

**BEFORE A PANEL OF INDEPENDENT HEARING COMMISSIONERS IN THE  
WAIKATO REGION**

**I MUA NGĀ KAIKŌMIHANA WHAKAWĀ MOTUHEKE WAIKATO**

**UNDER** the Resource Management Act 1991 (RMA)

**AND**

**IN THE MATTER** of Proposed Variation 3 to the Waikato Proposed  
District Plan (PDP)

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**REPLY LEGAL SUBMISSIONS ON BEHALF OF WAIKATO DISTRICT COUNCIL  
FOR SUBSTANTIVE HEARING HELD BETWEEN 26 JULY AND 2 AUGUST 2023**

**(Flood hazards)**

**29 September 2023**

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## INTRODUCTION

1. These reply legal submissions are presented on behalf of Waikato District Council (Council) following the first substantive hearing of Variation 3 to the Waikato Proposed District Plan (Variation 3).
2. These submissions relate solely to the topic of managing the natural hazard risks associated with flooding.<sup>1</sup>

## MANAGING FLOODING RISK

3. Following removal of the Urban Fringe qualifying matter the Council undertook additional flood assessment work to inform whether MDRS intensification was appropriate in the Urban Fringe qualifying matter area. The flood assessment work indicated that intensification was not appropriate in areas impacted by flooding and therefore the Council proposed to introduce a new qualifying matter under section 771(a) – known as the Stormwater Constraints Overlay. Section 771(a) allows the Council to make the MDRS less enabling of development to accommodate the management of significant risks from natural hazards as a matter of national importance under section 6 of the RMA.<sup>2</sup>

## Scope

4. In our opening legal submissions, we submitted that given the scope limitations arising from both the *Waikanae*<sup>3</sup> and *Clearwater*<sup>4</sup> decisions a flooding qualifying matter could only apply to the Urban Fringe area (now known as the Outer Intensification Area) and the provisions could not be disenabling of the rights established by the PDP.<sup>5</sup> We do not understand any party to disagree with our analysis on scope.

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<sup>1</sup> Our reply legal submissions addressing all other matters were filed on 22 September 2023.

<sup>2</sup> No submitter disputed the ability to propose a qualifying matter to manage the natural hazard risk associated with flooding.

<sup>3</sup> *Waikanae Land Company Limited v Heritage New Zealand Pouhere Taonga* [2023] NZEnvC 056.

<sup>4</sup> *Clearwater Resort Ltd v Christchurch City Council* HC Christchurch AP34/02, 14 March 2003.

<sup>5</sup> Our analysis is set out in detail in Opening Legal Submissions at paras 149-150.

### **Matters raised at the hearing**

5. The two central issues addressed in the hearing related to:
  - (a) Whether a qualifying matter should be introduced now (in the limited way described above) or left to a later comprehensive variation or plan change; and
  - (b) If a qualifying matter is included, whether the rules should be based on mapped areas shown on the planning maps, or areas defined as being within the 1% AEP floodplain. The latter option allows for 1% AEP floodplain to be shown in a non-statutory map and continually updated as needed.

### **Rationale for the qualifying matter**

6. Before responding to those two issues in detail, it is worth setting out the rationale for including a qualifying matter. The section 42A Closing Statement explains how the existing flood hazard layers in the PDP do not control residential density.<sup>6</sup> Ms Hill considers it is appropriate to manage intensification on sites subject to flooding risk. As a general proposition this principle was agreed by all experts in the Joint Witness Statement who agreed that “urban development within an identified flood plain should trigger a resource consent application to evaluate the effects.”<sup>7</sup> No expert resiled from this position in the hearing.

### **Timing matter - include the qualifying matter now or wait for a variation**

7. Kāinga Ora submitted that the inclusion of any new rules relating to natural hazard risk should be introduced through a later traditional plan change or variation process.<sup>8</sup> Despite Mr Jaggard agreeing in the JWS that development in a flood plain should be assessed through a resource

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<sup>6</sup> Section 42A Closing Statement, para 64.

<sup>7</sup> JWS 11 July 2023 Para 3. 2. b) iv) C.

<sup>8</sup> This position was supported by Next Construction.

consent process, he raised concerns about the ad hoc nature of the proposed rules arising from scope constraints and he considered that it was illogical for properties subject to the same flood risk to be treated differently depending on whether they were in the Outer Intensification Area or not.

