BEFORE THE NEW PLYMOUTH DISTRICT COUNCIL
INDEPENDENT COMMISSIONER MARK ST CLAIR

IN THE MATTER OF
an application to vary consent notice 7890638.35 under section 221 of the Resource Management Act 1991 — SUB24/50201.01

WASHER FAMILY TRUST LIMITED
Applicant

LEGAL SUBMISSIONS OF THE JOINT SUBMITTERS

Filed pursuant to the Notice of Hearing dated 8 April 2026

Submitters: Patrick Cameron and Randy Buckley (23 Washer Road), for and on behalf of nine freehold owner households of Tapuae Country Estate (the "Joint Submitters"), together with the separate submission of Emma and Joe (Lot 31 co-owners).

Date: 15 June 2026 Hearing: 16 June 2026, NPDC Civic Centre, New Plymouth.

1. Introduction

1. The Joint Submitters are freehold owners of residential lots at Tapuae Country Estate, Omata. Each holds a residential lot together with an undivided 1/30th share in Lots 31 and 32 DP 385658 — the balance estate lots held in common by all 30 owners. They oppose the application to vary consent notice 7890638.35.

2. The application is brought by the Washer Family Trust Limited, registered owner of Lot 20 DP 385658 (9 Washer Road), which is one of the 30 residential lots. The Washers seek to vary the consent notice to enable a boundary adjustment that would transfer approximately 1,507m² between Lot 20 and Lot 31, relocating their consented building platform away from an active landslip.

3. The Council's section 42A officer, Mr Robinson (report dated 22 May 2026), recommends that the application be declined. The Joint Submitters support that recommendation and adopt Mr Robinson's analysis where it is consistent with these submissions.

4. These submissions advance four reasons the application should be declined: (1) the variation is not appropriate having regard to the purpose of the consent notice (section 221); (2) the geotechnical evidence does not establish that the proposed building platform is safe, and the application cannot satisfy the National Policy Statement for Natural Hazards 2025; (3) the variation would cause significant and permanent adverse effects on the submitters' jointly-owned land; and (4) even if granted, the variation cannot be implemented (futility). The submitters also raise two matters of scope and respond to the applicant's expert evidence.

2. Background

The consent notice and its purpose

5.Consent notice 7890638.35 was registered against Lots 31 and 32 DP 385658 on 29 July 2008 under section 221 of the RMA. It contains two operative restrictions:

(a)that Lots 31 and 32 "shall not be further subdivided and shall not be disposed other than in conjunction with Lots 1–30 inclusive"; and

(b)that there shall be no residential building located on Lots 31 or 32.

6.The consent notice was imposed to preserve the low-density, open-space farm-park character of Tapuae Country Estate. It reflected the original developer's undertaking that the balance lots would remain undivided, in common ownership, and free of residential development. That purpose is reflected in the founding documents of the estate, including the objects of the Tapuae Country Estate Limited constitution, which record the company's purpose as, among other things, "to maintain, preserve and enhance the unique character of the Land as a rural-residential farm park" (constitution, clause 3.1).

7.Commissioner St Clair and the independent legal adviser, Mr Duncan Laing, both confirmed in the prior proceeding (SUB24/50201) that the consent notice prevents the proposed boundary adjustment from proceeding without variation. That is not in dispute in this proceeding.

Ownership, the company, and the lease structure

8.Lot 31 is held by 30 registered proprietors as tenants in common in undivided 1/30th shares. Each lot's composite computer register records that share — for example, the record of title that includes one such 1/30th share is identifier 342942. The Washer Family Trust is one of the 30 proprietors.

9.Tapuae Country Estate Limited ("TCEL") is not a registered proprietor of Lot 31. TCEL is the lessee under a head lease of the balance lots, granted by the Washers in 2008 for a term of 50 years with one 50-year right of renewal (to 2108). TCEL in turn sub-leases the farmed parts of the balance to Washer & Co Limited (the Washers' farming company); the current sub-lease runs to 2030. By Encumbrance 7890638.42, every registered proprietor of the estate is required to be a shareholder in TCEL and to abide by its Constitution.

