

Before the Selwyn District Council

under: the Resource Management Act 1991

in the matter of: Proposed Private Plan Change 69 to the Operative
District Plan: Lincoln South

and: **Rolleston Industrial Developments Limited**
Applicant

Closing legal submissions on behalf of Applicant

Dated: 15 December 2021

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CLOSING LEGAL SUBMISSIONS ON BEHALF OF APPLICANT

INTRODUCTION

- 1 These closing legal submissions are made on behalf of the Applicant, Rolleston Industrial Developments Limited (*RIDL*), in relation to a private plan change request, known as PC69, to the Selwyn District Council (the *Council*) to change the Operative Selwyn District Plan (the *District Plan*) to rezone approximately 190 hectares of land on Springs Road, Lincoln currently zoned Rural (outer plains) to Living Z and Business 1 (Local Centre).
- 2 The final proposed rules package (tracked showing changes that have been made during the course of the hearing, and clean), including the Outline Development Plan (*ODP*), are attached as **Appendix 1**.

OVERVIEW

- 3 The hearing for PC69 was held on the week of 22 to 26 November 2021 and traversed a wide range of relevant matters. These legal submissions only seek to cover the contentious aspects of the plan change and issues that arose from the hearing.
- 4 Matters to which these legal submissions relate are as follows:
 - 4.1 Lincoln Sewerage Treatment Plant;
 - 4.2 NPS-UD/response to CCC and ECan;
 - 4.3 Flooding;
 - 4.4 Greenhouse Gas Emissions;
 - 4.5 Transport matters;
 - 4.6 Ecology;
 - 4.7 Versatile soils; and
 - 4.8 Some further points of clarification sought by the Commissioner during the course of the hearing.

LINCOLN SEWERAGE TREATMENT PLANT

The position reached by the experts

- 5 The setback distance for the Lincoln Sewerage Treatment Plant (the *Pond*) was at issue at the hearing.

- 6 At the hearing, Ms Nieuwenhuijsen made it clear that the evidence that she had previously provided was based on the information that she had available to her at the time. Ms Nieuwenhuijsen received further information regarding use of the Pond which she did not have available to her until the day before the hearing. Using this data she provided, in her summary of evidence, an indicative scale of the likely odour effects, and concluded that she did not consider that the full 150m buffer would be required to mitigate odour effects.
- 7 However, it became clear that Ms Nieuwenhuijsen needed more information before being able to properly assess and make a recommendation on an appropriate setback for the effects that might result from the current use of the Pond.
- 8 Following a discussion between Ms Nieuwenhuijsen, Mr Van Kekem, Mr England, and Mr Bender, it was agreed that further information would be provided to Ms Nieuwenhuijsen (particularly around the nature of pond use currently and specification of the aerators) to enable her to make this assessment.
- 9 Notwithstanding that, by the end of the hearing, it became clear that all of the experts (Council's and Applicant's) were comfortable with a 100m setback (which was proposed by Council and subsequently proffered by the Applicant) on the basis that:
 - 9.1 the 150m setback for the Pond in the District Plan was based on a previous use that is no longer being undertaken;
 - 9.2 that previous use had a greater risk of odour effects beyond the boundary than the current (and future intended) uses for the Pond;
 - 9.3 that the 100m setback will be sufficient to avoid any adverse odour effects from the Pond;
 - 9.4 that while it is possible a number less than 100m might be appropriate (noting that more information on the uses and aerators would be required to establish this), the Applicant had decided not to pursue a setback less than 100m; and
 - 9.5 as such the proposed 100m setback from the Pond is conservative.
- 10 We accept that simply because the Applicant and the Council experts have reached a common position, this does not mean the Commissioner is bound by it. The Commissioner could impose any setback he deems appropriate. However, we emphasise that all odour experts present at the hearing were comfortable with the

100m and Ms Nieuwenhuijsen maintains it is likely to be overly conservative.

- 11 Whether the Applicant has otherwise agreed any other matters with the Council (i.e. no complaints covenants, affected party approvals for future resource consents) is not relevant to the decision the Commissioner has to make regarding the setback. These have been offered privately by the Applicant to the Council to assist the Council to obtain certainty in its future and separate consenting processes.

The rule in the District Plan

- 12 At the hearing, the Commissioner sought clarification on the activity status of an activity sought to establish within the setback specified in the District Plan for the Pond.
- 13 The setback is contained in Rule C4.9.32 of the District Plan. Rule C4.9.48 provides that any activity that does not comply with the setback shall be a restricted discretionary activity (with no obvious identifiable matters of discretion).
- 14 However, in the 'Reasons for Rules' section of the District Plan, under 'Building Location' it states that building within the setback for the Pond is a non-complying activity.
- 15 We understand from discussions with the Council that it was always intended a breach of this rule would be a non-complying activity, and that the plan makes an error in Rule C4.9.48 in classifying this as a restricted discretionary activity.
- 16 We do not dispute this and in any event consider it moot, as determination of this matter is irrelevant to the Commissioner's decision on what the appropriate distance of the setback should be in this plan change process.
- 17 The activity status sought in this plan change for an activity seeking to establish within the setback is proposed to remain non-complying. This can be seen in the amendment to Rule C4.9.32 proposed in **Appendix 1**.

