

Before Palmerston North City Council

Under

the Resource Management Act 1991

In the matter of

a proposed plan change to rezone
land at 611 Rangitikei Line to establish
the Whiskey Creek Residential Area

**LEGAL SUBMISSIONS IN REPLY FOR FLYGERS INVESTMENT GROUP LIMITED
5 AUGUST 2022**

Counsel Acting
M J Slyfield
Stout Street Chambers
(04) 915 9277
morgan.slyfield@stoutstreet.co.nz
PO Box 117, Wellington 6011

Introduction

1. These are the requestor's submissions in reply on a range of matters that have evolved over the course of the hearing.
2. The submissions do not address any of the issues arising in relation to the topic of housing mix (i.e. mixture of density, typology and/or price) as that is a matter on which the planners have not yet been able to conclude their discussions. The requestor has proposed to file a separate reply submission addressing those issues discretely once the planners have provided any refinement that they can.
3. These submissions should also not be read in isolation. Many relevant matters have been resolved through the efforts of the requestors and Council's expert witnesses through the hearing process; and it is not the role of these submissions to re-traverse all matters, or re-state what has already been covered in opening. Rather, the focus here is on a handful of key issues that the requestor apprehends are likely to be significant in the Panel's deliberations, and which have evolved or developed through the hearing process.
4. As additional context, the requestor also endorses the Panel's description, provided at the very outset of the hearing, that the determination exercise is essentially a two-step inquiry:
 - (a) Are there any fundamental issues that would make the land simply inappropriate for greenfield residential development (servicing impediments, natural hazards or the like)?
 - (b) If not, are all the constituent parts of the proposed zoning appropriate, meaning fit for purpose to suitably address the effects of residential development?

Alterations to the Structure Plan

5. The requestor supports the alterations to the Structure Plan as agreed between the planners and recorded in their planners' joint witness statement dated 29 July 2022 (**JWS**).

6. These changes include adjustments to the boundary of the area to which the Structure Plan applies, being a shrinking of the boundary to the north-west (to exclude all the land that is to remain zoned “rural”), and an enlargement of the boundary to the south-east (to incorporate 127 Benmore Ave and the road reserve at the location of the future intersection at Benmore Ave and Meadowbrook Drive).
7. In case this triggers any concern, the requestor submits that both changes are within scope. The shrinkage is within scope because it is a lessening of the area to which the Structure Plan applies. It rationalises the boundary to reflect that there never was proposed to be any change in the zoning or provisions applicable to the c.18ha of rural land adjacent to Flyers Line, despite its inclusion in the notified Structure Plan area.
8. Likewise, the enlargement of the Structure Plan boundary on the south-eastern side is within scope because it is not an enlargement of the Plan Change area itself:
 - (a) 127 Benmore Avenue is, and always has been, one of the titles over which the Plan Change is sought,¹ and the request has been clear from the outset that this is to facilitate the roading connection into the local street network. To the extent that the Structure Plan now extends around 127 Benmore Ave, that ensures the Structure Plan more accurately reflects the area of change.
 - (b) The intersection of Benmore Avenue and Meadowbrook Drive has also always been shown in the Plan Change documents as the site of a future intersection from which Road 1 will connect into the Whiskey Creek area. The formation and subsequent operation of such an intersection is not dependant on any change being made to the District Plan, as the Council—as roading authority—already controls and manages the road reserve for purposes like these. The extension of the Structure Plan boundary does not alter any of the underlying status of this road reserve area, but rather reflects the intent that this location will be the site of a future intersection upgrade, which is entirely appropriate given the purpose of the Structure Plan is to

¹ Plan Change Request, 20 April 2021, p 6.

reflect all the key design principles for the later detailed design to be assessed against.

