



2 April 2014

Attention: Craig Friedel/Tim Harris
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Dear Craig/Tim

LURP ISSUES RURAL RESIDENTIAL

The issue

- 1 The sites that are subject of the two submissions, Dryden Trust (S36) and Trents Road (S37), are in different locations, but have similar characteristics. Both are located outside the Greenfield priority areas in the LURP, but are identified at least in some documents as possible locations for future urban development.
- 2 The ultimate goal of both of the above submissions is for the land to be developed for full residential development. However, the submitters are attempting to use the current process as a "*future-proofing*" opportunity to secure rural residential development as an interim measure to provide for full residential development to occur sometime in the future.
- 3 You do not support this outcome for two key reasons. Firstly, there are a number of practical constraints and problems that you consider would result from allowing this type of interim development. We agree with the points you made in your officer's report in this regard. Secondly, you consider that the submissions are inconsistent with the Land Use Recovery Plan (the LURP) and the Canterbury Regional Policy Statement (the RPS), including in particular Policy 6.3.9 (7) of the RPS.
- 4 The key issue for which you would like my opinion is whether the proposed interim development gives effect to the above provisions of the RPS and whether or not it is consistent with the LURP. Further, you ask in reference to Section 23 of the Canterbury Earthquake Recovery Act 2011 (the CER Act): is it lawful for a hearings panel to approve the submissions even if they agree with the merits of the argument put forward in the submissions?

Executive summary

- 5 It is the form of development proposed by the submitters in terms of its "*future-proofing*" element that, in my view, falls foul of Policy 6.3.9(6) and (7). Along with the points made in your report relating to the "practical reasons" why this form of development should not be supported by the commissioners, I consider a further and more fundamental reason is that to support the submitters' form of development would be inconsistent with the relevant provision of the RPS as amended by the LURP.
- 6 While such a decision would be inconsistent as described above, the question remains whether it is lawful for the hearings panel to approve the submission. Expressed another way, does the hearings panel have jurisdiction to approve a

submission on the rural residential strategy, recognising that this decision is made under the Local Government Act 2002 (LGA).

- 7 Normally, decisions of the sort under consideration here would be made under the RMA and Section 23 of the CER Act would apply, with the result that SDC could not make a decision that was inconsistent with the LURP.
- 8 However, in my view the LGA provides limits on the commissioners' jurisdiction. Firstly, Section 80 prevents the commissioners from making a decision that is inconsistent with any plan required by the LGA or any other enactment unless SDC clearly identifies an intention to amend the plan (in this case, the RPS) to accommodate its decision. Plainly, SDC cannot of its own volition amend the RPS; and signalling any intention to amend it is of no value. This results in a jurisdictional problem if the commissioners were to accept the submitters' submission.
- 9 Section 77 of the LGA provides requirements in relation to decisions. In assessing options, the decision-makers must consider the benefits and costs of each option in terms of the present and future interests of the district and also consider the extent to which community outcomes would be promoted and achieved in an integrated and efficient manner by each option, and consider the impact of each option on the local authority's capacity to meet present and future needs in relation to any statutory responsibility of the local authority and finally, any other matters that in the opinion of the local authority are relevant.
- 10 In my view, acting properly, the commissioners, when having regard to the requirements under Section 77 LGA should decline the submitters' submission.

Principles of interpretation

- 11 One of the key issues then is to determine the meaning of the words:

"shall not be regarded as in transition to full urban development".
- 12 To do this we need to apply appropriate principles when interpreting the provisions of a plan.
- 13 The framework to interpret plan provisions is found in the Interpretation Act 1999 and, primarily, three leading cases that provide useful guidance for interpreting the provisions of the plan. These cases are: *Powell v Dunedin City Council*,¹ *Brownlee v Christchurch City Council*,² *Nanden v Wellington City Council*.³
- 14 Applying this framework, to ascertain what the correct meaning of the words are in this case, the following matters fall for consideration:
 - (a) The words used in their immediate context;
 - (b) The purpose of the relevant policy;
 - (c) The context and scheme of the plan;
 - (d) The history of the plan; and

¹ [2004] 3 NZLR 721 (CA).

² [2001] NZRMA 539 (Env Ct).

