

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 – PALMERSTON NORTH CITY COUNCIL REPORTING OFFICERS

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MAY IT PLEASE THE HEARING PANEL:

- [1] These brief legal submissions focus on legal issues in respect of the Whiskey Creek residential area private plan change (**Whiskey Creek**).
- [2] The submissions are brief, as there are very few contentious legal issues. Issues that are front and centre for the Hearings Panel are either technical in nature (i.e. flooding), or relating to the planning mechanics of the provisions. The Hearing Panel will have had the benefit of detailed summaries, discussions and supplementary evidence from the key witnesses on these topics. Counsel will be at the hearing to assist the reporting officers and Hearing Panel, as required.
- [3] It is important that the Hearing Panel is confident in its understanding of the planning mechanics, including how the provisions ‘fit’ within the district plan framework for greenfield residential development areas, and how they and the structure plan will ‘work’ when applied to resource consent applications within the Whiskey Creek area. In that respect, Council’s planning witnesses, in particular, Mr Duindam, and counsel will be available to assist and answer any questions.
- [4] The Hearing Panel has heard from Mr Slyfield for the applicant, whose opening legal submissions provide a fair and balanced summary of the proposal and the legal principles relevant to this process.
- [5] While the Council officers and the applicant are generally in agreement regarding the proposal, and most of the proposed provisions, there remains some issues between the parties. The key differences between the witnesses are captured in the witnesses various summary and supplementary statements, including as between the planning witnesses in the joint witness statement of 4 July 2022.
- [6] These submissions address two persistent legal issues arising from the evidence, and a third that was raised by a submitter in the first part of the hearing.

Prescriptiveness of plan provisions

- [7] Mr Duindam’s supplementary evidence of 4 July 2022 includes his response to the Commissioner’s Minute # 3, in which he comments on the importance of the multi-unit housing components of the Structure Plan to the Council.

[8] Mr Thomas' supplementary evidence of 8 July 2022 takes issue with Mr Duindam's evidence. The reporting officers' approach to the Structure Plan and provision for multi-unit housing is described as entailing a "fundamental review of the provisions". It is said that the s 42A officers should "correctly focus on the issues raised in submissions rather than embarking on a fundamental review of provisions including the policies".¹ With respect, review and commentary by the Council's s 42A officers (or for that matter the Hearing Panel) on these aspects of the proposal is appropriate and properly responds to both the Hearing Panel's Minute and directly addresses issues raised in a submission on the proposal.

[9] In more detail, counsel submits the following:

- a. Mr Duindam's evidence provides a direct response to questions put by the Hearing Panel;
- b. Mr Duindam's evidence (read alongside Mr Thomas' response) helpfully illuminates a mismatch between the outcomes Mr Thomas and Mr Duindam were expecting from a development in 'general accordance' with the Structure Plan – that is, does it 'require' or merely 'enable' multi-unit housing in the prescribed area. This is an issue requiring clarity, and is squarely before the Hearing Panel in its assessment of the plan change.
- c. Mr Duindam is clear that his views are predicated on the applicant's own information. For example, Mr Burns' landscape assessment describes it (the multi-unit housing) as a "Key Feature" of the structure plan.²
- d. Mr Duindam is not precluded from giving his opinion and recommending changes to provisions of the plan change, just because the Council approved the applicant's private plan change request for notification.
- e. The Chief Executive Officer of the Palmerston North City Council lodged a submission on this plan change (Submission #8), raising the following issue:

It will be appropriate to ensure that the mixture of housing typologies envisaged by the structure plan and assessed as an

¹ Mr Thomas' supplementary statement at paragraph 10.

² See, for example, Mr Duindam's paragraph 10, and reference to Mr Burns' Landscape Assessment.

important element of the urban design and landscape report, is a realised outcome of development. This may require careful consideration of the proposed provisions and further prescription of design outcomes for the development to ensure delivery of the identified multiunit housing areas.

- [10] Within this context (and indeed, at a general level) it is appropriate for the Hearing Panel to consider the necessary level of ‘directiveness’ contained in the provisions regarding delivery of aspects of the Structure Plan, particularly those components described by the applicant’s own witnesses as ‘key’. It is submitted that Mr Duindam’s evidence on the identified issue is relevant, sought after, and engages directly with a topic of concern raised by the Council as submitter.
- [11] Counsel respectfully invites (likely unnecessarily) the Hearing Panel to carefully consider the language of the relevant policies and provisions with the respective planning witnesses, to ensure that the provisions ultimately provide for the appropriate outcome (whatever the Panel considers that to be). It is important to the success of the rezoning that all parties are aware and clear as to what outcomes the Panel considers appropriate for the Structure Plan to deliver, and how the provisions confirmed by the decision are intended to apply to achieve those outcomes. It would also be helpful for these matters to be recorded in any decision, as an extrinsic guide to decision making at the consenting stage.

Flooding – Flood Prone Overlay

- [12] The Panel has heard several submissions in relation to flood hazard issues, and has received technical evidence from various sources, including from Mr Wallace and Mr Preston. In some respects, the flooding issues have evolved over the course of this process with much more information now available to the parties and Hearing Panel, as noted by Mr Preston, and this has resulted in various changes and amendments to the provisions in response to further information.
- [13] While it appears that issues in respect of provisions relating to flooding and stormwater appear to be agreed, there remains a dispute in relation to the planning treatment of a flood prone overlay for Whiskey Creek.
- [14] Mr Thomas for the applicant proposes that the following provision should be inserted into the plan with an associated map (22.6.3), as shown in the joint witness statement at paragraph 7:

Map 22.6.3 identifies an area that is zoned residential and also shown on the plan maps as flood prone area. If flood hazard avoidance is achieved for that area then it shall be deemed to immediately cease being flood prone area, despite anything to the contrary in the planning maps.

