

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 FOR FLYGERS INVESTMENT GROUP LIMITED

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INTRODUCTION

1. This is the hearing of the Whiskey Creek Residential Area plan change, requested by Flygers Investment Group Ltd (**requestor**). You will shortly hear evidence from Mr Higgins that will explain more fully who the requestor is.
2. You have before you already a significant quantity of written and visual material regarding the plan change, and you will be hearing from many experts who will address that material and answer your questions. In light of this, and the introduction already provided by Council advisors, this legal submission does not attempt to cover all the relevant subject matter for your consideration, but takes a more focussed approach:
 - (a) Part One provides a brief outline of the plan change request;
 - (b) Part Two describes the legal framework relevant to your assessment; and
 - (c) Part Three addresses some issues that have (or potentially have) legal dimensions.

The relatively small number of issues I address in Part Three is a reflection of the level of agreement that has been achieved between the requestor's advisors and Council's advisors across most other matters, as well as in relation to the ultimate outcome — namely, that this plan change is appropriate for approval.

THE REQUEST

The Site and Location

3. The site is on the northern side of Cloverlea. It comprises four legal titles, which together make up a roughly rectangular block of land, approximately 41ha in area. It is held in four legal titles, the legal descriptions of which are contained in the original request dated 11 April 2021 (**request**).
4. Three of the current titles, for 611 Rangitikei Line, 165-243 Flygers Line and 609 Rangitikei Line, are presently zoned rural, and the fourth, at 127 Benmore Ave is residential.

5. Rangitikei Line/SH3 runs along the north-eastern boundary of the site, and Flyers Line along the north-western boundary. To the south-west lies further rural land, and to south-east the site adjoins the established residential neighbourhood of Cloverlea.
6. An existing underground high pressure gas pipeline, owned and operated by First Gas Ltd, traverses (broadly) east-west, across the northern corner of the site.
7. The eponymous Whiskey Creek, an ephemeral stream, traverses the site (again, broadly) north to south.
8. The two largest titles within the site are also the subject of a Flood Prone Overlay in the District Plan Maps, which reflects that this land is part of a floodable area identified in the Lower Manawatu Flood Control Scheme.
9. Horizons has a designation over a small part of the site adjacent to the boundary with Benmore Avenue, for a stopbank to protect the Benmore Avenue properties from floodwaters.

The Plan Change

10. The requested plan change reflects that future plans for the site are in three parts:
 - (a) Around 18 ha of the site, adjacent to Flyers Line, is to be retained as productive rural land (as it is now), with no change to the zoning;
 - (b) A band of about 10 ha running through the centre of the site will be developed as public reserve, including new walkways and stream regeneration, so the change seeks to re-zone this land as conservation and amenity area;
 - (c) Around 13 ha, closest to the established residential activity along Meadowbank Drive and Benmore Avenue, is to become available for residential development once the land has been recontoured to avoid flood risk. The plan change accordingly seeks for this part of the site to be re-zoned residential, which will facilitate development of around 150-160 dwellings.

11. For completeness, I note the plan change will also re-zone 127 Benmore Ave. Although it is already residential, it will become part of the Whiskey Creek Greenfield Residential Area, to which Section 7A applies, as it facilitates the primary transport connection for the site.
12. As Mr Duindam records in his evidence,¹ there is a problematic lack of short-term supply of greenfield land in Palmerston North. Unsurprisingly, a change of the sort entailed in the plan change has therefore been anticipated by the Council for many years. It was noted in the 2018 City Development Strategy, the 2018 Infrastructure Strategy, the 2018-2028 Long Term Plan and the 2019 Housing and Business Needs Assessment. Despite its modest size in comparison to other identified greenfield sites around the City, Whiskey Creek is an important opportunity to provide short to medium-term greenfield capacity.
13. The District Plan already contains, in Section 7A, a framework for enabling growth on identified greenfield sites. That section currently enables development at Whakarongo and Kikiwhenua. This plan change seeks to extend the application of the same framework to Whiskey Creek, with as few bespoke provisions as necessary to address site-specific issues.²
14. In conformity with the Plan's approach towards all significant greenfield sites a Structure Plan is proposed as a graphic guide to the overall land use pattern, primary roads, areas of open space, infrastructure features and constraints. This ensures the re-zoning is guided by an appropriate overall vision for the site — which in this case is the product of significant multi-disciplinary assessment, as will be described in the evidence of Mr Burns.³
15. You will also hear in the requestor's evidence that many of the issues raised by submitters or Council's advisors need not be addressed as part of the requested plan change. This reflects that the plan change, if approved, will not fully enable development, but will lay the necessary framework for consenting the anticipated development. This is in keeping with the