³ [2000] NZRMA 562 (HC).

- (e) The policy considerations identified in *Nanden*, namely whether the interpretation:
 - (i) Leads to absurdity or anomalous outcomes;
 - (ii) Is consistent with the expectations of property owners; and/or
 - (iii) Enables practical administration of the Policy by Council officers.
- 15 I will use each of the above as headings to discuss the interpretation of Policy 6.3.9(7) before returning to the application of the Policy to the facts.

Broader context

- 16 Before applying the principles of interpretation, it may be helpful to set out some points on context.
- 17 Policy 6.3.9 is an amendment to the RPS, inserted by the LURP. The LURP is a creature of statute, namely the Canterbury Earthquake Recovery Act 2011. That Act, among other things, provided the relevant Minister with the statutory powers to direct changes to, relevantly, statutory instruments, namely plans. The LURP both directed and inserted changes to the RPS as we have earlier described.
- 18 Importantly in terms of context, the Canterbury Earthquake Recovery Act 2011 (CER Act) contains Section 23, which provides, among other things, that councils are not to act inconsistently with a recovery plan on, and from, its notification. It will be clear from the above that the recovery plan (the LURP) has been notified and Selwyn District Council (SDC) must act consistently with the LURP.
- 19 However, Section 23 relates to the exercise of functions or powers under the Resource Management Act 1991 (RMA). Interestingly, the decision here at issue is not being made under the RMA at this point. Rather, SDC is making a decision on a rural residential development strategy under the Local Government Act. Once that strategy is settled according to the LURP details of any changes are to be provided to the Minister for Earthquake Recovery within six months of Gazettal of this recovery plan for the Minister to determine any public process required to give effect to those amendments.
- 20 While it is not clear, I think it is safe to assume that the type of public process the Minister would determine will be a process under the RMA. If this assumption is correct and if the commissioners here make a decision that is inconsistent with the RPS as amended by the LURP, one could well imagine the Minister rejecting the commissioners' decision and amending it before giving it effect under the RMA because of that inconsistency.
- 21 However, in any event, there are a range of provisions under the Local Government Act 2002, which in my opinion are critically important. They are Sections 77 (which provides for requirements in relation to decisions) and Section 80 (which provides for identification of inconsistent decisions). Of those two sections, Section 80 is I think the more important. Section 80 provides:

“(1) If a decision of a local authority is significantly inconsistent with, or is anticipated to have consequences that will be significantly inconsistent with, any policy adopted by the local authority or any plan required by this Act or any other enactment, the local authority must, when making the decision, clearly identify—

- (a) the inconsistency; and
- (b) the reasons for the inconsistency; and
- (c) any intention of the local authority to amend the policy or plan to accommodate the decision.

(2) Subsection (1) does not derogate from any other provision of this Act or of any other enactment."

- 22 In my view, Section 80 requires SDC when making a decision that is inconsistent with any plan required by the LGA or any other enactment (that must include a plan made under the RMA) to clearly identify the inconsistency and reasons for that inconsistency within its decision. More importantly, however, as well as recognising and providing reasons for the inconsistency SDC must clearly identify its intention to amend a policy or plan to accommodate the decision it intends to make.
- 23 SDC cannot amend the LURP or the RPS to accommodate a decision SDC may make where that decision is inconsistent with the LURP or RPS.
- 24 Given the importance of the LURP in the context of earthquake recovery for the Greater Christchurch area, it would be an anomalous outcome if SDC could, and did, make decisions that were inconsistent with the LURP.
- 25 In any event, it is trite to say that even if SDC could make an inconsistent decision with the LURP it does not follow that it should do so. Given the importance of making such an inconsistent decision in the context of earthquake recovery one would think there would need to be reasons of fundamental importance to depart from critical policy documents such as the LURP. In my view, much more justification than is contained within the submitter's submission to the strategy would be required to support such a departure.

