

BRIEF OF EVIDENCE OF JANE WHYTE

Qualifications, Experience and Representation

- 1) My name is Jane Whyte. I hold the degrees of Bachelor of Arts and Master of Regional and Resource Planning from Otago University. I am a full member of the New Zealand Planning Institute.
- 2) I am currently a Director of RESPONSEPLANNING Consultants Limited, a consultancy company specialising in planning and resource management. I have seventeen years planning and resource management experience working for local authorities and in private consultancy in strategic, community, policy, regulatory and statutory planning.
- 3) I am experienced in the development of plans through all phases of the process including the on-going variation and changing processes. I have written, and been involved in, the preparation of a number of district plans and plan changes and variations (including privately requested plan changes).
- 4) I am very familiar with the difficulties of preparing a successful plan. I am also familiar with the difficulties of implementing plans that have not been successfully prepared, resulting in additional issues and costs for applicants, submitters and Councils.
- 5) I have first hand practical experience in dealing with Selwyn District Council for consents on an outstanding landscape area of the Port Hills. I have been involved in subdivision and land use consent applications in the areas affected by Plan Change 6. I have prepared and lodged applications to enable new dwellings to be erected in the Port Hills (outstanding landscape area). This has included an application in the upper slopes area which was a non-complying activity (declined) and an application in the lower slopes area which was a restricted discretionary activity (approved).
- 6) I am familiar with the Selwyn District Plan and the provisions that relate to the Port Hills and all of the documentation associated with Plan Change 6. I have reviewed Plan Change 6 and associated material, the summary of all original submissions, the Section 42A report and supporting documents.
- 7) I have been asked to prepare evidence in support of submissions lodged by Drinnan Investments Limited hereafter referred to as Drinnan Investments. Drinnan Investments owns land at Rhodes Road, Tai Tapu. An aerial photograph of this land is shown in Appendix 7C of the officer report.

Key Outcomes Sought

- 8) The key outcomes sought by Drinnan Investments are:
- a) That Plan Change 6 not result in the loss of development rights available when the land was zoned Inner Plains and secured by subdivision and land use consents (R307290 and R307291) obtained by Drinnan Investments. In particular:
 - i) that the "grandfather" clause applies to subdivision consents that have been granted consent but are yet to be completed.
 - ii) that appropriate linkages be provided to the land use rules to secure development rights for new dwellings on those lots approved by consent.
 - iii) That the land use rules provide for the erection of dwellings on these lots as a permitted activity, subject to relevant conditions; or if retained as a controlled activity then sufficient certainty is provided within the Plan as to the actions required when designing and siting a dwelling.
 - iv) That the land use rules provides certainty that any earthworks associated with the erection of these dwellings can occur as a permitted activity, or if consent is required, that it is as a controlled activity for which consent will not be declined.
 - v) For the land owned by Drinnan Investments that the plan provisions enable changes to the subdivision layout without this resulting in the loss of development rights intended to be protected by the "grandfather clause".

Background

- 9) I am outlining an extensive background for the property owned by Drinnan Investments. This is so the Commissioner can understand:
- a) the vision Drinnan Investments has for its property
 - b) the level of investment that has occurred based on the previous planning regime,
 - c) the approach it has taken in implementing its subdivision and land use consents and
 - d) the consequence of Plan Change 6 for Drinnan Investments
- 10) Drinnan Investments owns just over 125 hectares of land. The land owned by Drinnan Investments was formerly part of the block of land owned by Canterbury early settler Sir Heaton Rhodes. That part of the Drinnan Investment land affected by Plan Change 6 is

not visible from any public location. It is very private as it is tucked into the head of the Otahuna Valley.

