

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

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

Anthony Harper
Solicitor Acting: Gerard Cleary
Level 9, Anthony Harper Tower
62 Worcester Boulevard,
PO Box 2646, Christchurch
Tel +64 3 379 0920
Fax +64 3 366 9277
Email

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

1 SCOPE OF REPLY

1.1 The submissions in reply address the following matters:

- (a) Relationship between the NPS UD & CRPS;
- (b) Whether the RPS as amended by Change 1 gives effect to the NPS-UD;
- (c) Response to Summary Statement of Nick Williamson;
- (d) Response to key issues identified in Residents' statements;
- (e) "Me too" submissions; and
- (f) Inclusion of a staging rule.

2 THE KEY ISSUE – THE RELATIONSHIP BETWEEN THE NPS UD & THE CRPS

2.1 It is not proposed to repeat our opening submissions on this matter, particularly as they anticipated the position taken by Mr. Wakefield in his legal submissions would be similar to previous Selwyn Plan Changes.

2.2 We note the Commissioner has been provided with a copy of the detailed legal advice prepared for the Council by Adderley Head, the substance of which accords with the position taken in our opening submissions that the prescriptive avoidance provisions of the RPS should defer to the later in time, higher order, NPS-UD.

2.3 A number of paragraphs of the Adderley Head advice are worth highlighting.

2.4 First, Paras 46-49 assess the primacy or otherwise of Policy 8 over the balance provisions of the NPS UD:

46 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.

47 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.

48 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 delivered following a plan review process.

2.5 Adderley Head therefore identify the different approaches towards enabling capacity in the NPS UD. The responsive provisions, Policy 8 included, are there to expeditiously address the housing crisis identified by Government in the NPS's background documents, as referred to in our opening submissions and as detailed in the Adderley Head advice. The

responsiveness provisions provide a means for enabling development that is distinct from, but supplementary to, that enabled under longer term planning exercises such as future development strategies.

- 2.6 We also agree with Adderley Head's conclusions regarding the tension between the responsiveness provisions of the NPS UD and Objective 6.2.1 of the CRPS, including the analysis provided at paras 161ff:

161 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.

162 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.

163 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.

164 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.

165 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.

166 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.

- 2.7 Fundamentally, it is the Applicant's position that to accord primacy to the avoidance Objective 6.2.1 of the CRPS would represent a reading down of Policy 8 of the NPS UD, in particular the reference to the requirement to have particular regard to development that is unanticipated by RMA "Planning Documents", which are defined to include regional policy statements. Such a requirement could not be meaningfully achieved if the inevitable outcome for all plan changes outside of the hard urban limits in the CRPS must be, as CRC and CCC assert, a refusal to approve.

- 2.8 Mr Wakefield submitted that responsiveness can be achieved in a number of ways including by collaborating with other local authorities and seeking to change the CRPS¹. Mr. Wakefield also submitted that within FDA's there is an ability to be responsive to plan change requests, while omitting to point out that FDA's are areas specifically anticipated for development within the RPS.²
- 2.9 Responsiveness should of course be the default approach for local authorities in dealing with the housing crisis. The point to be made however is the NPS UD specifically requires a responsive approach towards qualifying plan changes, PC 68 included.

An Administrative Pathway

- 2.10 Mr. Wakefield submitted that Policy 8 provides an administrative pathway for private plan changes. We submit such a characterisation downplays the importance of Policy 8, and its role in implementing the NPS UD.
- 2.11 The responsiveness provisions, as they apply to PC68 apply in two stages, the first being a decision under Clause 25 of the First Schedule to the RMA to either accept, adopt or reject the Plan Change for public notification. That decision has of course been made, and involved a careful analysis of the Request against the criteria in Clause 25 of the First Schedule to the Act. To some extent such a decision could be said to be administrative in nature.
- 2.12 The second stage is of course the substantive consideration of PC68 on its merits. At this Stage, Clauses 3.8 (1) & (2) of the NPS UD stipulate that local authorities **must have particular regard to** the development capacity provided by the plan change if, amongst others, the plan change would contribute to a well-functioning urban environment. This means that real and meaningful consideration must be given to the contribution a plan change would make towards achieving the objectives of the NPS –UD, including providing for the social and economic wellbeing of Selwyn and supporting a competitive land market. Policy 8 and the supporting Clause 3.8 therefore create a positive obligation on behalf of local authorities – Policy 8 is not an administrative gateway.

