

**Before Independent Hearing Commissioners appointed by Wellington  
City Council**

In the matter of the Resource Management Act 1991 (**RMA**)

And

In the matter of hearing of submissions on the Proposed Wellington City District  
Plan

Between

**Argosy Property No 1 Limited, Fabric Property Limited,  
Oyster Management Limited and Precinct Properties New  
Zealand Limited**

and

**Wellington City Council**

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Legal submissions on behalf of Argosy Property No 1 Limited  
(submitter 383), Fabric Property Limited (submitter 425), Oyster  
Management Limited (submitter 404) and Precinct Properties New  
Zealand Limited (submitter 139)

Hearing Stream 4 – City Centre zone and Waterfront zone

Dated 20 June 2023

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## MAY IT PLEASE THE COMMISSIONERS

### INTRODUCTION

1. Argosy Property No 1 Limited (**Argosy**), Fabric Property Limited (**Fabric**), Oyster Management Limited (**Oyster**) and Precinct Properties New Zealand Limited (**Precinct**) have made submissions on the Proposed Wellington City District Plan (**Proposed Plan**). In this Centres hearing, these legal submissions relate to the City Centre Zone (**CCZ**) and Waterfront Zone (**WFZ**) chapters of the Proposed Plan.
2. These legal submissions will:
  - (a) Provide some legal context;
  - (b) Explain the role and function of a city centre under the National Policy Statement on Urban Development 2020 (**NPS-UD**);
  - (c) Identify that there are fundamental issues with the proposed City Outcomes Contributions framework;
  - (d) Note that it is not appropriate to require mandatory notification for the purpose of discouraging activities;
  - (e) Address the amendments are necessary to the WFZ provisions to provide certainty of ongoing investment and give effect to the NPS-UD.
3. In addition to these legal submissions, the following witnesses have prepared statements of evidence in support of Argosy, Fabric, Oyster and Precinct's submissions on the CCZ and WFZ chapters of the Proposed Plan:
  - (a) Joe Jeffries has prepared a statement of planning evidence;
  - (b) Cameron Wallace has prepared a statement of urban design evidence;
  - (c) Grant Burns has prepared a statement of corporate evidence on behalf of Argosy;

- (d) Kevin Pugh has prepared a statement of corporate evidence on behalf of Precinct; and
- (e) Tom Jamieson has prepared a statement of corporate evidence on behalf of Oyster.

## LEGAL CONTEXT

4. A territorial authority must review its district plan every 10 years and consider whether provisions require alteration.<sup>1</sup>
5. The requirements for a territorial authority when changing a district plan are set out in Part 5 RMA. Section 74(1)(ea) requires a territorial authority to change its district plan 'in accordance with' a national policy statement and s 75 requires a district plan to 'give effect to' a national planning standard and a national policy statement.
6. Significant changes to the planning framework since the operative Wellington District Plan was last reviewed are the introduction of the National Planning Standards and the NPS-UD.
7. The NPS-UD came into force on 20 August 2020, and was amended on 11 May 2022. The NPS-UD 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. The NPS-UD reinforces the centres hierarchy in the National Planning Standards, and sets express requirements for intensification to be enabled in centres.
8. The Supreme Court in *King Salmon* recognised that 'give effect to' in the context of a national policy statement simply means 'implement' and that on the face of it this is a strong directive, creating a firm obligation on those subject to it.<sup>2</sup>

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<sup>1</sup> Resource Management Act 1991 (**RMA**), s 79.

<sup>2</sup> *Environmental Defence Society v New Zealand King Salmon* [2014] NZSC 38, [2014] NZLR 593, at [77].

9. In giving effect to the NPS-UD when making decisions on the Proposed Plan, the Council is required to:<sup>3</sup>
- (a) contribute to well-functioning urban environments.<sup>4</sup>
  - (b) enable more people to live in, and more businesses and community services to be located in, areas of an urban environment in which the area is in or near a centre zone; is well-serviced by existing or planned public transport; and / or there is a high demand for housing or business land in the area.<sup>5</sup>
  - (c) 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.<sup>6</sup>
  - (d) have regard to the fact that the planned urban form in the Proposed Plan may involve significant changes to an area, and those changes may detract from amenity values appreciated by some people but improve amenity values appreciated by others.<sup>7</sup>

#### **THE ROLE AND FUNCTION OF THE CITY CENTRE UNDER THE NPS-UD**

10. Argosy, Fabric, Oyster and Precinct are property funds and companies which have significant investment in the CCZ (as shown in the map at **Appendix A**), and have each lodged submissions on the Proposed Plan seeking to ensure that development and investment is enabled while being subject to planning controls that are appropriate for New Zealand's capital city centre.
11. The Introduction to the CCZ chapter of the Proposed Plan reflects that the CCZ is "the principal commercial and employment centre servicing the city and metropolitan region" and Objective CCZ-O3 states the CCZ has "the highest and most intensive form of development concentrated in this zone". However, sufficient height and density of development and appropriate

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<sup>3</sup> National Policy Statement on Urban Development 2020 (**NPS-UD**), Policy 6(b) and (c).

