

**BEFORE THE SELWYN DISTRICT COUNCIL**

**Under** the Resource Management Act 1991

**In the matter of** Proposed Plan Change 72 to the Operative Selwyn  
District Plan: Prebbleton

**And** Trices Road Rezoning Group (The Applicant)

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**CLOSING LEGAL SUBMISSIONS ON BEHALF OF  
THE TRICES ROAD REZONING GROUP**

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## INTRODUCTION

- 1 These closing submissions are made on behalf of the Trices Road Rezoning Group (**TRRG**) in relation to Plan Change 72 to the operative Selwyn District Plan (**PC72**). The hearing was held on 31 January – 1 February 2022.
- 2 These submissions address several matters that arose during the course of the hearing and identify revisions to the Outline Development Plan (**ODP**) Narrative volunteered by the TRRG in response. These submissions ought to be read alongside our earlier legal submissions dated 26 January 2022 and our opening statement and supplementary submissions dated 31 January 2022.
- 3 Matters to which these legal submissions relate are as follows:
  - 3.1 Summary of amendments to PC72 ODP Narrative
  - 3.2 Transportation recommendations
  - 3.3 Urban Design recommendations
  - 3.4 Jurisdiction to consider the now preferred relief – full Living Z proposal
  - 3.5 Scope to include the Drinnan Land in PC72
  - 3.6 The doctrine of natural servitude
  - 3.7 Additional traffic data
  - 3.8 Plan Change 67 Recommendation

## SUMMARY OF AMENDMENTS TO PC72 ODP NARRATIVE

- 4 Various amendments to the ODP and the ODP Narrative were discussed during the hearing. Following deliberation among the TRRG consultant team the ODP itself remains unchanged, however various amendments have been made to the proposed ODP Narrative. Attached as **Appendix A** is an updated ODP Narrative in both tracked change (A1) and clean form (A2).
- 5 The changes made to the ODP Narrative are outlined below:
  - 5.1 Addition of text to confirm that at the time of subdivision, the need for and nature of minor safety improvements at the Trices Road / Birchs Road intersection will be considered in consultation with the Selwyn District Council (**SDC**).
  - 5.2 Specific recognition that that the PC72 site will provide connectivity links to existing pedestrian and cycle paths, including the Rail Trail and the Prebbleton Domain. The amendments also recognise the potential for the main north-south road connection to re-route the Rail Trail through the site (but acknowledging that this will be subject to further consultation with various stakeholders).
  - 5.3 Recognition that the PC72 site is to provide a shared pedestrian / cycle path along Trices Road together with a safe crossing near Stonebridge Way and a

shared pedestrian / cycle path along Hamptons Road – to be located on the Birchs Road Park frontage and to extend only as far as the main north-south road connection.

- 5.4 A requirement that any shared pedestrian / cycle path between private properties is to be at least 10m wide with provision for amenity landscape planting and controls on the style of fencing.
- 5.5 All road frontage upgrades are to be developed in consultation with the SDC and where suitable provide direct access to properties.
- 5.6 Recognition that during detailed stormwater assessment, the stormwater outfall location shall be identified.
- 5.7 Minor consequential amendments to improve readability.

## **TRANSPORTATION AND TRAFFIC RECOMMENDATIONS**

- 6 The Summary Statement of Mr Collins<sup>1</sup> identifies several transport matters that remain in contention. These include:
  - 6.1 Provision of cycling facilities on Trices Road and Hamptons Road frontages;
  - 6.2 The mechanism by which the safety effects at the Trices Road / Birchs Road intersection are assessed and addressed;
  - 6.3 Cumulative effects on the wider transport network; and
  - 6.4 Minor amendments to the ODP Narrative

### *Provision of cycling facilities on Trices Road and Hamptons Road frontages*

- 7 Mr Collins supports the wording of the ODP Narrative which includes recognition for cycling facilities on Trices and Hamptons Road frontages, however, he also seeks that the ODP identify the cycling facilities, and a safe crossing on Trices Road near Stonebridge Way.<sup>2</sup>
- 8 In response, we maintain the position outlined at paragraph 36 of Ms Williams' evidence – that it is unnecessary to incorporate these recommendations into the ODP itself.<sup>3</sup> It is submitted that a more effective planning outcome is to incorporate additional wording to the ODP Narrative to ensure consistency with other ODP's in the operative Selwyn District Plan (**OSDP**) – that do not identify these features.
- 9 There is no risk that PC72 will fail to deliver the additional cycling facilities as these are proposed to be clearly prescribed in the ODP Narrative as follows:

*“A shared pedestrian / cycle path will be provided on Hamptons Road along the Birchs Road Park frontage between the Birchs Road intersection and the main north-south road connection.*”

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<sup>1</sup> Summary Statement of Mathew Ross Collins (Transport) dated 31 January 2022 at [3.4]

<sup>2</sup> Ibid at section 4

<sup>3</sup> Evidence of Lisa Williams Maree Williams (Transport) dated 13 January 2022 at [36]

*A shared pedestrian / cycle path will be provided on Trices Road along the entire frontage that abuts the Site. A safe crossing is to be provided on Trices Road near Stonebridge Way.”*

- 10 A further consequential amendment is proposed to introduce a new heading ‘Pedestrian and Cycling Network’ and to relocate all related text under this heading to improve readability. The full extent of this consequential change is identified in Appendix A1 (tracked change version).

*The mechanism by which the safety effects at the Trices Road / Birchs Road intersection are assessed and addressed*

- 11 Mr Collins requests that the ODP Narrative is updated to identify that the Applicant is required to provide minor safety improvements to the Trices Road / Birchs Road intersection prior to any new intersection or direct vehicle access being formed onto Trices Road.<sup>4</sup>

- 12 Accordingly, the ODP Narrative has been updated to include the following:

*“At the time of subdivision, the need for and nature of minor safety improvements at the Trices Road / Birchs Road intersection will be considered in consultation with Selwyn District Council.”*

- 13 The above proposed revision to the ODP Narrative is considered to be both acceptable and consistent with the existing assessment matters within the OSDP. For completeness we identify these provisions below:

13.1 *Rule 12.1.4.15 – the design and layout of any new road shall ensure that desired speed is achieved with respect to the classification of road (including the subsets of local roads) and surrounding environment.*

13.2 *Rule 12.1.4.16 - The avoidance of areas which could create unsafe situations e.g dark corridors, a lack of natural surveillance or clear sightlines across pedestrian and cyclist routes, or where a safe and secure environment may be compromised.*

- 14 It is submitted that minor safety improvements to the Birchs Road / Trices Road intersection are appropriately addressed at the subdivision design stage where the full detail of intersection layout, shared pedestrian / cycle path alignment, final location and design of crossing points and driveway access will be available.

*Cumulative effects on the wider transport network*

- 15 Mr Collins’ Summary Statement traverses the opinions of the various transport and planning consultants and concludes that:<sup>5</sup>

*“I am therefore of the view that, while PC72 will have effects on the wider transport beyond those assessed by Ms Williams, these effects (including cumulative effects of other Plan Changes) are more appropriately addressed at a District and/or Regional level.”*

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<sup>4</sup> See Note 1 at section 5

<sup>5</sup> See Note 1 at section 6

- 16 We agree that the cumulative effects on the transportation network can only be assessed at a broader District / Regional level. It is neither possible nor practicable to undertake a broader cumulative assessment as part of PC72. Our earlier submissions address the relevance of the broader strategic planning exercise in the context of a Plan Change process.<sup>6</sup> On this basis, we consider sufficient information has been provided by Ms Williams in relation to traffic effects resulting from PC72.

Additional amendments to the ODP narrative.

- 17 Mr Collins makes a further minor recommendation to the ODP Narrative<sup>7</sup> and requests the removal of the following words:

~~“All roads will provide at a minimum one footpath to provide a safe pedestrian-only alternative”~~

- 18 TRRG has adopted this recommendation within the amended ODP Narrative.

**URBAN DESIGN RECOMMENDATIONS**

- 19 Mr Nicholson’s Summary Statement makes similar recommendations to those of Mr Collins, which we discuss below:<sup>8</sup>

- 19.1 Provision of pedestrian / cycling facilities on Birchs Road, Trices Road and Hamptons Road frontages.
- 19.2 Provision of a safe crossing point on Trices Road near Stonebridge Way.
- 19.3 Provision of a pedestrian / cycling connection through the Drinnan land (if it is included) to connect PC72 with Birchs Road Park.