10.TCEL, as lessee, is not the owner of the freehold to which the consent notice is registered. The application relies on a landowner-consent signature from TCEL. The Joint Submitters note that TCEL's consent is not the consent of the registered proprietors of the freehold title, and that the 29 other proprietors have not consented to the variation. The significance of this is developed under Ground 4 (futility) below.

The geotechnical history

11.The general geology of the locality — New Plymouth Ash overlying the Maitahi Lahar, with groundwater at the interface — was recorded across the subdivision before Lot 20

was developed, in Tonkin & Taylor's 2004 subdivision investigation (Job No. 21276.001), as referenced in T&T's 2021 desktop assessment at footnote 4 and section 2.3. That 2004 investigation was subdivision-wide; its nearest borehole (AH1) was approximately 140m from Lot 20, and it pre-dated the gully instability. The gully was a pre-existing feature.

12. The slip at the gully head occurred in 2012, with a further slip in 2020/2021. By July 2021 Red Jacket Limited (the Washers' engineers) assessed the existing Site 1 building platform as compromised (RPT-4317 Rev B). Tonkin & Taylor's desktop assessment of 28 September 2021 (Job No. 1018457) identified the consented Site 1 platform as unsuitable and proposed Site 2 as the alternative location for the building platform.

13. Red Jacket carried out physical subsoil testing at Site 2 in October 2021 and reported in November 2021 (RPT-4317-A-01 Rev A). It classified the ground as "Good Ground" under NZS 3604:2011, but required the building to be positioned "at least 40m from the top of the gully at the closest point" (Table 3-1), a requirement also annotated on the KR Architecture site plan as "40m MIN OFFSET FROM TOP OF BANK" (Figure 1-2).

14. The application was lodged in November 2024 — approximately three years after that 2021 engineering advice. In the intervening period no further geotechnical testing was carried out, and the within-lot relocation options identified by Red Jacket in 2021 were not pursued.

3. Ground 1 — The variation is not appropriate having regard to the purpose of the consent notice

The legal test

15. Under section 221(3) and (3A) of the RMA, the Commissioner may vary a consent notice if satisfied that the variation is appropriate in the circumstances, having regard to the purpose for which the notice was originally imposed and to relevant considerations under section 104.

16. The test is not simply whether the boundary adjustment would produce acceptable environmental effects in isolation. The Commissioner must be satisfied that varying the notice is consistent with the purpose it was intended to serve. Where the variation would defeat or undermine that purpose, the appropriateness test is not met, regardless of the merits of the boundary adjustment itself.

The original purpose would be defeated

17. The consent notice was imposed to ensure that Lots 31 and 32 would remain undivided balance land in common ownership, and that no residential development would occur on them. This preserved the open-space farm-park character of the estate and the shared land of all 30 owners.

18. The proposed variation would carve out an exception to the no-further-subdivision and no-disposition restrictions specifically to enable the transfer of 1,507m² of Lot 31 into

a residential lot. That is precisely the type of transaction the consent notice was designed to prevent. The variation does not clarify the notice's intent; it overrides it for the benefit of one co-owner at the expense of the other 29.

19. The applicant argues (variation application, section 5.5) that the variation does not undermine the original purpose because no new residential lot is created. The no-further-subdivision and no-disposition limbs are distinct. Mr Laing confirmed (advice ECM 9602521, [64]) that the notice "prevents the proposed disposition of allotments to give effect to the boundary adjustments." A variation enabling such a disposition contradicts the notice's operative effect.

Self-created hardship is not a planning justification

20. The applicant's case rests substantially on the proposition that the boundary adjustment is necessary because the existing building platform is unsafe. The following observations bear on that proposition.

21. The instability crystallised with the 2012 and 2020/2021 slips. By July 2021 the Washers' own engineer had identified relocation options within Lot 20 — moving the dwelling "further back from the gully area towards the highway" or "sideways and away from the gully to the north" (RPT-4317 Rev B, section 4) — neither of which required any boundary change.