8. In response we submit:
  - (a) The Council acknowledges that the proposed response is not a complete answer and that properties that were zoned medium density in the PDP cannot have their right to three units per site disabled by Variation 3;
  - (b) To the extent possible Variation 3 must give effect to the Waikato Regional Policy Statement (WRPS) including objective HAZ-O1 “the effects of natural hazards on people, property and the environmental are managed by ...2. reducing the risks from natural hazards to acceptable or tolerable levels...” therefore leaving the flooding qualifying matter until a later date will not be giving effect the WRPS; and
  - (c) NPS:UD Objective 8 is that urban environments are “resilient to the current and future effects of climate change”, the Panel are required to give effect to Objective 8 when making recommendations on the IPI.<sup>9</sup>
9. The Council’s approach to include what it can now, was supported by Ms Andrews on behalf of the Waikato Regional Council. In her supplementary statement Ms Andrews states:<sup>10</sup>

While I strongly support WDC undertaking a further variation or plan change to comprehensively address stormwater flood hazards across the district, in the meantime, I strongly support Variation 3 responding to the new modelling and stormwater information as far as possible.

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<sup>9</sup> *Southern Cross Healthcare Limited v Eden Epsom Residential Protection Society Inc* [2023] NZHC 948.

<sup>10</sup> At paragraph 26.

10. In our submission, the Panel must, to the extent possible, give effect to the higher order documents set out above and reduce the flooding risk on people and property to an acceptable or tolerable level. This reduction is achieved through the introduction of the Flood density QM area and resource consent being required for intensification.

**Including the mapping in the plan or using a non-statutory approach**

11. The Council has given very careful consideration to whether the new flood provisions could be provided through a non-statutory approach with definitions in the provisions based on the 1% AEP floodplain, with supporting maps included in a non-statutory GIS layer. During the hearing the various parties identified the pros and cons of both approaches.
12. During his presentation for CSL and Pokeno West, Mr Fuller noted the following concerns about the mapping work to date:<sup>11</sup>
  - (a) The mapping [proposed overlay] is restricted to only the Urban Fringe area, due to scope, even though flood modelling work has been undertaken across the wider District.<sup>12</sup>
  - (b) The peer review is limited in terms of scope and timing.
  - (c) Other technical witnesses have not had time to interrogate the mapping for Pookeno.
  - (d) Mapping really needs to be ground proofed, and those affected should be consulted, and learnt from, in terms of how and where overland flow moves in reality (Mr Jaggard).

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<sup>11</sup> Highlight Legal Submissions for Pokeno West – West Pokeno – CSL Trust and Top End Properties, 1 August 2023.

<sup>12</sup> This point is addressed earlier in these submissions.

- (e) Mapping is very contentious as it has material and significant effects on development and property rights (Mr Jaggard).
- (f) At least as far as Mr Jaggard is concerned, the mapping must be “extremely accurate”.

#### Accuracy of the modelling

- 13. The majority of the concerns expressed by Mr Fuller about including the modelling in the PDP related to the accuracy and veracity of the modelling work undertaken by Te Miro Water (TMW) on behalf of the Council.
- 14. As Mr Boldero explained to the Panel and set out in his second statement of rebuttal, the modelling undertaken for the Council is a large scale urban model,<sup>13</sup> the same approach used by Councils throughout the country. These large scale models are suitable for identifying properties impacted by flooding and supporting plan provisions that require a developer or landowner to undertake additional site-specific work to support development on the site.
- 15. The Council acknowledges that the modelling was undertaken under time pressure and that the independent review was limited. However, TMW have continued to undertake quality assurance work on the modelling and Mr Boldero explains that, in his opinion, no additional work could be undertaken to improve the accuracy of the model.<sup>14</sup>
- 16. Mr Fuller and Mr Patel, on behalf of Pokeno West, did suggest a hybrid approach where mapped information was only included in the PDP once detailed site-specific survey information had been obtained.<sup>15</sup> However, as Commissioner Mark-Brown expressed in questioning of Mr Patal undertaking site-specific survey work to confirm the modelling outcomes

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<sup>13</sup> Boldero second statement of rebuttal 25 August 2023, paragraph 19.

<sup>14</sup> Ibid, paragraph 24.

<sup>15</sup> Highlight Legal Submissions for Pokeno West – West Pokeno – CSL Trust and Top End Properties, 1 August 2023, para 3.2.

is an onerous task that no Council would undertake for the purpose of district wide modelling.