Provision of cycling facilities on Birchs Road, Trices Road and Hamptons Road frontages.

- 20 As discussed within the preceding paragraphs, the amended ODP Narrative adopts the recommendation to provide cycling facilities along both Trices Road and Hamptons Road. Birchs Road currently provides pedestrian and cycle path facilities, which will be retained on development. The OPD Narrative specifically provides for this as follows:

*“The combination of the pedestrian and cycle provisions allow a safe and enjoyable journey through the residential areas to the sporting and recreational facilities in Birchs Road Park, the neighbourhood reserve, SMAs, neighbouring residential areas, and links to existing pedestrian / cycle paths, including the Rail Trail and cycleway to Prebbleton Domain via Stonebridge Way. The main north-south road connection may present an opportunity to re-route the Rail Trail through the Site subject to consultation with relevant parties and appropriate design at subdivision stage.”*

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<sup>6</sup> Opening Legal Submissions on behalf of TRRG, dated 26 January 2022 at [53]-[60] and Supplementary Legal Submission on behalf of TRRG dated 31 January 2022 at [43]-[45]

<sup>7</sup> See Note 1, at section 7

<sup>8</sup> Summary Statement of Hugh Nicholson (urban Design) dated 28 January 2022 at p.2

- 21 Discussion between Ms Lauenstein and Mr Nicholson at the end of the hearing concluded that the best location for a shared pedestrian / cycle path on Hamptons Road would be on the south side of the road corridor fronting Birchs Road Park so as to avoid unnecessary driveway crossings and improve the safety for users.
- 22 We understand that it was also agreed that the shared path need only extend from the Birchs Road intersection as far as the central PC72 north-south road connection. There is no need to extend the shared path the full length of Hamptons Road as the eastern extent of Hamptons Road is a dead end, will have very limited traffic, and so provides a safe environment for on-street cycling.
- 23 The ODP Narrative has been updated to provide for a shared pedestrian / cycle path along the full extent of Trices Road that abuts the PC72 site. This addition will support cycle and pedestrian connections to the north and east along Trices Road and contribute to a cohesive and continuous cycleway network.

Provision of a safe crossing point on Trices Road near Stonebridge Way.

- 24 As discussed above, provision for a safe crossing at Stonebridge Way has been added to the ODP Narrative. As the final alignment of the Rail Trail is still to be confirmed, it is submitted that this is the most appropriate response (when compared to identifying the safe crossing location on the ODP) to provide flexibility on final location.

Potential connection through the Drinnan land to Birch's Road Park

- 25 The Drinnans have not satisfied their evidential burden to demonstrate the merits of their land being incorporated with PC72. Accordingly, Mr Nicholson's recommendation to include a potential connection through to the Drinnan land on the ODP is rejected. This approach is consistent with paragraph [5] of your Minute 2<sup>9</sup> which does not direct the ODP or the ODP narrative to include the Drinnan land (at this stage).

Other urban design recommendations

Treatment of pedestrian / cycle paths

- 26 During the hearing, you questioned the ability to control the amenity treatment of pedestrian / cycle paths. Of particular concern was that pedestrian / cycle paths would be completely fenced, creating a 'corridor effect' with a lack of passive surveillance.
- 27 While there was already provision within the ODP Narrative to control these effects, the following amendments clarify boundary treatment of proposed pedestrian and cycle paths:

*"Any shared pedestrian / cycle path between private properties is to be of a minimum 10m width with provision for amenity landscaping provisions planting and controls on fencing height restrictions and permeability apply."*

- 28 While the proposed ODP Narrative does not directly refer to the fencing rules within the OSDP<sup>10</sup>, the expectation is that PC72 will adopt similar design features. For clarity, Rule 4.17.1 (which is only triggered at building consent stage) states that fences adjoining reserves

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<sup>9</sup> Proposed Plan Change 72 to the Operative Selwyn District Plan, Completion of the hearing, Minute 2, 4 February 2022

<sup>10</sup> Selwyn District Plan, C4, LZ Buildings, Rule 4.17.1. A breach of this rule will result in a RD activity.

and walkways shall be limited to a single fence within 5m of any Council reserve that is at least 50% transparent where it exceeds 1.2m in height.

