BEFORE THE WAIKATO DISTRICT COUNCIL INDEPENDENT HEARING PANEL

IN THE MATTER	of Proposed Variation 3, under clause 16A of Schedule 1 of the Resource Management Act 1991, to the Proposed District Plan Change
AND	
IN THE MATTER	of submissions by Harrisville Twenty Three Limited and Greig Developments No 2 Limited (the **Submitters**).

To: **The Hearings Co-ordinator**
Waikato District Council

OPENING LEGAL SUBMISSIONS FOR HARRISVILLE TWENTY THREE LIMITED & GREIG DEVELOPMENTS NO 2 LIMITED

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MAY IT PLEASE THE PANEL

1. INTRODUCTION

1.1 These legal submissions, on Variation 3: Enabling Housing Supply (the **Variation**) to the Proposed Waikato District Plan (**PWDP**) are made on behalf of Harrisville Twenty Three Limited (**Harrisville**) and Greig Developments No 2 Limited (**Greig**). Greig and Harrisville own relatively small, but well-located parcels of Large Lot/Village zoned land within proximity to the Tuakau town centre. The Greig land is on the corner of Johnson and Oak streets and is only approximately 200m from the town centre. The Harrisville land is 2.6ha in size, not all of it developable, and is located at 23 and 23A Harrisville Road. It is only about 350 to 450m from the town centre.

1.2 Greig and Harrisville have sought Medium Density Residential Standards (**MDRS**) zoning for their properties. This is the MRZ2 zone in the latest nomenclature of Council's recommended provisions as per the Rebuttal s42A Report and provisions.

1.3 The main focus of these legal submissions is on the Harrisville site. The panel will have read that the Council agrees that there is merit in the site being developed for urban activities, because it is very proximate to the town centre and adjoins existing residential land that will be upzoned to MRZ2. In my submission this is a helpful starting point for the consideration of the zone change from Large Lot to residential. The Council also helpfully submits that there is legal scope for this Panel to grant the relief sought.

1.4 The main issue identified in the s42A Rebuttal report is regarding the technical information filed in support of the rezoning request. It is submitted that the written information provided to-date, supplemented by the witnesses in the Hearing, and in response to the s42A Report, will be a sound evidential and planning basis for the Panel to recommend that the Harrisville site be rezoned to MRZ2. There is a difference in the level of technical detail that

is required to support a zone change, verses a subdivision/landuse development application, as will be emphasised below.

1.5 The Harrisville submission is supported by the following applicant, planning and technical witnesses, who have provided the following evidence to assist the Panel.

a) Mr McNaughton for Harrisville.

b) Mr Boag – 3 Waters/Stormwater evidence.

c) Mr Thompson –Economic and Property Market evidence.

d) Mr Hunter–Traffic evidence.

e) Mr Tilsley – Geotechnical evidence.

f) Ms Hayhurst – Ecology evidence.

g) Ms Peake – Landscape evidence.

h) Ms Addy – Planning evidence.

1.6 The evidence circulation process has been compressed, and often concurrent, and this means that the witnesses for the Submitters will update the Panel in the Hearing on their final positions. This is particularly in response to the Council Reply evidence and the Rebuttal s42A Report and the final sets of provisions recommended for approval (Natural Hazards and Climate Change, Water Wastewater and Stormwater and Subdivision), received on 18 July and the following 2 days.

1.7 These legal submissions focus on the main issues considered to be in contention at the time of writing. The position may be updated at the Hearing, and in response to any further evidence received in the Hearings and other party's legal submissions. The scope of matters covered can be understood from the Table of Contents.

2. PARKING THE GREIG RELIEF

2.1 Regarding the Greig site, General Residential Zoning (**GRZ**) relief is being sought under the PWDP appeals. A subdivision consent for this site under the current rules had been well advanced, and there are no technical reasons that the land could not be used for housing development. It was agreed with the Council, as reflected in memoranda from the parties, that where there is an overlap of jurisdiction between the Environment Court and the Variation relief, for the same parcel of land, it would be preferrable to try and resolve the relief in the PWDP appeal process.

