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 Pokeno West, West Pokeno, CSL Trust and Top End Properties Limited, at Munro and Helenslee Roads, Pokeno (the **Submitters**)

To: The Hearings Co-ordinator
Waikato District Council

OPENING LEGAL SUBMISSIONS FOR POKENO WEST – WEST POKENO – CSL TRUST AND TOP END PROPERTIES

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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 Pokeno West Limited, West Pokeno Limited, CSL Trust and Top End Properties Limited (the **Submitters**). The Submitters are significant landholders in Pokeno with large greenfield parcels identified as General Residential Zone (**GRZ**) in western Pokeno (**Pokeno West**). The GRZ zoning of the land is now beyond challenge in the PWDP Appeals with an Environment Court Ruling reducing the scope of the Anna Noakes appeal.

1.2 The Pokeno West land is the next logical greenfield extension to Pokeno and this supply of sections is needed because the Pokeno Village Holdings site is nearly fully developed. The Submitters land has been subject to rigorous master planning and technical reporting, which demonstrates that it is appropriate and feasible for residential development. There are no development constraints that cannot be addressed at the 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 significant urban land resource.

1.3 In recognition of demand for housing and business opportunities in Pokeno the site has been identified within an Urban Enablement Area for Pokeno contained in the Future Proof Strategy 2022, the Council's Waikato 2070 district growth strategy, and as predominantly GRZ in the PWDP. Due to this existing spatial identification, the Council and the Submitters agree that the subject land is exempt from the requirements of the National Policy Statement – Highly Productive Land – 2022 (**NPS-HPL**). More information can be provided on the reasons for this legal understanding if it is of assistance to the Panel.

1.4 The Submitters provided 2 submissions on the Variation and have briefed technical witnesses who have participated in expert conferences and provided the following evidence to assist the Panel.

a) Mr Patel – Primary and Reply 3 Waters/Stormwater evidence.

b) Mr Thompson – Primary and Reply Economic and Property Market evidence.

c) Mr Hills – Primary Traffic evidence.

d) Mr Munro – Reply Urban Design evidence.

e) Mr Oakley – Primary and Reply Planning evidence.

1.5 The Submitters are also appellants on the PWDP that is currently before the Environment Court as the Panel will be aware. Technical reports, and evidence from the PWDP Hearings, can be provided if of assistance to this Panel. There are linkages between the Variation relief and PWDP appeal relief, as explained in these submissions, and referred to in the s42A Reports.

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 and other party's legal submissions. The scope of matters covered can be understood from the Table of Contents.

2. LEGAL FRAMEWORK

2.1 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, and is relevant to the latest Council position of proposing larger minimum and average lot sizes if more that 800m from the town centre, as covered in more detail later.

2.2 Section 77I states that a territorial authority may make the MDRS less enabling of development but only if 1 or more of the stated qualifying matters apply. Subsections (a)-(i) list specific qualifying matters[1]. Notably, most qualifying matters specified in the Amendment Act are matters of national importance and only those outweigh the competing demand for urban development and capacity. Subsection (j) has a general catch-all for any other matter that makes higher density inappropriate, but only if s77L is satisfied. Section 77L states that a matter is not a qualifying matter unless the s32 evaluation report:

a) Identifies the specific characteristics that makes the level of development provided by the MDRS inappropriate for the area;

b) Justifies why that characteristic makes the level of development inappropriate in light of the national significance of urban development and the objectives of the NPS-UD; and

[1] These include matters of national importance, matters to give effect to national policy statements or Te Ture Whaimana o Te Awa o Waikato - the Vision and Strategy for the Waikato River, ensuring the safe and efficient operation of nationally significant infrastructure and the provision of public open space.

c) Includes a site-specific analysis that identifies the site to which the matter relates, evaluates the specific characteristics on a site-specific basis and evaluates a range of options to achieve the greatest heights and densities permitted by the MDRS while managing the specific characteristics.

2.3 The clear purpose of the Amendment Act is to enable more housing, of diverse typologies, and in more locations within relevant urban environments. There are specific exceptions and a process to identify site-specific restrictions to the greater enablement. The language of the Act continually refers to individual sites and a detailed assessment of those individual sites. In my submission the Act does not contemplate a general qualifying matter applying to multiple sites based on general planning principles, which will be relevant to the lawfulness of the latest proposed vacant lot restriction area (**Restriction Area**).

2.4 Also notable is the requirement on a council to justify why a particular site characteristic may mean application of the MDRS is inappropriate, considering the national significance of urban development under the NPS-UD. It follows, that to justify an exemption from the MDRS, a council must demonstrate that a specific site has a particular characteristic of national significance that outweighs the national imperative of providing for and enabling urban development. These site-specific limiting characteristics will be rare.

2.5 Therefore, for the Variation the starting point is that unfettered MDRS must apply to all residential zones in all urban environments in the Waikato District (in this case the GRZ as it applies to Pokeno, Tuakau, Huntly and Ngaruawahia). Only qualifying matters that meet the threshold of national importance or national significance, that can be demonstrated on a site-by-site basis can justify a departure from MDRS. While the requirement for assessment on a site-by-site basis may appear onerous, it is appropriate for the class of qualifying matters that were envisaged by Parliament, such as heritage buildings, a mapped SNA, or a flood plain hazard. The Council has

had no difficulty mapping these features and the impact on individual sites is understood.