¹ Statement of Evidence of Michael Duindam for the Palmerston North City Council, 11 May 2022 at [10].

² For completeness, I note the plan change will also re-zone 127 Benmore Ave. Although it is already residential, it will become part of the Whiskey Creek Greenfield Residential Area, to which Section 7A applies, as it facilitates the primary transport connection for the site.

³ Statement of Evidence of Andrew Burns in support of Flyers Investment Group Limited, 18 May 2022, at [18] and beyond.

approach already established in the Plan, which involves laying a foundation for development by applying appropriate zoning in combination with a Structure Plan, and bringing the developable area within the consenting regime of Section 7A: Greenfield Residential Areas. This means many matters of detailed design are yet to come, in the form of a Comprehensive Development Plan supporting consent applications to develop the land.

16. Other components of the plan change worth noting at this introductory stage are:
 - (a) The change does not seek to introduce any new District Plan objectives.
 - (b) The change seeks to introduce a new policy, specific to subdivision of the Whiskey Creek Residential Area.
 - (c) The change proposes a raft of amendments to existing policies, rules and other methods (e.g. mapping). Of some significance, as will be addressed below, one of these is amendments is intended to remove of the existing "Flood Prone Overlay" from the proposed new residential zone once land recontouring has in practice avoided that area of land from being flood prone.
17. It should also be noted that prior to notification the requestor developed a further policy to state the "overall design principles" behind the Structure Plan, and gave it to Council for inclusion in the notified change. Council omitted it from the notified version, so requestor filed a submission (#4) seeking its inclusion. While this technically means the requestor is wearing "two hats" in this hearing, the requestor is presenting a single case, addressing the additional policy from its submission alongside all other elements of the plan change it is seeking.

RELEVANT LEGAL FRAMEWORK

18. Sections 32 and 75 establish all the key statutory considerations relevant for assessing a "private plan change" (i.e. a plan change initiated under Part 2 of Schedule 1 of the RMA) — subject of course to Part 2 of the RMA itself, where appropriate.

19. These requirements were comprehensively summarised in *Colonial Vineyard v Marlborough District Council*⁴, followed by many cases since,⁵ and that summary is set out in Mr Thomas' evidence, so is not repeated here. Aside from the requirements to give effect to a range of higher order planning instruments, as set out in s 75(3), the detail of most relevance here is in the contents of section 32.
20. There are two features of the requested plan change that dictate how section 32 must be applied:
- (a) The proposed change is what s 32(3) defines as an "amending proposal" (i.e. it will amend the existing District Plan).
 - (b) The proposed change does not include new District Plan "objectives", only new "provisions" (i.e. policies, rules and other methods, such as the structure plan). The purposes of the plan change itself are to:⁶
 - Enable a feasible development with a mix of housing density, housing type and price point;
 - Enable a sustainable and liveable neighbourhood that provides a high level of amenity and connectivity and incorporates the revitalisation of Whiskey Creek;
 - Enable a maximised development area without adversely affecting the flood management function of the area;
 - Appropriately manage environmental risks associated with liquefaction, stormwater discharges, environmental noise and existing infrastructure.
21. I acknowledge these are referred to as the "objectives" of the plan change within the request documents. I refer to them as "purposes" purely to distinguish them from the more technical meaning of "objectives", i.e.