- 29 It is submitted that the ODP narrative provides a mechanism to ensure that both landscaping and fencing controls are implemented consistently by all landowners whose land borders proposed pedestrian / cycle paths. It is possible that these amenity requirements will be controlled by developer covenant at subdivision design stage. If PC72 relied solely on Rule 4.17.1, then it would be open to each landowner to interpret the SDC fencing rules differently, creating inconsistent implementation and adverse amenity outcomes.
- 30 To further enhance the amenity of these public linkages, landscape treatment within the reserves and around the stormwater management areas is proposed which will be guided by the relevant assessment matters at subdivision stage. The expectation is that the pedestrian / cycle paths will not only provide a direct connectivity link but will also integrate green landscaping to break up the built form and create a high amenity environment.

#### Road frontage upgrades

- 31 There is agreement between the consultants that upgrades to Trices, Birchs and Hamptons Roads are required to be to urban standard in accordance with Council's Engineering Code of Practice. Discussion at the hearing considered whether this was sufficient to ensure that PC72 did not 'turn its back' on the roading network. The TRRG project team agree that would be an undesirable amenity outcome. To address this, the following amendment is proposed to the ODP Narrative:

*The Trices Road, Birchs Road and Hamptons Road frontages are to be upgraded to an urban standard in accordance with the Council's Engineering Code of Practice. All frontage upgrades are to be developed in consultation with the Selwyn District Council and where suitable provide direct access to properties.*

#### **JURISDICTION TO CONSIDER THE LIVING Z PROPOSAL**

- 32 At the commencement of hearing, you sought clarification whether it was open to you to recommend PC72 as a full Living Z proposal and directed Counsel to Clause 26, Schedule 1 of the Resource Management Act 1991 (**RMA**).
- 33 It is submitted that the starting point is that PC72 was 'accepted' by the SDC<sup>11</sup> pursuant to Clause 25(2)(b) of the RMA following a series of responses to further information requests. The TRRG responses to the various requests for further information were incorporated into the publicly notified version of PC72 dated 28 June 2021.
- 34 PC72 as originally lodged and as publicly notified includes several alternate forms of relief, including the 'less preferred relief' of:

*Option 1: Rezone all of the land owned identified in Table 1 above Living Z<sup>12</sup>*

- 35 Table 1 has been replicated below and includes the land at 42 Hamptons Road (owned by Helen and Lawrence Tuff).

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<sup>11</sup> Council Meeting Agenda, 9 June 2021 at page 59 ([Council Agenda \(selwyn.govt.nz\)](#))

<sup>12</sup> Notified Application, dated 28 June 2021, at page 1 and 3.

Table 1

Registered Owner	Address	Appellation Title	Area (ha)
Grant James Crabbe Mark James Crabbe Rosemary Joyce Crabbe	341 Trices Road	Lot 1 DP 73583	2.0236
Anne Elizabeth Sweney Mark Raymond Sweney	329 Trices Road	Lot 2 DP 73583	2.3868
Gina Ann Cridge Timothy John Cridge	32 Hamptons Road	Lot 1 DP 3896	2.4237
Lee Michael Christopher Robinson	327 Trices Road	Lot 1 DP 5284	0.1279
Bronwyn Jeffs Evan Ross Jeffs	321 Trices Road	Lot 1 DP 78905	8.0000
Anthony Edwin George Barbara Ellen George Hugh Simon Lindo	311 Trices Road	Lot 1 DP 360577 Lot 2 DP 360577	8.1200
John Barrett Tania Barrett	299 Trices Road	Pt RS 2423	2.8327
Helen Nancy Tuff Lawrence Napier Tuff	42 Hamptons Road	Pt RS 3122 RS 39794	2.7864
<b>TOTAL</b>			<b>28.7011</b>

- 36 The SDC had discretion to accept only part of the PC72 i.e. the preferred relief only, however it accepted (and publicly notified) the proposal in its entirety. Submissions were received which addressed the full gamut of different relief options. More recently, evidence presented at hearing by the TRRG expert witnesses specifically addressed the less preferred relief option of Living Z zoning across the entire site as this was recommended as the preferred option in the Council Officer's s42A Report.
- 37 It has been clear from day one that the TRRG proposal could take several forms – including Living Z zoning over the entire site. Accordingly, it is submitted that there is no jurisdictional bar preventing a recommendation that supports the now preferred Living Z proposal.

