

6 It is fundamental to this hearing and the position of the Applicant that we are considering the provisions of a Development Concept Plan that will become part of the Matamata-Piako District Plan. The intention is to provide a district plan framework for the existing and future development at Hobbiton.

7 This is an application for a private plan change and it is important to remember that:

(a) the performance standards in the DCP should be comparable to those in other DCPs , while still reflecting the nature of this site; to change any of those performance standards will require a plan change process; and

(b) it is not resource consent.

8 In particular performance standards introducing prescriptive requirements for parking, site management and monitoring plans and acoustic monitoring methodology are neither consistent with other DCPs in the district nor consistent with district plan provisions where the mechanism for change is a First Schedule process.

9 We note that no other DCP requires a Site Management and Monitoring Plan that is subject to annual review and no other DCP includes a Community Liaison performance standard. Again, this is a DCP that will form the planning framework for the site within the District Plan. It is not a resource consent.

10 Mr Bigwood's evidence deals with specific provisions that the Applicant considers inappropriate for this DCP and attachment B of his evidence sets out the changes to the DCP proposed by the Applicant. Mr Bigwood has attempted to align the Applicant's recommended changes alongside those of the Council for ease of reference.

Scope

11 The s42A report recommends a range of changes to address concerns raised in submissions and in the expert reports from Mr Black and Mr Hegley. We note there are also changes recommended to the performance standards that manage landscape effects although there was no supporting report from Ms Gilbert and she had not visited the site until the weekend of 30/31 March, which was after the submission of the Applicant's evidence.

12 In addition, Mr Rademeyer has recommended changes to various performance standards to distinguish between 'themed' and 'non-themed' events. The recommendations go as far as introducing a new non-complying activity for non-themed activities that don't meet all the performance standards for permitted activities.

13 According to the s 42A report, these changes are primarily to address concerns about duplication of commercial activities offered elsewhere in

the district.[1] Aside from the argument that this response raises trade competition considerations, the proposed change is not something that is sought in any submission. It is not a change sought in MPDC's submission or further submission and it's not sought in Mr Reichmuth's submission.

14 Clause 24 of the First Schedule enables the local authority to modify the Plan Change request as a result of reports or additional information provided it has the agreement of the person making the request. The Applicant does not agree to modifying the Plan Change to separate out themed and non-themed events.

15 Clause 29(4) enables the local authority to decline, approve or modify the plan change but that is not an unrestricted ability. The changes must be within the scope of the plan change.

16 The High Court in *General Distributors v Waipa District Council*[2] urged caution about making changes to a plan change where those changes have not been made by a submitter. *General Distributors* involved a private plan change request, and suggests the adoption of a conservative approach to the question of jurisdiction to make amendments to a plan change. At paragraph 63 of the decision, Wylie J observed:

> *In my view councils, and the Environment Court on appeal, should be cautious in* ***making amendments to plan changes which have not been sought by any submitter****, simply because it seems that there is a broad consistency between the proposed amendment and other provisions in the plan change documentation. In such situations it is being assumed that the proposed amendment is insignificant, and that it does not affect the overall tenor of the plan change* ***doubt that that conclusion should be too readily reached****. [emphasis added]*

17 The High Court's primary findings in *General Distributors* are set out at paragraphs 61, 62 and 63 of the decision, where the Court rejects the proposition that "connection with", being "signalled", or being "consistent" with the tenor of the plan change can provide jurisdiction for

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[1] At 6.4 page 20 s 42A report
[2] (2008) 15 ELRNZ 59

substantive changes. The General Distributors decision is clear authority for the provision that submissions need to provide the basis for specific changes which are being sought to a plan change request.

18 The Environment Court in *Oyster Bay Developments Limited v Marlborough District Council* [3](*Oyster Bay*) set out a test for what was within scope of the submission. The test essentially incorporates two elements; jurisdiction and fairness. The Court sought to identify at paragraph 22 the appropriate elements for consideration when deciding whether an amendment to a change in a planning instrument is within or beyond jurisdiction. In doing so, the Court referred to and applied the reasoning in *General Distributors*.

(a) The terms of the proposed change and the content of submissions filed delimit the Environment Court's jurisdiction [64];

(b) Whether an amendment goes beyond what is **reasonably and fairly raised in submissions** on the plan change will usually be a question of degree to be judged by the terms of the plan change and of the content of the submissions [58]; and

(c) That should be approached in a **realistic workable fashion rather than from the perspective of legal nicety, and requires that the whole relief package detailed in submissions be considered** [59-60]." [our emphasis]

19 In respect of the themed events issue, the reporting planner has proposed this distinction to mitigate perceived economic competition effects but not as a direct result of an outcome sought by any submission.