2.6 The Council had previously identified a qualifying matter called Urban Fringe which limited the application of the MDRS to an area of a walkable catchment of 800m from the centre. The Submitters and other parties opposed the Urban Fringe because it was considered unlawful, and as we are aware the Council eventually accepted that position, and the Panel has also agreed it did not meet the requirements for a qualifying matter.

2.7 While the Urban Fringe has now been dropped the Restriction Area is now being promoted by the Council. While not exactly the same, to the extent that it seeks to impose a minimum 300m^2 and average (Revised Rebuttal received on 21 July), lot size of 450m^2 , if more that 800m from the village centre, its urban form outcomes may not be that dissimilar to the unlawful Urban Fringe.

2.8 It is submitted that the s32AA evaluation does not undertake the required detailed site-by-site analysis to justify the Restriction Area, and it is based largely on the alleged benefits of concentrating housing intensification (Ms Fairgray) closest to the centre. As will be discussed in more detail below, the technical assumptions behind this justification are weak, from both urban design and economic perspectives. In a small town like Pokeno this arbitrary 800m control is even less connected to the objectives and policies of the NPS-UD than the previous "walkable catchment" Urban Fringe proposition.

2.9 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. It is also important to appreciate that the capacity requirements in the NPS-UD are a <u>minimum</u> 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).

2.10 Enablement of housing to MDRS level must be facilitated unless there is a good reason not to provide it in a particular existing residential area. In many respects it is a reverse burden of proof from the previous regime that has contributed to a long-standing significant undersupply of housing and significant hardship. Instead of having to justify why MDRS up-zoning is needed, the Amendment Act requirement is to prove why it is inappropriate in all recognised urban zones and on individual sites. It is submitted that the Restriction Area method is inconsistent with the statutory objectives because it limits the effective application of MDRS across the entirety of the Submitters land.

3. MINIMUM LOT SIZE RESTRICTION AREA

3.1 The s42A reporting planners and Ms Fairgray's final position (as per the Addendum dated 20 July received on 21 July) is for a minimum 300m^2 vacant lot size, and an average of 450m^2 for the Restriction Area MRZ2 that it more than 800m from the town centre (Rule MRZ2-Iaii). The rationale is allegedly that intensification will provide more benefits if concentrated within 800m of the centre. The minimum lot size if within 800m is 200m^2 (Rule MRZ2-Iai). A minimum lot size of 450m is supported by some parties including Pokeno Village Holdings through the evidence of Ms McGrath.

3.2 The most relevant statutory provisions are set out below:

Schedule 3A – Subdivision Requirements

Clause 2 Permitted activities

> *(1) It is a permitted activity to construct or use a building if it complies with the density standards in the district plan (once incorporated as required by section 77G).*

(2) There must be no other density standards included in a district plan additional to those set out in Part 2 of this schedule relating to a permitted activity for a residential unit or building.

Clause 7 General subdivision requirements

Any subdivision provisions (including rules and standards) must be consistent with the level of development permitted under the other clauses of this schedule, and provide for subdivision applications as a controlled activity.

Clause 8 Further rules about subdivision requirements

Without limiting clause 7, there must be no minimum lot size, shape size, or other size-related subdivision requirements for the following:

(a) any allotment with an existing residential unit, if—
(i) either the subdivision does not increase the degree of any noncompliance with the density standards in the district plan (once incorporated as required by section 77G) or land use consent has been granted; and
(ii) no vacant allotments are created:

(b) any allotment with no existing residential unit, where a subdivision application is accompanied by a land use application that will be determined concurrently if the applicant for the resource consent can demonstrate that—
(i) it is practicable to construct on every allotment within the proposed subdivision, as a permitted activity, a residential unit; and
(ii) each residential unit complies with the density standards in the district plan (once incorporated as required by section 77G); and
(iii) no vacant allotments are created.

3.3 In planning law there is a distinction between density and subdivision but it is submitted that there is a blurring of this distinction in the operation of the clauses above. Clause 7 requires that any subdivision provisions, which would include minimum lot sizes, must be consistent with the development permitted under other clauses in the schedule, including the standards from which density is derived for permitted activities.

3.4 Due to the manner in which the proposed Restriction Area will operate it is submitted that does not give effect to the NPS-UD (Policy 3 in particular)

and is contrary to requirements of the Amendment Act and the Standards in Schedule 3A.

3.5 The primary objective of the NPS-UD and Amendment Act is to enable growth to improve housing supply, and therefore affordability, and provide for a variety of lifestyle options and residential typologies. Contrary to this purpose, the Restriction Area actively restricts development, as the name obviously implies, and while it is not a full reincarnation of the former Urban Fringe it is not entirely a dissimilar mechanism. Considering the fate of the Urban Fringe it is surprising to the Submitters that the Restriction Area is being promoted to the Panel.

3.6 The Restriction Area fails to recognise that higher density residential options are appropriate in areas beyond the strict 800m arbitrary distance. Is there really a material difference between a house at say 750m, and one at 850m, from the village centre, especially if actual individual multi-modal physical accessibility routes to the centre are taken into account?

