

Before Independent Hearings Commissioners At Wellington

Under the Resource Management Act 1991 (the Act)

In the matter of Applications for resource consents, and a Notice of Requirement for a Designation by Wellington Water Limited on behalf of Upper Hutt City Council, for the construction, operation and maintenance of the structural flood mitigation works identified as the Pinehaven Stream Improvements Project.

Outline of legal submissions for Wellington Water Limited

Dated 3 August 2020

大成 DENTONS KENSINGTON SWAN

89 The Terrace
PO Box 10246
Wellington 6143

P +64 4 472 7877
F +64 4 472 2291
DX SP26517

Solicitor: N McIndoe/ L D Bullen

E nicky.mcindoe@dentons.com/liam.bullen@dentons.com

May it please the Commissioners:

1 Wellington Water's Case

- 1.1 These submissions relate to a Notice of Requirement ('**NOR**') for Designation and associated resource consent applications for the construction, operation and maintenance of the structural flood mitigation works identified as the Pinehaven Stream Improvements Project ('**the Project**'). Wellington Water Limited ('**WWL**') has lodged the resource consent applications and NOR on behalf of Upper Hutt City Council ('**UHCC**').
- 1.2 Pinehaven Stream ('**the Stream**') has experienced serious flooding issues for many decades, most notably in 1976 when a storm in excess of a 100-year rainfall event caused severe flooding in Pinehaven and Silverstream.¹ The flood caused extensive damage to many homes and businesses.²
- 1.3 In order to respond to these ongoing risks, Greater Wellington Regional Council ('**GWRC**') and UHCC undertook a flood management planning process. This process involved quantifying the flood hazard and key contributing factors, identifying management options, and extensive consultation with the public.³
- 1.4 The response decided upon through the Floodplain Management Plan ('**FMP**') has two parts:
- a Changes to the Upper Hutt City Plan to include planning controls on development in the catchment (PC42);⁴ and
 - b The physical stream improvement works that comprise this Project.
- 1.5 The Project works will address flooding issues by improving the capacity and functioning of the Stream to convey a 4% AEP⁵ water level (in other words, a 1 in 25 year flood event).⁶ This will also contribute to the management of flood risk to habitable floor levels up to the predicted peak 1 in 100 year flood level.⁷ Overland flow paths will also be integrated into the wider stormwater network.⁸ Overall, the flood hazard risks to people and property will be substantially reduced, with

¹ Fountain EIC, para 5.2.

² Fountain EIC, para 5.3.

³ Fountain EIC, para 5.7.

⁴ Fountain EIC, para 5.9.

⁵ 'Annual exceedance probability', i.e. the statistical probability of an event occurring in any given year.

⁶ Fountain EIC, para 5.16.

⁷ i.e. a 1% AEP flood event, Fountain EIC, para 6.1

⁸ Kinley EIC, para 10.1e.

consequential benefits to health, safety and wellbeing. Flooding will be less frequent and less severe.⁹

Almost total agreement with UHCC and GWRC

- 1.6 There is almost total agreement between the witnesses for WWL, GWRC and UHCC. Joint witness statements helpfully record agreement on:
- a Activity status, and relevant plan provisions (including rules);¹⁰
 - b The environment which will be affected by the Project,¹¹ (although the terrestrial ecologists disagree about the ecological value of 0.25ha of native dominated riparian vegetation which will be affected by the Project¹²);
 - c That increased runoff from potential new development in the catchment is not relevant to the application, as this will be managed through the hydraulic neutrality provisions of PC42;¹³
 - d The flood model being fit for purpose (although Mr Hall and Mr Horrell disagree that the hydrology is fit for use)¹⁴;
 - e The nature and scale of effects, except in relation to some aspects of terrestrial ecology;¹⁵
 - f The acceptability of effects, overall;¹⁶
 - g Compliance with sections 105 and 107;¹⁷
 - h Consistency with Part 2 of the RMA;¹⁸
 - i The designation being reasonably necessary to achieve the Project objectives;¹⁹
 - j Alternatives being adequately considered;²⁰ and

⁹ Fountain EIC, para 7.2.

¹⁰ Joint Witness Statement – Planning, para 2.1(f), (g), (h) and (i).

¹¹ Joint Witness Statement – Planning, para 2.1(a); Joint Witness Statement – Freshwater Ecology, paras 2.1(a) and 4.1; Joint Witness Statement – Erosion and Sediment Control, para 1.3(a) (page 2).

¹² Joint Witness Statement – Terrestrial Ecology – para 2.1(a).

¹³ Joint Witness Statement – Hydrology and Flood Modelling (30 July 2020), para 3.1(d); Joint Witness Statement – Planning, para 2.1(a)(xii).

¹⁴ Joint Witness Statement – Hydrology and Flood Modelling (30 July 2020), para 3.2(a) and (c).

¹⁵ Joint Witness Statement – Planning, para 2.1(k); Joint Witness Statement – Terrestrial Ecology, paras 2.1(a)(iv) and (v); Joint Witness Statement – Freshwater Ecology, paras 2.1(b) and (c) and 4.1.

¹⁶ Joint Witness Statement – Planning, para 2.1(k).

¹⁷ Joint Witness Statement – Planning, para 2.1(l); Joint Witness Statement – Erosion and Sediment Control, para 1.3(e) (page 2).

¹⁸ Joint Witness Statement – Planning, para 2.1(o).

¹⁹ Joint Witness Statement – Planning, para 2.1(e)(i).

²⁰ Joint Witness Statement – Planning, para 2.1(e)(ii); Joint Witness Statement – Freshwater Ecology, para 4.1(d).

- k Most of the proposed conditions.

Areas of disagreement

- 1.7 The areas of disagreement between WWL, GWRC, UHCC and submitters are limited. In summary:
- a WWL opposes the winter works condition proposed by GWRC²¹ because of the additional costs and effects it could cause, and because it is *ultra vires*.
 - b **Dr Forbes** and UHCC's terrestrial ecology expert, Ms Paler, had two areas of disagreement at expert conferencing:
 - i Whether any replacement planting is necessary to be carried out to compensate for the removal of native riparian vegetation;²² and
 - ii Whether a condition is required to prevent tall trees being planted close to residential dwellings.²³
 - c As a result of expert witness conferencing, WWL now seeks amendments to the better enable an adaptive management approach to be taken to turbidity and suspended sediment concentrations ('**SSC**');
 - d Several submitters raise concerns with regards to vegetation.²⁴ The evidence for WWL is that these effects will be minor and appropriately mitigated.²⁵
 - e The submission and evidence of Save Our Hills raises a number of issues relating to flood modelling. In summary:
 - i Save Our Hills and its experts consider that the flood frequency curves on which the Project is based overestimate flood peaks and runoff volumes.²⁶ This would mean the Project is over-engineered; and
 - ii Save Our Hills considers that the model used for the Project has not been adequately calibrated and validated.²⁷
 - f Save Our Hills is concerned that if future development occurs within the catchment, those developers would not be required to undertake additional

²¹ GWRC Section 42A Report, Appendix 2, conditions 40 and 41.

²² Joint Witness Statement – Terrestrial Ecology, para 5.1.

²³ Joint Witness Statement – Terrestrial Ecology, para 5.1.

²⁴ Deborah Griffiths, Karyn Mills

²⁵ Forbes EIC, para 8.2 – 8.3, Compton-Moen EIC, para 9.2-9.5, James EIC, para 12.3 – 12.6.

²⁶ Hall EIC, para 4; Joint Witness Statement – Hydrology and Flood Modelling, para 3.2(a).

²⁷ Ross EIC, paras 7.1, 10.5; Joint Witness Statement – Hydrology and Flood Modelling, para 3.2(b).

stormwater mitigation as the Stream upgrade would already provide enough flow for that development.²⁸

1.8 WWL submits that these concerns are unfounded. **Mr Kinley** and Mr Law agreed at expert witness conferencing that the flood modelling is fit for use for the purposes of this application.²⁹ This is because:

- a The hydrological model prepared by Mr Hall for Save Our Hills is materially different to the hydrological model prepared for this Project, as outlined in the evidence of **Mr Kinley**;³⁰ and
- b The flood model has been designed to respond to flooding expected within the catchment and has been validated and calibrated.³¹ The hydrological model is fit for purpose.³² It does not consider future development which may occur as this is neither a permitted activity nor have consents been granted. Therefore, flood modelling for the Project has accurately sized the effects.

2 Scope of legal submissions

2.1 These submissions will address:

- a Background to the Project;
- b A description of the Project;
- c The statutory framework;
- d Assessment of effects on the environment;
- e Statutory instruments;
- f Matters raised in submissions;
- g Modifications sought to the designation footprint;
- h Response to the Hearing Panel's Minute 2;
- i Proposed conditions;
- j Part 2 of the RMA; and

²⁸ GWRC Section 42A Report, Appendix 5.

²⁹ Joint Witness Statement – Flood Modelling, para 3a.

³⁰ Kinley EIC, para 11.5.

³¹ Kinley EIC, paras 8.5 – 8.7.

³² Joint Witness Statement – Hydrology and Flood Modelling dated 30 July 2020, para 3.2(c)(ii).

- k The evidence to be presented in support of the NOR and resource consent applications.

3 Background to the Project

Wellington Water Limited

- 3.1 WWL is a shared-service council-controlled organisation jointly owned by the Wellington, Hutt, Upper Hutt, and Porirua City Councils and GWRC. WWL manages drinking water, wastewater, and stormwater services on behalf of these five councils.
- 3.2 Although UHCC is the requiring authority under the RMA and has overall financial responsibility for the Project,³³ UHCC has delegated the development of the Project to WWL, as a council controlled organisation. This includes responsibility for the NOR materials and hearing process, as well as the construction, operation and maintenance of the Project once approved.³⁴

Pinehaven Stream

- 3.3 The Pinehaven Stream flows from the upper catchment in the southern Pinehaven Hills, to its confluence with Hulls Creek in the north.³⁵ The Pinehaven Stream channel is primarily located within private property, particularly in the upper catchment. The channel is mostly narrow with vegetated banks while there are also many structures located within and above the Stream, including private bridges and culverts.³⁶
- 3.4 The Project area is located in the lower catchment of the Pinehaven Stream and includes the beds and banks of the Pinehaven Stream for a length of approximately 1,200 metres starting from the Pinehaven Reserve (at the upstream end) and extending to the inlet where Pinehaven Stream is piped to the Hulls Creek confluence (at the downstream end).³⁷
- 3.5 The three reaches are (from north to south or downstream to upstream):³⁸
 - a Reach 1 Lower (48 Whitemans Road to Sunbrae Drive);
 - b Reach 2 Mid (Sunbrae Drive to Pinehaven Road); and

³³ As explained in Mr Fountain's EIC at para 4.4.