<sup>4</sup> NPS-UD, Objective 1 and Policy 1.

<sup>5</sup> NPS-UD, Objective 3.

<sup>6</sup> NPS-UD, Policy 2.

<sup>7</sup> NPS-UD, Policy 6(b).

design flexibility are necessary to ensure that the CCZ continues to be an attractive place for investment.

12. Policy 3(a) of the NPS-UD requires that the Proposed Plan enable “in city centre zones, building heights and density of urban form to realise *as much development capacity as possible, to maximise benefits of intensification*” (emphasis added). This is strong direction.
13. Policy 4 of the NPS-UD requires that the Proposed Plan must modify the relevant building height or density requirements under Policy 3 only to the extent necessary to accommodate a qualifying matter.<sup>8</sup>
14. The starting point under the intention of the CCZ and the NPS-UD therefore is that as much development capacity as possible must be enabled in the CCZ. This means careful consideration is needed of the development controls in the CCZ which restrict building heights and density.
15. There are two tools available to limit building heights and density of urban form in the CCZ: development controls (in the form of rules and standards) and qualifying matters.
16. Development controls will always be needed in the CCZ. However, it is important that development controls are tested to ensure that building height or density requirements give effect to the NPS-UD. For a qualifying matter, this requires evaluation of the impact that a limit will have on development capacity and the costs and broader impacts of imposing those limits is needed for identifying a qualifying matter (clause 3.33 of the NPS-UD and s 77J RMA).
17. The evaluation for each rule or standard that imposes limits on height or density should be similarly robust. This is because of the starting point that as much development capacity as possible should be realised to maximise the benefits of intensification (Policy 3) and significant changes are anticipated in areas as part of the planned urban form under the NPS-UD (Policy 6). In giving effect to the NPS-UD, development controls that may have been rolled over from the Operative District Plan now need to be considered under a different lens.

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<sup>8</sup> NPS-UD, Policy 4.

18. Precinct sought that the height limits in the CCZ be deleted. The Council officer in the section 42a report has recommended that height limits in the CCZ be deleted from the Proposed Plan, and the existing height limits be reclassified as 'height thresholds'.
19. We consider that deleting the height limits in the CCZ is necessary and appropriate to give effect to the NPS-UD. The plain language of Policy 3(a) expressly contemplates "building heights" realising as much development capacity as possible. The clearest interpretation of Policy 3(a) is a presumption of unlimited building heights unless there is a reason that is not possible – for example, there is a qualifying matter.
20. This is consistent with the interpretation of Policy 3 by the territorial authorities in the Wellington region – Hutt City Council and Upper Hutt City Council both propose to allow unlimited height in the city centre. The Regional Policy Statement for the Wellington Region (**RPS**) states the Wellington City Centre is intended to be the regional central business district,<sup>9</sup> and it would be inconsistent with the RPS if more development height was enabled in the Hutt City and Upper Hutt centres than in the Wellington CCZ.
21. Argosy, Fabric, Oyster and Precinct have also sought other amendments to the rules and standards in the CCZ, which would more appropriately enable development and maximise the benefits of intensification, including:
  - (a) Enabling minor cosmetic alterations to buildings or structures as a permitted activity (CCZ-R19);
  - (b) Limiting the minimum ground floor height to buildings within 10m of a street front (CCZ-S5);
  - (c) Reducing the requirement for sites to be built up to the full width of a street boundary (CCZ-S8);
  - (d) Deleting the minimum building separation distance standard (CCZ-S11); and

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<sup>9</sup> Regional Policy Statement for the Wellington Region, Objective 22(a).

- (e) Deleting the maximum building depth standard (CCZ-S12).
22. Mr Pugh's evidence explains that removing these unnecessary consent triggers would give landowners and developers the flexibility to maximise the potential of a site, while still resulting in good quality, functional buildings.<sup>10</sup> These amendments would better give effect to the NPS-UD because they would enable land to be better utilised to the extent possible in the CCZ.