22. The location ultimately chosen (Site 2) instead "straddl[es] the south-eastern boundary" (T&T, section 1.1) — that is, it requires the transfer of Lot 31 land. Mr Rendall records that he asked the applicant's geotechnical expert, Ms Franklin, whether the platform could be relocated within Lot 20, and that her advice was that a platform on the eastern or southern boundary would remain "intimately connected" to the slip (Mr Rendall's variation statement dated 29 May 2026, paras 14(h) and 37–39). That advice addresses only moving the platform towards the slip; it does not address the engineered remediation of the existing platform discussed below, for which no costed assessment is on the record. The submitters put the point no higher than that the option encroaching on the shared lot was preferred without the alternatives being assessed in any detail, and the burden of justifying that choice rests on the applicant.

23. Engineered remediation of the existing site (an in-ground palisade wall; a fill buttress with shear key; or deep pile foundations) was also identified as feasible, though costly (T&T section 4.1; Franklin paras 31 and 38). These options were not investigated.

24. The cost and difficulty of those solutions — real as they may be — is a consequence of development decisions made when the estate was created. It is not a planning justification for varying conditions that protect the shared land and the interests of all 30 co-owners. The applicant's own planner accepts that the consent-notice framework is, in hindsight, insufficiently flexible (Hooper para 18); but the Washers were the original developers who created that framework, and cannot disclaim responsibility for it.

25. The section 42A officer reached a similar conclusion (report [55]–[62]): the effects on the opposing submitters would be significant, permanent, and could not be clearly mitigated, and he identified no obvious options to avoid, remedy or mitigate them.

The exchange of land is materially unequal

26. On the applicant's scheme plan (McKinlay Surveyors, W-211212-RC01, 27 May 2024), proposed Lot 1 of 4,070m² comprises 2,564m² of retained Lot 20 plus 1,506m² of flat pasture taken from Lot 31, while 1,507m² of steep, vegetated, slip-affected gully-margin land is transferred from Lot 20 out to the balance lot. The common land is permanently diminished in quality and utility, and takes on the slip-affected ground.

27. No valuation or assessment of equivalence, and no compensation or mitigation, has been provided. The land added to Lot 31 carries ongoing slip-stability and maintenance obligations that would fall on all 30 co-owners. This is not a neutral transaction; it is a transfer of risk and liability from one co-owner to the collective.

4. Ground 2 — The geotechnical evidence does not establish that the proposed building platform is safe, and the application cannot satisfy NPS-NH 2025

The applicant's own reports require a 40-metre offset

28. Red Jacket's report requires the building to be positioned "at least 40m from the top of the gully at the closest point" (RPT-4317-A-01 Rev A, Table 3-1). The same table requires that, "if the building platform location differs from the layout shown in this report, the building platform will need to be re-assessed by a suitably qualified engineer."

The proposed conditions fall short of that requirement

29. The conditions the applicant now proposes do not meet that requirement. The agreed draft conditions require a dwelling to be "setback by a minimum distance of 24.2 metres from the head of the gully" (Joint Witness Statement, Appendix 1, condition 4) and buildings to be "setback by at least 15m from the top of the gully" (condition 8) — while condition 7 requires the foundation design to be "informed by" the Red Jacket and Tonkin & Taylor reports, being the reports that set the 40-metre requirement. On their face, the setbacks the conditions secure (24.2 metres and 15 metres) are well short of the 40 metres those reports require. The conditions are also not internally consistent: they differ both on distance and on whether the setback is measured from the "head" or the "top" of the gully.

The applicant's NPS-NH assessment depends on the same offset

30. The applicant relies on Ms Franklin's assessment under the National Policy Statement for Natural Hazards 2025 (updating statement dated 29 May 2026, paras 16–19), which applies the NPS-NH risk matrix and rates Site 1 "high" and the proposed Site 2 "low" (para 18). That assessment does not answer the offset problem — it depends on it. Both sites sit in the same likelihood band, and Ms Franklin confirms that "the risk of landslides remains the same" (para 19); the rating falls from "high" to "low" only because the consequence drops from "moderate" to "negligible", which para 19 states is "mitigated by moving" the building away from the gully. The "low" rating for Site 2

therefore rests entirely on the building being set far enough back — that is, on the offset.

