Before the Independent Hearings Panel
At Wellington City Council

Under	the Resource Management Act 1991
In the matter of	the Proposed Wellington City District Plan
And in the matter of	**Hearing Stream 8 – Natural Features and Landscapes**

LEGAL SUBMISSIONS FOR KILMARSTON DEVELOPMENTS LTD AND KILMARSTON PROPERTIES LTD

24 APRIL 2024

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Introduction

1. These legal submissions are made on behalf of Kilmarston Developments Ltd and Kilmarston Properties Ltd (collectively "Kilmarston").

2. For the purposes of this Hearing Stream, there is only one matter raised by Kilmarston's submissions that requires to be addressed. That is, the removal of the Special Amenity Landscape (SAL) overlay from those parts of Kilmarston's land that have already been zoned Medium Density Residential.

3. There are two parcels of land owned by Kilmarston that are relevant for present purposes. They are depicted in the images at paragraph 30 of Ms van Haren-Giles' supplementary evidence (dated 19 April 2024).

4. The parcels are subject to three different underlying zones: General Rural, Natural Open Space and Medium Density Residential (MRZ).

5. There are 'live' submission points by Kilmarston on the zoning of the land outside this hearing stream. They inform a wider discussion with Council around the tenure and zoning for that land. Kilmarston's submission point in this hearing stream relates exclusively to the removal of the SAL overlay from the MRZ parts of the land (which I call "the subject land" for the remainder of these submissions). Kilmarston accepts the SAL overlay over all other parts of the land.

6. The subject land has been identified for development for a long time, but given the position taken by Ms van Haren-Giles in her supplementary evidence, it seems unnecessary to dwell on that history. Ms van Haren-Giles supports the outcome that Kilmarston is seeking: that the SAL is removed from the subject land.

7. These submissions address the three relevant lenses for examining this issue — landscape values, planning and law.

Landscape values

8. The SAL as notified extends over the entire land area owned by Kilmarston. For a significant part of the Kilmarston land this means that the cadastral boundary of the land on the lower side of the property has been used to define the extent of the SAL.

9. This adoption of the cadastral boundary seems to be a "default" approach, rather than one reflecting the true extent of the relevant landscape values.

10. For instance, Mr Anstey's evidence (26 March 2024) suggests at paragraph 65 that this choice of SAL boundary is based on the current "natural edge of development". That is more a matter of historical chance than an analysis of landscape value: it assumes that just because development has not yet occurred on some of the lower parts of the land, their value as a special amenity landscape is as great as the higher and more prominent parts of the land.

11. Mr Anstey rightly observes that the SAL as notified was based on Boffa Miskell's June 2019 assessment of "natural science" , "sensory", and "shared and recognised" values of this landscape. However, it should be noted that

    11.1 the subject land is a very small fraction of the larger SAL that Boffa Miskell was describing, and

    11.2 Boffa Miskell's analysis does not address in any detailed way the relationship between any specific values of the subject land and the choice of SAL boundary.

    This is not a criticism of Boffa Miskell's assessment, but a note that it is important not to read into that assessment any more detailed analysis than actually took place.

12. Mr Anstey makes two other points in support of the SAL over the subject land (also in has paragraph 65).

13. First, he seems to record that the SAL matches an SNA listing. This is not accurate. The Plan as notified does not include an SNA listing over the subject land (unlike the pre-notification draft, which did).

14. Second, Mr Anstey states that vegetation cover on the subject land performs an important role in ensuring soil stability and the regulation of water runoff. There are three responses to this:

    14.1 While SAL's may serve to recognise values of different sorts, it is not their role to stabilise soil or regulate water runoff. Those may be incidental outcomes of a particular SAL, but they cannot be used to justify an SAL's imposition.

    14.2 Kilmarston holds a current certificate of compliance from Wellington City Council that authorises the removal of this vegetation in its entirety.

    14.3 Kilmarston also holds relevant permits and consents from the Regional Council that address land disturbance (earthworks and gully crossings). Kilmarston sought consents for these land use activities to support the City Council's long-standing intent to enable residential use of the subject land.