3.7 Greenfield sites provide significant opportunities to provide for higher density development, which could include opportunities around neighbourhood centres, open spaces, schools, and other social infrastructure. The benefits of the MDRS applying to all of the GRZ, without a minimum and average lot size restriction, include:

a) Providing for a range of housing opportunities, densities and lot sizes;

b) Supporting local neighbourhood shops and services;

c) Providing for a range of house prices to the market, including affordable housing. This supports housing for a wider demographic than a monoculture of the same sized houses and lots as currently exists in Pokeno;

d) Utilising residential zoned land more efficiently, allowing opportunities for integrated housing developments rather than lower density vacant fee simple lots. Pokeno is an ideal location to accommodate growth, and with its growing commercial, employment and community focus can reduce vehicle kilometres travelled compared with countryside living areas and the smaller towns and villages in the District;

e) Avoiding the unnecessary use of highly productive rural land in the future (NPS-HPL);

f) Establishing densities that can support the provision of local public transport in the medium term;

g) Providing for the efficient use of infrastructure;

h) Providing greater residential population and diversity within the growing town of Pokeno, supporting the local economy through commerce and exchange; and

i) Managing pressure for ongoing rezoning in the future and in locations with fewer locational attributes compared with efficiently using land within Pokeno West.

3.8 In the evidence of Ms Fairgray, and the other witnesses for the Council, while an argument is advanced to justify this limitation on the full effect of MDRS, there is no adequate explanation of how the Restriction Area meets the statutory requirements. Considering the mandatory nature of MDRS, the Restriction Area cannot be adopted unless it is legally within the scope of the provisions and the case has not been made out at the time of writing.

3.9 Even in technical terms, the assumptions that the Restriction Area will lead to better functioning urban environment outcomes is questionable for reasons including:

a) In a town such as Pokeno it is generally easier and cheaper to provide more density through master planning on greenfield sites (Mr Thompson and Mr Munro).

b) The above reality is borne out simply by observing the development that has been taking place in Pokeno and other similar towns such as Pukekohe and Waiuku.

c) As per the evidence of Mr Boldero for the Council, it is difficult to retrofit stormwater management measures with infill development due to space and existing infrastructure constraints. This is corroborated in the evidence of Mr Patel.

d) Therefore, to the extent that meeting the objective and policies of Te Ture Whaimana is a key requirement, providing density in greenfield locations is usually a better alternative to infill re-development.

e) Regarding what forms of development are "feasible" and "reasonably expected to be realised" (the NPS-UD tests) the evidence of Mr Thompson, and practical observation, supports the provision of unfettered MDRS on the entirety of the Submitters GRZ land.

f) By reducing the development potential on land just because it is more than 800m from the town centre does not give effect to the NPD-UD nor the NPS-HPL. This is urban zoned land that should be utilised as efficiently as possible to avoid the use of rural land for future urban growth.

g) Pokeno is a small village/town and the Submitters land is still proximate and will be well connected to the centre with walking and cycling routes. This is not a situation such as the spatially vast urban Auckland area where a gradation of plan enabled density from the core, and subregional centres and corridors, is appropriate to promote accessibility and optimise public transport efficiency etc.

h) Finally, the Restriction Area approach is very mono-centric. Currently a school is being investigated on the Submitters land and a neighbourhood/local centre on the site has been master planned from the outset. Associating more density with these community services and facilities is entirely appropriate from an urban form and economic perspective, but most importantly, gives effect to the NPS-UD.

3.10 It is submitted that although Ms Fairgray describes her evidence as economic, it is predominantly urban planning and urban form preferences based on the efficiencies known to form in dense, mixed-use settings. She is simply saying she thinks centres-based outcomes are more efficient and is presumably motivated by the principle of "agglomeration". However, Ms Fairgray is not understood to be an urban planner and she has overly focused on a single principle and has not recognised that it's not only about centres, but the opportunities presented for connecting people more readily with their needs and wants. Based on the relative scale of Pokeno (for example) the centre only provides some benefits for some people, but that access to schools, employment areas, or major facilities could provide the same benefits.

3.11 Even if there were to be efficiency and economic benefits of more centralised development as claimed, there has been no attempt to quantify the benefits of the Restriction Area over a more widely applied unfettered MDRS opportunity. It is submitted that there should have been a robust s32AA analysis of the method proposed to demonstrate why it best meets the purpose of the mandatory objectives and polices that are to be incorporated into the Plan. There should have also been detailed analysis of how restricting development beyond 800m gives effect to the NPS-UD better than fully enabling development in all the main GRZ. There is a statement about the Restriction Area best achieving a "well-functioning urban environment" but no detailed analysis is provided to support this statement.

3.12 Mr Thompson has shown 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. This experience is at odds with the Council's focus on infill in walkable catchments, which while may be achieved to an extent in large urban centres, will not be achieved to any extent in small-medium scale rural towns. Because infill housing is generally more expensive to provide/m^2 Ms Fairgray has not reconciled the impact of the Restriction Area with how the demand for houses under $700,000 will be met, which she has identified there is a shortage of. She has also not fully considered that larger scale master planned developments are better placed to meet this demand at this price point than infill.

3.13 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. Adopting a method that will potentially restrict the supply of affordable homes, in favour more centralised growth, that is not required to be achieved in a town as small as Pokeno, does not achieve this key objective. Policy 2 clearly requires the application of MDRS across the entire zone unless there is a qualifying matter.

3.14 It is understood that the Council is not claiming that the Restriction Area is a qualifying matter per se, and it is correct that MDRS applies in the Restriction Area, but the unnecessary setting of a minimum lot size does interfere with the full development potential available under the Schedule 3A clauses. Therefore, it is submitted that this method is contrary to the overall purpose of the Amendment Act and does not give effect to the NPS-UD and Policy 3.

