

**BEFORE INDEPENDENT HEARING COMMISSIONERS APPOINTED BY
THE WAIMAKARIRI DISTRICT COUNCIL**

UNDER The Resource Management Act 1991

AND The Proposed Waimakariri District Plan

IN THE MATTER OF Submissions and further submissions on Proposed
Waimakariri District Plan

**LEGAL SUBMISSIONS ON BEHALF OF OXFORD EQUITY LIMITED
(SUBMITTER ID FS-117)**

14 August 2023

Tavendale and Partners
Lawyers, Christchurch
Level 3, Tavendale and Partners Centre, 329 Durham Street North
P O Box 442
Christchurch 8140
Telephone: (03) 374-9999, Facsimile (03) 374-6888

Solicitor acting: J R King / S A Chidgey

MAY IT PLEASE THE COMMISSIONERS:

- 1 These submissions are presented on behalf of Oxford Equity Limited (**OEL**) in relation to the proposed Waimakariri District Plan (**PDP**).
- 2 OEL is the landowner of 17 Main Street, Oxford (**the Property**). The historic dwelling on the Property, known as 'Redwoods' or 'Currilea', is a Category 2 Heritage Item entered on Heritage New Zealand Pouhere Toanga's New Zealand Heritage List.
- 3 As stated in the s42A Officer's Report, OEL made a Further Submission on the PDP. As discussed at paragraphs [33] and [34] of Mr Dallimore's evidence, OEL did put forward an original submission, but this was refused by the Council as it was made 76 days later after the submission period closed (being approximately 46 days beyond the Council's apparent policy of accepting no submissions made more than one month after the submission period). We return to this matter later in these submissions.

Clarification of Relief Sought

- 4 In essence, OEL's further submission:
 - 4.1 supports and/or opposes proposals by various submitters to insert additional drafting proposed by various submitters into a number of polices and rules in the PDP Historic Heritage chapter¹; and
 - 4.2 supported submission point 408.14, seeking that the mapped Heritage Protection Overlay (**the Overlay**) notified over 'Belgrove Farmhouse' be reduced, due to its arbitrary extent.² As a consequence, OEL sought that the Overlay over its own Property (also arbitrarily drawn in our submission) be reduced to reflect the description of the Property's features as described by the Heritage New Zealand List.³
- 5 In response to the s42A Report Officer's concerns regarding scope, OEL is no longer pursuing the various drafting relief sought in its further submission (paragraph 4.1 above). The Panel can therefore disregard that relief and the Officers' comments in the s42A Report relating to it.⁴
- 6 OEL is pursuing its mapping request and continues to support the case presented by Bellgrove Rangiora Ltd, Submitter 408 (**Bellgrove**) in this regard.

¹ Oxford Equity Limited (FS-117) further submission dated 21 November 2022, at [14] to [15], [18] to [19], [24] to [25], [30] to [31] and [36] to [37].

² As sought by Bellgrove Rangiora Ltd (Submitter No.408) at pages 6 and 16 of its original submission submitted by Aurecon NZ.

³ Oxford Equity Limited (FS-117) further submission dated 21 November 2022, at [10] – [11].

⁴ s42A Report, particularly at pages 100-106 of Appendix C.

Content of Submissions

- 7 These written submissions therefore focus on the requested mapping relief and to that end address:
- 7.1 deficiencies in the Council's Section 32 Report and s42A Officer's Report; and
 - 7.2 responding to the scope issues raised by the s42A Officer's Report at [392]-[393], and in Appendix C (at page 99).

