

BEFORE THE HEARING PANEL

IN THE MATTER of the Resource Management Act 1991 (RMA)

AND

IN THE MATTER of Proposed Variation 3 to the Waikato Proposed District Plan

LEGAL SUBMISSIONS OF COUNSEL FOR NEXT CONSTRUCTION LIMITED
21 July 2023

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MAY IT PLEASE THE PANEL

Introduction

- 1 These submissions are made on behalf of Next Construction Limited (**Next Construction**) in regard to their submission (#99) (**Submission**) on Waikato District Council's (**Council**) Variation 3 to the Proposed Waikato District Plan (**Variation 3**). Variation 3 is Council's Intensification Planning Instrument (**IPI**).
- 2 Next Construction is the development management entity for the following companies and properties to which Next Construction's Submission relates:
 - (a) 61 Old Taupiri Road, Ngaruawahia – owned by 61 Old Taupiri Limited;
 - (b) 15 Galbraith Street, Ngaruawahia – owned by Swordfish Projects Limited;
 - (c) 29-33 Galbraith Street and 26 Jackson Street, Ngaruawahia – owned by 26 Jackson Limited; and
 - (d) 99 and 99A Ngaruawahia Road and 18 Rangimarie Road, Ngaruawahia – owned by 99 Ngaruawahia Limited.

Scope of submissions

- 3 These submissions address the Urban Fringe Overlay, the rezoning request for 99A Ngaruawahia Road and 18 Rangimarie Road, and the proposed Stormwater Constraints Overlay with the associated technical report.
- 4 The following submissions should be read alongside Mr Andrew Wood's evidence dated 7 July 2023.

Executive Summary

- 5 In summary, the evidence and legal submissions for Next Construction conclude that:
 - (a) The Urban Fringe Overlay should not be considered a qualifying matter under s 77L of the Resource Management Act 1991 (**RMA**);

- (b) The properties at 99A Ngaruawahia Road and 18 Rangimarie Road (**Properties**) should be rezoned as Medium Density Residential 2 Zone (**MDR2Z**); and
- (c) Stormwater and flooding material provided by Council must be considered at a district wide level through the normal Schedule 1 RMA process. It should not be restricted to the 'Urban Fringe' boundary for the direct purpose of attempting to ensure that stormwater is within scope of Variation 3.

Urban Fringe Overlay

- 6 We submit that the Urban Fringe qualifying matter does not have the necessary planning or legal merit to meet the requirements of the Resource Management (Enabling Housing Supply and Other Matters) Amendment Act 2021.
- 7 We understand that the Panel and the s42A authors consider that Urban Fringe does not satisfy the requirements of s 77L of the RMA as a qualifying matter.¹ We support this finding. This is in line with the relief sought in Next Construction's Submission.

Rezoning

- 8 Next Construction's Submission has sought to rezone the Properties from General Rural zone to MRZ2 (previously referred to as General Residential zone).
- 9 The zoning under the Proposed Waikato District Plan (**PWDP**) has split the properties down the middle. Half is zoned General Rural and half is zoned General Residential. This error was sought to be remedied by Council, but for various reasons, as set in Mr Wood's evidence,² the rezoning has not taken place.
- 10 The s 42A authors do not support the rezoning for the following reasons:³

¹ Waikato District Council IPI Interim Guidance 1 (14 March 2023). Section 42A report at [592].

² Statement of Evidence of Andrew Wood – 7 July 2023 at [17] – [19].

³ Section 42A report Addendum 1 at [7].

- (a) The General Rural Zone area of the Properties is located within the High Risk Flood Area and the Flood Plain Management Area;
- (b) No additional information was provided with the submission that supports rezoning of the Properties; and
- (c) If the Properties were to be rezoned, a comprehensive approach is required given the presence of the flood hazard in this location.

