

**BEFORE A COMMISSIONER PANEL APPOINTED BY THE TASMAN DISTRICT
COUNCIL**

In the matter of the Resource Management Act 1991
And

In the matter of proposed Plan Change 79 to the Tasman Resource
Management Plan

And Submissions of AB & SL Family Trust (**OS 4222**); Wai West
Horticulture Limited (**OS 1651**); Coral and Tracy Yelverton (**OS
4230**); Flowerlands Limited (**OS 4228**)

**JOINT LEGAL SUBMISSIONS FOR
THE LOWER QUEEN STREET LANDOWNERS**

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Introduction

- 1 These joint legal submissions are made on behalf of the lower Queen Street landowners – AB & SL Family Trust, Wai-west Horticulture Limited (**Wai-west**), Coral and Tracy Yelverton, and Flowerlands Limited (**the landowners**). The landowners own (and lease) land directly affected by that part of Plan Change 79 (**PC79**) that proposes to lift the operative deferred status, and rezone Rural 1: Deferred Light Industrial land to Light Industrial in lower Queen Street.



Figure 1 – lower Queen Street landholdings

- 2 The majority of the landowners' land sits within the boundaries of proposed Schedule 17.4A. Wai-west is the only landowner who owns and occupies land both within and outside the scheduled area.

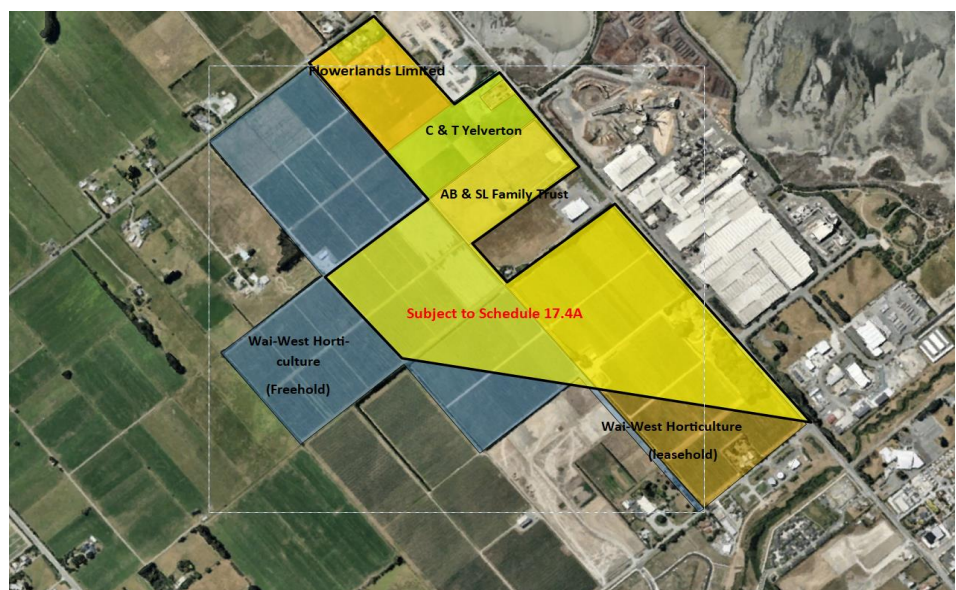


Figure 2 – Schedule 17.4A overlay on Figure 1 above

- 3 The land proposed to be upzoned to Light Industrial comprises only some of Wai-west's freehold land; held in three records of title – see figure 3.