- 11) Access to the land is from an existing right-of-way off Rhodes Road near its intersection with Otahuna Road. This right of way also serves a number of other properties in the immediate area. The property is currently in two certificates of title. The land is legally described as Lot 2 DP336164 and Lot 3 DP300940.
- 12) Under the Proposed Selwyn District Plan (Rural Section) prior to Plan Change 6, the whole property had a mixed zoning. Just over 21 hectares of the land was zoned Inner Plains. The remaining 104 ha was in the Port Hills area. It is the 21 hectares that is primarily affected by Proposed Plan Change 6.
- 13) Drinnan Investments has secured subdivision and associated land use consents affecting the 125 hectares of its land. These consents were granted on 21 March 2005 (reference numbers R307290 and R307291).
- 14) The subdivision consent sought to:
 - a) subdivide the property into five rural allotments (Lots 2 to 6) being:
 - Lot 2: 4.01ha
 - Lot 3: 5.29ha
 - Lot 4: 4.58ha
 - Lot 5: 4.29ha
 - Lot 6: 4.51 ha
 - and to create a balance allotment (Lot 1) of 103.06 hectares (area and dimension subject to final survey)
 - b) create private rights-of-way with legal widths of between 8 metres and 10 metres.
- 15) The land use consent sought to:
 - a) to construct vehicular accessways formed to an all-weather metalled standard.
 - b) to complete earthworks for vehicle accessway construction
 - c) reduce the boundary setback for the existing dwelling and accessory building from a new right-of-way boundary.
- 16) The subdivision of lots 2-6 focussed on the land zoned Inner Plains. Each of these lots has at least 4 ha of land zoned Inner Plains, some of the lots also have small areas of Port Hills Lower Slopes land included. This was done to promote lot boundaries that best followed the contours and natural topography of the land.
- 17) At the time the subdivision was approved the erection of dwellings on any of these lots was a permitted activity. The erection of a dwelling on proposed Lot 1 (balance area)

would require consent for a restricted discretionary activity. No land use consent to erect a dwelling on Lot 1 was sought at the time of subdivision.

- 18) An application for an extension of time for the implementation of the above resource consents was lodged earlier this year. This extension was granted by Selwyn District Council. Subdivision and land use consents (R307290 and R307291) now have a lapsing period of 21 March 2015.
- 19) Drinnan Investments sought the extension of time to ensure that it could fully implement its vision for the area. To complete the subdivision before the original lapsing period of 2010 would have required compromise in the overall form of development.
- 20) Drinnan Investments has sought to ensure that the subdivision fits into this area, including its topography, rather than is imposed on it. What this approach means in practice is that Drinnan Investments has, unusually in my experience, established the entry features, completed the initial roadway through the site (but not to each individual lot), sought to establish landscaping and site plantings in gullies and along the new access, prior to obtaining the section 223 certificate.
- 21) The reason for doing these site works and planting prior to the final legal survey is to ensure that the exact location of the final boundaries are sited in the location where they represent the best fit with the environment. The final boundary locations will also affect the location of the access to each individual lot. As this stage it is unclear whether these changes can be accommodated as a minor change to the subdivision (and a 223 certificate will be issued) or whether any changes will necessitate a variation to the consent.
- 22) This approach adopted by Drinnan Investments relating to the final siting of the lot boundaries and access will result in positive environmental outcomes however due to Plan Change 6 an unintended outcome has resulted for Drinnan Investments.
- 23) By not completing the survey and having certificates of title issued for the lots, the notification of Plan Change 6 as notified has removed any development rights. Given the level of investment that occurred in the property at the time of purchase (based on the Inner Plains Zoning), and the significant level investment in implementing the subdivision and land use consents, this necessitated the submission by Drinnan Investments.

Proposed Plan Change 6

Issues with Plan Change 6 as notified

24) As notified Proposed Plan Change 6 results in significant concern for Drinnan Investments. Effectively, Plan Change 6 removes all development rights that had previously existed for this land.

25) It is recognised that the removal of development opportunity is usually the intended consequence of changing a District Plan when provisions are made more restrictive. However, this does not lessen the impacts on individuals who have made decisions relying on the previous planning environment. This is especially important for parties who are part way through the development process. In these circumstances parties have expended costs but are yet to achieve any benefit from the development. Impacts such as this must necessarily inform the judgement of whether the new provisions are necessary and are efficient and effective.

