BEFORE THE INDEPENDENT HEARING PANEL

IN THE MATTER OF the Resource Management Act 1991

AND

IN THE MATTER OF applications by Gisborne District Council – Community Lifelines for resource consents associated with the Te Karaka Stopbank Upgrade Project

LEGAL SUBMISSIONS FOR THE M & W BURGESS FAMILY TRUST

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MAY IT PLEASE THE PANEL

Introduction

1. These legal submissions are made on behalf of the M & W Burgess Family Trust ("the Trust").

2. The Trust supports, in principle, measures that improve flood resilience for the Te Karaka community. The Trust does not oppose the objective of reducing flood risk to the township. Rather, its concern is that the proposed scheme transfers increased flood risk and adverse flood effects onto its property without those effects having been adequately assessed or appropriately mitigated through the resource consent process.

3. The Trust's submissions are intentionally narrow. They focus on four issues:
   a) The adequacy of the assessment of consequential flood effects on the Trust's property;
   b) The reliance on future Public Works Act 1981 ('PWA') processes and other external agreements as a response to those effects;
   c) The absence of certainty regarding proposed mitigation measures; and
   d) The need for further refinement and mitigation before consent can properly be granted.

4. Wendy Burgess's evidence sets out challenges facing their orchard and the impact of uncertainty for rebuilding and continuing their business. It has been beyond frustrating to be initially treated as unaffected parties and then to have the project move onto their driveway in order to accommodate the outcome sought by their adjoining neighbour.

5. The application documents clearly demonstrate that there will be a change to the environment for properties outside the protected area. The extent and impact of that change on their business operation should have been assessed as part of this application process. It hasn't been.

Flood effects

6. The existence of increased flood effects on the Trust's property is no longer in dispute.

7. The Applicant's own information confirms that the amended alignment will result in materially increased flood velocities across the Trust property and increased flood hazard classifications in certain scenarios, including under a similar event to Cyclone Gabrielle.[1]

8. The planning question before the Panel is therefore not whether increased effects exist, but whether those effects have been sufficiently assessed and appropriately avoided, remedied or mitigated under the Resource Management Act.

9. In that regard, the evidence of Ross Muir and Scott Wilson is significant. Mr Muir notes that the amended alignment affecting the Trust property was introduced relatively late in the process and that the corresponding effects assessment has largely occurred

[1] S Exeter: Evidence paragraph 14.58 and M Hooker: Evidence paragraphs 10.26 – 10.27.

after notification. He further notes that key property-specific flood information is continuing to emerge through the hearing process itself.[2]

10. Mr Wilson's evidence notes the uncertainty arising from a lack of information around how increased flood flows and levels will affect different crops on the Burgess property. He is unable to assess the full impact of the stop-bank relocation and road raising without information about modelled outcomes for the different crop blocks.[3]

11. The Trust submits that the Panel should exercise caution before concluding that the consequential effects on the property are either minor or adequately mitigated where the assessment process remains incomplete and important information has only become available after notification.

12. Section 104(1)(a) requires this Panel to have regard to any actual and potential effects on the environment. It should not the responsibility of the Submitter to identify all of the effects on its property.

Public Works Act 1981

13. A recurring theme throughout the application material is the proposition that adverse effects for certain affected properties can ultimately be resolved through acquisition, compensation, relocation agreements, easements or other legal arrangements.

14. The Trust accepts that compensation and land acquisition may be addressed through separate statutory processes. However, those processes do not relieve the Panel of its obligation to undertake an assessment of environmental effects under s 104 of the RMA.

15. The issue before the Panel is not compensation. The issue is whether the proposal appropriately addresses the consequences of directing increased flood hazard onto land outside the protected area.

16. As Mr Muir observes, the PWA is not an environmental statute. Compensation may address financial consequences arising from land acquisition, but it does not itself avoid, remedy or mitigate environmental effects. The Trust submits that the Panel should be cautious about placing weight upon future agreements whose content, scope and outcome remain uncertain at the time consent is determined.

17. The relationship between the assessment of effects under the RMA and compensation under the PWA was considered by the Environment Court in its interim decision in *Director General of Conservation v New Zealand Transport Agency et a[4]l* which was later appealed to the High Court *in Poutama Kaitiaki Charitable Trust and D & T Pascoe v Taranaki Regional Council*.[5] Together I refer to these as the Mt Messenger litigation.