#### SCOPE – DRINNAN LAND

- 38 When considering Minute 2<sup>13</sup>, further discussion on the scope to include the Drinnan land may not be necessary, however we reiterate our submission that the TRRG experts have not been engaged and therefore their technical reports have not considered the implications of the potential inclusion of the Drinnan land within the PC72 proposal. It is submitted it would be inappropriate for the Commissioner to rely on conclusions of the TRRG experts as reached in the PC72 technical reports to fulfil the evidential requirements for rezoning of the Drinnan land.<sup>14</sup>
- 39 Even if there were scope to include the Drinnan land, we do not consider the Drinnans have satisfied the evidential burden to demonstrate the site specific merits of their land being included in the PC72 proposal. There are various technical matters that need to be investigated and considered, including stormwater treatment and disposal, boundary treatment with neighbouring rural land, interface with the Birchs Road Park and related connectivity matters including provision for and location of extended pedestrian and cycle path linkages between PC72, the Drinnan land and the Birchs Road Park.

<sup>13</sup> See note 9

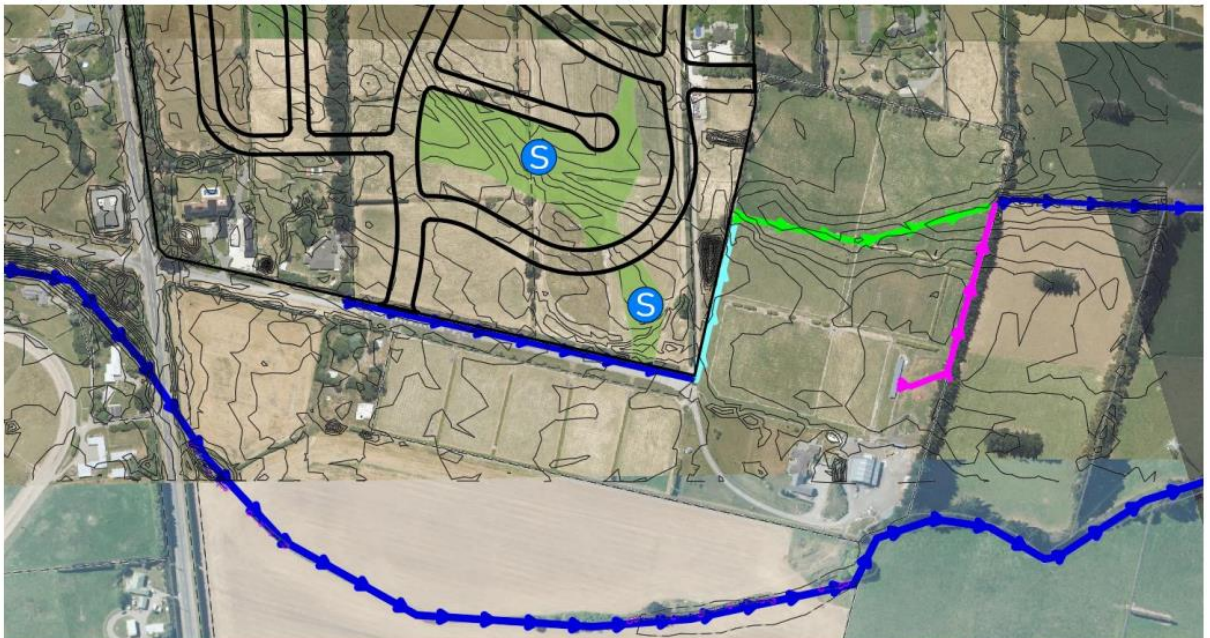
<sup>14</sup> Legal Submissions on behalf of TRRG dated 26 January 2022 at [75]

## NATURAL SERVITUDE

- 40 The Drinnans raised concerns relating to the potential effects of stormwater discharge from the PC72 site across their land. We have categorised these concerns as follows:
- 40.1 There is no natural discharge point from the PC72 site onto the Drinnan Land; and
  - 40.2 The TRRG have abandoned their right of natural servitude (a 'sinking lid' approach) due to works undertaken on a neighbouring driveway.