17. One of the benefits of the non-statutory approach is that landowners and developers can present the Council with the site-specific survey work as evidence that the 1% AEP floodplain does not impact their property. The Council can then review that information and update the model outputs accordingly. The related rules that apply to the 1% AEP floodplain would not then apply to that site.
18. The approach also allows for more frequent Council-led reassessments of the floodplain modelling following significant developments or stormwater asset works that may have an impact on the modelling results.<sup>16</sup>

#### Council officers and experts' approach

19. Ms Huls' rebuttal evidence identified the following benefits of the non-statutory approach:
  - (a) Modelling is more responsive to climate change and the realities of flood modelling;
  - (b) Flood modelling is time consuming and expensive and requires constant updating to reflect current land use and zoning;
  - (c) Updates require a full plan change process, which is time consuming and not responsive to real world changes;
  - (d) non-statutory layer is pragmatic.<sup>17</sup>
20. Ms Huls remained concerned about potential confusion of having some flood mapping shown in the PDP planning maps and relying on non-statutory mapping for other provisions. She preferred a consistent

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<sup>16</sup> These benefits were outlined in section 9 of Mr Jaggard's evidence in chief for Kāinga Ora.

<sup>17</sup> Rebuttal evidence of Katja Huls, paragraphs 33-38.

approach with the existing PDP maps and recommended that Council consider moving to a non-statutory approach through a comprehensive plan change or variation.<sup>18</sup>

21. In the section 42A Closing Statement Ms Hill agrees with the analysis of Ms Huls and is also concerned about confusion for PDP users and inconsistent administration within Council. Ultimately, it is Ms Hill's recommendation that including the Flood density QM area on the planning maps is the most appropriate approach at this time.<sup>19</sup> Noting that the issue was finely balanced, Ms Hill did prepare alternative provisions for the Panel to consider that would give effect to the non-statutory approach.

#### Lawfulness of the non-statutory approach

22. As we identified in opening legal submissions the Environment Court will be considering appeals related to the non-statutory approach arising from Tauranga City Council's Plan Change 27, and no decision on those appeals is likely prior to the Panel making its recommendations.<sup>20</sup>
23. Auckland Council has however been using the non-statutory approach in the Unitary Plan, and we understand that other Councils are in development phase of similar plan changes.
24. While not directly on point, the High Court did comment on the use of non-statutory layers in the Auckland Unitary Plan in the judicial review *North Eastern Investments Ltd v Auckland Council*.<sup>21</sup> Auckland Council originally notified nine non-statutory layers in the Unitary Plan as part of the proposed planning maps. One of the purposes of the layers was to

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<sup>18</sup> Ibid, paragraph 38.

<sup>19</sup> Section 42A Closing Statement paras 65-69.

<sup>20</sup> We note that submitters on the Tauranga City Council IPI have continued to question to legal status of those maps under Plan Change 27.

<sup>21</sup> [2018] NZHC 916.



“provide users with the Council’s most faithful representation of a particular type of information.”<sup>22</sup> The High Court notes that

The use of this information served purely as information or guidance in the context of certain rules in the *Proposed Plan*. The information did not automatically entail the application of those rules in the context of a particular site. The rules could stand alone without any reference to, or use of, the information in non-statutory layers.<sup>23</sup>

25. The Auckland Unitary Plan Independent Hearings Panel (IHP) was concerned however about potential confusion with the non-statutory layers forming part of the planning maps, rather than a separate source of information. At paragraph [69], the High Court recorded:

The Panel recommended only the inclusion of maps that served a resource management purpose within the structure of the *Proposed Plan*. The Panel considered that other information should be located in ways that avoided any confusion as to whether the information was part of the *Proposed Plan*. This was seen as important to avoid giving a false impression to users of the *Proposed Plan* about whether these maps had any regulatory effects.

26. Therefore, the IHP recommended removing six of the nine non-statutory layers (including the flood hazard information) from the planning maps and having them outside of the Unitary Plan. Two layers were recommended to remain in the planning maps – street addresses and the indicative coastline. The final non-statutory layer, the Macroinvertebrate Community Index (MCI), was recommended to be upgraded as a control layer, as part of the Unitary Plan.
27. The judicial review was focused on whether the IHP made an error of law when recommending that the MCI layer become a control layer. The decision therefore does not squarely address the issue of whether a flood hazard non-statutory layer is lawful. It is noteworthy however the the High Court did not make any adverse comments on the approach the IHP had taken, to include non-statutory layers both inside and outside of the planning maps.