Restrictive Covenants

3.15 In Pokeno, the original s32 evaluation in section 11.4 (Rationale for the qualifying matter), identified existing constraints on land that mean the realisation of development intensification of existing urban areas to implement MDRS will be difficult:

> *"Secondly, in places such as Pokeno, there are restrictive covenants on a very high proportion of the existing sites such as limitations on having more than one storey, the number of dwellings and subsequent subdivision. This means that further development on these sites is limited as the amendments to the RMA do not over-ride private covenants on titles".*

3.16 This constraint does not apply to Submitters land, or other greenfield land, and is a further reason to not have large minimum lot size restrictions in the Restriction Area. Much of the recent development in Pokeno is unable to be further intensified because of private covenants on the records of title that prevent further subdivision. It is understood that the bulk (if not all) of the land developed by Pokeno Village Holdings Limited to date is subject to such encumbrances. This represents most of the land comprising Pokeno today further illustrating that the unfettered application of MDRS needs to go beyond the identified Restriction Area in the manner Parliament intended.

3.17 Consequently, intensification opportunities should be equally allowed in all current GRZ land. These greenfield locations offer the most significant opportunity to provide for a range of house and lot sizes and densities, along with opportunities for housing choice and affordability. For the avoidance of doubt, enablement in existing centres of intensification is supported by the Submitters. This is a case of "as well as" rather than "instead of". The statutory provisions do not allow unnecessary and arbitrary limitations to be put on the application of MDRS in the GRZ, and the Submitters consider that the Restriction Area is not legally or technically justified.

4. MINIMUM LOT SIZE AND SHAPE FACTORS

4.1 The expert conferencing and evidence reflect different approaches to interpretation of the Amendment Act provisions and whether there should be a minimum lot size for vacant lots in the Plan and/or that a shape factor should be applied. With respect to the technical experts, there is a fundamental planning law legal interpretation issue that must be resolved first before the method of a minimum lot size can even be considered.

4.2 In my submission, and as outlined above, the Amendment Act and Schedule 3A does not appear to provide for the setting of a minimum lot size for vacant lots under the operation of the Standards, to the extent that if frustrates achieving the densities that the Standards enable. In my submission the approach of Mr Munro in Reply evidence is correct, and any indicative lot size is merely the incidental byproduct of applying the Standards and modelling different outcomes. His approach is intended to meet the mandatory Objectives and Policies that fully enable MDRS, while also recognising the need for safe and attractive streets/surveillance (Policy 3) and practical and high quality development outcomes (Policies 4 & 5).

4.3 In my submission an appropriate interpretation of the new regime is as set out in the Primary Planning Evidence of Mr Campbell for Kainga Ora in paragraphs 7.16 to 7.24. Mr Munro has based his assessment on a similar planning law interpretation and application of the new statutory regime, but as is clear from his evidence, he has recommended that a bigger shape is adopted than the one recommended by Mr Wallace for Kainga Ora. Mr Munro has made it clear why his results are different to those of Mr Wallace and a key factor is the accommodation of vehicular access/parking by Mr Munro because he considers this to be needed. His approach best meets the requirements of Policy 4: *"enable housing to be designed to meet the day-to-day needs of residents".*

4.4 It is noted that Mr Campbell does also suggest that if there were to be a vacant minimum lot size it could be 200m^2 (Primary evidence par 7.31), and this concession is highlighted and relied upon in the Reply evidence of Ms Fairgray. In my submission the concession of Mr Campbell should not have been the focus of the Council Reply evidence, but it should have addressed the principled interpretation that Mr Campbell has provided from paragraph 7.16 as highlighted above.

4.5 In my submission it is incumbent on the Council to clearly demonstrate how any minimum subdivision lot size restriction is within the statutory framework

of Schedule 3A. It provides for standards to manage vacant fee simple subdivisions in Part 1 Cl. 3 that:

> *"provide for as a controlled activity the subdivision of land for the purpose of the construction and use of residential units in accordance with clauses 2 and 4".*

4.6 Clause 2(2) in turn states that:

> *"there must be no other density standards included in a district plan additional to those set out in Part 2 of this schedule relating to a permitted activity for a residential unit or building."*

4.7 The recommendations of Mr Munro based on a shape factor are not a density standard relating to a permitted activity for a residential unit or building that might limit what the MDRS could accommodate (i.e., up to 3 dwellings). His recommendations relate to standards for controlled activities for subdivision and do not offend Clause 8. This is because, while based on a shape factor method, it is designed to implement the density standard to an optimal level, and does not frustrate achieving the density standard with minimum vacant lot sizes, and the Restriction Area method, as proposed by the Council.

4.8 As per the JWS on lot sizes in the conferencing session Mr Oakley did support a minimum lot size of 300m^2 , if one were to be recommended by the Hearings Panel, but he did qualify that position as set out in his Reply evidence. When preparing his evidence, he did not have the benefit of the Reply evidence from Mr Munro (filed a day later).

4.9 Further to the previous section, Mr Oakley is clearly of the view that the Restriction Area mechanism is not efficient or effective and also falls foul of Schedule 3A Clause 7 (see above).

4.10 Mr Oakley outlined in his evidence that should the interpretation of the Standards outlined by Mr Campbell be correct (refer to par 7.16 in particular), there would be no minimum lot size in the final provisions *per se*. The lot size would be the end result of applying the development standards,

while ensuring that a dwelling is presumably still functional and not “fanciful”. This is explained in the evidence of Mr Munro and summarised below.

5. RECOMMENDED SHAPE FACTOR PROVISIONS

5.1 The following minimum vacant fee simple allotment standards are recommended by Mr Munro. 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 objective and policies 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.

