

**SUBMISSION BY TA AND LM ROBERTS**

**Dated 4 April 2016**

**THE GREATER WELLINGTON REGIONAL COUNCIL  
AND THE PORIRUA CITY COUNCIL**

<b>In the matter of</b>	Land Use Subdivision Consents (RC69222 – SL004615)
<b>And</b>	Discharge Permits and Land Use Consents (WGN160025)
<b>Applicant</b>	Jagger NZ Limited

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**1. Background**

1.1 These submissions are made on behalf of the Applicants Trevor Athol Roberts and Lesley Marilyn Roberts of 12 Observatory Close, Whitby.

1.2 I have resided with my wife at the above address for sixteen years but I have been familiar with Whitby and its various subdivisions for a period much longer than that. When Whitby was first subdivided I was Junior Counsel and Instructing Solicitor in respect of applications by the landowner and subdivider Community Developments

Consortium to the Town and Country Planning Appeal Board and the Hutt County Council which was then the relevant local authority in respect of the Whitby land, the leading Counsel being the late Laurie Southwick QC. I was involved in all of the decisions and research leading up to the applications. The basis of the application was a document colloquially known as “The Blue Book” which formed the basis for the design and planning of a proposed major urban development consisting of five villages including a large new town centre and industrial development. That concept was ultimately abandoned and the Whitby Village which was to be the first part of a larger development, was the only development that ultimately proceeded. The Whitby Village Plan embodied in the “Light Blue Book” ultimately became part of the Hutt County District Plan and was a separate section of that plan. Hutt County then was absorbed by Porirua City and other local authorities and the area included in the Whitby Village Plan became part of Porirua City. Porirua City District Plan was ultimately reviewed and the original planning for the Whitby Village was lost in that review, though subsequent developers and the Porirua City Council tended to follow the basics of the plan as the Whitby Village developed. The review of the Porirua District Plan is now many years overdue for review. Parts of it have been reviewed under a so called “Rolling Review” policy but the Suburban Section, including Whitby remains to be reviewed.

1.3 I am familiar with the development of Whitby and with various attempts on the part of residents to preserve the basic concept underlying development of Whitby. Whitby was intended as a planned community the planning of which was based on a great deal of research on the part of the original subdivider who based its work on

extensive overseas studies including in particular a United States development of a suburban town known as “Reston”, Whitby was both nationally and internationally regarded as an excellent example of urban planning and was frequently used academically in the 1960’s and 1970’s and later, as an example of superior urban planning

1.4 There were a number of general concepts which formed the core of policy and among them were:

- Significant active and passive recreation facilities;
- The provision of superior urban design facilitating safety and movement throughout the planned area and superior environment for its inhabitants
- The ability to move on foot through a series of walkways both from north to south and east to west across the area without crossing major roads;
- The provision of rural areas on skyline and escarpments to provide a “backdrop” for Whitby;
- The provision of a planned adequate and self-contained small commercial area together with churches and other social and commercial activities to enable Whitby to be self-contained to a degree, the early ear-marking of sites for schools and other facilities to provide access and services to families throughout the development of Whitby.

1.5 The Panel will be familiar with the facts of the developments that effect the land the subject to this application which I will refer to throughout this submission as “Duck Creek North”. Duck Creek North was originally the northern part of an 18 hole golf course which formed the core of the Duck Creek development from both a design and marketing point of

view and the existence of the golf course and the open space and reserve that it represented was an integral and early part of the original marketing and development for the whole of Whitby Village. The golf course ultimately closed and development commenced in circumstances which are irrelevant to this matter but caused a great deal of angst within the Whitby Community. After some minor developments, the southern part of the golf course was sold as was, separately, the land which now forms part of the area known as "Silverwood" which was intended to form a backdrop for Whitby and to remain the rural zoned part of the setting of Whitby. The Community Development Consortium included entities owned by the Todd family who ultimately (in one of the small ironies of the development of Whitby) became the developers of Duck Creek South which no doubt will be referred to in the course of this hearing.