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<sup>22</sup> Ibid, paragraph [68].

<sup>23</sup> Ibid.

28. The key point made by the IHP is that “[t]he rules could stand alone without any reference to, or use of, the information in non-statutory layers’. This approach has been adopted in the proposed Variation 3 provisions shown in Appendix C of the section 42A Closing Statement. The proposed introductory wording in the Natural Hazards chapter is:

Within the MR22, an Outer Intensification Area has been identified where additional controls apply to residential activities located within the 1% Annual Exceedance Probability (AEP) floodplain. The Council holds publicly available information available on the WDC Data Service showing the modelled extent of the 1% AEP floodplain, including a higher risk area where the depth of flood water in a 1% AEP flood event exceeds 1 metre and the speed of flood water exceeds 2 metres per second, or the flood depth multiplied by the flood speed exceeds one. The full modelling extent of the 1% AEP floodplain is not part of the District Plan but is information available to the Council and the public to assist in determining whether the applicable rules will apply. The Council will update the flood model maps, including where site specific information becomes available and to account for catchment changes as a result of infrastructure and land development. Council will consider publicly held site-specific information as well as information and technical assessments provided by any person(s) when assessing the 1% AEP floodplain on a particular site.

29. In our submission, there is no decision from a Court that the use of non-statutory flood maps (to support definitional based provisions) is unlawful, and we are not aware of any legal challenge to the approach that has been in place for many years now in Auckland. The approach adopted by the Auckland Council has been replicated in proposed provisions for Variation 3. In our view, there is no legal barrier to the non-statutory approach.

Consultation underway on National Direction for Natural Hazards

30. Since the end of the hearing, the Ministry for the Environment has released a consultation document “He Marohi Kaupapa Here ā-Motu mō ngā Whakataunga Mōreareatanga ā-Taiao Proposed National Policy

Statement for Natural Hazard Decision-making".<sup>24</sup> The document makes the following comments on mapping of natural hazards:

- (a) Gaps exist in approaches to identifying hazards and risks, and often information is incomplete or out of date;
  - (b) Older data does not always incorporate climate change impacts;
  - (c) Currently no national direction on mapping; and
  - (d) Comprehensive national direction (not currently proposed) could include standardised methodologies for mapping natural hazards.
31. The document notes that developing comprehensive national direction is one-to-two years away and then will take time for local authorities to implement.<sup>25</sup> The consultation document also notes that the MDRS can be modified by a qualifying matter if development would be inappropriate because of natural hazard risk.
32. While identifying that the matters before the Panel relating to flood mapping are not unique, and are faced by local authorities throughout the country, the proposed National Policy Statement for Natural Hazard Decision-making is not proposing to resolve these issues in the first phase. Therefore, we submit that the Panel does need to decide on how Variation 3 will incorporate flood-based rules in the short term.

#### Council's position

33. Having considered all of the above, the Council's position is that the non-statutory approach should be adopted for Variation 3. It is acknowledged that this is not the final position of either Ms Huls or Ms Hill, however both identify the benefits of the approach. The Council's position has been informed by internal discussions at Council involving different

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<sup>24</sup> Information and key documents included here: [Proposed National Policy Statement for Natural Hazard Decision-making - Ministry for the Environment - Citizen Space](#)

<sup>25</sup> See first section on page 11.

teams involved in flood management and resource consenting. To address the concerns raised by Ms Hill the Council is:

- (a) Developing the necessary tools and systems to ensure a consistent experience for PDP users;
  - (b) Planning internal training, in particular with the resource consents team; and
  - (c) Developing protocols for the confirmation of the 1% AEP floodplain on a site-specific basis.
34. The Council has been mindful of the likely extent of greenfield development in the district, and the current structure planning being undertaken for Ngaaruwaahia (and being planned for other towns). It is therefore likely that catchment wide changes to the floodplain will occur in the short to medium term. The Council considers that the most up-to-date and accurate knowledge of the floodplain should be guiding resource consent processes.
35. The disbenefit of the non-statutory approach is the lack of certainty for landowners as the application of the rules on piece of land may change over time. It is the Council's view however that accuracy of natural hazard information is more important than any potential uncertainty.

