

**BEFORE AN INDEPENDENT HEARINGS COMMISSIONER AT  
SELWYN**

**IN THE MATTER OF**

Clause 21 of the First Schedule of  
the Resource Management Act 1991  
(Plan Change 67)

**IN THE MATTER OF**

**GW WILFIELD LIMITED**  
(Applicant)

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**CLOSING LEGAL SUBMISSIONS**

Dated: 29 September 2021

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## **MAY IT PLEASE THE COMMISSIONER**

### **1 INTRODUCTION**

- 1.1 These closing submissions are provided on behalf of the Applicant in relation to the following matters raised during the Plan Change 67 (**PC67**) hearing:
  - (a) The interplay between the National Policy Statement on Urban Development (**NPSUD**), and Policy 8 in particular, with respect to the “avoid” policies in Chapter 6 of the Canterbury Regional Policy Statement (**CRPS**);
  - (b) The implications of that interplay for the provisions of the Selwyn District Plan (**SDP**) with specific reference to the requirement in section 75(3) Resource Management Act 1991 (**RMA**) to give effect to the CRPS (and as such, those same “avoid” provisions); and
  - (c) The extent to which the precedent/cumulative effects of other extant plan changes may lawfully be taken into account in your decision-making.
- 1.2 These submissions also provide clarification as to the position taken by the Canterbury Regional Council (**CRC**) and the Christchurch City Council (**CCC**) in relation to other plan changes and, in particular, their significance with respect to the provision of development capacity in the Selwyn District.
- 1.3 For the reasons set out below it remains the Applicant’s firm position, supported by the expert evidence before you, that PC67 satisfies all matters relevant to your decision-making. Namely, that it will achieve the overall purpose of the Resource Management Act 1991 (**RMA** or **Act**), give effect to the relevant operative objectives and policies of the NPSUD, give effect to the relevant objectives and policies of the CRPS (as necessarily modified by the application of Policy 8 of the NPSUD) and achieve the wider objectives of the SDP. In summary, it can and should be granted.

## 2 The NPSUD and the CRPS

- 2.1 The role of the NPSUD and its relationship to the CRPS was the subject of considerable focus, both in the written submissions of Counsel for CRC and CCC and in the oral discussion that followed the presentation of those submissions during the hearing.
- 2.2 The primary thrust of Counsel's submissions for CRC and CCC appears to be that:
- (a) Pursuant to s75(3) RMA, the SDP must give effect to the policy directions in the CRPS to avoid development outside the specific areas identified in Map A.<sup>1</sup>
  - (b) Doing so is "*entirely consistent with an interpretation of the NPSUD as a whole*", and there is no flexibility (presumably under the NPSUD or otherwise) to reach any other decision. Selwyn District Council (**SDC**) is therefore effectively estopped from approving PC67 (or any other plan change which is outside the areas identified in Map A).<sup>2</sup>
  - (c) "*There is no sound legal interpretation available that allows for the responsive planning framework*" (i.e. Policy 8 of the NPSUD) "*to be given greater weight, or precedence, over a CRPS framework that engages with the core objective of the NPSUD*".<sup>3</sup>

### Response

- 2.3 At the outset, it is submitted that the approach adopted by CRC and CCC in this hearing (consistent with the approach adopted by those parties at the SDP plan review hearings) amounts to a thinly veiled attempt to eschew and undermine the NPSUD (and in particular the intent of Policy 8) and hold fast to a fixed (non-responsive) urban limit framework that controls where and when development occurs. In my submission such an approach is precisely the mischief (in a legal sense) that Policy 8 is seeking to address.<sup>4</sup>

<sup>1</sup> Wakefield M; Winchester, J. Legal submissions for Christchurch City Council and Canterbury Regional Council, 14 September 2021 at 1.10, 7.2.

<sup>2</sup> Wakefield, legal submissions, at 7.2.

<sup>3</sup> Wakefield, legal submissions, at 1.10(a).

<sup>4</sup> Ministry for the Environment (2019). *Planning for successful cities: A discussion document on a proposed National Policy Statement for Urban Development*. 2019, page 19: "One challenge with the current planning system is that it is not responsive enough to changing

- 2.4 CRC and CCC's position appears to be held despite clear evidence that the supply of housing in the urban areas of the Selwyn District is insufficient to respond to demand, contributing to an anti-competitive land and development market, extreme price escalation and decreased housing affordability.
- 2.5 Such an approach is, in my submission, directly contrary to the positive obligation on regional councils in s30(1)(ba) of the RMA to establish, implement and review "*objectives, policies, and methods to **ensure** that there is sufficient development capacity in relation to housing and business land to meet the expected demands of the region*" (emphasis added), and the requirement in s62(3) of the RMA to give effect to a National Policy Statement.
- 2.6 It is quite simply an approach that fails to acknowledge the critical role regional and territorial authorities have in responding urgently to the nation's housing crisis, a matter that the Government has seen fit to view as a matter of national importance and thus issue direction on via the NPSUD.
- 2.7 In that respect, as a matter of law, the NPSUD (alongside other national directions) sits at the apex of the hierarchy of RMA documents.<sup>5</sup> Lower order documents including regional policy statements and regional and district plans are required to "give effect" to these higher order documents, operating together as a "*cascade of planning documents, each intended, ultimately, to give effect to section 5, and Part 2 [of the RMA] more generally*".<sup>6</sup> As the Supreme Court has noted, through this requirement, the Minister (in this case, the Minister for the Environment) secures "*a measure of control*" over what regional and territorial authorities decide to do.<sup>7</sup>
- 2.8 The way in which that cascade is applied to a decision will depend on various matters, including the way in which the particular policy direction

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*circumstances or opportunities. Existing urban boundaries or planned land release sequences are sometimes defended to encourage a particular urban settlement pattern, or to manage infrastructure costs."*

<sup>5</sup> *Environmental Defence Society Inc v New Zealand King Salmon Company Ltd* [2014] NZSC 38, at [11] and [30].

<sup>6</sup> Resource Management Act 1991, sections 62(3), 67(3)(a), 75(3)(a). *EDS v New Zealand King Salmon*, above n5, at [39].

<sup>7</sup> *EDS v New Zealand King Salmon*, above n5, [86(b)].

is framed,<sup>8</sup> and the timing of when particular documents within that hierarchy are released. For example, if a higher order document existed at the time a plan and/or policy statement was being prepared, there is a rebuttable presumption that the policy direction in that higher order document has already been particularised in that plan or policy statement. That presumption is, of course, removed where a higher order document has come later in time than the lower order document(s).<sup>9</sup>

- 2.9 So, while there can be varying scope in terms of the way various national directions are applied, what is not in question is that, of all the RMA documents, it is the set of national directions which set the prevailing course for the fulfilment of Part 2, not regional policy statements.
- 2.10 Despite that, Counsel for CRC and CCC's argument appears to be that in Greater Christchurch at least, Policy 8 has limited or no application because you are only entitled to apply it in locations and circumstances that already align with, or are anticipated by, the CRPS (as areas identified by Map A).
- 2.11 In my submission, to do so lawfully would rely on you finding that the CRPS already gives effect to the responsive planning directions in the NPSUD such that Policy 8 was not required as a separate and distinct mechanism to meet the national direction and consequently Part 2. That is to say, you would need to be satisfied that the CRPS has already particularised the national direction to be responsive to unanticipated or out of sequence plan changes in some manner. Putting to one side the complexities of particularising such a directive policy in a manner other than that already set out in the NPSUD, as a matter of fact that is not the case here.
- 2.12 The CRPS (being an "RMA planning document"<sup>10</sup>) includes objectives and policies (supported by an accompanying spatial plan – Map A) that

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<sup>8</sup> *EDS v New Zealand King Salmon*, above n5, at [90] - "...the requirement to give effect to a policy which is framed in a specific and unqualified way may, in a practical sense be more prescriptive than a requirement to give effect to a policy which is worded at a higher level of abstraction."

<sup>9</sup> *Appealing Wanaka Inc v Queenstown Lakes District Council* [2015] NZEnvC 139, at [43] – [44]; *Thumb Point Station Ltd v Auckland City Council* [2015] NZHC 1035 (HC) at [31].

<sup>10</sup> National Policy Statement on Urban Development 2020, Interpretation 1.4: "RMA Planning Documents" means all or any of a regional policy statement, regional plan or district plan.

prescribe the anticipated location and timing (the “where and when”) of residential development in the greater Christchurch area.<sup>11</sup>

2.13 Policy 8 of the NPSUD, however, requires decision makers to be responsive to plan changes which meet specific criteria, even if that development capacity is:

- (a) unanticipated by RMA planning documents; or
- (b) out-of-sequence with planned land releases.

2.14 In this way, Policy 8 effectively directs that non-compliance with the Chapter 6/Map A framework can no longer act as an automatic barrier to assessing the merit of a plan change which meets certain specified criteria (as set out in clause 3.8).

2.15 The rationale for the Policy is obvious. Our standard plan making processes are generally too slow to account for a rapidly shifting residential housing market trying to respond to a housing shortage/crisis. Nor are our local authorities able to predict the location and timing of all possible opportunities for urban development, when plans are being formulated.<sup>12</sup>

2.16 Within this context, Policy 8 can be characterised as a complementary mechanism to the future development strategy process outlined in the balance of the NPSUD, in the sense that both are designed to ensure the provision of housing capacity and support the achievement of well-functioning urban environments. Policy 8 simply provides a more responsive mechanism.

2.17 In my submission, it is not, as Counsel for CRC and CCC has sought to characterise it, a contest.<sup>13</sup> As reinforced in the guidance material provided by the Ministry for the Environment, in giving effect to the NPSUD, local authorities may continue to identify in RMA plans where

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<sup>11</sup> Canterbury Regional Policy Statement 2016, policies 6.3.1(4), 6.3.5, 6.3.7, 6.3.12.

<sup>12</sup> Ministry for the Environment. (2020). *National Policy Statement on Urban Development 2020, Responsive Planning – Fact Sheet*, Ministry for the Environment: Wellington, page 2.