The hazard is regressing, and the "low" rating is not shown to hold at the proposed setback

31. The offset the conditions secure is 24.2 metres, short of the 40 metres the reports require, and the gully is not static. Ms Franklin's substantive statement records that "RJL concludes the gully head's rate of regression … is difficult to predict", and assesses "the likelihood of slope regression within the designed life of a residential structure (50 years)" as "high" (statement dated 17 September 2025, para 30). On the matrix's own logic — the same "likely" recurrence, with the consequence depending on distance from the gully — a building only 24.2 metres from a gully head that is expected to keep advancing over a 50-year life has not been shown to retain the "negligible" consequence on which the "low" rating depends.

32. Ms Franklin also affirms that the assumptions and conclusions of the 2021 Red Jacket report "remain valid" (17 September 2025 statement, para 21) and assesses Site 2 as "good ground" (para 33). But the report whose validity she affirms requires a 40-metre offset, while the conditions secure 24.2 metres; and "good ground" is a bearing-capacity assessment under NZS 3604, a different question from the offset from the gully. The applicant has not reconciled the 40-metre requirement with the 24.2-metre setback it proposes.

The burden has not been discharged

33. The burden of establishing that the proposed platform is safe rests on the applicant. On the material before the Commissioner, the agreed conditions secure a setback substantially short of the 40 metres the applicant's own reports require; the "low" NPS-NH rating depends on an offset the conditions do not deliver; and the applicant's own expert describes the gully as regressing at an unpredictable rate over the design life. The Commissioner may wish to ask Ms Franklin: on what assessment is a setback of 24.2 metres, rather than 40 metres, said to keep the consequence "negligible" and the NPS-NH risk "low" over the dwelling's 50-year design life, given the regression she describes?

34. Two further points. First, the applicant's planners describe the Site 1 risk as "very high" (Rendall para 42; Hooper para 16), escalating beyond their own geotechnical expert's "high" rating (updating statement, para 18). Second, the variation itself manages no hazard: it changes consent-notice wording, builds nothing and moves no one. Any benefit is contingent on the transfer being registered — which requires all 30 proprietors (Ground 4) — and on a compliant dwelling later being built at a safe position. The section 42A officer put the natural-hazard limb no higher than that there is no reason to decline under section 106; the recommendation to decline rests on the effects addressed under Ground 3.

5. Ground 3 — The variation would significantly and permanently affect the submitters' jointly-owned land

35. The submitters' interest in Lot 31 is not a paper interest. Under the estate's Constitution, each owner is entitled to "make full use of the Farm Land" (clause 3.5) (defined to include Lots 31 and 32) and has a right of "access to the Farm Land and use of the Recreational Facilities", subject to the rules (Farm Land Rules, Appendix A, rule 2.1), with the company able to restrict access only to "certain areas" for defined reasons such as calving, safety or maintenance (rule 2.5). Owners also hold a registered "free and uninterrupted right" to pass over the accessways and roads on the balance land (head-lease variation, clause 4.5).

36. The applicant's contention that there is no amenity effect rests on the premise that owners cannot lawfully access or use the farm (Mr Rendall's substantive statement dated 17 September 2025, para 52; Washer paras 15–17). That premise is contradicted by the estate's own founding documents. The sub-lease itself excludes "all walkways and plantings, roading and infrastructure" and the recreational facilities from the farmed land (sub-lease, Schedule), so those areas remain available to owners; and the farming sub-lessee's possession, taken under TCEL, cannot exceed what TCEL holds subject to the owners' reserved access.