### Natural discharge point

- 41 Mr Blakie, the TRRG stormwater expert witness provided an image showing existing LIDAR contours<sup>15</sup> in his Summary Statement. This image (reproduced below) identifies the "low point" (green line) on the Drinnan land which will discharge and convey surface water from the PC72 land in the right climatic conditions.



- 42 This is consistent with the original E2 Environmental assessment which identified that the topography of the site falls to the south-east at an average grade of 1 in 300 in a north-west to south-east direction with an outfall to a drain east of the site.<sup>16</sup> This position is also consistent with the flow paths identified within SDC's Flood Hazard assessment.<sup>17</sup>
- 43 Evidence presented on behalf of the Drinnans opined that this is not a natural flow path, and therefore discharge cannot be protected through natural servitude.<sup>18</sup> With respect, Mr Stewart is a planning consultant, and his view is not shared by Mr Blakie, an expert in this field.

<sup>15</sup> Summary Statement of Lindsay Marshall Blakie (Stormwater), dated 31 January 2022 at [16]

<sup>16</sup> Evidence of Lindsay Marshall Blackie (Stormwater and Hazards), dated 14 January 2022, Appendix A, (E2 Environmental Assessment dated 21 June 2021 at [1.1])

<sup>17</sup> Summary Statement of Lindsay Marshall Blakie (Stormwater), dated 31 January 2022 at [14]

<sup>18</sup> Evidence of Stewart William Fletcher (Planning), dated January 2022 at [5.2]

44 Historical imagery presented by the Drinnans depicts a historic drain at the location of the low point, which confirms that the disputed flow path has in the past conveyed water across the Drinnan land. We cannot accept the proposition that the low point identified by Mr Blakie is not the natural discharge point to convey up catchment surface water run-off.

45 Nonetheless, the Commissioner does not need to decide this matter. Mr England <sup>19</sup>has presented an eloquent solution within his Summary at [12]:

*The status of the stormwater outfall from this development has not been fully resolved at the time of writing this statement. The ODP should either show the legal stormwater outfall from this development or the ODP narrative should include the need to confirm and secure a legal outfall from the development.*

[emphasis added]

46 The amended ODP Narrative adopts this approach which is consistent with Mr Blakie's evidence that while an outfall across the Drinnan land is the preferred stormwater solution, an alternative solution may be pursued following more detailed modelling and design.<sup>20</sup>

47 Therefore, despite disagreement with the Drinnans, the issue does not need to be determined at this point – and can be resolved through the inclusion of the following words within the ODP Narrative:

*Detailed stormwater solutions, including stormwater outfall location, are to be determined in collaboration with the Council at subdivision stage and in accordance with Environment Canterbury requirements.*

#### 'Abandoned' natural servitude

48 The Drinnans also submitted that if natural servitude was established, that the TRRG have abandoned their rights due to earthworks undertaken on the PC72 site (a 'sinking lid' approach).

49 The starting position is that, at common law, lower land is subject to a natural servitude by which is it obliged to receive surface water which falls naturally from a higher land.<sup>21</sup> The key words being 'obliged to receive'.

50 The position on natural servitude in New Zealand was considered by the High Court in *Barron v Louw* <sup>22</sup> which adopted the summary from *Hinde McMorland and Sim Land Law in New Zealand* as an authoritative statement of the doctrine as follows:<sup>23</sup>

*"Before the commencement of the Resource Management Act it was clearly established that the natural servitude as expressed in *Gibbons v Lenfestey* applied in New Zealand allowing a higher owner in the natural use of the higher land, to concentrate and discharge on the lower land water that would otherwise naturally flow there. Three principal limitations were placed upon this right. First, the higher owner could not, by means of an 'artificial structure' such as a building or a raising of soil level, **alter the flow on to the lower land causing injury to that land**. Secondly, he or she could not so concentrate the water as to **increase appreciably** the burden on*