⁴ *Colonial Vineyard v Marlborough District Council* [2014] NZEnvC 55 at [17],

⁵ For example, *A & A King Family Trust v Hamilton City Council* [2016] NZEnvC 229; *Adams v Auckland Council* [2018] NZEnvC 8; *Motiti Rohe Moana Trust v Bay of Plenty Regional Council* [2018] NZEnvC 67; *Cabra Rural Developments v Auckland Council* [2018] NZEnvC 90.

⁶ Plan Change request, 20 April 2021 at p 56.

planning objectives of the sort that District Plans are required to state under s 75(1)(a). It makes no difference to the way in which s 32 applies.

22. Taking into account the two features of the plan change outlined above, section 32 ostensibly calls for two primary evaluations:
 - (a) An evaluation of the extent to which the plan change's purposes, (listed above), are the most appropriate way to achieve the purpose of the RMA.⁷
 - (b) An evaluation whether the plan change's provisions (i.e. its policies, rules and other methods) are the most appropriate way to achieve
 - (i) the purposes of the plan change;⁸ and
 - (ii) the existing objectives of the District Plan that are relevant to the plan change's purposes.⁹
23. When undertaking the first evaluation, it is relevant to bear in mind the Supreme Court's findings in *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd*¹⁰: in the absence of invalidity, incomplete coverage or uncertainty of meaning in the higher order planning instruments it is to be presumed that those instruments themselves give effect to the purpose of the RMA. Those higher order instruments are addressed both by Mr Thomas and Mr Asgar, and neither of them identifies any of the above trifecta of issues that might necessitate recourse to Part 2.
24. Both of the primary evaluations call for consideration of what is "most appropriate" which the High Court has stated¹¹ does not mean 'superior'. It is a value judgement, in which 'appropriate' means suitable.
25. Also relevant here is the Environment Court's guidance in *Royal Forest & Bird Protection Society of New Zealand Inc v Whakatane District Council*:¹²

⁷ Section 32(1)(a).

⁸ Section 32(1)(b) in conjunction with s 32(3)(a).

⁹ Section 32(1)(b) in conjunction with s 32(3)(b).

¹⁰ *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 38.

¹¹ *Rational Transport Society Inc v New Zealand Transport Agency* [2012] NZRMA 298 at [45].

¹² *Royal Forest & Bird Protection Society of New Zealand Inc v Whakatane District Council* [2017] NZEnvC 51 at [59].

...where the purpose of the Act and the objectives of the Plan can be met by a less restrictive regime than that regime should be adopted. Such an approach reflects the requirement in s 32(1)(b)(ii) to examine the efficiency of the provision by identifying, assessing and, if practicable, quantifying all of the benefits and costs anticipated from its implementation. It also promotes the purpose of the Act by enabling people to provide for their well-being while addressing the effects of their activities.

26. The section also prescribes a host of secondary requirements:
- (a) the evaluation of provisions must identify "other reasonably practicable options" for achieving the purposes and objectives,¹³ assess the "efficiency and effectiveness" of the provisions for achieving the purposes and objectives¹⁴ and summarise the reasons for deciding on the provisions;¹⁵
 - (b) the assessment of "efficiency and effectiveness" must identify and assess benefits and costs of the environmental, economic, social and cultural effects anticipated from implementation of the new provisions;¹⁶ quantify those benefits and costs if practicable;¹⁷ and assess the risk of acting or not acting if there is uncertain or insufficient information about the subject matter of the provisions.¹⁸
27. Suffice to say that the requestor's position is that all of these requirements have been addressed in the plan change request documents and in the requestor's evidence (most particularly Mr Thomas' evidence); and the requestor submits that at the conclusion of this hearing you will be able to recommend approval of the plan change on the basis of that information.

