

Before an Independent Commissioner
appointed by Selwyn District Council

Under the Resource Management Act 1991

In the matter of Proposed Plan Change 62 to the Selwyn District Plan

**Memorandum of Counsel on behalf of D Marshall, L Martin and A Formosa, M
and T Saunders, B Hammett, and J and S Howson, in response to Minute 4**

6 October 2020

Applicant's solicitor:

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May it please the Commissioner:

- 1 This memorandum is filed on behalf of D Marshall, L Martin and A Formosa, M and T Saunders, B Hammett, and J and S Howson (the **Applicants**) in response to a Minute from the Commissioner, dated 2 October 2020, enquiring whether there is jurisdiction to consider the Proposed District Plan (**PDP**) and (if necessary) seeking advice as to process given the hearing is not yet closed.

Jurisdiction to consider the PDP

- 2 When considering a request for a private plan change the statutory documents to be considered are prescribed in sections 74 and 75 of the Resource Management Act 1991 (**the Act**). When preparing and changing its district plan, a territorial authority must:
 - (a) do so in accordance with a national policy statement, a New Zealand Coastal Policy Statement, and a national planning standard;¹
 - (b) have regard to any proposed regional policy statement, or proposed regional plan;²
 - (c) to the extent that their content has a bearing on the resource management issues of the region, have regard to management plans and strategies prepared under any other Acts, entries on the New Zealand Heritage List/Rārangī Kōrero; specified regulations; and relevant project area and project objectives in accordance with the Urban Development Act 2020;³
 - (d) have regard to the extent to which the district plan needs to be consistent with the plans or proposed plans of adjacent territorial authorities;⁴
 - (e) give effect to any national policy statement, New Zealand coastal policy statement, national planning standard or (operative) regional policy statement;⁵ and

¹ Section 74(1)(ea)

² Section 74(2)(a)

³ Section 74(2)(b)

⁴ Section 74(2)(c)

⁵ Section 75(3)

- (f) not be inconsistent with a water conservation order or a regional plan for any matter specified in section 30(1).⁶
- 3 Several Environment Court decisions address the situation where a privately requested plan change is heard subsequent to the notification of a new proposed district plan. Of particular relevance are the following decisions, which reach differing positions about the ability to consider the proposed plan:
- (a) In *Kennedys Bush Road Neighbourhood Association v Christchurch City Council* (W063/97, at page 20), the Environment Court held that *"the provisions of a proposed plan can be taken into account because the provisions of s.74 are mandatory but not exhaustive"*. The Court also noted that the proposed plan would be subject to submission and challenge, and *"the proposed plan does not have any particular force when considering an amendment to a transitional plan in that the proposed plan is superseding that transitional plan and the mere fact that the change to the transitional plan has been picked up by the proposed plan does not give it any further force or effect"*.
- (b) However, in *Canterbury Regional Council v Waimakariri District Council* (C94/99, at page 15) the Environment Court considered the timing of a fixture to hear appeals on a private plan change and the timing of a Council variation to the proposed District Plan to reflect its position on the plan change. The Court found *"...the District Council should promote its variation to the proposed plan now, notwithstanding that this reference is pending before the Court. This will not compromise the Court's position because Change 53 has to be determined having regard to the matters set out in section 74 of the Act which do not include the proposed plan. In terms of that section the relevant matters for present purposes seem to be the provisions of Part II and section 32 of the Act; the relevant instruments in section 75(2) of the Act; and any relevant instruments referred to in section 74(2)."*
- 4 Accordingly, in summary:
- (a) There is no statutory direction, mandatory or otherwise, to consider the proposed district plan. The Act identifies a relatively comprehensive list of planning documents to be considered when assessing a change to a district plan, and this list does not include a proposed district plan.

⁶ Section 75(4)

- (b) There is, however, no explicit jurisdictional bar on considering additional matters where these are relevant to the decision.
 - (c) Case law is inconsistent regarding the ability to consider a proposed district plan. However, at least in the circumstances of the cases cited, the provisions of the proposed plan were not considered to have any particular force.
- 5 In my view the Commissioner does have residual discretion to consider the PDP, if he considers that it is appropriate to do so because evidence as to the content of the PDP would be relevant to his decision.
- 6 In my submission, in addition to the absence of statutory direction to consider proposed plans, it is relevant that the PDP has only recently been notified and will be subject to submissions and testing through hearing. It is likely to be subject to considerable change, however prior to close of submissions (on 4 December 2020) it is not possible to ascertain what the scope of potential changes will be. Accordingly, the PDP should be afforded little (if any) weight. In these circumstances the Commissioner may conclude that it is not appropriate to consider the PDP further.

Process

- 7 To the extent that there is residual discretion to consider the PDP, the Commissioner must determine whether it is appropriate to do so. As a first step, the Commissioner may wish to seek comment from other parties as to whether it is appropriate to consider the PDP. If this course is followed, I suggest that comments could be provided in a relatively short timeframe.
- 8 Alternatively, if the Commissioner considers at this point that it is appropriate to consider the PDP, it would be appropriate to have further comment from the parties as to the relevant provisions and weight. The Applicant suggests that comments should be provided sequentially to limit duplication. I suggest allowing 10 working days for comment from Council and a further 5 working days for comment from the Applicant and any submitters.

Dated this 6th day of October 2020



Sarah Eveleigh

Counsel for D Marshall, L Martin and A Formosa, M and T Saunders, B Hammett, and J and S Howson