1.6 The history of this matter has produced a circumstance of not inconsiderable difficulty as far as planning and development of the remaining undeveloped areas of Whitby is concerned. I refer to paragraph 1.4 of my original submission in this matter in which I noted that the residents of Whitby deeply regretted the loss of the open space which was one of the core features of the design of the original Whitby Village. The current subdivision of the southern part of the golf course is the latest and most material modification of the original concept of design for Whitby to which must be added various decisions which have undermined the futility of the design for the commercial heart of Whitby and have seriously undermined the original concept of unrestrained and properly planned access by foot and in safety to walkways in all parts of Whitby.

1.7 The residents of Whitby now find themselves in a situation that the Irish tourists in the old story who asked the Irishman "How do we get to Dublin?" and were told "If I was

going to Dublin I wouldn't start from here." Regrettably but inevitably here is where we are and the residents are faced with the decision of how to responsibly deal with that situation, given the planning history of Whitby and the passage of time. It is in the view of this submitter now inevitable that the opportunity to retain golf course land or any part as a significant public reserve is long gone and the issue now is how to deal responsibly and creatively with the current situation

1.8 . It is submitted that the way forward would appear to be to grant consent subject to the imposition of appropriate conditions. That leaves the Panel with the extremely difficult and sensitive task of deciding what in all of the circumstances are appropriate conditions. Putting the matter bluntly, the Commissioners are called upon to decide what must be done to clean up a mess left by a series of carelessly inappropriate decisions by Porirua City Council. Great damage has been done and is largely irreparable but that leaves the Panel in a position of tidying up a situation that simply should not have occurred had proper policies and processes been adopted.

1.9 I recall a discussion I had in the late 1960's with the original manager of the Community Developments Consortium Mr Rex Green, when in response to a question as to why the golf course was placed where it is, he simply commented that doing anything else was simply too hard or too damaging in the long run. Extensive investigations had been made by the Consortium prior to the design and it was evident that much of the golf course land was subject to flooding and some of it was subject to liquefaction to the point that part of Duck Creek North was subsequently designated in the District Plan as an Earthquake Hazard Area. The liquefaction was complex and variable in its nature, part being of a nature experienced in Christchurch and part due to the presence of sawmill

waste in that part of the land originally occupied by the Bradey Family sawmill which had been located close to the creek bed in Duck Creek North. A recent subdivision of land between Observatory Close and James Cook Drive proceeded notwithstanding warnings that were given to the subdivider and representatives of Porirua City, and work continued until the attention of the Wellington Regional Council was drawn to the matter, illustrates the nature of the problem that could be expected to be found in some other parts of Duck Creek North. The late Rex Green was quite open with regard to the solution to the problem when he stated that the evident difficulties presented an opportunity that could be capitalized on from a marketing point of view without acting to the detriment of future residents of Whitby and that was the course of action that followed in the original design. Hence the Golf Course.

1.10 However the Council proceeded to accept a series of development proposals in and around Whitby that have culminated in presenting an extremely difficult situation for the subdivider of Duck Creek North:

- The location of the pumping station and the associated pipelines assumed that there would be no future development of the site that now gives the subdivider a series of aesthetic and engineering problems;
- A variety of circumstances have increased the likelihood of flooding of areas of Duck Creek North. Since we moved to Observatory Close, we have observed that the land has been subjected to what has been described to us by Council Officers and others as "100 year floods" on at least three occasions. The flooding problem that has been very evident in respect of this site is a result not just the sudden arrival of a large quantity of water in the catchment

but also as a result of the increase in the velocity of that water as a result of developments at The Banks, Silverwood, other subdivision, and the continual removal of the vegetation and the increase of the area of hard surfaces throughout Whitby be they roofs or roads or other developments and structures with an associated reduction in permeability coupled with the increase in the velocity of water finding its way into the catchment. The problem is both in respect of storm water arriving directly into Duck Creek but also the increase in storm water entering the two main subsidiaries to Duck Creek itself.

