

BEFORE THE SELWYN DISTRICT COUNCIL

UNDER the Resource Management Act 1991

AND

IN THE MATTER Of a request to change the Operative Selwyn District Plan –
Plan Change 68

**SUBMISSIONS ON BEHALF OF URBAN HOLDINGS LIMITED,
SUBURBAN ESTATES LIMITED AND CAIRNBRAE DEVELOPMENTS LIMITED**

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A handwritten signature in dark ink, reading "Anthony Harper". The signature is fluid and cursive, with the first letters of the first and last names being capitalized and prominent.

1 INTRODUCTION

- 1.1 Plan Change 68 (**PC68**) seeks to change the Operative Selwyn District Plan (**OSDP**) by rezoning approximately 67.5 hectares of land located between Trents Road, Shands Road, and Hamptons Road to the southwest of Prebbleton. The Applicants seeking a rezoning from Rural Inner Plains to Living Z.
- 1.2 Rezoning will enable significant additional capacity of approximately 820 new residential allotments in Prebbleton, and directly contribute to alleviating the housing crisis within the Selwyn District. The evidence points to an insatiable level of demand for housing and sections in the District, demand that surpasses existing supply by a long way. This has resulted in home ownership becoming increasingly unaffordable for many families, something local authorities should strive to remedy with urgency.
- 1.3 Evidence on behalf of the Applicants demonstrates the unaffordable nature of the property market over the last 18 months, and how it has exceeded all expected forecasting. The evidence suggests this dysfunctional market should be addressed immediately by local authorities.
- 1.4 The Council should be acutely aware of the high levels of demand for housing in the Prebbleton area, low to non-existent supply, and out of reach unaffordability because local authorities are required by the Canterbury Regional Policy Statement (**CRPS**) to carry out monitoring of housing supply and demand within territories.¹ This includes monitoring and review of housing affordability.
- 1.5 The National Policy Statement on Urban Development 2020 (**NPS UD**) provides local authorities an avenue to alleviate the housing crisis, through utilising the responsiveness framework set out in Objective 6 and Policy 8.
- 1.6 As described in the *Recommendations and decisions report on the NPS UD*:

"the current planning system can be slow to respond to these changing circumstances... which can lead to a mismatch between what is enabled by planning and where development opportunity (or demand) exists. This can lead to delays in supply, or incentivise land banking. The intent of the responsive planning provisions in the NPS UD is to:

*...ensure that plan change requests are considered on their own merits, irrespective of infrastructure funding constraints, and to ensure that decision-making supports developments that are of scale and contribute to well-functioning urban environments."*²

- 1.7 The Applicants' case is that PC68 should be considered by Council in a manner that is consistent with the responsiveness policy included in the NPS UD. The responsiveness policy was included to allow a pathway for flexibility, to enable a responsive and active consideration of the existing situation at the time of any plan change requests.

¹ Objective 6.3.11 Canterbury Regional Policy Statement: Monitoring and Review

² Ministry of Housing and Urban Development and Ministry for the Environment *Recommendations and decisions report on the National Policy Statement on Urban Development*. Wellington, 2020. At 59.

- 1.8 The Applicants are experienced developers, well positioned to provide capacity at pace. The Applicants wish to contribute meaningfully towards relieving the housing crisis by having this plan change approved.
- 1.9 The opposing Regional and City Councils ask that you decline PC68. These Councils say (through evidence) that any decisions on enabling further house supply beyond those areas identified in the RPS should await a spatial planning process, followed by a review of the RPS, followed by changes to the District Plan.
- 1.10 With respect, we submit this would simply not be a strong enough action to remedy the current housing crisis. Instead, what is needed is swift and purposeful decision-making in order to counteract the factors contributing to this crisis.

2 OVERVIEW OF THE ISSUES

- 2.1 The legal and planning issues to be determined are:
- a Whether PC68 can be approved in light of the, doctrinaire or hard limit approach adopted in the Canterbury Regional Policy that urban development falling outside designated greenfield priority areas is to be "avoided";³
 - b Whether PC68 would add significantly to development capacity to meet the expected demands for the area; and
 - c Whether PC68 will contribute to a well-functioning urban environment?;
- 2.2 The main body of these submissions focuses on the first issue, as it is the key legal issue raised in submissions and evidence filed to date.
- 2.3 The other issues are touched upon relatively briefly, noting they have also been comprehensively addressed in the evidence presented both on behalf of the Applicants, and within Mr Cleese's thorough s 42A Report. Finally, a response is provided to other matters raised in the planning evidence filed on behalf of submitters, particular those which raise legal issues.
- 2.4 In advance of addressing the matters summarised above, we first set out the statutory framework for assessing plan change applications and also provide a summary of the principles of statutory interpretation.

3 STATUTORY FRAMEWORK

- 3.1 *Colonial Vineyards*⁴ is typically cited as providing an appropriate summary of the framework against which plan changes should be tested:

³ Objective 6.2.1.3 Canterbury Regional Policy Statement 2013, as amended July 2021

⁴ *Colonial Vineyards v Marlborough District Council* [2014] NZEnvC 55

- a A district plan change should be designed to accord with and assist the territorial authority to carry out its functions so as to achieve the purpose of the Act.
- b A district plan change must give effect to any national policy statement, national planning standard and operative regional policy statement.
- c Each proposed objective is to be evaluated by the extent to which it is the most appropriate way to achieve the purpose of the Act.
- d The policies are to implement the objectives, and the rules are to implement the policies.
- e Each proposed policy or method is to be examined, having regard to its efficiency and effectiveness, as to whether it is the most appropriate method for achieving the objective of the district plan by:
 - a Identifying other reasonably practicable options for achieving the objectives;
 - b assessing the efficiency and effectiveness of the provisions in achieving the objectives; and
 - c summarising the reasons for deciding on the provisions
- f In making a rule, the territorial authority must have regard to the actual or potential effects on the environment.

- 3.2 Given the present context i.e. the NPS-UD post-dating both the RPS and the Operative District Plan by some time, and as discussed in more detail below, the prescriptive objectives and policies within these subordinate documents should not be applied in such a manner as to prevent private plan applications being approved.

4 PRINCIPLES OF STATUTORY INTERPRETATION

- 4.1 In determining the key issues, a reminder of the principles of statutory interpretation as they apply to subordinate legislation is handy.
- 4.2 A good summary can be found in *Simons Pass Ltd v MacKenzie District Council*⁵;

[25] ... The leading Court of Appeal authorities include J Rattray & Son Ltd v Christchurch City Council (decided before the RMA was enacted) and Powell v Dunedin City Council (decided in 2005).