Existing Environment

20 The case law specifying the environment that must be considered when assessing the effects of an activity is relatively settled. This is a non-discretionary assessment that is different from consideration of permitted baseline effects.

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[3] C081/09.

21 The Court of Appeal in *Queenstown Lakes DC v Hawthorn Estate Ltd* (2006) 12 ELRNZ 299 considered that the 'environment' embraces the future state of the environment as it might be modified by the utilisation of rights to carry out a permitted activity under a district plan. It also includes the environment as it might be modified by the implementation of resource consents which have been granted at the time a particular application is considered, where it appears that those consents will be implemented.

22 The Environment Court in *Bay of Plenty RC v Fonterra Cooperative Group Ltd* [2011] NZEnvC 73, (2011) 16 ELRNZ 338 paraphrased the *Hawthorn* principle as being, "[t]he existing environment is the environment as it exists at the time of hearing including all operative consents and any consents operating under section 124 of the Act, overlain by those future activities which are permitted activities and also unimplemented consents (which can be considered at the discretion of the authority)".

23 In *Te Runanga-a-iwi O Ngati Kahu v Far North DC* [2013] NZCA 221, the Court of Appeal clarified the distinction between the permitted baseline and existing environment assessment stating:

> *In this case the Environment Court was not required to undertake a comparative enquiry of the type contemplated by the permitted baseline test. That was because Carrington did not seek to invoke the test in its favour to argue that the district plan permitted an activity having an adverse effect on the environment of the same nature as the proposed subdivision. The Court's enquiry was not into whether the plan permitted an activity with the same or similar adverse effect on the environment as would arise from the subdivision proposal. Its enquiry was focussed instead on the meaning of the "environment", taking proper account of its future state if it found as a fact that Carrington's land use consent would be implemented. Acting within those parameters, it was open to the Court to find as a matter of fact that the potential effects on the environment of implementing the resource consent would be minor when viewed in the context of a future environment that would include the 12 dwellings permitted as a result of the land use consent.*[4]

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[4] Paragraph 93

24 The Court of Appeal went on to note:

> *In this respect we note this Court's statement in Hawthorn to the effect that it is permissible and will often be desirable or even necessary for the consent authority to consider the future state of the environment. However, that observation does not affect our conclusion. The Court was simply recognising that a consent authority will not always be required to consider the future state of the environment. But, as the Court expressly recognised, it would be contrary to s 104(1)(a) for the consent authority not to take account of the future state of the environment where it is satisfied that other resource consents will be put into effect. This is such a case.*
>
> *It follows that we must respectfully disagree with White J. In our judgment the Environment Court did not err in determining that it was required to take into account the likely future state of the environment as including the unimplemented land use consent for the purposes of s 104(1)(a) if it was satisfied that Carrington was likely to give effect to that consent.* [5]

25 The Court of Appeal's decision in *Te Runanga-A-Iwi O Ngati Kahu*[6], is a clear statement that consent authorities must take into account the future state of the environment including unimplemented resource consents when determining effects for the purposes of s 5 when assessing a plan change application.

26 In this case, the environment includes the resource consents that are already in place for the site. Those consents are in respect of:

(a) Land use for the tourism venture

(b) Wastewater

(c) Stormwater

(d) Earthworks

(e) Water diversion and takes

(f) New administration building under construction

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[5] Paragraphs 94 and 95.

[6] The Supreme Court has granted the iwi the right to appeal in a decision dated 2 December 2013 however there is no record of any decision on the substantive appeal.

27 The land use consent, with amendments places limits on the overall visitor numbers and permits 12 events per year including movie nights. There is no qualification on the nature of those events and certainly no requirement that they should be Lord of the Rings themed.

28 The land use consent also imposes a cap of 300,000 visitors per year with no restriction on the daily numbers or traffic. There is a review condition that is triggered when numbers get to 270,000 in a 12 month period. That review is primarily directed at considering pavement deterioration on Buckland Road.

29 It is accepted that Hobbiton is operating in excess of that 300,000 annual limit and that is the reason for this DCP application to manage the growth and development of the site. Mr Alexander's evidence is that the visitor numbers are limited by the capacity of the site to maintain a genuine visitor experience and that capacity is 3,500 movie set tour visitors per day. His evidence also describes the way in which tours are staggered thus avoiding the occurrence of peaks within the normal movie set tour hours.