Deficiencies in s32 and s42A Reports

Section 32 Report

- 8 Clause 5(1) of the First Schedule of the RMA directs that the local authority is to prepare an evaluation report under section 32, to have particular regard to it in deciding whether to proceed, and if it decides to do so, to publicly notify the proposed plan change.
- 9 The Section 32 Report⁵ lacks a robust evidence-based justification for the current delineation of the Overlay in the notified PDP. Council's 2021 Heritage Item Record Form 050 notes the HNZPT description: *"the extent of scheduling is the land parcel on which the house is located."* and directly acknowledges the HNZPT extent *"is part of Lot 1 DP22696 ... the building known as Redwoods thereon, with the buffer of approximately 2 metres around the house"*. Yet, concludes that *"...the extent of scheduling is the land parcel on which the house is located."* The detail within the Council's assessment supports the smaller extent for scheduling, rather than the full parcel extent proposed by Council.
- 10 OEL agrees with the assessment by Bellgrove in its submission that the analysis/method undertaken by the Council to delineate the Overlay has resulted in arbitrary 'footprints' that do not reflect the heritage areas requiring protection on the 'Belgrove Farmhouse'.
- 11 It appears the Council has elected (or defaulted to) match the ratepayers' title boundaries, regardless of the size of the heritage item in the site. We submit this is misleading, unfounded in the site assessments, and will cause further debate between Council and landowners in future. This method to delineate the Overlay is neither underpinned, or reflective of the Historic Heritage Significance Assessment Criteria set out under HH-SCHED1.

⁵ Section 32 Report for Historic Heritage prepared for the Waimakariri District Plan, dated 18 September 2021.

- 12 In the case of OEL, the Council's assessment has resulted in a greater area being delineated as a Overlay, than is required in order to protect the historical heritage values within the site from inappropriate subdivision, use and development under s6 RMA. This is supported by HNZPT having re-confirmed the extent of the heritage values in the Listed Record 3073 (as being limited to the historic dwelling and 2m surrounds) after undertaking a site visit ten years ago.⁶

Section 42A Report

- 13 The Council's conclusion that OEL does not have scope to seek a reduction of the Overlay over its site is also deficient, lacks justification, and is not supported by law.

- 14 The Council Officer said:⁷

...I consider the further submission... to be out of scope of what a further submission can seek as the further submission seeks changes that were not sought in the original submission. The further submission supports the changes sought by Bellgrove [408.14] to the extent of the scheduled setting for HH052 and supports Bellgrove's reasons as to why the extent of the setting should be amended. The further submission seeks that the extent of the setting for the 'Redwoods' property HH050, is amended to the setting in the Operative Plan that was the building with a 2m buffer zone.

As the further submission seeks a decision that was not sought in the Bellgrove [408.14] original submission, I consider the decision sought is out of scope. I have therefore only considered the further submission's support for the Bellgrove [408.14] original submission. I have not considered the decision sought in the further submission as it pertains to the 'Redwoods' property HH050.

- 15 While this statement is correct insofar that Bellgrove did not expressly seek mapping relief apply to OEL's site in particular, the Council's Section 42A Report failed to consider the role of consequential relief requested by Bellgrove in its original submission, and OEL's ability to rely on this in its further submissions as "scope" to seek a reduction in the Overlay over other areas (such as its site).

- 16 If the Council's Section 42A Report had considered the role of consequential relief in providing scope, we submit the Council would have reached a different conclusion as to OEL's request to reduce the Overlay area. The ability for OEL to rely on consequential relief as scope for reducing the Overlay on the Property is traversed further below in these submissions.

⁶ Mr Dallimore, Statement of Evidence, dated 07 August 2023, at [19].

⁷ Section 42A Report, Historic Heritage Stream 5, dated 21 July 2023, at [392]-[393].

Scope generally

- 17 The legal principles relating to the scope of relief that may be sought to a Proposed Plan, or more relevantly, the scope of decisions able to be made on submissions, are fairly well established and settled. For relief to be considered within scope, the amendment must fairly and reasonably land within:
- 17.1 an original submission; or
 - 17.2 the proposed change as notified; or
 - 17.3 somewhere in between.⁸
- 18 Considering whether a further submission goes beyond what was fairly and reasonably raised in submissions will usually be a question of degree, that is:
- 18.1 judged by the terms of the proposed change and the content of the submission;⁹
 - 18.2 approached in a realistic workable fashion rather than from the perspective of legal nicety,¹⁰ with consideration of the whole relief package detailed in submissions;¹¹
 - 18.3 also approached in a precautionary manner, because the public should not be denied the opportunity to effectively respond to additional changes in the plan making process¹²; and
 - 18.4 is able to deal with the realities of the situation and notice when it is unreal to devoutly stick to a legalistic interpretation that a council can only accept or reject relief sought.¹³

OEL's case on scope

- 19 As identified earlier in these submissions, we submit [392]-[393] and Appendix C (at page 99) of the s42A Officers' Report does not adequately deal with the following relevant matters in relation to scope:

⁸ *Re an application by Vivid Holdings Ltd* [1999] NZRMA 467 (EnvC) at [19]. See also *The Church of Jesus Christ Latter Day Saints Trust Board v Hamilton City Council* [2015] NZEnvC 166 at [19].