Application of the principles of interpretation

Words used in their immediate context

- 26 RPS Policy 6.3.9 - Rural Residential Development provides that rural residential development further to the areas already provided for in district plans as at 1 January 2013 can only be provided by territorial authorities in accordance with an adopted rural residential development strategy prepared in accordance with the LGA, subject to paragraphs (1) through (7). SDC is underway with this step, which is referred to as Action Step 18 within the LURP.
- 27 Critically, any decision made is subject to Policy 6.3.9. This means, in my view, that only a decision that meets Policy 6.3.9 in its entirety and any other provisions of the RPS as amended by the LURP that are relevant to that decision.
- 28 Paragraph (7) contains the proposition that a rural residential development area is not to be regarded as 'in transition to full urban development'. Giving these words as they appear on the page their plain, ordinary meaning, in my view they mean a rural residential development should not be seen as a stage or a progression to full urban development.
- 29 This, in my view, is a critical tripping point for the submitters. I say this because on the basis of their own submission I have concluded that their real goal is to achieve in the future a form of urban development at a higher density than rural

residential development. I can think of no other reason as to why they provide information relating to the "*future-proofing*" of the now intended rural residential development, but to enable it to transit in the future to a more intense form of development. If the submitters' ultimate goal was rural residential development alone there would be no need for any discussion of "*future-proofing*" within their submissions.

- 30 More relevant information is provided in the balance of Policy 6.3.9. Turning to the structure of Policy 6.3.9, in my view paragraphs (2) to (5) inclusive of subparagraphs (a) to (l) are qualifiers. In other words, if these qualifications are met, then the rural residential development falls for consideration. These qualifiers are to do with the location and the provision of infrastructure. So, even if these qualifiers are met it does not automatically follow that the rural residential development should be approved.
- 31 Staying with the structure of Policy 6.3.9 paragraphs (6) and (7), these paragraphs can be seen as exclusions. Firstly, paragraph (6) is important, particularly because it seeks not only integrated design for the subdivision and land use, but it seeks to provide for the long-term maintenance of rural residential character.
- 32 This is important because the intent of the policy relates to the long-term maintenance of rural residential character. The policy and the LURP recognises the critical importance of distinguishing between urban development and its requisite character and rural locations and their requisite character.
- 33 Rural residential character can, in my view, be identified as a location in which farming and other rural activities with all their attendant effects, including noise and odour, are recognisable. Open space, in terms of developed farmland, would also be an element of rural residential character. The important point here is that rural residential character is to be seen as different from urban character. What paragraph(6) seeks to do then is provide for the long-term maintenance of that rural residential character.
- 34 When the submissions are set alongside paragraph (6) it is clear, in my opinion, that the submitters do not seek to provide for the long-term maintenance of rural residential character. They cannot because their development form is an interim form of rural residential development transitioning to a more intense form of urban development. Thus additional characteristics of the rural residential character, such as wide streets and large allotments, upon which rural activities can occur without causing adverse effects would be lost in the future if this interim rural residential development transits to a more intense urban form. Thus the long-term maintenance of rural residential character cannot be met by the form of development proposed by the submitters.
- 35 In a similar and related way, paragraph (7) also operates as an exclusion. In my view, a form of rural residential development that transits some time in the future to full urban development, as the submitters here propose, is inconsistent, if not contrary to, paragraph (7). This outcome is, in my view, apparent from the plain ordinary meaning of the words as they appear in paragraph (7) compared with the outcome the submitters seek.
- 36 So, even if the submitters' submission qualifies for consideration under paragraphs (2) to (5), it is in my view caught by paragraphs (6) and (7) because, for the reasons already advanced, it is clearly inconsistent or, I think more properly, contrary to them.