3 DOES THE RPS (INCORPORATING CHANGE 1) GIVE EFFECT TO THE NPS-UD?

- 3.1 Mr Wakefield said in submissions that Change 1 was: *"... intended to achieve the requirement in the NPS-UD for local authorities to ensure that there was sufficient development capacity to meet expected demand for housing and business over the medium and long term."*³
- 3.2 Mr. Wakefield referred to the FDA's identified through the Change 1 process.

¹ Legal submissions on behalf of CRC/ CCC at para 4.14

² Legal submissions on behalf of CRC/ CCC at para 4.18

³ Legal submissions on behalf of CRC/CCC at para 2.3 (a)

3.3 He went on to accept however that Change 1: "... *only partially gave effect to the NPS –UD requirements, but it not seek to give effect to all such requirements.*"⁴

3.4 This is a realistic acceptance given the range of statements to this effect in the documents associated with Change 1. For example, in *Appendix 5 – Legal and Statutory Framework – compliance with the requirements of relevant national direction and the RMA (including section 32AA Evaluation report)*, it is specifically acknowledged that Change 1 is **not** intended to give full effect to the NPS UD:

62. The Proposed Change does not purport to, and nor it is required to, give full effect to the NPS-UD as it is has not been practicable for Environment Canterbury to fully implement the NPS-UD within the scope of this change being progressed through the streamlined planning process and within the timeframes available.

65. Some submitters have sought that the Proposed Change go further in order to give effect to the responsive planning approach of the NPS-UD and that comprehensive change to the CRPS policy framework is required now to enable the 'flood' or private plan change requests to respond to and implement the NPS-UD.

66. Further changes to the CRPS are anticipated in order to fully give effect to the NPS-UD, including the introduction of criteria as to what would add significantly to development capacity and contribute to well-functioning urban environments so that local authority decisions affecting urban environments are responsive to plan changes in accordance with Policy 8 of the NPS-UD. This work is being undertaken now, and in the meantime, any private plan change requests will need to be considered in light of the NPS-UD. More comprehensive changes to the policy framework in the CRPS will be considered as part of the full review of the CRPS scheduled to commence in 2021.

3.5 A more fulsome analysis of the issue of whether or not Change 1/RPS gives full effect to the NPS UD has been included in Mr. Cleese's supplementary report presented at the end of the hearing. Mr. Cleese's analysis is supported.

Change 1 Relied on Inaccurate & Outdated Information

3.6 Further to the above, a fundamental criticism which the Applicants level at Change 1 is that it relied on an assessment of housing demand and capacity that was both outdated and fundamentally inaccurate.

3.7 Change 1 relied on data incorporated in an earlier Housing Capacity Assessment undertaken in 2017/2018 to support *Our Space 2018-2048*. This is confirmed at paragraph 124 of Appendix A to Mr. Wakefield's submissions:

124. In undertaking the Proposed Change Environment Canterbury has reviewed and accepted the findings of the capacity assessment that informed Our Space 2018-2048. The capacity assessment methodology and draft report were independently peer reviewed by

⁴ *Ibid* at para 2.3 (c)

relevant experts and withstood challenge through the Our Space 2018-2048 hearings process. This assessment of future demand for housing and business land incorporated a range of conservative assumptions to ensure demand was not underestimated. Periodic review is also necessary to incorporate any new data and remain up-to-date. The next capacity assessment under the NPS-UD is scheduled to be completed later in 2021 and can consider changes in population and employment projections, any further post-earthquake trends and importantly the impacts of the COVID-19 pandemic on anticipated housing and business land demand. This plan-monitor-manage cycle is recognised good practice evidenced-based decision-making and can inform any future changes to be incorporated within the full review of the CRPS. In the absence of evidence to the contrary we are satisfied that the current capacity assessment is sufficiently robust to guide the planning response and quantum of additional development capacity promoted through this Proposed Change. [My Emphasis]

3.8 Change 1 was approved by the Minister in May 2021, in the apparent absence of any contemporaneous evidence on the issue of demand and capacity within the Selwyn District. Furthermore, there is no evidence that the different methodologies for assessing capacity introduced by the NPS UD 2020, including the very specific assessment of whether or not capacity was "reasonably expected to be realised"⁵ were addressed in the evidence supporting Change 1.

3.9 There is no suggestion in the documents relating to Change 1 that any effort was expended in updating the 2017/2018 analysis, or in considering any publicly available evidence on this issue. This is notwithstanding the fact that the Selwyn District Council (a member of the GCP) had updated its Housing and Business Development Capacity on November 2 2020 (the Update), an update which noted that:

The key changes from this update is available capacity. This has reduced to 5,663 from 9,717, a change to just over 4,000. The change in capacity, as a result of: take-up (accounts for almost ¾ of reduction in capacity), misidentification of available capacity and underutilisation; has meant that Selwyn has a shortfall in the next ten years (medium term).