<sup>13</sup> Wakefield, legal submissions at 1.5.

they expect development to occur and where urban services/infrastructure are anticipated to be provided.<sup>14</sup>

- 2.18 Pursuant to s62(3) RMA, such a framework would, however, still be required to give effect to the responsive policies of the NPSUD and the need to provide for plan changes which are unanticipated by, or out of sequence with such a framework but which would otherwise deliver significant development capacity and meet the other relevant criteria.
- 2.19 The CRPS, with its Chapter 6/Map A “avoid” framework does not yet do so, and as such does not give effect to the NPSUD in this regard.
- 2.20 As the Ministry guidance indicates “*a hard rural urban boundary without the ability to consider change or movement of that boundary would not meet the requirements of the responsive planning policy*”.<sup>15</sup> The CRPS contains just such a boundary in Map A, supported by the policies in Chapter 6.
- 2.21 While it might be argued that policy 6.3.12 (as introduced by Change 1 to the CRPS) includes a mechanism, “*to consider change or movement of that boundary*”, it is noted that this mechanism exists only in relation to anticipated development, that is to say, it applies only to areas already identified as Future Development Areas, not to areas that are “unanticipated”.<sup>16</sup> As such, it cannot, in my submission, be said to give effect to that aspect of the NPSUD.
- 2.22 That is not a criticism *per se* of the current provisions of the CRPS or Change 1. As set out in opening, Change 1 was not intended to give effect to all aspects of the NPSUD.<sup>17</sup> Nor could it be expected to. The *Our Space* future development strategy which formed the basis of Change 1 commenced in 2018, significantly in advance of the promulgation of the NPSUD in 2020 and with no knowledge of its directions on responsive planning.

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<sup>14</sup> Refer Ministry for the Environment. (2020). *National Policy Statement on Urban Development 2020, Understanding and implementing the responsive planning policies*, Ministry for the Environment: Wellington, page 3.

<sup>15</sup> Ministry for the Environment. (2020). *National Policy Statement on Urban Development 2020, Responsive Planning – Fact Sheet*, Ministry for the Environment: Wellington, page 2.

<sup>16</sup> Canterbury Regional Policy Statement 2016, Policy 6.3.12.

<sup>17</sup> Refer Semple, L. Synopsis of Opening Legal Submissions for the Applicant, 14 September 2021, 4.67.

- 2.23 The streamlined plan process for Change 1 was sought from the Minister in late September 2019 and granted on 29 April 2020 – again, ahead of the NPSUD. When Change 1 was publicly notified on 16 January 2021, the NPSUD was operative, however, the section 32 analysis clearly indicates that Change 1 had a limited scope giving effect only to Policy 2 and Clause 3.7 of the NPSUD<sup>18</sup> with a further process to consider the responsive planning provisions, in particular Clause 3.8(3).<sup>19</sup> Specifically, there is no evaluation of Change 1 against Sub-Part 2 of the NPSUD (the responsive planning provisions) in the section 32 assessment which accompanied the Change request.
- 2.24 The balance of the NPSUD is expressed as being given effect to as part of the CRPS full review scheduled (at that time) to commence this year.
- 2.25 Given the above, Counsel for CRC and CCC’s contention that “*Change 1 was supported by an evaluation, by CRC, which (relevantly) assessed the extent to which it would give effect to the NPSUD. This evaluation determined, and the relevant Minister agreed, that Change 1 would give effect to the NPSUD*”<sup>20</sup> is a considerable overstatement.
- 2.26 It follows from that, that Counsel’s admonition that you must be “*very cautious to disregard or place less weight on this recent policy amendment [Change 1], particularly because it relates to and provides direction on essentially the same subject matter as is raised through PC67 (i.e. the approach to strategic growth for Greater Christchurch)*” is also misplaced.
- 2.27 The CRPS, including recent Change 1, do not address or give effect to the responsive planning directions in Policy 8 or Sub-part 2 of the NPSUD. That is to say, in the language of the Supreme Court in *King Salmon*, they do not “*cover the field*” of matters the national direction requires be addressed in order to give effect to Part 2.<sup>21</sup>

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<sup>18</sup> Environment Canterbury (2021). *Proposed Change 1 to Chapter 6 – Recovery and Rebuilding of Greater Christchurch, of the Canterbury Regional Policy Statement – Evaluation under section 32 of the Resource Management Act*, page 8. See also, Environment Canterbury (2021). *Report to the Minister for the Environment on Proposed Change 1 to Chapter 6 of the Canterbury Regional Policy Statement*, March 2021 at page 5.

<sup>19</sup> *Proposed Change 1 – Section 32 evaluation*, above n16 at page 9.

<sup>20</sup> Wakefield, legal submissions at 3.5.

<sup>21</sup> *EDS v New Zealand King Salmon*, above n5, at [88].



- 2.28 In those circumstances, you are entitled to and in fact must, place weight on the higher order document, and its clear and precise direction to you.<sup>22</sup> In doing so the SDP will appropriately give effect to the NPSUD in terms of s75(3)(a) RMA.
- 2.29 To the extent that this creates a tension with the ability of the SDP to also give effect to s75(3)(c), that matter is resolved by the question of weighting. Where an RMA document does not “*cover all of the ground*”, as is the case with the CRPS, you are entitled to have recourse to the higher order document or Part 2. In this case the higher order document provides you with a clear direction.
- 2.30 Finally, in characterising Policy 8 as some form of contest with the future urban development strategy provisions of the NPSUD, Counsel for CRC and CCC emphasises the need to read and apply the NPSUD as a whole, without elevating one set of policies over another.
- 2.31 In broad terms, I agree that that is the correct approach (for relevant policies), although I note the Supreme Court’s comments in *King Salmon* that the way in which particular provisions are applied will depend (among other things) on how prescriptively particular provisions are framed.<sup>23</sup>
- 2.32 Putting that matter to one side, I do not agree, that lawful compliance with the directive in Policy 8 does, in fact, elevate it and the “responsive planning framework” above the other aspirations of the NPSUD in the way Counsel implies. Despite what Counsel for CRC and CCC asserts, Policy 8 does not require you to be responsive to development capacity as a stand-alone matter “*without engaging any other criteria*”, nor does it inevitably lead you to the end result of a “*proliferation of ad hoc (and potentially significant and speculative developments being approved)*”.<sup>24</sup>
- 2.33 To engage Policy 8, the plan change must contribute to what Counsel for CRC and CCC identifies as the “*core objective*” of the NPSUD, namely, a well-functioning urban environment (as defined in Policy 1 of the

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<sup>22</sup> See for example, commentary in *Appealing Wanaka Inc v Queenstown Lakes District Council* [2015] NZEnvC 139, at [43] – [44]; *Thumb Point Station Ltd v Auckland City Council* [2015] NZHC 1035 (HC) at [31]; *Infinity Investments Limited v Canterbury Regional Council* [2017] NZEnvC 36 at [32], [35], and [36(c)]; *Bunnings Limited v Queenstown Lakes District Council* [2019] NZEnvC at [113], [191]; *Aratiatia Livestock Limited & Ors v Southland Regional Council* [2019] NZEnvC 208, at [35].

<sup>23</sup> *EDS v New Zealand King Salmon*, above n5, at [80].

<sup>24</sup> Wakefield, legal submissions at 4.7(f).

NPSUD).<sup>25</sup> Consequently, if the plan change in question does not meet that criteria then Policy 8 will be of no benefit to it.<sup>26</sup>

- 2.34 The overarching importance of a well-functioning urban environment is therefore safeguarded through the requirement in Policy 8 for any “unanticipated” or “out-of-sequence” plan change to demonstrate that it will contribute to achieving that outcome. As such, Policy 8 is not the destructive “free for all” CRC and CCC appear concerned about.
- 2.35 In my submission, the inclusion of this safeguard serves to illustrate that Policy 8 is provided as an additional or complementary tool for securing the aspirations of the NPSUD, not as a separate or disconnected threat to those aspirations (or indeed to the aspirations of the CRPS).
- 2.36 Put bluntly, the spatial plan provided by Chapter 6/Map A of the CRPS is not the only way to achieve a well-functioning urban environment for the Selwyn District. The NPSUD recognises the need to be responsive to alternative options, both in terms of location and timing. Policy 8 provides that you must consider such options on their merits, ensuring that a well-functioning urban environment is still achieved. PC67 does that.

### **3 PRECEDENT/CUMULATIVE EFFECTS**

- 3.1 In his submissions, Counsel for CCC and CRC put to you that “[i]f PC67 and ...[the other requests for plan changes outside the projected infrastructure boundary on Map A] are granted, then there will be cumulative effects issues at play”. Of most concern to these parties is the “potential cumulative impact on strategic planning and infrastructure, with each out-of-sequence request creating additional, and unanticipated, demand for necessary services, roading and public transport”.<sup>27</sup>
- 3.2 I have already addressed you on why the application of Policy 8 does not inevitably lead to disconnected, poorly serviced and poorly functioning urban environments. Were those conditions extant it might be expected that any individual plan change would be declined.

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<sup>25</sup> Wakefield, legal submissions at 4.7(e).

<sup>26</sup> National Policy Statement on Urban Development, Policy 8 and clause 3.8.

<sup>27</sup> Wakefield, legal submissions, at 6.2.

- 3.3 For the avoidance of doubt, with respect to PC67 it is the uncontroverted evidence of the Applicant and the Council that the Proposal can be appropriately serviced<sup>28</sup>, and safely accommodated within the transport network.<sup>29</sup> The future roading layout will be designed to accommodate public transport, should CRC determine to improve its servicing of West Melton. The plan change contributes to, rather than detracts from, a compact form for West Melton. As a matter of evidence, each of the other plan changes in the District will be required to meet similar tests.
- 3.4 More generally, as a matter of law relating to the issue of precedent and cumulative effects in the context of a proposed plan change, the Environment Court has held that:

*Precedent is thus linked to the integrity of the Plan as it would apply to a resource consent application. This being a proposed plan change, the integrity of the planning instruments are addressed by statutory provisions and the need to be consistent with the plan's objectives and policies.*<sup>30</sup>

*...Again, the issue [of cumulative effects] is better dealt with in terms of whether the new rules and methods implement the policies and objectives of the Plan, and give effect to the operative regional policy statement.*<sup>31</sup>

- 3.5 That is to say, matters of precedent and cumulative effects will generally be satisfied where it can be demonstrated that a proposed plan change will most appropriately achieve the relevant aspirations of the planning framework (including the district, regional and national RMA documents).<sup>32</sup> Those wider aspirations, in other words, act as a form of safeguard against the proliferation of activities which would ultimately give rise to adverse outcomes for an area.
- 3.6 In this instance, Counsel for CRC and CCC identifies that the demand for services generated by PC67 is 'unanticipated' within the current planning framework. While that is correct, Policy 8 does not act to absolve such

<sup>28</sup> Statement of evidence of Andy Hall, at [2.1] – [2.3]; Summary Statement on Plan Change 67 – Three Waters Infrastructure – Shane Bishop, at [14].