#### Review of the PDP decisions

36. The Council has referred back to the PDP decisions on natural hazard flood mapping. Submitters did request that a non-statutory approach be adopted. The Council's reporting planner noted the following concerns with a non-statutory approach:
- (a) Is potentially subject to multiple changes, and hence the permitted threshold can change when the maps are tweaked or updated;

- (b) Is problematic, as it will allow the Council to update the flood maps without a statutory process and this may not be fair and transparent; and
  - (c) Does not provide the ability for affected landowners to submit in support or opposition, and there is no recourse to challenge the mapping in terms of RMA processes.
37. The PDP Panel adopted the Council's reporting planner's views and rejected the submissions.
38. In response to the concerns raised, the Council's position now is:
- (a) Accuracy of flood information is more important than the potential for different rules to be applicable to a property over time;
  - (b) The updating of flood information will be accompanied by community engagement, and there will be a clear and transparent work plan developed;
  - (c) Protocols will be put in place to provide recourse for affected landowners to challenge site-specific identification of their properties.
39. Overall, it is considered that the reasons for not pursuing the non-statutory approach at the time of the PDP decisions can all be addressed or are outweighed by the importance of using the most up-to-date flood information.

#### Conclusion

40. In our submission, it is open to the Panel to recommend the non-statutory approach. The collective evidence before the Panel in the Council's opinion supports a recommendation that the non-statutory

approach is the most appropriate way, under section 32, of achieving the objectives and is more efficient and effective than the “in plan” approach.

***Waikanae* matters relating to the flooding QM**

41. Regardless of the approach taken above, the following provisions relating to flooding require closer analysis against the *Waikanae* principles:
- (a) The defaulting activity status of non-complying in proposed rule NH-R26A; and
  - (b) The requirement in rules NH-R26A, B and C for residential units to have a minimum floor level of at least 0.5m above the 1% AEP flood level.

Non-complying activity status

42. The provisions recommended by Ms Hill include a non-complying activity status in rule NH-R26A for two or more residential units in the higher risk area of the Flood density QM area. In the existing General residential zone, the activity status for two or more residential units is discretionary. Non-complying status is considered the most appropriate status to give effect to the objectives in the PDP to avoid development in high risk areas.
43. In our opening legal submissions, we said:
- Two or more residential units in the higher risk area are proposed to be non-complying. This is an increase in activity status as compared to the PDP. The non-complying status better gives effect to the natural hazard objectives and policies in the PDP that seek to avoid development in high risk areas. We submit that, in terms of the *Waikanae* decision, this change to activity status is not disabling. A discretionary consent was already required and therefore requiring a non-complying consent does not remove a person’s rights.
44. We submitted that a change in activity status from discretionary to non-complying was not disabling. In questioning from the Panel, we acknowledged that applications would be subject to the additional ‘gateway tests’ in section 104D. However, in our submission the

requirement to obtain a non-complying consent does not deprive an applicant of the ability or capacity to seek a resource consent for two or more residential units.

45. If the Panel does not agree, we submit that rule NH-R26A should be maintained, with a default status of discretionary, rather than non-complying as proposed by Ms Hill.

#### Minimum floor levels

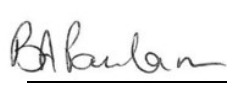

46. For areas covered by the Flood density QM area, that are not already identified within the Flood plain management area, the proposed rules require the permitted residential unit to have minimum floor level of at least 0.5m above the 1% AEP flood level.
47. The right to a permitted residential unit has not been removed, but an additional permitted standard has been added. In our submission this additional standard is entirely appropriate and does not offend the *Waikanae* principles.

#### **Final Flood density QM maps**

48. We propose to provide the Panel with the final flood maps and the proposed PDP planning maps showing the Flood density QM area prior to commencement of the final Variation 3 hearing.
49. At the conclusion of the hearing on 2 August 2023, we advised the Panel that we would consider whether further circulation or procedural steps were necessary relating to the flood modelling. In our view the matters of concern raised by submitters relating to the accuracy of the modelling will be addressed through the additional work TMW is completing.
50. We do not consider additional evidence or submissions will assist the Panel in determining whether a qualifying matter should be included in

Variation 3 now, and if so, whether the maps should be included in the PDP. The positions of the parties are, in our view, clear.

Signed this 29<sup>th</sup> day of September 2023

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