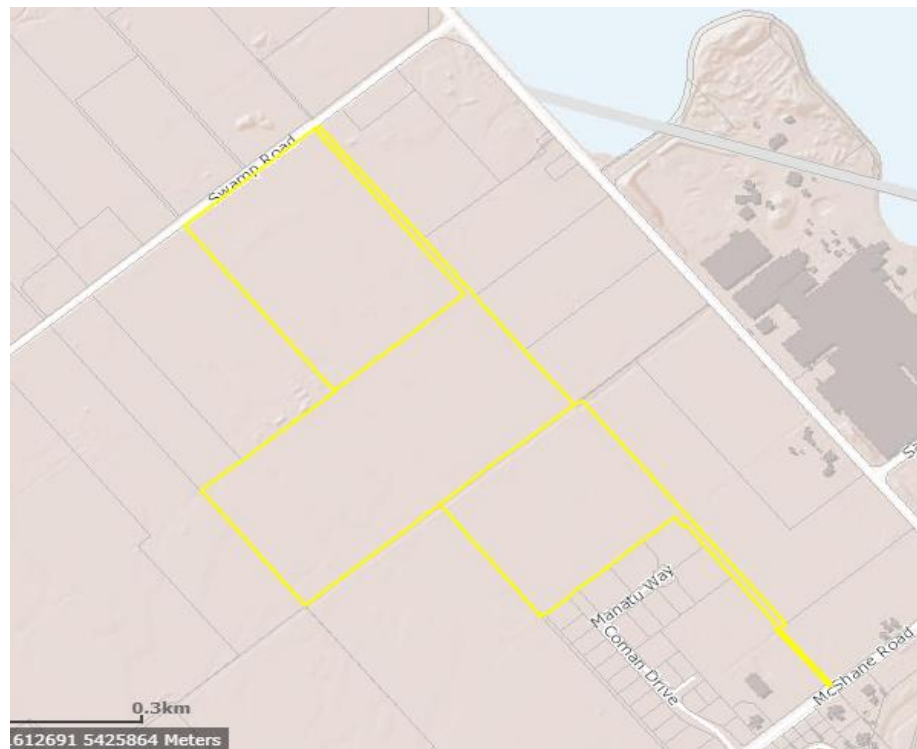


Figure 3 – Wai-west landholdings (Records of Title RTNL13C/748, RT320151, RT320152)

