

**Before the Independent Hearing Panel appointed by Hutt City Council**

In the matter of

**The Resource Management Act 1991**

And

In the matter of

**Plan Change 56 to the Hutt City District Plan**

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**Legal submissions on behalf Stride Investment Management Limited (submitter 470), Investore Property Limited (submitter 405), Oyster Management Limited (submitter 179) and Argosy Property No 1 Limited (submitter 189) on Plan Change 56 to the Hutt City District Plan**

Dated 12 April 2023

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## MAY IT PLEASE THE COMMISSIONERS

### INTRODUCTION

1. Stride Investment Management Limited (**Stride**), Investore Property Limited (**Investore**), Oyster Management Limited (**Oyster**) and Argosy Property No 1 Limited (**Argosy**) lodged submissions and Investore lodged a further submission on Plan Change 56 (**PC 56**) to the Hutt City District Plan (**District Plan**).
2. These legal submissions will:
  - (a) provide some background to Stride, Investore, Oyster and Argosy;
  - (b) identify that PC 56 must give effect to the National Policy Statement on Urban Development 2020 (**NPS-UD**);
  - (c) address the approach taken to natural hazards in PC 56.
3. In addition to these legal submissions, Joe Jeffries has prepared a statement of planning evidence in support of Stride, Investore, Oyster and Argosy's submissions.

### BACKGROUND

4. Stride, Investore, Oyster and Argosy are commercial property funds and ownership companies which manage and own properties throughout New Zealand. In Hutt City:
  - (a) Stride manages Queensgate Shopping Centre, which is owned by Diversified NZ Property Trust;
  - (b) Investore owns Petone Countdown at 45 Jackson Street;
  - (c) Argosy owns industrial buildings at 39 Randwick Road, 147 Gracefield Street and 19 Barnes Street; and
  - (d) Oyster manages an office building at 106-110 Jackson Street, Colonial House office building at 270 High Street and an industrial property at 75 Wainui Road.

5. Stride, Investore, Oyster and Argosy seek to ensure that PC 56 gives effect to Policy 3 the NPS-UD, and applies an appropriate planning response to avoid or mitigate risks arising from natural hazards.

### **PC 56 MUST GIVE EFFECT TO THE NPS-UD**

6. The NPS-UD came into force on 20 August 2020 and provides clear and directive objectives and policies to ensure towns and cities are well-functioning urban environments and have sufficient development capacity to meet the changing needs of diverse communities. It removes barriers to development to allow growth ‘up’ and ‘out’ in locations that have good access to existing services, public transport networks and infrastructure. It also requires local authorities to engage with the development sector to identify significant opportunities for urban development.<sup>1</sup>
7. As a tier 1 local authority under the NPS-UD and the Resource Management (Enabling Housing Supply and Other Matters) Amendment Act 2021 (**Amendment Act**), Hutt City Council is required to amend the Plan to incorporate the Medium Density Residential Standards (**MDRS**) in relevant residential zones, and to give effect to Policies 3 and 4 of the NPS-UD, and use the Intensification Planning Instrument (**IPI**) process to do so.
8. These submissions focus on the Council’s duty to implement Policy 3 in non-residential zones.
9. Policy 3 of the NPS-UD requires district plans to enable intensification in centre zones, within at least a walkable catchment of or adjacent to various centres based on their hierarchy, and within at least a walkable catchment of existing and planned rapid transit stops.
10. Importantly, Policy 3 is focused on ‘intensification’ in particular locations, and not just ‘residential intensification’. Intensification required by Policy 3 is “*to reflect the demand for housing and business use*” within Metropolitan Centres (Policy 3(b)), and to be “*commensurate with the level of commercial activity and community services*” within and adjacent to other centres (Policy 3(d)). Policy 3 also has to be interpreted within the context of the NPS-UD as a whole, including Objective 3 and Policy 2 which support intensification

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<sup>1</sup> NPS-UD, Policy 10(c).

where there is “*high demand for housing or business land in the area*” and to “*provide at least sufficient development capacity to meet expected demand for housing and for business land over the short term, medium term, and long term*”.