- 37 Turning now to the principal reasons and explanations for Policy 6.3.9 provided within the RPS⁴, it is noted that many of the rural western areas were undamaged by the earthquakes and are located outside areas identified as being prone to liquefaction, making them more desirable locations to live, especially after the earthquakes.
- 38 However, the explanatory paragraph continues to note that:
- "...it is important to manage the extent of residential activity due to pressure it places on infrastructure, transportation efficiency, maintenance of rural character, and rural land use for production."
- And further:
- "Rural residential development can have significant effects disproportionate to the number of households living within this form of development; and more than limited provision would undermine the achievement of recovery."
- Critically, the paragraph continues to note:
- "Rural residential development is provided, but to a limited extent, in recognition of the desirability of providing a range of choices of housing types for those needing to locate and without compromising the overall intent of consolidation in the CRPS."
- 39 So, in my opinion, we can take from Policy 6.3.9 that limited rural residential development areas are appropriate, provided a range of location and design requirements are met. Importantly, the conflict that could occur through providing more than limited rural residential development areas with the intent or purpose of the RPS (which can simply be described as urban consolidation), will arise.
- 40 Concentrating on paragraph (7) of Policy 6.3.9, to help in its interpretation the question can be asked as to who the policy is directed at. Expressed another way, who should not regard residential development as being a transition to full urban development?
- 41 In my view, an answer is provided by the process undertaken to determine where rural residential development areas will be located within the district. Action Step 18 of the LURP requires SDC to implement a residential development strategy. The process for that has already been commented upon. The process enables proponents for particular areas of the district to become rural residential development areas to put forward their case within that process to the SDC.
- 42 Therefore Policy 6.3.9(7) is a very clear signal to such proponents and decision-makers that a rural residential development area shall not be regarded as being in transition to a full urban development area. So, if such a proponent had a plan to develop a rural residential development into a full urban development, this policy is sending them and decision-makers a very clear signal that that transition or outcome is not what the LURP intends.

⁴ Page 21, LURP.

Purpose of the relevant policy

- 43 Issue 6.1.5⁵ relates to rural residential impacts. Importantly, the Issue notes the impacts of rural residential development if unconstrained.
- 44 The explanation to the Issue notes that if rural residential development is unconstrained it can give rise to requests for the expansion of urban services and exacerbate dispersed settlement patterns, leading to inefficient use of infrastructure and impacts on rural production. The explanation further notes that this can lead to pressure for future urbanisation, which is difficult to achieve in an effective manner given that the land use pattern has been established for a different purpose.
- 45 Put simply, if rural residential development is unconstrained there can be adverse effects that would pull against one of the central cores of the LURP, which is to enable recovery, rebuilding, and development in a speedy, efficient and effective manner through utilising geographic limits for development, so that infrastructure can be efficiently utilised.
- 46 Moving to the objectives of the LURP, Objective 6.2.2⁶ (urban form and settlement pattern) specifically provides at paragraph (6) for managing rural residential development outside of existing urban and priority areas.
- 47 In the principal reasons and explanation paragraph⁷ of the LURP, it is explained that consolidation of existing urban settlements is the form of development that will minimise adverse effects (such as travel, cost of new infrastructure) and avoid adverse effects of development on sensitive landscapes, natural features and areas of high amenity. The paragraph notes that this approach will enable Greater Christchurch to build back better and support the recovery of Central Christchurch. Intensification, particularly of urban development, is a key theme underpinning Objective 6.2.2.
- 48 In summary to this point, with the benefit of considering the issues and the relevant objectives in the LURP and utilising those provisions to assist in the interpretation of Policy 6.3.9(7) in particular, paragraphs (6) and (7), it is my view that a rural residential development area is not to be seen or regarded by proponents of such areas as being in transition to full urban development. This is because to allow that to occur clashes in a fundamental way with the overriding objective of the LURP, which I say is to enable recovery, rebuilding and development through the consolidation of the existing urban settlements and greater intensification within Christchurch urban area.
- 49 Further support for this view as to the proper interpretation of Policy 6.3.9(7) is found by reference to Action Step 18; in particular, paragraph 4.2.1.⁸ Paragraph 4.2.1 deals with identification of priority areas for greenfield housing development. Of note is the final paragraph⁹, which provides that the LURP does provide a regional policy framework supporting some rural residential development during the recovery period to allow a range of choices of housing types for those needing to relocate. The paragraph notes:

⁵ Page 7 of the LURP.

⁶ Page 8 of the LURP.

⁷ Page 9 of the LURP.

⁸ Page 25 of the LURP.

⁹ Page 25 of the LURP.

“However, provision is limited to avoid inefficient use of land and infrastructure, protect future urban expansion options, and manage potential conflict with rural character and rural activities.”