³⁴ Fountain EIC, para 4.4.

³⁵ AEE, para 5.1.2.

³⁶ AEE, para 5.1.2.

³⁷ Fountain EIC, para 5.12.

³⁸ Skowron EIC, para 5.1.

c Reach 3 Upper (upstream of 2A Freemans Way to the Pinehaven Reserve).

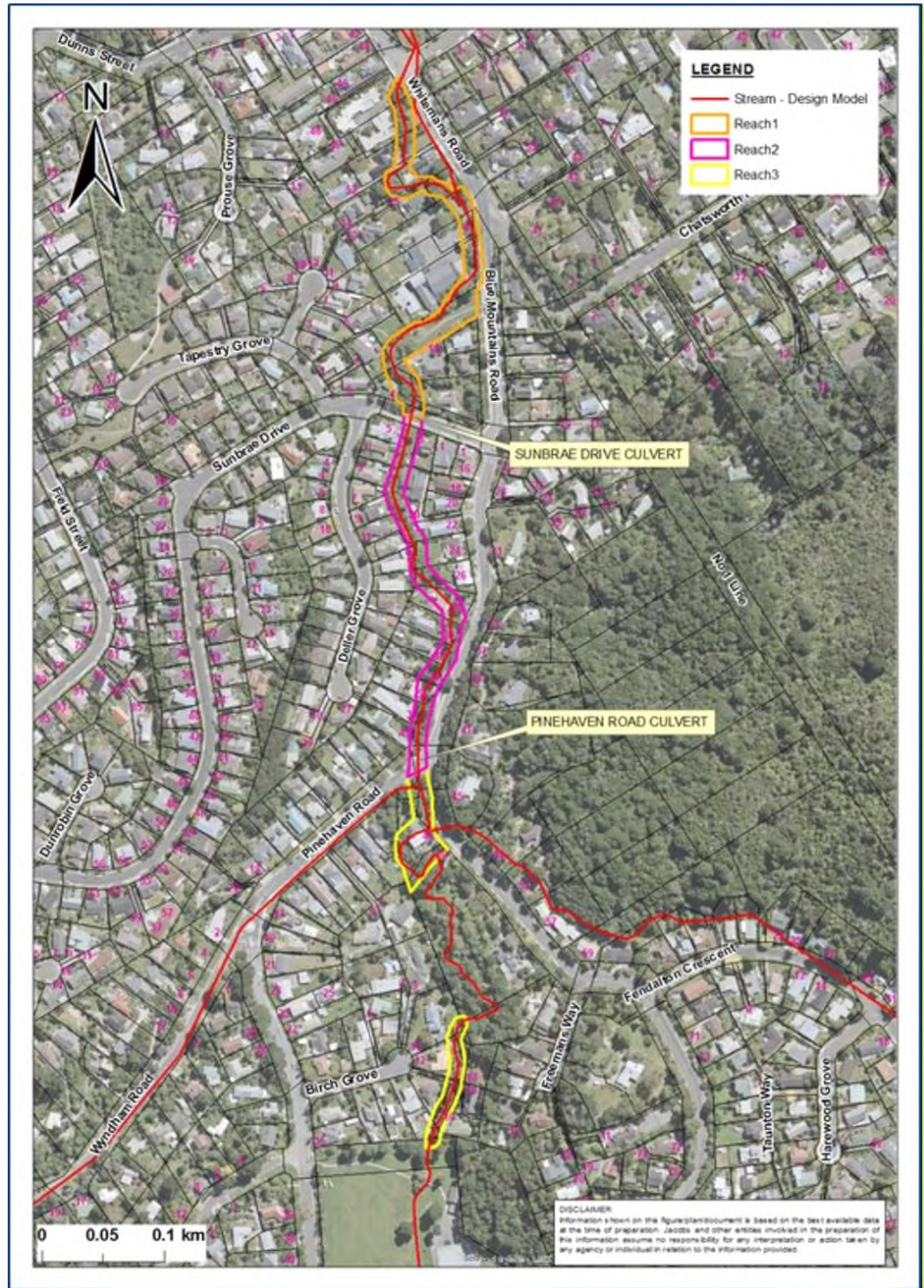


Figure 1: Pinehaven Stream Reaches

Need for the Project

Stream capacity for a 1 in 25 year flood event

- 3.6 The current Pinehaven Stream channel is subject to flooding risks with much of the channel having less than a 5-year flow capacity, meaning that overtopping is likely to occur in any rainfall event greater than the 1-in-5 year level.³⁹ The flow capacity of the Stream needs to be increased to reduce the potential for flooding of dwellings in the Pinehaven community.⁴⁰

Reducing the risk of physical injury or harm

- 3.7 Flooding carries the risk of physical harm to people as well as causing stress and worry. This can continue for long periods of time after the event has taken place.⁴¹

Integrating overland flow paths into the wider stormwater network

- 3.8 The Project will reduce the frequency of flooding but will not eliminate the hazard. Securing overland flow paths will help manage the residual flood risk that remains post construction.⁴²

Efficient and effective construction

- 3.9 The physical works will impact individual landowners and it is important to minimise this disruption.⁴³ Also, the Project needs to be designed to allow for easy maintenance in the longer term to help ensure that the capacity of the stream remains at a 1:25 flood event level.⁴⁴

Project objectives

- 3.10 The identified need for physical works to improve the functioning and capacity of the Stream has driven the development of the Project objectives. These are:⁴⁵

Objective 1: To provide improved capacity and effective and efficient functioning stormwater infrastructure in the stream and its tributaries to a 4% AEP (1 in 25 year return period) flood event level, which will also

³⁹ Fountain EIC, para 5.15, SKM report, Pinehaven Stream Flood Hazard Assessment: Flood Hazard Investigation Report: Volume 1, May 2010.

⁴⁰ AEE, para 4.1.

⁴¹ AEE, para 10.6.7.

⁴² Fountain EIC, para 6.7.

⁴³ Fountain EIC, para 6.9.

⁴⁴ Fountain EIC, para 6.9.

⁴⁵ Fountain EIC, para 6.1.

contribute to the management of flood risk to habitable floor levels up to the predicted peak 100 year flood level.

Objective 2: To reduce the risk of injury or harm from fast or deep flowing water in Pinehaven Stream and its tributaries.

Objective 3: To integrate overland flow paths into the wider stormwater network.

Objective 4: To enable efficient and effective construction and ongoing maintenance of all structures and stream improvements.

4 The Pinehaven Stream Improvements Project

4.1 The details of the physical stream works which comprise the Project are described in **Mr Skowron's** evidence⁴⁶ and shown in the updated General Arrangement Plans dated 11 June 2020. Broadly, the works comprise:

- a Replacement (and consolidation) of 3 private vehicular access bridges;
- b Replacement of 4 private pedestrian bridges;
- c Grading the sides of the stream to increase stream capacity;
- d Scour reduction and protection measures; and
- e Works to secure overland flow paths and secondary flow paths.

4.2 These works and the ongoing operation and maintenance of the Project will be authorised by the following approvals under the RMA:

- a A notice of requirement for a designation to address the restrictions on the use of land imposed by section 9(3) RMA;
- b An Outline Plan waiver deferred to the conclusion of the designation process;⁴⁷
- c Resource consents from GWRC to authorise:
 - i Land uses pursuant to section 13(1) RMA;
 - ii Water permits pursuant to section 14(2) RMA; and

⁴⁶ Skowron EIC, paras 5.6 – 5.17.

⁴⁷ Joint Witness Statement – Planning dated 20 July 2020, para 2(d)(ii)

iii A discharge permit pursuant to section 15(1) RMA.

4.3 Given the extent to which these authorisations overlap, their effects have been assessed in an integrated way, and they will be jointly managed by the same management plans for the whole Project.

5 Statutory framework – notice of requirement

5.1 Section 168A(3) provides that, when considering a requirement and any submissions received, a territorial authority must, subject to Part 2, consider the effects on the environment of allowing the requirement, having particular regard to:⁴⁸

(a) any relevant provisions of—

(i) a national policy statement:

(ii) a New Zealand coastal policy statement:

(iii) a regional policy statement or proposed regional policy statement:

(iv) a plan or proposed plan; and

(b) whether adequate consideration has been given to alternative sites, routes, or methods of undertaking the work if—

(i) the requiring authority does not have an interest in the land sufficient for undertaking the work; or

(ii) it is likely that the work will have a significant adverse effect on the environment; and

(c) whether the work and designation are reasonably necessary for achieving the objectives of the requiring authority for which the designation is sought; and

(d) any other matter the territorial authority considers reasonably necessary in order to make a decision on the requirement.

5.2 Section 7 of these legal submissions discusses the Project's effects, and section 8 discusses planning instruments. 'Other matters' are discussed in section 6 as they are also relevant to the resource consent applications. Section 13 of these legal submissions discusses Part 2 of the Act, and concludes that the Project will achieve the purpose of the Act. Issues raised in submissions are discussed at section 9 and by relevant witnesses.

⁴⁸ Resource Management Act 1991, section 168A(3).

5.3 This section addresses the remaining NOR considerations set out in section 168A(3), namely:

- a Reasonable necessity to achieve the Project objectives; and
- b Adequate consideration of alternatives.

Reasonable necessity to achieve the objectives

5.4 The reasonable necessity of the Project for achieving the objectives is discussed at Section 12 of the UHCC Section 42A Report, and WWL agrees with that analysis.

5.5 It is submitted that the work and designation are reasonably necessary to achieve the Project objectives set out in paragraph 3.10 above. Consistent with criteria considered in previous cases:⁴⁹

- a there is a nexus between the works proposed and the achievement of UHCC's objectives for which the designation is sought;
- b the spatial extent of land required is justified in relation to those works; and
- c the designated land is able to be used for the purpose of achieving the UHCC's objectives for which the designation is sought.

5.6 The evidence of **Mr Fountain**, **Mr Skowron** and **Ms Anderson**⁵⁰ describes how the Project works, and also the designation as a planning tool, are reasonably necessary to achieve the Project objectives:

- a The extent of the works to widen the channel have been specifically designed, using the flood modelling outlined in **Mr Kinley's** evidence, to generally achieve the objectives of improving the capacity and functioning of the Stream in order to cope with a 4% AEP flood event.⁵¹ In some locations, design refinement has allowed the designation to be modified, and this is discussed later in these submissions.

⁴⁹ *Re Queenstown Airport Corporation Ltd* [2017] NZEnvC 46 at [9]. While this criteria is in the context of section 171(1)(c), this is equally applicable to section 168A(3), due to the wording being the same in the two subsections.