- 1.11 As a matter of observation the problem is compounded by the inadequacy of the culvert at Duck Creek where it reaches State Highway 58 (“SH58”). Any combination of high tide and heavy rainfall demonstrates the inadequacy of that culvert which translates into an increase in flooding. It is appropriate to observe at this point that on the basis of experience the modelling in respect of flood hazard in respect of Duck Creek as it stands and Duck Creek as it is intended to be following the proposed earthworks is on the basis of observation and experience, inadequate. It is presumed that the extensive modelling that was done by the predecessors of the Wellington Regional Council under the supervision of Mr Keith Davis is still available in the Council records but it would be useful to examine those records and the associated reports.
- 1.12 The development history of Whitby has left the developers of Duck Creek North with unpalatable situations to deal with in connection with



the roading and servicing of the subdivision. As a result of the arrival of the Marsden School on the southern end of the site, it has become extremely difficult to provide alternative access to the single access on to James Cook Drive at the southern end of the subdivision. That leaves a community consisting of potentially 148 households with only one possibility of servicing and egress. Another possibility may exist at the southern end of Duck Creek North though it is difficult to envisage where and what that might be. Access from Shackle Lane has been suggested and that may be a possibility though topography makes it a singularly unattractive one. The result will inevitably be that in the fullness of time, vehicles passing to and from 148 residential properties will be dumped onto James Cook Drive close to a sensitive and already overloaded intersection at SH58. Emergency and other vehicle access to those homes is also prejudiced both by flooding and traffic issues. It has been suggested that the ultimate arrival of Transmission Gully will produce a solution. Commonsense observation and a little thinking about what the situation is going to be in five years' time, when Transmission Gully finally arrives, indicates major problems. The situation is of course compounded by the presence of the Anchor Church which provides a substantial access and parking load and the approval of the extension to Glenbrook Age Care facilities to which forty beds have recently been added with the provision of only four or five additional car parks when the

existing car parking was already grossly inadequate in terms of the District Plan.

- 1.13 Designing a subdivision of Duck Creek North is fraught with difficulties in terms of design, compliance, engineering and aesthetics and detriment to someone is inevitable as a result of the compromises necessary if the land is to be developed. The issue is “who carries the risk and burden of those compromises and to what extent. It is not equitable for the present and future residents of Whitby to be expected to carry a heavy share of that burden when it results in substance from past errors of the local authority. It is not just a matter of producing an optimum and convenient result for the Council and the Applicant. A decline in quality and an increase in risk for existing and future residents are also issues. The Panel is left with the Solomon like task of producing fairness for all concerned in unpalatable circumstances, and it is submitted that a robust use of conditions is a ready and useful tool in doing so.

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## **2 Conditions**

2.1 Some aspects of the processes adopted in dealing with this application have caused great difficulty for some of the parties. That is particularly the case for the parties that take the view that suitable and robust conditions should be applied in respect of the development in fairness and to meet the reasonable needs and risks of all of the parties.

2.2 The appropriate and what this submitter regards as necessary conditions fall into two main categories:

- Conditions relating to flood control and engineering;
- Conditions relating to design and the quality and suitability of design for “engineering” conditions.

2.3 General Conditions suggested by the Wellington Regional Authority whilst they are scattered throughout the very lengthy Section 42A report of the Authority, appear at first study to be suitable and appropriate. However, that is subject to the Caveat that a proper examination of them cannot be made in the time and with the information readily available to other submitters. The length of the report concerned is considerable as is the associated complexity. The suitability and appropriateness of some suggested conditions will only emerge when they are subjected to full scrutiny and analysis and in the light of all of the expert evidence presented. It is unrealistic to expect individual submitters to be able to undertake the necessary analysis when, the expense of printing documents served electronically and the inconvenience of doing so with a report consisting of 274 pages and a large number of addenda and annexures is taken into account and that reference is made only at this point in respect of the report of the Regional Council. Other reports and submissions notably the Section 42A report and submission of the Porirua City Council which will be referred later in this submission, is subject to the same difficulties. In reality, the process to which particularly objectors are subject to goes very close to a breach of natural justice, if it does not indeed in fact constitute such a breach. It is submitted that this problem can be readily corrected by the panel by the panel producing a comprehensive set of conditions, distributing that list to all the parties and seeking further submission or comment within 28 days with the opportunity for a further hearing and submissions if necessary.