26) The key issues for Drinnan Investments with Plan Change 6 (as notified) are:

- a) That the "grandfather clause" only applies to situations where certificates of title had been issued, not situations where subdivision consents had been approved but not completed.
- b) That the provisions may be too inflexible to provide for minor changes to a subdivision to occur without all land use development rights being lost.
- c) That the activity status of new dwellings on sites subject to the grandfather clause as controlled activities was not necessary and similar and appropriate outcomes could be achieved through permitted activity conditions.
- d) The specific wording of some provisions would result in uncertainty in their implementation.

27) Drinnan Investments provided a number of options in the relief sought. This relief includes:

- a) retaining the zoning of this property as Inner Plans,
- b) altering all of the provisions,
- c) providing specific recognition and provisions for the Drinnan Investment Property.

28) This relief sought is addressed in the submission which the Commissioner will have a copy of. I consider that any or a combination of the relief sought in the submission will achieve the objectives of Drinnan Investment and will not undermine the outcomes Selwyn District Council is seeking through Plan Change 6.

29) I now address each of the matters at issue below.

Grandfather Clause

30) When developing Plan Change 6 it is evident that Selwyn District Council recognised the potentially serious implications and impacts the change in regulatory environment could have on some individuals. It sought to manage and moderate the significance of this impact through the introduction of what is known as a "grandfather clause".

31) This approach recognised that there are parties who have made significant investment decisions based on provisions which are now substantially changed, and that these parties would be affected in a detrimental and inequitable manner. The grandfather clause would provide a transitional approach enabling those parties who had effectively been 'caught' by the change of regulation, and providing the ability to generally complete their developments. The grandfather clause would not provide new opportunities which could undermine the effectiveness of the new regulatory approach.

32) In my experience the general approach adopted by Selwyn District Council to incorporate a 'grandfather clause' is correct in this situation. Were such an approach not taken I the nature of submission received to Plan Change 6 from Drinnan Investments may have been very different.

33) The changes in development opportunity between the previous provisions and Plan Change 6 are substantial for many parties and if not appropriately addressed may have resulted in the new provisions not being able to be considered efficient or effective - in accordance with Section 32 of the Resource Management Act. This would have been due to the significant economic costs of the Plan Change falling on individuals.

34) The main issue with the 'grandfather clause' as notified is that it only applies to situations where certificates of title have been issued. It fails to recognise that the same impacts and detrimental outcomes occur on those parties who have had consents granted to enable development but are yet to complete the subdivision process. This is the position of Drinnan Investments. In considering the provisions and the explanations it may be

that this was an oversight in the drafting and not an intended result. The submission lodged by Selwyn District Council support this view.

- 35) I consider that the same issues and evaluation undertaken in the section 32 documentation applies equally to parties who have completed their subdivision applications as well as those who have been granted subdivision consents that are not completed. Therefore I consider that the application of any grandfather clause should not distinguish between situations where certificates of title have been issued and where subdivision consents have been granted and not lapsed.
- 36) The recommendation in the Section 42A report is that the "grandfather clause" is extended to apply to situations where subdivisions are consented but which may not have title. This approach is strongly supported.

Minor Changes to Approved Subdivision

- 37) This next matter I address is an issue likely specific to the Drinnan Investments.
- 38) As outlined earlier in my evidence it is likely that there will be some changes to the location of individual property accesses and minor changes to the boundaries of individual lots prior to the completion of Drinnan Investments subdivision. At this stage it is not known whether these changes will just be considered inconsequential and completed as part of the original subdivision application or whether there will need to be a variation to the consent.
- 39) The issue of concern to Drinnan Investments is the potential that undertaking a variation could result in extinguishing its rights to development under the "grandfather clause". This could occur because the date of subdivision may change from the original date to the date of the variation which would obviously be after the notification of Plan Change 6.
- 40) The submission is not supported in the officer's report. The report on page 22 recognises that there are already processes (both informal and statutory) by which Council can amend subdivision plans that have been lodged. The report author considers that approval for as yet unknown changes to a subdivision should not be written into the District Plan provisions.
- 41) I understand the matters raised in the officer report. However, I consider there may have been a misunderstanding in the outcome the submission was seeking. Drinnan Investments was not seeking that a blanket ability to alter the subdivision in any way it

chooses be written into the Plan. It is aware that there is a process that must be followed, either formally or informally, and is happy to do that. Rather it wanted to ensure that any variation, which may result in a newly dated subdivision approval, did not extinguish its ability to rely on the grandfather clause in the land use rules.