11. In changing the District Plan to give effect to Policy 3, the Council may:
  - (a) create new urban non-residential zones or amend existing urban non-residential zones (s77N(3)(a) RMA);
  - (b) modify the requirements in Policy 3 to be less enabling of development only to the extent necessary to accommodate a qualifying matter (s77N(3)(b) RMA); and
  - (c) amend related provisions, including objectives, policies, rules, standards and zones, that support or are consequential on the MDRS or Policies 3 and 4 of the NPS-UD (s80E(1)(b)(iii) RMA).
  
12. Therefore, the scope of PC 56 is broad. It is necessary for the Hearings Panel to consider and assess relief sought in submissions that seek to give effect to Policy 3, or that support or are consequential on the MDRS or Policies 3 or 4. Although there seems to be more of a focus in PC 56 on residential intensification, it is essential that intensification is also enabled within centre and business zones, to support the residential intensification enabled in Hutt City.
  
13. The relief sought by Stride, Investore, Argosy and Oyster will give effect to Policy 3 of the NPS-UD as follows:
  - (a) Policy 3(a) of the NPS-UD requires the Council to enable building heights and density of urban form to realise as much development capacity as possible in the Central Commercial Activity Area (which is equivalent to a city centre zone under the Plan). The proposal under PC 56 to remove maximum building height limits in this Area gives effect to Policy 3(a) and is supported by Stride and Oyster.
  - (b) Policy 3(b) of the NPS-UD requires the Council to enable building heights and density of urban form to reflect demand for housing and business use, and in all cases building heights of at least six storeys, in the Petone Commercial Activity Area (which is equivalent to a

metropolitan centre zone under the Plan). The proposal under PC 56 to remove maximum building height limits in this Area gives effect to Policy 3(b) and reflects the intent of the NPS-UD to enable more businesses to be located in centres and areas of an urban environment that have employment opportunities. Investore and Oyster support this proposal.

- (c) Policy 3(d) of the NPS-UD requires the Council to enable building heights and densities of urban form commensurate with the level of commercial activity and community services within and adjacent to neighbourhood centre zones, local centre zones and town centre zones (or equivalent).
14. The Council Officer rejected some submission points on the basis that they did not have a connection to NPS-UD Policies 3 and 4.<sup>2</sup> This raises a question of whether this part of the submission, and relief sought, are “on” PC 56.
  15. The tests for whether a submission or relief sought are “on” a plan change are well established in the leading decisions of *Clearwater Resort Limited v Christchurch City Council*<sup>3</sup> (**Clearwater**) and *Palmerston North City Council v Motor Machinists Limited*<sup>4</sup> (**Motor Machinists**). The applicable two-limb test is whether:
    - (a) The submission addresses the change to the status quo advanced by the proposed plan change. In other words, the submission must relate to the plan change itself. In assessing this, the High Court has held that one approach to this analysis is considering whether the submission raises matters that should have been addressed in the section 32 report.<sup>5</sup>

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<sup>2</sup> Council Officer’s report on Hutt City Proposed District Plan Change 56: Enabling Intensification in Residential and Commercial Areas (**Officer’s Report**).

<sup>3</sup> *Clearwater Resort Limited v Christchurch City Council* HC Christchurch AP34/02, 14 March 2003.

<sup>4</sup> *Palmerston North City Council v Motor Machinists Limited* [2013] NZHC 1290.

<sup>5</sup> *Ibid* at [81].