### **THERE ARE FUNDAMENTAL ISSUES WITH THE PROPOSED CITY OUTCOMES CONTRIBUTIONS FRAMEWORK**

23. The City Outcomes Contributions framework proposes to create a 'points' system in which certain thresholds must be met for buildings that exceed the maximum height threshold or are under the minimum height limit.
24. Mr Jeffries' and Mr Wallace's evidence sets out that the City Outcomes Contributions framework is highly problematic from a planning and urban design perspective. As some of the most significant landowners in the CCZ, the corporate evidence provided in support of Argosy, Oyster and Precinct's submissions explains that the framework is also highly fraught from a commercial perspective because it does not provide enough certainty for developers to actually use the framework to construct buildings that exceed the height thresholds.
25. The fundamental legal issue with the City Outcomes Contributions is that while they impose requirements for taller buildings, but they do not relate to the potential adverse effects on the environment from buildings that exceed height thresholds or do not comply with minimum height limits. Mr Wallace identifies that the adverse effects of buildings that exceed permitted height limits usually turn on issues around visual effects, and off-site amenity effects (e.g. shading).<sup>11</sup>
26. A territorial authority's functions under s 31(1)(a) RMA include the "establishment, implementation, and review of objectives, policies, and methods to achieve integrated management of the *effects* of the use, development, or protection of land and associated natural and physical

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<sup>10</sup> Statement of evidence of Kevin Pugh on behalf of Precinct at [29]-[33].

<sup>11</sup> Statement of evidence of Cam Wallace on behalf of Argosy, Fabric, Oyster and Precinct at [38]. See also the statement of evidence of Joe Jeffries on behalf of Argosy, Fabric, Oyster and Precinct at [5.5].

resources of the district”. The City Outcomes Contributions do not fit within this function.

27. It is therefore difficult to justify the limit that the City Outcomes Contributions impose on height limits in the CCZ in the context of the RMA. Proactively requiring developers to provide ‘outcomes’ where height thresholds are exceeded will also not give effect to Policy 3(a) of the NPS-UD.
28. It is appropriate for the Proposed Plan to seek that development in the CCZ provides positive amenity effects. However, most new buildings and additions or alterations to existing buildings will trigger a restricted discretionary consent status under Rules CCZ-R19 or CCZ-R20, and so an assessment of amenity will be required in any case.<sup>12</sup> Mr Burns’ and Mr Pugh’s statements of evidence reflect that:
- (a) there are commercial incentives for taller buildings to provide the public benefits sought by the City Outcomes Contributions, without the restrictive and uncertain points system;
  - (b) providing flexibility for a feasible development is more likely to provide additional amenity and public beneficial outcomes in the development; and
  - (c) the City Outcomes Contributions framework is more likely to limit building height due to its uncertainty, and therefore will not lead to the positive amenity outcomes sought.
29. Therefore, Argosy, Fabric and Precinct seek as primary relief that the City Outcomes Contributions framework is deleted in its entirety from the Proposed Plan. This is most appropriate because it would avoid imposing unnecessary and uncertain threshold limits on building heights, and enabling flexibility in building height that will better support the efficient use of land and quality design outcomes.

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<sup>12</sup> For example, under Objectives CCZ-O5 and CCZ-O7 and Policies CCZ-P9, CCZ-P10 and CCZ-P12.



30. As alternative relief, Argosy, Fabric and Precinct seek that the City Outcomes Contributions framework is significantly amended so that:
- (a) Appendix 16 containing the points system and table of outcomes is deleted; and
  - (b) Policy CCZ-P11 is amended to instead 'support' new developments that exceed the height thresholds or do not comply with minimum building heights and provide positive city outcomes (including those matters in Appendix 16).
31. This alternative relief would provide more certainty. It would set a threshold for building heights but recognise the positive outcomes from providing the matters listed in the policy (including contributing to public space, sustainability, earthquake resilience, and housing affordability).

**IT IS NOT APPROPRIATE TO REQUIRE MANDATORY NOTIFICATION FOR THE PURPOSE OF DISCOURAGING ACTIVITIES**

32. Precinct seeks that the mandatory public notification requirement for resource consent applications for at grade carparking is deleted. Mr Jeffries explains the planning reasons for this requirement to be deleted.<sup>13</sup>
33. The Council officer in the section 42a report for the CCZ considers that mandatory public notification is appropriate as it discourages these activities.<sup>14</sup>
34. The function of notification under the RMA is to enable submissions to be made which may assist a decision-maker to understand the effects of a proposed activity, and the consequence of mandatory notification is enabling public participation in a resource consent application. While public notification increases the time and cost of consent processes, it is not a tool for encouraging or discouraging certain activities, and it is inappropriate for the Council officer to require public notification for this purpose. The mandatory public notification requirement should therefore be deleted.

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<sup>13</sup> Statement of evidence of Joe Jeffries on behalf of Argosy, Fabric, Oyster and Precinct at [6.1]-[6.7].

<sup>14</sup> Section 42a report on the City Centre zone at [372].

