

BEFORE THE SELWYN DISTRICT COUNCIL

UNDER the Resource Management Act 1991

AND

IN THE MATTER Of a request to change the Operative Selwyn District Plan –
Plan Change 63

**SUBMISSIONS IN REPLY ON BEHALF OF MERF AGRICULTURAL SERVICES
LIMITED AND MATTHEW REED**

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A handwritten signature in dark ink, reading "Anthony Harper". The signature is fluid and cursive, with the first name "Anthony" and last name "Harper" clearly distinguishable.

1 SCOPE OF SUBMISSIONS

- 1.1 These submissions are necessarily limited by the fact that by the end of the hearing on Monday 26th July 2021 had finished, the experts were agreed that the proposed rezoning was appropriate.
- 1.2 In particular, the Council's Reporting Officer (Ms Carruthers) had changed her recommendation and advised that the time was right for rezoning. Ms. Carruthers' revised opinion is acknowledged and appreciated.
- 1.3 There remained some minor differences on the details of the provisions that should be inserted into the Operative Plan should the Commissioner be minded to approve PC63. During the hearing the planning experts (Ms Carruthers & Ms Aston) undertook to further discuss these differences of detail with a view to arriving at an agreed position, if possible.
- 1.4 The outcome of these discussions is an agreed set of provisions, including an amended Outline Development Plan, which are attached as Appendix A to these submissions.
- 1.5 The Commissioner will note that the document entitled: "*Proposed amendments to the District Plan (Townships Volume) – post hearing agreed version*" sets out the amendments sought in the Plan Change Request, together with the agreed provisions.
- 1.6 Some key agreed provisions are:
 - (a) Restricted discretionary activity status for the erection of dwellings that do not incorporate a minimum freeboard height of 400mm above the 0.5% AEP flood event (Rule 4.1.1B.1);
 - (b) Confirmation that dwellings or principal buildings must be connected to a reticulated sewage and treatment disposal system (Rule 4.5.1); and
 - (c) Restricted discretionary activity status for retirement villages in the location shown on the ODP (Rule 4.6.4A).
- 1.7 The agreed provisions also include the following Discretionary Activity: Rule 12.1.6.9 in the Subdivision section of the Operative Plan:

12.1.6.9 Any subdivision of land in the Living 1 zone at Darfield as identified on the Outline Development Plan at Appendix E41B as 'Kimberley Rd Restrictions' with a minimum allotment size less than 1000m² but not less than 650m²
- 1.8 The effect of this amendment is to change the activity status of a subdivision which does not meet the minimum allotment size requirement shown in the area

identified on the ODP as "Kimberley Rd Restrictions" from the default non-complying status to discretionary.

- 1.9 The Commissioner will recall the discussion at the hearing as to whether or not larger allotments on the Kimberley Road frontage were the most appropriate method of implementing the Plan's objectives and policies. At the time, there was uncertainty as to why the ODP included in evidence illustrated a minimum allotment size of 1700m² on Kimberley Road. It has subsequently been confirmed that this was a mistake, and that the average allotment size in this location is shown as 1000m² in the response to the Council's request for further information.
- 1.10 Furthermore, the ODP in the Application as originally lodged with the Council contained a standard Living 1 Zone minimum lot size of 650m² along the Kimberley Road frontage.
- 1.11 As identified by the Commissioner at the hearing, whether or not a change to discretionary activity status is permissible is a question of jurisdiction? This is addressed below.

Analysis

- 1.12 Clause 29(1) of the First Schedule provides:
- (1) Except as provided in sub clauses 1A -9, Part 1 of this Schedule, with all necessary modifications, shall apply to any plan or change requested under this Part and accepted under Clause 25 (2) (b).*
- 1.13 Clause 29(4) sets out the range of options available to a local authority in making a decision on a plan or change:
- (4) After considering a plan or change, undertaking a further evaluation of the plan or change in accordance with section 32AA, and having particular regard to that evaluation, the local authority –*
- (a) May decline, approve, or approve with modifications the plan or change; and*
- (b) Must give reasons for its decision*
- 1.14 While the reference to approval with modifications indicate an inherent jurisdiction to amend a plan change, it is difficult to support an interpretation which effectively says this jurisdiction is unlimited.
- 1.15 Rather, it is submitted that a preferred interpretation of Clause 29 (4) is that the power to modify the provisions of a plan change should, broadly speaking, be limited to an amendment that reflects the application documents and/or the relief sought in submissions.