37. The effect of the variation is therefore the permanent loss, to the collective of owners, of part of the shared land they are entitled to access and use — the better, flat pasture — in exchange for slip-affected gully land. Mr Robinson found exactly this: the swap of more-functional for less-functional land "impacts on their appreciation and amenity of the land" ([55]); the effects are significant, permanent and cannot be mitigated ([60]–[62]); and the proposal would "negatively impact on the submitters' use and appreciation of the land to which they have part-ownership" ([83]).

38. The applicant's contrary points do not meet this. The framing of the change as "less than 0.2% of pasture" (Rendall para 32.4) measures area, not the appreciation and use of a co-owned asset. The submitters' distance from the site answers a visual-amenity point they do not press; their interest is in the shared land itself. The applicant's own evidence acknowledges the balance lot's amenity value to the whole Estate (Washer statement, para 11). And "amenity values" in section 2 of the RMA expressly extend to an area's "cultural and recreational attributes" and to people's "appreciation" of it — which is what is engaged here.

6. Ground 4 — Futility: the consent cannot be implemented

39. Even if the Commissioner grants the variation, the boundary adjustment cannot be completed. To register a transfer of any part of Lot 31 at LINZ, instruments of transfer must be executed by all 30 registered proprietors of that lot (Land Transfer Act 2017). No proprietor can be compelled to execute them.

40. The applicant's own planner concedes the point repeatedly. Mr Rendall accepts that the matters in opposition "relate primarily to landowner approvals" and that "if not given effect to consents lapse" (para 14(f)); that "giving effect to any granted consent would require separate approvals" (para 17); and that granting consent "does not

automatically enable these activities to occur — there are legal steps which must then follow" (para 32.7). He records that the applicant has sought consensus "for several years" without success and that this process is "the only practical approach" (para 21).

41. The proprietors whose execution is required will not provide it. Nine owner households are parties to the Joint Submitters' submission opposing the application; and a further owner (Emma and Joe's submission) does not consent to the consent-notice amendment without all freeholders' agreement. That is at least ten of the thirty registered proprietors who do not consent to the variation proceeding on the present basis — consistent with Mr Robinson's finding of "10 registered owners" ([61]). Mr Rendall's suggestion that the officer over-counted (para 25) confuses the number of submission documents with the number of owners: the nine are named parties to one submission, and the further owner filed separately.

42. Futility is not advanced as a jurisdictional bar on the Commissioner's power to grant. It is a relevant "other matter" under section 104(1)(c). Where a consent cannot in practice be given effect without the voluntary cooperation of co-owners who have made clear they will not cooperate, granting it does not advance the sustainable management of natural and physical resources. It creates a permission that produces no actual outcome while perpetuating uncertainty and cost for all parties.

43. The consent notice also contains a freestanding disposition prohibition: Lots 31 and 32 shall not be "disposed other than in conjunction with Lots 1–30 inclusive." Mr Laing confirmed (advice [64]) that this restriction "prevents the proposed disposition of allotments to give effect to the boundary adjustments." The application is directed at the no-further-subdivision limb; the Commissioner should be satisfied that the full scope of what requires variation, including the disposition limb, has been identified.

7. Matters outside the scope of the notified application

44. Two matters fall outside what was notified, and the Joint Submitters ask the Commissioner to be cautious about them.

The "Option Two" scheme plan

45. After notification, the applicant introduced a second scheme plan ("Option Two") and proposes that it be available in this process and the substantive process (Rendall paras 33–36). Mr Rendall acknowledges that Option Two "has not been circulated to the closest neighbours" who approved Option One, and that it produces a "complex angular boundary" (paras 35–36). The Commissioner's Minute 4 flagged that Option Two may be outside the scope of the application. The affected-person approvals the applicant relies on were given for Option One; they do not extend to Option Two, which has not been consulted on.

Cancellation versus variation

46. The application, as notified, seeks to vary the consent notice. The Joint Witness Statement (Robinson and Rendall, 12 June 2026) now proposes that the relevant conditions be

cancelled rather than varied (para 3.2). Cancellation is a different remedy from variation and is not what was notified. The conditions in Appendix 1 to the Joint Witness Statement are also internally inconsistent: condition 4 fixes the 24.2-metre position, condition 8 retains a 15-metre setback, and condition 7 cites the Red Jacket reports that require 40 metres. The Commissioner should be satisfied that any relief is within the scope of the notified application and is internally coherent.