[2] R Muir: Evidence paragraphs 6.1 – 6.11.
[3] S Wilson: Evidence paragraphs 26 – 29.`
[4] [2018] NZEnvC 203.
[5] [2022] NZHC 629.

18. .The Environment Court decision on Mt Messenger applications involved appeals relating the lack of assessment of cultural impacts for amendments to the designation and resource consents for the Mt Messenger roading project.

19. In Mt Messenger the Environment Court declined to complete its determination because key acquisition and mitigation arrangements remained unresolved. The Court held that it could not be satisfied that project effects were appropriately addressed until it knew the outcome of those arrangements.

20. The relevance of the case is the principle that a consent authority should not assume unresolved future agreements will adequately address adverse effects where those agreements form an important part of the mitigation package relied upon to support the proposal.

21. The Environment Court emphasised the importance of certainty where environmental outcomes relied upon in the assessment process depend on arrangements outside the consent itself. At paragraph 241 the Court noted:

> *"In considering the cultural effects of the Project we do not think the proposed conditions can be separated from the fact that the Agency has not yet acquired the Ngati Tama Land. The two are inextricably intertwined. The proposed conditions provide the means by which certain effects of the Project can be appropriately addressed. On their own, they do not, however, appropriately address the significant cultural effects of the Project. We can only be satisfied on that point if Te Runanga advises us that an agreement has been reached with the Agency as to sale of the Ngati Tama Land and on other key elements it seeks by way of mitigation and offset/compensation."*

22. The relevance of that authority is not that all agreements must be completed before consent can be granted. Rather, it is that the Panel must be satisfied that mitigation relied upon in support of the proposal is sufficiently certain and capable of being delivered. The Environment Court's reasoning was supported in the High Court with no criticism.[6]

23. In the present case the Applicant's own proposed approach recognises that additional arrangements are required beyond the consent framework. That acknowledgement tends to confirm rather than resolve the concern that important consequential effects remain outstanding.

24. The Trust further notes that the interim access arrangements for the Burgess orchard during the construction process are uncertain, with a potential temporary access proposed over an adjoining neighbour's land. That environmental effect has certainly not been assessed.

25. Mr Exeter's evidence proposes to delete condition 69 on the basis that the effects on the identified properties (which do not include the Trust's land) are managed appropriately.[7] Quite apart from the fact that he ignores the impact on horticultural production from increased flood vulnerability, Mr Exeter also advances the use of an Evacuation Contingency Plan and compensation under the PWA as appropriate

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[6] *Poutama* paragraph 8.

[7] S Exeter paragraphs 17.16 – 17.18.

mitigation of adverse environmental effects. In my submission such processes do nothing to mitigate the adverse environmental effects. What they mitigate (potentially) is the risk to human safety from those effects. Risk to safety and impacts on production are not the same thing. Physical impact of flooding has a direct impact on production, insurance costs and other economic factors that are relevant to the concept of sustainable management, which still underpins the s 104 assessment.

Proposed mitigation lacks certainty

26. The Trust adopts the evidence of Ross Muir regarding the proposed conditions addressing consequential flooding effects.

27. The proposed conditions proceed on the basis that future land interests, easements, covenants or legal arrangements will authorise consequential flooding effects prior to commissioning of the works. There are two difficulties with that approach:
    a) First, the conditions do not identify with sufficient precision what effects are to be addressed, the extent of those effects, or the standard of mitigation that must be achieved;
    b) Secondly, the conditions defer the practical resolution of those effects to future arrangements that are presently unknown.

28. The Trust submits that conditions of this nature provide limited assistance to the Panel in determining whether the actual environmental effects of the proposal have been appropriately mitigated.

29. If increased flood velocity, increased hazard exposure, effects on productive land and effects on orchard viability are accepted as consequences of the proposal, those matters should be addressed through identifiable and enforceable mitigation measures capable of evaluation by the Panel now rather than through future arrangements yet to be negotiated.

