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

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

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1 Aug 2023

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MAY IT PLEASE THE PANEL

1. INTRODUCTION

1.1 The following written "highlights" submissions build on the opening submissions already filed and respond to legal submissions, evidence and Panel questions, from the Hearing.

2. FLOOD OVERLAY PLANS

2.1 It appears that further work will be required before a sufficient level of confidence is achieved to put a flood hazard map in the DP as a statutory layer. Mr Boldero indicated to the Panel that he had a *"reasonable amount of confidence for putting into the plan"* regarding the veracity of the information. In my submission, that was a proper and fair assessment on his behalf, and the following comments are not a criticism of the work undertaken to-date by the Council and its advisers on stormwater/flooding.

2.2 From the evidence heard, we also understand that:

a) The mapping is restricted to only the Urban Fringe area, due to scope, even though flood modelling work has been undertaken across the wider District.

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 Pokeno.

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).

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".

2.3 Based on the evidence before the Panel to-date, in my submission further work is required Te Miro/Council before the current mapping becomes a statutory layer.

2.4 The evidence suggests that because dwellings are seldom not subdivided, very few, if any, permitted dwellings are likely to be built before more robust provisions are developed. Therefore, there is no need to rush through less-than-ideal Plan provisions for only a small part of the District anyway. On this issue I concur with the submissions of Mr Allen.

3. SCO/FLOOD HAZARD MAP AS A STATUTORY LAYER

3.1 Legal problems of having as a GIS layer outside the Plan that affects activity status etc, were outlined in opening legal submission.

3.2 While much of the discussion has considered a GIS Layer outside the Plan, or a statutory plan map, as mutually exclusive options, there is no reason of course they must be used in that way. Once there is a sufficient level of confidence in the mapping, it can be incorporated in the Plan.

3.3 A clone could then be created as a GIS layer that can be publicly available and updated as information changes improves, e.g:

a) For actual flood and rainfall event data.

b) As consents are granted and modify the physical environment and flood plains.

c) In response to further studies/modelling.

d) In response to landowner input that is verified – flood photos that are sourced after an event.

e) As infrastructure is upgraded, e.g. a culvert is increased in size.

3.4 This GIS layer would not necessarily eliminate the need for a consent, as this would be determined by the final DP Flood Hazard Map, but a "live" up-to-date GIS layer, should make the consenting process much more efficient and straight forward. It would also be a reference for insurers and purchasers etc.

4. NOAKES STORMWATER RELIEF

4.1 The following is a quote from Ms Noakes in her presentation to the Panel from the audio:

> *"I have seen the current rules in practice, and they are not adequate. If the rules were adequate my land would not have artificial water flows, and my land and infrastructure wouldn't have been disappearing before my eyes".*

4.2 With respect to Ms Noakes, the problem for this statement is that Mr Davis confirmed that the Dines Stage 5 development was assessed and consented only under TP10 and not the current Guideline.

4.3 Therefore, the issues claimed to be a problem on her property, even if assumed to be correct, are not a reflection of the "current rules" but the previous consenting regime. The issues on her property do not justify the significant changes to the current regime for stormwater, because there is no evidence before the Panel that the current provisions would have resulted in the same downstream outcomes on her property.

4.4 As had been highlighted in questions from the Panel, the Guidelines have 4 methods for addressing the concerns with stormwater, erosion, and flooding and the TP10 method of attenuation is essentially only one of them. I understand that the Guidelines are relatively new and still bedding in.

4.5 Mr Davis has now acknowledged some changes made at conferencing, but he still considers the provisions are not strong enough as there is no inclusion of the words "volume" & "duration". He stated that having those words: "*Does not mean you have to do anything, but you need to evaluate*

it", i.e. he said it raised the question of whether we need to avoid, and mitigate.