<sup>29</sup> Statement of evidence of Andrew Metherall, at [2.9]; Summary Statement on Plan Change 67 – Transportation – Dave Smith, at [2].

<sup>30</sup> *Bell Farms Limited and Another v Auckland City Council* [2011] NZEnvC37, at [107].

<sup>31</sup> *Canterbury Fields Management Limited v Waimakariri District Council* [2011] NZEnvC 199, at [96].

<sup>32</sup> Refer Resource Management Act 1991, sections 32, 74 and 75.

proposals from being required to address matters such as serviceability. The NPSUD, CRPS and the operative SDP all include directions on those matters, which must be assessed in the context of any requested plan change, including those currently before SDC.

- 3.7 In the case of PC67, the expert evidence before you confirms that the transport and infrastructure features proposed are feasible and appropriate, and that demand generated for those services can be feasibly accommodated. On that basis, Ms Seaton considers that the relevant aspirations within the applicable RMA documents are appropriately satisfied through the Proposal.<sup>33</sup> Ms White has accepted the evidence of Mr Smith and Mr Bishop on matters of transport and servicing, and in her presentation at the hearing, confirmed that she had no “fundamental opposition” to Ms Seaton’s view.
- 3.8 It is submitted that the concerns of CCC and CRC in relation to precedent and cumulative impacts have little basis in actual effect terms nor in relation to the form of development that might eventuate if PC67 is granted. These matters are all addressed in detail by the Applicant because that is what the planning framework requires. That same framework will continue to provide that safeguard with respect to any plan change which follows.

#### **4 OTHER MATTERS**

- 4.1 It is noted that on the Monday preceding commencement of the PC67 hearing, Selwyn District Council received a legal opinion from Adderley Head (see **Attachment 1**) in relation to matters raised during the Selwyn District proposed plan hearings. That opinion traverses a number of matters similar to those raised during the PC67 hearing regarding the relationship between the NPSUD, the CRPS and the SDP. To the extent that it traverses similar issues to those before you and may therefore assist in your decision-making, it is commended to you.
- 4.2 In answer to your questions Mr Tallentire indicated with some certainty that the 2021 Housing Capacity Analysis provided sufficient residential capacity and that there was no inherent inconsistency between what

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<sup>33</sup> Statement of evidence of Kim Seaton, at [5.23] – [5.24], [7.44] – [7.45], [8.1].

was contained in the analysis and what was being observed “*on the ground*”.

- 4.3 It is noted, however, that the Minutes of the Greater Christchurch Partnership Committee of 13 August 2021 (included in the Agenda dated 10 September 2021 (see **Attachment 2**)) record that the July 2021 Housing Capacity Analysis was accepted by the Committee but noting “*the report relies on historical statistics, [the Committee] expressed concern that the report does not reflect the current reality of unavailability of land in Selwyn and Waimakariri District’s (sic)*”.<sup>34</sup> This is consistent with the evidence of Mr Colegrave and Mr Sellars.
- 4.4 Further on the topic of development capacity (and specifically the significance of the same), Mr Tallentire took issue with the evidence of Ms Seaton and indicated in paragraph 65 of his evidence that “*it would not constitute requests in the order of several thousand to be significant*” and “*that CRC did not question the significance of some of the larger plan change requests in Selwyn that have recently been notified*”. Those statements were further confirmed during the hearing in answer to questions from you.
- 4.5 With respect to Mr Tallentire, it is noted that Plan Change 73 is the largest plan change request (at some 2100 houses) extant in the Selwyn District at the present time which is “unanticipated” to the extent that it is not identified in Map A in the CRPS as a greenfield priority area or a future urban development area. In their respective submissions on that plan change both the CRC and CCC expressed reservations as to whether even that scale of proposal constituted significant development capacity.
- 4.6 As Ms White outlined in her closing remarks, you have before you extensive evidence on the development capacity provided by PC67 and the significance of this to both the West Melton township and the wider urban environment of the Selwyn District.
- 4.7 As against that you have evidence from Mr Tallentire, who confirmed he had not worked on the July 2021 Housing Capacity Analysis and did not have the benefit of any supporting economic analysis or evidence, yet

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<sup>34</sup>

Greater Christchurch Partnership Committee. (2021) Minutes from GCPC/2021/00026, Item 5: Greater Christchurch Housing Development Capacity Assessment.

remained satisfied that there was sufficient residential capacity such that any contribution PC67 might make would not be significant.

- 4.8 The contrast between that position and the position of Mr Colegrave, Mr Sellars and Mr Wheelans is stark. It is made even more so when one considers the reservations of the Greater Christchurch Partnership itself regarding the apparent gap between the analysis and the clear “on the ground” market conditions.
- 4.9 In my submission there is no doubt that PC67 provides significant development capacity. As such, you are required by Clause 3.8(2) of the NPSUD to have “particular regard” to that matter in reaching your decision. Particular regard is a “strong direction”, requiring you to recognise that matter as an “important consideration” to be “carefully weighed” in coming to your decision.<sup>35</sup>
- 4.10 The evidence of Ms Seaton, supported by the expert evidence of the Applicant’s witnesses, is clear that on its own merit, PC67 contributes to a well functioning urban environment, is well connected to transport links and is the most appropriate means to achieve the purpose of the Act.<sup>36</sup>
- 4.11 For her part, Ms White expressed commendable and thoughtful reconsideration of these matters as a result of hearing all of the evidence and legal submissions, finding that in her overall assessment she and Ms Seaton were not “fundamentally opposed” and that the matter was “finely balanced”, “not black and white” and with considerable “nuance”.
- 4.12 In my submission, to the extent that there are any residual questions as to the “finely balanced” or “nuanced” nature of this Proposal, these are overwhelmingly resolved by the application of the requirement to have **particular regard** to the provision of the additional development capacity the Proposal contributes.

## 5 CONCLUSION

- 5.1 The Government has seen fit to identify the provision of sufficient residential housing as a matter of national importance by promulgating

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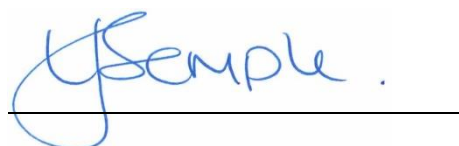
<sup>35</sup> *New Zealand Transport Agency v Architectural Centre Inc* [2015] NZHC 1991, at [64] - [67].

<sup>36</sup> Statement of evidence of Kim Seaton, at [2.5], [7.45].

the NPSUD and the NPSUDC before it. The responsive planning provisions in the NPSUD indicate the urgency of resolving the current deficits in achieving that outcome.

- 5.2 With respect to PC67, the weight of the independent expert evidence before you indicates no fundamental opposition to the rezoning as sought. In my submission, that suggests that, even without the additional weight afforded by clause 3.8 of the NPSUD, it is open to you to approve PC67. Having particular regard to the development capacity enabled by the grant of consent to PC67 places that beyond doubt.
- 5.3 In the face of house price escalation ranging from 50 to 100% in the last nine months, PC67 delivers development capacity of a specific and much needed typology which will contribute to easing some of that pressure without compromising the wider outcomes sought for the urban areas of Selwyn. It is urgently needed, and warrants your support.

**DATED** this 29<sup>th</sup> day of September 2021



L J Semple

Counsel for the Applicant

**Attachment 1 – Adderley Head Legal Opinion**





**ADDERLEY  
HEAD**

ENVIRONMENTAL LAW SPECIALISTS

## Memo

**DATE:** 13 September 2021

**TO:** Benjamin Rhodes and PDPR Team

**FROM:** Paul Rogers

**CLIENT:** Selwyn District Council

**OUR MATTER:** 038777/425

**SUBJECT:** NPSUD-CRPS-PLAN CHANGES TO THE ODP AND SUBMISSIONS ON THE PDP

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### Advice - The Issue

1 You are seeking advice on how the National Policy Statement on Urban Development 2020 (NPS-UD) (**NPS-UD**) is to be applied, taking into account the highly directive avoidance regime created by Objective 6.2.1 of the Canterbury Regional Policy Statement (**CRPS**) when making decisions on privately initiated plan changes to the operative district plan (**ODP**) and submissions on the proposed district plan (**PDP**).

2 Objective 6.2.1 states:

*... enables recovery, rebuilding and development within Greater Christchurch through a land use and infrastructure framework that:*

*1 identifies priority areas for urban development within greater Christchurch*

*...*

*3 avoids urban development outside of existing urban areas or Greenfield priority areas for development, unless expressly provided for in the CRPS;*

### Context and Our Approach

3 This advice is set against the context of a number of proponents that are seeking plan changes to the ODP to change zoning to provide for developments. The plan change proponents have lodged companion submissions on the PDP.

4 The NPS-UD is engaged in both processes. In addition, there is a particular question whether or not Policy 8 of the NPS-UD applies to submissions on the PDP as well as in the plan change context. We discuss that below.

5 You have also sought advice on whether or not the PDP (given it includes an avoid objective) should be amended to better provide for the responsive provisions of the NPS-UD and how amendment could be achieved.

- 6 To assist us you have provided us with copies of legal submissions in support of both plan changes and submissions on the PDP. We summarise those submissions below and respond to them in the broader context of undertaking the statutory interpretation exercise so as to establish the purpose and meaning of the NPS-UD. We do consider an interpretative exercise is also required for the directive avoid Objective 6.2.1 within the CRPS as well.
- 7 We consider undertaking the interpretative exercise enables us then to address how to approach the avoid objective in the context of the plan change and plan review processes.