Productive capacity

30. The Panel has evidence from Scott Wilson regarding the implications of the increased flood exposure for the Trust's orchard operation, including the uncertainty as to extent of those effects.

31. His evidence describes increased risks associated with flood velocity, infrastructure damage, tree losses, erosion, siltation, reduced productivity and long-term investment uncertainty.

32. The planning significance of those matters extends beyond private financial consequences. As Mr Muir notes, the National Policy Statement for Highly Productive Land requires consideration not only of the soil resource itself but also of productive capacity.

33. The evidence before the Panel raises a legitimate concern that the proposal may permanently reduce the ability of the property to sustain intensive horticultural production. The Applicant’s own flood modelling evidence indicates a likely reduction

in the ability for a number of similarly impacted properties to maintain intensive horticultural production. That is particularly in terms of the increased direct exposure to flood waters.

34. The Trust submits that this matter warrants careful consideration and should not be dismissed on the basis that the property already experiences flooding. It is surprising that the Applicant has not provided evidence regarding the impacts on productive land given the significance and relevance of the NPS-HPL.

35. The relevant issue is not whether flooding presently occurs. It is whether the proposal materially worsens the nature of that flooding and thereby diminishes the productive capacity of the land.

36. Mr Westphal's evidence for the consent authority notes that the Applicant's evidence: "*does not fully address the previously identified uncertainty regarding changes in the frequency and duration of inundation of productive land. In my opinion, these are relevant hydraulic characteristics because the consequences of flooding to productive land may depend not only on maximum depth or velocity, but also on how often inundation occurs and how long it persists.*"[8]

    Mr Westphal goes on to note that:

    "*From a hydraulics perspective, I consider that there remains uncertainty regarding the baseline flood regime and the incremental change caused by the proposal, particularly in terms of flood frequency and duration on productive land. This limits the hydraulic information available to characterise the change experienced by affected landowners.*"

Consent bundling

37. The Trust maintains and accepts the position advanced by Ross Muir regarding the passive flood flap consent.

38. The submission simply records that the flood flap forms part of the overall flood protection scheme and there is a credible argument that the proposal should be assessed holistically having regard to the overlap and interdependence of effects identified in Mr Muir's evidence.

39. The Trust does not propose to elaborate on that issue beyond the evidence already filed except to note that should the Panel accept that the non-complying element be bundled and the s 106D gateway tests apply, it is difficult to see how the objectives and policies gateway could be met given the requirement for consistency of that framework with national policy direction including the NPS-HPL.

Section 42A report addendum

40. The s 42A addendum report proposes further discussion regarding draft conditions 69 and 70. That revised position is in response to the comments contained in S Exeter's evidence for the Applicant.[9]

[8] Westphal Evidence paragraph 24.
[9] Section 42A Addendum paragraph 51.

41. The Trust notes that these conditions raise several issues. Firstly, draft condition 69 does not apply to the Trust's orchard at 2416 Matawai Road. That omission is effectively confirmation that the adverse flooding and horticultural production effects related to the stop-bank realignment are not proposed to be mitigated in any way as part of this application.

42. Secondly, the form of mitigation proposed in these conditions is of the type already criticised by the Courts in the Mt Messenger proceedings. It is proposing that future agreements that may or may not be achieved through willing negotiation with landowners is an acceptable alternative to a full effects assessment as part of the resource consent process.

Conclusion

43. The Trust supports the objective of improving flood resilience for Te Karaka. However, the resource consent process requires more than identification of community benefits. It also requires a transparent assessment of the adverse effects borne by those properties outside the protected area.

44. The evidence establishes that the Trust's property will be subject to materially increased flood hazard effects as a consequence of the proposal. The Trust submits that those effects have not yet been adequately addressed through enforceable and certain mitigation measures.

45. The Panel is therefore respectfully invited to:

    a) Give significant weight to the evidence of Ross Muir, Scott Wilson and Wendy Burgess;
    b) Find that future PWA arrangements and compensation processes cannot substitute for an assessment and mitigation of environmental effects under the RMA;
    c) Require further refinement and mitigation of the consequential flood effects affecting the Trust property, which could include realignment; and
    d) Decline the application unless and until the Panel is satisfied that those consequential effects have been appropriately addressed through the consent framework.

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