⁹ *Hastings v Auckland City Council A068/01*, at [58].

¹⁰ *Royal Forest and Bird Protection Society Inc v Southland District Council* [1997] NZRMA 408 (HC) at 10. This proposition was recently endorsed by the High Court in *Gertrude's Saddlery Limited v Queenstown Lakes District Council* [2020] NZHC 3387 at [74].

¹¹ *General Distributors Ltd v Waipa District Council* (2008) 15 ELRNZ 59 at [58]-[60].

¹² *General Distributors Ltd v Waipa District Council* (2008) 15 ELRNZ 59 at [58]-[60]; *Palmerston North City Council v Motor Machinists Ltd* (2013) NZHC 1290 at [82].

¹³ *Albany North Landowners v Auckland Council* [2016] NZHC 138 at [107], citing *Countdown Properties (Northlands) Ltd v Dunedin City Council* [1994] ELRNZ 150 (HC) at 170.

- 19.1 OEL's mapping request is in support of, and a consequential change arising from, the Officer's¹⁴ and Dr Ann McEwan's¹⁵ recommendations to accept the mapping change by Bellgrove;
- 19.2 the wider surrounds of the Property are not a heritage setting worthy of protection under s6(f) of the RMA; and
- 19.3 the prejudice strict adherence to legalistic process would cause to the affected landowner.

Consequential mapping changes

- 20 While on first blush the mapping relief sought by OEL looks geographically out of scope to that sought by Bellgrove, in order to consider consequential amendments one must first identify the scope in the original submission.
- 21 Bellgrove's submission states:
 - 21.1 the method in the form of a circle centred on the heritage item is arbitrary, and is open to interpretation as to the criteria and relevance of setting;
 - 21.2 the Overlay mapping is not justified by an appropriate s32 report, and a further site-specific assessment is required to be undertaken for the area to confirm the Bellgrove setting; and
 - 21.3 requests "*all consequential and necessary amendments to the PWDP that address the matters raised by [Bellgrove]*" be made.¹⁶
- 22 It is settled law that consequential changes can flow downwards or upwards through a proposed plan. A submission on an objective or policy could result in a change in the methods below¹⁷, and vice versa – a change to a method can mean the policies, or objective above it are no longer compatible.¹⁸
- 23 We submit that this movement can also occur 'laterally', whereby a mapping or spatial submission approved on one site can have a consequential outcome on another, provided it is truly a consequential change.

¹⁴ S42A Report by Bryony Steven on behalf of Council, dated 21 July 2023, at [388]-[389] and Figure 1.

¹⁵ Statement of Evidence of Dr Ann McEwan on behalf of Waimakariri District Council, dated 21 July 2023, at [24]-[27].

¹⁶ Bellgrove Rangiora Ltd Submission 408, at [32].

¹⁷ *Campbell v Christchurch City Council* [2002] NZRMA 332 (EnvC), at [20].

¹⁸ *Church of Jesus Christ of Latter Day Saints Trust Board v Hamilton City Council* [2015] NZEnvC 166, at [40]-[48]; *Albany North Landowners v Auckland Council* [2017] NZHC 138, at [96], [113]-[118] and [135].

24 Crucially, the High Court in *Albany North Landowners v Auckland Council* also recognised that lateral changes to zones and/or overlays are possible even where landowners do not lodge their own submissions on a proposed plan. The Court held that the Independent Hearing Panel (IHP) had correctly approached the issue of scope, when the IHP considered that:¹⁹

On the issue of spatial consequential changes, where there were good reasons to favour rezoning sought in a submission and good reasons to include neighbouring properties as a consequence, even where there were no submissions from the owners of them [sic] neighbouring properties, including the neighbouring properties in recommendations because it saw that the overall process including notification, submission, summarising points of relief, further submission and late submission and further submission windows provided the real opportunity for participation by those potentially affected.