Response to further submitter comments on the matter

- 18 In his Minute number 3 dated 30 November 2021, the Commissioner provided the submitters with a further opportunity to comment on matters related to the Pond, given the above developments during the hearing.
- 19 We have read these responses and comment further as follows:
 - 19.1 The additional response by Ms Tania Hefer raises her concerns regarding the no complaints covenant (applying to residential allotments between 100m and 150m from the

Pond edge) agreed to by the Applicant. As noted above, we do not consider this agreement should have any bearing on the Commissioner's decision regarding the appropriate setback. Nevertheless we respond further to Ms Hefer's concerns as follows:

- (a) The covenant was sought by the Council and not the Applicant;
- (b) Neither the Applicant, nor the Council, consider the covenant is necessary as a measure to mitigate effects. We understand it is simply to give the Council some piece of mind given the rule in the District Plan;
- (c) All of the expert evidence confirms that a 100m setback on its own is appropriate to mitigate adverse effects, having considered odour and also potential health issues;
- (d) Covenants of this type will run with the land and therefore would not lapse after a specified time. Further, future owners of those sites would be put on notice that the covenant will apply, and therefore will make an informed decision to purchase bearing in mind all encumbrances places on the land;
- (e) In any case, the Council itself accepts that covenants of this kind are not the be all and end all of complaints. In practice, there is nothing stopping a future land owners from making a complaint to the regional council, and then that regional council pursuing enforcement action should odour be unacceptable.

19.2 In response to Ms Nancy Borrie's additional comments we note that the memorandum of consent which she refers to related to the previous use of the Pond which Council has confirmed is no longer occurring there. It is therefore irrelevant. The current and intended future uses have now been considered and the experts agree that a reduced setback would be appropriate.

19.3 We note the proposed 100m is to be taken from the edge of the Pond as opposed to from the edge of the boundary for the designation. All odour experts considered this appropriate at the hearing given the Pond itself is where odour effects (if any) would arise.

20 We further note that no submitters provided expert evidence that would support the maintenance of the full 150m setback.

NPS-UD/RESPONSE TO CCC AND ECAN

- 21 While we do not seek to repeat the various legal submissions already lodged (in this process and previous processes the Commissioner has been involved in) on the matter of the NPS-UD, we consider the approach taken in this plan change by counsel for CCC and ECan was more developed than it was at previous hearings. The position of the Councils appears to now be that:
- 21.1 the responsive planning framework allows Councils to be responsive to plan changes such as this one and the Selwyn District Council was responsive to this plan change when it accepted it for processing;
 - 21.2 despite this, the Council is bound to give effect to the CRPS and therefore must decline the plan change as being outside Map A; and
 - 21.3 if the Council was minded to grant this plan change, it should seek a change to the CRPS.
- 22 We submit this interpretation to fall within the absurd category. To suggest that the Council can accept the plan change for processing, but is then prevented from granting, it is not logical and would result in this hearing having been a complete waste of the Commissioner's, the Applicant's, and submitters' time and resources. This cannot have been the intention of Policy 8.
- 23 Counsel also placed significant focus on the words "Local authority decisions" within Policy 8. We do not argue that a 'local authority decision' could encompass a wide range of decisions, not just a decision on a plan change itself.
- 24 Counsel consistently ignored the important words within Policy 8 being "even if". We consider these words to be directive that local authorities are to behave in a responsive way "even if" they hit a barrier such as what Council considers to be a hard line like Map A. This is a strong statutory direction to decision makers to "keep going" even if they hit a constraint such as the line in Map A.
- 25 "Even if" is defined as follows:¹
- "used to stress that something will happen despite something else that might prevent it"*
- 26 Applying this plain and ordinary meaning does not allow the interpretation that CCC and ECan have put forward. This confirms

¹ Definition of "even if", Merriam Webster, <<https://www.merriam-webster.com/dictionary/even%20if>>

that Policy 8 is intended to allow council decisions (including decisions on plan changes) to be responsive despite the fact that the CRPS might have otherwise prevented it.