2.2 Constructive discussions have been taking place with the Council about the appeal relief, process, and the most appropriate landuse for the Greig land. It is understood that there is agreement in principle with the Council, currently on a without prejudice basis, that GRZ is appropriate for the Greig site, and the appeal has been recently amended to clarify the relief sought. There are no s274 parties that are opposed to the GRZ being applied to the site. Therefore, while not formally agreed by a consent order at this stage, Greig will now work with the Council to prepare the necessary documentation to present to the Court for approval.

2.3 It is noted that the Council has suggested in its s42A Report and legal submissions, that due to the circumstances above, the Panel should recommend that the Greig relief be declined. In my submission and taking a conservative approach in the interests of my client, it is requested that rather than being declined, the Greig MDRS/MRZ2 relief sought, under the Variation submission, is deferred or "parked" to the purposes of the current Hearing process. This is for the following reasons:

a) There is still a risk that the relief under the PWDP may not be granted by the Court.

b) It is understood that the Panel will be holding hearings later in the year on some matters that are not currently ready to be heard. Greig respectfully reserves the right to bring evidence and be heard in a subsequent hearing process and subject to the outcome under the PWDP appeals.

c) Should the GRZ relief sought under the PWDP Appeals be approved by Consent Order, it may become operative prior to this Panel releasing its final decisions on the Variation. It is anticipated that the MRZ2 would potentially apply automatically to the newly operative GRZ on the Harrisville site.

d) However, should there be a scope issue with this outcome, this Panel could grant the MRZ2 relief over the top of the GRZ based on the scope in the Variation submission.

2.4 While the requested legal approach may be perceived as having a "bob each way" it is submitted that what is proposed is more of a "belt and braces" approach to ensure that this land resource is developed as efficiently as possible. Serviced urban land is an important resource, and increasingly valuable, as constraints on the use of rural land increase, most recently through the NPS-HPL.

2.5 Regarding the final development and urban form outcome, the owner of the site is an experienced developer, and does intend to provide some more intensive housing on the site for older persons (at the Oak Street end). There is a significant shortage of affordable new smaller units that are close to the town centre in Tuakau. Creating these units will increase the efficiency of the property market by enabling older residents to "downsize" from family homes that are too big for their needs, therefore making those properties available for people that need larger homes/sections.

2.6 It is understood that there is no disagreement that the land is very suitable for urban housing, and the above strategy would ensure that the greatest number of houses can be potentially constructed. Therefore it is submitted

that the requested approach best gives effect to the NPS-UD and meets the statutory requirements of s32 of the Act, the Amendment Act provisions, and the objectives, policies and standards of Schedule 3A.

2.7 For these reasons, it is respectfully requested that the Greig submission relief be "parked" by the Panel instead of declined at this stage. The Submitters undertake to collaborate with the Council jointly update the Panel on the progress of the consent order under the PWDP.

3. LEGAL FRAMEWORK

Overview

3.1 As the Panel will be aware s77G of the Amendment Act requires that every relevant residential zone of a specified territorial authority must have the Medium Density Residential Standards (**MDRS**) Schedule 3A provisions incorporated. This is a mandatory statutory requirement, with very limited exceptions in the form of qualifying matters. The clear purpose of the Amendment Act is to enable more housing, of diverse typologies, in appropriate locations, and increase market competition for supplying urban land/sections.

3.2 I have provided an overview of the relevant provisions and their interpretation and application in my legal submissions for Pokeno West and other parties, and those are not repeated in these submissions, but are also adopted for Harrisville and Greig.

There is scope for the relief sought

3.3 It is submitted that there is no limitation of scope for the Panel to recommend that the Harrisville land be rezoned from Large Lot to MRZ2. I have had the benefit of perusing the Council legal submissions on scope of the Harrisville relief and concur with the conclusions that the relief requested is an incidental extension of the MRZ2 zone. I also concur that the relief satisfies the tests of being "on the plan change" and not offending the principles of natural justice, in accordance with *Clearwater* and other precedent cases.

3.4 The only additional comments I make are to remind the Panel that some of the leading cases in this area of law have concluded that there is a breach of natural justice, because of prejudice and other grounds, in circumstances where a submitter has sought to rezone the land of other parties (in addition to their own). The Harrisville circumstances are distinguishable because it is seeking that only its own land is rezoned. It is noted that no neighbours have sought to oppose the relief sought by lodging further submissions.