**AMENDMENTS ARE NECESSARY TO THE WFZ PROVISIONS TO PROVIDE CERTAINTY OF ONGOING INVESTMENT AND GIVE EFFECT TO THE NPS-UD**

35. Fabric has a 99-year ground lease from Wellington Waterfront Limited for the Meridian Building, in the WFZ. However, this building has been vacant since April 2022 as a precaution, after an assessment identified that the building may be earthquake-prone.
36. Fabric is seeking a number of changes to the WFZ, including restricted discretionary activity status for demolition in the WFZ (WFZ-R13), removing the mandatory public notification requirement for alterations and additions (WFZ-R14) and to increase the maximum building height for the Meridian Building (WFZ-S1).
37. Mr Jeffries acknowledges that there is generally a high degree of public interest in the WFZ.<sup>15</sup> Therefore it is important that landowners have sufficient certainty of development parameters so that they can continue to invest in their buildings, which will maintain and enhance the amenity of the WFZ.
38. For example, Fabric is seeking that an additional storey is enabled to the four storey Meridian Building. We understand that being able to construct and lease an additional storey at this building without needing a resource consent for the increase in height would make the necessary earthquake strengthening more feasible (and would only be a moderate increase to the height).<sup>16</sup> Jarrod Thompson's statement of evidence on behalf of Stride Investment Management Limited (which manages Fabric's portfolio) explains that seeking resource consent for a building increases uncertainty and decreases feasibility.<sup>17</sup> This is particularly the case in the WFZ, which weighs public interest very highly (and so increases the uncertainty, delay and cost of a resource consent application).
39. Removing the mandatory public notification requirement for additions and alterations to buildings in the WFZ would also contribute to providing the certainty needed for continued investment in the WFZ. Some additions and

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<sup>15</sup> Statement of evidence of Joe Jeffries on behalf of Argosy, Fabric, Oyster and Precinct at [8.9].

<sup>16</sup> Statement of evidence of Joe Jeffries on behalf of Argosy, Fabric, Oyster and Precinct at [8.15].

<sup>17</sup> Statement of evidence of Jarrod Thompson on behalf of Stride Investment Management Limited and Investore Property Limited at [25] and [32].

alterations to buildings may trigger a discretionary resource consent under Rule WFZ-R14.6 but still may be fairly minor and public notification may not contribute to an assessment of the effects of the addition or alteration. In these circumstances it is more appropriate for the processing planner to retain discretion to assess whether it is appropriate to notify a resource consent application under the robust and clear tests of the RMA, rather than requiring notification.

40. In terms of building height, Policy 3(c) of the NPS-UD directs that building heights of at least 6 stories are enabled within at least a walkable catchment of the edge of city centre zones. The WFZ is clearly within a walkable catchment of the City Centre, and although the WFZ is subject to qualifying matters, development must be limited only to the extent necessary to accommodate that qualifying matter (Policy 4). Here, the additional storey will still be subject to assessment against the Minimum Sunlight Access Public Space overlay that applies to Kumutoto park. Height is not required to be restricted because of this open space as it has its own control that applies. Mr Wallace also confirms that he has no issues on urban design grounds for the further height sought, noting resource consent will still be required, and it is more important to facilitate the ongoing use of this building and activation of the WFZ.<sup>18</sup>
41. It is submitted that increasing the permitted height to at least 23.1m as sought will give effect to the NPS-UD, while accommodating qualifying matters in the WFZ.
42. Andrew Wharton has prepared supplementary evidence on the increase to the permitted height limit and considers Fabric's evidence "is not detailed enough or public enough to justify an increased height on this site".<sup>19</sup> We disagree. Fabric's submission on the Proposed Plan sought a 23.1m height limit for the Meridian Building, and this submission point was included in the Council's summary of submissions. Making submissions on the Proposed Plan is a public process, and an appropriate process to seek this change. The public had the opportunity to comment on the height controls in the WFZ, but in this case no other submissions or further submissions were lodged on

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<sup>18</sup> Statement of evidence of Cameron Wallace on behalf of Argosy, Fabric, Oyster and Precinct at [50].

<sup>19</sup> Statement of supplementary evidence of Andrew Wharton on behalf of Wellington City Council at [10].

- the height of the Meridian Building or any other building in the Waterfront zone.
43. In the WFZ, an addition or alteration to a building (WFZ-R14) or construction of a new building (WFZ-R15) will require a resource consent application that will be publicly notified in any case. Fabric is seeking for the Proposed Plan to recognise that a 23.1m height limit is appropriate at this site.
44. Overall, these amendments would balance the recognition that the WFZ is an important public space, that more certainty should be provided for minor alterations and additions so that the built form continues to contribute to the amenity of the area, and to provide more certainty on the level of building height and density in this highly accessible and desirable location.

### **CONCLUSION**

45. Argosy, Fabric, Oyster and Precinct seek that their submissions and the relief sought (set out in Appendix A to Mr Jeffries' statement of evidence) are accepted by the Panel.

**DATED** at Auckland this 20th June 2023



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**Bianca Tree / Amy Dresser**

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