- 27 We remain unconvinced by the arguments of the Councils and consider the interpretation set out in our opening legal submissions is the most appropriate having regard to the principles of statutory interpretation.
- 28 Finally, we further note that Mr Langham is incorrect at paragraph 5 of his summary. The Proposed Selwyn District Plan does not zone the FDAs as residential, but rather provides for them through an 'urban growth overlay'. This would not meet the definition of 'plan-enabled' under the NPS-UD for the medium term, and therefore Mr Colegrave is correct in concluding that the FDAs should not have been included in the medium-term capacity assessment.

FLOODING

- 29 The issue of flooding was a matter of concern to a number of submitters.
- 30 The Applicant, on the advice of Mr O'Neil, has not pursued the Living X zone based on the potential flooding risks. Mr O'Neil otherwise considered that it is appropriate to leave the more site-specific flood modelling to the subdivision stage of the development, as is common practice.
- 31 We consider this completely appropriate, given that the plan change process is at a much higher level than the specific design stage and that section 106 of the RMA provides consent authorities with sufficient ability to decline subdivision consent if there is a significant risk from natural hazards (i.e. should that risk be identified as part of this further modelling that might make development otherwise inappropriate).

GREENHOUSE GAS EMISSIONS

- 32 A number of submitters raised the issue of greenhouse gas emissions (*GHGs*). We accept that this is an important issue for this plan change but reject the proposition that proposals of this nature are required to show a net decrease in *GHGs*.
- 33 The NPS-UD requires that planning decisions "*support reductions*" in *GHG* emissions, not in and of themselves reduce emissions.²

² Refer to paragraphs 99 to 101 of the evidence of Mr Jeremy Phillips.

- 34 Mr Farrelly's evidence demonstrates that the change in land use from a dairy farm to a residential development will result in a reduction of emissions generally (particularly given the significantly greater impact methane emissions have as compared to carbon dioxide). Further, the form of housing and infrastructure will be relatively efficient (particularly on an emissions per resident basis) when compared to other residential developments. Mr Farrelly also commented on the various ways the development could enable developers and future home owners to be, or become, more efficient into the future.
- 35 We note that the submissions and evidence by CCC and ECan state that the applicant has made no attempt to quantify the impact of GHG emissions. The NPS-UD does not require you to quantify these, and as outlined by Mr Farrelly it is very difficult and complicated to even begin to calculate this for a future land use. Nor is it required to demonstrate that a proposal would support reductions in GHG emissions.

TRANSPORT MATTERS

- 36 It is accepted by the Applicant that there are a number of transport network upgrades that would need to occur prior to the occupation of houses within the plan change area.
- 37 The Applicant has accepted this and expressly recognises the upgrades that would be required within the ODP text. During the hearing, further discussions between Mr Fuller, Mr Smith, Mr Collins, and Mr Mazey occurred and further wording for the ODP text was proposed, which would make it very clear where responsibility for each of the transport network upgrades would fall. We note that the majority of the upgrades will be developer funded, and the rest will be based on development contributions to which the developer for PC69 will be providing a significant portion of those.
- 38 The matter of infrastructure provision, particularly for transport matters, as the Commissioner put it at the hearing is very much a situation of whether the chicken or the egg came first. Often, infrastructure will only be established provided there is sufficient demand. However, in order to establish, development must have the required infrastructure.
- 39 The Applicant has struck an appropriate balance in this case, recognising that infrastructure upgrades are likely to be required prior to development, and providing certainty through the ODP text as to how this will be achieved.
- 40 We note the Applicant has also proffered the following additional mitigation (shown at **Appendix 1**):

40.1 Has brought forward the requirement to upgrade Ellesmere Road (this is now required upon formation of a connection to Moirs Lane, which must occur prior to the occupation of more than 1,354 households); and

40.2 Has now proposed a park and ride facility to cater for at least 75 cars.

ECOLOGY

41 The ecologists for the Applicant were comfortable that the proposed mitigation included in the ODP could provide the opportunity for a net ecological betterment at the site compared to the current conditions.

42 Mr Burrell also considered the changes made to the ODP were positive with regards to protecting and enhancing ecological values. He did however, maintain a couple of reservations which we address now.

43 With regards to groundwater recharge, we note that Mr Burrell accepted in his section 42A report that the potential effects of this could be adequately addressed with appropriate engineering design and construction methodologies. Mr Veendrick provided evidence on this matter and concludes the same noting the provisions to ensure this in the ODP text and the proposed setbacks.

44 With respect to Mr Burrell's concern about the use of the term 'natural inland wetlands' as limiting what wetland bodies might be protected by the ODP text, we note that while Ms Drummond did use these words in her evidence, the ODP text uses the word 'wetlands' more broadly. The Applicant has clarified this further in the ODP text along with making some other changes as suggested by Mr Burrell and Mr Boyes at the hearing (shown highlighted in grey) including reference to ecological monitoring and a riparian planting plan.