8. Response to the applicant's expert evidence

Mr Rendall (Landpro Limited)

47. Mr Rendall's evidence is addressed throughout these submissions. In short: his concessions on landowner approval support the futility ground (Ground 4); his amenity analysis measures area rather than the use and appreciation of co-owned land (Ground 3); and his "very high" characterisation of the NPS-NH risk overstates the only geotechnical evidence before the Commissioner (Ground 2).

Ms Hooper (Landpro Limited)

48. Ms Hooper's brief is an overarching review that endorses Mr Rendall's evidence (paras 9–10). She is the Executive Director of the same firm that authored the application and Mr Rendall's evidence, and she declined to take part in the expert conferencing. Her brief adds a second voice but no independent analysis; weight is not a matter of headcount against the Council's own reporting officer's reasoned, contrary view.

49. Ms Hooper's observation that the consent-notice conditions "in hindsight" lacked flexibility (para 18) is an admission, not a justification: the Washers were the original developers who created that framework. It also sits against the applicant's fallback position that the notice does not truly prohibit the boundary change. Ms Hooper accepts that "without the ability to adjust the boundary, Lot 20 cannot be developed" (para 19) — that is, the notice does constrain the boundary adjustment, and must be varied to permit it.

Ms Franklin (Red Jacket Limited)

50. As addressed under Ground 2, Ms Franklin affirms the validity of the 2021 Red Jacket report while the application departs from that report's central 40-metre requirement, and her risk assessment does not engage that requirement. The reconciliation question raised under Ground 2 above should be put to her.

9. Relief sought

51. The Joint Submitters seek that the application to vary consent notice 7890638.35 be declined in full.

52. In the alternative, if the Commissioner is minded to grant the variation, the Joint Submitters submit that no consent should issue without:

    (a) evidence of written consent from all 30 registered proprietors of Lot 31 to the variation;

(b) a current geotechnical assessment, conducted after 15 January 2026, that applies the NPS-NH 2025 risk-based assessment to the proposed building position at 24.2 metres and specifically addresses the departure from the 40-metre requirement in RPT-4317-A-01 Rev A; and

(c) an assessment demonstrating that proposed Lot 1 can accommodate a building that simultaneously satisfies the geotechnically required setback from the hazard and the consented boundary setbacks.

10. Conclusion

53. This application asks the Commissioner to vary a consent notice that was imposed by the original developers of Tapuae Country Estate as part of the framework under which 30 families purchased their properties. That notice protects the shared character and shared land of the estate for all owners equally.

54. The application is brought by one of those 30 owners, to alter the shared land for private benefit, without the consent of the other owners, to resolve a problem arising from development decisions made when the estate was created.

55. The variation is not appropriate having regard to the purpose of the consent notice. The geotechnical evidence does not establish that the proposed building location is safe: the applicant's own engineer describes the gully as a regressing formation of unpredictable rate, the assessed safe distance was 40 metres, and the proposal sits at 24.2 metres without any current re-assessment. The variation would significantly and permanently affect the submitters' jointly-owned land. And even if granted, it cannot be implemented without the cooperation of owners who have made clear they will not provide it.

56. The Commissioner should decline the application.

Dated 15 June 2026

Patrick Cameron

For and on behalf of the Joint Submitters — freehold owners of Tapuae Country Estate:

Philip Pryde & Robin Marshall (2 Washer Road); Richard & Lorette Rayner (13 Washer Road); Brent & Maree Schumacher (14 Washer Road); Brenda Moore (15 Washer Road); Maria Vosper-Rink (19 Washer Road); Barbara Cameron & Deborah Williams (21 Washer Road); Stephen & Fiona Frowde (22 Washer Road); Patrick Cameron & Randy Buckley (23 Washer Road); Denise & Jimmy Seed (24 Washer Road).