- 50 In my opinion, this further reinforces the point that rural residential development should be seen as only rural residential development and not a stage or transition to full urban development; and should, in terms of its allocation, be limited (importantly) to protect future urban expansion options.
- 51 The submitters here are endeavouring to secure for themselves now a possible future urban expansion opportunity. This pulls against the policy base of the LURP because the LURP addresses this issue by keeping urban expansion option open for the future and not determining them now as would occur if the submitters’ position were accepted.

Context and scheme of the LURP

- 52 In terms of context the LURP is about recovery and rebuilding of Greater Christchurch following the earthquakes. At its core it seeks to ensure that critical recovery resources are directed at specific geographic areas, enabling efficient and effective use of those resources for the benefit of the community.
- 53 In relation to rural residential development, the LURP acknowledges the importance of such developments because they provide for variety and flexibility and some of the areas where rural residential activities could locate and where they are now are undamaged by earthquakes.
- 54 Nevertheless, the LURP recognises the adverse effects of unconstrained rural residential development, particularly adverse effects on the change of the character of rural areas, adverse effects on rural activities such as farming through reverse sensitivity, and further adverse effects caused by dispersed settlement patterns and consequent inefficient forms of development and provision of services.
- 55 So the scheme of the LURP when it considers these possible adverse effects is to provide for rural residential development, but in a limited way so as to address these potential adverse effects.
- 56 The detail of the LURP’s approach to rural residential development, in particular in the way it seeks to address these possible adverse effects, is fully set out in Policy 6.3.9.

This history of the LURP

- 57 The history of the LURP stretches as far back as Plan Change 1 to the Canterbury Regional Policy Statement (PC1), which was notified on 28 July 2007. In its notified form, the issues relating to rural residential development we have referred to above have received consideration. Indeed, it is of interest to contrast the wording in Method 13.1(v)¹⁰ with Policy 6.3.9 of the LURP.
- 58 The consistency is remarkable. In the Method, provision for long-term rural residential character (which I take to mean its retention) and the linked point that rural residential development is maintained and not to be regarded as a transitional area to full urban development is clearly expressed. Both of these issues and words are present within Policy 6.3.9 of the LURP.

¹⁰ Proposed Change 1 to RPS, July 2007.

- 59 In terms of the explanation to PC1 Policy 13 – Rural Residential Development (which the Method we have referred to above relates), the explanation notes the significant effects that rural residential development can have and considers a more than limited provision would undermine Objective 1 and Policies 1 and 2.
- 60 In my view, the primary objectives and policies of PC1 and the LURP are similar and consistent as is the approach of both plans to rural residential development.
- 61 Therefore there is a long and consistent history of dealing with rural residential development. Further, in my view, what the submitters here propose is inconsistent or, I would say more correctly, contrary to the policy thrust of both the current and historic plans.

The policy considerations identified in *Nanden*

Absurd or anomalous outcomes

- 62 By allowing the form of development proposed by the submitters it would provide an outcome which, on the face of it, given the policy and objective base of the LURP, would be both absurd and anomalous.
- 63 I say this because on a clear reading of Policy 6.3.9 approval to the submitters preferred form of development could in no way be seen as consistent with the outcome that Policy 6.3.9 seeks. Indeed, it would be so extreme as to be seen as an absurd outcome and clearly anomalous, particularly given the objective and policy base of the LURP as we have earlier described.

Consistent with expectation of property owners

- 64 In my view, a property owner reading Policy 6.3.9, particularly where they were a rural property owner, would form the view that any rural residential development should be developed and maintained as such, and should not be proposed or developed with a purpose of transiting to full urban development sometime in the future. Similarly, that property owner after reading Policy 6.3.9 and comparing that and its outcomes with the submitters' submission would understand that the submitters' submission would not provide for the long-term maintenance of rural residential character.

Practical administration of the policy by a council officer

- 65 For reasons that should by now be obvious, if the submitters' submission were to be accepted this would, in my view, mean that in the future practical administration of Policy 6.3.9 would not be possible. The extent or degree of clash between what the submitters propose in terms of "*future-proofing*" their proposed rural residential development, if consented, would mean that the integrity of Policy 6.3. 9, particularly paragraphs (6) and (7) would be imperilled to such an extent that practical administration of the policy would be impossible.

The facts - is what the submitter proposes either a "transition" or "in transition to full urban development"?