Ability to rezone

11 Tier 1 territorial authorities are required to give effect to all the objectives and policies of the National Policy Statement on Urban Development (**NPS-UD**).⁴ That extends beyond just Policy 3 of the NPS-UD which enables district plans to maximise the benefits of intensification.⁵ Policies and Objectives that should also be considered by the panel when making a decision include (but not limited to):

- (a) *Objective 2: Planning decisions improve housing affordability by supporting competitive land and development markets.*
- (b) *Objective 6: Local authority decisions on urban development that affect urban environments are:*
 - (i) *integrated with infrastructure planning and funding decisions; and*
 - (ii) *strategic over the medium term and long term; and*
 - (iii) *responsive, particularly in relation to proposals that would supply significant development capacity.*

⁴*Southern Cross Healthcare Limited V Eden Epsom Residential Protection Society Incorporated And Others* [2023] NZHC 948 [27 April 2023] at [85].

⁵ National Policy Statement on Urban Development 2020, Policy 3.

- (c) *Policy 1: Planning decisions contribute to well-functioning urban environments, which are urban environments that, as a minimum: have or enable a variety of homes that:*
- (i) *meet the needs, in terms of type, price, and location, of different households; and*
 - (ii) *enable Māori to express their cultural traditions and norms; and*
 - (iii) *National Policy Statement on Urban Development 2020 – updated May 2022 11 have or enable a variety of sites that are suitable for different business sectors in terms of location and site size; and*
 - (iv) *have good accessibility for all people between housing, jobs, community services, natural spaces, and open spaces, including by way of public or active transport;*
 - (v) *and support, and limit as much as possible adverse impacts on, the competitive operation of land and development markets; and*
 - (vi) *support reductions in greenhouse gas emissions; and*
 - (vii) *are resilient to the likely current and future effects of climate change.*

12 For the Council to meet its functions under section 77N(1), that is when giving effect to policy 3, and to meet the obligations under section 80F, the Council must use an IPI and the ISPP.⁶ The Council must ensure that the provisions in its district plan for each urban non-residential zone⁷ (within the authority's urban environment) gives effect to the changes requires by policy 3.⁸ To complete this, the Council may create new urban

⁶ Resource Management Act 1991, section 77N(1) (amended by Resource Management (Enabling Housing Supply and Other Matters) Amendment Act 2021).

⁷ Resource Management Act 1991, section 77F (amended by Resource Management (Enabling Housing Supply and Other Matters) Amendment Act 2021). **Urban non-residential zone** means any zone in an urban environment that is not a residential zone.

⁸ Resource Management Act 1991, section 77N(2) (amended by Resource Management (Enabling Housing Supply and Other Matters) Amendment Act 2021).

non-residential zones or amend existing urban non-residential zones.⁹

There is the ability to rezone the Properties as they are within a urban non-residential zone in an urban environment as identified in the Ngaruawahia Structure Plan 2017 (**NSP 2017**).

- 13 It is submitted that there is the ability to rezone land under Variation 3 from General Rural that is within the urban non-residential zone to General Residential under section 77N(3)(a) and then to MDR2Z under section 77G(4), as this will be giving effect to the NPS-UD.
- 14 In the rebuttal s42a evidence, the authors note that “there is no need to rezone additional land residential for capacity reasons”¹⁰ There is not an obligation for Council to only supply land if there is a capacity need. Policy 2 of the NPSUD states that “local authorities, at all times, provide at least sufficient development capacity...”¹¹ as a bare minimum capacity needs to be provided, the Council is not restricted to limit capacity because it may meet the bare minimum.

Flood risk

- 15 The s42a authors conclude that it is inappropriate to rezone the Properties because the General Rural zoned area of the Properties is located within the High Risk Flood Area and Flood Plain Management Area under the PWDP.¹²
- 16 As set out in Mr Wood’s evidence, only 37% of the land on the Properties is in the High Risk Flood Area and Flood Plain Management Area, making majority of the land developable.¹³
- 17 Further, Next Construction has undertaken consultation with Council and has provided Council with a masterplan which provides for stormwater within the High Risk Flood Area and Flood Plain Management Area under the PWDP. This stormwater area is suggested to be a park that extends beyond the flood risk areas, opening up the Waipā River. The masterplan

⁹ Resource Management Act 1991, section 77N(3)(a) (amended by Resource Management (Enabling Housing Supply and Other Matters) Amendment Act 2021). These zones are subject to qualifying matters as outlined in section 77O.