⁵ *Simons Pass Station Limited v Mackenzie District Council* [2020] NZHC 3265, (2020) 22 ELRNZ 277 at paras [25] – [35] and [38]

[26] As its primary statement of the applicable principles, the Court adopted the Court's earlier formulation in *Auckland Council v Budden*, where it was stated:

- "[36] The principles for the interpretation of a subordinate RMA planning instrument are also well settled and not contentious. We are guided by the Interpretation Act 1999 ('IA'), particularly s 5 on purposive interpretation. The principles are also as set out in the leading Court of Appeal authorities of *Rattray* (decided pre-RMA) and the more recent decision in *Powell* (where *Rattray* was applied and interpreted in relation to an RMA district plan matter). In particular, we apply the approach described in the following passage in *Powell*:

[35] ... While we accept it is appropriate to seek the plain meaning of a rule from the words themselves, it is not appropriate to undertake that exercise in a vacuum. As this Court made clear in *Rattray*, regard must be had to the immediate context ... and, where 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 rigid adherence to the wording of the particular rule itself would not, in our view, be consistent with a judgement of this Court in *Rattray* or with the requirements of the Interpretation Act.

[37] We add that, for subordinate legislation, where examination of the immediate context of the plan leaves some uncertainty, it is also permissible to consider provisions in light of the purpose they fulfil in the authorising legislation (in this case, the RMA). Similarly, the fact that a district plan is to give effect to a RPS can make the latter of some relevance to the interpretation of the former."

...

[28] In the Judgment, the Court went on to observe that a contextual and purposive approach to interpretation requires consideration of those matters the High Court identified in *North Canterbury Clay Target Association Inc v Waimakariri District Council*, being:^[18]

- the text of the relevant provision in its immediate context;
- the purpose of the provision;
- the context and scheme of the plan and any other indications in it;

- the history of the plan;
- the purpose and scheme of the Act;
- any other permissible guides to meaning.

[29] Counsel on this appeal accepted the relevance of those identified factors. Their relevance is underscored by the observations of the Supreme Court in *Commerce Commission v Fonterra Co-operative Group Ltd* where it was stated:

"[22] It is necessary to bear in mind that s 5 of the Interpretation Act 1999 makes text and purpose the key drivers 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 s 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."

4.3 To summarise the above principles:

- a the words of the document are to be given their ordinary meaning unless it is clearly contrary to the statutory purpose or social policy behind the plan or otherwise creates an injustice or anomaly;
- b the language must be given its plain and ordinary meaning, the test being "what would an ordinary reasonable member of the public examining the plan, have taken from" the planning document;
- c the interpretation should not prevent the plan from achieving its purpose; and
- d if there is an element of doubt, the matter is to be looked at in context and it is appropriate to examine the composite planning document.

4.4 In circumstances where the plain ordinary meaning of a provision creates an anomaly, inconsistency or absurdity, the other principles of interpretation must be taken into account in order to determine its proper interpretation.

4.5 Where there is an inconsistency between two documents, particularly where one is a higher order document, the Courts will first seek to reconcile this inconsistency and allow the two

provisions to stand together.⁶ Indeed, decision-makers are under an obligation to make a "thoroughgoing attempt to find a way to reconcile" conflict.⁷

4.6 As a last resort the doctrine of implied repeal would be applied if inconsistencies cannot be reconciled.⁸

4.7 Finally, extrinsic materials can be considered as relevant to an interpretation, the critical factor being whether the material is sufficiently relevant.⁹ In the present case, we submit there is nothing to preclude you from considering background materials in the development of the NPS, including a decision by the responsible Ministers on the draft NPS UD, and subsequent guidance issued as to its meaning and application.

5 OVERVIEW OF THE PLANNING INSTRUMENTS

National Policy Statement on Urban Development

5.1 The NPSUD came into force on 20 August 2020. Of course, the NSPUD must be considered in the round, however the objectives and policies of particular relevance to PC68 include:

Objective 1: *New Zealand has well-functioning urban environment that enable all people and communities to provide for their social, economic, and cultural wellbeing, and for their health and safety, now and into the future.*

Objective 2: *Planning decisions improve housing affordability by supporting competitive land and development markets*

Objective 3: *Regional policy statements and district plans enable more people to live in, and more businesses and community services to be located in, areas of an urban environment in which one or more of the following apply:*

(a) *The area is in or near a centre zone or other area with many employment opportunities*

(b) *The area is well-served by existing or planned public transport*

(c) *There is high demand for housing of for business land in the area, relative to other areas within the urban environment*

Objective 6: *Local authority decisions on urban development that affect urban environments are:*

(a) *Integrated with infrastructure planning and funding decisions; and*

(b) *Strategic over the medium term and long terms; and*

⁶ *R v Taylor* [2009] 1 NZLR 654.

⁷ *Royal Forest & Bird v Bay of Plenty Regional Council* [2017] NZHC 3080 at [38].

⁸ *Taylor v AG* [2014].

⁹ *Sky City Auckland Ltd v Gambling Commission* [2008] 2 NZLR 182 at [38]- [55]

(c) Responsive, particularly in relation to proposals that would supply significant development capacity.

Policy 1: *Planning decisions contribute to well-functioning urban environments, which are urban environment that, as a minimum:*

(a) *Have or enable a variety of homes that:*

- i. Meet the needs, in terms of type, price, and location, of different households; and*
- ii. Enable Maori to express their cultural traditions and norms;*

(b) ..

(c) *Have good accessibility for all people between housing, jobs, community services, natural spaces, and open spaces, including by way of public or active transport; and*

(d) *Support, and limit as much as possible adverse impacts on, the competitive operation of land and development markets; and*

(e) *Support reductions in greenhouse gas emissions; and*

(f) *Are resilient to the likely current and future effects of climate change.*

Policy 2: *Tier 1, 2 and 3 local authorities, at all times, provide at least sufficient development capacity to meet expected demand for housing and for business land over the short term, medium term, and long term*

Policy 6: *When making planning decisions that affect urban environments, decision-makers have particular regard to the following matters:*

(d) *The benefits of urban development that are consistent with well-functioning urban environments (as described in Policy 1)*

(e) *Any relevant contribution that will be made to meeting the requirements of this National Policy Statement to provide or realise development capacity*