⁵⁰ Fountain EIC, paras 6.1 – 6.11., Skowron EIC, paras 5.1 – 5.25., Anderson EIC, paras 8.3 – 8.6.

⁵¹ Kinley EIC, para 10.1b. Modelling shows that with only one exception (the section between, and including, 48 Blue Mountains Road and 2A Freemans Way) the proposed design will contain the 4% AEP flood event within the main stream channel.

- b These same measures will inevitably also contribute to the management of flood risk to habitable floor levels up to the predicted peak 100 year flood level.⁵²
- c The evidence of **Mr Fountain** explains why these measures and outcomes are necessary to reduce the risk of injury or harm from fast and deep flowing water.⁵³
- d As outlined by **Mr Fountain** and **Mr Skowron**, the works will integrate and secure overland and secondary flow paths by removing obstacles, shaping the surrounding land form and installing sumps.⁵⁴
- e Finally, features of the works such as replacing blockage prone crossings, and installing structures to improve channel capacity are reasonably necessary to enable efficient and effective construction and ongoing maintenance of the structures and stream improvements.⁵⁵
- f The designation (as a planning tool) is reasonably necessary because it will:
 - i Authorise the construction and ongoing operation and maintenance of the flood control scheme;
 - ii Allow the required land to be identified in the District Plan, to provide a clear indication of the intended land use;
 - iii Provide a more efficient mechanism than a resource consent because it enables aspects of detailed design to be finalised through the outline plan of works, as agreed by the UHCC Planner;⁵⁶ and
 - iv Be more appropriate than a plan change altering the zoning of the site.

5.7 At some locations, the Project designation will be second in time (i.e. it will overlap with existing designations).⁵⁷ The requiring authority for both overlapping designations will be UHCC. UHCC will need approval from itself to undertake

⁵² [A comparison of the areas likely to be inundated during a 100 year flood event with and without the works is provided in the AEE, para 10.3 and discussed in the evidence of Mr Kinley, para 10.1.

⁵³ Fountain EIC, para 6.6.

⁵⁴ Fountain EIC, paras 6.7-6.8, Skowron EIC, para 6.24.

⁵⁵ Fountain EIC, paras 6.9-6.10.

⁵⁶ UHCC Section 42A Report, para 11.15. In addition to the reasons in the UHCC Section 42A Report, the designation also prevents work from occurring which would stop or hinder the designated work.

⁵⁷ UHCC Section 42A Report, para 19.1.

works at these locations.⁵⁸ WWL agrees with the UHCC Section 42A Report conclusion that the existing designations will not hinder the Project.⁵⁹

- 5.8 With respect to the spatial extent of the designation, it is proposed that once construction is complete the designation will be partially withdrawn. This will limit the designation to the land that is required for the long-term operation, maintenance and mitigation of effects of the Project.⁶⁰

Consideration of alternatives

- 5.9 In UHCC does not have an interest in land sufficient for undertaking the work, and so the Commissioners are required by section 168A(3)(b) of the RMA to have regard to:

Whether adequate consideration has been given to alternative sites, routes or methods of undertaking the work.

- 5.10 'Adequate consideration' does not mean exhaustive or meticulous consideration, but means that the consideration must be sufficient or satisfactory and will depend on the circumstances.⁶¹ The measure of adequacy will depend on the extent of the land affected by the designation: the greater the impact on private land, the more careful the assessment of alternative sites not affecting private land will need to be.⁶² Similarly, the greater the adverse effects, the more rigorous the assessment of alternatives that may have lesser effects may be required (but this is not necessarily a strict requirement in every case).⁶³
- 5.11 WWL (UHCC) is not required to demonstrate that it has considered all possible alternatives, nor that it has selected the best of all available alternatives.⁶⁴ In particular, it is not required to eliminate alternatives that are clearly speculative or suppositious,⁶⁵ nor is it required to consider every alternative that is non-suppositious with potentially reduced effects.⁶⁶ It is for the requiring authority to establish an appropriate range of alternatives and properly consider them.⁶⁷

⁵⁸ RMA, s177(1)(a). The UHCC Section 42A Report at para 19.2 suggests that if approval is not received from the requiring authority in to carry out works at these overlapping locations then resource consents will be required. This is incorrect, approval will be required regardless, see section 177 RMA.

⁵⁹ UHCC Section 42A Report, para 19.4.

⁶⁰ Haylock EIC, para 5.18.

⁶¹ *NZ Transport Agency v Architectural Centre Inc* [2015] NZHC 1991 ('*Basin Bridge*'), at [137].

⁶² *Queenstown Airport Corporation Limited v Queenstown Lakes District Council* [2013] NZHC 2347, at [97].

⁶³ *NZ Transport Agency v Architectural Centre Inc* [2015] NZHC 1991, at [140] - [142].

⁶⁴ *NZ Transport Agency v Architectural Centre Inc* [2015] NZHC 1991, at [154].

⁶⁵ *Queenstown Airport Corporation Limited v Queenstown Lakes District Council* [2013] NZHC 2347, at [122].

⁶⁶ *NZ Transport Agency v Architectural Centre Inc* [2015] NZHC 1991, at [156].

⁶⁷ *NZ Transport Agency v Architectural Centre Inc* [2015] NZHC 1991, at [154].

- 5.12 Alternatives have been considered for the Project at different stages and levels, including:
- a Alternative responses to the flood hazard, using a multi criteria analysis and community consultation process, were addressed through the Pinehaven FMP process, as outlined in the evidence of **Mr Fountain**.⁶⁸
 - b Alternative designs were considered both before the AEE was lodged and after, as outlined in the evidence of **Mr Skowron**.⁶⁹
 - c Alternative construction methods were considered, as outlined in the evidence of **Mr Haylock**. This included consideration of construction from outside of the stream vs construction inside the stream.⁷⁰
- 5.13 Overall, the evidence for WWL demonstrates that the consideration of alternatives for the Project has been thorough, rational and robust, and meets the requirements of section 168A. The UHCC Section 42A Report concludes that WWL has used a robust methodology to assess the various alternatives.⁷¹ The Section 42A Report also looks at four alternative options and, for each of them, concludes that the NOR and associated flood management works are more appropriate to achieve the outcomes sought.⁷²

6 Statutory framework – resource consents

6.1 Section 104 provides that, when considering an application for a resource consent and any submissions received, the consent authority must, subject to Part 2, have regard to:⁷³

(a) Any actual and potential effects on the environment of allowing the activity; and

(ab) Any measure proposed or agreed to by the applicant for the purpose of ensuring positive effects on the environment to offset or compensate for any adverse effects on the environment that will or may result from allowing the activity; and

(b) any relevant provisions of--

(i) a national environmental standard:

(ii) other regulations:

⁶⁸ Fountain EIC, para 5.19.

⁶⁹ Skowron EIC, paras 6.1 – 6.32.

⁷⁰ Haylock EIC, paras 6.1 – 6.8.

⁷¹ UHCC Section 42A Report, para 11.2.

⁷² UHCC Section 42A Report, para 11.3 – 11.15.

⁷³ Section 104(1).

(iii) a national policy statement:

(iv) a New Zealand coastal policy statement:

(v) a regional policy statement or proposed regional policy statement:

(vi) a plan or proposed plan; and

(c) any other matter the consent authority considers relevant and reasonably necessary to determine the application.

6.2 The Project's effects, planning instruments, Part 2 RMA, and matters raised in submissions are addressed in sections 7, 8, 13 and 9 of these legal submissions (respectively).

6.3 This section of the legal submissions addresses 'other matters' (relevant to both the NOR and resource consent applications) and the other statutory considerations that are relevant to the resource consents, being sections 105 and 107 RMA.

'Other matters'

6.4 The Project is identified within the UHCC Long Term Plan ('LTP') as a key 'business as usual' infrastructure activity.⁷⁴ The UHCC Infrastructure Strategy which forms part of the LTP identifies that the UHCC's policy is to provide flood protection to a design standard of meeting a 1 in 25 year flood event if there is a secondary flow path and 1 in 100 year flood event level if there is no secondary flow path.⁷⁵ The Project is consistent with and will contribute to achieving the desired level of service for stormwater activity in the LTP and UHCC Infrastructure Strategy, as outlined in the evidence of **Ms Anderson**.⁷⁶

6.5 'Other matters' discussed and agreed upon in the Joint Witness Statement – Planning were the FMP, the overlapping of designations, the Port Nicholson Block (Taranaki Whānui ki Te Upoko o Te Ika) Claims Settlement Act 2009 and the Ngāti Toa Rangatira Claims Settlement Act 2014.

Section 105 – matters relevant to discharge applications

6.6 Section 105 of the RMA sets out matters relevant to certain applications, and states that:

⁷⁴ UHCC "Long Term Plan 2018-2028" <<https://www.upperhuttcity.com/Your-Council/Plans-policies-bylaws-and-reports/Long-Term-Plan>> pg 19. Total cost at preliminary design stage of \$18.22 million.

⁷⁵ UHCC "Long Term Plan 2018-2028": Infrastructure Strategy, pgs.104-149 <https://www.upperhuttcity.com/Your-Council/Plans-policies-bylaws-and-reports/Long-Term-Plan>.

⁷⁶ Anderson EIC, para 11.3.

(1) If an application is for a discharge permit or coastal permit to do something that would contravene section 15 or section 15B, the consent authority must, in addition to the matters in section 104(1), have regard to—

(a) the nature of the discharge and the sensitivity of the receiving environment to adverse effects; and

(b) the applicant's reasons for the proposed choice; and

(c) any possible alternative methods of discharge, including discharge into any other receiving environment.

6.7 This matter has been addressed in the AEE⁷⁷ and in **Dr Conwell's** evidence.⁷⁸ In short:

- a The nature of the discharge is water taken for dewatering purposes, and construction phase stormwater associated with the construction of the Pinehaven Stream Improvements.
- b The receiving environment is the Pinehaven Stream, and its sensitivity to adverse effects is as described in the AEE and **Dr Conwell's** evidence.⁷⁹ The GWRC Section 42A Report concludes that the Pinehaven Stream is not recognised as being highly sensitive in the regional planning documents, but the ultimate receiving environment (Hulls Creek and Hutt River) has significant values under the regional planning documents.⁸⁰ The experts agree that existing water quality is good in dry weather conditions, and that after heavy rain, water quality is significantly affected.⁸¹
- c There is no alternative method of discharge or receiving environment for the discharge, other than not undertaking the works at all. The proposed approach was also agreed as the only option in the expert witness conferencing.⁸²

⁷⁷ AEE at 12.7.