3.10 For present purposes however, the Commissioner is in a position to evaluate the most up to date information available on demand and capacity in Selwyn, specifically the evidence of Mr. Sellars and Mr. Colegrave. Both are highly experienced experts, whose opinions have not been countered by any appropriate expert analysis.

RPS/ Change 1 does not Provide Short or Medium Term "Plan Enabled Capacity"

3.11 It is submitted that there is further, very real, difficulty in the CRC/CCC's reliance on the FDA's included within Change 1. The difficulty is that the FDA's do **not** equate to either short or medium term "plan enabled capacity", as defined in Clause 3.4 of the NPS-UD:

⁵ NPS-UD, Part 3, sub-part 1, clause 3.26.

3.4 Meaning of plan-enabled and infrastructure-ready

(1) Development capacity is plan-enabled for housing or for business land if:

(a) in relation to the short term, it is on land that is zoned for housing or for business use (as applicable) in an operative district plan

(b) in relation to the medium term, either paragraph (a) applies, or it is on land that is zoned for housing or for business use (as applicable) in a proposed district plan

(c) in relation to the long term, either paragraph (b) applies, or it is on land identified by the local authority for future urban use or urban intensification in an FDS or, if the local authority is not required to have an FDS, any other relevant plan or strategy.

3.12 In practice therefore, the responsibility for providing short and medium term capacity i.e out to 10 years falls squarely on the shoulders of territorial authorities such as the Selwyn District Council. This is to be achieved via district plans and changes to the same.

3.13 There are many reasons why simply identifying land within a Regional Policy Statement as either a Greenfield Priority Area (GPA) or FDA fails to provide certainty that the same land will crystallise into zoning, or indeed that further steps (subdivision, titling, engineering marketing etc...) will be taken by developers to provide "on the ground" housing capacity. These reasons are touched upon by Mr. Colegrave, and include landowners not harbouring any ambition to rezone or develop, and intervening events which affect the viability and/or appropriateness of rezoning land within a GPA/FDA.⁶ Further, given that FDA's are subject to contestable plan change processes, there is no guarantee rezoning will not be opposed. Even if approved, appeals may follow thereby significantly delaying or, worst case, preventing a rezoning.

3.14 Of further relevance, it is submitted that zoning (let alone identification of land as FDA) should never be confused with the volume of sections available at any one time to meet demand – see *Appealing Wanaka Inc v Queenstown Lakes District Council* [2015] NZEnvC 196 at [113]:

"There is also a wider resource management issue here which is that it is important not to confuse zoning with the quantity of sections actually supplied. Land may be zoned residential but that does not mean it is actually assisting to meet the quantity of sections demanded. Only sections for sale can do that. There is no direct relationship between the number of sections theoretically able to be cut out of land zoned residential and the number of sections actually on the market at any one time especially when — as in Wanaka — there are very few landowners with land zoned for residential activities."

3.15 The above is consistent with evidence from on the ground real estate experts such as Mr. Sellars (PC78) who identified a significant area of land (233 ha) within Rolleston either

⁶ An example in the Greater Christchurch context can be found in *Equus Trust v Christchurch City Council* High Court, Christchurch, 21/2/2017, CIV-2016-409-606, Cull J

already zoned for residential use or within an FDA that, for a range of reasons, could only be considered as providing potential long term capacity. Mr. Sellars evidence regarding the complete lack of available sections in Prebbleton is also telling.

Does the Operative Plan Give Effect to the NPS UD?

- 3.16 The NPS UD imposes an obligation on behalf of the Selwyn District to **at all times** provide at least sufficient development capacity to meet expected demand for housing. This is to be achieved through its plans, the Operative Plan included.
- 3.17 The Operative Plan of course pre-dates the NPS UD by some considerable time. With the exception of the provisions inserted via the LURP in 2013, there does not appear to have been any significant changes to the Plan's framework for urban growth in the intervening years.
- 3.18 In my submission, there are several areas in which the Operative Plan does not give effect to the higher order NPS. These include, but are not necessarily limited to:
- (a) A failure to enable all people and communities within affected urban environments to provide for their economic wellbeing both now and in the future (Objective 1). This failure has consistently been demonstrated by undisputed evidence which refers to the lack of land availability, which has contributed in a significant way to a dramatic increase in levels of unaffordability.
 - (b) Similarly, the Plan does not enable more people to live in areas of the District (a wider urban environment) where there is a high demand for housing (Objective 2). At the present point in time, it is the market through property developers which are seeking to achieve this Objective. Mr. Wakefield appeared, in oral submissions, to be dismissive of developers as merely acting "*..in their own best interests*", so seemingly has failed to grasp the fact that it is developers who subdivide land and build homes in order to meet the demand.
 - (c) Related to this failure to give effect to the enabling aspects of the above Objectives, it follows that the District Plan does not have or enable a variety of homes which meet the needs of different households (Policy 1 a(i)) and fails to provide for a competitive market in urban environments (Policy 1 (d)). Furthermore, it is evidence that the District Plan does not: "*...provide at least sufficient development capacity to meet expected demand for housing ... over the short term, medium term and long term (Policy 2)*". This is a requirement that must be met at all times and a requirement which applies to existing and new urban areas (Subpart 1 –*Providing Development Capacity*, Clause 3.2).