3.5 A further matter to bring to the Panel's attention is that regarding what is "on the plan change", the Council has rezoned some parcels of land from rural to MRZ2 in Pokeno West in the Variation. The zoning change for these blocks is fully supported because it would have otherwise left "spot" rural zonings surrounded by the Pokeno West current GRZ, and new MRZ2, proposed zonings.

3.6 For the record, my clients and consultants in Pokeno West had sought to include these owners/properties in their PWDP rezoning submissions, but they did not want to participate at that time. The Council has properly used the Variation process to address these zoning anomalies and achieve a consistent and comprehensive planning outcome.

3.7 Regarding the broader scope of notified changes in the Variation, in my submission, relief seeking a change from Large Lot to MDRS/MRZ2 is clearly within the scope of changes from Rural to MRZ2, which is a more significant "up-zoning". It is understood that Tuakau is a different settlement to Pokeno, but they are close, and both the respective examples are for land that adjoins existing, or soon to become, operative GRZ land. This is not a case where the land being sought to be rezoned is dislocated from existing areas of the same zoning, and there is no planning merit in granting the relief sought.

3.8 Finally, not all of the Harrisville land can be developed as there is steeper topography leading down to a small stream boundary. If the actual development footprint is considered, then the MRZ2 rezoning will reconcile what is effectively a "gap" in the current residential and built form edge to

this part of Tuakau. In that respect, while not as stark as the isolated parcels of rural land at Pokeno, it is not dissimilar in terms of establishing a logical and defendable edge to the residential area from a spatial planning perspective.

4. MERITS OF RESIDENTIAL ZONING

4.1 The Harrisville land is a logical greenfield extension to Tuakau and the increased supply of sections above the current zoning will best meet the requirements of s32 of the Act, the intention of the Amendment Act, and the mandatory objectives and policies of Schedule 3A. It will also best give effect to the NPS-UD.

4.2 As will be explained further below and in the Hearing, there are no development constraints that cannot be addressed at the detailed development/subdivision consent stage, in the usual manner. The Variation is an important opportunity to improve the efficiency, and overall environmental and societal benefits, from developing this proximate land resource.

4.3 The witnesses for Harrisville have discussed the benefits of rezoning the land, and in particular Mr McNaughton, who outlines the objective to provide more affordable housing and contribute to the wellbeing of Tuakau, and Mr Thompson and Ms Addy. Ms Addy has provided a comprehensive s32AA Report in support of the application and it is noted that the s42A Rebuttal report raises no issues with the content of that assessment.

4.4 Helpfully, the Council witnesses and the s42A Rebuttal report agree that the land is suitable for urban development due to its proximity to the town centre and adjoining existing zones but have raised concerns about some technical issues. They have questioned whether the assessment has properly accounted for the number of dwellings that could potentially be built under the MDRZ2 provisions. The Report writers did appropriately flag that these matters could be further addressed at the Hearing (par 16).

4.5 In my submission it is very important to note the following subdivision rule, in the context of the consideration of the MRZ2 zoning being sought:

> *SUB-P14 Future development – Tuakau, Pokeno, and Te Kowhai within the LLRZ – Large lot residential zone.*
>
> *In Tuakau, Pokeno, and Te Kowhai, buildings, access, and lot boundaries are located to enable future subdivision and development in the event that reticulated water, stormwater, and wastewater infrastructure become available and a plan change to rezone to a higher density is in place.*

4.6 The first point to make is that unlike many Large Lot zoned areas, reticulated services are already available to the site, as is accepted in the s42A report. Therefore, based on this rule, the Harrisville site is ready for an upzoning plan change. The Variation is an entirely appropriate opportunity to realise the more intensive and efficient residential outcome that this rule is attempting to "future proof". There is no need to wait for a subsequent plan change process that, at the time of writing, it is understood there is no commitment to, funding for, or time-frame to commence.

4.7 Plan change processes are very expensive and time consuming, as we are all aware, and the relatively small size of this site would not justify the level of effort and resources required. If this plan change is not granted, then the applicant will inevitably reactivate the current subdivision application for significantly less houses than would otherwise be built under MRZ2. The lost opportunity to provide additional much needing housing in this desirable location, would not give effect to the NPS-UD. In my submission the relief sought is a "low hanging fruit" that will make a small, but still important contribution, to enabling the people of Tuakau to provide for their social and economic needs and health and safety. Housing is a fundamental human need.