Policy 8: *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:*

(a) Unanticipated by RMA Planning documents; or

(b) *Out-of-sequence with planned land release.*

- 5.2 These objectives and policies are to be implemented by a non-exhaustive list of measures local authorities must take, including the establishment of Housing Bottom Lines¹⁰, quarterly monitoring requirements on demand and supply¹¹ and the preparation of capacity assessments¹² which are to inform the preparation of 6 yearly Future Development Strategies¹³. A key purpose of an FDS is to spatially identify the broad locations in which development capacity will be provided over the long term, in both existing and future urban areas.¹⁴ Intensification and greenfield expansion is contemplated.
- 5.3 In the present case, the NPSUD also includes a requirement on behalf of the District Council to provide **at least sufficient development capacity** to meet expected demand for housing in both existing **and** new housing areas (3.2). Again, the clear message is that growth is anticipated to be both up and out.
- 5.4 In respect of the requirement to be responsive, Clause 3.8 stipulates that local authorities must have particular regard to the development capacity provided by a plan change if that development capacity:
- (a) *Would contribute to a well-functioning environment*
 - (b) *Is well-connected along transport corridors; and*
 - (c) *Meets the criteria set under subclause (3); and*
- (3) *Every regional council must include criteria in 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.*
- 5.5 To summarise the above, the overarching purpose of the NPS UD is to set in place a framework to address an ongoing critical social and economic issue facing New Zealand, this being the undersupply of housing capacity to meet demand. This framework must operate to ensure that competitive land and development markets are supported in order to provide for affordable housing. Sufficient development capacity **must** be enabled in the short (3 years), medium (3-10 years) and long term (30 years). There is a stated requirement **at all times** to meet the demand for housing.
- 5.6 Under this framework, local authorities must be responsive/have particular regard to plan changes which provide for significant development capacity **even if** the development capacity is **unanticipated** i.e. unplanned or unforeseen in current planning documents.

Chapter 6 of the Regional Policy Statement

- 5.7 The Commissioner will be familiar Chapter 6 of the RPS, which was inserted into the RPS in December 2013 as part of the Government's response to the Canterbury Earthquakes.

¹⁰ Clause 3.6 NPSUD

¹¹ Clause 3.9 NPSUD

¹² Clause 3.10 & Subpart 5 NPSUD

¹³ Subpart 4 NPSUD

¹⁴ Clause 3.13 (a) NPSUD

- 5.8 Chapter 6 was written with a clear focus on the recovery and rebuilding of Greater Christchurch after the earthquakes, within the recovery period of 2013-2028. A strong focus on efficient recovery, relocation and business growth, and where that would take place is evident. A key concept of certainty is also apparent, in that certainty of future development would lead to efficient investment decisions by infrastructure providers and developers.
- 5.9 While this was vital at the relevant time, things have moved on from the time of recovery, and it is now a time of growth. As the evidence of Mr. Sellars and Mr. Colegrave illustrate, nowhere is this more evident than in the Selwyn District, which faces an ongoing and sustained high level of demand for housing.
- 5.10 Post 2013, the only amendment of present relevance to Chapter 6 was Change 1. This was initially prepared under the previous NPS UD 2016, and then finalised under the later 2020 version. Plan Change 1 included "targets" for housing development capacity in Greater Christchurch, for the period 2018-2048. It also identified Future Development Areas that may be rezoned if certain criteria are met.
- 5.11 As the evidence of Mr. Colegrave and Mr. Sellars demonstrates, development capacity in Selwyn District is chronically understated when compared to forecast demand. Further, Mr. Colegrave confirms that this undersupply is not remedied by the FDAs which are not considered as plan-enabled capacity by the NPS UD. Even if they were, both the RPS and indeed the subordinate District Plan which parrots the RPS still fail, in Mr. Colegrave's opinion, to *at all times, provide at least sufficient development capacity to meet expected demand for housing and for business land over the short term, medium term, and long term.*
- 5.12 As a further point, the RPS does not include, as required by the NPS, criteria on significant development capacity. It is now approximately 18 months since the NPS was gazetted and objectively regarded, the lack of any obvious progress on this matter is difficult to justify.
- 5.13 Accordingly, it is submitted that the CRPS plainly does not give effect to the NPS UD. Nor does the Operative Selwyn District Plan, which of course incorporates the hard urban limit approach of the RPS and therefore does not have sufficient zoned land to meet ongoing demand.

6 RECONCILING THE NPS UD & RPS

- 6.1 For present purposes, the critical provisions of Chapter 6 relied upon by the Canterbury Regional Council (CRC) and Christchurch City Council (CCC) are Objective 6.2.1.3 and its supporting Policy 6.3.1:

Objective 6.2.1:

Recovery framework

Recovery, rebuilding and development are enabled 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;*

Policy 6.3.1 Development within the Greater Christchurch Area

In relation to recovery and rebuilding for Greater Christchurch:

1. *give effect to the urban form identified in Map A, which identifies the location and extent of urban development that will support recovery, rebuilding and planning for future growth and infrastructure delivery;*

...

3. *enable development of existing urban areas and greenfield priority areas, including intensification in appropriate locations, where it supports the recovery of Greater Christchurch;*

4. *ensure new urban activities only occur within existing urban areas or identified greenfield priority areas as shown on Map A, unless they are otherwise expressly provided for in the CRPS;*

- 6.2 The above provisions remain essentially unchanged since 2013. Collectively, they establish a doctrinaire, hard urban limit, approach which directs the location of future development and the avoidance of development outside these locations.
- 6.3 The tenor of the evidence from the Canterbury Regional Council and the Christchurch City Council is that the above, directive, provisions of the RPS must prevail over the NPS UD. Mr. Langman is essentially of the view that the enabling of housing capacity should adhere to this entrenched, hard limit, framework and that the enabling of capacity should essentially be left to an embryonic (at best) spatial planning process, followed by a review of the RPS in late 2024.
- 6.4 How then is this particular planning conundrum or tension between the NPS & RPS to be resolved or reconciled?