- 42) This potential issue arises due to the specific wording on the grandfather clause land use provisions. These provisions apply when a subdivision has been approved prior to the notification of Plan Change 6. If a variation of subdivision occurs resulting in a new date of approval then these rights would be extinguished for the Drinnan Investments property. It is this situation that Drinnan Investments is seeking to avoid.
- 43) The submission was seeking that any amendment to a subdivision, not extinguish the associated land use rights, it was not seeking new development rights. I consider that this situation could be addressed to the satisfaction of Drinnan Investments while not resulting in the concerns expressed in the officer report through incorporating an amendment to Proposed Rule 3.10.2(c). The wording could be altered by adding the underlined words so it reads "..... before 29 November 2008 and that subdivision or any variation to that subdivision has not lapsed".

Activity Status and Specific Wording of Provisions

General Matters

- 44) The submission of Drinnan Investments sought that the erection of a dwelling on any property (to which the grandfather clause applies) be a permitted activity subject to meeting relevant conditions.
- 45) This submission is recommended to be rejected in the Officer Report. The Officer Report (page 22 which I paraphrase) identifies that there is a limitation to the effectiveness of rules to ensure the protection of landscape values. The ability to consider the design and appearance of particular buildings in relation to individual site features as a Controlled Activity may achieve a better landscape outcome than being permitted.
- 46) I do not fundamentally disagree with the evaluation undertaken in the officer report. However, this is a situation where the plan provisions could be appropriately written for permitted activities which will still achieve the outcomes of the District Plan. In these circumstances the overall pattern of development and the location of lots subject to the grandfather clause are already established. Certificates of title are already issued or subdivision consents have been granted. In addition, there are a limited number of

situations where this applies and even as evidenced by the controlled activity approach, it is evident that the development of a dwelling on these properties is an appropriate activity.

- 47) Having considered the location of these lots they are generally in the less sensitive locations of the Port Hills. In my assessment it would be possible to write permitted activity conditions relating to height, size of building and reflective values that would be sufficient to ensure that appropriate environmental outcomes are achieved. A permitted activity would result in less compliance costs for the individuals involved.
- 48) Having considered the matters relating to location raised in the officer report I consider that to provide greater security as to the appropriateness of dwellings the addition of a new permitted activity may be necessary. This would be a permitted activity condition based on reservation of control matter 3.2.3.5 seeking that buildings not being a skyline structures. Having this as a permitted activity standard would mean that any dwelling on a ridge or spur below the 60 m contour would be subject to individual assessment as a controlled activity. This would effectively manage those dwellings in these most sensitive locations, while dwellings in other areas could be a permitted activity.
- 49) If it is not accepted that a permitted activity status is appropriate in the limited circumstances it would apply, then the controlled activity status should remain. A resource consent for a controlled activity must be granted. In addition conditions cannot be imposed in a manner that would frustrate a consent.
- 50) Any requirement to obtain a resource consent does result in compliance costs for applicants. It is becoming evident within planning practice that the costs of obtaining even a relatively simple resource consent can be significant. Therefore it is essential that a resource consent really be necessary before imposing additional compliance costs.
- 51) If consent is required for a controlled activity in my view it is advantageous that the Plan provisions be drafted in such a way that promotes the most efficient processing of any consent. This should be in the form of the process that will be followed and ensuring plan provisions are clear as to the actions required of applicants.
- 52) I consider that consents for controlled activities should be processed without notice and should involve only the applicant and the consent authority. In my assessment for a controlled activity there is no need for any potentially affected parties to be involved in any resource consent process.
- 53) Further, along with the actual process it is important the Plan clearly articulate the outcomes the consent authority expects applicants to achieve.