- 66 The submitter contends after having regard to the Oxford dictionary meaning of the words "in transition" that the intended proposal for rural development cannot be considered as being in transition to full urban development. That is because they contend the submission cannot be considered to be in the process of changing from one state or style to another. The submitter claims that rural residential development is occurring now and if they are successful the zoning,

what follows would preclude the full urban development from occurring or being in the process of occurring on the site. Having established a Rural Residential development zone, there is no scope for any transition to occur.

- 67 However, reading the submission, particularly that of the Dryden Partnership Trust, the rural residential development is fundamentally influenced by a future goal or objective. The form of development proposed by the submitter includes protection, or "*future-proofing*", to ensure that this goal or objective can be realised. Put another way, the development here proposed envisages, and indeed provides for, change over time. At the heart of the development proposal is the objective or goal that there will be change or transition from one form of development (Rural Residential to Urban) over time. Expressed another way, it provides for a transition from one state or stage of development to another.
- 68 Returning to the dictionary definition, "transition" means "change or passage from one state or stage to another". This is precisely what is occurring here, with this form of development changing from one state (rural residential) to another over time (namely, urban). Indeed, one of the cornerstones or planks of the proposed rural residential development is that it will be undertaken in such a way so as to preserve and provide for full opportunity for urban living zoning. This demonstrates the key point that this submitter is intent on providing a form of rural residential zoning and development, which provides for the very transition that the policy is directed at avoiding.
- 69 The submitters' approach - claiming that once rural residential zoning is achieved no transition can occur until the later change to an urban living zoning - seems a fundamental contradiction with the balance of the submission, which is directed at demonstrating how rural residential zoning can be a precursor or transition to full urban development.
- 70 The submitters demonstrate this point of transition by making continual reference to a "*future-proofing*" approach - claiming that rural residential zoning for the site will not compromise, but rather will enable ultimate consolidation in the manner outlined in the RPS. The submitters are at pains to point out that this "*future-proofing*" can occur through design and servicing controls and through the provision of legal mechanisms to ensure that there are no impediments to future urban development. This, in my view, evidences and supports the view that what is proposed here is in fact a transition from rural residential to urban zoning over time: the very issue that the Policy 6.3.9, particularly paragraphs (6) and (7), seeks to address and prevent.
- 71 In addition, the submitters rely on this ability of the development to transition via "*future-proofing*" to support the submission that interim rural residential development will not imperil the broader objective of the LURP. That broader objective being primarily to protect future urban expansion options and opportunities, and to avoid inefficient use of land and infrastructure. The submitter, by demonstrating that a transition from a Rural Residential to Urban zone is provided for, seeks to so demonstrate that the critical outcome of the LURP can be met notwithstanding this interim stage of rural residential development.
- 72 In my opinion, on my reading of the submission, there is no reference to Policy 6.3.9(6). In particular, given the transition element I have already referred to, how the form of development proposed by this submitter provides for the long-term maintenance of rural residential character.

- 73 I note that the submitters when referring to Policy 6.3.9(7) refer to decisions of other commissioners where they have considered that paragraph. The view expressed by the submitters is that paragraph (7) is meaningless. However, for the reasons I have advanced above, I consider that that view is based upon a fundamental misinterpretation of Policy 6.3.9(7).

Conclusion

- 74 For the reasons set out in this opinion while the commissioners are not bound by Section 23 of the CER Act 2011 there are important sections of the Local Government Act 2002 they must satisfy before their decision can be lawful.
- 75 Even if the commissioners were convinced they could satisfy both Sections 77 and 80 of the LGA giving them jurisdiction or the ability to make the decision on the submitters' submission, in my view, there are very compelling reasons why the commissioners should not accept the submitters' submissions, primarily because to do so would result in an outcome that is in my view fundamentally inconsistent with Policy 6.3.9 of the RPS.
- 76 Finally, because as I understand the LURP even when the commissioners make their decision on the rural residential development strategy this matter will pass to the Minister to determine any public process required to give effect to that strategy, presumably within the context of the RMA. Thus, to now make a decision inconsistent with the RPS would, in my opinion, likely result in the Minister rejecting any proposal for change in respect of rural residential development.

Yours faithfully
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