SOME ISSUES WITH LEGAL DIMENSIONS

28. For the purposes of these opening submissions, I do not traverse all of the issues, subject by subject, that are relevant to your assessment. I adopt a more focussed approach for the following reasons.

¹³ Section 32(1)(b)(i).

¹⁴ Section 32(1)(b)(ii).

¹⁵ Section 32(1)(b)(iii).

¹⁶ Section 32(2)(a).

¹⁷ Section 32(2)(b).

¹⁸ Section 32(2)(c).

29. First, you are going to hear evidence (most of it from experts) that comprehensively covers all of the issues that the requestor considers you need to consider, and in the interests of timeliness it is better that you progress to hearing that evidence directly than spend time listening to a second-hand summary of that evidence from me.
30. Further, to the extent that an opening submission might often serve as a 'roadmap' for all the material issues, I can commend to you the plan change request itself, and Mr Thomas' comprehensive statement of evidence, which collectively pull together all the relevant material.
31. Frankly, a more detailed legal opening might be justified if there were more significant issues still at large to be addressed, but the reality here is that agreement has been achieved between the requestor's advisors and Council's advisors across many matters, including the ultimate outcome, and for those difference of opinion that remain the requestor is content at this stage to rely largely on the content of its evidence to progress matters.
32. Finally, the requestor will see what transpires as the hearing progresses, and if necessary provide more detailed submissions in responses to particular issues as part of its reply.
33. With that in mind, I turn to address three issues that have (or potentially may have) some legal significance, concerning water supply, flooding and cultural matters.

Water Supply

34. The evidence of Mr Miks identifies that there is not presently the ability to supply water (at an appropriate level of service) to the development. As Mr Judd (for the requestor) and Mr Duindum (for the Council) both state, this was not a known issue until Mr Miks undertook the detailed servicing assessment. Given estimates that this will take some 3-5 years to address, Mr Asgar proposes an additional policy, performance standard, and rule, the combined intent of which is to ensure the water supply shortfall has been addressed at the time of subdivision, or otherwise the subdivision is treated as a non-complying activity (it would otherwise be restricted discretionary).
35. The requestor opposes that approach, on the basis that the restricted discretionary performance standards for essential services already require

lots to have water supply services available. This is addressed in Mr Thomas' evidence.¹⁹ He says these performance standards adequately cover the issue, i.e. there is simply no need for the additional provisions proposed by Mr Asgar.

36. The requestor submits that deals with the issue in its entirety.
37. However, if you should take a different view than Mr Thomas, and are considering possible amendments along the lines proposed by Mr Asgar, there will be a complex scope issue to be resolved: the changes he is proposing are not changes that have been sought by any submission, including the submission filed by Council. In fact, Council's submission omits altogether any mention of any water supply issue.
38. The introduction of Council's new position on water supply as part of a s 42A report will require close consideration to be given to the role of s 42A reporting in the plan-making scheme, given the considerable body of caselaw that establishes that the scope of potential outcomes of a plan change is set by
 - (a) the plan change as notified, and
 - (b) the content of submissions,

not by s 42A reports.
39. Council had opportunities to identify and raise the water supply issue before notification. It could have commissioned a report on water supply after receiving the plan change request,²⁰ and could have sought to modify the request to address water supply issues before even deciding whether to accept the request.²¹
40. A further opportunity to identify and raise the issue arose in the submissions phase. Yet the submission Council filed did not mention water supply at all.

¹⁹ Statement of Evidence of Paul Norman Thomas in support of Flyers Investment Group Limited, 18 May 2022 at [111] to [115].

²⁰ RMA, First Schedule, cl 23(3).

²¹ RMA, First Schedule, cl 24 and 25.