1.16 In *Foodstuffs (Otago Southland) Properties Ltd v Dunedin City Council*¹, the appellant contested a range of amendments made by the Council to a private plan change request. The Planning Tribunal categorised the challenged amendments as follows:

- (a) Amendments sought in written submissions;
- (b) Amendments that respond to groups of written submissions;
- (c) Amendments that address cases present at the hearing of submissions;
- (d) Amendments to wording not altering meaning or effect; and
- (e) Other amendments not in (a)–(d).

1.17 The Tribunal's view was that the ability to amend a plan change request was limited to categories (a)–(d). Accordingly, with exception of (d), it is necessary that a proposed amendment be linked to the relief sought in a particular submission.

1.18 In *Oyster Bay Developments Limited v Marlborough District Council*², the Council had declined a private plan change request. On appeal to the Environment Court, the applicant proposed a number of changes to reduce the scale and impact of the proposed development. None of the changes had been raised in submissions.

1.19 The Environment Court referred with approval to Wylie J's High Court decision in *General Distributors v Waipa District Council*³

[22] From that Judgement we identify these elements for deciding whether an amendment to a change to a planning instrument is within or beyond jurisdiction (citing the relevant paragraphs in General Distributors):

[a] The terms of the proposed change and the content of submissions filed delimit the Environment Court's jurisdiction [64];

[b] Whether an amendment goes beyond what is reasonably and fairly raised in submissions on the plan change will usually be a question of degree to be judged by the terms of the plan change and of the content of the submissions [58];

[c] That should be approached in a realistic workable fashion rather than from the perspective of legal nicety, and requires that the whole relief package detailed in submissions be considered [59][60].

¹ W053/93

² C081/09

³ (2008) 15 ELRNZ 59

- 1.20 Applying the above, the Court held that amendments of the nature proposed by Oyster Bay Developments were essentially minor in nature. The amendments would not broaden the limits of what was originally requested in the plan change, did not extend beyond what was reasonably and fairly to be understood from the content of submissions and, finally, did not prejudice anyone who failed to lodge a submission on the original request.
- 1.21 In the present case, as noted above, the application as originally lodged did not contain any special treatment in terms of minimum allotment size for properties on the Kimberley Rd frontage. Rather, the standard Living 1 Zone minimum density requirement of 650m² was to be applied. Any subdivision in compliance with this minimum lot size would be a restricted discretionary activity.
- 1.22 Accordingly, it is submitted that an outcome which results in a minimum average allotment size of 1000m² along the Kimberley Road frontage, together with the requirement to obtain a fully discretionary activity consent for an allotment between 650m² – 1000m² does not broaden the limits of Plan Change 63.
- 1.23 I acknowledge that submissions do not explicitly comment on what activity status should apply to the subdivision of land along the Kimberley Rd frontage. Submissions did refer to allotment size within the Plan Change area, an example being the relief sought by the Vercoes:

We seek that the Council reconsider the size of the sections within the subdivision and the impact of the larger retirement village to the wider community.

- 1.24 And the submission by Phillipa Anderson states:

Covenants need to be applied by the SDC in relation to the size of sections & height of properties on them. They should be single storey only & sections at least 800m²...

- 1.25 In the context of an RMA document, a reasonable interpretation of the request that covenants be applied by the Council is that the submitter intended to refer to rules in the Plan controlling the density of sections. This is simply because the Council does not use covenants as a means of directing such an outcome.
- 1.26 Perhaps the most important limit on jurisdiction is the issue of whether or not the amendment from non-complying to discretionary activity status will result in prejudice to any third parties?
- 1.27 In my submission, there is no risk of prejudice. This is simply because the proposed amendment cannot affect the processing of any future subdivision consent application seeking to provide for allotment sizes between 650m -100m² along the Kimberley Road frontage. Rather, the question of status is immaterial to those aspects of the consent process which safeguard the interests of potentially affected parties.

- 1.28 In particular, the statutory tests for notification under s 95 of the Act, either limited or public, are identical for discretionary or non-complying activities. Equally, the matters to be taken into account in making a substantive decision under s 104 of the Act are identical, including most relevantly any potential impacts on the amenity of neighbouring properties.
- 1.29 In summary therefore, it is submitted that the jurisdiction exists to incorporate the agreed Rule 12.1.6.9. This is particularly because the agreed amendment does not expand the limits of what was sought in the Plan Change Application as originally lodged. Furthermore, there is no possibility of prejudice to any third parties, be they submitters or otherwise.



G J Cleary

13 September 2021