...where the matter could reasonably have been foreseen as a direct or otherwise logical consequence of a submission point the Panel has found that to be within scope...

Surrounds inappropriately caught in notified Overlay

25 Likely as a result of the s42A Report's premature ruling out of OEL's mapping submission, unfortunately the Council's expert nor HNZPT's evidence have not further assessed, or commented on OEL's relief.

26 Mr Dallimore provides written and visual records explaining the nature and features of the wider landscape setting at the Property, as compared with the listed heritage dwelling and 2m surrounds. In particular, Mr Dallimore notes that:²⁰

26.1 the entranceway does not hold any heritage values and are currently under threat by existing tree roots; and

26.2 the grounds of the property have been rebuilt, replanted, and significantly added as well as including numerous garden sculptures, to the extent that it is now highly modified.

27 In the absence of a more recent site visit, and the lack of a robust analysis underpinning the delineated Overlay, HNZPT's prior visit must be persuasive in the case of the Property, as it is more reflective of the wider landscape setting identified by Mr Dallimore.

¹⁹ *Albany North Landowners v Auckland Council* [2017] NZHC 138, at [96] - [97].

²⁰ At [22] - [29].

- 28 Counsel acknowledges that Bellgrove’s submission point has been accepted in part, and the new Overlay proposed in the S42A Report and Dr McEwan’s evidence will conform to the extent of its new title as approved under their subdivision application.²¹ While this is the case, it is not determinative of retaining the notified Overlay on OEL’s Property to match the title boundaries, without a robust evidence based justification for this approach.
- 29 It is important to bear in mind that Bellgrove’s new title (as approved in the subdivision proposal – 0.31ha), is much smaller than OEL’s title (0.71ha). As a consequence, the parts of OEL’s title which do not include heritage features will be more heavily affected by the inclusion of the Overlay, if it is not re-assessed in light of OEL’s submission – ie. re-assessed in the same manner as the Belgrove Farmhouse has been.

Prejudice to affected landowner

- 30 If the Panel does not accept our argument as to scope under the consequential amendments umbrella, we submit strict adherence to a legalistic approach on timing of making an original submission would, in our client’s case, cause undue prejudice.
- 31 As traversed by Mr Dallimore in his evidence at paragraphs [32] and [33], he identified his disagreement with the proposed Overlay during the draft/consultation version phase and communicated his concerns to the Council. He was reassured that “it” – in his mind, being the Overlay – would only apply to the house and 2m surrounds. This would naturally match the HNZPT listing.
- 32 OEL is not a submitter that has ‘come out of the woodwork’; it is a submitter that technically missed the submission window, but had previously set out its position to Council and has stuck to the same request throughout.
- 33 Council refused to accept OEL’s late original submission as it was 76 days post the close of original submissions, yet the Council’s Summary of Submissions was (as at the date it refused OEL’s submission), still at least another 8 months away. It is therefore difficult to comprehend any prejudice that would have been caused to the Council or other parties if the Council had accepted the late submission.
- 34 OEL was, and likely still is, entitled to have the Council’s decision to refuse OEL’s late submission judicially reviewed, should it decide to do so in the future.

²¹ Statement of evidence of Dr Ann McEwan, dated 21 July 2023, at [24]-[27]; s42A Report, at [386]-[389].

Conclusion

- 35 We submit that granting OEL's requested relief to the Overlay mapping:
- 35.1 is within scope of the submission made by Bellgrove on the PDP by way of being a consequential amendment in terms of mapping approach;
 - 35.2 matches the Heritage New Zealand Pouhere Taonga extent for the historic dwelling and 2m surrounds, as reconfirmed by HZNPT following a site visit;
 - 35.3 better aligns with the Council's own description and assessment of the Property in HH-SCHED2-HH050;
 - 35.4 will not be to the detriment of the public or heritage values generally, as the Property is already modified by modern landscaping and its heritage extent was reconfirmed by HZNPT following a site visit; and
 - 35.5 addresses the prejudice that would otherwise be caused to OEL.
- 36 Further, we submit the relief sought by OEL to amend the Overlay mapping as it applies to 17 Main Street, Oxford, is most appropriate, as it better achieves the purposes of the RMA.



Johanna King/Sam Chidgey
Counsel for Oxford Equity Limited
14 August 2023