Policy Framework

9. Relatively little needs to be said about the bespoke policies proposed for insertion into Chapter 7A.
10. Mr Asgar and Mr Thomas, with input from Mr Duindam, have revised and refined the structure and content of those policies, as set out in section 5 of the JWS. The requestor records its support for those refinements. For all the reasons traversed in the JWS the revised policies are considered to be the most appropriate for giving effect to the plan change objectives.
11. Further, the requestor submits the revised policies are also the most appropriate for giving effect to the relevant existing objectives of the District Plan, relying on the assessment in the plan change request,² Mr Thomas' evidence,³ and Mr Asgar's evidence,⁴ — all of which must be read subject to the resolutions now achieved/agreed in respect of more specific matters (such as the resolution of the water supply issue, and the agreed mechanism to uplift the flood prone overlay, which are both addressed below).

Water Supply

12. The water supply issue evaporated over the course of the hearing.
13. Mr Miller's evidence,⁵ on which the requestor relies, confirms that there are no water supply constraints that could reasonably stop development of the Whiskey Creek area proceeding.

Uplifting the Flood Prone overlay

14. It became clear at the hearing that the requestor and Council were in agreement that the Flood Prone overlay must remain in place until flood

² At pages 54-55.

³ Statement of Evidence, 18 May 2022 at [24]-[47] and [136]-[146].

⁴ Statement of Evidence, 11 May 2022 at 4.6-4.11

⁵ Given verbally at the hearing, on 11 July 2022 and later recored in a Statement dated 14 July 2022, tabled with the Panel.

hazard avoidance (as defined in the One Plan and District Plan) is implemented. All that was left was to agree an appropriate mechanism to achieve this.

15. A mechanism has been put forward (in R7A.5.2.4) which has the support of the planners, and the requestor.
16. Once the steps specified in R7A.5.2.4 have been completed, the Flood Prone Overlay will cease to apply, even though that overlay may still be shown on the Planning Maps. The requestor is content to leave it for Council to tidy this up by way of a future Plan Change (to remove the overlay from the Maps). In the meantime, the requestor's view is that R7A.5.2.4 would override the Planning Maps to the extent that those Maps continue to depict as 'flood prone' any land that has in fact ceased to be flood prone due to completion of all the steps in R7A.5.2.4 in respect of that land.
17. The JWS records that one aspect of R7A.5.2.4 has not been agreed, namely the use of the term "subdivision development" in the first paragraph. The planners respective reasons are set out in the JWS at 7.3-7.5. The requestor supports Mr Thomas' analysis, for the following reasons:
 - (a) The relevant hazard rules for Flood Prone Areas, in Chapter 22 of the Plan, are not triggered by subdivision, but by land uses.
 - (b) For example, R22.6.2.1 (2) requires any new habitable structure within a Flood Prone Area identified on the Planning Maps to be consented as a restricted discretionary activity.
 - (c) On Mr Asgar's wording, this may lead to the following sequence:
 - i. The requestor completes all the steps in paragraphs (a) to (d) of R7A.5.2.4 (i.e. the steps which both Council and the requestor agree will prevent the land from being flood prone);
 - ii. The requestor subsequently subdivides the land and sells Mrs Smith a residential section in the area still shown on the Maps as being flood prone (because Council has not yet completed a plan change to amend the Maps);
 - iii. Perversely, R22.6.2.1 (2) requires Mrs Smith to seek and obtain a discretionary restricted land use consent to construct a house

on the site, because she is is not undertaking "subdivision development" (Mr Asgar's words) and therefore R7A.5.2.4 does not apply to her.

18. What this shows, with respect, is that Mr Asgar's wording choice undermines the very purpose for which R7A.5.2.4 has been put forward. Its purpose was to ensure that once the work has been done that stops the land being flood prone, then none of the District Plan's restrictions triggered by the "Flood Prone Overlay" will continue to apply, even though it may yet take some time for the Council to change the Planning Maps to reflect this.

19. Fortunately, this is easily resolved. One option is Mr Thomas' preference: that a simple "and/or" is inserted so that the phrase in the first paragraph of R7A.5.2.4 reads

subdivision and/or development

On this approach, the house Mrs Smith wants to build, in the example above, would be a "development" to which the Flood Prone Overlay, and associated rules in Chapter 22, would not apply.