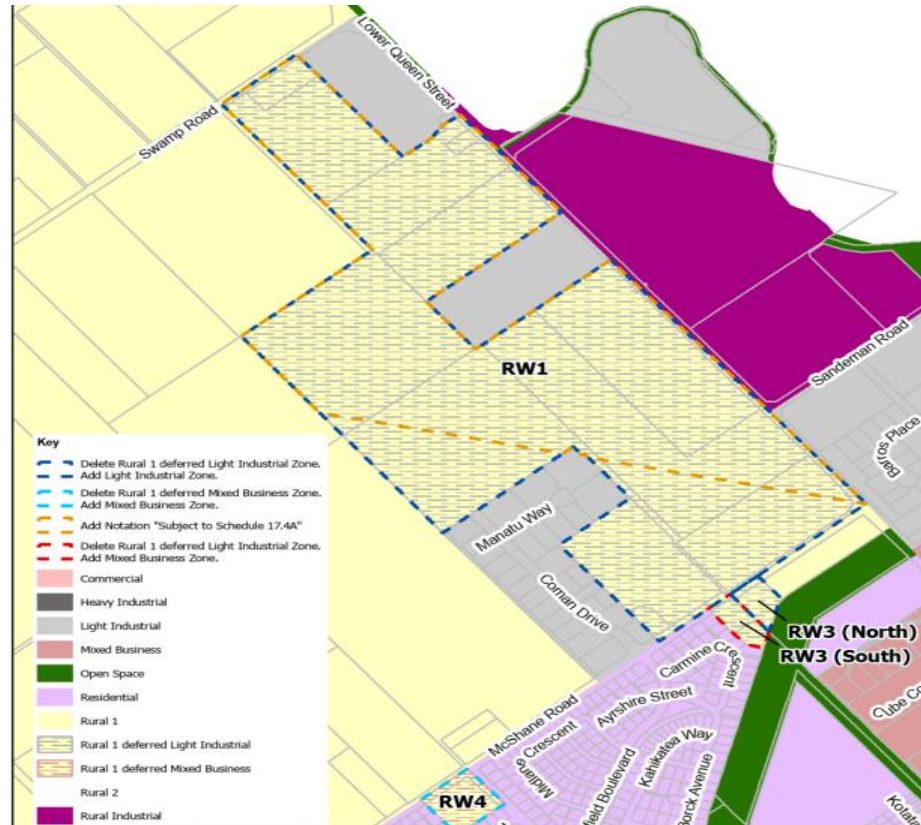


Figure 4 – PC99 proposed updated planning map 76-12

- 4 Figure 4 identifies the extent of land proposed to be upzoned. When figures 2, 3 and 4 are assessed side by side the implications of PC79 for the future management of Wai-west land becomes clear. If PC79 is approved in its present form Wai-west's lower Queen Street landholdings will be subject to three different sets of plan provisions – Rural 1 zone, Light Industrial zone, and Light Industrial zone subject to Schedule 17.4A. The proposed multi zone/ overlay approach delivers a poor planning outcome. This is discussed in more detail in the site-specific section of these submissions.
- 5 The lower Queen Street land is presently zoned Rural 1: Light Industrial deferred (Area G) in the operative Tasman Resource Management Plan (**TRMP**). The reasons for deferral are limited to available servicing connections for reticulated water, wastewater and stormwater.
- 6 Pursuant to the infrastructure report prepared by Stantec, the identified constraints have been remedied with water and wastewater infrastructure in place for development and onsite stormwater solutions considered appropriate to be determined by a developer. Stantec concludes that infrastructure is suitable for upzoning the lower Queen Street land to light industrial land use.¹

The landowners

- 7 Detail of the landowners and background to their contribution to the local community is set out in each submission and for brevity is not repeated. All landowners attend the hearing in support of their submission, and some will address the panel subsequently.
- 8 The landowners have collectively pooled resources to engage with PC79 – they have lodged submissions, further submissions and have commissioned expert planning evidence together with legal representation. The owners of 17 Swamp Road, the Thompsetts, also submitted (4223) on PC79 but are not speaking to their submission at hearing. The Thompsett submission raises similar themes to the submissions lodged by the landowners.
- 9 While the landowners support the lifting of the deferred status to unlock light industrial land use, their participation in this hearing is to ensure that the resulting provisions will facilitate viable development, and for Wai-West will

¹ Section 32 Evaluation Report, Appendix 2, Deferred Zone Infrastructure Background Report, table 1, page 8

adequately manage reverse sensitivity effects on its existing horticultural operation.

- 10 The landowners accept that coastal hazard risks must be adequately managed, however they consider there may be circumstances where this can be dealt with through site-specific mitigation measures. PC79 must deliver a planning framework that is compatible (and consistent) with neighboring land use. To encourage investment and promote full utilization of the upzoned land it is critical that conditions imposed do not frustrate light industrial land use.²
- 11 Choice is important. Both to accommodate market demand, but also to provide options to investors (and to the Council) to develop in a way that allows flexibility to assess what is best for project and for the community. As proposed, land captured by Schedule 17.4A includes a wide range of elevations and variable distance from the coast. When sea level rise modelling is assessed, this land is subject to a range of vulnerabilities to coastal hazards. It requires bespoke treatment, and a one size fits all approach is not appropriate.
- 12 Key regional infrastructure is located along lower Queen Street, including wastewater and water pipelines³ and stormwater management. The Council community water supply is also drawn from aquifers in the vicinity. Hard (maintained) coastal hazard structures exist to protect existing businesses (Nelson Pine Industries), live zoned land and community facilities. Council retreat from this area is unlikely – this stretch of lower Queen Street is a servicing lifeline to the Richmond community and surrounds.
- 13 The landowners consider that in some circumstances it may not be necessary for industrial activities and buildings to be temporary, relocatable and readily removable where other mitigation (such as building up of land, specific design solutions, or the construction of seawalls/ other protection structures) may be feasible and appropriate. Alternate measures to address the risk of future sea level rise (including storm surge) would of course need to be assessed on a case-by-case basis and be accompanied by supporting technical evidence to provide the necessary assurance. A resource consent

² Section 85(2) RMA

³ Tasman's Capital Work Programme 2024-2034 includes funding to the tune of \$5M for the lower Queen Street trunk main upgrade/ replacement to provide increased capacity in the years 2024 – 2028.

process is the most effective and efficient avenue to provide for this as it does not shut the door on innovation, it affords choice to the landowner/ investor/ developer to select a best for project outcome and reserves the decision to the Council.