For rear sites (where these are provided for):

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.

5.2 Mr Munro notes that the above recommendations are based on "everything goes well" allotments that are flat or nearly flat. The Submitters 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. S42A REBUTTAL ADDENDUM ON LOT SIZES

6.1 The final Council position on lot sizes is summarised in paragraph 8 of the s42A Rebuttal Addendum dated 20 July:

> *"I would like to add to the rebuttal evidence that I think 300m2 is an appropriate response as a minimum net lot area. In writing this evidence I did not fully consider the implications of whether 300m2 would deliver an appropriate range of intensification options in the longer term. On this I note the evidence of Ms. Fairgray about the importance over the longer term of providing the flexibility to enable redevelopment within a single site. Ms. Fairgray at paragraphs 99 to 101 considers that whilst 300m2 is better than 200m2, it could still restrict future redevelopment. I agree with Ms. Fairgray and for this reason I consider there is merit in a minimum and an average net lot area. I consider this approach strikes an appropriate balance of enabling both the short-term benefits of smaller houses on smaller lots and allowing for a better dwelling mix, with a portion of larger lots in subdivisions that could be redeveloped at a higher levels of density in the future. Based on the evidence of Ms. Fairgray I consider an average net lot area of approximately 450m2 to be appropriate. I consider this approach to be both enabling and consistent with the direction in Schedule 3A(7). I also consider it will assist in future proofing the ability to intensify in the district.* (Emphasis added)

6.2 With respect, this Addendum position does appear to be a late attempt to try and reconcile the differences in evidence between Ms Fairgray and the planning witnesses including Mr Mead.

6.3 Being that as it may, the more fundamental issue is that just because there may be a vacant lot of 450m^2 (on average) does not mean that developing it subsequently, with up to 3 dwellings as a permitted activity (MDRS), will be

an acceptable, or desirable, urban design outcome. This is the critical point made by Mr Munro. He rightly is focussed on the objectives/policies/standards, and proposed, based on considerable experience, that if you are providing for medium density outcomes, which is what MDRS mandates, it is best practice to design the final density and urban form from the outset. Relying on subsequent subdivision of arbitrarily sized, small, and constrained individual lots will not achieve the desired MDRS density and amenity outcomes.

6.4 Mr Munro's design led approach is to work from the dwellings that the objectives, policies, and standards provide for, up, rather than intensity from pre-set cadastral lot sizes that are disconnected with what can be realistically constructed. The Pokeno Village Holdings development is a case in point, where a minimum lot size has led to a largely homogenous housing typology of relatively low density. That low density outcome is not what MDRS is intended to achieve, and there is little diversity of size and price, which is an objective of the NPD-UD.

6.5 Most importantly, even setting aside the restrictive covenants, it is expected that there would be only modest intensification in the future of the existing PVH development due to the limitations of the current built form. The Council has not undertaken calculations of how much capacity will be potentially lost by applying minimum and average lots sizes and the Restriction Area method. The dwellings forgone may be significant in number, and this would be a major loss of potential benefits to society, and this is why it is submitted that the Rebuttal s42A approach does not satisfy the relevant statutory requirements (s32/Amendment Act/NPS-UD).

6.6 The Submitters support the shape factor approach from Mr Munro and the Panel has the range of sizes from those proposed by Kainga Ora and Mr Wallace, to those recommended by Mr Munro, which provide for some on-site accommodation of vehicles and sloping development sites. The lot areas do not end up being that different to some of the sizes that have been discussed.

6.7 However, the important benefit of Mr Munro's approach is that it will achieve both a higher density final development (dwellings/ha), and better urban design outcomes for owners/occupiers, their neighbours, and the wider community. The physical functionality/wellbeing outcomes, from re-subdividing and intensifying a 450m^2 site, would be inferior to applying a shape factor formula at the outset. A shape factor guarantees a functional base level of housing that, for example, maintains amenity values, street surveillance, avoids a wall of garaging to the street, and manages street parking demand, that can be a real traffic and pedestrian safety issue with more intensive development. Mr Munro's approach responds to known problems with redevelopment and intensification and builds upon successful working examples such as the Drury 1 Precinct.

7. HUNTLY HEIGHT SUPPORTED

7.1 The Submitters fully support the increases in height proposed for Huntly and the centres to enable more development and redevelopment intensification. However, they are more pragmatic about what will be commercially viable to be built in towns like Huntly and Pokeno, particularly within the 10-year life of the Plan.

7.2 As Mr Thompson has noted in Reply, notwithstanding enabling provisions in the AUP in Pukekohe, which has a population of 20,000 and a strong core, the only apartment building that has been constructed is a recent 4-5 story development by Kainga Ora. The Submitters support such projects but as the Panel will be aware, Kainga Ora is not a fully commercial entity and has different objectives and funding sources to a private developer. The property development sector does not currently find such projects viable in smaller towns, for the reasons outlined by Mr Thompson including much higher building costs. If they were profitable and there was demand, the private sector would be suppling this medium/high density apartment product.

7.3 Mr Thompson has provided Reply evidence to Mr Osborne on the Kainga Ora Huntly proposed increases in height. He supports the provisions sought

based on the economic principle that greater flexibility generally is desirable to enable a wider range of market responses.

7.4 However, he has raised a concern regarding the way that capacity is assessed under the NPS-UD. Because he does not consider development to the plan enabled level sought, in a centres like Huntly, is currently feasible, this theoretical capacity should be treated with caution regarding using it to meet the requirements of the NPS-UD. Furthermore, this theoretical capacity should not be used to offset/reduce greenfield MDRS capacity that is viable, such as at Pokeno.