20. Alternative formulations that would also work in the same way include

subdivision and/or land use ~~development~~

or just

~~subdivision~~ development

21. The critical aspect from the requestor's perspective is that the wording avoids the perversity that Mrs Smith's house needs a consent under the natural hazards provisions when the relevant natural hazard has already been comprehensively avoided.

22. The requestor notes that whatever wording is used in the first paragraph of R7A.5.2.4, some minor amendment will be needed to ensure consistency in paragraphs (b) and (d). This has not been addressed in the planners' JWS, but paragraphs (b) and (d) presently both contain the phrase

...in respect of the site of the proposed subdivision...

And paragraph (d)(ii) also refers to

the subdivision

For consistency, it is submitted that all these references to subdivision would need to be amended to utilise the same wording that is used in the opening paragraph of the provision (i.e. depending on which of the formulations above the Panel settles upon).

Cultural issues

23. Mr Thomas' summary evidence⁶ and supplementary evidence⁷ summarise the outcomes of ongoing consultation with Rangitāne o Manawatū that addresses the iwi's expectation that the requestor would put forward provisions to reflect whānau ora and on-going consultation as development takes shape.⁸ These matters have been incorporated into Policy 2.8 (which the planners' jointly support). It records a Structure Plan design principle (which subdivision must be in general accordance with) that the open space and reserves design provides for consultation with Rangitāne and preparation of a management plan regarding whānau ora values.
24. In addition, Mr Thomas's supplementary statement records the recommendation from Rangitāne to adopt the name "Matangi" for the reserve and Matangi Way for Road 1. That is supported by the requestor, alongside changing the name of the Residential Area to Matangi Residential Area.
25. Rangitāne remains supportive of the plan change.
26. The same cannot be said for Ngāti Turanga, who, although supportive of Rangitāne, do not feel their concerns have been addressed.
27. It is not the domain of the requestor to define Ngāti Turanga's interests for Ngāti Turanga. The requestor has, however, heard Mr Turoa, and understands that the hapū's concerns are, at heart, concerns that the process has failed to result in the sort of engagement they desired. In

⁶ Statement dated 3 June 2022.

⁷ Statement dated 8 July 2022

⁸ Recorded in Rangitāne o Manawatū's Cultural Impact Assessment, appendix 4 to the plan change request.

response to questions from the panel, Mr Turoa asked for the plan change to be paused, to create the space for better engagement.

28. The requestor is committed to continuing its attempts to engage with Ngāti Turanga in a way which is more meaningful for them. The requestor also considers there is space for that outside the constraints of this plan change process. In a resource management sense, the plan change is the beginning, not the end. Further shaping of the development (detailed design) is yet to come, and the processes for that and/or the pause that may exist until that occurs, provide opportunities for further engagement with Ngāti Turanga that may be more meaningful to them, and may ultimately result in them playing a greater role in shaping the development.
29. The requestor and Ngāti Turanga have both made attempts to continue to engage with each other since the hearing, and the requestor is optimistic that a dialogue that is fruitful for both parties can occur.

Flooding

30. The Panel heard from a number of submitters with concerns to do with flooding. Broadly speaking these can be thought of in two groups: on the one hand, concerns that the potential for the site to flood has been underestimated, and on the other hand concerns about the possibility that development of the site will increase the amounts of water received by neighbouring sites or downstream.
31. Dealing first with *incoming* water, it is critical to keep in mind that the existing situation is that the site sometimes does receive floodwater. It is not the purpose of the plan change to prevent the site from receiving such water — indeed it is fundamental that the site continues to provide the same functionality, as a component in the wider drainage scheme. A second critical point is that such flooding is extremely rare: Mr Wallace's evidence being that the Flyers Line Spillway has only ever operated 3 times (the last two in 2015 and 2004, and prior to that in the 1980s).
32. Nevertheless, Mr Wallace expressed confidence in his modelling, and ultimately Mr Preston agreed most of his concerns regarding the modelling had been addressed, to the point that the plan change can proceed, leaving residual matters of detail to be addressed under the provisions

applying to subsequent development.⁹ This has been reflected in the provisions agreed between the planners.¹⁰