- 14 The landowners are fundamentally opposed to a resulting planning framework that imposes development restrictions on their landholdings, whereas neighbouring land – subject to the same predicted exposure to sea level rise – are not subject to the proposed constraints. Council's approach to enable additional built form and subdivision on land already 'live zoned' is not consistent and prejudices the landowners. Figure 4 above illustrates how the scheduled area has been mapped to carve out some land parcels and exclude this land from the PC79 provisions.

Evidence

- 15 The landowners have provided a brief of planning evidence prepared by Mr Hayden Taylor. Mr Taylor will summarise his evidence, and address additional matters raised in the Council's reply evidence subsequently.

Content of Submissions

- 16 The relief sought by the landowners, including the inclusion of an 'exemption pathway' to operate in parallel with the Council proposed provisions, and reasons in support are traversed in detail in the landowner submissions and in Mr Taylor's evidence. These legal submissions ought to be read alongside these other documents and together they present the landowners' case.
- 17 These submissions address the relevant legal considerations that must inform the panel when determining PC79:
 - 17.1 Scope to impose changes to subdivision rules for the lower Queen Street Light Industrial zone;
 - 17.2 Application of planning documents;
 - 17.3 Risk and appropriate response; and
 - 17.4 Relief sought, including site specific considerations

Are submissions regarding subdivision as it relates to the lower Queen Street area “on” PC79?

- 18 It is submitted that due to the form and content of PC79 as notified it is not open to the panel to consider the subdivision provisions relevant to the Light Industrial zone.
- 19 Considerations regarding whether a submission is on a plan change are settled and derive from Clause 6, Schedule 1 of the RMA. The leading authority is *Clearwater*⁴, expanded on in *Motor Machinists*.⁵ Case law is clear that if a submission is not “on” the plan change then the Council has no business considering it.⁶
- 20 The first question to answer is what is fairly and reasonably described as the scope of the plan change? That is because there can be no coherence and integrity in the process otherwise. It follows that a submission must be within the ambit of the plan change as notified i.e. it must not take things in a different direction. That respects the fact that the initiator, in this case the Council, is not committed to a process of a scale and scope that could not be reasonably anticipated when the process was initiated.
- 21 The landowners contend that PC79 is not about limiting subdivision (as it relates to the lower Queen Street area), rather it targets the release of existing deferred land for development provided adequate servicing is available and the zoning remains appropriate. Assessment of coastal hazard risk is of course relevant in this context but is confined to those parts of the TRMP that PC79 proposed to alter. Incidental or consequential changes are permissible⁷, provided that no substantial further s32 analysis is required to inform affected persons of the comparative merits of that change.
- 22 This procedural fairness consideration is particularly relevant as notwithstanding that Wai-west has the benefit of a lease, Nelson Pine Industries as landowner is not a submitter and may well have elected to participate in PC79 had it known limitations on future subdivision of its land may result.

⁴ *Clearwater Resort Ltd v Christchurch City Council* HC Christchurch AP34/02

⁵ *Palmerston City Council v Motor Machinists Ltd* [2013] NZHC 1290

⁶ *Ibid* at [1]

⁷ Schedule 1 RMA, clause 10(2)

- 23 As above, the first step to determine scope, is to establish the purpose of PC79. The Council website describes PC79 as follows:

This Plan Change proposes to introduce a new deferred zone framework to replace the existing method in the Tasman Resource Management Plan. The new framework relies on a trigger rule mechanism, which is considered to be robust, minimally bureaucratic, efficient and effective. The Plan Change also proposes to formally rezone some existing deferred land on the basis that servicing is now available. The plan change includes all the deferred zone locations in the Tasman District except for those in or adjacent to Māpua and Motueka as other planning processes are underway to address the zoning issues in those areas

- 24 The s32 evaluation report that accompanies PC79 as notified records that the overall purpose of PC79 is:

24.1 to amend the TRMP to introduce a new method that provides for a legally robust deferred zone framework; and

24.2 to release existing deferred land, (land previously rezoned to a deferred zone through a Schedule 1 plan change) for development provided the services are available and the zoning remains appropriate.

- 25 To achieve that purpose, the s32 report notes that PC79 includes, where relevant, the addition of new planning provisions for land that is subject to risks associated with climate change including sea level rise, coastal inundation and flooding.⁸ The table on page 6 of the s32 report summarises the proposed changes to existing deferred locations that are included in the scope of PC79. There is no reference to any amendment to the status quo subdivision rules relevant to the lower Queen Street land.

- 26 Further, it is clear from the confidential Council minutes appended to the Council's s42A report that a prohibition on subdivision (advanced in an early iteration of PC79 by Council planning staff) in the lower Queen Street Light Industrial zone were directed to be removed prior to notification. The Council was entitled to limit the scope of PC79. It consulted with the landowners and recognised that assessment of coastal hazard risk was best advanced on a

⁸ Section 32 Evaluation Report, page 5

case-by-case basis through the resource consent process. It was also noted that rules should be the same across the region.⁹

- 27 While the s32 report contains isolated references to limitations on subdivision within the Light Industrial zone and within the Appendix 5 schedule of amendments, these are in error¹⁰ and likely the result of revisions made to the PC79 package following the Council's decision to remove any amendment to the status quo subdivision provisions relevant to the lower Queen Street land.
- 28 As notified PC79 does not propose to change the operative chapter 16: General Rules, including the 16.3 subdivision rules as they relate to subdivision in the lower Queen Street Light Industrial zone. Changes to this chapter are limited to the closed commercial zone in Marahau.
- 29 This contrasts with changes proposed to the 17.4 industrial rules, specifically the introduction of new and amended land use and building rules that apply to the scheduled area. Further, the section 17.4.20 explanation to the rules does not reference subdivision in the new text specific to the lower Queen Street Light Industrial zone.
- 30 The s32 report does not include a cost benefit assessment to address the option of limiting subdivision within the scheduled area. There is no evidence to support the Council recommendation that the risks posed from coastal hazards outweigh the financial impacts that prohibiting subdivision will impose on the viability of development and/ or the economic wellbeing of the landowners. Instead, the assessment focusses on proposed restrictions on land use and built form development.¹¹
- 31 The landowner submissions support PC79 as notified – with no limitation on subdivision as it relates to the lower Queen Street Light Industrial zone and the scheduled area. The submissions of Jenny Easton¹² and the Nelson Tasman Climate Forum raise the issue of restrictions on subdivision in the

⁹ Tasman District Council Minutes of Strategy and Policy Committee, 3 October 2024, at 8.2

¹⁰ Acknowledged in the s42A report, page 53

¹¹ See note 6, Appendix 1, page 20

¹² It is not accepted that this submission requests a prohibition on subdivision. This submission point also relates to residential land use rather than industrial land use.

lower Queen Street area. The relevant excerpts of each submission are set out in the s42A report.¹³

- 32 Reliant on these two submissions the Council reporting officer(s) recommend a departure from PC79 as notified and advance a new position that seeks to prohibit subdivision within the scheduled area.¹⁴ In taking this approach the officers undermine the direction of Council (as per the decision recorded in the confidential Strategy and Policy Committee minutes) and the scope of PC79 as notified. It is submitted that for the reasons outlined above, neither of these submissions were “on” PC79 as notified and therefore the Council officers’ recommendation to prohibit subdivision in the scheduled area is an error of law.