- 54) I consider that the current guidance provided in the recommended matters control is reserved over in Plan Change 6 lack clarity of outcome. In particular, I see some potential issues with the following matters control is reserved over:
- a) materials,
 - b) facade articulation,
 - c) colour and
 - d) reflectance value
- 55) My concern with these is that other than containing these words the Plan lacks further guidance as to what it is about these matters that would make a proposal appropriate or inappropriate.
- 56) As an experienced planner I am able to reasonably anticipate what outcome the consent authority is seeking through the reservation of control over these matters. However, by just reading the Plan provisions including the objectives, policies, explanations and environmental results anticipated it is not clear to me what the actual outcomes the consent authority is seeking.
- 57) The key area of guidance I find is in the policy B1.4.9 which seeks to ensure that a building blend in with the surrounding environment. In my view it would be preferable for the Plan to articulate the outcomes it was seeking through the reservation of control in a more specific manner. This may be as simple as ensuring that the explanations to the policies or the rules identify the outcomes each of those matters of control is intended to achieve. As an example reflectance value of 37% is a permitted activity condition in parts of the Port Hills. However in reading the Plan it is unclear whether adopting a similar approach for a controlled activity would be considered an appropriate outcome.
- 58) The other potential issue is the relationship between the earthworks rules incorporated by Plan Change 6 and the land use rules for the erection of dwellings where the grandfather clause applies.
- 59) The grandfather clause rules seek to make the erection of dwellings a controlled activity. The earthworks rules now applying to these areas would likely result in any earthworks required to establish one of these dwellings as a discretionary activity. It is likely that for any dwelling the potential for earthworks required may exceed the earthworks threshold (20m³ or 100m³). This could render any controlled activity status for a dwelling ineffective. In my assessment it would be appropriate for any earthworks associated with

the establishment of a dwelling on properties where the grandfather clause applies to also be a controlled activity. This could be achieved by providing earthworks as a matter control is reserved over and providing an exclusion from the specific earthworks rules.

Specific Matters

60) I now address some potential issues with the specific provisions as recommended in Appendix 2 of the Officer Report.

Policy B 4.1.5 (d) and explanation to policy

61) My reading of this proposed policy is that it does not clearly address the situation where a subdivision consent is obtained but that a certificate of title is not issued. This is due to the wording "on any existing (my emphasis), bare allotment upon which a dwelling might have been erected".

62) To me the wording in "existing bare allotment" still results in confusion. Does this mean that the allotment must be existing on the ground or does it sufficiently "exist" when it is drawn on a subdivision consent plan? I consider that there is benefit in altering the policy by adding a new item (e) which specifically addresses situations where subdivision consent has been granted and has not lapsed.

63) I also have a similar concern with the wording in the proposed explanation to this policy. This wording identifies "or had obtained approval for a subdivision for a complying dwelling prior to adjustment of the Outstanding Allowing landscape boundary.....".

64) While I understand the intent of the explanation I believe the specific wording should be improved. I consider that the wording "obtained approval for a subdivision for a complying dwelling" to be unclear. Most subdivisions that were undertaken in the Inner Plains Zone while being of a sufficient size to enable a complying dwelling to be erected, the actual subdivisions were not undertaken for the purpose of providing a complying dwelling. In my view the meaning could be improved along the lines of: "or had obtained approval for subdivision upon which a complying dwelling could have been erected prior to adjustment of the".

Rural Rules – Buildings 3.2 Buildings and Outstanding Landscape Areas

65) I have already addressed what I see as a lack of specification as to the outcomes sought in the reservation of control specified in 3.2.3.1.

- 66) The final matter I address is that both of the standards and terms 3.2.2.1 and 3.2.2.2 are not required. I am not aware of any situation where if the existing ground level of the building site is wholly located below 60m above mean sea level that it will not be in the Lower Slopes of the Port Hills Area.
- 67) I consider this situation has arisen in an effort to ensure that the grandfather clause not apply to any land above the 60 metre contour. This change has rendered the first standard and term unnecessary.