33. As for *outgoing* water, the experts have now agreed to a tolerable model result flood level increase of 50mm in the existing rural areas (i.e. property adjoining the site to the south west), and a zero tolerable model result flood level increase for the existing urban areas.¹¹
34. It is submitted that this comprehensively addresses the concerns advanced by submitters in relation to flooding issues, and any flooding-related concerns that remain are either concerns about the existing situation (which the plan change is not required to 'fix') or else are mere perceptions of risk unfounded in any expert assessment. The requestor submits you can, and should, rely on the work of the experts.

Residential amenity for properties adjoining the site

Intersection design/property access/traffic effects

35. Submitters in the vicinity of 127 Benmore Avenue have concerns about the impacts of the new roading and intersection. The concerns include intersection design, property access, and the noise and light effects created by vehicle movements.
36. All of these are considered suitable to address as part of the future consenting processes, given the range of discretionary assessment matters provided under R7A.5.2.1.¹² In order to ensure that relevant parties may have the opportunity to participate in those processes, the planners have agreed an amendment (in R7A.5.4.1) that would allow for the relevant property owners to be served with notice of the relevant consent applications.

⁹ Summary Statement of Tim Preston, 10 July 2022 at [4].

¹⁰ See R7A.5.2.2(a)(xiii) in the set of agreed provisions tabled on 25 July 2022.

¹¹ Summary Statement of Tim Preston, 10 July 2022 at [6].

¹² The matters are set out under 4.2 in the planners JWS of 29 July 2022.

Sunlight/Daylight/Outlook for Meadowbrook owners with a Whiskey Creek boundary

37. A considerable subject of concern for many submitters with a common boundary with Whiskey Creek is the change that will occur 'over the boundary', where those owners presently enjoy open, rural views. The concerns are expressed in a variety of ways that incorporate effects on views, effects on sun and daylight, effects on character and privacy effects.
38. For reasons well-traversed in the hearing, the requestor does not support the creation of a reserve strip as way of mitigating amenity effects.
39. What the requestor does offer is a trifecta of other controls over and above the standard residential development controls:
- (a) a doubling of the usual setback requirement from 1.5m to 3m,
 - (b) a height limit of 5m (which would allow for only single storey development of the adjacent Whiskey Creek lots), and
 - (c) a requirement to align lot boundaries to match the layout along Meadowbrook Drive where possible (to achieve consistent 'fit' between lots and 1-to-1 relationships over the common boundary).
40. The requestor maintains, relying on the evidence of Mr Burns and Mr Thomas in particular, that these measures collectively will result in an appropriate level of residential amenity for the existing houses adjoining the boundary, in combination with standard controls for boundary fencing (both District Plan limits, and Fencing Act tools).
41. The requestor does not support an increase in the proposed setback from 3m to 5m. While that might be achievable for many¹³ of the properties adjoining Meadowbrook Drive, the requestor questions whether the additional constraint on Whiskey Creek property owners would deliver any meaningful improvement for Meadowbrook owners. Mr McCavanagh provided the fairest representation when he openly stated that neither 3m nor 5m would suffice from his perspective. He proposed a setback (effectively a reserve) of the whole south-eastern side of Road 2 saying

¹³ Not all, as Mr Burns' evidence confirmed.

“that's how big it needs to be to provide sun”. There is no reasonable level of mitigation the requestor can offer that would resolve concerns like these.

42. If the Panel ultimately determines that a setback greater than 3m should be provided along the rear boundaries of some of the properties adjoining Meadowbrook Drive, then the requestor asks that the Panel make a commensurate adjustment to the site coverage allowance — increasing the allowance from 40% to 45% — to ensure the affected owners have marginally more flexibility over building size at the front of their sections, to offset the loss of a significant area for potential building at the rear.