⁷⁸ Conwell EIC, sections 5 and 6.

⁷⁹ Conwell EIC, paras 5.1 – 5.9.

⁸⁰ GWRC Section 42A Report, para 9.2.

⁸¹ Joint Witness Statement – Erosion and sediment control, para 1.3a.

⁸² Joint Witness Statement – Erosion and sediment control, para 1.3g.

Section 107 – restrictions on grant of discharge permits

- 6.8 Section 107 RMA restricts the grant of certain discharge permits. Essentially it states that a resource cannot ordinarily⁸³ be granted for a discharge that, after 'reasonable mixing', will give rise to the proscribed effects in subsections (2)(c) to (g). If any of the proscribed effects are likely to occur then the consent authority may only grant consent if it is satisfied that granting consent is consistent with the purpose of the RMA and one of the following requirements are met:
- (a) that exceptional circumstances justify the granting of any permit;
or
 - (b) that the discharge is of a temporary nature; or
 - (c) that the discharge is associated with necessary maintenance work.
- 6.9 **Dr Conwell's** evidence concludes that, through the adoption of the measures set out in an erosion and sediment control plan ('**ESCP**'), the level of proscribed effects will be negligible to no more than minor, with the exception of a conspicuous change in visual clarity of the water which will have a minor and temporary effect beyond the reasonable mixing zone of 50 metres.⁸⁴
- 6.10 The GWRC Section 42A Report considers that the proposed conditions will ensure any discharges that result in a conspicuous change in visual clarity are intermittent (as they will only result from heavy rain events and specified construction activities) and temporary (only occurring for approximately 24 hours).⁸⁵
- 6.11 The experts agree that the SEMP's and ESCP will manage the proscribed effects set out in section 107,⁸⁶ although the experts are uncertain about whether the GWRC proposed limit of 50 mg/[m³] SSC is appropriate or achievable.⁸⁷ The experts indicated that this uncertainty could be managed by learnings from earlier stages of construction being applied to later stages (via the adaptive management approach).⁸⁸
- 6.12 Given views set out in the Joint Witness Statement, WWL:

⁸³ Unless the exceptions in subsection (2) apply, i.e. either exceptional circumstances apply, the discharge is temporary, or the discharge is associated with necessary maintenance work, and (in all cases) the consent authority is satisfied that granting consent is consistent with the purpose of the RMA.

⁸⁴ Conwell EIC, para 6.30.

⁸⁵ GWRC Section 42A Report, para 9.3.

⁸⁶ Joint Witness Statement – Erosion and Sediment Control, para 1.3e.

⁸⁷ Joint Witness Statement – Erosion and Sediment Control, para 1.3(h) (page 3).

⁸⁸ Joint Witness Statement – Erosion and Sediment Control, para 1.3(h) (page 3).

- a Is concerned that the proposed SSC limit of 50 mg/m³ for ‘normal’ discharges is untested in the field and may not be appropriate or achievable;
- b Agrees with the experts that an adaptive management approach should be used to ensure sediment control limits are adjusted to respond to observed changes in visual clarity (rather than simply focusing on a number provided in resource consent conditions);
- c Agrees with the GWRC officer⁸⁹ that the SSC limits currently set in the proposed conditions cannot be amended through the adaptive management process (but would require a section 127 application); and
- d Suggests alternative condition wording to achieve this outcome, as set out in **Appendix A** to these submissions. The amendments are designed to ensure that:
 - i management plans set SSC limits with the objective of ensuring any conspicuous change in visual clarity is only temporary;
 - ii the ‘default’ SSC limits are those which are recommended by the GWRC officer; but
 - iii those limits can be adjusted (without a section 127 process) if monitoring demonstrates that the limits are inadequate to achieve that objective, or more onerous than necessary; and
 - iv any adjustment to limits in the management plans would need to be approved by the GWRC Manager.

6.13 It is submitted that:

- a Contrary to the concerns of the GWRC officer,⁹⁰ the process required by the revised conditions would provide certainty of effects, and is entirely consistent with an adaptive management approach; and
- b The Commissioners are able to grant the discharge permit, as the revised condition will ensure that any conspicuous change in visual clarity resulting from the discharge will be temporary.

⁸⁹ GWRC Section 42A Addendum Report: Response to applicant’s evidence and joint witness statements and updated set of recommended conditions, 28 July 2020, paras 11-15.

⁹⁰ GWRC Section 42A Addendum Report: Response to applicant’s evidence and joint witness statements and updated set of recommended conditions, 28 July 2020, para 12.

7 Assessment of effects

- 7.1 It is necessary to consider the effects of the Project on the environment under sections 168A and 104 of the RMA. Accordingly, this section outlines the positive and adverse effects of the Project.

Existing environment

- 7.2 The environment affected by the Project is simply the environment as it currently exists, and is agreed by the expert planners⁹¹.
- 7.3 This environment includes the Sunbrae Drive and Pinehaven Road replacement culvert works authorised by resource consent.⁹² These culvert works will involve installing erosion and sediment control devices, replacing the existing culverts with larger box culverts, removing the cofferdams and pump used for over-pumping the Stream, backfilling around the new culverts and stabilising the banks.⁹³ Any effects anticipated from the culvert works should not be attributed to this Project (although it is permissible to consider cumulative effects). UHCC and GWRC agree that the culvert works are part of the existing environment.⁹⁴

Positive effects

- 7.4 The positive effects or benefits of the Project are discussed in the evidence of **Mr Fountain**,⁹⁵ and summarised in the evidence of **Ms Anderson**.⁹⁶
- 7.5 First and foremost, the Project is expected to significantly⁹⁷ mitigate flood risk. The current Pinehaven Stream channel has less than a 5-year flow capacity in large parts.⁹⁸ Regular flooding has significant adverse effects on the community.⁹⁹ The Project works will mean that:
- a The Pinehaven Stream is largely¹⁰⁰ confined to its channel during an up to 1-in-25 year flood event;¹⁰¹

⁹¹ Joint Witness Statement – Planning, para 2.1(a).

⁹² Consent No WGN200101

⁹³ Consent No: WGN200101, pg 13.

⁹⁴ Joint Witness Statement – Planning, para 2.1(a)(x).

⁹⁵ Fountain EIC, para 7.2.

⁹⁶ Anderson EIC, paras 9.3 – 9.4, 9.10, 9.11, 9.31e, 9.37.

⁹⁷ Joint Witness Statement – Flood modelling, para 2.6, Kinley EIC, para 10.1.

⁹⁸ Fountain EIC, para 5.15.

⁹⁹ Fountain EIC, para 5.5.

¹⁰⁰ There are some exceptions to this in the section between 48 Blue Mountain Road and 2A Freemans Way: Kinley EIC, para 10.1b.

¹⁰¹ Kinley EIC, para 10.1b.

- b The flood extent during a modelled 1-in-100 year event will be substantially reduced, affecting 53 fewer ‘habitable floors’ and 25 fewer ‘non-habitable floors’;¹⁰²
 - c Overland flow paths will be integrated into the wider stormwater network;¹⁰³ and
 - d Overall, the flood hazard risks to people and property will be substantially reduced, with consequential benefits to health, safety and wellbeing. Flooding will be less frequent and less severe.¹⁰⁴
- 7.6 These matters are fully explained in the evidence of **Mr Fountain** and **Mr Kinley**.
- 7.7 In addition to the benefits with respect to flood mitigation, the Project will also result in positive benefits in terms of:
- a Creation of a new stream channel which improves the highly modified channel that currently exists;¹⁰⁵
 - b Positive amenity to local residents and improvements to the character of the Stream;¹⁰⁶
 - c Greater pedestrian connectivity and urban design benefits through changes to the extent and layout of Willow Park;¹⁰⁷
 - d Improved access for ongoing maintenance of the Stream to manage flood risk;¹⁰⁸
 - e The establishment of a more natural riparian zone dominated by native plants after construction;¹⁰⁹ and
 - f Potential for increased fish diversity.¹¹⁰

Adverse effects

- 7.8 The potential adverse effects of the Project are comprehensively assessed in the AEE and expert evidence, and summarised in the evidence of **Ms Anderson** and

¹⁰² Kinley EIC, para 10.1c, GWRC Section 42A Report, para 10.1.3(b).

¹⁰³ Kinley EIC, para 10.1e.

¹⁰⁴ Fountain EIC, para 7.2.

¹⁰⁵ James EIC, para 7.1, Joint Witness Statement – Freshwater Ecology, para 2.1d.

¹⁰⁶ Compton-Moen EIC, para 6.4.

¹⁰⁷ Compton-Moen EIC, para 8.3.

¹⁰⁸ Joint Witness Statement - Planning, para 2.1(b)(iv).

¹⁰⁹ Joint Witness Statement – Freshwater Ecology, para 2.1d.

¹¹⁰ Joint Witness Statement – Freshwater Ecology, para 2.1d.

in the Section 42A Reports. The evidence for WWL is that the potential effects can be appropriately avoided, remedied, or mitigated.

- 7.9 The GWRC Section 42A Report concludes that the adverse effects of the Project will be appropriately mitigated through consent conditions¹¹¹ while the UHCC Section 42A Report considers that the effects associated with the Project are acceptable.¹¹² The experts agreed in expert witness conferencing that, subject to conditions, the overall environmental effects of the Project are acceptable.¹¹³

Ecological effects

- 7.10 Aquatic ecology effects are addressed in the evidence of **Dr James**, and in the report at Appendix S to the AEE. These effects were also agreed through expert witness conferencing.¹¹⁴
- 7.11 Overall, the aquatic ecology effects of the Project are expected to be reduced, with mitigation, to a minor level of adverse effects during construction.¹¹⁵ The operational phase of the Project will have a less than minor, nil or potentially positive effect on aquatic ecology after mitigation.¹¹⁶
- 7.12 Terrestrial ecology effects are addressed in the evidence of **Dr Forbes** and in the reports at Appendix S to the AEE.
- 7.13 **Dr Forbes'** evidence is that, without mitigation, the Project will potentially have a low to very low level of effect on terrestrial ecology.¹¹⁷ With mitigation, the terrestrial ecology effects will reduce to a very low or negligible level.¹¹⁸
- 7.14 A new condition is proposed in relation to 50 Blue Mountains Road, to ensure ecologically significant trees located in proximity to the construction areas in 50 Blue Mountains Road are adequately protected. This is outlined in the evidence of **Dr Forbes** and **Ms Anderson**.¹¹⁹ WWL understands that the UHCC officer agrees with the suggested condition.
- 7.15 **Dr Forbes** and UHCC's terrestrial ecology expert, Ms Paler, had two areas of disagreement at expert conferencing. In summary, the disagreement was:

¹¹¹ GWRC Section 42A Report, para 10.7.