The Hierarchy

- 6.5 To begin, the Resource Management Act 1991 (**RMA**) provides for a three-tiered planning management system for the management of natural and physical resource. These documents are interlinked and form a hierarchy, dictating which document should give effect to which. The hierarchy of these planning documents is of particular relevance within plan change application decisions. In hierarchical order highest to lowest, these documents are first: national policy statements, second: regional policy statements, and third: district plans.
- 6.6 National policy statements are published by central Government, and put in place to guide decision-making by councils under the RMA at national, regional and district levels. Section 45 RMA reads that a national policy statement's purpose is to state objectives and policies for matters of national significance, in the present case the housing crisis besetting New Zealand.
- 6.7 Regional and district council planning instruments are required under the RMA to give effect to national policy statements, as the higher ranking planning documents published by central Government.¹⁵
- 6.8 The Supreme Court decision in *King Salmon*¹⁶ states that to "give effect to" is a strong direction and demonstrates that national policy statements give more than just general guidance to local authorities. More than an "overall judgment" approach is required when implementing the policies of a national policy statement.¹⁷
- 6.1 *King Salmon* also contains several observations which are relevant to PC68 as to why decision-makers must give effect to national policy statements:
- a The hierarchical scheme of the RMA;
 - b National policy statements allow central government input into local decisions and decision makers should not decline to implement aspects of a National Policy Statement;
 - c That where provisions are in conflict between two planning documents, it is important not to conclude too readily that reconciliation cannot be achieved.
- 6.2 Finally the district plans at local council level, in today's context the Operative Selwyn District Plan, are required to implement the direction given by both regional, and national level planning documents. Where any changes are proposed to be made to district plans, the higher order documents should be considered when deciding on the proposed changes.

¹⁵ Required by S 66 and 67(3)(a) Resource Management Act 1991

¹⁶ *Environmental Defence Society Inc v The New Zealand King Salmon Company Ltd* [2014] NZSC 38.

¹⁷ *Environmental Defence Society Inc v The New Zealand King Salmon Company Ltd* [2014] NZSC 38 at [132].

Again, to state the obvious, the District Plan is required by the NPS to, at all times, meet the demand for housing. It plainly does not.

- 6.3 Where a document or provision published later in time is said to be inconsistent or at odds with a document published earlier, it is logical to assume by the process of statutory amendment that the intention of the later in time document was to amend the earlier document. It is accepted of course that this canon of statutory interpretation has been described by the Court of Appeal in *R v Pora*¹⁸ as being too mechanical, and that where there is inconsistency, the proper approach is to determine which is the leading provision:

[38] .. Preference for a later provision is equally a default one which presupposes a mechanical rather than a purposive approach to statutory interpretation. The later is not to be preferred if the earlier expressly provides that it is to prevail.

[39] The proper approach is that described by Lord Herschell in Institute of Patent Agents and referred to above in paragraph [4]. Where there is inconsistency the court must determine which is the leading provision. This approach does not prevent implied repeal where it is clear that a later enactment supplants an earlier one. It makes it clear however that there is no chronological formula to be mechanically applied.

- 6.4 In terms of the issue at hand, it is submitted that the document at the top of the planning hierarchy i.e. the NPSUD (Objective 6 & Policy 8 included) is patently the leading provision and therefore must be read as prevailing over inconsistent provisions within the subordinate RPS.
- 6.5 Further, the purpose or focus of this later in time instrument is on addressing a particular issue i.e. the housing crisis and therefore must be considered the dominant component of the planning framework against which this Plan Change must be tested. As outlined above, it specifically sets out what local authorities must do to tackle this issue of national significance, including being responsive to plan changes such as PC68. In contrast, the focus or purpose of Chapter 6 remains predominantly on the recovery and rebuilding of Greater Christchurch with limited provision for growth out to 2028 grafted onto its framework by means of Change 1.
- 6.6 As summarised above, the NPSUD contains a range of actions, including long term planning processes. These processes are, or should be, read as complementary to plan change processes which inherently provide greater flexibility to urgently respond to the need to enable further housing capacity.

Absurdity

- 6.7 CRC/CCC essentially say that, taking a responsive approach means that while you are entitled to "open the door" to consider PC68 on its merits, ultimately the door must be closed shut because Objective 6.2.1 and Policy 6.3.1 direct this outcome. Put another way, they say you can have particular regard to unanticipated development that provides

¹⁸ *The Queen v Pora* [2000] NZCA 403

significant additional capacity, but you must decline it because it is unanticipated. Respectfully, this is an absurd position to adopt, and one which would render meaningless Policy 8 in the context of Greater Christchurch, Selwyn District included.

- 6.8 We refer to Commissioner Caldwell's decision on Plan Change 67, where he held in respect of the tension between Policy 8 and the RPS:

161. Policy 8 specifically addresses responsiveness to plan changes. It must be given some meaning. It does not address development which is simply out-of-sequence. It also addresses development that is "unanticipated" by the RMA planning documents. In my view, "unanticipated" must be read to include circumstances where planning documents (here the CRPS as reflected in the SDP) contain avoidance objectives. Development in areas outside of those identified in Map A is clearly "unanticipated".

162. To read otherwise would amount, in my view, to a significant watering down, or even an undermining, of the responsive provisions of the NPS-UD. It would lead to a conclusion that the responsive planning provisions of the NPS-UD did not apply to plan changes within Greater Christchurch. Mr Wakefield submitted that giving effect to Chapter 6 of the CRPS demands that PC67 is declined, and that there is no flexibility to decide otherwise. I do not accept that submission. In my view, that interpretation is not one which is available on a proper interpretation of the NPS-UD, and recognising its position in the hierarchy of documents.

163. Ms Semple identified the position the NPS-UD holds in the hierarchy of documents prepared under the RMA. I consider, given the position the NPS-UD holds in the hierarchy of documents, that it is the latter in time document, promulgated in the context of a housing crisis, and when interpreted by considering its text and its purpose and the contextual matters, it enables qualifying plan changes to be assessed on their merits, notwithstanding the avoidance objectives and policies of Chapter 6.

164. Overall, I consider Policy 8 provides the method by which a qualifying plan change can be assessed on its merits. By a 'qualifying plan change', I mean one that would add significantly to development capacity and contribute to well-functioning urban environments.

- 6.9 Commissioner Caldwell's rationale is clear. That is, the NPS UD responsiveness policy has been intentionally included by Government in order to allow a pathway for development in areas unanticipated by planning documents. This is in recognition of the social context of a housing crisis with demand for housing rising, and supply tightening.
- 6.10 To rigidly apply the "avoidance" approach in the RPS would prevent local authorities from acting in accordance with the NPS UD in being responsive to certain plan change proposals, to do so would be out of step with the NPS UD. Policy 8 is, in our submission, intended to address the restrictive attitude councils have toward such development proposals, and to apply to exactly the types of changes proposed by the Applicant in PC68. Thus, to "avoid"

sincere consideration of such a plan change as PC68 on its merits would fundamentally go against the purpose of the NPS UD.