4.8 Furthermore, in my submission, and considering that any subdivision under the Large Lot provision, quoted above, will be assessed on its ability to provide for MDRZ2, it would be a somewhat perverse outcome not to grant the relief sought. Mr Munro in evidence makes the very good point, that if medium density outcomes are the objective, then it is far more desirable to

design it from the outset, and from the dwellings first, and then a subdivision pattern around the houses, than to try and rely on a secondary future development infill stage. The reasons for this position are set out in his evidence.

4.9 A further reason is simply that if designed at the outset, dwellings can be designed to address the street and benefit from the amenity and safety of the public/private interface. Infill typologies typically end up with duplexes/terraces facing each other and parallel to the street with an inefficient accessway down the side of the lot. It is a basic spatial difference but is one of the main reasons why a terrace house in a comprehensive master planned development, such as Hobsonville, has a lot higher amenity value than say, a block of 3-5 terraces on a redeveloped small lot in Ellerslie. These foundational urban design elements do make an important contribution to achieving a "well-functioning urban environment" (NPS-UD).

4.10 The following sections are the legal response to the latest Council position, and further evidence will be provided at the Hearing as suggested by the s42A Rebuttal Report. However, the first point of clarification is to establish what is the appropriate level of information for a plan change as discussed below.

5. INFORMATION FOR A PLAN CHANGE

5.1 Council has upzoned significant areas for GRZ of the district that contain thousands of properties. Understandably, for a zoning change of this scale, there has not been rigorous testing of the ability to achieve up to 3 permitted dwellings on every site that has been up zoned. The upzoned sites will have significantly different circumstances in terms of being front or rear sites, topography, size, infrastructure servicing constraints, accessibility challenges, and neighbour affects issues etc. Just because the Council has a general level of comfort with the upzoning (as a statutory mandate it had little choice of course), but for any qualifying matters, the upzoning itself does not mean that development can actually take place to the plan enabled capacity.

5.2 As the Panel will be aware, the consenting process is intended to ensure that minimum standards and requirements are met for every development. Just because the plan may enable a potential yield or outcome, it does not mean that this can be realised on every site.

5.3 This brings me to the main point of concern that has been raised by the Council which is with the yield that has been assumed by the Harrisville technical consultants with the current Large Lot zoning and the rezoning to MRZ2. The NPS-UD recognises that there is a difference with what is plan enabled, what is feasible, and what is reasonably expected to be realised. The yield scenario presented was mainly to try and establish the difference in effects between what can be established under the Large Lot zoning with servicing, and what is expected to be built under MRZ2. This is so the effects of the relief being sought are distinguished from the difference between a rural zoning and MDRZ2.

5.4 Regard the total yield, this will be looked at again before the Hearing to address the concern of the s42A Rebuttal Report. The yield will be based on the evidence of Mr Munro and other witness evidence on vacant lot sizes and the use of shape factors. Harrisville can clearly confirm that it has no intention of enabling its proposed 25 lots to then be re-subdivided to create 75 lots which is the scenario considered in the S42A Rebuttal for traffic (par 14i) and more generally (par 16).

5.5 While it is accepted that the reports were largely originally prepared for the previous subdivision consent application, the writers have all subsequently concluded that the land is suitable for MDRS/MRZ2 rezoning. There is no “fatal” traffic, geotechnical, ecological, infrastructure or planning evidence before the Panel that the land could not be rezoned.

5.6 However, it is fully accepted that the final subdivision/landuse development application will have to satisfy all the necessary technical requirements, or the Council will not grant consent. Therefore, for example, if there are concerns with access, because it is a rear lot, that would simply limit the final number and size of dwellings that can eventually be built, and taking into

account the ability to further develop under MRZ2. That level of detail will be a matter for the applicant to work through with the Council in the future. In my submission, it is not a reason to prevent the land being re-zoned in this process.