### Alternative opinions and submissions

- 8 We have been provided with a copy of legal submissions dated 20 August 2021 by Simpson Grierson (**Simpson**) prepared for the Christchurch City Council and the Canterbury Regional Council and presented to the DPR hearing. As well we have legal submissions dated 25 August 2021 by Chapman Tripp (**Chapman**) presented in support of Plan Change 66 and to the PDP hearing panel. Finally, you have also provided further legal submissions from the Christchurch City Council, the Canterbury Regional Council (From **Wynn Williams** dated 3 September 2021) and Kāinga Ora all being in response to the DPR Commissioners Minute 5.
- 9 These submissions address the issue of how in particular the responsive planning provisions of the NPS-UD are to be applied, taking into account the directive avoid Objective 6.2.1 of the CRPS.
- 10 In summary, the Simpsons and Wynn Williams submissions contend that, based on available evidence, given the CRPS gives effect to the NPS-UD, and that the CRPS is a higher order document establishing a directive urban development framework, any planning decision on the PDP and presumably the ODP, must give effect to the avoid Objective.
- 11 In addition, Simpsons submit given the correct interpretation the NPS-UD responsive planning provisions are procedural in nature. Being procedural means the responsive planning provisions are not to be utilised for substantive decision making.
- 12 Also they argue that the NPS-UD responsive planning provisions should not be interpreted and applied selectively in a manner that purports to alter the CRPS directive framework and gives the responsive planning provisions priority or precedence over the balance of the NPS-UD.
- 13 Simpsons consider the NPS-UD identifies Christchurch being the greater Christchurch Area including the Selwyn District as one urban environment. So that context affects the interpretation of the NPS-UD, in that its application is to the Greater Christchurch urban environment and not to the Selwyn Districts urban areas.
- 14 Simpsons submit if the Chapman submission on giving priority to the NPS-UD over the CRPS and its approach to softening or reading down the directive CRPS Objective is accepted, then this will result in question marks over the entire urban growth framework in the CRPS. This will lead to ambiguity that could facilitate or encourage ad hoc unplanned urban growth. Simpsons further submit such an outcome would licence developers under the SDC PDP to second guess and or challenge the strategic planning undertaken by partner councils.

- 15 Simpson's submission is that giving priority to the NPS-UD over the CRPS in its recommendations may be unlawful because the panel would not be following the directive under the RMA to give effect to the higher order CRPS.
- 16 Simpsons in responding to the Chapman submission that the Simpsons interpretation of the responsive planning provisions of the NPS-UD leads to an outcome that those provisions are meaningless, counter by submitting this interpretation is wrong and the NPS-UD need be read as a whole so that the responsive provisions do not have primacy over the balance of the NPS-UD.
- 17 In summary, the Chapman submissions consider that the Plan Change 1(PC1) change process evidence supports a conclusion that at best the CRPS only partially gives effect to the NPS-UD. In support of that submission a table detailing a timeline of actions undertaken by the Greater Christchurch Council partners to support the submission that the CRPS includes only the Future Development Areas from the Our Space project of 2019. As well Chapmans refer<sup>1</sup> to planning reports prepared by Environment Canterbury for the PC1 process which acknowledge the PC1 partially gives effect to the NPS-UD.
- 18 Chapmans accept that where possible conflict between the competing planning documents need be reconciled. Chapmans submit the two competing documents can be reconciled by adopting an approach that reads down or softens the directive CRPS Objective 6.2.1.
- 19 Chapmans also contend as a last resort that the NPS-UD being the higher order planning document and being the latest in time to address the issue of urban development impliedly repealed the earlier CRPS in the instance of conflict.
- 20 Simpsons do not accept the Chapmans solution of reading down the directive CRPS Objective or the implied repeal point. Wynn Williams submit that the conflict between the provisions may dissolve if close attention is paid to the way in which the provisions are expressed.<sup>2</sup> Chapmans and Simpsons
- 21 Both accept that a full merit hearing needs to be had on submissions to the PDP and the plan changes. That full merit hearing needs to include evidence that a decision to grant either a plan change or accept a submission is supportable under the relevant planning documents and the RMA. Some of that evidence could be directed at the issue of how a favourable decision sits alongside and or respects the directive CRPS objective.

### **Legal Principles-Statutory Interpretation**

- 22 Determining answers to the issues above requires interpretation of the relevant provisions of the NPS-UD and the CRPS. That interpretation requires an application of the principles of statutory interpretation.
- 23 Section 76(2) of the RMA states that rules in district plans shall have the force and effect of regulations. This brings into play s5 of the Interpretation Act 1999 which provides the following guidance for ascertaining the meaning of legislation:

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<sup>1</sup> Paragraphs 23.1-23.4

<sup>2</sup> Paragraph 12

### *Ascertaining Meaning of Legislation*

- 1) *the meaning of an enactment must be ascertained from its text and in light of its purpose.*
  - 2) *the matters that may be considered in ascertaining the meaning of an enactment include the indications provided in the enactment.*
  - 3) *examples of those indications are preambles, the analysis, a table of contents, headings to Parts and sections, marginal notes, diagrams, graphics, examples and explanatory material, and the organisation and format of the enactment.*
- 24 Taking the above provisions into account, the generally accepted approach for interpreting plans is derived from the decision of the Court of Appeal in *Powell v Dunedin City Council*,<sup>3</sup> which accepts the approach of the High Court in *Beach Road Preservation Society v Whangarei District Council*.<sup>4</sup> In *Powell*, the Court held at paragraph [35] that while it was:
- "... appropriate to seek meaning of a rule from the words themselves it is not appropriate to undertake that exercise in vacuum. As this Court made clear in Rattray, regard must be had to the immediate context (which in this case would include the objectives and policies and methods set out in section 20) and, whether any obscurity or ambiguity arises, it may be necessary to refer to the other sections of the plan and the objectives and policies of the plan itself. Interpreting a rule by a rigid adherence to the wording of the particular rule itself would not, in our view, be consistent with a judgment of this Court in Rattray or with the requirements of the Interpretation Act."*
- 25 Another helpful case which predated *Powell* but occurred after *Beach Road* is the decision of the Environment Court in *Brownlee v Christchurch City Council*,<sup>5</sup> whilst accepting the decision in *Beach Road*, which identified the following factors as relevant when interpreting a plan under the RMA:
- (a) *The text of the provision;*
  - (b) *The purpose of the provision;*
  - (c) *The context and scheme of the plan*
  - (d) *The history of the plan*
  - (e) *The purpose and scheme of the RMA; and*
  - (f) *Any other permissible guides to meaning (including common law principles, or presumptions of statutory interpretation).*
- 26 Furthermore, the High Court in *Nanden v Wellington City Council*<sup>6</sup> stated that, when weighing competing interpretations of plan provisions:
- "The fundamental issues of policy associated with which meaning should be adopted are as follows:-*

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<sup>3</sup> [2005]NZRMA 174(CA)

<sup>4</sup> [2001]NZRMA 176

<sup>5</sup> [2001]NZRMA 539

<sup>6</sup> [2000]NZRMA 647

1. *It is desirable for an interpretation to be adopted which avoids absurdity or anomalous outcomes.*
  2. *It is also desirable for an interpretation to be adopted which is likely to be consistent with the expectations of property owners.*
  3. *Practicality of administration by... Council officers is also an important consideration. In particular, it is unlikely that the... Council would deliberately adopt a rule which meant that the lawfulness or otherwise of proposed houses or renovations could only be assessed after lengthy historical research had been carried out"*
- 27 So in our view to determine the correct interpretation of a plan provision, a holistic approach that incorporates the relevant factors identified in *Powell* and *Brownlee* should be used, with the policy considerations in *Nanden* serving as a useful test for determining the appropriateness of the conclusions reached.
- 28 We agree with all of the legal submissions that in the instance of conflict between provisions of planning documents and their provisions decision makers are under an obligation to make a "thoroughgoing attempt to find a way to reconcile"<sup>7</sup> that conflict.

## **Role and Purpose of the NPS-UD Responsive Planning Provisions**

### Structure Organisation and Format of NPS-UD

- 29 Before addressing the responsive planning provisions, we consider the structure and organisation and format of the NPS. All of the NPS is in force from 20 August 2020. However, clause 1.2 recognises not all of the NPS can be put into effect as at 20 August. Within Part 4 the NPS sets out the time frames for complying with different parts of the NPS. For example, intensification is to be complied with no later than 2 years from the commencement date.
- 30 The NPS requires monitoring of a range of matters including demand, supply price rents and housing affordability. As well Housing and Business Development Capacity Assessments (**HBA**) are to be undertaken every 3 years. Future Development Strategies are to be prepared and made publicly available.
- 31 So the NPS has a range of measures some of immediate effect such as planning decisions, as well as a range of future steps. Those future steps given their nature as detailed within the NPS will likely take time gathering data, monitoring, consulting and effecting change.
- 32 So we think a contrast emerges between those parts of the NPS that can be seen as more immediate, direct and responsive as opposed to those longer term parts of the NPS which focus on future action steps dependent on data gathering evaluation and engagement.
- 33 We consider that contrast helps distinguish the responsive planning provisions from the balance of the NPS. Perhaps the contrast could be expressed as responsive planning parts of the UDS being immediate action steps compared to the balance NPS being medium- or longer-term action steps.
- 34 In support of our view as to the structure of the NPS-UD we refer to a recent Environment Court case *Eden – Epsom and others v Auckland Council*<sup>8</sup>

<sup>7</sup> Royal Forest v Bay of Plenty Regional Council[2017] NZHC 3080 at [38] citing King Salmon [2014]NZSC38 at [131]

<sup>8</sup> [2021] NZEnvC 082

considered the question does the NPS-UD apply and if so what parts to a plan change to the Auckland Plan? In particular the Court considered the question: are decision makers, on the likes of plan changes, to move ahead of decision making by Councils on implementation of directive and urgent policies within the NPS-UD?

