

**BEFORE THE INDEPENDENT HEARING PANEL  
APPOINTED BY PORIRUA CITY COUNCIL**

**IN THE MATTER** of the Resource Management  
Act 1991 (**RMA**)

**AND**

**IN THE MATTER** of Variation 1 to the  
Proposed Porirua District  
Plan and Plan Change 19 to  
the Operative Porirua District  
Plan

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**LEGAL SUBMISSIONS ON BEHALF OF KM & MG HOLDINGS LIMITED**

**9 MARCH 2023**

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## INTRODUCTION

1. These submissions are made on behalf of KM & MG Holdings Limited (**the submitter**), which is identified as submitter 54 on the matters before the Hearing Panel.
2. The submitter is the freehold owner of the Plimmerton Farm Zone land subject to operative Plan Change 18 (**PC18**), and now proposed Plan Change 19 (**PC19**), to the Porirua District Plan. Plan Change 18, which provides for a comprehensive and integrated urban development of the Plimmerton Farm Zone, was approved by the Minister for the Environment after being considered by an Independent Hearing Panel through the Streamlined Planning Process (**SPP**) under the Resource Management Act 1991 (**RMA**).
3. The essence of the submitter's interest in Plan Change 19 is not to seek any material amendments to the intensification elements of what Porirua City Council (**PCC**) has developed and notified in response to the requirements of the Resource Management (Enabling Housing Supply and Other Matters) Amendment Act 2021 (**Enabling Act**). Rather, its central concern is to ensure that a clear and acknowledged error in the PC18 process and decision, concerning the mapping of Biodiversity Offsetting and Restoration Areas (**BORAs**) on the PC18 land, is rectified.
4. The submitter originally sought to have this error addressed through making a submission on the notified Porirua Proposed District Plan, which sought that the land covered by PC18 and the relevant PC18 provisions be brought into the PDP in an integrated manner and the errors in the PC18 BORA maps rectified as part of that exercise.
5. It is however now accepted by the submitter that its submission on the PDP and that process is not the correct "vehicle" for its concerns to be addressed, given that the PC18 land was excluded from the scope of the PDP and it is therefore doubtful whether, as a matter of law, the Hearing Panel has scope to consider that PDP relief through that process. As such, it is accepted that PC19 provides

the most appropriate opportunity for the Hearing Panel to consider and recommend necessary changes to PC19.

#### **WHAT WAS THE MISTAKE IN PC18?**

6. The submitter has lodged a submission on PC19 and Variation 1 which identifies that, very late in the PC18 process, its predecessor Plimmerton Developments Limited (**PDL**) became aware of problems with the proposed mapping of BORA areas in the draft PC18 report and recommendation and made comments to that effect in response to the draft report and recommendations<sup>1</sup>.
7. The problem was that various changes had been made to the BORA maps through the PC18 process, despite the basis for those changes not being clearly explained in evidence and, more importantly, without there being any scope in submissions on PC18 to make the changes to the BORA maps.
8. Importantly, while the SPP is a bespoke process under the RMA, it does not have the same flexibility as the Intensification Streamlined Plan Process (**ISPP**) in terms of scope to make recommendations beyond what has been raised in submissions<sup>2</sup>. In short, under a SPP, the “normal” rules regarding scope to recommend changes to the planning instrument apply<sup>3</sup>.
9. In the final report and recommendations on PC18, the Hearing Panel appointed for that matter identified and accepted that there had been an error<sup>4</sup> with the BORA mapping, but considered that it was effectively too late in the SPP for anything to be done about it because the hearing had been closed and the rectification would have been beyond what could be done in response to comments on the draft report and recommendations. The final report on PC18 also noted that future plan processes would provide the ability to fix the mistake<sup>5</sup>.

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<sup>1</sup> For the PC18 process, the Minister for the Environment gave a direction to PCC under clause 78 of Part 5, Schedule 1 to the RMA which required that submitters have the opportunity to make comment on the draft report and recommendation, but could not seek to revisit the merits of that report.

<sup>2</sup> See clause 99(2) of Part 6, Schedule 1 to the RMA

<sup>3</sup> See section 80B of the RMA

<sup>4</sup> See paras 8.79 – 8.83 on page 61 of that report, dated 22 December 2020

<sup>5</sup> Para 8.83

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10. As such, the Minister for the Environment, when he approved the Hearing Panel's final report and recommendations on PC18, also effectively confirmed an outcome which was in error and arguably without legal foundation.
11. One of the processing planners and co-author of the section 42A report for PC18, Mr Andrew Cumming, is now the expert witness for the submitter in this process. His evidence<sup>6</sup> explains the process by which the changes to the BORA maps were made and how the errors came about. It is submitted that it is clear from Mr Cumming's evidence that the error was inadvertent and that there was no appreciation of the problem by the PCC section 42A authors or expert advisors<sup>7</sup> as the SPP process progressed, until PDL made its comments on the draft PC18 report and recommendations.
12. The relief sought by the submitter is both substantive and based on procedural fairness and integrity, in that it is appropriate that a mistake or oversight in a previous process which is likely to materially impact on the submitter's interests, can and should be addressed and rectified through an appropriate process, if that opportunity is available.