5.7 In another example, the s42A Rebuttal raises the concern that proof has not been provided that the additional load of 3 residential units at 50% site coverage has been assessed (par 14iv). With respect this level of detail has not been assessed on any MDRZ2 sites that I am aware of in the District. The requirement for geotechnical stability is an assessment criterion in the subdivision rules such as the discretion over the: *"ability of lots to accommodate a practical building platform including geotechnical stability for building*" (MRZ2 – DUB-R153).

5.8 Concern is raised in the s42A Rebuttal about three waters servicing and integrating zoning with infrastructure. However, as to be expected, if servicing cannot be demonstrated, consent can be refused so the Council remains ultimately in control. A new proposed advice note in the Subdivision Chapter of the s42A Rebuttal version specifically give notice of this reality:

> *Advice Note: A water, wastewater and/or stormwater connection approval from the network provider will be required. The presence of infrastructure that can service the lot or unit does not guarantee a connection will be possible and capacity is available to service new development.*

5.9 This protection in the rules, in the usual manner of a district plan, means that in terms of an infrastructure constraint, only for example, if there was no technical possibility of servicing an area in the 10-year life of a Plan, would it be a reasonable ground to refuse approval. In the Harrisville situation there is servicing already in place, so approval of the zone change is justified. The exact level of servicing will be worked through at the time of development and the Advice Note fully enables the Council and infrastructure providers to refuse approval if servicing cannot be adequately provided.

5.10 The approach of the s42A Rebuttal, with respect, risks turning this high-level strategic spatial zone change hearing into a *de facto* detailed resource consent approval hearing. The grounds for declining a zone change would have to be a broader evidence-based concern such as the land is prone to flooding or is geotechnically unstable. However, it is even noted with those issues that it does not prevent such areas being included in the urban up-zoning. The affected areas are identified and are simply to be avoided at the time of development. While the s32AA assessment of Ms Addy did suggest they could be a qualifying matter, it is not formally necessary to do this in the plan provisions.

5.11 Even with ecology and natural wetlands etc, this does not prevent rezoning, unless the area was of sufficient size to form is own zone, such as an "open space" zone (if there were one in the plan). For example, there are SNAs and natural wetlands distributed throughout the new greenfield zonings from the PWDP, all across the district, including Pokeno West. The presence of these features has not meant that the up-zonings, from rural to urban, have been declined. There are robust provisions in place to ensure that these features are protected at the time of subdivision and development including the required setbacks, as appropriately outlined in the s42A Rebuttal Report (par 14). A zoning does not mean that every part of a site can be developed to the full potential of the activities contemplated in the zone. That is simply a developer reality they must accept and have usually already taken into account in when purchasing land.

5.12 The information provided in support of the Harrisville rezoning request is actually far more detailed than is usually provided for rezoning requests, because it is at the subdivision consent level of detail. This is simply due to the history of the previous consent application (now parked) and reporting on the site. It is accepted that there will be valid questions regarding the details of the final subdivision design and outcome, but the key is to appreciate the appropriate stage, and planning process, to address those questions. In my submission it would be an unfair outcome, if by providing more detailed technical information for this zone change hearing than is

strictly required, it ended up being detrimental to Harrisville, because not every single technical subdivision and final development question had been answered.

5.13 As per the evidence of the Harrisville witnesses, none have concluded that there is any technical reason why the land should not be rezoned to MDRS/MRZ2. While the S42A Report does raise questions that would be addressed at the subdivision stage, there is no evidence before the Panel from any qualified technical witnesses that claim the land should not be rezoned and developed because:

a) The entire site is geotechnically unstable.

b) It is flood prone.

c) It cannot be serviced with 3 waters.

d) It cannot be provided safe vehicular and pedestrian access.

e) It will adversely affect ecological features.

5.14 The final form of the development that is acceptable to the Council will be determined later.

6. RECOMMENDED SHAPE FACTOR PROVISIONS

6.1 The following minimum vacant fee simple allotment standards are recommended by Mr Munro in his evidence for Pokeno West. He relied on shape factors rather than specified minimum areas, to ensure that workable and safe real-world built urban environments are achieved to meet the mandatory objectives, policies and standards in Schedule 3A:

For front sites:

a) Where an allotment is proposed to be limited to the opportunity for a single-width driveway and associated garage / car parking space, a minimum frontage width of 9.5m should apply.

b) Where an allotment is proposed to be limited to the opportunity for a double-width driveway and associated garage / car parking spaces, a minimum frontage width of 12.5m should apply.

c) A minimum allotment depth of 19.5m should apply.

d) Allotments seeking triple-width vehicle crossings or associated garage / car parking spaces should not be provided for.