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<sup>19</sup> See Note 13 at [12]

<sup>20</sup> Ibid at [15]

<sup>21</sup> *Body Corporate 335089 v Vero Insurance New Zealand Ltd* [2020] NZHC 2353 at [420]

<sup>22</sup> *Barron v Louw* [2018] NZHC 2275 at [27]

<sup>23</sup> *Barron v Louw* at [28] with reference to DW McMorland & Ors *Hinde McMorland and Sim Land Law in New Zealand* (online ed, Lexis Nexis) at [6.017]

*the lower land by altering the volume and velocity with which the water flowed on to the lower land, thus causing damage to the lower land which would not have been caused by the natural flow. Thirdly, he or she could not introduce 'foreign water', that is, water which would not be part of the natural surface water on the higher land, and insist that it be received by the lower landowner. Though there is some authority for the proposition that the natural servitude applies only to rural land, and not to urban or suburban land, the better view is that it applies to all land and that any problems in its application to non-rural land are met by the limitations upon that right."*

- 51 The recent High Court decision in *Body Corporate 335089 v Vero Insurance New Zealand Ltd* clarifies that the owner of land with a right of natural servitude is not required to obtain a legal easement in order to protect and utilise its right. Under New Zealand's land transfer system, there is no necessity for the registration of natural servitude affecting land (whether by easement or otherwise).<sup>24</sup> The inherent nature of natural servitude was described within *Hinde and McMorland*:

*"But the right of the superior proprietor to throw natural water on the lower land is not an ordinary servitude to which this rule can apply. It is a natural right inherent in property; it is a question of nomenclature whether it is or is not called a servitude. Their Lordships do not doubt that the law of Guernsey in this matter is the same as that of every other country whose jurisprudence is traceable to Roman sources. Indeed, even the countries ruled by the common law have accepted the Roman rules. It is true that the Romans designated this right as servitude, but they explained the distinction by dividing servitude into three classes—natural, legal, and conventional—and it is to the first class that this belongs."*

- 52 *Banora v Auckland Council*<sup>25</sup> identifies that natural servitude can be used as a defence against a claim of private nuisance. The case discussed a factual scenario where the plaintiffs contended that the emanation of water from the higher site was adversely affecting the plaintiffs' use and enjoyment of the property. Ultimately, the Court held that the construction of a walkway and installation of a culvert did not materially change the natural water flows. The doctrine of natural servitude applied. Therefore, the land does not have to stay in its natural state, rather can be modified to the extent it does not increase effects on the lower land.

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- 53 It is well established that natural servitude has some limitations (i.e. flows cannot be altered in a manner that causes damage to lower land). To determine whether a limitation applies in a particular factual scenario will require comparison against the natural or unmodified state of the land. This is what is proposed through detailed assessment and modelling at subdivision stage. Modelling already completed by Mr Blakie confirms that stormwater can be attenuated within the PC72 site so that stormwater that is discharged, via existing surface flow paths (to the Drinnan land) will be at or below existing peak discharge rates.
- 54 The Drinnans approach suggests that there is a 'sinking lid' to natural servitude, a new limitation that is not described within the 'authoritative statement' in *Barron v Louw*<sup>26</sup>, or applied in the High Court decision of *Body Corporate 335089 v Vero Insurance New Zealand Ltd*.<sup>27</sup> This is inconsistent with the fundamental concept that natural servitude is 'inherent' in property. It is submitted that natural servitude is incapable of being abandoned.
- 55 In any event, the earthworks identified by the Drinnans (a driveway on the PC72 site), are immaterial to the flow of water. The driveway is unformed, comprised of a fine layer of shingle

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<sup>24</sup> *Bailey v Vile* [1930] NZLR 829 (SC) and (CA) at 840.

<sup>25</sup> [2019] NZDC 5184

<sup>26</sup> *Barron v Louw* [2018] NZHC 2275 at [27]

<sup>27</sup> *Body Corporate 335089 v Vero Insurance New Zealand Ltd* [2020] NZHC 2353 at [420]

and is not raised so as to impede water flows across its surface. It is submitted that the principals confirmed in *Banora* ought to be applied here i.e. modifications made to the superior land do not undermine the existence of natural servitude.