- (b) There is a real risk that persons potentially affected by such a change have been denied an effective opportunity to participate in the plan change process.
16. These tests must however be applied within the context of the requirements for an IPI under the RMA, to incorporate the MDRS, give effect to Policy 3, and amend related provisions, including objectives, policies, rules, standards and zones, that support or are consequential on the MDRS or Policies 3 and 4 of the NPS-UD.
17. The Environment Court in *Waikanae Land Company Limited v Heritage New Zealand Pouhere Taonga*<sup>6</sup> has recently observed that it is apparent that the provisions give very wide power to territorial authorities undertaking the IPI process,<sup>7</sup> which is only limited by s80E of the RMA.<sup>8</sup>
18. We address the first limb of these tests in the context of the IPI process and the submission points below:
- (a) Argosy seeks for greater intensification to be enabled in Moera, including applying the High Density Residential Activity Area to the residential properties between 39 Randwick Road and Barber Grove. We consider that granting this relief would give effect to Policy 3(d) of the NPS-UD as these properties are in a residential area that is adjacent to the Moera Suburban Mixed Use Area (which is equivalent to at least a local centre zone), and enabling greater residential intensification would be consistent with the level of commercial activity and community services in the area, as set out in Mr Jeffries' evidence.<sup>9</sup>
- (b) Oyster seeks that the maximum permitted height for 75 Wainui Road (in the General Business Activity Area) be increased to 22m. It is considered that this relief is within the scope of PC 56 as it would enable a level of development that reflects the demand for industrial

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<sup>6</sup> *Waikanae Land Company Limited v Heritage New Zealand Pouhere Taonga* [2023] NZEnvC 056.

<sup>7</sup> *Ibid* at [22].

<sup>8</sup> *Ibid* at [27].

<sup>9</sup> Evidence of Joe Jeffries dated 29 March 2023 at [8.3].

use and employment in proximity to areas of residential intensification, and therefore supports Policy 3 and the application of the MDRS.

- (c) Argosy seeks that the maximum permitted height in the Special Business Activity Area be increased to 22m. The permitted height in the Special Business Activity Area should also be increased to reflect the demand for industrial use and employment in proximity to areas of residential intensification, to support Policy 3 and the MDRS. Mr Jeffries addresses that the 22m height limit is consistent with other Activity Areas and appropriate under PC 56.<sup>10</sup>

19. In respect of the second limb of the test, it is submitted that due to the broad nature of PC 56, the directive requirements of Policy 3, and the public interest and media attention in the intensification plan changes, there has been clear opportunity for the public to understand the potential changes to the Plan and be involved if they wish to. Furthermore, a person could not be considered to have been denied a right to participate in an outcome of PC 56 if it implements the MDRS or gives effect to Policy 3, or supports or is consequential to that relief.
20. Mr Jeffries will address the specific relief sought by the submitters in more detail.

## **NATURAL HAZARDS**

21. The Council has recognised natural hazards as a qualifying matter under PC 56 that makes higher density inappropriate in an area. This is by proposing new Natural Hazard and Coastal Hazard Overlays, to be supported by new objectives, policies and rules.
22. Argosy's submission sought that the risk rankings for the Natural and Coastal Hazard Overlays are deleted, and Stride, Investore, Argosy and Oyster all made various submission points on these Overlays.

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<sup>10</sup> At [10.1].

23. We consider:
- (a) the Natural Hazards and Coastal Hazards Overlays may conflict with the intensification enabled under PC 56 and the Plan needs to provide better guidance on how to reconcile these provisions;
  - (b) the Natural Hazards and Coastal Hazards Overlays do not take a consistent approach to identifying the risk and mitigation of each hazard; and
  - (c) it is not appropriate to apply low, medium and high risk rankings to natural and coastal hazards – PC 56 should take a practical and clear approach to identifying and managing risks.
24. We address these matters in more detail below.

*The Natural Hazards and Coastal Hazards Overlays may conflict with the intensification enabled under PC 56 and the District Plan needs to provide better guidance on how to reconcile these provisions*

25. PC 56 proposes that the Flood Hazard Overlay and Coastal Hazard Overlays apply to a large area within Hutt City, including in particular Petone, Seaview, Morea and Hutt Central. However, PC 56 also enables significant intensification in Hutt City, including the Central Commercial Activity Area, Petone Commercial Activity Area and High Density Residential Area.
26. It is necessary and appropriate to manage the development required to be enabled under Policy 3 of the NPS-UD where land is subject to hazards. However, an informed and deliberate approach should be taken to identifying where land is subject to hazards to an extent that development should not occur, or where land is subject to hazards but these risks can be mitigated. Consideration also needs to be given to the type of hazard, risk it poses, and response to that risk. For example, a different planning response is required where there is certainty that a hazard will occur but gradually overtime (such as sea level rise), or if it is uncertain if the hazard will occur but if it does the effects could be significant (such as a tsunami).
27. The Council has taken a broad brush approach to identifying hazards in PC 56 and imposing corresponding objectives, policies and rules (including applying the same provisions for coastal inundation and tsunami even though



they have different time, risk and response profiles). We also consider that the approach in the new Hazard Chapter is difficult to reconcile with the PC 56 provisions which expressly enable greater development capacity.