- 35 The Court explored the term “planning decision” noting it is defined in the NPS-UD as meaning a decision on a district plan or a proposed plan. The Court then explored the words “District Plan’ and “Proposed Plan” referring to relevant sections of the RMA to determine the meaning of the same.
- 36 Notably the Court referred to section 43AAC of the RMA which provides the meaning of a proposed plan. It noted under the RMA, subject to context, a proposed plan means a proposed plan, a variation or change or a change to a plan proposed by a local authority that has been notified under clause 5 of schedule 1 but has not become operative under clause 20 of that schedule. Effectively then the RMA equates a proposed plan and a plan change as being the same.
- 37 The Court also noted there is a definition of “change” in s43AA RMA meaning a change proposed by a local authority under clause 2 of schedule 1 and a change proposed by a person under clause 21 of schedule 1. The Court noted this was somewhat confusing. Presumably because the meaning of a proposed plan included a plan change making a separate definition of a “change” superfluous as s43AAC sufficiently dealt with the matter.
- 38 So one possible conclusion from the above is that there is no real difference between a plan change and a plan review. We comment on this point again later when considering the application of Policy 8 to decisions on submissions to the PDP.
- 39 The Court went on to consider NPS clause 3.8 that refers to plan changes. The Court did not explicitly reference NPS policy 8. The Court then found within the next paragraph of its decision:
- “... from that clause ]our words -we assume clause 3.8] it may be found that some provisions of the national instrument may be considered in a “planning decision” on the merits of a requested plan change including on appeal to the Environment Court.”*
- 40 The Court found decision makers are not required to give effect, in the context of a decision on a plan change, to any NPS-UD objectives and policies that are not requiring “planning decisions”. So all of the objectives and policies of the NPS-UD that include those two words “*planning decisions*” are engaged when a plan change is under consideration.
- 41 We also consider the same approach applies when planning decisions for the DPR are being made. So Objectives 2, 5 and 6 and Policies 1, 6 and possibly 8 and Part 3 Implementation apply, as required by the context, to planning decisions made for the DPR. As well the NPS definition of “planning decision” supports this view.
- 42 The Court was of the view the balance of the NPS-UD required steps to be undertaken in the future following gathering and review of relevant information. To apply those objectives and policies before councils made decisions would following the Courts decision pre-empts those processes.

- 43 The Court identified those parts of the NPS-UD that are engaged directly in the plan change process and those other parts of the NPS-UD that are engaged later in time. So we consider this decision supports our view that the structure of the NPS is such some parts require immediate engagement in planning decisions while others are deferred while actions such as data gathering and consultation occur.
- 44 The NPS preliminary provisions in Part 1 make it very clear the NPS-UD applies relevantly to any tier 1 council and any planning decision by a local authority affecting an urban environment. An urban environment is defined in the NPS-UD as "*any area of land that is or is intended to be predominantly urban in character.*"
- 45 We do not agree with the Simpson submission that the responsive planning provisions of the NPS-UD do not have primacy over the balance provisions of the NPS.
- 46 While we would not use the word primacy, we do consider the responsive planning provisions should be seen as being distinctive from the balance provisions. As well the responsive planning provisions are engaged now while other NPS provisions have a much longer time frame for action. We consider this point links with the purpose of those responsive provisions which we see as in part to make planning decisions now in a manner that urgently seeks to address the housing crisis.
- 47 The responsive provisions deal with planning decision taken now, seeking to deal expeditiously with land supply issues, more expeditiously than standard planning processes. The balance provisions of the NPS-UD are different and relate to a range of future action steps<sup>9</sup> delivered following a plan review process.

#### Purpose- The Text of the NPS-UD

- 48 The NPS allows the Government to prescribe objectives and policies for matters of national significance relevant to sustainable management under the RMA. This circumstance needs to be borne in mind because we consider it has an influence on the interpretative exercise because the NPS-UD is dealing with matters of national significance.
- 49 We refer to a non-RMA case<sup>10</sup> on finding the purpose of an enactment from the Supreme Court where it stated:

*[22] It is necessary to bear in mind that section 5 of the Interpretation Act 1999 makes text and purpose the key driver of statutory interpretation. The meaning of an enactment must be ascertained from its text and in the light of its purpose. Even if the meaning of the text may appear plain in isolation of purpose that meaning should always be cross-checked against purpose in order to observe the dual requirements of section 5. In determining purpose the court must obviously have regard to both the immediate and the general legislative context. **Of relevance too may be the social, commercial or other objective of the enactment.***

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<sup>9</sup> See Part 4 Timing

<sup>10</sup> *commerce commission v Fonterra Cooperative Group Ltd* [2007] NZSC 36

- 50 We have highlighted the last sentence because in our opinion the social objective of the NPS-UD is influential, if not critical in the interpretive exercise. That social objective is recorded within Objective 2 which states:

*"Planning decisions improve housing affordability by supporting competitive land and development markets."*

- 51 The NPS-UD particularly the responsive planning provisions have come into force against a context of what is frequently described as a national housing supply crisis. The supply crisis impacts upon affordability of housing nationally.

- 52 In our view the responsive planning provisions of the NPS-UD need to be interpreted and applied taking into account the relevant context of the housing land supply crisis. Moreover based on what follows we consider the purpose, particularly of the response planning provisions, is to endeavour to address and resolve housing land supply.

- 53 Objective 2 NPS-UD provides for planning decisions to improve housing affordability by supporting competitive land in development markets. Policy 1 (a) (i) refers to type, price, and location. Price, in particular, picks up the purpose of competition impacting on price and improving affordability.

- 54 Policy 1(d) more pointedly addresses competition in land development markets. It seeks to:

*... have planning decisions contribute to well-functioning urban environments which are urban environments that, as a minimum support, and limit as much as possible adverse impacts on, the competitive operation of land and development markets.*

- 55 Objective 6 states that:

*Local authority decisions on urban development that affect urban environments are integrated with infrastructure planning and funding decisions and strategic over the medium term and be responsive, particularly in relation to proposals that would supply significant development capacity.*

- 56 So we see Objective 6 as applicable to decisions on both the plan changes and on the PDP because both involve decisions on urban environments. So decisions on urban development that affect urban environments are to be responsive, particularly in relation to proposals that would supply significant development capacity.

- 57 The word "*proposal*" as it appears in Objective 6 is not defined in the NPS-UD. Admittedly the word *proposal* has a linkage with a proposed plan change or a plan change proposal. But the word *proposal* is capable of supporting a wider meaning such as to put forward for consideration, or advance something to be dealt with.

- 58 So a proposal could include a submission, on the PDP that seeks additional zoning. However we acknowledge the words in Objective 6 do not include submissions on a PDP. However, given the broad application of Objective 6 and the broad language utilised within it and considering the purpose (as we see it) of the responsive planning provisions of the NPS-UD, reading the word proposal to include a submission is an available and reasonable interpretation.



- 59 Policy 8 states Local Authority decisions affecting urban environments are responsive to plan changes that would add significantly to development capacity and contribute to well-functioning urban environments, even if the development capacity is unanticipated by RMA planning documents or out of sequence with planned land releases.
- 60 The use of the words local authority decisions suggests the scope of decisions under policy 8 is broader than just planning decisions. Policy 8 links to Subpart 2 clause 3.8 which deals with unanticipated or out of sequence developments. Clause 3.8 (3) is the sub clause that requires the Regional Council to include criteria within its regional policy statement for determining what plan changes will be treated for the purposes of implementing Policy 8, as adding significantly to development capacity.
- 61 The choice of the word "*Responsive*" raises the questions responsive to what and why? We consider as detailed below what is being responded to are two matters. The first is, subject to conditions, to be responsive to the plan change, and the second is to respond to provisions in planning documents that either constrain or do not enable land supply and or do not provide for at least, assessment of out of sequence developments. The reason, or the why, is the need to respond to a housing crisis by increasing land supply in a timely way resulting in competitive land markets and to respond to Planning documents that constrain development.
- 62 Planning decisions under the NPS-UD must satisfy the requirements of Policy 1 that detail what a well-functioning urban environment will as a minimum include. Policy 6 directs decision makers to have particular regard to a number of matters when making decisions that affect urban environments.
- 63 The choice of words in Policy 6 "have particular regard to" are familiar to resource management practitioners as they are the same words used in s7 RMA.
- 64 The balance of Policy 6 sets out a range of matters to which particular regard is to be had all of which inform and guide the planning decision.
- 65 Policy 8, including its linkage to Subpart 2 clause 3.8, also includes the matters for decision-makers to take into account in the shaping of their decision.
- 66 We consider the above paragraphs adequately respond to the concerns raised in the Simpson submission including that developers will be licenced under the PDP to second guess or challenge the strategic planning undertaken by the Christchurch partners, and that such an approach raises question marks over the entire urban growth framework set out in the CRPS.
- 67 That is because as noted above there are ample directions within the NPS as to how and what should be considered in making planning decisions on development opportunities. Applying those NPS directions will ensure ad hoc decisions do not occur nor will those decisions cause the CRPS urban growth framework be compromised.

#### Purpose- Recourse to Explanatory Material

- 68 Given the NPS-UD is relatively new with very limited guidance from case law available there are a number of fact sheets<sup>11</sup> (attached) issued by the Ministry for

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<sup>11</sup> Guidance document titled Responsive planning published in July 2020 and Understanding and implementing the responsive planning policies published in September 2020.

the Environment to provide guidance and understanding in implementing the responsive planning policies of the NPS-UD.