¹¹² UHCC Section 42A Report, para 10.78.

¹¹³ Joint Witness Statement – Planning, para 2.1k.

¹¹⁴ Joint Witness Statement – Freshwater Ecology, para 2.1.

¹¹⁵ James EIC, para 6.22, Joint Witness Statement – Freshwater Ecology, para 4.1b.

¹¹⁶ James EIC, para 7.6, Joint Witness Statement – Freshwater Ecology, para 4.1c.

¹¹⁷ Forbes EIC, paras 6.2 – 6.4.

¹¹⁸ Forbes EIC, para 4.3.

¹¹⁹ Forbes EIC, para 7.7, Anderson EIC, para 13.14, Appendix B, pages 42-43.

- a **Dr Forbes** considers there will be a low level of effect from the loss of native riparian vegetation and that it is not necessary for positive effects to address this loss, i.e. in the form of replacement planting;¹²⁰
 - b **Ms Paler** considers that there will be a moderate level of effect from the loss of native riparian vegetation and that it is necessary to address this loss through positive effects. **Ms Paler** recommends replacement planting be carried out at a 2:1 ratio.¹²¹
 - c This disagreement is of no consequence, because WWL proposes to carry out 0.6 hectares of riparian planting as required by condition 23.¹²² This planting has been proposed for landscape and amenity purposes, but will also provide ecological benefits and exceeds that which would be required under a 2:1 ratio to replace the 0.25 ha loss of native riparian vegetation.
 - d **Dr Forbes** and **Ms Paler** also disagreed about conditions relating to the location of tall trees. **Ms Paler** considers that tall trees (taller than 15m at maturity) as part of the replacement planting should not be planted within 10m of any residential buildings.¹²³ **Dr Forbes** considers this concern can be addressed through the protection of plantings on an ongoing basis.¹²⁴
- 7.16 Except for the areas of disagreement above, **Dr Forbes** agreed with the suggested amendments¹²⁵ by **Ms Paler** to the conditions outlined in the UHCC Section 42A Report. It is submitted that compliance with the conditions recommended by **Dr Forbes** will ensure that any potential terrestrial ecological effects associated with this Project will be acceptable.

Water quality

- 7.17 The construction phase of the Project has the potential to adversely affect the quality of the Pinehaven Stream through soil disturbance and associated stormwater runoff from earthworks, stream bed disturbance, and the discharge of dewatering water from excavations.
- 7.18 Effects on water quality are addressed in the evidence of **Dr Conwell**, and the way in which effects will be avoided or mitigated during construction are outlined by **Mr Haylock**. These matters are also addressed at section 10.5 of the AEE.

¹²⁰ Joint Witness Statement – Terrestrial Ecology, para 5.1.

¹²¹ Joint Witness Statement – Terrestrial Ecology, para 5.1.

¹²² UHCC Section 42A Report, Appendix 5.

¹²³ Joint Witness Statement – Terrestrial Ecology, para 5.1.

¹²⁴ Joint Witness Statement – Terrestrial Ecology, para 5.1.

¹²⁵ UHCC Section 42A Report, Appendix 7, Forbes EIC, para 9.7.

- 7.19 The principle mitigation measures will be:
- a The controls set out in the ESCP, in particular, the methods set out in sections 4 and 5, and the monitoring and reporting requirements in section 6;¹²⁶
 - b The construction procedure of 'dam and diversion' will minimise environmental effects and provide the best protection for the water quality of Pinehaven Stream. The experts consider the proposed construction methodology to be industry best practice;¹²⁷
 - c Extensive proposed conditions imposing controls to minimise the release of sediment into the Stream;¹²⁸
 - d An adaptive management approach to ensure that downstream water quality is managed using trigger levels;¹²⁹ and
 - e The requirement for downstream monitoring of deposited fine sediment.¹³⁰
- 7.20 **Dr Conwell** considers the approach set out in the ESCP to be robust and it will ensure that any adverse effects are temporary, short in duration and will not significantly affect the ecological health of the downstream receiving environment.¹³¹ The experts concluded through expert witness conferencing that the construction methodology should appropriately protect downstream environmental values and associated water quality measures.¹³² The overall contribution of sediment released to the wider catchment is expected to be small, and the contribution to cumulative effects from this activity will be minor in terms of the Hutt River catchment.¹³³ **Dr Conwell** agrees with the description of potential effects on water quality in the GWRC Section 42A Report.¹³⁴
- 7.21 As noted above, there remains disagreement about conditions regulating SSC limits and turbidity. The amendments proposed by WWL:
- a Ensure the limits on turbidity and SSC are based on a comparison between upstream and downstream measurements (instead of past and current

¹²⁶ Section 92 response to GWRC dated 21 February 2020, Appendix B.

¹²⁷ Haylock EIC, para 1.8, Joint Witness Statement – Erosion and sediment control, para 1.3c.

¹²⁸ Conwell EIC, para 7.5, GWRC Section 42A Report, Appendix 2.

¹²⁹ Conwell EIC, para 7.6, GWRC Section 42A Report, Appendix 2, condition 18.

¹³⁰ Conwell EIC, para 7.7, GWRC Section 42A Report, Appendix 2, conditions 19, 23-37 and 42-43.

¹³¹ Conwell EIC, para 4.5.

¹³² Joint Witness Statement – Erosion and sediment control, para 1.3c.

¹³³ Conwell EIC, para 4.6.

¹³⁴ Conwell EIC, para 8.2.

measurements – which could be affected by historic rainfall or activities in the catchment); and

- b Allow for the SSC limits for ‘normal’ works and heavy rainfall to be changed if monitoring demonstrates that they are not appropriate to ensure conspicuous changes in visual clarity are only temporary.

7.22 WWL also disputes the need for winter works conditions. This is discussed further below.

Landscape and visual

7.23 The landscape, natural character, and visual effects of the Project principally relate to the construction phase, and the proposed removal of vegetation. These effects have been assessed in detail in the evidence of **Mr Compton-Moen** and in the Landscape and Visual Impact Assessment in the AEE at Appendix V.

7.24 Overall, **Mr Compton-Moen** concludes that, after mitigation and 5 years of planting growth, the residual effects of the Project will be less than minor for landscape character¹³⁵, natural character¹³⁶, and amenity¹³⁷. There will also be minor visual effects on the most affected properties, 26 and 30-38 Blue Mountains Road, and 10-12 Birch Grove while the remaining visual effects will be less than minor or indiscernible.¹³⁸ The UHCC Section 42A Report concludes that there will be some short to mid term visual amenity and landscape effects associated with the Project and that these are acceptable given the urban nature of the local environment and the proposed designation conditions.

7.25 The landscape and visual reinstatement and mitigation measures proposed are contained in the UHCC Section 42A Report conditions.¹³⁹ **Mr Compton-Moen** agrees with the UHCC Section 42A Report’s conclusions relating to landscape and visual effects.

Other construction effects

7.26 Construction of the Project will be undertaken using the best practicable options, including timing of activities, temporary relocation of residents (if required) and ongoing consultation with affected properties throughout construction.¹⁴⁰ However, there is still likely to be moderate adverse effects of construction noise

¹³⁵ Compton-Moen EIC, para 6.4.

¹³⁶ Compton-Moen EIC, para 6.5.

¹³⁷ Compton-Moen EIC, para 6.9.

¹³⁸ Compton-Moen EIC, para 7.2.

¹³⁹ Appendix 5.

¹⁴⁰ UHCC Section 42A Report, Appendix 5, conditions 26 and 27.

and vibration on those residents in close proximity to the works.¹⁴¹ The UHCC Section 42A Report considers that any potential construction effects associated with the Project will be appropriately mitigated by the proposed conditions.¹⁴²

Flood hazard effects

- 7.27 The flood modelling predicts that the Project will make flooding worse in a 1% AEP event at 54 Whitemans Road, 56 Whitemans Road, 7 Pinehaven Road and 9 Birch Grove. For the 1% AEP event, these four habitable buildings will experience increased flood levels as outlined in the evidence of **Mr Kinley** and the UHCC Section 42A Report, para 10.25.¹⁴³ The increase is less than 0.06m for all four properties and the peak flood level remains at 0.3m below floor level. This means none of these buildings would be flooded before or after the Project. Therefore, these adverse effects are no more than minor.¹⁴⁴ This was accepted by Mr Law at expert witness conferencing.¹⁴⁵
- 7.28 The flood modelling predicts there may also be some adverse effects for 48 and 50 Blue Mountains Road, and 2A Freemans Way, for the 4% AEP flood event, as outlined in the evidence of **Mr Kinley**.¹⁴⁶ **Mr Kinley** and the GWRC Section 42A Report consider these effects to be no more than minor.¹⁴⁷

8 Statutory instruments

- 8.1 Relevant statutory and policy instruments have been considered in the evidence of **Ms Anderson**, in the Section 42A Reports and in the Joint Witness Statement for Planning.
- 8.2 Overall, **Ms Anderson** and the GWRC and UHCC Planners conclude that the Project is consistent with the applicable provisions of the relevant statutory documents.¹⁴⁸

¹⁴¹ Haylock EIC, paras 8.2 – 8.4.

¹⁴² UHCC Section 42A Report, para 10.7.

¹⁴³ Kinley EIC, para 10.1d, UHCC Section 42A Report, para 10.25.

¹⁴⁴ Kinley EIC, para 10.1d.

¹⁴⁵ Joint Witness Statement – Flood modelling, para 2.6.

¹⁴⁶ Kinley EIC, para 10.1b.

¹⁴⁷ GWRC Section 42A Report, para 10.1.3(a).

¹⁴⁸ Anderson EIC, para 10.1, Joint Witness Statement – Planning, paras h and i.