28. We have also identified conflicts between the Natural Hazard chapter and existing Plan provisions which are not proposed to be changed by PC 56. For example, the Coastal Hazard Overlay applies to the General and Special Business Activity Areas on the maps, while most of the Coastal Hazard policies and rules do not to apply to these areas. The only hazard provisions that are to apply are Objective 14H1.1 to “avoid or reduce the risk to people, property, and infrastructure from natural hazards and coastal hazards”, and Policy 14H1.1 on levels of risk. It is onerous and unclear to apply this objective and policy in isolation without further policy direction or applicable rules.
29. Attached to Mr Jeffries’ statement of evidence he proposes some minor amendments to Chapter 14H: Natural Hazards. These amendments seek to make the relevant provisions better, but do not address all of the issues we have identified with the hazard provisions. We recommend that the Council consider its approach to natural hazards in the context of provisions in other Activity Areas to ensure they can be reconciled, are workable, and are appropriate relative to the specific hazard and risk response.

*The Natural Hazards and Coastal Hazards Overlays do not take a consistent approach to identifying the risk and mitigation of each hazard*

30. PC 56 identifies risk rankings for how each Natural and Coastal Hazard Overlay identifies a relevant property, and includes objectives, policies and rules which establish an approach to each hazard depending on the risk ranking. We appreciate that this approach is intended to simplify the management of hazards in a district planning context. However, this approach has not been applied consistently, and in any case, does not show an accurate representation of the risks.
31. We will briefly set out the different context to each hazard identified in PC 56, to demonstrate why it is inappropriate to manage hazards through simplified ‘high’, ‘medium’ and ‘low’ rankings.

32. The Wellington Fault Overlay has been applied to identify land within 20m of the latest available map of the Wellington fault line. This is intended to manage development within 20m of the fault because of the risk of permanent ground damage during an earthquake on the Wellington Fault, because this has been estimated to involve up to 4m horizontal movement and up to 0.5m vertical movement.<sup>11</sup> Nicola Litchfield, in her geological hazard evidence on behalf of the Council, notes that “other hazards associated with Wellington Fault ruptures (e.g., subsidence, landslides, liquefaction) should be addressed in other ways because they may require different policies and mitigation measures.”<sup>12</sup>
33. The Flood Hazard Overlay has been applied to identify land within a stream corridor, overland flowpath and inundation area in the event of a 1:100 year inundation event and 1m sea level rise.
- (a) The land within a stream corridor has been identified as having a ‘high’ hazard ranking. Alistair Osbourne of Wellington Water, in evidence provided on behalf of the Council, identifies that this includes open water courses in urban areas, alongside contributing branches in the upper reaches of stormwater catchments.<sup>13</sup> He suggests this hazard can be managed by including a no-build buffer of 5m either side of the stream centreline.<sup>14</sup>
- (b) The land subject to overland flowpaths has been identified as having a ‘medium’ hazard ranking. Mr Osbourne identifies that these are flowpaths that convey stormwater when the pipe or stream network capacity is exceeded or blocked.<sup>15</sup> He comments that risks can be managed by obtaining detailed investigations to ensure that buildings do not impede the flow of water and to prevent property damage.<sup>16</sup>
- (c) The land in inundation areas has been identified as having a ‘low’ hazard ranking. Mr Osbourne identifies that this includes areas

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<sup>11</sup> Hutt City Council *Proposed Plan Change 56: Enabling Intensification in Residential and Commercial Areas – Summary of Information for Natural Hazard Areas* at 1.

<sup>12</sup> Statement of evidence of Nicola Litchfield dated 3 March at [18].