In the alternative

- 33 If the panel do not accept the submission that subdivision as it relates to the lower Queen Street area is out of scope, the correct activity status for subdivision ought to be restricted discretionary for the reasons outlined in Mr Taylor’s evidence.¹⁵ The Council’s blunt approach to prohibit subdivision (as promoted in the Council’s s42A report) is inconsistent with the higher order framework. A restricted discretionary activity status would enable Council to impose matters of discretion to appropriately manage coastal hazard risks through conditions of consent and Council could decline an application in certain circumstances.
- 34 Further, it is entirely inappropriate for the Council to introduce a prohibition on subdivision when it is advancing a broader district-wide natural hazards plan change (currently underway).¹⁶ This plan change to come will be informed by the National Policy Statement for Natural Hazards (**NPS-NH**) presently in development which may find that a prohibition on subdivision is not the most effective and efficient response. Dealing with subdivision on lower Queen Street in advance of the wider plan change is inequitable and poses significant risk to Council of getting it wrong. It is submitted that the sensible approach is to leave any assessment on subdivision to this second tranche review.

¹³ Report prepared to fulfil the requirements of s42A of the RMA, at page 49

¹⁴ See note 13, page 48

¹⁵ Evidence of Hayden Taylor, paragraph [47]

¹⁶ Council reply to submitters statements and evidence at [50]

Application of planning documents

- 35 While Mr Taylor and the Council reporting officers agree on the planning documents relevant to PC79, they disagree on how they ought to be interpreted. In particular, the Council reporting officers focus on the term “avoid” as it exists in Policy 25 of the New Zealand Coastal Policy Statement (**NZCPS**), Objective 5.2 and Policy 5.2 of the Tasman Regional Policy Statement (**TRPS**) and various policies¹⁷ in the TRMP as justification for introducing a prohibition on subdivision and disallowing the landowners preferred relief – the exemption pathway. This approach fails to acknowledge settled case law that objectives and policies cannot be read in isolation and must be read together as a whole.
- 36 When read in this way, it is clear it is not the subdivision, land use and development activity itself that is to be avoided in areas prone to coastal hazards it is the avoidance of any increased risk. As Mr Taylor points out, the guiding planning framework enables a range of responses to address coastal hazard risks, depending on the circumstances.¹⁸ There is no blunt prohibition directive.
- 37 Mr Taylor’s evidence confirms that the NZCPS provisions are embedded in both the TRPS and the TRMP as the later has been updated to give effect to it. As the TRPS is an earlier document it is helpful to acknowledge that the NZCPS 2010 replaced the 1994 version, which also included policies¹⁹ addressing appropriate subdivision, use and development of the coastal environment provided adverse effects were avoided, remedied or mitigated. It is submitted that the concepts of mitigation and remedy (which incorporate site-specific mitigations to protect against predicted sea level rise as afforded by the landowners’ exemption pathway) serve to meet the “avoid” standard by reducing the level of perceived risk.
- 38 Notwithstanding that the TRMP is not considered to be invalid, or incomplete, the *Port Otago* Supreme Court decision confirms that where inconsistency is perceived in higher order documents this ought to be reconciled as a priority and is best dealt with at the regional policy statement and plan level as far as possible.²⁰ While noting its decision does not revert back to the “overall

¹⁷ See note 14 at [23]

¹⁸ See note 14 at [22]

¹⁹ Refer 3.2

²⁰ *Port Otago Limited v Environmental Defence Society Incorporated* [2023] NZSC 112 at [72]

judgement” approach rejected in *King Salmon* the *Port Otago* decision does introduce a certain gloss that directs the panel to carefully analyse the factual circumstances when striking the appropriate balance and in turn the most efficient and effective planning outcome.

- 39 The discussion above is relevant to the panel's determination as to whether a prohibition on subdivision in the lower Queen Street area is warranted, based on the available evidence regarding modelled sea level rise, the timeline in which that may give rise to adverse effects, and what options are available to manage the risk.