4 RESPONSE TO EVIDENCE OF NICK WILLIAMSON

- 4.1 Much of what Mr. Williamson traversed at the hearing focused on the processes associated with the Plan Change, including the requirements imposed on the Council by the Resource Management (Enabling Housing Supply and Other Matters) Act 2021. Mr. Williamson appeared to accept that the Commissioner's role is to make a recommendation to the SDC on the merits of PC68. Beyond that, it is for the Council to take whatever further action it considers necessary to comply with the Enabling Act.
- 4.2 That apart, as with his primary evidence, Mr. Williamson failed to discuss in any meaningful way the relevance of the NPS UD to this Plan Change. He did not respond to the Commissioner's question regarding the responsiveness policy being able to provide for clear demand without the inherent delays associated with the development of spatial and reviews of the RPS.
- 4.3 The Commissioner had a lengthy discussion with Mr. Williamson regarding infrastructure matters, including the funding of necessary upgrades either in Council planning documents or by means of a private developer agreement (PDA).
- 4.4 When questioned on Mr. Hall's reference to the widely used and successful practice of using PDA's in Selwyn District, Mr Williamson sought to assert (somehow) that development agreements specifically provided for in the Local Government Act 2002 (sections 207A to 207F) are illegal. These agreements have been used by the Selwyn Council on large scale greenfield developments, as identified by Mr. Hall.
- 4.5 It was fundamentally unclear from Mr. Williamsons' response whether or not he considered it necessary to have absolute certainty as to the availability of every single piece of infrastructure required to support the development, together with the details of who precisely pays for what.
- 4.6 Respectfully, he sought to add a level of complexity to the issue of infrastructure funding which does not exist in the present circumstances given the level of funding already committed in the Council's long term plan for roading and wastewater upgrades. This funding has been specifically earmarked by Council to support growth. Any other development specific upgrades that are required will be solely at the developer's cost with no risk of a burden being passed on to the Community.
- 4.7 It is worth repeating that, as with the witness for the CRC/CCC (Mr. Langman), Mr. Williamson did not have any technical evidence that would support his stated concerns regarding infrastructure. Plainly, in reading the comprehensive report prepared by Mr. England after the hearing, he is satisfied that the Plan Change can be adequately serviced.
- 4.8 As such, it is submitted that the Plan Change development is "infrastructure ready", as that term is defined in the NPS-UD.

Lees

- 4.9 The Lees are the parties included in the Plan Change which oppose the rezoning. The Commissioner questioned Mr. Williamson as to whether or not there was anything in the legislation which addressed that circumstance, noting an understanding that a council can seek to rezone land regardless of a landowners' agreement.
- 4.10 Essentially, on this point, there is no distinction in the Act between council and privately initiated plan changes. Approval of the Plan Change does not of course direct that the Lees must develop their land either immediately or otherwise, rather it enables development in the future.