#### **PCC SECTION 42A REPORT ON PC19**

13. The substance of the submitter's PC19 relief is addressed in the PCC officer's report for PC19<sup>8</sup>. The particular analysis of and response to the submitter's relief is set out at sections 3.3.1 to 3.3.3 of the section 42A report, from pages 12 - 15.
14. Given the relatively clear basis for the submission and the relief sought, it is somewhat surprising that the section 42A report does not appear to engage with the substance of the submission and rather addresses the issues on a parallel path. The section 42A report appears to address the submission on an environmental merits basis in order to justify the recommendation to reject the relief sought.

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<sup>6</sup> Statement of Andrew Brown Cumming, dated 24 February 2023

<sup>7</sup> Noting that I was counsel for PCC in the PC18 process

<sup>8</sup> Section 42A Report – Plan Change 19 – Plimmerton Farm Intensification, 10 February 2023

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15. Because the PCC response to the submitter's relief was based on a quite different foundation and rationale, prior to finalising his evidence the submitter's expert planner Mr Cumming sought to engage with the section 42A report author to try and better understand the author's assumptions and basis for the recommendations. Mr Cumming's evidence summarises this engagement and his understanding of the section 42A report author's rationale for his analysis and recommendation.
  16. It appears that the PCC recommendation is based on a conclusion that, irrespective of the way in which the BORA maps came about, they should not be amended because they have a sound evidential foundation and are likely to support a better environmental outcome than removing the BORA mapping changes that were added through the PC18 process. There is no recognition that the changes were made without any scope or jurisdiction to do so. It is noted that the report suggests that the submitter would need to present expert ecological evidence in order to justify a return to the BORA maps originally proposed through the PC18 process.
  17. With respect, it is submitted that the assumptions that are now more clearly understood to support the section 42A recommendation are not well founded. These matters are discussed in Mr Cumming's evidence and the submitter relies on his analysis, particularly given his detailed involvement in and understanding of the factual position which led to this issue arising in the first place.
  18. There are two matters that warrant comment from a legal perspective at this point. The first is that it appears that the report takes the position that, as far as the outcome of PC18 is concerned, the end justifies the means. In essence therefore, the section 42A report is recommending that a "windfall" that was mistakenly generated by PCC through the PC18 process, at the likely expense of and detriment to the submitter, is embedded through this PC19 process. It is submitted that this does not reflect good planning practice.
  19. The second matter is that the report states that this outcome is justified in order to *"maintain the integrity of the planning framework that the Panel arrived at*
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*once considering all evidence and submissions in the context of PC18*<sup>9</sup>. With respect, based on Mr Cumming's evidence, that conclusion misrepresents what actually occurred through the PC18 process. Rather, the mistake and potential lack of justification for the outcome of the BORA maps is acknowledged by the Panel in its final report and recommendation, as identified earlier. The evidential foundation for this outcome was questionable, and there were no submissions which justified the outcome.

- 20.** If planning integrity is a relevant factor (and it is submitted that it clearly is), then it weighs heavily in favour of the submitter's position and relief rather than (incorrectly) being called in aid of the PCC recommendation. Put simply, the PC18 planning framework in terms of the BORA mapping does not have the integrity that the section 42A report author attributes to it, and was arrived at through a process which involved clear procedural irregularity. Relying on the resource consent process is not a satisfactory substitute to achieving accuracy in the planning document, quite apart from the risks in relying on that process<sup>10</sup>.
- 21.** It is also important to identify in this context that the submitter is not seeking to take an unjustified advantage of the present process, nor is it seeking to achieve an outcome to which it would not otherwise be reasonably entitled.
- 22.** If PCC is concerned that third parties will criticise it for recommending an outcome that might be seen to be in the interests of the property owner and be perceived as favouring development over environmental protection, that is neither a reasonable basis for the approach adopted nor is it a fair reflection of the underlying circumstances.
- 23.** It is therefore hoped that the section 42A report writer will reflect on their recommendation and consider changing it when exercising their right of reply towards the conclusion of the hearing.