The concept of risk

- 40 Our knowledge of climate change continues to grow, and it follows that the risk profile of sea level rise occurring as modelled, and the attached timeline is not hard and fast. The planning response must be commensurate of the risk posed. It is submitted that a certain level of flex must be built into the planning regime to enable subdivision, land use and development to adjust as both knowledge improves, and national guidance evolves over time.

- 41 An example of this is the methodology informing the identification of the sea level trigger that once reached will elicit various planning responses within the scheduled area. The trigger while promulgated in science includes a number of limitations/ assumptions that impact the consequences of modelled sea level rise at lower Queen Street. These are outlined in Appendix 4 to the s32 report and include:²¹

41.1 there is no gauge at lower Queen Street, and tide recorders at other locations have to be used;

41.2 it is assumed that sea-surface height is the same between Lower Queen Street and both the Little Kaiteriteri and Port Nelson tide gauges; and

41.3 there is limited understanding of wave set up in the Waimea Inlet.

- 42 Based on the above, the science informing identification of the trigger is conservative at best and potentially inaccurate. The bathtub modelling adopted by Council to measure potential sea level rise has been subject to

²¹ Appendix 4 Coastal Inundation, at 6.2.1, page 12

scientific scrutiny.²² It is submitted that for these reasons the panel ought to err on the side of caution (at the risk of getting it wrong) and enable subdivision in the scheduled area to continue for the time being. There is no certainty how many years it may take for sea level rise to breach the existing protection structures and/ or whether these may be built up/ made more resilient once Council has completed its 10-step decision making to achieve an adaption plan as required by the National Adaption Plan 2022. As Mr Taylor points out Policy 27 of the NZCPS recognises that protection structures may be the only practical means of protecting existing infrastructure of regional importance such as the NPI industrial facility and three waters infrastructure along the lower Queen Street reach.

- 43 The s42A report alleges that the landowners' proposed exemption pathway will expose the Council to increased liability. This is manageable and there are mechanisms available to minimise Council exposure. An important consideration is that the scheduled area is earmarked for industrial land use, not residential. Buildings are to be relocatable and readily moveable. If desired, Council can require development to occur pursuant to an outline development plan and it is common for internal infrastructure to be maintained privately. The reticulated network in this location already exists and the reality is that the land use footprint will be no different whether subdivision is provided for or not. Further, coastal hazard risk goes hand in hand with the Building Act – which governs new buildings; and land information and project information memoranda assists in property purchases and resource/ building consent processes.
- 44 Lastly, Mr Taylor's evidence traverses several levers that already exist to mitigate against coastal hazard risk including those contained in the operative Light Industrial zone rules (such as raised building platforms and considered stormwater drainage), the s106 RMA ability to decline consent, the Inundation Practice Note, and use of consent and hazard notices under the RMA. It is submitted that these solutions together with the landowners proposed exemption pathway ought to be preferred over a blunt prohibition on subdivision.

²² [Scientists urged to pull the plug on 'bathtub modeling' of flood risk – UC Irvine News](#)

Relief sought – general

- 45 Mr Taylor's evidence sets out the relief sought by the landowners, including the proposal for an exemption pathway in relation to limited consent durations and temporary/ relocatable buildings. The exemption pathway is proposed to operate as an alternate option to the Council's prescribed regime. It is supported by new policy 6.5.3.10AA which would allow a different development approach provided it is accompanied by expert technical assessment in support. Importantly, this does not water down the Council response to coastal hazards it simply provides for site specific treatment of risk where it is available.
- 46 The landowners also seek revisions to the Council proposed version of PC79 to improve application of the land use and building rules, and to ensure an efficient and effective planning outcome. The landowner submissions comprehensively address the requested drafting revisions and Mr Taylor has promoted some additions in his evidence, namely a restricted activity status for an application for subdivision (rather than the Council proposed prohibited activity) within the scheduled area and a 2000m² minimum lot size. The interplay of the scheduled area within the wider Light Industrial zone is critical to the zone functioning as intended and delivering the needed business development capacity to the district. Ambiguity in the plan framework has potential to undermine the operation of the upzoned land and disincentivise investment.
- 47 Two examples that presently invite interpretation challenge are the Council references to 'short, medium and long term' with no accompanying definition to confirm what these time periods are, and the requirement for a plan to be developed by a consent holder to address how buildings are able to be physically and financially removed from the site (Rules 17.4A.1.2 and 19.2.1.18A). The landowners seek that both references are removed to improve operation of the PC79 provisions.