¹⁰ Rebuttal evidence of Section 42a Report, dated 19 June 2023, at [37].

¹¹ National Policy Statement on Urban Development 2020, Policy 2.

¹² Section 42A Report Addendum 1, at [7].

¹³ Statement of Evidence of Andrew Wood, 7 July 2023 at [35].

demonstrates that the rezoning has considered and provided for the High Risk Flood Area and Flood Plain Management Area.

- 18 The current General Rural zoning and the flood risk overlays are a natural inhibitor to farming activities and other permitted activities in the General Rural zone. Retaining the General Rural zoned area of the Properties does not align with good planning practice, provide for logical planning outcomes, or have regard to the NSP 2017.

Information provided to support rezoning

- 19 As outlined in Mr Wood's evidence, sufficient information to support the rezoning and urbanisation of the Properties already sits with Council.¹⁴ The NSP 2017 included numerous supporting reports which detailed the urbanisation that is expected on the Properties. These reports support the identification of the Properties as "Living (Proposed) zone".¹⁵ These reports, paired with the expectation that the Resource Management (Enabling Housing Supply and Other Matters) Amendment Act 2021 is to 'enable' housing support the Properties being rezoned.
- 20 While the s42a authors accept that the NSP 2017 identifies the Properties for future residential expansion,¹⁶ the rebuttal evidence also suggests that there are outstanding issues for the Properties that need to be resolved.¹⁷ The further issues that have been identified are best dealt with in the resource consenting process and it is submitted that these issues are not required to be addressed in a rezoning process.
- 21 In respect to the water and wastewater connections, the s42a authors in their rebuttal evidence state that water and wastewater connections should not be assumed. We understand that it has been agreed that water and wastewater connections are to be addressed at the service connection stage through a bylaw, not at this hearing, nor at the resource consenting stage.

¹⁴ Statement of Evidence of Andrew Wood – 7 July 2023 at [22].

¹⁵ Ngaaruawaahia, Hopuhopu, Taupiri, Horotiu, Te Kowhai & Glen Massey Structure Plan March 2017, Figure 21 at [44].

¹⁶ Rebuttal evidence of Section 42a Report, dated 19 June 2023, at [30].

¹⁷ Rebuttal evidence of Section 42a Report, dated 19 June 2023, at [35].

- 22 We submit that sufficient evidence has been provided by Next Construction and Council holds the required reports and information to complete the anticipated rezoning of the Properties.

National Policy Statement on Highly Productive Land

- 23 An assessment of the National Policy Statement on Highly Productive Land (**NPS-HPL**) is relevant in circumstances where General Rural zoned land is proposed for rezoning and has been raised through further submissions.¹⁸
- 24 Clause 3.5(7) of the NPS-HPL provides that:

Until a regional policy statement containing maps of highly productive land in the region is operative, each relevant territorial authority and consent authority must apply this National Policy Statement as if references to highly productive land were references to land that, at the commencement date:

...

(b) is not:

*(i) **identified for future urban development***

(Emphasis added)

- 25 Land identified for future urban development is defined as:¹⁹
- (a) *identified in a published Future Development Strategy as land suitable for commencing urban development over the next 10 years; or*
- (b) *identified:*
- (i) *in a strategic planning document as an area suitable for commencing urban development over the next 10 years; and*
- (ii) *at a level of detail that makes the boundaries of the area identifiable in practice*

¹⁸ Waikato Regional Council, Further Submission to Waikato District Council Variation 3, dated 13 December 2022.

¹⁹ National Policy Statement for Highly Productive Land 2022, clause 1.3.

- 26 The land held by the Properties meets the definition identified for future urban development because there is the NSP 2017, the Future Proof boundaries and the Ngaruawahia Structure Plan 2023, which all identify the subject land as being for future urban development, subject to demand and infrastructure.
- 27 We submit that an assessment of the Properties against the NPS-HPL is not required.