41. I note the submission instead adopted a highly questionable practice of purporting to incorporate into the submission all the later modifications recommended in s 42A reports (whatever those might turn out to be, and regardless of how those tied in to the matters raised in the submission).
42. A (marginally) better starting point on scope would be for the council to rely on submission #22 from Sally and Murray Rasmussen, and I note this is in fact the only submission Ms Asgar refers to in the water supply section of his report.²² Yet, here too, there would be scope issues. The Rasmussens make a single reference to "water", as one of a number of "facilities" they say the new residents will lack,²³ but that is as far as it goes. While this might be enough to sustain a contention that the subject of water supply was raised, it is a considerable leap to get from that generality to Mr Asgar's detailed and specific changes to policy, assessment criteria and activity status.
43. Much more could be said on these scope issues, but as stated above, the requestor's primary position is that the water supply issue and Mr Asgar's proposed amendments to provisions, can be resolved without recourse to any of that.

Flooding

44. You will hear from a number of experts about flooding-related aspects of the plan change, and in particular Mr Wallace will shortly take you through his revised flood mitigation design, and his evidence will be that this further improves flood management beyond the standards described in the written evidence already filed. It is not yet clear whether this resolves the remaining points of difference between experts on this topic.
45. There is one other flood-related matter to address from a legal standpoint.
46. The plan change anticipates earthworks that will raise the development area of the site well above flood levels, rendering that part of the land no longer flood prone. This is why the request included a change to the Flood Prone Overlay in the District Plan maps that would take effect upon implementation of the relevant earthworks consents. However, the

²² Pages 36 – 38.

²³ Page SO 22-10.

earthworks consents have not yet issued, so it is not possible to include a reference to those specific consents in the relevant provision.

47. The requestor therefore proposes an equally clear and appropriate 'trigger' to automatically uplift the relevant part of the Flood Prone Overlay. This will be addressed in Mr Thomas' evidence. He will recommend, that in place of a reference to the earthworks consent, the change to the Flood Prone Overlay becomes effective "once works have been completed that achieve flood hazard avoidance" on the relevant land. "Flood hazard avoidance", as defined in the RPS, means flood control measures are in place that provide protection from 1-in-200 year floods, and the measures are soundly designed and constructed.
48. In my submission, this alternative formulation will ensure you can be confident that whatever course the earthworks consents take, the overlay will remain in place until appropriate flood protection is in place. The requestor's present understanding is that this would satisfy the Horizons submission. The alternative promoted by Mr Asgar, which is to leave the overlay in place and require a further plan change to effect its uplift, would introduce a significant, unnecessary and ultimately inefficient impediment to the development.

(Potential) Cultural Matters

49. At this point in time it is unclear whether cultural issues may take on a greater significance during the hearing. The requestor commissioned a cultural impact assessment from Rangitāne o Manawatū, which found no "fatal flaws" in the proposal, supported the restoration of the Whiskey Creek tributary, recreation access and housing, and requested further information, which will be the subject of future engagement during detailed design.
50. However, the requestor has been unable to achieve similar levels of engagement with Ngāti Turanga, a self-described downstream hapū, who have filed a submission in opposition to the plan change and have indicated they will speak at the hearing. The requestor acknowledges it is fundamentally for those with cultural interests, and not the requestor, to speak and act on the matters affecting them. Once they have had the opportunity through this hearing to give expression to the matters affecting them, the requestor may be better able to offer responses.

WITNESSES

51. The requestor will call:
- (a) Grant Higgins (representing the requestor)
 - (b) Andrew Burns (urban design)
 - (c) Dan Males (landscape)
 - (d) Phillip Wallace (flood modelling)
 - (e) Paul Mitchell (stormwater)
 - (f) Kevin Judd (earthworks and services)
 - (g) Harriet Fraser (transportation)
 - (h) Nigel Lloyd (noise), and
 - (i) Paul Thomas (planning).



M J Slyfield
Counsel for Flygers Investment Group Ltd
3 June 2022