- 69 The fact sheets record they are not legal advice. However they state the policy intent behind the NPS-UD. Critically, given they are guidance documents issued by a Government Department it follows they should be considered to be the views from the Executive (The Government) as to why the national instrument has been promulgated and to what effect, again in the view of the Executive.
- 70 So we consider as the Environment Court<sup>12</sup> in *Eden* when interpreting the NPS-UD, utilising these fact sheets is valid as part of the interpretive exercise because the facts sheets are explanatory material. As well s5 of the Interpretation Act allows examples and explanatory materials to be utilised in the interpretive exercise.
- 71 The July 2020 Fact sheet provides information on Objective 6 (c), Policy 8 and Sub part 2 of Part 3 of the NPS-UD, Under the heading *Purpose* states:

*Purpose*

*This direction seeks to ensure that local authorities respond to development proposals that would add significantly to development capacity and contribute to well-functioning urban environments, regardless of whether they are planned for or anticipated in existing planning documents. It applies to development proposals in both Greenfield and brownfield locations.*

*Local authorities routinely receive plan change requests that would result in significantly increased development capacity. The NPS-UD requires local authority decisions on these plan changes to be responsive if the plan change proposal meets a set of criteria. This increases the responsiveness of the planning system to significant opportunities and removes constraints to urban development.*

- 72 Clearly approving development proposals that add significantly to development capacity is a core purpose. Increasing the responsiveness of the planning system to development proposals regardless of whether they are planned for or anticipated is a further purpose.
- 73 The delivery mechanism or the how is through local authority decisions through planning decisions. So we consider there is a strong signal that planning and local authority decisions are seen as being the responsive tools to remove constraints to urban development. Other fact sheets elaborate on what the constraints to urban development might be.
- 74 The July fact sheet under the heading "*Requirements*" on page 1 specifically records that

*...regional councils under NPS-UD clause 3.8 (3) are to include criteria within regional policy statements to determine what plan changes will be treated as adding significantly to development capacity for the purposes of implementing Policy 8.*

- 75 Moreover the fact sheet records those changes must be made as soon as practicable.<sup>13</sup>

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<sup>12</sup> *Eden- Epsom v Auckland Council* [2021]NZEnvC082

<sup>13</sup> NPS-UD Part 4: Timing 4.1 (1)

- 76 The introductory guide published in July 2020 on page 6 deals with the intent of the NPS – UD. In particular we observe that the guide states that the NPS-UD is designed to improve the responsiveness and competitiveness of land and development markets. In particular, it requires local authorities to open up more development capacity, so more homes can be built in response to demand.
- 77 The September fact sheet includes detail on the intent of responsive planning policies. In terms of Objective 6 (c) the fact sheet notes that local authorities cannot predict the location or timing of all possible opportunities for urban development. It therefore directs local authorities to be responsive to significant development opportunities when they are proposed.
- 78 The September fact sheet on page 2 states the intent of Policy 8 and Part3, subpart 2 is to:
- enable transparency and responsiveness in planning decisions
  - improve competition inland markets
  - accelerate land supply
  - discourage land banking
- 79 The fact sheet continues noting that this approach will support improved housing affordability. The sheet again notes that the proposed development may be unanticipated in the existing plans.
- 80 The September fact sheet on page 3 under the heading of *Expected Outcomes* states the responsive planning policy in the NPS-UD limits a local authority's ability to refuse certain private plan change requests without considering evidence. The sheet goes on to note:
- implementing this policy is expected to result in more plan change proposals being progressed where they meet the specified criteria, which in turn will lead to proposals being put forward for development in areas which Council planning documents have not identified as growth areas.*
- 81 At the bottom of page 3 the September fact sheet notes that
- identified areas for development within planning documents must give effect to the responsive planning policies in the NPS-UD and therefore should not represent an immovable line. It further notes Council policies including those in regional policy statements relating to out of sequence development, will need to be reviewed and, in some cases amended to reflect the responsive planning policies of the NPS-UD.*
- 82 Under the heading "Timing" on page 7 the September fact sheets specifically states:
- the responsive planning requirements apply to all tier 1 local authorities and came into effect on 20 August 2020 and further the policies will need to be implemented continuously, as and when relevant requests for plan changes are made. Specifically for the purpose of implementing Policy 8 regional councils are to include the criteria as soon as practicable.*

- 83 The September fact sheet on page 2 when considering Objective 6 (c) states "*It therefore directs local authorities to be responsive to significant development opportunities when they are proposed*". So we consider this broad wording supports our interpretation as to the application of Objective 6.
- 84 We consider utilisation of planning decisions<sup>14</sup> to give effect to the NPS-UD recognises the planning regime is dynamic. Moreover the NPS-UD requiring planning decisions to take into account<sup>15</sup> and have particular regard to<sup>16</sup> certain matters support the view that planning decisions should give effect now, to those parts of the NPS-UD that commence with the words "*Planning Decisions*".
- 85 We also suggest this deliberate approach supports the view that the NPS-UD particularly the responsive planning and housing land supply issues require urgent implementation.
- 86 Those planning decisions are to be made by individual local authorities when considering plan changes and or plan reviews and recognise and require those decision to be responsive to developments that would significantly add to development capacity while contributing to a well-functioning urban environment, even if the plan changes<sup>17</sup> are unanticipated or out of sequence with planned land release.
- 87 However we consider the environment under consideration in those decisions is the district environment and not the wider Christchurch environment as suggested by Simpsons.
- 88 We note "*urban environment*" is defined under the NPS-UD to include any area of land regardless of size and irrespective of local authority boundaries that is predominantly urban in character and is or is intended to be part of a housing and labour market of at least 10,000 people.
- 89 So we are of the view this definition pulls against the thrust of the Simpsons submission relating to the Christchurch environment being the environment under consideration when planning decisions are made.
- 90 As well the NPS-UD requires councils to develop criteria as soon as practicable<sup>18</sup> for determining which plan changes would add significantly to development capacity and contribute to well-functioning urban environments, even if the development capacity is unanticipated by RMA planning documents or out of sequence with planned land release.
- 91 On Timing Part 4 also requires amendment to a district plan to give effect to the provisions of the NPS-UD as soon as practicable. So decisions on a proposed plan, subject to scope constraints, could be a "*soon as practicable*" opportunity.
- 92 We agree that the CRPS is to be included as part of any merits assessment but not in the determining manner which Simpsons Grierson advance. To apply and weight Objective 6.2.1 in that manner in our view clashes directly against NPS-UD responsive planning provisions that would frustrate the objective of the NPS-UD.

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<sup>14</sup> NPS-UD- definitions, Objective 2,5,Policy1,6,8

<sup>15</sup> NPS-UD-objective 5

<sup>16</sup> NPS-UD-policy 6

<sup>17</sup> We return to the scope of application of Policy 8 below.

<sup>18</sup> See Part 4 Timing clause 4.1 (,1)

### Conclusion on Interpretation of the NPS-UD responsive Planning Provisions.

- 93 Giving the words as they appear within the NPS-UD their ordinary meaning our view is that the role and purpose of the NPS-UD responsive planning provisions, is to through planning decisions, on district plans and plan changes improve housing affordability by supporting competitive land and development markets by ensuring unanticipated or out of sequence qualifying land development opportunities are not rejected without a merits assessment.
- 94 We consider planning decisions under the NPS-UD are intended to be to be both responsive, immediate and to an extent unconstrained by existing provisions in planning documents that restrict or limit development to identified locations.
- 95 However we readily accept planning decisions under the NPS-UD must also ensure that those out of sequence or unanticipated developments qualify by contributing to a well-functioning urban environment. So planning decisions are not completely unrestrained. Evidence will be needed to satisfy those NPS-UD requirements.
- 96 More broadly the NPS-UD is designed to speedily improve the responsiveness and competitiveness of land and development markets to meet the community needs for more housing and differing preferences for different types of housing, such as intensification.
- 97 Addressing land supply to increase competitiveness in housing markets and consequently provide for more and affordable housing is a matter of national significance to be addressed responsively, in a timely way. Planning documents that constrain development to particular locations need to be amended as soon as practicable to allow consideration of alternative development options.
- 98 The structure of the NPS-UD being divided into parts and through the deliberate choice of words such as "planning decisions" provides for steps or actions on an immediate basis and other steps over the longer term.
- 99 We consider the responsive planning provisions to be distinctive compared to the balance NPS provisions. While the responsive planning provisions operate under the entire framework of the NPS-UD we do not agree with Simpsons view that the responsive planning provisions should not be seen as separate or distinctive.
- 100 Comparing the responsive planning provisions with the balance provisions of the NPS-UD in our view amplifies the difference between them. Also other than in a broad general way, primarily because of this difference, we do not consider the balance provisions of the NPS-UD are particularly informing on the interpretation of the responsive provisions.
- 101 As well we do not support Simpsons view that the NPS-UD need be interpreted and applied as a whole with the consequence the responsive planning provisions are read down or somehow limited.
- 102 Also we do not support the Wynn Williams view that there is not a conflict between the provisions because as they submit if close attention is paid to the way in which the provisions are expressed then the conflict dissipates. Wynn Williams submit that the "avoid" framework does not preclude the merits of a proposal for unanticipated or unplanned urban development or for local authority

decisions to be responsive.<sup>19</sup> But they submit the planning documents including the CRPS have already provided sufficient development capacity. As well consequent on future quarterly monitoring and three yearly capacity assessments any insufficiency can be addressed and provided for.

- 103 We disagree because we consider Wynn Williams are not correctly interpreting the responsive provisions of the NPS-UD in particular they are not acknowledging the NPS-UD seeks a responsive approach on a much more urgent basis than a CRPS review that may happen in 2024. As well the NPS recognises that there may be unanticipated and unplanned developments that are available for consideration and approval in planning decisions taken now under the NPS-UD.

### **Alignment - CRPS with NPS-UD –“give effect to”**

#### Alignment

- 104 Is the CRPS aligned with and does it give effect to the NPS-UD, so as to respect the vertical alignment between statutory planning documents as required by the RMA in particular the “give effect to” sections 62 (3), and 67 RMA?
- 105 The answer to this question is important as we think the answer affects the weighting that could be given the CRPS. The answer is also important in terms of the matters under Policy 6 (a) decision makers are to have particular regard to.
- 106 Notwithstanding that PC1 to Chapter 6 postdates the coming into force of the NPS-UD, the CRPS does not include any criteria for determining what plan changes will be treated, for the purposes of implementing Policy 8, as adding significantly to development capacity, (the criteria) as directed by the NPS-UD. We understand conversations occurred between District and Regional Councils but inclusion of any criteria within the CRPS did not result.
- 107 The absence of the Policy 8 criteria must raise the question whether or not in its current form the CRPS gives effect to or is aligned with the NPS-UD. Also the CRPS is now being scrutinised in a context where lack of that criteria is important. The materials referenced<sup>20</sup> by Chapman disclose that the Regional Council being aware of the need to include criteria to assess developments determined that criteria would be later included in the CRPS.
- 108 We note the Simpsons submissions while acknowledging that the Regional Council clearly considered the NPS-UD, does not explain why the criteria were not included in PC1. The absence of any criteria within the CRPS creates a vacuum in which planning decisions now need to be made.
- 109 On page 2 of the July fact sheet it states that the NPS-UD requires councils to respond to out of sequence development proposals. It continues, *“noting councils will need to review the policies relating to unplanned and out of sequence development and in some cases, their policies will need to change to implement the NPS-UD”*. For example, a hard rural urban boundary without the ability to consider change or movement of the boundary would not meet the requirements of the NPS-UD responsive planning provisions.