Extrinsic Evidence

- 6.11 For completeness, we set out below documents relating to the development of the NPSUD which we submit are materially relevant to the issue of inconsistency between the responsive NPS and the entrenched, hard limit, approach of the RPS
- 6.12 We commence with *Planning for Cities – A discussion document on a Proposed National Policy Statement on Urban Development* (August 2019) (the Discussion Document).
- 6.13 The opening message from the Ministers of the Environment/Housing and Urban Development confirms housing and urban development is a priority for the Government. It points to a "**startling array**" of indicators that there is a problem and, as a consequence there is a need for urban land and housing markets to work better and be more competitive by significantly increasing the number and type of development opportunities in the market.

This Government has made housing and urban development a priority. Everyone in New Zealand deserves healthy, secure and affordable homes that provide access to jobs, education, amenities and services. When performing well our cities can contribute to the well-being of residents, and raise living standards for all. Our cities need to be able to adapt and respond to the diverse and changing needs of all people, whānau, communities and future generations, and function within environmental limits.

However, a startling array of indicators in housing and urban development tells us we have a problem: severe housing unaffordability, falling home ownership, increased hardship and homelessness, increased household debt, intergenerational inequality, congestion, poor transport choice and urban pollution.

*It is clear our urban land and housing markets need to work better and be more competitive. We need to significantly increase the number and type of development opportunities in the market, and ensure future growth benefits our towns and cities.*¹⁹

- 6.14 The Discussion Document refers to existing:

*"... urban land markets that do not enable housing development to keep up with growth and ensure land is affordable...; and the need: to remove unnecessary restrictions on development to allow growth up (eg, higher density housing near existing services and infrastructure) and out (eg, well connected houses in greenfield areas with good infrastructure)".*²⁰

¹⁹ Planning for Successful Cities – p.7

²⁰ Planning for Successful Cities – p.8

- 6.15 In respect of greenfield growth, the Discussion Document speaks to the need for a more responsive planning system:

Providing for further greenfield development

Summary of the proposal

To meet growth requirements local authorities may need to provide for growth out as well as up. An important part of this work is to ensure outward development is managed in the best way possible to deliver quality urban environments, while being responsive to development beyond areas planned for.

The Government is considering provisions in the NPS-UD that would direct local authorities with major urban centres in their jurisdiction to consider plan change requests for urban development in locations that are out of sequence (eg, locations that are identified for future urban development but are dependent on land release sequence), or outside of areas identified for urban development where particular conditions are met. For example, where this development would support good urban outcomes, environmental effects could be adequately managed, and the full costs of development (including on the wider network) could be met. These conditions are not intended to override or replace the consideration of environmental effects through a usual plan change process – those considerations must still take place.

Rationale

Local authorities signal where they are planning on enabling the future development of the urban area through local plans (eg, holding zones like the future urban zones in Auckland) or through non-statutory processes like spatial planning. These plans and processes often signal where urban development can occur once certain conditions are met, such as the provision of trunk infrastructure and other amenities that support urban areas.

The proposed NPS-UD recognises the value of having well-integrated and coordinated growth areas. This is encouraged through the FDS requirements. However, the proposed NPS-UD also recognises that urban areas are dynamic and complex systems that are continually changing in response to wider economic and social change. As much as cities need to anticipate and plan for growth, they must also remain open to change and be responsive to demand.

One challenge with the current planning system is that it is not responsive enough to changing 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. The proposed NPS-UD is seeking to support the UGA's objective to provide a system that is more open and responsive to new urban development opportunities in the areas where they are most needed.

The intention is that these plan changes for urban development are (or will be) well connected to jobs and amenities through transport choice (especially by public or active

transport) and that the onus to provide infrastructure (including wider network considerations) should not fall on the local authority when not provided for by their long-term plan and/or development plan process. [My Emphasis]

- 6.16 Following public input on the Discussion Document, the *Recommendations and decisions report on the National Policy Statement on Urban Development*. Wellington: Ministry for the Environment and the Ministry of Housing and Urban Development was released in July 2020 (the Decision).²¹
- 6.17 Chapter 12 of the Decision addresses the need for a responsiveness policy, its conclusions being:

Responsiveness policy

The panel broadly supported the intent of improving planning responsiveness and agreed there would be value in retaining specific policy direction for local authorities to actively consider out-of-sequence and/or unanticipated development. Officials recommend introducing a policy to ensure planning decisions affecting urban environments are responsive to proposals that would add significant development capacity. This policy would apply both to RPSs and decisions on plan changes to district and regional plans. In particular, this policy should provide for opportunities to be considered on their own merits and not rejected simply because they do not align with current plans.

The policy would recognise the benefits of plan changes that would add significantly to development capacity and contribute to well-functioning urban environments. Because the intent is responsiveness in the planning system, this would apply to both greenfield and brownfield developments. Significance would be determined by councils and could include development capacity significant to Māori that contributes to a well-functioning urban environment and has the necessary transport connections.

This approach will also address the possibility raised by submitters and the panel for local authorities to entrench hard urban growth boundaries in their RPSs. This could undermine the intent of the NPS-UD, because RPSs are not subject to private plan changes under the RMA. [My emphasis]

- 6.18 Both the Discussion Document and the Decision are explicit in directing that the purpose behind a responsiveness policy is to ensure plan changes (greenfield included) which would add significantly to development capacity must have the ability to be considered on merit. PC68 cannot be rejected as is urged by CRC and CCC simply because it is said to be inconsistent with their strategic framework.
- 6.19 Overall therefore, we submit that a responsive approach requires you to consider PC68 on its merits and, in doing so, to put to one side the hard urban limits in Chapter 6.

²¹ <https://environment.govt.nz/assets/Publications/Files/Recommendations-and-decisions-report-NPS-UD-final.pdf>

- 6.20 It is not of course the Applicants' position that Policy 8 is a trump card which demands that PC68 be approved. Rather, the requirement of Policy 8 should be considered holistically. The Council need only be responsive where a change proposed would add to development capacity in the area "significantly", and contribute to "well-functioning urban environments". These matters are discussed below, and also in the detailed evidence on behalf of the Applicants.

7 SIGNIFICANT DEVELOPMENT CAPACITY

- 7.1 As noted above, the Regional Council has failed in its requirement to include criteria in the RPS as to what constitutes "significant development capacity". Accordingly, you are able to determine what it might mean.
- 7.2 The NPS UD defines an "urban environment" as an area of land that is, or is intended to be predominantly urban in character, or is intended to be part of a housing market of at least 10,000 people. The Council has previously considered Prebbleton, Lincoln and Rolleston collectively as an urban environment.²² This collection of townships has a population exceeding 10,000.
- 7.3 As noted in the Section 42A report (198 – 200), both CCC & CRC submitted that PC68 does not meet the threshold for "significant additional capacity". Their position is that the question of capacity should be assessed within the context of the Greater Christchurch area. Notwithstanding this position, Mr. Langman properly acknowledges [87] that the *contribution of housing proposed, in terms of quantum could be considered to be substantial*.
- 7.4 This concession aside, the evidence of Mr. Colegrave, Mr. Sellars and Mr. Cleese all are of the opinion that the significant additional capacity threshold is met. This is hardly a surprising conclusion given the absence of available sections within Prebbleton and the extent of ongoing demand. In addition, as noted above, the Applicants are extremely experienced developers and are able to provide capacity at pace.