4.6 With respect to Mr Davis, this is a misunderstanding of the nature of planning provisions in terms of what they require. E.g. the Hearing version of the Noakes provisions tabled have a proposed Subdivision servicing requirement SUB-P4(1)(h):

> *(h) Stormwater collection, attenuation, treatment and disposal in the MDRZ2 that maintains avoids, remedies or mitigates any alterations to pre-development hydrological conditions, including run-off volume, frequency and duration.*

4.7 This provision has real teeth and would not be able to be fully complied with for urban development, even according to the testimony of Mr Davis himself. When questioned by Commissioner Mark-Brown, he accepted that unless you had sufficient onsite infiltration and storage, there will be increased flows for increased duration, so mitigation cannot be achieved. What his provision would require is full mitigation on every site which would significantly compromise the efficiency and benefits (number of houses etc) of development.

4.8 It is understood that the Panel has significant expertise in planning and engineering, and my clients clearly have no objection to the Panel visiting the Noakes site. However, with the greatest respect, in my submission care is appropriate when drawing conclusions about the causation of any effects observed.

4.9 In my submission, understanding what has occurred/is occurring, would require detailed study of the entire, design, consenting, implementation, compliance and climatic circumstances, of the Dines and Noakes sites, before robust conclusions could be drawn.

4.10 There is no evidence before the Panel that identifies specific issues with the current rules/regime, and in my submission, it would be incorrect to assume at this stage that they are deficient. The majority of technical experts have expressed confidence in the current provisions, and the main concerns are

regarding implementation, which is not a problem of the provisions themselves.

5. PROPOSED WAY FORWARD ON FLOOD RISK AND STORMWATER

5.1 Based on the evidence heard to-date in my submission, further work is required before any amendment to the provisions beyond what has been agreed in conferencing.

5.2 I remain concerned that there is overlap with the jurisdiction of the EC. While this Panel is required to respond to submissions before it, it is of course not obliged to grant relief if not confident about the evidence in support of that relief.

5.3 I also maintain my submission point, after hearing from Ms Beresford, that Variation 3 really only provides scope for consequential amendments to stormwater provisions for the difference between GRZ and MRZ2. While it is expected that there may be more coverage with MRZ2, with avoidance, remedy, and mitigation methods, this does not necessarily mean an increase in effects. Higher coverage potential does not mean it will be realised on the ground.

5.4 From my understanding of the evidence, no one has provided a metric on the alleged difference between GRZ and MRZ2 in terms of stormwater/flooding. While it is not an unreasonable assumption to make, the Panel does not know if the difference is 3% or 30% so responding in a proportional way with appropriate provisions would be difficult.

1.1. Therefore, in my respectful submission it is premature to modify the provisions in the manner sought by the Noakes relief. There appear to be issues with properly implementing the current Guidelines and planning provisions at the officer level, particularly at the District level, and this should be the first focus of inquiry.

5.5 The Panel does have powers of recommendation as has been discussed. Beyond the agreed caucus changes, the Panel could recommend that:

a) The subdivision process is independently monitored over a period of 6 months to ensure best practice is being applied for flooding and stormwater. This could include notification decisions, on the basis that notification in appropriate circumstances can better inform decision making, and compliance/enforcement.

b) More Council training is undertaken to implement the Guidelines as they are new and are still being understood and applied. If found to be deficient they could be updated later as an option.

c) Industry training workshops are held – evidence was provided that most applications are being turned away to be reworked so there is a potential knowledge gap to be addressed.

d) If considered helpful, an independent "audit" of the Dines stage 5 project/Hitchens could be undertaken to try and determine if the same outcome would have occurred under the current provisions. This would need to distinguish genuine regulatory failures from effects of a very wet period, for example. As previous, we do not really know what the detailed nature of the issues are that have allegedly affected the Noakes property.

5.6 The above recommendations are essentially a s35 monitoring function, and while often overlooked, properly understanding the shortfalls of current policy, should really be a pre-requisite for changing policy. Again, this is not a criticism of the Council, that has had a cyclone event and provisions thrust upon them with little time to respond.