7.5 Therefore, while is not necessarily being framed this way in the Council's evidence, to-date at least, the Submitters would be concerned if, for example, an argument were advanced that the average 450m^2 lot size of the Restriction Area is justified because there is significant capacity due to increases in height in the existing town centres.

8. FLOOD MAPPING LAYER LOCATION

8.1 The mapping of floodplains has been discussed at expert conferencing but an agreed position between the experts on whether mapping should be a statutory layer within the District Plan (as proposed through the Stormwater Constraints Overlay (**SCO**)) or sit outside of it in the Council GIS (or other system) was not reached. There is a planning law component to this matter as well as the overall consistency and integrity of the district planning instrument, as the Panel will be aware.

8.2 There are potential legal *vires* issues with having a flexible GIS layer that is referenced in the Rules and governs important planning matters such as determining the activity status of consent applications. For example, as we are aware, formal plan change processes ensure that the public and affected parties can make submissions and be heard to test the veracity of notified provisions. If the GIS layer can be amended largely "at will" by the Council, there could be prejudice to the owner of a property being outside a flood plain, and then being included, without the opportunity to be heard. This

could have significant impacts on insurability, and therefore access to mortgage finance, and resale value. In some cases, there may be a relatively simple engineering "solution", such as increasing a culvert size, to address the flooding risk.

8.3 It is accepted that the Council may make a change to the model/mapping with the best of intentions, such as to update it to reflect recently experienced actual rainfall intensity. It is also noted that Mr Oakley supports an outcome that provides for flexibility to update the data to recognise, and respond to, the dynamic and changing environment in which development occurs. The flexible layer was originally proposed by Mr Boldero. Mr Oakley does also acknowledge the potential legal concern outlined above and has helpfully outlined how a flexible GIS layer works in conjunction with the rules in the Auckland Unitary Plan.

8.4 As above, it is the difference between GRZ and MRZ2 that is really the scope of amendments in this Variation to address stormwater. Wider concerns and changes, such as the flood modelling and mapping, is, in my respectful submission, a matter that is arguably outside the scope of the Variation. They are also matters that are under the jurisdiction of Environment Court and the resolution of the PWDP appeals.

Section 42A Rebuttal Recommendation – Statutory Layer

8.5 In paragraph 60 of the Rebuttal s 42A the reporting planner refers to discussion on the status of flood mapping as a statutory or non-statutory layer and continues to support the data being a statutory layer. Whilst Mr Oakley is understood to still prefer the flexibility of the non-statutory GIS layer approach, he acknowledges that currently the hydrological information is in a statutory layer. There may be a future plan change/variation as required to address the matter of natural hazards comprehensively.

8.6 There is a risk of potential legal challenge from a non-statutory layer making a de facto plan change each time it is updated, that materially affects the

interests of property owners. Therefore, the Submitters support a Stormwater Constraints Overly remaining a statutory layer in the Plan.

8.7 However, whether it is most appropriate for it to be incorporated by way of this Variation process, or through the resolution of the PWDP Appeals, is in my respectful submission, a matter for careful consideration by the Panel. The preparation of the final flood hazard map has been late in the process, and modelling takes time to interrogate. This is not intended to be a criticism of the Council and its witnesses, merely an observation, and resolution and adoption through the PWDP appeals, rather than this Variation, would allow more time for rigour and examination.

8.8 It is understood that the key parties are already involved in both processes, and while there is understandably a sense of urgency on the back of recent cyclones, due to the relatively slow pace of actual physical development, resolution through the PWDP appeals is an acceptable timeframe. It is most important that the final statutory provisions are robust and supported by as many parties as possible.

9. SUBDIVISION IN FLOODPLAINS

9.1 The Submitters technical stormwater and planning evidence supports limited building in a floodplain providing that hazard risks are avoided, remedied and mitigated. Mr Oakley has offered an alternative approach to the Council 450m^2 average lot size that focusses on providing a building platform. It is noted that the response from Mr Oakley was provided in his Reply evidence prior to the very latest changes (minimums and averages) received by the Submitters on 21 July.

9.2 The development in floodplains issue was the subject of discussion at the conferencing session on the 11th and 13th and has resulted in a drafted standard as below which is recorded in the JWS as a potential option (Note: The blue text denotes amendments made at the conferencing session on the 12th and the purple text denotes amendments made at the session on the 13th).

(iii) Where the site is within the sw constraints overlay a building platform of 8m x 15m is required and must be outside of the Stormwater Constraints Overlay.

9.3 Mr Oakley considers that the option above is a suitable approach to addressing flood risk when subdividing as it will ensure that new lots can accommodate a suitable flood-free building platform. Amended matters of discretion are noted in the 13th July JWS (such as (k) below) which will work in conjunction with the building platform approach to address issues such as ingress/egress.

(k) The ~~likely~~ effectiveness of the stormwater system to ~~avoid~~ manage flooding (including safe access and egress), nuisance or damage to other infrastructure, buildings and sites, including the rural environment;

9.4 The approach above is performance based and an application must demonstrate that a suitable building platform can be achieved away from the floodplains. Mr Oakley observes that the building platform approach is tried and tested with many Councils (including the WDC) requiring building platforms (or shape factors) to be identified for subdivision.

