BEFORE THE SELWYN DISTRICT COUNCIL
HEARING BEFORE INDEPENDENT COMMISSIONER

IN THE MATTER	of the Resource Management Act 1991
AND	
IN THE MATTER	of a request by Rolleston Industrial Developments Limited for a plan change (Private Plan Change 69) under the First Schedule to the Resource Management Act 1991

LEGAL SUBMISSIONS FOR CHRISTCHURCH CITY COUNCIL AND CANTERBURY REGIONAL COUNCIL

24 November 2021

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1. INTRODUCTION

1.1 These legal submissions are made on behalf of Christchurch City Council (**Council or CCC**) and Canterbury Regional Council (**CRC**) in relation to Private Plan Change 69 (**PC69**) to the Selwyn District Plan (**SDP**), which has been requested by Rolleston Industrial Developments Limited (**RIDL**, or **Applicant**).

1.2 CCC and CRC both made submissions in opposition to PC69, with a number of issues raised that are common to both councils. It is for this reason that a joint case is being presented, with planning evidence presented by Mr Marcus Langman dated 11 November 2021, and groundwater evidence by Ms Philippa Aitchison-Earl dated 24 November 2021.

1.3 In addition to opposing PC69, CCC and CRC also made submissions in opposition to PC67 and PC73, both of which have been recently heard (with decisions pending).

1.4 Given the consistent legal argument being presented by CCC and CRC, in order to avoid unnecessarily repeating legal submissions previously presented, these submissions have been prepared to only respond to certain points made by counsel for the Applicant (with reference to their submissions dated 22 November 2021).

1.5 In all other respects, CCC and CRC rely on the submissions previously filed, which are available online here:

(a) For PC67: https://www.selwyn.govt.nz/__data/assets/pdf_file/0010/511489/Legal-Submissions-CRC-and-CCC.pdf ; and

(b) For PC73: https://www.selwyn.govt.nz/__data/assets/pdf_file/0007/521755/CCC-and-CRC-PC73-Legal-Submissions.pdf

1.6 If required, counsel can file hard copies of the earlier submissions with the hearing administrator.

2. RESPONSE TO LEGAL SUBMISSIONS FOR THE APPLICANT

2.1 The legal argument made by the Applicant is that Objective 6.2.1 of the CRPS, more specifically the word "avoid", is appropriately "read down" or "softened" as a result of the responsive planning framework established by the NPS-UD.

2.2 In advancing this interpretation, counsel for the Applicant relies on the fact that the NPS-UD is the later in time, and higher order, document, and that giving effect to the NPS-UD (at this time) should involve "grafting a limited exception onto the objective" (as a means of invoking the doctrine of implied repeal).[1]

2.3 This interpretation involves counsel for the Applicant submitting that a rigid interpretation of the word "avoid" inherently prevents local authorities from being responsive, as it would not allow them to consider the merits of a plan change. Counsel also relies on Guidance prepared by the Ministry for the Environment, relative to the responsive planning policies.[2]

2.4 In response we make the following submissions:

(a) While the NPS-UD as a *whole*, is the later-in-time document, it is relevant that the CRPS has been recently changed (Change 1) post the NPS-UD coming into force, to include the new Future Development Areas (**FDAs**). With that in mind, the suggestion that this is a clear situation of implied repeal lacks a complete factual foundation, or is potentially incorrect, as one of the relevant provisions has been considered and amended to provide for additional growth opportunities.

(b) While we agree with the Applicant that attempts should be made to reconcile any perceived inconsistency so that planning documents can stand together,[3] there is no valid basis for effectively amending the CRPS in reliance on

1 At 31, 34, 35.
2 At 28, 29 and 30.
3 Refer submissions at 21.

certain provisions in the NPS-UD, particularly when there is no direction in the NPS-UD to this effect.[4]

(c) The doctrine of implied repeal is (as accepted by counsel for the Applicant) a "last resort". Counsel's understanding is that the Applicant here is relying on this doctrine to amend, rather than repeal, Objective 6.2.1. In either case, it is submitted that this is not warranted, particularly when the responsive planning provisions of the NPS-UD and Objective 6.2.1 are not provisions that entirely overlap with each other in terms of effect, or intent.

(d) As per our earlier submissions, the responsive planning provisions of the NPS-UD provide a pathway for the consideration of out-of-sequence or unanticipated proposals on their merits. The responsive planning provisions are, in effect, non-substantive in this respect, as they open the door, but do not provide all answers in terms of whether proposals should be accepted or not. Selwyn District Council's acceptance of PC69 for processing under clause 25 of Schedule 1 to the RMA is consistent with that intention, but there can be no presumption of acceptance of PC69 on its merits.

(e) Objective 6.2.1 is more specific, and provides substantive policy direction relative to urban growth in a Greater Christchurch (sub-regional) context. This framework, including the avoid direction, has been developed and tested in section 32 terms, with evidence supporting the resulting policy direction.

(f) Given these distinctions, it is submitted that this is not a case where there are two laws (or provisions) that are so in conflict with one another that they cannot stand together. One is procedural, whereas the other provides substantive policy direction which is engaged in a merits context.

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4 And noting of course that the NPS-UD could be expected to be explicitly directive about this issue if that was the intention, given that it is directive about changes to inferior planning instruments in other respects.