2.4 The report or submission of the Porirua City Council is in all of the circumstances a particular disappointment. It is inappropriate in this case that the Council should present a report which in substance is a matter of advocacy and does not take into account the interests of the community that it represents. In particular, it does not adequately comment upon and deal with the process of production of the negotiated a concept plan which was the result of a charrette process (which is a slightly fancy name for a controlled mediation) which involved not just the then subdivider and the Council, but also representatives of the Whitby community. In fairness to the subdivider and applicant, it is evident that an attempt has been made within limits to accommodate the agreement that was reached through the charrette process. The Council could be expected to support and defend the decisions made in the course of that process, but it has clearly not done so in a number of instances. The conditions imposed by the panel should include additional conditions designed to accord with the agreements reached by that charrette process and if the applicant has a subsequent purchaser who is not prepared to comply with the agreements that were earlier reached with regard to some matters determined in respect of the development in Duck Creek North, then the panel should exercise its own judgment and impose conditions that address the problems. For instance ,the Comprehensive development plav envisaged a subdivision of 90 lots complying with the standards in the Suburban Section of The District Plan. The Application represents a very significant departure from that agreement.. The Council cannot simply ignore and escape the responsibility of the “deal” that it did with the then landowner and the community .

2.5 The issues particularly arise in respect of the density of development and the standards to be applied in respect of streets. The Council has a District Plan upon which the

community as a whole is entitled to rely until it is amended under full scrutiny. A number of objections have been raised or noted with regard to the density of the subdivision including the size of sections and aspects of site coverage and issues with regard to roading in particular in respect of a residential development of the size and density proposed. The Council either takes its responsibility in the District Plan seriously or it does not, and it should not take the position that it will enforce the District Plan when it suits it, but exercise discretion particularly discretion on the part of Council Officers, when for other reasons, some of them absolutely collateral to its responsibility under the District Plan when such exercise simply appears to better suit the Council. The Council has enough experience and knowledge to make a principled decision and it should not attempt to depart from the provisions of the District Plan unless it either reviews the plan itself or otherwise subjects a major departure from the plan to other means of community scrutiny. The Council should not make decisions on the basis of what is really self-servicing pragmatism. It is noticeable that in the subdivision of the Aotea Block in which the Council of course has a direct interest, the problems or alleged problems were dealt with in advance by a full scale scheme change. The residents of Whitby have not been allowed that courtesy and the community involvement that goes with it and that state of affairs can only be described as unfortunate. The Council has a responsibility to represent its citizens and ratepayers and if that gives rise to an unfortunate conflict of interest, then the Council should keep its hands off the decision making process entirely except to the extent that it is required by Statute to do so. I reiterate the relief I expressed in the original submission that this matter is effectively in the hands of the Regional Council and not in the hands of the Porirua City Council. If the Panel decides that there

is merit in recognizing the reasonable expectation of Whitby residents that the District Plan should be adhered to in this case, then it is submitted that that may be dealt with by the Panel imposing conditions requiring adherence to the plan. That matter could also be subjected to conditions requiring or enabling further submission before a final decision is made.