Stormwater

Te Miro report

- 28 Council has introduced new information that has not previously been a part of the Variation 3 process. We submit that this raises questions of procedural unfairness and that the inclusion of this new qualifying matter should be disregarded.
- 29 Appendix 1, Te Miro Water “Technical Review: Stormwater DRAFT” (**Te Miro report**) has been introduced into the s42A report. Next Construction has not been able to properly consider the Te Miro report nor have its own experts review this in detail to the effect it has on the Properties.
- 30 Next Construction has concerns that the Te Miro report is not suitable for being included in the Variation 3 process. The Te Miro report is incomplete and introduces new potential flood risk assessments that have now been reviewed by an independent reviewer as stated in rebuttal evidence.²⁰ A copy of this review has not been provided to submitters, nor has the report been through the appropriate public consultation process. As a result, a large number of properties and landowners will be burdened by the findings of the Te Miro report.
- 31 The unfairness of the introduction of the Te Miro report is exacerbated by the fact that evidence for Next Construction was due on 7 July 2023 and expert conferencing was held on 11 July 2023. Followed by rebuttal evidence with updated maps (but no comparison) provided two days before legal submissions were due. We submit that this timeline given for

²⁰ Rebuttal evidence of Andrew Boldero, dated 19 July 2023, at [33].

Next Construction and other submitters to review the evidence is unacceptable and is not conducive of a transparent plan change process.

- 32 We submit that the Te Miro report should be removed from Variation 3 and should be considered through the standard Schedule 1 RMA plan change process with significant amendments at a district wide or town wide scale (if to be considered in a planning process at all).

Qualifying matter

- 33 Council's planner Katja Huls concluded that the management of significant risks from natural hazards is a matter of national importance under s 6 of the RMA, and this status is justification for a qualifying matter.²¹ Ms Huls has determined that stormwater management in the Waikato District is linked to the overall water quality of the Waikato River and therefore managing this risk is justification for a qualifying matter under Variation 3.²² While it is agreed that flood risk can be identified under section 6 of the RMA, the process that has been followed under the IPI is not appropriate and it ultra vires.
- 34 As noted in the s42A report, the PWDP has existing flood plain hazards, identified by the Flood Plain Management Area and Flood Ponding Area, the High Risk Flood Area, and the Defended Area. While there is a suite of rules proposed from on stormwater as a qualifying matter, the new overlay with the high level modelled flood plains should be not accepted by the Panel.
- 35 In *Waikanae Land Company Limited v Heritage New Zealand Pouhere Taonga*,²³ the Environment Court considered the limitations imposed on councils when determining qualifying matters under s 77I of the RMA. The Environment Court found that Kapiti Coast District Council had "disenabled" the rights of property owners by changing the status of activities commonly associated with residential development in light of adopting a qualifying matter.²⁴

²¹ Statement of Evidence of Katja Huls – 20 June 2023 at [47].

²² Statement of Evidence of Katja Huls – 20 June 2023 at [48].

²³ *Waikanae Land Company Limited v Heritage New Zealand Pouhere Taonga* [2023] NZEnvC 056.

²⁴ *Waikanae Land Company Limited v Heritage New Zealand Pouhere Taonga* [2023] NZEnvC 056, at [31].

- 36 The Environment Court found that there is an “inherent limitation” in the matters which fall within the related matters category under s 80E(1)(b)(iii) of the RMA.²⁵ The Environment Court held that:²⁶

...the purpose of the IPI process inserted into RMA by the EHAA was to impose on Residential zoned land more permissive standards for permitted activities addressing the nine matters identified in the definition section and Schedule 3A.