8 CONTRIBUTING TO A WELL-FUNCTIONING URBAN ENVIRONMENT

- 8.1 The features of a "well-functioning urban environment" are set out in the NPS UD Policy 1, and include (but are not limited to) urban environments which:
- a Have or enable a variety of homes that meet the needs in terms of type, price and location, of different households;
 - b enable a variety of sites suitable for different businesses;
 - c have good accessibility for all people, including by way of public or active transport;
 - d support, and limiting as much as possible adverse impacts on, the competitive operation of land and development markets; and

²² S42A Report at para 36

- e Support reductions in greenhouse gases.
- 8.2 The fact sheet on well-functioning urban environments advises that local authorities should be proactive in removing barriers that limit social benefits.²³ These social benefits include good accessibility to employment, amenity and services.
- 8.3 In terms of (a) and (d) above, a poignant observation is that the current urban environment in Selwyn is **not** a well-functioning urban environment, particularly with respect to its housing market. Indeed, Mr. Sellars describes it as the exact opposite i.e. dysfunctional.
- 8.4 If approved, PC68 site would contribute substantially toward a well-functioning urban environment by adding 820 residential homes, and increasing population ready to support the Township's social and economic well-being. PC68 would contribute to social benefit in Prebbleton by providing homes in an area of high demand and in an area with good access to jobs, schooling and amenities. The proposed 820 lots will provide a variety of medium and low density allotments at a **minimum** of 12 households/hectare.
- 8.5 PC68 is expected to provide one-off economic stimulus by creating employment for around 262 people over an approximate 10 year construction period (see detail in evidence of Mr Fraser Colegrave at para 12.38). This equates to income from jobs directly in the pockets of local builders, architects, surveyors and their families. Economic benefit also trickles to businesses supplying goods for the development, and when the wages and salaries generated by the construction period are spent in the local or regional economy. This increased economic benefit will be seen in Prebbleton, and in nearby urban areas such as Rolleston and Christchurch – both demonstrated to be preferred spending hubs for residents in Selwyn.²⁴
- 8.6 That aside, PC68 site is directly adjacent to the Prebbleton area marked as an identified growth area in the Our Space report published by the Greater Christchurch Partnership.²⁵ This area has already been marked as suitable for future development because the Greater Christchurch Councils believe Prebbleton has the facilities, amenities, transport links and ability to undertake further development and a growth in population.
- 8.7 Further, Mr Clease has provided substantial analysis of the anticipated urban form for Prebbleton. He notes that the PC68 site is located in a manner that is consistent with future growth direction in the most recent strategic planning document undertaken for Prebbleton.²⁶ Mr. Clease concludes that the PC68 is a logical extension to the existing Township form.
- 8.8 Mr. Langman claims that the PC68 does not support a reduction in greenhouse gas emissions. He is critical of the Applicants for not providing any quantitative analysis of how

²³ *National Policy Statement on Urban Development 2020, Well-functioning urban environment fact sheet*, Ministry for the Environment, July 2020

²⁴ See evidence of Mr Fraser Colegrave, at 12.23, and Table 9

²⁵ See Figure 1, Our Space 2018-2048, Page 2

²⁶ Section 2A Report at p.135.

PC68 will address this matter, noting of course that no such analysis was undertaken by the CRC for the FDA's identified in Change 1 to the RPS.

- 8.9 Notably, the language of Policy 1 e) of the NPSUD refers to the word "support" in terms of reductions in greenhouse gas emissions. It does not say, for example, that greenhouse gas emissions are to be avoided or that a reduction in the same must be demonstrated or particularised. Further, looking at the wider context of the objectives and policies of the NPSUD, it is noted that Objective 3 contemplates the rezoning of areas that are not well serviced by existing or planned public transport. Rezoning is considered appropriate if other factors are at play, including proximity to areas of employment and areas where there is a high demand for housing. Policy 1 (c) refers to accessibility including by way of public or active transport. Plainly, and realistically, the use of private motor vehicles and attendant emissions must be contemplated.
- 8.10 This matter is of course referred to in evidence and will be addressed in more detail in the summaries prepared by Mr. Smith & Ms Harte. Suffice to say, it is their opinion that the location of the plan change, together with measures adopted to support alternative modes of transport (walking/ cycling) are supportive of a reduction in greenhouse gas emissions.

9 ADVERSE EFFECTS

- 9.1 Relevant to the Council's functions under s 31, the effects of the proposal have been assessed by experts on behalf of the Applicants, and need not be addressed in detail here. Rather we simply refer to those effects where a legal dimension has been raised in submissions or evidence.

Soil productivity

- 9.2 Mr. Mthamo provides a comprehensive assessment of the productivity of soils within the PC68 area. When considering whether PC68 may negatively affect the productivity potential of the soils in the area and future rural agricultural activities on the site, it is submitted that the cost and practical difficulty in sufficiently irrigating the sites, according to Mr Mthamo, would be too high to render this a practical reality.
- 9.3 Approving the plan change would not reduce the productivity potential of the area, and it is highly unlikely that anybody in the foreseeable future would be able to utilise the soils for highly productive farming.
- 9.4 In terms of the proposed National Policy Statement for Highly Productive Land referred to in submissions and evidence²⁷, it is just that i.e. proposed. As such, it does not have any legal weight.

Reverse Sensitivity

²⁷ Evidence of Marcus Langman [153] – [155]

9.5 Some submissions raised the issue of potential reverse sensitivity effects arising from potential complaints by new residents of the PC68 development.²⁸ Notably these relate to the Trents Nursery, and rural activities concerned with livestock and crops.

9.6 Reverse sensitivity is a well-established concept in RMA law, and has been defined as follows²⁹:

Reverse sensitivity is the legal vulnerability of an established activity to complaint from a new land use. It arises when an established use is causing adverse environmental impact to nearby land, and a new, benign activity is proposed for the land. The "sensitivity" is this: If the new use is permitted, the established use may be required to restrict its operations or mitigate its effects so as not to adversely affect the new activity.