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<sup>19</sup> Paragraph 23

<sup>20</sup> Appendix 5 and paragraphs 20 -23.4 Chapman Submissions on Strategic Directions 25 August 2021

- 110 In our view the CRPS, and in particular Objective 6.2.1, which seeks to avoid urban development outside of existing urban areas or greenfield priority areas for development, unless expressly provided for in the CRPS, is precisely the type of hard line boundary type provision that the NPS- UD identifies as requiring attention.
- 111 So given the clear and direct tensions between CRPS Objective 6.2.1 and Objective 2, Policy 1(a) and (d), Policy 6(d), and Policy 8 and Subpart 2 clause 3.8 we conclude that the CRPS only partially gives effect to the NPS-UD as required by the RMA.<sup>21</sup>
- 112 The NPS-UD directs amendment to regional policy statements and/or district plans to give effect to the provisions of the NPS-UD as soon as practicable. We accept that does not mean urgently. However inaction and/or the absence of an explanation as to why there has been no change and or when the change will occur, would not be in accord with the direction to change as soon as practicable.
- 113 Given the extent of effects on communities, nationally, timeliness in interventions to address the housing crisis appears to us to be very important.
- 114 The Chapman submissions as well as referencing the Regional Councils own planning reports on PC1 in our view certainly provides strong support to the submission properly viewed; the CPRS only partially gives effect to the NPS-UD. However we do note in later submissions<sup>22</sup> Wynn Williams challenge the accuracy of those submissions. We are not in a position to validate one view over the other.
- 115 However given the CRPS includes housing targets that originated from the now replaced or superseded NPS-UDC (2016), and given the housing requirements under the NPS-UD are both different and are yet to be entered (as soon as practicable) after a Housing Capacity Assessment (**HCA**) is made, we agree with the Chapman submission that this is another reason why the CRPS is at best partially giving effect to the NPS-UD.
- 116 We do acknowledge Minister Parker's letter dated 28 May 2021<sup>23</sup> to the Chief Executive Environment Canterbury records on page 1 that Environment Canterbury has complied with the Resource Management Act 1991, regulations made under it, and any relevant national direction.
- 117 However, the letter is broad in its ambit and primarily addresses the issue of the CRPS PC1 streamlined planning process. We accept that at the time the letter was written given the requirement to include the Policy 8 criteria was a future requirement the CRPS could be taken to give effect to the NPS-UD.
- 118 However the letter, understandably, does not include a consideration of the current context of applying the NPS-UD to planning decisions relating to plan changes and the district plan review. So we consider the weight given to this letter should reflect the absence of detailed considerations of the current context and absence of explanations as to why the criteria given the opportunity to include them was not taken.

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<sup>21</sup> RMA- s62(3)

<sup>22</sup> Canterbury Regional Council Legal Submission Minute 5 response 3 September 2021 Paragraphs 25 and 26.

<sup>23</sup> Copy attached.

- 119 As well given the earlier discussion on how and what materials can be utilised when planning documents interpreted we do think relying on this letter to assist in interpreting whether or not PC1 gives effect to the NPS-UD is going beyond what is allowed. So while the letter provides context in our view it does not have a role in the interpretative exercise.
- 120 We emphasise that a NPS is a tool the government utilises to prescribe directions for matters of national significance. So this point needs to be borne in mind when considering the alignment issue.

#### Give Effect To

- 121 We draw attention to section 75(3) which details the contents of district plans. Relevantly subsection (3) (a) provides a district plan that must give effect to any national policy statement.
- 122 So if decision-makers accorded, when making planning decisions under the NPS-UD, the CRPS priority, as contended for by Simpsons, it is very difficult to see how decision-makers would be complying with, let alone respecting, both the directive to have particular regard<sup>24</sup> to the NPS-UD in reaching a decision as well as satisfying s75(3)(a).
- 123 This is particularly so when the CRPS is not fully giving effect to the NPS-UD. Such an outcome does not recognise an NPS prescribed actions via objectives and policies for matters of national significance which we consider must and should prevail over regional matters.
- 124 So recognising the hierarchy of plans as well as recognising an NPS deals with matters of national significance assists in resolving what at first may appear to be an irreconcilable choice for decision makers.

#### Requirement for Companion Plan Changes to the CRPS

- 125 Simpsons also contend that without any companion changes to the CRPS there is no clear pathway for approval of a non-compliant proposal as it will fail to give effect to the regime established by the CRPS as required under section 75(3).
- 126 We do not think there is a need for a plan change applicant to make companion changes to the CRPS. We say this because the NPS-UD already directs a Regional Council to make changes to the CRPS to provide for the responsive planning objectives and policies of the NPS-UD. Further we contend the pathway is not absent but is provided by the responsive planning provisions of NPS-UD.
- 127 Admittedly until the CRPS change occurs there would be a level of disconnect between the district plan and the CRPS but that reason for disconnect is that the Regional Council has not responded in a timely way to include the necessary criteria in its regional plan. That is not a matter for an applicant seeking a plan change to an operative plan to seek.
- 128 How long that level of disconnect remains is in the hands of the Regional Council.

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<sup>24</sup> NPS-UD Policy 6



## Conclusion

- 129 In conclusion then it is our view that the CRPS, Objective 6.2.1 in particular, is not well aligned nor does it give full effect to the responsive planning provisions within the NPS-UD. At best the CRPS is partially compliant.
- 130 Given the purpose of the NPS-UD, the fact it is a higher order document dealing with matters of national significance containing express and specific provisions as to what decision makers when making planning decisions are to take into account and have particular regard to as we consider the NPS-UD should receive greater weight than the CRPS Objective 6.2.1 when planning decisions are made. We do not consider there is any available information supporting the view that the NPS-UD has not been competently prepared or does not give effect to Part 2.
- 131 We emphasize again a full merits decision on a plan change and mirror submission on the PDP needs to consider all relevant evidence including all relevant planning provisions their purpose and that of the RMA.

## **Applying the NPS-UD responsive planning framework absent criteria and effects on CRPS Urban Planning Framework**

- 132 How should the responsive planning framework be interpreted and applied when making decisions on privately initiated plan changes to the Selwyn District Council's ODP, and decisions on zoning submissions on the PDP in the absence of any criteria determining what plan changes will be treated, for the purposes of implementing Policy 8, as adding significantly to development capacity?
- 133 We consider the absence of the criteria within the CRPS is not a barrier to making a planning decision. The July fact sheet at page 2 provides details on the subject matter and nature of the criteria to be included in regional policy statements by regional councils for determining what plan changes will be treated as adding significantly to development capacity.
- 134 As well the September 2020 fact sheet explains how local authorities must consider private plan-change proposals for developments that are unanticipated or out of sequence as outlined in the NPS-UD Objective 6(c) Policy 8 and Part 3 sub part 2-responsive planning.
- 135 Policy 8 provides local authority planning decisions affecting urban environments are to be responsive to plan changes that would add significantly to development capacity and contribute to well-functioning urban environments, even if the development capacity is unanticipated by RMA planning documents or out of sequence with planned land release.
- 136 Once satisfied under Policy 8 that the development proposal provides significant development capacity that is not otherwise enabled in a plan Sub part 2 in particular 3.8 (2) (a) and (b) are additional matters that a local authority must have particular regard to.
- 137 The September fact sheet picks up the significance of these words "*particular regard to*" noting that such matters are important to the relevant decision and therefore must be considered and carefully weighed in coming to a conclusion.
- 138 The September fact sheet on page 4 details and expands on the three aspects local authorities need to consider when determining if a plan change proposal should be considered under the responsive planning policies.

- 139 It details what contributing to a well-functioning urban environment includes. It also addresses what adding significantly to development capacity means in the context of responsive planning policy. It also discusses in detail the criteria for determining significant development capacity. Finally, it addresses what well-connected along transport corridors is intended to mean.
- 140 So in the absence of inclusion by the Regional Council of criteria in its regional plan, in our view there exists adequate direction<sup>25</sup> within the NPS-UD with further support available from the fact sheets, for a decision maker to consider on the merits whether or not the proposed plan change and or a new zoning submission would add significantly to development capacity. Adopting this approach provides for the vacuum created by the failure of the Regional Council to include such criteria within its regional plan.
- 141 We also consider the above paragraphs provides a response to the possible argument that because the criteria to identify, in terms of Policy 8, which plan changes will add significantly to development capacity, has not yet been included in the CRPS, Policy 8 cannot be deployed.
- 142 We accept if decisions are made approving developments which are located outside of the prescribed limited locations included within the CRPS there will be a disconnect until the Regional Council includes the criteria within the CRPS.
- 143 So on the basis planning decisions approving the developments carefully apply the now available criteria within the NPS and the fact sheets alignment will be resorted. Developments that are now approved should be able to satisfy the criteria which is subsequently inserted by the Regional Council into the CRPS albeit retrospectively.

#### **How is the conflict between CRPS Objective 6.2.1 and the NPS-UD to be resolved?**

- 144 We agree with both Simpsons and Chapmans submissions that the correct approach as a first step to conflicting planning provisions is through an interpretative exercise to try to make a "thoroughgoing attempt to find a way to reconcile" provisions in plans that are in conflict.<sup>26</sup>
- 145 Chapmans submit the CRPS only partially gives effect to NPS-UD for a range of reasons and so Objective 6.2.1 should be read down. As well Chapmans submit the NPS-UD is the latest word and is the higher order document so it should prevail as it impliedly repeals the earlier.
- 146 That approach is rejected by Simpsons as it does not satisfy the RMA requirement for a lower order document, the PDP or ODP to give effect to the higher order document the CRPS.
- 147 As we read the Simpsons submissions they interpret and apply Objective 6.2.1 as a veto or a complete "no go". Based on the words in the objective and relying on case law such as *King Salmon* such a literal interpretation is available. However in this particular context applying an overly literal approach delivers a very unusual if not absurd outcome giving the need to apply a more purposive approach to the interpretative exercise.