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<sup>9</sup> Section 42A report, para 83, page 14

<sup>10</sup> Ibid, para 82

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## ISSUES WITH THE SUBSTANCE OF THE BORA MAPS

- 24.** Putting the central focus of the submitter's concerns to one side, Mr Cumming has in any event sought to engage with the PCC report and addressed the planning merits of the two positions.
- 25.** He accepts that, notwithstanding how the BORA maps changed and were finalised in PC18, those changes do have some evidential foundation<sup>11</sup>. He also identifies that, of the two sets of maps that were the starting points in PC18, there are "overs and unders" with both<sup>12</sup>.
- 26.** It is however submitted to be apparent that, when conducting a site visit over the PC18/PC19 land, some of the operative BORA maps are plainly in error in that they cover areas of very limited ecological interest or value that have always been identified for development and roading. An area to the south of the site near Mo Street is an obvious example of pasture which has been incorrectly included in a BORA, and when the submitter's case is presented Mr Cumming can identify for the Panel two large areas of pasture in Precinct C that are intended to be developable and through which a road is identified as going, that are also within a BORA.
- 27.** Mr Cumming has identified that the likely outcome of implementation of PC18 through the consenting process is that omissions from the BORA maps or areas have increased in ecological or biodiversity value in the meantime will be picked up in the manner identified in his evidence<sup>13</sup>, and that this was the intention of the inclusion of specific additional provisions in PC18.
- 28.** The reverse is not necessarily true however, in that the provisions do not expressly recognise opportunities to remove areas that should not have been included (ie. the mapped BORA areas are the starting point for further ecological assessment, are assumed to be correct, and can be added to). In other words, the pathway through the consenting process for removal of areas that should not

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<sup>11</sup> Cumming evidence, paras 21 -23

<sup>12</sup> Ibid, paras 24 and 39

<sup>13</sup> Ibid, paras 41 - 43

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have been mapped is submitted to be less straightforward, which highlights the importance of having a starting point in the planning documents that has greater integrity.

- 29.** In terms of the relative risks of the PCC recommendation or the submitter’s relief, it is submitted that there is little risk of poor ecological outcomes on the PC18 land, due to the provisions referred to above. There is therefore very little ecological or biodiversity “downside” should the submitter’s relief be granted. There is however a real risk that the intention of PC18 could be frustrated for no ecological benefit if the relief is not granted, noting that PC18 was a carefully considered, comprehensive and integrated plan change for the entire Plimmerton Farm Zone. This risk is submitted to be even more acute given the policy thrust of the Enabling Act and the intention of PC19 to provide increased opportunities for housing intensification.

#### **SCOPE ISSUES FOR THE PANEL IN THIS PROCESS**

- 30.** Given that PC19 is an Intensification Planning Instrument (**IPI**) to be considered through an ISPP<sup>14</sup>, the Panel in this instance will need to be satisfied as to its powers to grant relief *and* that such relief will appropriately be within the scope of what can or should be included in an IPI.
- 31.** There are several potential scope issues that need to be considered, including:
- (a) the Panel’s powers under Part 6 of Schedule 1 to the RMA to make recommendations beyond matters sought in submissions;
  - (b) the geographical scope of PC19 as notified;
  - (c) whether relief would be within the mandatory or discretionary matters for an IPI in terms of section 80E of the RMA;
- 32.** These matters are addressed further below.

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<sup>14</sup> See ss 80D – 80H and Part 6 of Schedule 1 to the RMA

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## **Clause 99 of Part 6, Schedule 1**

- 33.** As has been noted earlier in these submissions, the process and powers under the ISPP differ from those that apply in normal Part 1 Schedule 1 and even SPP processes. One of the main differences is that the usual rules in terms of scope to recommend changes to the planning instrument are varied, in that clause 99(2) of Part 6, Schedule 1 to the RMA provides:

The recommendations made by the independent hearings panel—

- (a) must be related to a matter identified by the panel or any other person during the hearing; but
  - (b) are not limited to being within the scope of submissions made on the IPI.
- 34.** For the avoidance of doubt, the relief sought by the submitter is clear from its face and it will be put before the Panel in the hearing. The key point is that the Panel is not necessarily bound by the IPI as notified, nor by relief sought in submissions, in terms of its ability to make recommendations on changes, additions, or deletions to the IPI.
- 35.** This is not an open-ended power or discretion, in that the Panel must still be satisfied that its recommendations are justified on the merits and still ensure that the IPI achieves its intended statutory purpose<sup>15</sup> (bearing in mind the particular facts and circumstances of Plimmerton Farm and Porirua)<sup>16</sup>.

## **Area covered by PC19**

- 36.** While PC19 intends to address the requirements of the Enabling Act by modifying PC18, it does not however cover the same geographical area as PC18.
- 37.** As noted earlier, PC18 was a comprehensive plan change which applied to the entire Plimmerton Farm site and sought to achieve a carefully considered and integrated residential development that responded to the issues, features and sensitivities of the site.