9 Matters raised by submitters

- 9.1 The application and NOR were notified on 19 December 2019. A total of 15 submissions were made, 10 in support and 5 opposed or raising concerns about the Project.¹⁴⁹
- 9.2 The matters identified in submissions have been addressed in the expert evidence for WWL. In summary, the evidence is that effects can be adequately mitigated.¹⁵⁰ This section of the legal submissions focusses on those submitters who lodged written evidence after the WWL evidence was submitted.
- 9.3 The submission of Save Our Hills raises a number of issues relating to flood modelling. Save Our Hills has submitted that the hydrological model overestimates runoff. Save Our Hills also extensively discuss proposed development in the upper catchment, which is addressed below in section 12. The concerns raised by Save Our Hills only concern the hydrological model rather than hydraulic model.
- 9.4 **Mr Kinley** considers that the hydrological model prepared by Mr Hall for Save Our Hills is materially different to the hydrological model prepared for this Project for the following reasons:¹⁵¹
- a It is not calibrated;
 - b A regional hydrological method is used rather than a local hydrological method; and
 - c Its review by Mr Macky does not assess whether the appropriate method has been used and adds little to Mr Hall's model.
- 9.5 Mr Hall and Mr Horrell consider that the flood frequency curve derived by MWH in 2009 over-estimates flows.¹⁵² In response, **Mr Kinley** and Mr Law consider the current hydrology is fit for use.¹⁵³
- 9.6 Mr Ross lodged evidence in support of his submission. He considers the Pinehaven Stream channel 'coped' with the December 2019 flood event.¹⁵⁴ The

¹⁴⁹ One submission in opposition (David Kyle) has subsequently withdrawn his submission. One submission in support (Deborah Griffiths) now opposes the Project.

¹⁵⁰ Forbes EIC, para 8.2, James EIC, para 12.5, Compton-Moen EIC, paras 9.2-9.4.

¹⁵¹ Kinley EIC, para 11.5.

¹⁵² Joint Witness Statement – Hydrology and Flood Modelling dated 30 July 2020, para 3.2(a).

¹⁵³ Joint Witness Statement – Hydrology and Flood Modelling dated 30 July 2020, para 3.2(a).

¹⁵⁴ Ross EIC, para 4.6.

flooding shown in the photographs and the report of property damage are not consistent with Mr Ross' claim that the channel 'coped'.¹⁵⁵

9.7 Mr Ross also considers the hydrology model used for this Project is 12 years out of date and has not been adequately calibrated or validated.¹⁵⁶ WWL does not accept this. The hydrological conditions of the catchment, in relation to the Project, have not changed in a material way and the model is therefore not out of date.¹⁵⁷ The model has been adequately calibrated and validated.¹⁵⁸

10 Other legal issues - modification of the designation footprint

10.1 As identified in the evidence of **Ms Anderson**, WWL asks that the Commissioners modify the designation footprint at 11 properties (as compared to the notified NOR).¹⁵⁹ For 10 of these properties the designation will be reduced or removed completely. At one property, 30 Blue Mountains Road, the designation area will be increased, due to the need to provide sufficient area for the proposed new driveway access.¹⁶⁰ These changes have come about due to refinement of the design of the structural works following lodgement and notification of the NOR and resource consent applications.

10.2 The footprint reduction over the property at 11 Birch Grove was confirmed only recently. Accordingly, **Appendix B** to these submissions contains replacement designation sheets for this part of the Project.

10.3 It is submitted, and agreed by the UHCC Planner,¹⁶¹ that the reductions in the designation footprint at 10 properties reduce the effects and scope of the designation compared to the notified designation footprint. It is therefore submitted that these modifications can be made by the Commissioners.

10.4 The property owner of 30 Blue Mountains Road has provided written approval for the increase in the designation footprint at their property.¹⁶² It is submitted, and

¹⁵⁵ Kinley supplementary evidence, para 4.5.

¹⁵⁶ Ross, EIC, paras 4.2-4.3, 7.1, 10.5.

¹⁵⁷ Kinley supplementary evidence, para 5.12.

¹⁵⁸ Kinley supplementary evidence, para 5.10.

¹⁵⁹ Anderson EIC, para 6.10. The table setting out the changes to the designation footprint in the UHCC Section 42A Report, para 2.1 is incorrect. The table set out in the evidence of Ms Anderson is the correct one, para 6.10. The table in section 3 of the UHCC Section 42A Report Addendum is correct.

¹⁶⁰ Anderson EIC, para 6.10.

¹⁶¹ UHCC Section 42A Report, para 2.2. The Section 42A Report doesn't suggest that the NOR needs to be modified in respect of the reductions in designation footprint, we disagree and consider that reductions in designation footprint also count as 'modifications' that the Commissioners can make under section 168A(4)(b).

¹⁶² Letter dated 1 May 2020 to UHCC: Amendment to designation areas, Attachment 3.

agreed by the UHCC Planner,¹⁶³ that the NOR can be modified to allow for the increase in the designation footprint at 30 Blue Mountain Road.¹⁶⁴

11 Response to Hearing Panel Minute 2

- 11.1 The Hearing Panel Minute 2 asked WWL to address how proposed future development in the Pinehaven catchment overlay will be assessed.¹⁶⁵
- 11.2 The flood model has been designed to respond to flooding expected within the catchment and has been validated and calibrated.¹⁶⁶ It does not consider future development which may occur as this is neither a permitted activity nor have consents been granted. This approach is agreed by the UHCC and GWRC Planners.¹⁶⁷ Therefore, the WWL flood modelling has accurately sized the effects of the Project. **Mr Kinley** and Mr Law agreed at expert witness conferencing that the flood modelling is fit for use for the purposes of this application.¹⁶⁸
- 11.3 The experts, including Mr Hall and Mr Horrell from Save Our Hills, agree that increased runoff from potential new development in the catchment is not of relevance to this application, as this will be managed through the hydraulic neutrality provisions of Plan Change 42.¹⁶⁹

12 Recommended conditions

- 12.1 The Section 42A Reports for both UHCC and GWRC recommended conditions, and those conditions were considered in the evidence for WWL – particularly in the evidence of **Ms Anderson**.
- 12.2 Further refinements to conditions have been suggested in the Section 42A Report Addenda provided by UHCC and GWRC. These refinements are a result of:
- a The officers agreeing with the amendments in the evidence of **Ms Anderson**;
 - b Suggestions made in the Joint Witness Statements; or

¹⁶³ UHCC Section 42A Report, para 2.4.

¹⁶⁴ The extent to which a designation footprint can be amended midway through a notice of requirement process was recently considered by the Environment Court in *Director-General of Conservation v New Zealand Transport Agency* [2020] NZEnvC 19. The first question is whether the Commissioners have the jurisdiction to modify the designation footprint, the Commissioners have broad power to do so and should consider whether the modification will change the “essential nature or character” of the proposal put forward by the NOR, at [26]. The second question, should the Commissioners modify, requires consideration of “issues of fair process” at [30]. This test is met if the affected landowners give consent, at [38].

¹⁶⁵ Para 18.

¹⁶⁶ Kinley EIC, paras 8.5 – 8.7.

¹⁶⁷ Joint Witness Statement – Planning, para 2.1 a xii, Response to Minute 2 of Hearing Panel on behalf of GWRC and UHCC, para 9.

¹⁶⁸ Joint Witness Statement – Flood Modelling, para 3a.

¹⁶⁹ Joint Witness Statement – Flood Modelling, para 3.1d.

- c To ensure consistency or correct typographical errors.
- 12.3 The remaining areas of disagreement regarding conditions are very confined. They are:
- a The setting of SSC and turbidity levels, and the measurement of these, as discussed above (GWRC conditions 26-28);
 - b Winter works conditions (GWRC conditions 40 and 41). WWL considers that these conditions should be deleted (for the reasons explained below), and winter works be specifically addressed through the SEMP (requiring amendments to condition GWRC 21);
 - c Restrictions on the planting of tall trees (UHCC condition 23(b)(i)); and
 - d Whether a compensation ratio is required for the replacement of native riparian vegetation (UHCC condition 32).

Winter works condition

- 12.4 The GWRC Section 42A Report recommends a winter works condition prohibiting works during the period of 1 June to 30 September unless approved by the Manager.¹⁷⁰
- 12.5 WWL opposes this condition for two reasons:
- a First, if no work can occur during winter then the cost, construction time and impact on affected residents and stakeholders will increase, as outlined in the evidence of **Mr Haylock**.¹⁷¹ An extended construction programme would also have greater effects on aquatic ecology,¹⁷² and delay the commencement of mitigation works; and
 - b Second, the proposed condition is *ultra vires* because it would delegate the decision regarding winter works to a GWRC officer, when that is properly a decision to be made now under the RMA.
- 12.6 WWL considers the proposed condition to be *ultra vires*, and therefore an unlawful delegation, on the following basis:

¹⁷⁰ GWRC Section 42A Report, Appendix 2, conditions 40 and 41. See also paras 16-17 of the Section 42A Report Addendum for GWRC.

¹⁷¹ Haylock EIC, para 14.2a, Joint Witness Statement – Erosion and sediment control, para 1.3(h)(i).

¹⁷² GWRC Section 42A Report, para 10.4.6(a).

- a A condition cannot delegate or reserve too much discretion to a designated approver,¹⁷³ or ‘delegate the making of substantive decisions’;¹⁷⁴
 - b It is submitted that the proposed condition grants an unfettered discretion to permit or prohibit winter works. The condition does not set out the matters which the GWRC Manager would take into account when deciding whether to approve the works. It is not clear what information would be required in order to support the further application for approval, over and above what has already been provided as part of this application;
 - c As the approval process sits outside of the RMA, there is no ability to challenge the GWRC’s decision on winter works approval – other than by way of judicial review.
- 12.7 WWL suggests that concerns regarding winter works can be addressed by amending the SEMP condition to include a specific reference to winter works, as outlined in the evidence of **Ms Anderson**.¹⁷⁵

Outline Plan of Works waiver

- 12.8 The UHCC Section 42A Report suggests that the outline plan waiver sought by WWL be considered once the designation is confirmed.¹⁷⁶ WWL is comfortable with this approach.

13 Part 2 considerations

- 13.1 The Commissioners’ determination under both Sections 104 and 168A is expressed as being ‘subject to Part 2’.
- 13.2 Caselaw indicates that there are different approaches to considering Part 2 under sections 104 and 168A.
- 13.3 In respect of designations, the ‘overall broad judgment’ approach remains valid and is required when considering the NOR components of the Project under section 168A.¹⁷⁷

¹⁷³ *Aubade NZ Ltd v Marlborough DC* [2015] NZEnvC 154 at [37]. See also *Turner v Allison* [1971] NZLR 833 where a condition (Condition 18) was found to be unlawful as it purported to confer on a third party an unfettered, binding power as an arbitrator (ordinarily the jurisdiction of the courts) (at p 857, lines 21-24 and 44-49). As in *Turner*, the proposed condition purports to grant a GWRC official (‘the Manager’) the power to fulfil the role of a consent authority

¹⁷⁴ *Royal Forest and Bird Protection Society Inc v Gisborne District Council* (EnvC, Wellington, W026/2009, 7 April 2019) at [88].

¹⁷⁵ Anderson EIC, para 15.3a, appendix B.

¹⁷⁶ UHCC Section 42A Report, para 21.2.