S42A Rebuttal Version

9.5 In the Rebuttal Section 42A Report, the reporting planner notes in paragraph 59 that drafting amendments have been made to address stormwater matters raised. The proposed amendments for land use/subdivision in the Stormwater Constraints Overlay are now contained in the amended Natural Hazards and Climate Change chapter.

9.6 Mr Oakley will indicate in the Hearing that he generally supports these changes as they provide flexibility for development e.g. NH-R26D (Subdivision that creates one or more vacant lot other than a utility allotment, access allotment or subdivision to create a reserve allotment) which implements his preferred building platform approach rather than a minimum lot size.

10. NOAKES STATEMENT AND EVIDENCE ON STORMWATER

10.1 Anna Noakes and Mr Davis have provided a statement and evidence in support of concerns about the impact of stormwater on farming operations. They are seeking wide ranging track changes to the provisions for stormwater including rules to maintain the volume, frequency, and duration of hydrological conditions post-development to pre-development levels.

10.2 In general terms and based on technical advice, the Submitters oppose the relief sought because it is not required to avoid, remedy, and mitigate the adverse effects of stormwater runoff. The current planning regime and engineering practices are fit for purpose, and this is particularly the case for Pokeno West, which will be required to reduce post development peak flow rates to 70% of current levels. The risks of flooding will be reduced by urbanisation of rural land which is a significant public benefit for downstream properties in Pokeno.

10.3 It is noted that Mr Davis has omitted to comment on the relevant parts of the evidence of Mr Boldero and Mr Patel that point out that across the district the new peak flow reduction requirements will be 80% and for Pokeno West it will be 70%. This is a highly relevant matter that is referred to by Mr Patel for the Submitters, but the evidence of Mr Davis is silent on this significant change to the past conventional design standard of “hydrological neutrality”.

10.4 Before getting in the detail of technical arguments, the Panel will need to be satisfied that there is scope in the Variation for the wide-ranging stormwater relief that Noakes is still seeking, beyond what has been agreed in expert conferencing. For example, most of the evidence and relief is concerned with the stormwater effects of the development transition from rural to urban landuse activities. The transition from rural to urban is not the subject of Variation 3 (apart from some very small re-zonings). The scope of the Variation is the up-zoning of existing urban areas that will be urbanised anyway.

10.5 Therefore, the only scope that is part of these proceedings on stormwater is arguably the effects of any increase in stormwater post development from

the difference between urban form outcomes of GRZ verses MRZ2. This is a relatively narrow band of additional effects that has not been appreciated, let alone quantified, in the statement and evidence provided for the Noakes submission.

10.6 For this reason, and because similar relief is being sought in the PWDP appeals, which has been ruled by the Environment Court as being within scope, in my submission, there is a sound basis for the Panel to recommend that the Noakes relief be declined (other than what has been agreed at expert conferencing and as per s42A rebuttal changes – see below). This would avoid this Panel effectively crossing over into the live jurisdiction of the Environment Court on essentially the same "topic". Further, the PWDP appeals are the best forum because the concerns raised, and relief being sought, are clearly much broader than the narrow scope of the stormwater effect differences between GRZ and MDRS/MRZ2.

10.7 There are also legal issues with the relief being sought that, with respect, the Environment Court would be best placed to address. For example, it is suggested that works should be undertaken on downstream farmland to address alleged stormwater effects arising from upstream urbanisation. The first response is that the Submitters do not consider such works are necessary under the current and proposed future provisions.

10.8 However, assuming works were required, the Council has no power to require mitigation on 3rd party privately owned sites, and an applicant cannot be compelled, and has no rights, to undertake works on another party's land. Only a council/CCO could undertake downstream public works, and only then within the specified powers available to a requiring authority.

10.9 It is accepted that agreements could be entered into between landowners negotiated on terms that they find acceptable, but the district plan provisions should not put in place provisions that would require such agreements to the effectively mandatory. This would be outside the legal scope of a planning rule.

10.10 In evidence Mr Oakley and Mr Patel have fully addressed the concerns raised in the Noakes submission and evidence. It appears that much of their concern originates from the localised urban development of the neighbouring Dines Stage 5 land. Apart from alleged changes to the hydrology of the Noakes land, there is little detail about why there appears to be an issue, and it may well be a consent application and compliance, or even an enforcement, issue. It is suggested in the evidence that there was a consenting oversight. This rather narrow anecdotal example, in my submission, is not a sufficient justification to introduce wide ranging and impracticable provisions to the Plan as a whole.

Volume, Frequency and Duration

10.11 Mr Patel has outlined the technical reasons why seeking relief to maintain the same hydrological volume, frequency, and duration, while it may appear superficially to be "reasonable", is impractical and therefore inappropriate and onerous. These three characteristics are impossible to maintain when going from a largely permeable rural catchment to one where there could be up to 80% coverage at a site level (Mr Patel Reply Evidence par 3.10). This is evident in the Figures 1 and 2 that are in the Primary evidence of Mr Davis himself.

10.12 To grant the relief sought would not only upend current stormwater engineering practice nationally, but it would also significantly reduce the amount of housing that could be provided on any parcel of land (yield/ha). This outcome would not give effect to the NPS-UD (or the NPS-HPL), which the Variation is required to do.

10.13 The impossibility of not altering volume, frequency, and duration, when land is converted from pasture/trees to urban hard surfaces, is why engineering best practice is to focus on maintaining the <u>same peak flow rate</u> pre and post development. It is the peak flow rate that causes the most adverse effects of scouring and health and safety risks. As noted earlier, Pokeno West will achieve much more than mere "maintenance" and will reduce the peak flow rate to 70% of the current level, which is a significant public benefit.