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<sup>15</sup> It must do the things required in section 80E(1)(a) of the RMA

<sup>16</sup> It can also address related or consequential matters as identified in sections 80E(1)(b) and 80E(2)

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38. On the eastern part of the PC18 site, what was identified as Precinct C<sup>17</sup> was a more sensitive area generally (but not wholly) within the Kakaho Special Amenity Landscape, which provided for residential clusters on suitable land and less dense residential development overall. In Part 14 of PC18, Precinct C is described as follows:

Precinct C provides for built development while maintaining and enhancing the area's natural and physical characteristics, including the Kakaho Special Amenity Landscape and Significant Natural Areas. The Plimmerton Farm Precinct Plan and the Precinct C provisions require residential development to be clustered or concentrated in identified locations, to prevent sprawl across the landscape.

...

The concentration of development in identified locations provides opportunities to maintain key landscape values, provide open space, walkways and cycleways as well as to restore and protect regenerating native vegetation. The clustering of developments also reduces roading and utility service infrastructure requirements.

39. So while Precinct C provides for a different and less intense form of residential development compared to Precincts A and B, it was still intended to make a meaningful contribution to overall residential yield and development capacity across the entire PC18 site. It will be apparent from the maps provided by the submitter and in Mr Cumming's evidence that the BORA mapping issue of concern applies to relatively substantial areas of Precinct C<sup>18</sup>.

#### **Qualifying matters and related provisions**

40. Porirua City is a Tier 1 local authority under the National Policy Statement on Urban Development 2020 (**NPS-UD**) and is within a Tier 1 urban environment<sup>19</sup>. So, even if it is not required to incorporate the Medium Density Residential Standards in Precinct C, it is required to ensure that its IPI gives effect to policies 3 and 4 of the NPS-UD<sup>20</sup>. It is doing this for Precincts A and B through PC19, but

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<sup>17</sup> Which includes the Kakaho Hillside Living Area, the Hillside Living Area, the Kakaho Basin and the Kakaho Basin North

<sup>18</sup> See also Figure 2 on page 14 of section 42A officer's report for PC19

<sup>19</sup> Table 1, Appendix to NPS-UD, page 31

<sup>20</sup> Section 80E(1)(a)(ii)

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should also have regard to the consequential impacts or issues on Precinct C, given that it is integrated with the other two precincts.

- 41.** It is submitted that the removal of a development capacity constraint provided by inappropriate and/or unnecessary qualifying matters (such as the BORA maps) in Precinct C falls within the scope of a related provision that the Panel has the ability to consider. This is due to the breadth of the meaning of “related provisions” identified in section 80E(2), which is not limited to matters within the geographical area of the land identified in the notified IPI. In concert with its more flexible powers to make recommendations in clause 99(2), it is submitted that the exclusion of Precinct C from PC19 is not a barrier to the Panel recommending relief in respect of inaccurate BORA mapping in Precinct C.
- 42.** From a planning perspective, in terms of the Panel’s ability to consider Precinct C as a qualifying matter or as related provisions, Mr Cumming notes that section 80E provides that an IPI may address related provisions including qualifying matters and district-wide matters that support Policies 3 and 4 of the NPS-UD. His opinion is that the support for Policies 3 and 4 derives from the Plimmerton Farm Zone’s coordinated, integrated Precinct Plan approach that will guide Plimmerton Farm’s development from a greenfield site to a well-functioning urban environment with rural residential margins and a supporting open space network.
- 43.** Finally it is noted that the section 42A report<sup>21</sup> does accept that amendment of the BORA maps falls within the scope of PC19 by way of being a related provision in section 80E(2) (albeit that it does not expressly address that issue in terms of Precinct C).

## **SUMMARY AND CONCLUSION**

- 44.** The BORA mapping errors arising from PC18 were a regrettable mistake which, due largely to timing issues in that process, could not be rectified. This problem was identified and accepted by the Independent Panel in its final report.

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<sup>21</sup> Section 42A officer’s report, para 84, pages 14-15

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- 45.** The most appropriate opportunity to address this issue is through PC19. There is no legal or jurisdictional barrier to the PC19 Panel making a recommendation which would ensure that the inaccuracies, potential unfairness, and inappropriate development constraints from PC18 would be made good. That result would also be consistent with the underlying policy intent of the IPI to ensure that an increase in residential development capacity is provided for in Tier 1 district plans, and is only constrained by clearly identified and justified qualifying matters.
- 46.** Overall, it is submitted that the Panel can have confidence, based on the evidence of Mr Cumming, that the relief sought by the submitter in PC19 will be superior to the section 42A report author's recommendation to retain what is currently in PC18, and will better enable the approval and implementation of an optimised IPI for the Plimmerton Farm Zone.

**DATED** this 9th day of March 2023



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James Winchester  
Counsel for KM & MG Holdings Limited