15. In summary, Kilmarston's position is that there is not a sound evidential basis for imposing the SAL specifically over the subject land. The particular attributes of the subject land are not addressed by the Boffa Miskell 2019 assessment (and do not reflect the wider sensory, shared and recognised values that the Mt Kaukau SAL seeks to maintain and enhance) and Mr Anstey's evidence does not materially add to that assessment. Taking into account the certificate of compliance and regional permits and consents held by Kilmarston, no assumption can be made that current vegetation and landform will remain.

Planning

16. The possible planning justification for the SAL has been examined in detail for Kilmarston by Ms Xkenjik.

17. As Ms van Haren-Giles now agrees entirely with Ms Xkenjik's assessment, and as you will soon hear from MsXkenjik anyway, I do not address these matters in any detail.

18. Suffice to say that Ms Xkenjik's evidence provides a detailed assessment of relevant provisions of

    18.1 the Regional Policy Statement for the Wellington Region,

    18.2 the National Policy Statement for Urban Development 2020, and

    18.3 Part 2 of the Resource Management Act 1991.

19. Ms Xkenjik essentially concludes that these provisions all support the MRZ zoning of the subject land (which is no longer in issue), and that imposing the SAL overlay would be inconsistent with that outcome. In her supplementary evidence, Ms van Haren-Giles agrees.

Legal

20. Irrespective of the landscape and planning perspectives outlined above, the only option lawfully available to this Panel is to uplift the SAL from the subject land, for the following reasons.

21. The subject land has already been zoned MRZ, and this is now operative under the ISPP.

22. The SAL overlay would restrict the operation of the medium density residential standards (MDRS). For example, if the SAL applies, then:

    22.1 Under NFL-R3, residential activity on the land would be a restricted discretionary activity, to be assessed against NFL-P3, which only allows use and development where the activity "maintains" the identified landscape values; and

    22.2 Under NFL-R11, buildings would only be permitted if limited to 8m above ground level (cf. the allowances for 11m height in the MDRS).

23. Any provision that restricts the operation of the MDRS (i.e. a "qualifying matter") is required to satisfy s 77I.

24. The only paragraph of s 77I that can potentially apply to an SAL is s 77I(j) (which provides for "other matters" not covered in paragraphs (a) to (i)).

25. However, in order for paragraph (j) to apply (and potentially legitimise Council's promulgation of the SAL over the subject land), a s 32 analysis is required to meet the additional specific requirements set out in s 77L. There has been no attempt to meet those requirements, as Ms van Haren-Giles' evidence confirms. In fact, from the outset, the SAL seems to have been approached on the explicit understanding that it was not a "qualifying matter": the s 32 report for "Natural Features and Landscapes" states at 4.4.1 that SALs are not considered qualifying matters.

26. Whatever the reason behind this, Ms van Haren-Giles correctly states that for SALs to apply to residentially zoned land, they would need to be supported by a site-specific assessment that meets the requirements of s 77I, and this has not occurred.

27. For those reasons, it is submitted that uplifting the SAL is in fact the only option lawfully available to the Panel at this juncture, given the SAL has not been assessed in the manner necessary for it to operate as a "qualifying matter" on the MDRS.

28. I note Ms van Haren-Giles' position is that Kilmarston's submissions provide scope for this outcome in relation to the subject land, but that there is "no scope to correct this… on other residential zoned sites".

29. With respect, in my submission that does not quite capture the situation accurately. Scope is not defined solely by what submitters have asked for. Scope is also defined by whether the relevant subject matter is before the Panel as a result of following correct legal process. If there are SALs proposed over land that has already been confirmed as MRZ (or more intense residential zoning) under the ISPP process, and if those SALs have not been promulgated strictly in accordance with the specific requirements

for "qualifying matters" (i.e. the necessary site-specific analysis required by s 77L) then it is not open to the Panel to decide in favour of including those SALs, irrespective of whether that has been raised by submitters or not. In other words, knowing that the correct process has not been followed, and knowing that this is a pre-requisite for a valid qualifying matter, it is not open to the Panel to make any decision that purports to uphold those SALs.

30. Kilmarston will call Ms Milcah Xkenjik.

M J Slyfield
Counsel for Kilmarston Properties Ltd and Kilmarston Developments Ltd
24 April 2024