30 The existing consents could allow for the 300,000 visitors to occur over the 4 month summer season without any control on daily numbers or vehicle traffic. The site has been close to operating at its capacity number during the 2019 summer season and there is no evidence that there are adverse effects on the environment that are not being effectively mitigated, or which will not be mitigated once the proposals that underpin the DCP are in place.

31 The effects of what is proposed in the DCP must be assessed against the current consented environment that could lawfully result if the activity was carried out over the high tourist season alone. That is without daily limits, without vehicle limits and without peak hour vehicle limits. That is also without any distinction between themed and non-themed events including movies.

32 In addition we understand there are stormwater consents that allow for ponds adjoining the notified version of Precinct 1 and wastewater consents for various infrastructure adjoining the notified version of

Precinct 2.[7] That stormwater and wastewater infrastructure that has been consented also falls within the existing consented environment. MPDC, in its submission has asked that all of the aspects of the RST site be included in the DCP including the stormwater and wastewater areas. The Applicant has provided amended plans for Precinct 1 and Precinct 2 that include those consented areas and those plans are in Attachment A of Mr Bigwood's evidence.

Visitor and/or Vehicle number caps

33 In our submission there is no evidential basis for imposing a restriction on vehicle numbers, on peak traffic or on total annual visitors provided there is a daily cap on the number of movie set tour visitors and there are known limits on the number of event attendees that can will be on site outside of normal tour hours.

34 The Applicant's transportation assessment has considered the effects of the activity operating with a limit of 3,500 movie set tour visitors during normal hours and potentially 1000 event visitors outside those hours. The site is already operating at close to that number of visitors during peak season and the consents do not prevent that level of operation on a daily basis (accepting that there is an annual cap that is presently being exceeded).

35 There is no evidence from the traffic experts that there has been a significant or even concerning increase in the rate of accidents and in fact, the level of accidents seems to be reasonably constant despite a significant increase in visitor numbers. That suggests the current mitigation is effective and the Applicant is proposing further mitigation to assist.

36 We submit further that the DCP needs to operate with a level of practicality to fit the circumstances of this significant tourist attraction. This is not a quarry where each visitor equates to a vehicle and the gates can be closed when the maximum number is reached. Some of the visitors to Hobbiton will have bought tickets well in advance. They may arrive in buses or in campervans or private cars. They may buy their tickets on the day but early. It will not be reasonable or practicable

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[7] Unhelpfully the WRC consents do not include a date and it is difficult to determine when they took effect so I am unclear whether those attached to the s 42A report include the latest consents.

for RST to close its doors when a specific number of vehicles for the day or the hour is reached. To do so would be hugely unreasonable for pre-booked visitors and for those scheduled later in the day. What is able to be controlled is the number of tickets that are sold per day and Mr Inder's traffic assessment has considered the predicted traffic effects from that 3,500 cap daily number, in light of what has actually been happening during the past few peak seasons. He is confident that the traffic effects of that 3,500 visitor limit will be properly managed in light of the mitigation that is proposed and existing.

MOU

37 The MOU signed between MPDC and the Applicant is an agreement as to how the mitigation works that underpin this DCP will be paid for and implemented. It is not a document required for the DCP itself. The s 32 analysis supporting the Plan Change anticipates that there will be specific mitigation measures undertaken and the expert reports also take that mitigation into account.

38 As set out in Mr Inder and Mr Alexander's evidence, almost all of the activities within the MOU have been completed. The outstanding actions arising from a misunderstanding as to the scope of the MOU funds and those actions will be completed by the Applicant at its cost.

39 We note and agree with the comments made by Mr Harkness regarding the status of the MOU as a document incorporated into the District Plan. We agree that it is entirely inappropriate that such a document should form part of the District Plan or that it should only be amended by way of a plan change.

40 We note further that some mitigation to provide safety for specific landowners is actually opposed by those landowners (convex mirrors on Buckland Road) and there needs to be further discussion between the Applicant, Council and neighbours regarding the appropriate steps to be taken. Mr Alexander and Mr Inder will address this issue as part of their evidence.

Recommended Changes

41 Attachment B to Mr Bigwood's evidence sets out the Applicant's proposed changes to the DCP. We note that includes changes to the areas of both Precinct 1 and Precinct 2 to include the stormwater and

wastewater consented areas as per the MPDC submission. Mr Alexander's evidence explains what areas are included in the revised precinct areas.