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<sup>25</sup> For example Obj 1,2,6,Policy 1,6,8 and subpart 2 3.8

<sup>26</sup> *Royal Forest and Bird Protection v Bay of Plenty Regional Council* [2017] NZHC 3080 at [98] citing *Environmental Defense Society v King Salmon* [2014] NZSC 38 at [131]

- 148 We are taking a different approach in trying to resolve the conflict. Our approach, utilising the interpretative approach detailed earlier, is to place more emphasis on understanding the purpose of Objective 6.2.1. Then once understood, to bear in mind the purpose of the responsive planning provisions of the NPS- UD, if an approval of a development meets or at least partially meets the purpose of the Objective.
- 149 We consider if it can be demonstrated that application of the NPS does meet the purpose of Objective 6.2.1 then it is possible to resolve that conflict (whilst not completely resolving it).
- 150 Giving the words in Objective 6.2.1 their plan ordinary meaning, if the location of the intended development is outside of the existing urban areas or greenfield priority areas for development and unless it is otherwise expressly provided for in the CRPS, then a direct clash results.
- 151 As we understand it the purpose of the Objective is to avoid ad hoc development, particularly urban development in locations that are not supported by infrastructure and transportation services and networks, employment opportunities, and proximity to community assets services and supplies.
- 152 As well the size of the area identified for development within the CRPS is intended to meet anticipated demand for development, for which demand has been assessed by a number of exercises such as Our Space. So expressed another way the size of the area equates with likely demand over time for development.
- 153 However provided the criteria ascertained from the facts sheets and the NPS itself for determining what plan changes will be treated for the purposes of Policy 8 as adding significantly to development capacity are satisfied and provided other matters provided for in NPS such as Objective 2, Policy 1 and Policy 6 are applied and addressed through the provision of acceptable evidence then the purpose of Objective 6.2.1 (other than the location of the development) will be achieved.
- 154 This is because the NPS-UD properly applied will not support developments that do not contribute to well-functioning urban environments. So to that extent there will not be a direct clash with the Objective 6.2.1. Properly interpreted, the NPS does not allow for ad hoc decisions to be made which will lead to the undermining of the CRPS urban development framework. Rather in our opinion the NPS responsive planning provisions, including guidance within the facts sheets, properly applied allows for an exception to Objective 6.2.1, authorised by a higher order document addressing a matter of national significance.
- 155 We say exception because the NPS fact sheets clearly recognise that it is not always possible for an authority to predict with certainty where and when urban growth will occur. So, when Simpsons claim that the CRPS provides all of the required land for development based on demand, while that may be correct, what the CRPS cannot control is the timing when that development may occur.
- 156 The NPS by facilitating consideration of development opportunities for locations outside of hard-line boundaries supported by restrictive objectives is allowing for additional development opportunities to foster increased competition leading to increased supply of land for housing and impacting favourably on housing affordability. But those developments must meet and satisfy the NPS criteria. Consequently, they will not be causing offence to the core purpose of the avoid Objective. We accept the locational part of the Objective will not be satisfied if the proposed development is located outside of the line.

- 157 However, the purpose of the NPS-UD responsive planning provisions through planning decisions, is to improve housing affordability by supporting competitive land and development markets by ensuring unanticipated or out of sequence land development opportunities are not rejected without a merits assessment.
- 158 Directive policies constraining development inside metropolitan urban limits have been identified by the NPS-UD and its supporting fact sheets as a form of planning that can adversely impact upon housing affordability and the supporting of competitive land and development markets.
- 159 Landowners and developers whose development opportunities fall within the likes of Metropolitan Urban Limits can adopt behaviours such as land banking that adversely impact upon supporting competitive land and development markets.
- 160 The NPS-UD seeks to addresses those effects of directive policies through the application of the responsive planning provisions. So, a decision according Objective 6.2.1 determinative weight cuts directly across the intention and purpose of the NPS-UD.
- 161 So it seems counter-intuitive, if not an absurd outcome to arrive at a planning decision after considering the merits that is ultimately determined by a irreconcilable opposing restrictive Objective such as 6.2.1.
- 162 While we accept that the CRPS is to be included as part of any merits assessment we do not accept that it be applied in the determining manner which Simpsons advance. To apply and weigh Objective 6.2.1 in that manner in our view clashes directly against the purpose of the NPS-UD responsive planning provisions that would frustrate their purpose.
- 163 If the Simpsons view on Objective 6.2.1 is to be followed then there would be no point in undertaking a merits assessment of a development proposal because, no matter how compelling the merits assessment is, the decision must always be to decline as the Objective is being applied as a form of veto.
- 164 Also if the Simpsons view is correct then effectively within the Greater Christchurch Area the responsive planning provisions of the NPS-UD would be placed on hold until such time the CRPS is reviewed next schedule for 2024. Such an outcome given the context of a housing affordability crisis as well as considering the purpose of the NPS-UD responsive planning provisions is irreconcilable.
- 165 Given the NPS-UD seeks to ensure unanticipated and or out of sequence developments are considered responsively, provided they add significantly to development capacity and contribute to well-functioning urban environments, the NPS-UD specifically recognises and provides for an exception or legitimate departure from restrictive Objectives such as CRPS Objective 6.2.1.
- 166 We have earlier commented on the Wynn Williams approach to resolving the conflict above at paragraphs 102 and 103 above.
- 167 Consequently, provided the plan change and companion zone submissions via evidence submitted at a merits hearing delivers on the development capacity and well-functioning urban environments outcomes sought by the NPS-UD and proper regard is had to the purpose of restrictive Objective 6.2.1 then a positive planning decision determined following a full merits hearing can be seen as a well-considered and supportable decision and not an unlawful one.

### Including Policy 8 - Criteria in the PDP Process.

- 168 We agree that the avoid development direction currently in the PDP need stay. We also agree utilising existing PDP wording as much as possible and relying on in scope submissions to seek to include guidance as to what unanticipated or out of sequence developments would need satisfy before approval is available.
- 169 Wording can leverage off objective 6(c) directing local authorities to be responsive to significant development opportunities when proposed. So, notwithstanding the avoid direction those significant developments that are unanticipated or out of sequence that satisfy the criteria can be considered.
- 170 The actual criteria can be gleaned from the intent of Policy 8 and Part 3. The intent is to enable transparency and responsiveness in planning decisions, to improve competition in land markets, to accelerate land supply and finally to discourage land banking. All of these intents or purposes support improved housing affordability.
- 171 As well as referring to the fact sheets for wording the PDP wording should include requirements that the proposed development has clear and realistic plans to be well connected to employment, amenities and public and active transport modes. As well the development need contribute to well-functioning urban environments.
- 172 We also refer to NPS-UD Part 4 Timing in particular 4.1 (1) that requires local authorities to give effect to the provisions of the NPS-UD as soon as practicable. So subject to content of the notified plan and scope of submissions decisions on the PDP could be a soon as practicable opportunity.

### Does Policy 8 apply to planning decisions on the DPR given it contains the words “plan changes” or is its application restricted to plan changes?

- 173 Policy 8 is clearly engaged by the plan change context. Rather than being procedural Policy 8 is a qualifier in that it qualifies only certain plan changes to be determined on their merits. Only those that will add significantly to development capacity are able to be considered on the merits.
- 174 In our earlier views on Policy 8 we expressed the view that given the wording in Policy 8 (primarily the explicit reference to plan changes) we did consider its application was restricted to plan changes. Now for the reasons stated we are less forceful in our thinking that Policy 8 should be restricted to just plan changes.
- 175 The first of those reasons is based on the recent Environment Court decision in *Eden* and others earlier referenced. In particular the discussion by the Court around s 43AA and 43AC could be utilised in support an argument so as to say given there is little distinction in planning terms as to the effect of and process for a plan review and plan change then notwithstanding the use of the words “*plan change*” within policy 8 policy 8 should apply to both.
- 176 We do note in the recent Commissioners decision on the Sleepyhead Factory and Residential Development proposal, the Commissioners at paragraphs 314 and 5 accepted Policy 8 did apply to a submission on a proposed plan.
- 177 The reasoning given by the Commissioners is very brief. Effectively they considered that a plan review was the same as or similar to a plan change. They considered there was little difference between the two. Therefore, they did not

consider that policy 8 need be restricted to plan changes and applied it to a submission on a proposed plan.

## Attachment 2 – Greater Christchurch Partnership Minutes (September 2021)

Greater Christchurch Partnership Committee  
10 September 2021



### Karakia – Timatanga Opening Incantation

Councillor Phil Clearwater led the committee in karakia

The agenda was dealt with in the following order.

#### 1. Apologies Ngā Whakapāha

Committee Resolved GCPC/2021/00026

That the apologies received from Jane Huria and Mayor Sam Broughton for early departure, and from Dr Te Marie Tau, and Councillors Malcolm Lyall and Neville Atkinson for absence be accepted.

Mayor Dan Gordon/Councillor Niki Mealings

Carried

#### 2. Declarations of Interest Ngā Whakapuaki Aronga

There were no declarations of interest recorded.

#### 3. Deputations by Appointment Ngā Huinga Whakaritenga

There were no deputations by appointment.

#### 4. Confirmation of Previous Minutes Te Whakaāe o te hui o mua

Committee Resolved GCPC/2021/00027

That the minutes of the Greater Christchurch Partnership Committee meeting held on Friday, 9 July 2021 be confirmed.

Mayor Dan Gordon/Sir John Hansen

Carried

#### 5. Greater Christchurch Housing Development Capacity Assessment

Committee Comment

David Falconer, Tim Harris, and Ben Baird presented the July 2021 Housing Capacity Assessment to the Committee that will inform spatial planning. The Housing Capacity assessment is a 'point-in-time' assessment that uses historical statistics to create a forecast of future housing demand. Further pieces of work on demand for papakainga housing and housing bottom lines will be completed during 'stage 2'.

The Committee:

- Accepted this is a compliance report.
- Noting the report relies on historical statistics, expressed concern that the report does not reflect the current reality of unavailability of land in Selwyn and Waimakariri District's.
- Noted that projecting demand based on historical statistics has an inherent assumption of the status quo.
- Noted that the Spatial Plan may consider incentives to promote housing density and a variety of housing typologies.

Item 4 - Minutes of Previous Meeting 13/08/2021