The Andersons at 23B Meadowbrook Drive

43. There is one property along Meadowbrook Drive that the requestor considers is in a unique position as regards amenity effects: Mr and Mrs Anderson's house at 23B.
44. As you have heard, the Andersons were provided assurances in the late 1980s that the Whiskey Creek land could never be built on, and as a result they were permitted to build closer to the rear boundary, on the assumption that the outlook would always be the same. They now say that a high fence along the common boundary would make their property “unliveable”, and the requestor empathises with the Anderson's specific situation.
45. This cannot be properly addressed through bespoke plan provisions, and it would not be appropriate for a district plan to attempt to resolve such matters of detail and *personal* history. As heralded in the JWS, the requestor considers the only appropriate response is to record here in writing an undertaking that it will offer to enter into a private fencing agreement with Mr and Mrs Anderson. It is of course up to the Andersons whether they accept this offer.
46. The agreement that the requestor undertakes to offer the Andersons will incorporate terms that:
 - (a) will bind the requestor or anyone else who becomes the owner of the Whiskey Creek land adjoining the common boundary with 23B Meadowbrook Drive;

- (b) will preclude that party from erecting any fence on the boundary or within 1.5m of the boundary, that is more than 1m above ground level, unless the Andersons give written agreement in advance.

This has the potential to provide the Andersons an assurance that any fence on (or materially near to) the boundary cannot be built to the 'usual' (i.e. 1.8m) height unless they agree. Such an agreement would explicitly override the requestor's right to build a potentially taller fence under the provisions of the Fencing Act. It would also allow the Andersons to agree a taller, more see-through fence if they chose, in the event they decide that would better balance their outlook and privacy interests.

47. Given the reliance that the Andersons personally placed on the representations made to them in the 1980s, it is appropriate that this protection is personal to them, and not transferable to any subsequent owner of their property; thus the offer of a fencing agreement, not a covenant.
48. Incidentally, Commissioner Rutherford asked for clarification where Mr Burns' assessment of fencing effects is to be found. It is in his primary statement of evidence (dated 18 May 2022) at paragraph 30(f), plus the larger scale images on the final three sheets of images attached to that statement. Notably he there compares the effects of shade *between* fencing and potential dwellings; as his evidence proceeds on the basis that a 1.8m fence must be taken to generate outcomes that the District Plan anticipates,¹⁴ including positive outcomes for protecting privacy.¹⁵
49. The requestor does not accept that any other of the owners along Meadowbrook Drive is in a position materially the same as the Andersons, and so maintains the usual Fencing Act controls, in addition to the trifecta of proposed amenity controls (setback, height and lot alignment) are adequate to address the amenity concerns of other submitters.

¹⁴ This approach is evident in the same statement, at [30](d)

¹⁵ Mr Burns' reliance on the role of standard height fencing for this is expressed in the same statement, at [35](a).

Conclusion

50. In conclusion, and subject to any further right of reply on matters of housing density/typology, the requestor returns to the two questions set out in paragraph 4.
51. It is submitted that there are no fundamental impediments that would render the Whiskey Creek/Matangji land inappropriate for zoning for residential growth.
52. Secondly, it is submitted that the provisions now agreed by the planners are fit for purpose and, based on the expert evidence you have heard and tested, those provisions will suitably manage all relevant effects.
53. Putting this into the statutory language, the requestor submits that you may conclude
 - (a) that the objectives (or “purposes”) of the Plan Change are the most appropriate way to achieve the purpose of the RMA in terms of managing the Whiskey Creek/Matangji land resource; and
 - (b) the plan change's provisions are the most appropriate way to achieve both the objectives of the plan change, and the existing objectives of the District Plan.



M J Slyfield

Counsel for Flyers Investment Group Ltd

5 August 2022