¹⁷⁷ *The New Zealand Transport Agency v Architectural Centre Inc* (Basin Bridge) decision is a “specific statutory direction to consider and apply Part 2 in making a determination on a designation” – *Re Queenstown Airport Corporation Ltd* [2017] NZEnvC 46 at [66].

13.4 In relation to resource consents, Part 2 should be considered where the decision maker is in doubt whether the planning documents appropriately reflect the provisions of Part 2.¹⁷⁸ Given the PNRP is subject to appeal, it is difficult to be assured that the regional plans cover the field (being Part 2). Therefore, it is appropriate to have recourse to Part 2.

13.5 **Ms Anderson** and the UHCC planner consider that the NOR is consistent with Part 2.¹⁷⁹ With respect to resource consents, **Ms Anderson** and the GWRC planner consider these are consistent with Part 2 as particularised in relevant statutory planning documents.¹⁸⁰

13.6 It is submitted that the Project is consistent with Part 2 RMA.

14 Evidence to be presented

14.1 WWL has lodged evidence by nine witnesses in support of the resource consents and NOR:

- a **Mr Ben Fountain** (Project need);
- b **Mr Eric Skowron** (Project overview)
- c **Mr Peter Kinley** (Flood model design);
- d **Mr Tim Haylock** (Construction methodology);
- e **Dr Claire Conwell** (Erosion and sediment control);
- f **Dr Adam Forbes** (Terrestrial ecology);
- g **Dr Alex James** (Aquatic ecology);
- h **Mr David Compton-Moen** (Landscape and visual); and
- i **Ms Helen Anderson** (Planning).

15 Conclusion

15.1 This Project is the crucial piece in a package of works designed to address the significant flooding risk experienced by the Pinehaven catchment. The Project will bring numerous benefits, including reducing the flood hazard risks to people and

¹⁷⁸ Following the approach of *R J Davidson v Family Trust v Marlborough District Council* [2018] NZCA 316.

¹⁷⁹ Anderson EIC, paras 12.1 – 12.6, Joint Witness Statement – Planning, para o, UHCC Section 42A Report, paras 20.1 – 20.17.

¹⁸⁰ Joint Witness Statement – Planning, para o, GWRC Section 42A Report, paras 13.5. We disagree with the approach taken by GWRC in terms of considering Part 2. However, we ultimately arrive at the same outcome.

property. This will have consequential benefits to health, safety and wellbeing of the Pinehaven community. The Project is supported by the majority of submitters.

- 15.2 The Project is consistent with the relevant statutory and policy framework, including the sustainable management purpose of the RMA. WWL asks the Commissioners to recommend that the NOR be confirmed, subject to the modifications outlined above at section 10, and grant the resource consents, to allow for the construction, operation and maintenance of proposed Pinehaven Stream improvements works.



Nicola McIndoe / Liam Bullen

Counsel for Wellington Water Limited

Appendix A Revised sediment control conditions

Condition 26 (standard works)

The consent holder shall ensure any discharges (except those managed by conditions 27 and 28 of this consent) from each stage of the works directly or indirectly to freshwater, do not result in an increase in suspended solids (measured as SSC) in the Pinehaven Stream at the zone of reasonable mixing ~~which exceeds the SSC limit stated in the certified SEMP for the relevant stage of 50g/m³ above the concentration measured at the upstream baseline monitoring site.~~

The SSC limit stated in the certified SEMP shall be 50mg/m³ above the concentration measured at the upstream baseline monitoring site for the same time period, unless:

- a. The consent holder provides monitoring results which demonstrate that a different SSC limit is appropriate in order to ensure any changes to visual clarity resulting from the works are temporary; and
- b. The Manager confirms satisfaction with the different limit, in accordance with condition 15.

The method for monitoring water quality for the purposes of assessing compliance with this condition shall be in accordance with the method and locations in the certified SEMP for the relevant stage.

Note: The zone of reasonable mixing for the purpose of this consent is defined in condition 23.

Note: Recording and reporting of this monitoring will be set out in the ESCP certified under condition 18 of this consent.

Condition 27 (during and after heavy rainfall)

The consent holder shall ensure that during, and for 24 hours after heavy rainfall conditions, any discharge from each stage of the works directly or indirectly to freshwater, does not result in an increase in suspended solids (measured as SSC) in the Pinehaven Stream at the zone of reasonable mixing ~~which exceeds the SSC limit stated in the certified SEMP for the relevant stage of 150g/m³ above the concentration measured at the upstream baseline monitoring site.~~

The SSC limit stated in the certified SEMP shall be 150mg/m³ above the concentration measured at the upstream baseline monitoring site for the same time period, unless:

- a. The consent holder provides monitoring results which demonstrate that a different SSC limit is appropriate in order to ensure any changes to visual clarity resulting from the works are temporary; and
- b. The Manager confirms satisfaction with the different limit, in accordance with condition 15.

The method for monitoring water quality for the purposes of assessing compliance with this condition shall be in accordance with the method and locations in the certified SEMP for the relevant stage.

Note: Heavy rainfall conditions are considered to be 20mm in a 24-hour period or a rainfall event with an intensity equal to or greater than 6mm/hour as measured at the GWRC Pinehaven Stream Site at Pinehaven Reservoir and/or the site rain gauge located at the main construction yard.

Note: The zone of reasonable mixing for the purpose of this consent is defined in condition 23.

Note: Recording and reporting of this monitoring will be set out in the ESCP certified under condition 18 of this consent.

Condition 28 (discharges associated with installation and removal of the piped diversion)

The consent holder shall manage discharges from the excavator movements within the stream for the construction and removal of the temporary piped diversion and dams through the following steps:

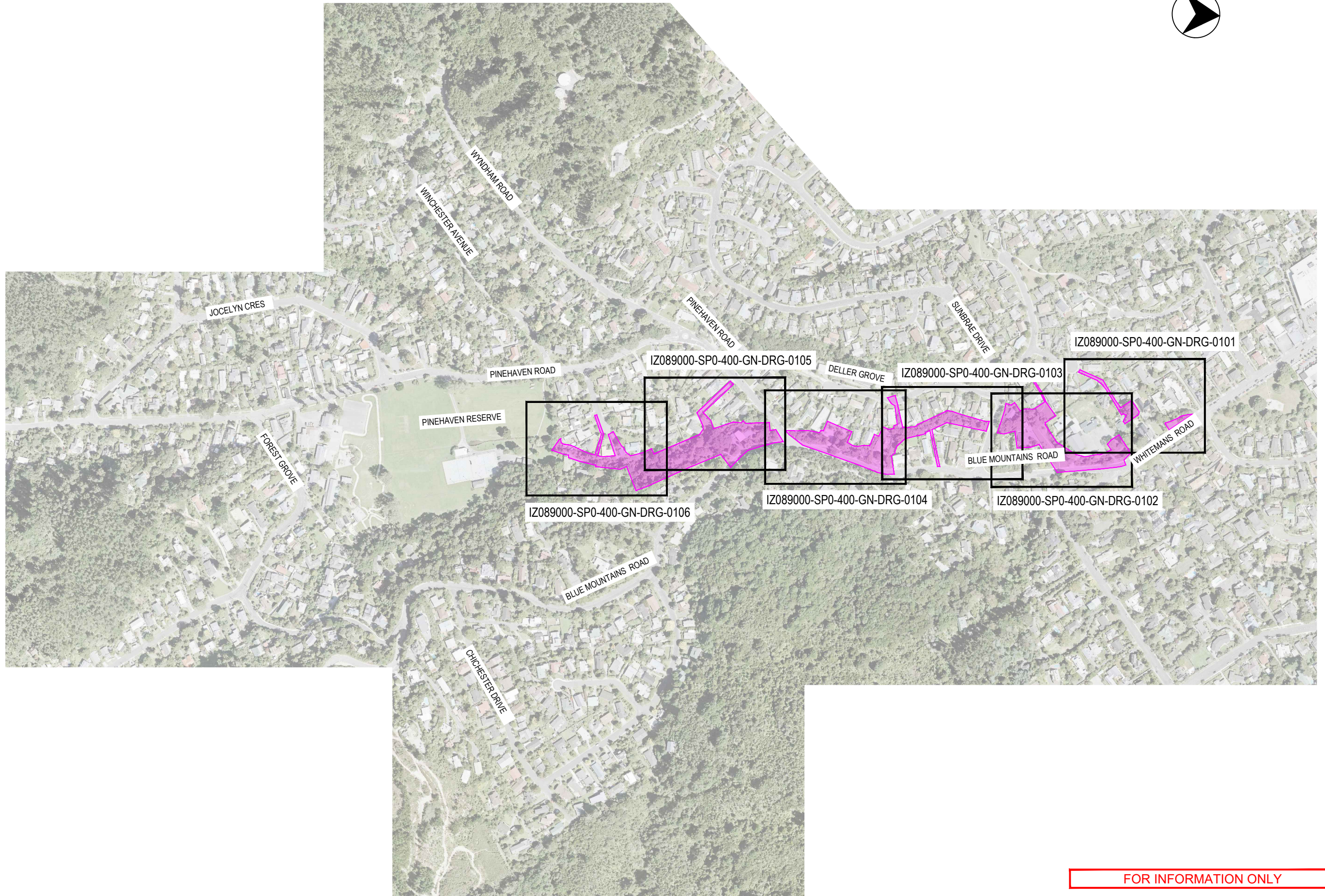
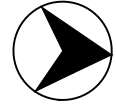
~~a) Prior to commencing works in the stream to install the temporary dams, the consent holder shall collect instream turbidity data using a continuous data logger from the upstream monitoring site(s) identified in the ESCP (required by condition 18 of this consent) for at least 2 weeks.~~

~~The monitoring data shall, in conjunction with the findings of the culvert construction works under WGN200101, be used to establish a turbidity trigger level to be applied at 50 metres downstream of the temporary dam. This trigger level shall be provided with the SEMP required by condition 21 of this consent;~~

~~a) During the construction or removal of the temporary dam works, the consent holder shall collect instream turbidity data at the zone of reasonable mixing for the relevant stage, every hour. Measurements shall be taken using a continuous data logger.~~

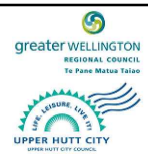
~~b) In the event that the downstream turbidity value at the zone of reasonable mixing for the relevant stage fails to return to the trigger level or within 20% of the upstream baseline monitoring site for the same time period levels where levels are <20NTU, within 24 hours of the temporary piped dam or diversion being installed or removed, the consent holder shall undertake response actions as detailed in condition 29.~~