- [15] The JWS records the difference in opinion between Mr Thomas and Messrs Asgar and Duindam and the reasons for their respective positions. Mr Preston also explains in his summary statement that the provision proposed by Mr Thomas has insufficient technical definition. In short, the concerns of Council officers relate to the certainty of the provision, its efficiency (as a provision), and generally whether it is the most appropriate provision in the circumstances.
- [16] The Council officers accept the simple proposition that the land may be capable of achieving flood hazard avoidance, and that if flood hazard avoidance is achieved, the land would no longer be flood prone. However, the problem at this stage of the process defines itself – that is, the earthworks necessary to achieve the environmental outcome promised by the applicant have not been done (or authorised) and the land, as things stand, is flood prone.
- [17] The effect of engaging the proposed factual trigger (“*flood hazard avoidance is achieved*”) would be that the land would be “deemed” to no longer be flood prone, and accordingly the relevant natural hazard provisions in Chapter 22 of the District Plan would not apply to the land. As Mr Thomas explains, the “flood hazard avoidance” trigger is sourced from the Regional Policy Statement. However, while definitionally this terminology is well suited as an expression of regional policy, it is considered insufficient for the purpose of triggering a plan provision that changes the effect of a natural hazard overlay.
- [18] In *Man O’War Farm Ltd v Auckland City Council*,³ Whata J understandably found (in a more extreme case) that a provision identifying land “which may be subject to coastal hazards over at least a 100 year time frame” was void for uncertainty, as it provided no guidance as to the requisite probability required to engage the rule, and because it gave rise to the possibility of scientific debate.
- [19] The authorities suggest that the requirement for certainty leave no room for subjective assessment in provisions dealing with natural hazards. This point is

³ [2017] NZHC 1349.
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illustrated within the context of this plan change, as recorded by Mr Preston, where *“Demonstrating flood hazard avoidance is not a simple matter and there is potential for differences of opinion.”*⁴ In that respect, it is envisaged that the trigger would require a technical assessment to take place, which is in of itself capable of engendering scientific debate. Equally, the provisions do not prescribe a methodology for ‘who’ is responsible for determining whether the circumstances of the trigger are achieved or what would happen in the event of any technical or scientific dispute. It is therefore submitted that the proposed rule lacks the essential element of certainty.

[20] While it is conceivable that the applicant’s proposed planning mechanism could be improved through further careful consideration between experts, the evidence required to demonstrate flood hazard avoidance would make this inherently difficult to translate into a sufficiently certain trigger rule. Further, undertaking this work would only be a worthwhile exercise if the planning justification for such a trigger rule was sufficiently strong. Mr Duindam and Mr Azgar do not consider that the provision has a strong planning justification, relative to the status quo.

[21] Importantly, while the applicant proposes the introduction of this provision as a ‘standalone’ provision and map (as above), the proposed approach does not actually amend the boundaries of the Flood Prone overlay that currently sits in the District Plan and applies to this land. In other words, while the provision (if triggered) would cancel the effect of the Flood Prone overlay, this would not be apparent to the average district plan user who would have no idea upon reading the plan whether the circumstances of the trigger rule have been achieved or not. Therefore, even with the applicant’s proposed trigger, a future plan change process would be required to eliminate this planning quagmire.

[22] Therefore, because either recommendation (the Council’s or the applicant’s) is likely to require a future ‘tidy up’ plan change, it would be preferable to favour the one that provides the higher degree of clarity and certainty in the meantime.

National Policy Statement for Highly Productive Land

[23] Ms Judy Milne (Submitter 21), addressed the Hearing Panel with a focus on the maintenance of highly productive land. Ms Milne advised the Hearing Panel that

⁴ Tim Preston Summary Statement, at page 4.
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the draft National Policy Statement for High Productive Land (the “**draft NPS**”) was likely to be made ‘final’ within a short space of time.

- [24] As the Hearing Panel may be aware, the draft NPS was promulgated in 2019. It has remained in ‘draft’ since then, and counsel is unaware of any official reason as to why it has not been approved to date. Suffice to say, while the National Policy Statement remains in draft, as a matter of law it is not a National Policy Statement that has been “issued” under s 52 of the Act, and the Hearing Panel is not required to implement it through its decision-making at this time.
- [25] If it transpires that Ms Milne’s submission is correct and the draft NPS is finalised before this plan change is determined (e.g. during deliberations), the direction will have legal relevance. The practical problem that the Hearing Panel will encounter in that scenario is that it will have no submissions or evidence as to how the NPS Highly Productive Soils would apply or how it could be ‘given effect to’ in this process. To address this issue in conjunction with the Hearing Panel, it is anticipated that all parties, and submitters, would be provided the opportunity to provide comment on the national policy statement and how it interrelates with the proposed plan provisions.
- [26] For present purposes, Mr Asgar addresses the versatile soils issue in his 42A evidence at 3.122, and Mr Thomas agrees with it.⁵



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⁵ Paul Thomas Statement of Evidence dated 148 May 2022, at paragraph 125.
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