- 56 Again, we submit nothing turns on this point provided the solution identified within paragraph 47 above is adopted.

## TRAFFIC DATA

- 57 During the hearing, there was discussion on travel destinations from Prebbleton, and whether this was influenced by employment or education facilities in proximity to the site (as compared to Central Christchurch).

- 58 Since the release of the ITA<sup>28</sup> appended to PC72 as notified, Stats NZ have made available the 2018 Census data via Commuter Waka<sup>29</sup>. At your request, Ms Williams has reviewed and summarised aspects of the data to provide guidance in respect of travel destinations and modes of transportation from Prebbleton. Her conclusions are set out below:

- 58.1 A total of 42 people travel to Halswell comprising: 12 people commuting to Halswell West for work and 15 to Halswell South (for work) as well as 15 for education. 15 also commute to the adjoining Oaklands area for work.
- 58.2 252 (around 9%) travel to Lincoln for work (81) or education (171).
- 58.3 21 people travel to Rolleston for work (none for education)
- 58.4 81 travel to the adjacent Islington / Hornby (around 3%) and 96 to Hornby Central (both for work) (around 3.5%)
- 58.5 330 People Live and work in Prebbleton, 447 live and attend study in Prebbleton. The remaining (71%) leave for work or education in other areas.
- 58.6 There are also 24 and 9 people travelling to Trents and Ladbrooks respectively (areas generally between Prebbleton and Lincoln / Rolleston) and many of these destinations may also be within comfortable cycling distance.
- 58.7 There is a general trend towards commute to locations on the south-west side of Christchurch for work and similar for work and education.

## RECOMMENDATION OF COMMISSIONER CALDWELL – PC67

- 59 Plan Change 67 is a private plan change initiated by GW Wilfield Limited to rezone approximately 33.4 hectares of Rural Inner Plains to Living West Melton (WM South) zone. The PC67 hearing was conducted in September 2021.

- 60 At its meeting on 9 February 2022 the SDC adopted Commissioner Caldwell's Recommendation to approve PC67<sup>30</sup>. At the time of filing these submissions, formal SDC meeting minutes are not available but a copy of Commissioner Caldwell's Recommendation is

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<sup>28</sup> Application for private plan change, notified June 28 2021, Appendix 10

<sup>29</sup> <https://commuter.waka.app/>

<sup>30</sup> [Selwyn District Council 9 Feb 2022 - YouTube](#) at minutes 47-54. The Minutes have yet to be released at the time of drafting these submissions.

located within the bundle of Agenda documentation on the SDC website<sup>31</sup>. Copy attached as **Appendix B**.

- 61 While acknowledging that the PC67 Recommendation should not be treated as a binding decision, we draw this to your attention as Commissioner Caldwell traverses the same competing NPS-UD and CRPS provisions that you also need to resolve in deciding PC72. On this complex and important issue, Commissioner Caldwell concludes:

*“Policy 8 specifically addresses responsiveness to plan changes. It must be given meaning. It does not address development which is simply out-of-sequence. It also addresses development that is “unanticipated” by the RMA planning documents. In my view, “unanticipated” must be read to include circumstances where planning documents (here the CRPS as reflected in the OSDP) contain avoidance objectives. Development in areas outside of those identified in Map A is clearly “unanticipated”...*

*To read otherwise would amount, in my view, to a significant watering down, or even an undermining, of the responsive provisions of the NPS-UD...”*

- 62 It is submitted that Commissioner Caldwell’s assessment is correct, and his finding align entirely with our earlier submissions on this issue. We commend you to our legal submissions over those of Mr Wakefield for the two Councils when reaching your own decision.

## **CONCLUSION**

- 63 We do not consider there are any matters remaining that would prevent you recommending that PC72 – Living Z zoning across the entire site – be approved on its merits. We note that Mr Cleese, the SDC Reporting Officer has maintained his recommendation that PC72 ought to be approved.

11 February 2022



**Katherine Forward**

Counsel for Trices Road Rezoning Group

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<sup>31</sup> Website link - [Public Agenda 9 February 2022.pdf \(selwyn.govt.nz\)](#)