Although not relevant to his analysis or recommendations, the above shape factors happen to equate to a minimum area range of 185.25m^2 – 243.75m^2.

<u>For rear sites (where these are provided for):</u>

A shape factor of 19.5m (minimum) x 13m (minimum), excluding the area required for any access strip or JOAL.

Although not relevant to his analysis or recommendations, the above shape factor equates to a minimum area of 253.5m^2 exclusive of any access strip / JOAL area.

6.2 Mr Munro notes that the above recommendations are based on "everything goes well" allotments that are flat or nearly flat. The Harrisville land is undulating and subdivision standards that take into account sloped sites, where retaining and other works may be required, would justify larger dimensions again and he recommends providing for an additional 1.5m in each dimension would future proof this. This would equate to 11m – 14m x 21m for front sites (231m2 – 294m^2); or 21m x 14.5m (304.5m^2) for rear sites.

6.3 For the reasons set out in the evidence of Mr Munro, and in the legal submissions I provided for Pokeno West and ors, Harrisville adopts the recommendations of Mr Munro for the final MRZ2 Rules that apply in Tuakau. To address the concerns about the effects of the yield from 3 permitted dwellings per vacant lot raised in the s42A Report, Harrisville will re-examine its previous calculations as is of assistance to the Panel in the Hearing.

6.4 However, to reiterate the point in the previous section, this work is indicative and is undertaken to respond to the concerns in the s42A Rebuttal Report, and whether the land is appropriate to rezone to MRZ2.

7. CAPACITY EVIDENCE AND ENABLEMENT

7.1 In its deliberations the Panel is respectfully encouraged to keep its focus on the higher-level clear intentions of the Amendment Act provisions and the NPS-UD. This is particularly the case when considering some of the contentious capacity evidence data and forward projections that have been provided for Tuakau by Ms Fairgray and Mr Thompson. Mr Thompson will respond to the criticisms of Ms Fairgray in her Reply evidence in the Hearing.

7.2 It is also important to appreciate that the capacity requirements in the NPS-UD are a minimum and the overall intention is to over-supply capacity. The short, medium, and long-term minimum requirements are not a “target” and can, and should, be exceeded to better meet the purpose of the NPS and foster a competitive land market. The only exception is the use of HPL if not within the next 10 years or there will be no infrastructure available for more than 10 years.

7.3 Mr Thompson has shown in his evidence (for Pokeno West as well) why MDRS is better able to be met through greenfield than infill in small rural towns and this is backed up by real-world evidence. Because infill housing is generally more expensive to provide/m^2 the demand for houses under $700,000 is usually easier to meet in larger scale master planned developments on greenfield sites.

7.4 Schedule 3A Objective 1, that must be included in the Plan, means that a well-functioning urban environment is to enable people and communities to provide for their housing needs. In my submission, and as per the planning evidence of Ms Addy, granting the relief sought will most effectively meet the statutory requirements.

8. REGIONAL POLICY STATEMENT

8.1 Ms Addy had addressed the most relevant RPS provisions in her assessment and in her view the rezoning to MDRS gives effect to the objectives and policies. In paragraph 18 and 19 of the s42A Rebuttal report attention is drawn to a policy on subdivision and development that the writer has raised a concern about. Ms Addy will address this in the Hearing.

8.2 However, from a wider legal perspective it is important for the Panel to be reminded that incorporating MDRS in to a relevant residential zone applies irrespective of an inconsistent objective and policy in the regional policy statement (s77G(8). While the planning hierarchy is acknowledged as per *King Salmon*, in my submission the statutory intention is clearly to apply the medium density provisions in this planning process and ahead of any amendments that will be made to the RPS at a future time.

DATED at **AUCKLAND** this *23rd* day of July 2023

Harrisville Twenty Three Ltd & Greig Developments (No 2) Ltd
by their barrister and duly authorised agent

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Peter Fuller
Barrister
Quay Chambers