5 RESPONSE TO KEY ISSUES IDENTIFIED IN RESIDENTS STATEMENTS/PRESENTATIONS

- 5.1 Generally speaking the majority of statements provided by the residents opposed Plan Change 68 on the basis that it will bring change to their receiving environment, change which is perceived to be negative.
- 5.2 In reality, greenfield development is inevitably located at the periphery of existing cities/townships and, as such, is often opposed by adjacent residents who will more readily experience effects associated with the change in zoning. One cannot doubt the sincerity of views as to why landowners have purchased in locations enjoying a rural aspect, however the protection of views is not enshrined in the RMA.
- 5.3 It is submitted that residents on the boundary of an existing urban environment should be realistic as to the possibility of change occurring in their immediate environment, whether by a request for rezoning or otherwise. There can be no expectation that the zoning of rural land is immutable, particularly land that shares an entire boundary with an existing urban zoning, and which has been identified within the preferred growth location for a township. This is especially the case when there are no features or characteristics of the land and its surroundings that would demand a greater level of protection.
- 5.4 The urban design experts (Mr. Cleese & Mr. Compton Moen) accept that there will be effects on amenity resulting from the rezoning, but do not accept that this change or the difference in appearance from rural to urban should necessarily be considered as negative.
- 5.5 A number of residents seek amendments to the lot sizes, the most favoured option being 5000m² so as to reflect the scale of existing allotments north of Shands Road. The Applicants rely on the Living 3 framework in the Operative Plan as providing a more efficient form of zoning, one that is capable of delivering an extensive quantity and range of housing at a time of significant existing and predicted shortages.
- 5.6 Reverse sensitivity is a common theme of a number of the statements (Pollard, Tod, Sommerfield, Phillips etc.).
- 5.7 It is submitted that Mr. Pollard's concerns about this matter cannot be considered significant given that there is a property or buffer between his landscape nursery and the

PC68. Likewise, with respect to the Tod operation, the majority of their tunnel houses are some distance from the site, one exception being 20m from the Trents Road boundary. This, it is submitted, is a more than adequate separation from future residences on the PC68 site.

- 5.8 The position of the Summerfields is acknowledged noting that their operation (Trents Nurseries) has been in place since 1983, and that the operation is fully developed. Mr. Summerfield referred to residential dwellings in proximity to the Trents operation including the Lees property. The Lees had not experienced any issues with the Trents operation in all the time they have lived next door. This, together with the absence of any evidence of complaints, strongly suggests that the Trents operation is well managed and is of low intensity in terms of effects generated. Mr. Summerfield disputed that there were similar operations in suburban Christchurch, a statement which Mr. Cleese disagreed to in his reference to a number of such operations.
- 5.9 Taken together therefore, we submit that no amendments to the Plan Change are required at this stage to address reverse sensitivity effects associated with, in particular, Trents Nursery. If the Commissioner disagrees, the proximity of residential development to the benign Trents Nursery operation is something that can be addressed at subdivision stage where more particular regard or consideration could be given to the potential for reverse sensitivity effects and any measures that may be required to address such effects. This could be facilitated by the addition of an assessment matter in the Plan Change.
- 5.10 The above matters aside, many of the residents' statements refer to effects such as increased traffic, infrastructure requirements, land demand/capacity and potential loss of productive soils. All of these matters are subject to wide ranging expert evidence, and it is this expert evidence which should be preferred on such technical matters.
- 5.11 There appears to be something of a misunderstanding on behalf of a number of residents that the Plan Change includes commercial development – it does not.
- 5.12 Likewise, statements made regarding the absence of any assessment of effects associated with a school establishing on the site are necessarily premature. As is clear from the agreed wording, the plan change makes some provision for a school on the site, if the Ministry considers it necessary.

6 ME TOO SUBMISSIONS

- 6.1 As indicated in opening, the Applicant remains fundamentally neutral on the position of the "me too" submissions. The Applicants recognise that there is merit in a number of these submissions, however we recognise that there are important natural justice provisions at play.
- 6.2 We note the Commissioner has had the benefit of thoughtful and comprehensive submissions filed on behalf of Mr. Shamy regarding this matter. His counsel, Ms Limmer, of course applied the law solely to her client's position and the Applicants do not take any issue with this analysis and the conclusion reached.

7 AMENDMENT TO THE PLAN CHANGE – STAGING RULE

- 7.1 In his supplementary report, Mr Collins proposed a draft staging rule that linked development of the site with planned upgrades to the roading network. The Applicants agree with the appropriateness of such a rule, and have essentially adopted Mr. Colin's suggested wording, with some minor grammatical amendments:

Part C

12 LIVING ZONE RULES – SUBDIVISION

12.1 SUBDIVISION – GENERAL

Prebbleton

12.1.3.48A *In respect of the Living 1 zoned land identified in Appendix []*

- (a) *No residential allotments may be created within ODP Area [] prior to completion of the upgrading of the Shands Road/Trents Road intersection involving a roundabout with two laning of Shands Road on both approaches and on the northern departure to the roundabout.*
- (b) *No more than 120 residential allotments may be created with ODP Area [] prior to the completion of:*
- (i) *the upgrading of the Shands Road/Hamptons Road intersection to form a roundabout; and*
 - (ii) *seal widening of Trents Road, between Springs Road and Shands Road; and*
 - (iii) *seal widening of Hamptons Road, between Springs Road and Shands Road.*

G J Cleary

06 May 2022