9.7 Whether reverse sensitivity is a relevant effect to address is therefore dependent on the following factors:

- a There must be an existing established use which is causing an adverse environmental impact on adjoining land;
- b There is an intended, benign use for this adjoining land; and
- c This benign use may result in restrictions on the existing established use.

9.8 Examining the first factor above, there is no evidence of anything other than a very minor, and occasional, effect associated with spray drift from Trents Nursery.

9.9 Given the negligible level of effects associated with the market garden operation, it follows that the consequences of establishing more intense residential development in proximity to its boundary is unlikely to result in complaints and, in turn, is unlikely to result in restrictions on the incumbent operation.

9.10 Both Mr. Cleese and Ms. Harte come to essentially this conclusion, and are accordingly of the view that reverse sensitivity is not a barrier to approving PC68. Ms Harte discusses how the central block of PC68 has already been determined appropriate for rural residential development,³⁰ and so should not raise issues with existing land uses surrounding the site.

9.11 More broadly, while the RMA provides limited protection to incumbent uses (through existing use rights), the Act does not include an express principle that new activities must necessarily be curtailed or restricted simply to protect established uses. In the present case, while the District Plan incorporates some provisions in relation to setbacks from intensive farming uses, these provisions certainly do not extend to the protection of wholesale market gardening operations or low intensity farming operations.

²⁸ Evidence of Patricia Harte, at 16.1

²⁹ Bruce Tardy & Janine Kerr: *Reverse sensitivity – the Common Law Giveth and the RMA Taketh Away*. New Zealand Journal of Environmental Law, Vol. 3, 1999: 93-107

³⁰ Evidence of Patricia Harte, at 8.6

10 PLANNING EVIDENCE PRESENTED ON BEHALF OF SUBMITTERS

Mr. Langman

- 10.1 As a general observation, it appears from Mr. Langman's evidence that both the CRC & CCC are in a state of denial regarding the present housing crisis in Selwyn. In particular, Mr. Langman makes a number of claims, entirely unsubstantiated by expert evidence, that there is sufficient development capacity to meet demand in the District. He denies that there has been a "*growth spurt*" [64] and says that there is a *perception* of high demand in Selwyn District [102]. His analysis is, we submit, directly contradicted by the expert evidence provided by Mr. Sellars and Mr. Colegrave.
- 10.2 Mr. Langman also repeatedly refers to intensification being the preferred method for meeting future demand, and continually seeks to compare greenfield developments such as PC68 with opportunities for intensification. With respect, this ignores the simple fact that the NPSUD specifically provides for development both up and out – intensification and greenfield. Individual plan change applications are not the arena to debate the respective merits of intensification v greenfield expansion.
- 10.3 On the same issue, Mr Langman states in a number of places that greenfield expansion will compromise the intensification policies within the RPS and future opportunities for intensification. Even if that were a relevant consideration, in order to place any weight on such statements, supporting technical analysis would be essential. None is provided.
- 10.4 It appears the witness is labouring under the blunt impression that each purchaser of a Greenfield dwelling is a purchaser lost from an intensified development. Notably, the Greater Christchurch Housing Capacity Assessment of July 2021 (relied upon elsewhere in Mr. Langman's evidence) suggests that the relationship between infill and greenfield demand is far from being as simple as Mr. Langman appears to portray. The HCA states [34]:

Further market analysis however is required on the relationship between greenfield and infill development (namely whether one offset the other) to draw any further conclusions on what specifically has driven the historical demand for new neighbourhoods (i.e. house design, section size, price, and/or amenity) and whether these greenfield drivers are the same or different between spatial areas (i.e. a new subdivision within Waimakariri compared to new neighbourhoods in Selwyn or Christchurch City). Furthermore, whether the greenfield area demand drivers are the same or different than for redevelopment areas, or do some demand aspects such as proximity to schools, come more into play.

As a location the Christchurch Central City has historically accommodated a decreasing share of the overall population. This is more a product of an expanding urbanised area but nevertheless population growth in the Central City has, until recently, lagged the rate of population growth elsewhere and was reduced immediately post the 2010-2011 earthquakes. Public and private sector investment in the Central City over the last decade has seen increased popularity as a location. In the last two years population growth and new home completions have reached a decade high and there is a strong pipeline of new housing development projects currently in planning phases to meet current demand. There continues to be strong interest in the Central City from the development community and from potential buyers. It remains a priority growth area for the Christchurch City Council and continues to attract public investment activity.

- 10.5 Likewise, Mr. Langman does not provide any technical support for claims that the cumulative impact of this Plan Change and others would impact on the ability to service areas already planned for development. In any event, these claims are contradicted by the Applicant's expert evidence and that of Mr. England for the Council.
- 10.6 Mr. Langman states [8] that approval of proposals such as PC68 are likely to place pressure for further greenfield development on the periphery of Christchurch City and Waimakariri, because of the precedent it would set. The simple response is that the Courts have repeatedly held that the concept of precedent does not arise in the context of a plan change request³¹.
- 10.7 Finally, Mr Langman advances two solutions [76-79] which he says reconciles the NPS with the prescriptive, hard urban limit, objectives and policies of the CRPS. The solutions involve two alternative procedural pathways, one of which is for the District Council to request a change to the RPS. The other is an application for a local authority to seek a declaration to the Environment Court under s 80 of the RMA. In respect of the latter option, one must rhetorically ask why neither the CRC nor the CCC has taken this step to date?
- 10.8 Regardless, there is nothing in the NPS-UD which suggests that approval of private plan change applications should be contingent on an individual local authority undertaking a parallel or later in time process of requesting a change to the CRPS. Rather as is explicit from the Discussion Document and the Decision referred to above, and is clear from Policy 8, private plan change applications must be considered on their merits. It should not need repeating that the private plan change mechanism has been a feature of the RMA since its inception, and is a mechanism specifically recognised in Policy 8.

Evidence of Mr. Williamson

- 10.9 Witnesses for the Applicants will respond in detail to Mr. Williamson. As an observation only, these witnesses [and the Applicants] are very familiar with the Selwyn planning framework and how to translate the zoning of land on paper into the reality of houses on the ground. They are fully conversant with how development is intended to happen within this framework and how it **does** work as intended, and without any risk of significant cost and burden to the community. PC68 seeks to adhere to this well established and proven framework.
- 10.10 In contrast, it is unclear whether Mr. Williamson has a working knowledge of how development occurs within the District, including the application of the Living Z provisions of the District Plan, the current Development Contributions Policy and other relevant provisions of the Council's Long Term Plan, which have programmed in a range of imminent infrastructure upgrades to support growth in the District.