2.6 There is the necessity for conditions to be imposed protecting or dealing with other matters particularly relating to walkway design which should be dealt with now:

- Better access to the existing walkway system at the point of Bridge no.3 needs to be recognized and dealt with now. That is not a difficult issue and the additional access can be provided at minimal expense and with little or no disruption to the overall design; The Council's Section 42A report does not adequately deal with or address the matter
- The nature and position of access to the walkway system in the area of the Marsden School also needs to be dealt with now. Some flexibility can be expected and is necessary but a suitable condition can be designed to preserve the continuity to the whole of the walkway system without unduly inhibiting design. That issues needs to be addressed.
- The problem of the inadequacy of the SH58 culvert has not been adequately addressed and further submission and evidence is necessary in this case. The vulnerability of that culvert and the discharge from it in the event of northerly wind, is in fact recognized and also vulnerability to sediment buildup beyond the culvert has been recognized and taken into account at least inferentially, but two other major problems need to be taken into account at this time and it

would be appropriate for the panel to call for further evidence from expert witnesses and some of the other parties. The issues are the size of the culvert (it is recognized that SH58 is regularly overtopped in flood conditions;)and

- the effect of tide on the culvert in flood conditions does not seem to have been recognized and residents who have had the opportunity to observe the culvert over a number of years are well aware that in high tide conditions and especially when there is a northerly wind and heavy rain into the Duck Creek catchment is a major contributor to flooding especially when the velocity of the floods can be expected to increase. The obvious solution is to get rid of the problem to a substantial degree by increasing the size of the culvert. It should be possible for the local authority and Transit NZ and the other entities responsible for SH58 to deal with that problem in the general public interest, and incidentally provide pedestrian access associated with SH58 at the point of the culvert that can be used as a link to the eventual walkway around the inlet when that important community feature and project is completed.

2.7 It is not sufficient or appropriate to rely on the commonsense and goodwill of the local authority, in particular to deal with the identified problems in respect of the pumping station. Specific conditions need to be applied at this point to deal with the pumping station issue.

### **3 Conclusion**

3.1 It is evident that an optimum solution in respect of the development of Duck Creek North is no longer possible and that for all concerned it is better for a solution to be found now rather than later, provided that that solution can be reached in a way that is not manifestly prejudicial to the interests of the Whitby community. The best solution available at this stage, it is submitted, is to support the application subject to the imposition of conditions that will protect the interests of the residents of Whitby as a whole, but also those residents who are particularly affected.

3.2 Those residents who reside between Observatory Close and the proposed subdivision are particularly adversely affected by the amount of fill required as well as by the unfortunate alteration of the outlook from their properties, bearing in mind that all of the properties within the sight of the old golf course were sold at a premium and purchased with an expectation that the area would remain accessible open space, and were marketed on that basis. It would be better if those sorts of problems particularly the ones affecting the residents of Observatory Close could be dealt with comprehensively and fairly now rather than later and it is submitted that the Panel has the opportunity to do so and enforce a negotiated solution by the imposition of conditions. The Panel may not be in a position to do that at this point without further evidence and an extension of its process. That may be appropriate to be examined by the Panel when the evidence of residents on the southern side of Observatory Close is given and the issue addressed in particular.

3.3 Finally, it would be helpful to the residents of Whitby as a whole for the Panel to comment upon the issues that inevitably arise when a local authority ignores or fudges its statutory responsibility to promptly and properly review its District Plan. The difficulties and



complexities in this matter it is submitted, arise substantially as a result of the cumulative effects of the failure of The Porirua City Council to deal promptly and effectively with its statutory responsibility to review the District Plan with the result that difficulties accumulate and increase in seriousness with the result where one bad decision by one process or another leads to another and then to yet another, and it is submitted that this case is a classic example of just that phenomena. Of course it must be recognized that not only the existing residents of Whitby suffer as a result of that, but also the subdivider is adversely affected being forced to plan and design in a circumstance where the problems inherent in the process are compounded by the effect of previous bad decisions and by the fact that what is achievable is not moderated by statutory certainty but dependent on the exercise of discretion by a local authority and its officers.

Dated this 4th. day of April, 2016.

A handwritten signature in black ink, appearing to read 'TA Roberts', is written over a horizontal line.

*TA Roberts*