45 There are no outstanding ecological issues.

VERSATILE SOILS

46 A number of submitters were particularly concerned with the loss of versatile soils that might occur as a result of this plan change. This included academic expert evidence.

47 We note that Ms McCusker concluded in her evidence that there is 4.6 hectares of soils on the PC69 site that she considered highly versatile. On the other hand, Associate Professor Almond in his evidence considered there to be between 80 and 100 hectares of versatile soils on the site.

- 48 We emphasise that Ms McCusker is highly experienced in what occurs on the ground and in coming to her conclusions had significant discussions with the current farmer of the site to 'truth' the LUC classifications and submitter assertions on the ground. The submitters had not had such discussions with the current farmer.
- 49 One significant consideration of Ms McCusker's evidence was the proportion of highly versatile soils contained on the site as against the highly versatile soils in the catchment. Ms McCusker's evidence states that the 4.6 hectares of soils on the PC69 site equates to approximately 0.005% of the catchment soils.
- 50 Applying the same calculation to Associate Professor Almond's figure for versatile soils, this would equate to approximately 0.1% of the catchment's soils. This is not significant when weighed and balanced against the need to enable housing to meet demands under the NPS-UD.
- 51 We further note that B1.1 of the District Plan expressly recognises that there are situations where it is appropriate to favour urban development over the preservation of versatile soils:

"The relevant objective and policy of the RPS ... acknowledge that there may be situations where it is not practical to protect versatile soils from irreversible uses ...; and that, in some cases, it may better promote sustainable management of natural and physical resources to use versatile soils for urban expansion ..."

- 52 On the evidence, this is such a situation.

OTHER MATTERS

Medium density areas on ODP

- 53 Mr Boyes at the hearing suggested that there could be benefit in showing the proposed medium density areas in the ODP, although noted this would not be imperative.
- 54 Ms Lewes for the Council subsequently informed us that as a matter of practice, the Selwyn District Council is moving away from showing such areas in ODPs, with a preference for them to simply be provided for in the ODP text and plan provisions. We understand this is due to difficulties that arise at the time of subdivision if the medium density areas are not exactly as identified in the ODP.
- 55 The ODP has therefore not been amended in this respect.

Lincoln as its own urban environment?

56 At the beginning of the hearing, the Commissioner questioned whether Lincoln itself would fall within the definition of an 'urban environment' under the NPS-UD.

57 'Urban environment' is defined in the NPS-UD as follows:

means any area of land (regardless of size, irrespective of local authority or statistical boundaries) that:

- (a) is, or is intended to be, predominantly urban in character; and*
- (b) is, or is intended to be, part of a housing and labour market of at least 10,000 people.*

58 We consider Lincoln is town that is predominantly urban (noting that it is identified as a Key Activity Centre (KAC) in the CRPS). While we understand Lincoln's current population is estimated at around 8,920³, we still consider the second limb of this definition is met. It is entirely possible that Lincoln's population is now already over 10,000 people when observing the significant population increases being experienced by the District. In any case, the fact that it is a KAC confirms it is intended to form part of a larger housing and labour market.

59 As noted in our opening legal submissions, we consider the NPS-UD requires consideration of a range of urban environments which might well comprise Canterbury, Greater Christchurch, Selwyn, or Lincoln.

The calculation for density

60 The Commissioner at the hearing sought clarification as to what constitutes the calculation for housing density.

61 'Net density' is defined in the CRPS as follows:

is the number of lots or household units per hectare (whichever is the greater). The area (ha) includes land for:

- Residential purposes, including all open space and on-site parking associated with residential development;*
- Local roads and roading corridors, including pedestrian and cycle ways, but excluding State Highways and major arterial roads;*

³ As at June 2021 according to Statistics New Zealand population estimates.

- *Local (neighbourhood) reserves.*

The area (ha) excludes land that is:

- *Stormwater retention and treatment areas;*
- *Geotechnically constrained (such as land subject to subsidence or inundation);*
- *Set aside to protect significant ecological, cultural, historic heritage or landscape values;*
- *Set aside for esplanade reserves or access strips that form part of a larger regional or sub-regional reserve network;*
- *For local community services and retail facilities, or for schools, hospitals or other district, regional and sub-regional facilities.*

- 62 The term 'net density' used in the ODP text is intended to have this definition.

CONCLUSION

- 63 We do not consider there are any matters remaining that would prevent the Commissioner from granting this plan change on its merits. We note that the Council's planner, having considered all of the evidence and the changes made in the course of the hearing, changed his recommendation, considering PC69 could be approved and is an appropriate way to achieve the purpose of the RMA.

Dated: 15 December 2021



Jo Appleyard / Lucy Forrester
Counsel for Rolleston Industrial Developments Limited

APPENDIX 1