Relief sought – site specific

AB & SL Family Trust

- 48 Mr Brett McLean will speak to the site-specific relief requested by the trust. A prohibition on subdivision will undermine the significant investment made by the trust to develop its land. This site-specific relief is only necessary where the panel determine that subdivision ought to be prohibited in the scheduled area. If subdivision is enabled as per the status quo Light Industrial

provisions, then this submitter would be entitled to make an application for subdivision once PC79 becomes operative.

Wai-west

- 49 To address the poor planning outcome that results from dissecting the Wai-west land with three separate zones/ overlays, Wai-west has sought to rezone its balance record of titles from Rural 1 to Light Industrial and/ or seeks to remove the Schedule 17.4A overlay from its land. Schedule 17.4A does not reflect cadastral boundaries, so PC79 in the form recommended by Council would extend a prohibition on subdivision over the balance Wai-west land, including that which borders the existing Coman industrial area. This cannot be what is intended.
- 50 The Council reply suggests that there may be some room to rationalise or “square up” certain edges of the mapped area where that would improve practical implementation. I understand this to be general agreement with the proposal to exclude Wai-west land from the scheduled area and encourage the panel to seek confirmation of this from those in the Council technical team.
- 51 Wai-west’s freehold land is the furthest from the coast. Sea level rise modelling indicates that that the Wai-west land will be affected by incremental sea level rise much later than land closer to the coast. This variability reiterates the importance of a planning regime that accounts for and responds to this. As presently drafted PC79 fails to acknowledge this distinction and effectively penalises Wai-west by imposing a restrictive regime (while the actual risk of inundation on Wai-west land may not yet be realised) immediately on breach of the sea level rise trigger.

Yelverton

- 52 As above for the AB&SL trust, Coral and Tracy Yelverton seek consequential amendments to chapter 16.3 to ensure that subdivision of the existing dwelling at 587 lower Queen Street is provided for as a controlled activity. The Yelverton land neighbours existing Light Industrial zoned land. As above for the trust, this site-specific relief is only necessary where the panel determine that subdivision ought to be prohibited in the scheduled area. If subdivision is enabled as per the status quo Light Industrial provisions, then this submitter would be entitled to make an application for subdivision once PC79 becomes operative.

Flowerlands

- 53 This submitter requests acknowledgement within the PC79 provisions that recontouring land within the scheduled area to a minimum 5.1m (NZVD 2016) – the level that the boundaries of the scheduled area have been calculated on – is an appropriate site-specific mitigation to manage modelled coastal hazard risk. This relief would operate within the landowners' proposed exemption pathway and alongside existing Light Industrial zone provisions that require development to avoid any impediment of stormwater drainage. This relief acknowledges the variability of the sites within the scheduled area.

Conclusion

- 54 Despite evidence presented by Mr Taylor the Council²³ continue to promote a prohibition on subdivision in the scheduled area citing future costs and risks to landowners, constraints to adaption pathways, increased pressure for hard protections measures and interference with the natural ability of the coastal margin to retreat over time. No evidence has been provided by Council to support these claims.
- 55 In contrast the landowners who will be responsible for the success or fall of the upzoned lower Queen Street Light Industrial zone request flexibility to select a development option that responds appropriately to coastal hazard risk but does so in a way that allows site-specific solutions. A blunt planning approach does not enable adaptive management.



Katherine Forward / Derek McLachlan
Solicitor for the landowners

²³ Through the Council reply to the submitter statements and evidence