10.14 Mr Patel has outlined a comprehensive list of technical best practice stormwater management methods that will be required and promoted, subject to final design and consenting (Reply par 3.11). These provisions will properly manage the adverse effects of stormwater including on downstream farmland. It is noted that the Noakes property is in a different sub-catchment to Pokeno West so will be completely unaffected by urban development on the Submitters land (Patel Reply par 3.5).

10.15 Having set out the position above, at the expert conferencing, the experts have agreed to amend some of the provisions to accommodate the concerns of Anna Noakes and Mr Davis. Mr Davis does not appear to fully acknowledge these changes in his Reply evidence, and they are set out below for ease of reference.

10.16 Mr Oakley has reviewed the s42A Rebuttal version proposed changes to the following chapters: Subdivision (SUB), Natural Hazards and Climate Change (NH), Water, Wastewater and Stormwater (WWS). The suite of changes is comprehensive, and he will comment in more detail in the Hearing. However, attention is specifcally drawn to the proposed new matters of discretion below for SUB-R153 (Subdivision – General) included in the s42A rebuttal.

> (m) The effectiveness of the stormwater system to manage flooding (including safe access and egress), nuisance or damage to other infrastructure, buildings and sites, including the rural environment;
>
> (o) The potential for adverse effects to the environment in terms of stormwater quantity and stormwater quality effects;

10.17 The changes above have directly responded to the concerns of the Noakes submission. These changes, and the technical response of Mr Patel, and the planning response of Mr Oakley, result in the position that the Submitters oppose the remaining relief sought by Ms Noakes to the provisions. The recommended s42A Rebuttal provisions, and engineering best practice/standards, are adequate to address the adverse effects of stormwater arising from urbanisation, and in terms of this Hearing and its scope, the difference in stormwater effects between GRZ and MRZ2. The

urbanisation of the Submitters land will reduce downstream peak flows through the existing village, to 70% of current levels. Therefore, contrary to the claims in the Noakes submission, conversion from rural to urban landuse in Pokeno West will be an improvement.

11. OTHER RELIEF

Boundary Fencing and Walls and Minimum Dwelling Sizes

11.1 As per the evidence of Mr Oakley, the Submitters concur with Mr Campbell that it would be beneficial to incorporate provisions to manage excessive height of boundary fencing and walls (par 7.7 to 7.10 of his evidence).

11.2 In the Rebuttal s42A Report the planner recommends amendments under Section 13.3 (Standards for Fences and Walls) and Section 13.4 (Minimum Residential Unit Sizes) of the report. The Submitters support these recommendations.

One Medium Density Zone

11.3 The Submitters concur with Mr Campbell, on the notified approach of having two medium density zones, that it would be preferrable to have only 1 zone. The exceptions of Raglan and Te Kauwhata could be accommodated in the Plan in the manner and for the reasons Mr Campbell provides for seeking a single zone (par 6.2 to 6.6).

11.4 It is noted that in the Rebuttal s42A Report the recommendation is now for a single zone (par 39-40) which is helpful.

12. NATIONAL POLICY STATEMENT FOR INDIGENOUS BIODIVERSITY

12.1 Mr Oakley has considered the newly released NPS-IB as it relates to the Variation and specifically for the Submitters land. It is acknowledged as per s75 of the Act that the district plan is required to give effect to any NPS.

12.2 The objective of the NPS-IB is:

> (a) *to maintain indigenous biodiversity across Aotearoa New Zealand so that there is at least no overall loss in indigenous biodiversity after the commencement date; and*
>
> (b) *to achieve this:*
>
> > (i) *through recognising the mana of tangata whenua as kaitiaki of indigenous biodiversity; and*
> >
> > (ii) *by recognising people and communities, including landowners, as stewards of indigenous biodiversity; and*
> >
> > (iii) *by protecting and restoring indigenous biodiversity as necessary to achieve the overall maintenance of indigenous biodiversity; and*
> >
> > (iv) *while providing for the social, economic, and cultural wellbeing of people and communities now and in the future.*

12.3 It is considered that the Variation gives effect to the NPS-IB as fundamentally the changes are about further enabling development opportunities in relevant residential zones and subject to qualifying matters. This is contrasted with rezoning land from rural to urban zones. Future development of the land will be subject to the NPS-IB and the provisions in the plan relating to Significant Natural Areas (**SNA**) such as Chapter 22 (ECO – Ecosystems and Indigenous Biodiversity).

12.4 In terms of the Submitters land specifically, there are scattered areas of identified SNA as explained by Mr Oakley. The ecological values have been previously assessed by Ms Jennifer Shanks of JS Ecology Ltd. In her primary evidence for the Hearing 25 (Pokeno Rezoning) she commented that the ecological values of this area are low due to historic and current land use practices. Ms Shanks concluded that whilst changing land use from rural to urban will potentially generate other ecological effects, these can be appropriately managed and that there is also the opportunity to integrate these areas into the development which will help restore the currently degraded environment.

12.5 Regarding the NPS-IB, it is submitted that Variation 3, and the application of the MDRS to the submitters land, both give effect to the NPS-IB and no further changes are needed.

DATED at **AUCKLAND** this *22nd* day of July 2023

Pokeno West, CSL and Top End
by their barrister and duly authorised agent

Peter Fuller
Barrister
Quay Chambers