Appendix B Revised designation plans



FOR INFORMATION ONLY

REV	DATE	DRAWN	REV'D	APP'D	REVISION	DRAWING NUMBER	REFERENCE DRAWING TITLE
B	14/04/20	CZ	JS	IG	ISSUED FOR INFORMATION		
A	29/11/19	JWS	JS	IG	ISSUED FOR TENDER		



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 1 Grey Street
 WELLINGTON 6011
 NEW ZEALAND
 Tel: +64 4 473 4265
 Fax: +64 4 473 3369
 Web: www.jacobs.com

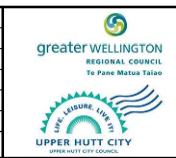
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PROJECT PINEHAVEN STREAM IMPROVEMENTS		DESIGNED JWS	DESIGN REVIEW DF	DATE 29/11/19	DATE 29/11/19

TITLE DESIGNATION PLAN SCHEME OVERVIEW		SCALE 1:5000 @A3	DRAWING No. IZ089000-SP0-400-GN-DRG-0100	REV B
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C	20/02/20	CZ	JS	IG	ISSUED FOR INFORMATION		
B	12/02/20	CZ	JS	IG	ISSUED FOR INFORMATION		
A	29/11/19	JWS	JS	IG	ISSUED FOR TENDER		



CLIENT		WELLINGTON WATER	
PROJECT		PINEHAVEN STREAM IMPROVEMENTS	
DRAWN	DRAWING CHECK	REVIEWED	APPROVED
JWS	DF	DF	IG
DESIGNED	DESIGN REVIEW	DATE	DATE
JWS	DF	29/11/19	29/11/19

TITLE		DESIGNATION PLAN SHEET 1	
SCALE	DRAWING No.	REV	
1:500 @ A3	IZ089000-SP0-400-GN-DRG-0101	D	

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 1 Grey Street
 WELLINGTON 6011
 NEW ZEALAND
 Tel: +64 4 473 4265
 Fax: +64 4 473 3369
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TITLE DESIGNATION PLAN SHEET 2		SCALE 1:500 @ A3	DRAWING No. IZ089000-SP0-400-GN-DRG-0102	REV C
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greater WELLINGTON
REGIONAL COUNCIL
Te Papa Māhau Taitoa



Wellington Water




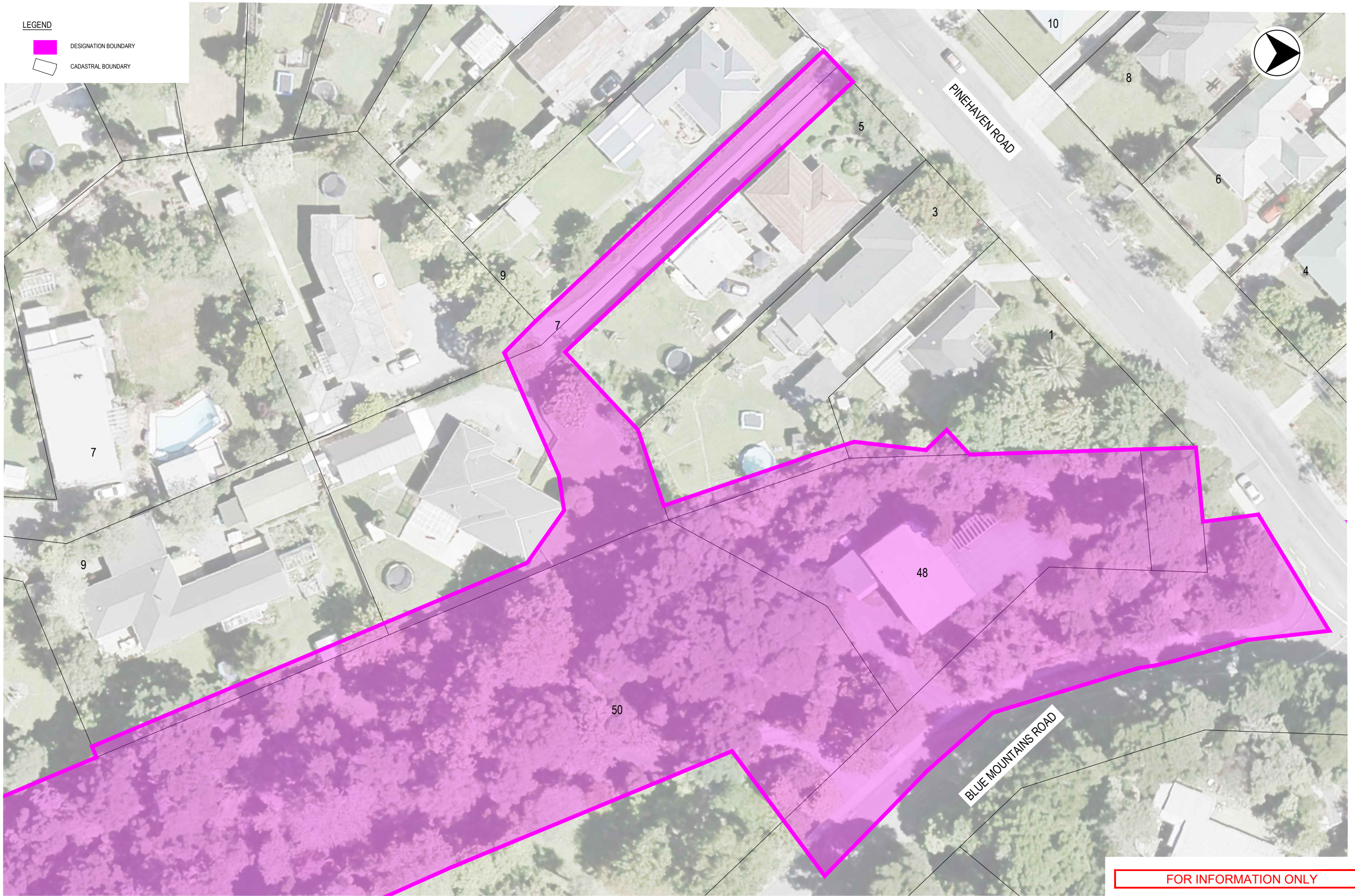
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NEW ZEALAND

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DESIGNED JWS	DESIGN REVIEW DF	DATE 29/11/19	DATE 29/11/19

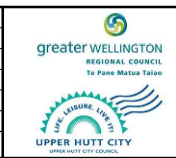
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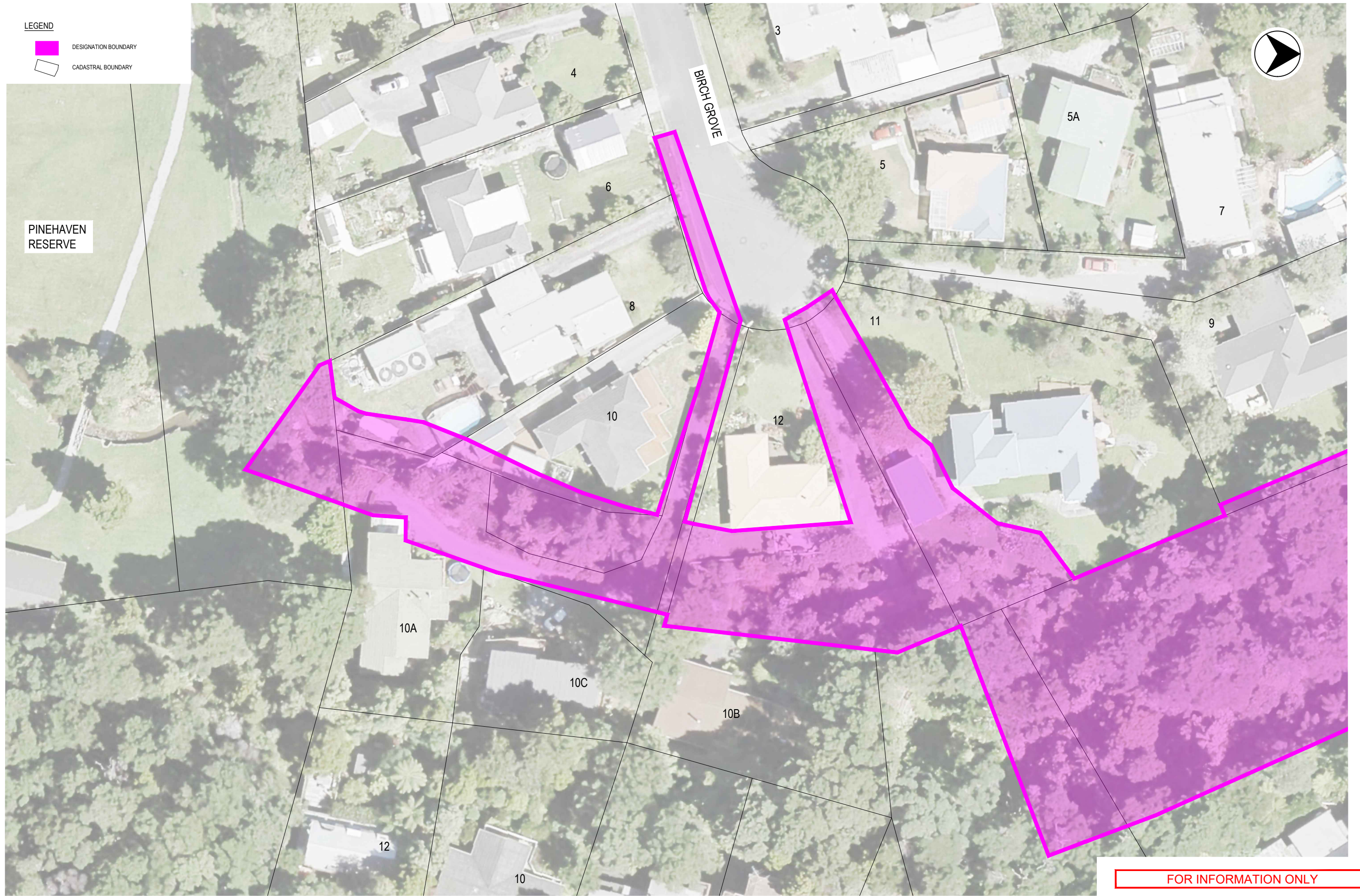
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DESIGNED JWS	DESIGN REVIEW DF	DATE 29/11/19	DATE 29/11/19

TITLE DESIGNATION PLAN SHEET 5		REV C
SCALE 1:500 @ A3	DRAWING No. IZ089000-SP0-400-GN-DRG-0105	

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PINEHAVEN RESERVE



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DESIGNED JWS	DESIGN REVIEW DF	DATE 29/11/19	DATE 29/11/19

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