- 37 The Environment Court held that changing the activity status of activities which are already permitted on sites within the General Residential zone goes beyond making the MDRS less enabling as contemplated under s 77I of the RMA.²⁷ This is also identified in the evidence given by Ms Huls, that there are legal restraints to the scope of amendments Council can make through this process and it is acknowledged that flood mapping updates require a full plan change process²⁸

- 38 As found in *Waikanae Land Company Limited*, the change to impose a qualifying matter needs to be consequential to the MDRS. Put simply, the effect of intensifying with the MDRS can have consequential effects on the environment and should therefore be limited by a qualifying matter. Section 80G of the RMA states that *a specified territorial authority must not ... use the IPI for any other purpose other than the uses specified in section 80E of the RMA. To which a territorial authority may amend or include provisions... that support or are consequential on the MDRS or policies 3, 4, and 5 of the NPSUD.* The Te Miro report and the new proposed Stormwater Constraints Overlay is not consequential on the MDRS. An example provided within Variation 3 is impermeable surfaces, which is outlined further below.

- 39 The mitigation for stormwater through limiting impermeable surfaces (being 70%) is not changing under Variation 3. As outline in Mr Wood’s evidence (and Council’s evidence), density does not create additional impermeable surfaces and this is recognised by the fact that the maximum impermeable surface of 70% per site does not change over any current or

²⁵ At [28].

²⁶ At [31].

²⁷ *Waikanae Land Company Limited v Heritage New Zealand Pouhere Taonga* [2023] NZEnvC 056 at [31].

²⁸ Statement of Evidence of Katja Huls, dated 20 June 2023, at [37]. Rebuttal evidence of Katja Huls, dated 19 July 2023, at [35].

proposed zoning.²⁹ The new mapping/overlay disenables activities to be undertaken on the Properties by changing the activity status under the MDR2Z from Restricted Discretionary or Controlled to Discretionary.³⁰ The disabling arises from creating a Discretionary activity from a Controlled activity with no basis that stormwater (with its limited boundaries) increases because of the MDRS. The stormwater is not a direct consequence of the MDRS and should be disregarded in accordance with case law.

- 40 Further, the consequence of the approach taken by Council in introducing stormwater as a qualifying matter so late in the process is that it was not notified last year when required. In *Waikanae Land Company Limited*, Kapiti Coast District Council had notified its qualifying matter (and that qualifying matter was still found to be ultra vires by the Environment Court). While notification was not considered an issue in this case, here it is limiting the natural justice on submitters, regardless of whether the 'Urban Fringe' boundary is being used to ensure submitters were 'included'.
- 41 Stormwater cannot be assessed in the form of arbitrary boundaries. Stormwater should be assessed over the whole district, with consideration of all flood areas on a property. The Properties in this case are half within the Urban Fringe. As a result of the new provisions created by the qualifying matter, rules will relate to half of these Properties and create different building standards if the zoning and qualifying matter remain. This makes for poor planning practice. Other councils are considering stormwater as a separate Schedule 1 RMA process.³¹
- 42 Under the IPI, there is no ability for an appeal if the mapping is incorrect. Allowing for a draft report and then a tight timeframe to finalise the report for evidence to then form the basis of activity status, is risking the integrity of the District Plan and its adoption should be avoided.
- 43 We submit that the Stormwater Constraints Overlay "disenables" development rights and makes the MDRS less enabling than as contemplated under s 77I of the RMA. For this reason, the Stormwater Constraints Overlay should be removed from Variation 3, an approach

²⁹ Andrew Wood evidence, dated 7 July 2023 at [42]. Katja Huls evidence, dated 20 June 2023, at [5.2]. Statement of evidence of Andrew Boldero, dated 20 June 2023, at [25(d)].

³⁰ Rebuttal evidence of Katja Huls, dated 19 July 2023, at [36].

³¹ For example, Hamilton City Council's PC 14 is a different process to its PC 12.

which is in better accordance with the *Waikanae Land Company Limited* decision.

Conclusion

44 It is submitted that:

- (a) The Panel’s decision regarding Urban Fringe not being a qualifying matter is upheld;
- (b) The Properties are rezoned to MRZ2;
- (c) The Te Miro report is given very little weight and not adopted by the Panel;
- (d) The Stormwater Constraints Overlay “disenables” development rights and makes MDRS less enabling than as envisioned under the Resource Management (Enabling Housing Supply and Other Matters) Amendment Act 2021; and
- (e) The Stormwater Constraints Overlay is removed from Variation 3.

Dated 21 July 2023



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