³¹ See, for example, *National Investment Trust v Christchurch City Council* C41/2005, at para [67] *Canterbury Fields Management Ltd v Waimakariri DC* [2011] NZEnvC 199 at [93] –[97], *Bell Farms and Another v Auckland City Council* [2011] NZEnvC, at para [107]; *Wallace Group v Auckland Council* [2017] NZEnvC, at para [39] – [41]

- 10.11 It is equally unclear whether the witness has read the evidence of Mr. Colegrave and Mr. Sellars on the issue of demand and supply and, if so, understood that this demand is simply not catered for in the Operative District Plan, as is required by the NPSUD.
- 10.12 Mr. Williamson refers to documents such as the Urban Development Strategy of 2006, the Prebbleton Structure Plan, both documents which are essentially out of date, and certainly not reflective of the requirements of the NPSUD. Again, it appears from the evidence that the NPS UD is not deemed to be of particular relevance – if so, there is no analysis of the higher order document which the OSDP must give effect to.
- 10.13 With reference to his statement [61] that it is highly irregular to apply for and advance an application for a Plan Change when a Proposed Plan is underway. This opinion does not take into account the responsiveness provisions of the NPS UD. Nor does it recognise the simple fact that the Council has went through a process under Clause 25 of the First Schedule of the Act, which concluded that notification and processing of the Application was appropriate, as opposed to being highly irregular. Simply put, the Applicants are entitled to have PC68 determined now.
- 10.14 Mr. Williamson also appears to be unaware of the extent of submissions on the Proposed District Plan, including further submissions by his clients (Tod #0510 & Somerfield # 0599). Fundamentally however, the Proposed District Plan does not carry any weight at this point in time, certainly not in respect of plan change applications such as the present.
- 10.15 Finally, Mr. Williamson agrees that the Site has strategic importance in the context of future growth of Prebbleton and Greater Christchurch. So if the importance of the location is accepted, it would seem that the main concern is as to process. In that respect the private plan change process has been an inherent feature of planning under the RMA since its inception.

11 SUBMISSIONS RECEIVED- THE "ME TOOS"

- 11.1 The Applicants are neutral as to whether or not the additional land on the edges of the Plan Change should be included within the proposed rezoning.
- 11.2 As the Commissioner will have noted, the Applicants' experts have provided advice as to whether or not the "me too" land can be incorporated into the Plan Change area. All are of the view it can. Likewise, the Applicants endorse Mr. Cleese's well thought out analysis and reasoning for including (or excluding as the case may be) the additional land.
- 11.3 There remains of course the jurisdictional issue as to whether or not there is scope to include this additional land, and that comes down to the question of whether or not the submissions in question are "on" the Plan Change. While we understand that counsel for Mr. Shamy will address you in more detail on this jurisdictional issue, we set out a summary of the relevant case law.

11.4 The leading authority is the High Court's decision in *Clearwater Resort Ltd v Christchurch City Council*³², which incorporates the following bi-partite test:

- a A submission could be fairly regarded as "on" a variation "if it is addressed to the extent to which the variation changes the pre-existing status quo"; but
- b If the effect of finding the submission "on" the variation would be to permit amendments to a planning instrument without any real opportunity for participation by those potentially affected, that is a "powerful consideration" against finding that the submission was truly "on" the variation. It is important that "all those likely to be affected by or interested in the alternative methods suggested in the submission have the opportunity to participate". So, a submission that "came out of left field" which "proposed something completely novel" would be unlikely to be found to be "on" a variation.

11.5 *Clearwater* does not exclude zoning extension by submission. Incidental or consequential extensions of zoning changes proposed in a plan change are permissible provided:

- a The submissions do not raise any matters that should have been addressed within the Section 32 evaluation report. If no further S 32 issues are raised as a result of the submission, there is less reason to exclude it from the plan change;
- b Persons directly, or potentially directly affected by the additional changes proposed in the submission have been given the ability to respond to the additional changes; and
- c The submission is not "out of left field" and completely unrelated to the plan change remit

11.6 The subsequent decision of *Palmerston North City Council v Motor Machinists Ltd*³³ confirmed the bi-partite *Clearwater* test. In respect of "me too" submissions, the Court said:

Yet the Clearwater approach does not exclude altogether zoning extension by submissions. Incidental or consequential extensions of zoning changes proposed in a plan change are permissible, provided that no substantial further s 32 analysis is required to inform affected persons of the comparative merits of that change. Such consequential modifications are permitted to be made by decision makers under schedule 1, Clause 10 (2). Logically they may also be the subjection of a submission. [Emphasis added]

11.7 Given the expert analysis regarding the inclusion of these properties, it is unlikely that further substantial analysis under s 32 is required, including any further assessment under s 32AA.

³² *Clearwater Resort Ltd v Christchurch City Council* AP34/02, at [34]

³³ [2013] NZHC 1290

- 11.8 In terms of the second limb of the *Clearwater* test, the Commissioner should of course be conscious not to disenfranchise parties that may be affected by the extension of the zoning. That is a matter of judgement, noting of course that different considerations may apply to different properties. At the same time, there is a high level of interest in PC68, and it is certainly the case that parties with a strategic interest in PC68 are already submitters. These factors should assist in diminishing any natural justice concerns you may have.

12 CONCLUSION

- 12.1 In summary, it is evident that the current planning instruments (RPS & ODP) do not give effect to the NPSUD.
- 12.2 While the latter promotes the use of development strategies to broadly identify areas for long term development, it also incorporates a clear direction that local authorities must be responsive to plan changes such as PC68 which add significant additional capacity. The use of plan changes generally represent a more flexible tool for responding to demand when it arises, as opposed to long after.
- 12.3 Once the responsiveness requirement is accepted by Council, and the PC68 application given consideration based on its merits and what it can deliver to Prebbleton and beyond, there is no reason to decline this proposal.
- 12.4 There is a dire need to provide additional capacity now. If now is not the right time to utilise the responsiveness pathway, then when?

13 EXPERT WITNESSES

- 13.1 Andy Hall – infrastructure
- 13.2 Dave Compton-Moen – Urban Design
- 13.3 Fraser Colegrave – Economics
- 13.4 Gary Sellars – Real Estate
- 13.5 Dave Smith – Traffic
- 13.6 Patricia Harte – Planning
- 13.7 Victor Mthamo – Versatile Soils/ Flooding

GJ Cleary/ RM Parsons

21 March 2022.