<sup>13</sup> Statement of evidence of Alistair Osbourne dated 3 March 2023 at [21.1].

<sup>14</sup> At [21.1].

<sup>15</sup> At [21.1].

<sup>16</sup> At [21.2].

subject to low velocity flood extents which have ponding deeper than 50mm, and can be managed by specifying minimum floor levels for habitable buildings.<sup>17</sup>

34. The Coastal Hazard Overlay – Inundation has been applied based on one sea level rise scenario mapped by NIWA.
- (a) The coastal inundation is mapped on the best available information, including sea level rise projections, and is intended to inform adaptive planning.<sup>18</sup>
  - (b) The Introduction to Chapter 14F (amendment 402) states that the ‘high’ hazard ranking has been applied to the existing coastal inundation extent with a 1:100 year storm; the ‘medium’ hazard ranking has been applied to the coastal inundation extent with 1.5m relative sea level rise and a 1:100 year storm tide and wave set up; and a ‘low’ hazard ranking has not been used.<sup>19</sup> The explanations for the rankings is only identified in the Introduction, and not the maps.
  - (c) Scott Stephens of NIWA, in evidence provided on behalf of the Council, identified that five scenario maps were provided to Council based on New Zealand Coastal Policy Statement (2010) recommendations to identify and avoid coastal hazards over at least the next 100 years and the Ministry for the Environment’s Interim guidance on the use of new sea-level rise projections.<sup>20</sup> He recommends that the four scenario maps which map inundation scenarios to 2030 should be included in the District Plan.<sup>21</sup>
  - (d) Mr Stephens also commented that “the currently used nomenclature of “high” and “medium” coastal hazard area is confusing.” He suggested that appropriate descriptive names could be used to describe the overlays according to the relevant scenario.<sup>22</sup> For

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<sup>17</sup> At [21.3].

<sup>18</sup> At [47].

<sup>19</sup> This is consistent with Scott Stephens’ understanding at [37] of his statement of evidence dated 2 March 2023.

<sup>20</sup> Statement of evidence of Scott Stephens dated 2 March 2023 at [18].

<sup>21</sup> At [18(d)].

<sup>22</sup> At [18(e)]. Note that ‘RSLR’ means ‘relative sea level rise’.

example he states “the high layer could alternatively be described as a “no sea-level rise” scenario and the medium layer as a “sea-level rise in the year 2130” scenario”, which would remove the “subjective judgement” of ranking the hazards.<sup>23</sup>

35. The Coastal Hazard Overlay – Tsunami has been applied based on maps prepared by GNS Science.
- (a) We understand that a tsunami is a low-probability, high-impact event, and the risk can be mitigated by controlling vulnerable uses and requiring evacuation routes.
  - (b) The Introduction to Chapter 14F (amendment 402) states that the ‘high’ hazard ranking has been applied to the 1:100 year inundation event; the ‘medium’ hazard ranking has been applied to the 1:500 year inundation event; and the ‘low’ hazard ranking has been applied to the 1:1000 year inundation event, with all scenarios also including 1m sea level rise.<sup>24</sup> The explanations for the rankings is only identified in the Introduction, and not the maps.
  - (c) David Burbidge of GNS Science assisted to prepare tsunami maps which informed PC 56. In evidence provided on behalf of the Council in response to Argosy’s submission, he stated the scope of GNS Science’s report was “to produce probabilistic tsunami inundation for three annual probabilities of exceedance. This modelling does not consider the potential mitigation of tsunami risk as a factor. The hazard rankings were not provided in my report and [he is] not qualified to comment on the appropriateness of the land use provisions.”<sup>25</sup>
36. As set out above, the factors which contribute to identifying each hazard and mitigating the risks posed by each hazard are specific to that hazard.
37. Inconsistent approaches have been taken to identify which hazard scenarios should be mapped across the Flood Hazard Overlays and the Coastal

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<sup>23</sup> Statement of evidence of Scott Stephens dated 2 March 2023 at [42].

<sup>24</sup> This is consistent with David Burbidge’s understanding at [13] of his statement of evidence dated 3 March 2023.