42 The Applicant opposes any changes in the DCP to introduce:

(a) An annual cap on visitor numbers. The intention is to try and develop the business to increase patronage during the shoulder and low seasons. There is no traffic-related reason for imposing an annual cap.

(b) A limit on vehicle numbers, vehicle movements or peak hour movements. This is impractical for a tourism operator where pre-purchased tickets are the norm and visitors arrive for pre-booked tours throughout the day and week. A daily cap of 3,500 on visitors during normal movie set tour hours is both workable and reasonable.

(c) Controls on the overnight visitor stays in Precinct 1. However many overnight visitors there are, there will not be sufficient to trigger any traffic safety effects. The opposite is likely to be the case with tired visitors that are unfamiliar with the area, particularly during night time hours being able to park over night without having to travel on. That is a safer outcome. There is no intention nor room to provide large-scale accommodation or overnight camping facilities at Precinct 1 and the landscape architects are working on agreeing performance standards that will ensure no adverse landscape effects from additional accommodation and parking.

(d) Themed vs non-themed events and any introduction of a category of non-complying activities. There are sufficient assessment criteria to deal with any applications for resource consent as restricted discretionary or discretionary activities.

(e) Complaints procedures. This is not something in any other DCP and is not appropriate. There is no way for RST to demonstrate compliance for documenting a complaint that could occur in the future.

(f) A community liaison requirement. Mr Alexander and his team have a strong focus on being part of the community and communicating

with them. That is part of the success of the business, also reflected in the extremely low number of submitters that are opposed to the Plan Change and the development it proposes. This is not a resource consent, and it is not appropriate to have such a standard in a DCP. As Mr Bigwood notes in his evidence it would be extremely difficult to demonstrate compliance with such a performance standard in the event that RST sought a Certificate of Compliance. Neither RST nor council could demonstrate compliance at any given period as the next annual meeting would not be certain.

(g) A Site Management and Monitoring Plan. This is not a resource consent. Again performance standards have to be certain. A plan change can't include provisions that might change as the result of further information and its operative status can't depend on some further information that has to be forthcoming. The RMA sets out the circumstances around rules becoming operative and waiting for a Site Management and Monitoring Plan to be submitted to the local authority doesn't appear to fall into any of the categories in s86F or cl10 of the First Schedule (notwithstanding the lack of timeframes in cl20 that relates to making the plan operative).

(h) The Applicant also opposes recommended changes to the issues, objectives and policies to reference funding arrangements. We are not aware of any other DCPs that have reference to the Local Government Act in relation to development contributions nor to the Local Government (Rating) Act 2002. The District Plan is a tool authorised by the RMA. It can't exclude other statutory tools lawfully open to Councils but nor can it authorise their use. Rather, the ability to impose financial contributions, to levy rates and to levy development contributions are separate statutory powers open to local authorities that are independent of each other except as specifically stated in their empowering statutes. As such cross referencing them in the DCP is inappropriate.

43 In addition we note there are other recommended changes that are not supported in respect of noise limits and hours, references to

development contributions, rates, parking, public use of public roads, fireworks displays and earthworks standards.

44 The Applicant seeks additional changes as outlined by Mr Bigwood and in Attachment B to his evidence. Mr Inder's evidence addresses the Applicant's concern that there is a need for additional directional signage at 3 places on SH1 to ensure visitors take the safest route to Hobbiton.

Evidence

45 Expert evidence has been received by Mr Swears for NZTA (Transport Engineering) and Mr Harkness for J Swap Contractors Ltd (Planning).[8] I note that Mr Harkness' evidence strays into addressing traffic matters and he does not disclose any relevant qualifications or expertise on that topic.

46 No expert evidence has been provided by MPDC as submitter.

47 The Applicant's experts will be:

(a) Mr Russell Alexander, director of RST on behalf of the Applicant.

(b) Mr Michael Graham, director of Mansergh Graham Landscape Architects (Landscape Architectural).

(c) Mr James Bell-Booth, consultant with Marshall Day Acoustics (Acoustical Engineering).

(d) Mr Cameron Inder, Transportation Engineer at Bloxam Burnett and Olliver.

(e) Mr Stephen Bigwood, Planning Manager at Bloxam Burnett and Olliver.

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Dr Joan Forret

Counsel for Applicant (Rings Scenic Tours Limited)

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[8] See Harkness evidence paragraphs 3.1-3.2 on page 5 (there is duplication of paragraph numbering) and 3.10-3.11 on page 6.