5.7 If it is considered there is an issue of inadequate provisions, then changes can be considered in a comprehensive manner and with the right information – say in a year and after the outcome of the PWDP appeals are known.

5.8 In my submission a pause will not help for V3, because it would not cure the issues of scope. The "cleanest" process is to complete V3 and the PWDP appeals as soon as convenient, while using this time to monitor the current consenting provisions properly, as above.

5.9 A GIS flood hazard layer for the whole district, can continue to be developed and "road tested" by the Council/consultants/landowners and based on further investigations by Mr Boldero and other consultants. It could be potentially used in assessments as a reference/guide external to the Plan, but not as a determinant of activity status.

5.10 A comprehensive future plan change could be notified with amended provisions and a robust statutory map layer, as is required. This of course, is all within the context of new Acts being passed, which will have different requirements again, and trigger further plan changes no doubt.

6. MINIMUM LOT SIZE & SHAPE FACTOR

6.1 The AUP-SHZ implementation and homogenous larger 600m^2 lot outcomes in and Orewa and Massey was arguably a driver for the Amendment Act and MDRS.

6.2 For the reasons set out in opening legal submissions, I still consider that having a 300m^2 minimum and 450m^2 average minimum vacant lot size (Restrictive Area) frustrates the intensions of the NPS-UD and the Amendment Act. It will lead to less efficient and lower amenity urban form outcomes, for reasons including:

a) Infill is generally a poorer outcome than master planned comprehensive and integrated development.

b) Future development is speculative.

c) Infrastructure servicing risks under or over supply, and timing problems – hard to "right size".

d) Initial purchasers are penalised by having to purchase more land than they may want or need.

e) Purchasers are not usually “developers” and development is a difficult process where equity is usually reduced before it is increased so financing is an issue.

f) Restrictive covenants are not unlawful and could effectively prevent any future redevelopment, anyway, as has occurred in Pokeno to-date.

g) Houses are built to last 50 years, so sites are usually too overcapitalised to justify redevelopment, until the existing buildings are run down. This process can take decades.

6.3 The key point in my submission is that to develop greenfield land efficiently and achieve a WFUE, it should be a “design led” outcome from the outset.

6.4 A shape factor is best to achieve this, and can be based on the mandatory development controls, and as per Ian Munro and Mr Tollemache’s evidence. In my submission the Kainga Ora sizes are too small for a more car dependent settlement such as Pokeno.

6.5 The minimum vacant lot sizes should be based on what works as a minimum shape factor, or multiples of those numbers**.** Otherwise, it is basically arbitrary, and will lead to inefficient and poor outcomes.

6.6 Therefore, in my submission once the Panel lands on a shape factor, and frontage length, that may be different for front and rear lots, then that should drive the minimum lot sizes. Lots of different numbers have been proposed and I will not muddy the waters further in these legal submissions. However, the positions of Munro/Tollemache/Oakley provide a sound basis for the Panel to work from in my submission.

6.7 The shape factor can be an assessment criteria in the Plan and the Panel can determine if there is a need for any wiggle room between a shape factor area/frontage length and a minimum lot size.

6.8 The above approach is a design led amenity outcome, but also provides the certainty that the Council and developers want, by having a minimum lot size.

6.9 The Panel will also be mindful that there are more drivers for setting lot sizes than buildings and curtilage. E.g. where could trees could be located in urban areas to address the hotter temperatures expected from climate change? If lots are too small, the only realistic location for larger shade trees would be in road/public spaces and that limits the many benefits they can provide.

6.10 Finally, in my submission Mr Tollemache was correct to point out that if Council really was concerned with holding back land to ensure higher density later, then it is the town centres that should be prevented from developing at too lower density. He also did not consider that there is a statutory basis for the 450m^2 outcome and trying to reserve a future development opportunity is a significant policy shift. Mr Oakley has reached the same conclusions and in my submission they are correct.

DATED at **AUCKLAND** this *1st* day of August 2023

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

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