<sup>25</sup> Statement of evidence of David Burbidge dated 3 March 2023 at [15].

- Hazard – Inundation and Tsunami Overlays, including a different sea level rise scenario. This makes it difficult to get a clear understanding of the risk and therefore appropriate response for each hazard.
38. The hazard scenarios have then been ranked into low, medium and high risks despite an inconsistent methodology taken to identifying those scenarios. It is also not clear why the hazard rankings have been applied to each scenario in the Coastal Hazards Overlay. It seems that the hazard rankings have been applied from the Council planning team without input from the relevant experts, based on the statements of evidence referenced above.
  39. The inconsistent approach to identifying and ranking hazard risks makes the PC 56 maps confusing and misleading. PC 56 may be interpreted as implying that there is a low, medium or high risk of each hazard event occurring and affecting the land subject to that overlay. This is not the case.
  40. In his planning evidence, Mr Jeffries proposes that simplifying hazards into low, medium and high risk rankings should only be done where every effort has been made to treat the different natural hazards consistently.<sup>26</sup>
  41. It is important that the Plan maps are clear because they inform existing and potential property owners and occupiers of the risk profile of the land. While the maps should not be viewed in isolation, as set out in PC 56, the maps do not give a clear or accurate understanding of the risks of those hazards, nor do they show all of the appropriate information available (in terms of the sea level rise projections).
  42. We consider that it would be more appropriate for the Council to delete the risk rankings and instead use labels that accurately identify and describe the hazard scenario. This would then inform an approach to objectives, policies and rules which appropriately manage / mitigate each risk. We also consider that all of the sea level rise projection maps should be available in the Plan maps.

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<sup>26</sup> Statement of Evidence of Joe Jeffries dated 29 March at [11.9].

*It is not appropriate to apply low, medium and high risk rankings to natural and coastal hazards – the Council should take a practical and clear approach to identifying and managing risks*

43. It is important that the approach taken to imposing Natural Hazards and Coastal Hazards Overlays in PC 56 is considered in context of the risks and timing of those risks.
44. Severe weather events are becoming more frequent, and it is important that steps are taken to plan for the future in light of the impacts of climate change. However, it is important that in doing so local authorities make decisions about their long-term approach to managing hazards – whether that is adaptation, mitigation or both. For example, a decision must be made on whether retreat is likely in Petone or whether adaptation will be needed. The District Plan is one element of the Council's approach to managing hazards, but infrastructure and funding decisions will also need to be made. National direction is also required, and we are waiting for an important part of the puzzle in the Climate Adaptation Act.
45. We appreciate it is difficult to provide a clear and workable planning response to natural hazards at this time (and under the urgency of the IPI process). Equally, it is also necessary to provide the best available information in the Plan and an appropriate immediate response to the risks from hazards.
46. However, it is also important that PC 56 does not give rise to an onerous or unnecessary planning response. For example, some of the hazard scenarios are mapped based on a 2130 sea level rise scenario, however some development (e.g. additions to existing buildings) may not be in place in 2130. Therefore, it is non sensical to require a planning response in a building that will not be present when the hazard arises. The planning response needs to take into account the likely lifespan of development relative to the potential of the hazard.
47. We recommend that to address the concerns raised in the submissions, that the following amendments are made:
  - (a) the specific wording changes proposed by Mr Jeffries;

- (b) removing the hazard risk classifications of high, medium and low and replacing with a description of the hazard scenario; and
  - (c) including all four of the coastal inundation scenarios in the Plan maps.
48. We also note that the full Plan review is currently underway, and this will be an opportunity to consider the hazard provisions in a more comprehensive way.

### **CONCLUSION**

49. Stride, Investore, Argosy and Oyster submit that their submissions and the relief sought give effect to Policy 3 of the NPS-UD and seek a clearer and more appropriate framework for managing natural and coastal hazards.

**DATED** at Auckland this 12<sup>th</sup> day of April 2023



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**Bianca Tree / Amy Dresser**

Counsel for Stride Investment Management Limited, Investore Property Limited, Oyster Management Limited and Argosy Property No 1 Limited