(g) It appears to CRC and CCC that the Applicant has appreciated this point, as the submissions do not seek for Objective 6.2.1 to be repealed or ignored in its entirety. Instead, the suggestion is that the objective needs to be amended (softened). It is submitted that this is, in fact, inherent acknowledgement that this is not a situation where one provision is abrogated by the other. They clearly serve different functions, and can stand aside each other for plan interpretation purposes.

(h) The Applicant relies on the Guidance issued by MfE, which we have previously discussed in relation to PC67 and PC73. Without canvassing this Guidance in its entirety, we note that:

(i) Selwyn District Council is acting consistently with the expected outcomes stated within the Guidance, by considering PC69 on its merits. The issue is what happens next, after that merits assessment has concluded.

(ii) The Guidance referred to (in 30 of the Applicant's submissions) does not assist, as it refers to concepts that are, in our submission, somewhat at odds with each other. By way of explanation, that Guidance refers to "identified areas" while also noting that these areas "must give effect to the responsive planning policies".

(iii) The responsive planning provisions are intended to apply to 'unanticipated' proposals, ie. proposals to develop in areas that are <u>not</u> identified in RMA plans. That is what makes the proposals unanticipated or out-of-sequence. If this Guidance is signalling that the responsive planning policies are intended to apply to "identified areas", including those identified through spatial planning exercises, then that is what the FDAs already achieve.

(iv) While not wanting to labour the point, the Guidance does not assist with the statutory interpretation exercise at hand, and does not support an approach which allows the NPS-UD to effectively amend the CRPS. If it was intended that the responsive planning provisions are to trump all existing planning documents (including those with avoid frameworks), then we would expect that to be stated or expressly directed in the NPS-UD.

(v) Finally, the Guidance notes that council policies "will need to be reviewed and, in some cases, amended to reflect the responsive planning policies of the NPS-UD". That is the situation that arises in this case, as if Selwyn District Council is minded to approve PC69, there will be a need to first amend the CRPS before it can be validly accepted and made operative. This will require another statutory process to be commenced, but in this instance the need for that is opposed by CRC and CCC.

(i) The Applicant's submissions, at 33.1, make the observation that the NPS-UD "provides a clear national level direction to **enable** development capacity". While there are policies that direct the enablement of intensification in certain areas (for Tier 1 urban environments), in our submission it is not correct to read the NPS-UD as directing the unfettered enablement of development capacity (either through its responsive planning provisions, or more generally). Relevantly, in a plan change context, the NPS-UD is one of several relevant documents that must be given effect to.

(j) Coming back to the submission that, when read in light of the NPS-UD, Objective 6.2.1 should be read as meaning "*except if otherwise provided for in the NPS-UD,* avoid…",[5]

5 At 35.

it is submitted that the framing of the NPS-UD is important. There is no express direction within the NPS-UD as to how local authorities are required to give effect to its provisions. Instead, the only direction is to give effect to it "as soon as practicable".

(k) This can be compared with other NPSs, for example the National Policy Statement on Freshwater Management 2020, which includes several express provisions that describe how and through which process its provisions are to be given effect to. The NPS-UD instead (appropriately, in our view) leaves discretion to local authorities in terms of implementation at a regional or district level.

(l) Finally, in relation to the submission (at 43.6) which contends that it would be absurd that "plan changes falling outside of the PIB should be accompanied by a change to the CRPS", we observe that while a private developer cannot of course request a change to the CRPS, Objective 6 and Policy 8 apply to "local authority decisions", and Policy 10 requires local authorities to work together to implement the NPS-UD. When read collectively, there is a realistic pathway for achieving necessary changes to the CRPS, so long as the relevant local authorities are in concert. While the Applicant does not consider this to be "accessible", ultimately it is not developers making the decisions, or developers who are required to be satisfied in light of the relevant statutory framework for the consideration of plan changes. Instead, it is the relevant local authorities who are able to take a position on any request, and reach their own assessment as to whether it warrants consideration under the responsive planning provisions, or should be approved / rejected on its merits under Schedule 1.

3. ASSESSING PC69 ON ITS MERITS: DOES PC69 SATISFY THE RESPONSIVE PLANNING FRAMEWORK, AND MEASURE UP AGAINST THE CRPS?

3.1 Mr Langman and Ms Aitchison-Earl have prepared and filed evidence on behalf of CCC and CRC.

3.2 Ms Aitchison-Earl's evidence is that development on the subject site will present risks for groundwater recharge, reduction of spring flow levels and a high risk of groundwater contamination arising from reticulated network construction. Ms Aitchison-Earl view is that these risks are such that the proposal should be declined.

3.3 Mr Langman's evidence addresses the statutory framework, and the relationship between the CRPS and NPS-UD, and the plan provisions of relevance to PC69. Mr Langman raises concerns with the interpretation advanced by the Applicant, and prefers an interpretation which does not undermine the CRPS framework. Overall, Mr Langman is not satisfied that PC69 will satisfy the criteria for the responsive planning framework, and considers that it is inconsistent with relevant CRPS objectives and policies and should be declined.

3.4 Both experts are available to answer any questions today.

4. CONCLUSION

4.1 The Commissioner is obliged to assess this request against the relevant statutory tests.

4.2 As noted in our earlier submissions for PC67 and PC73, section 75(3) of the RMA requires both the CRPS and NPS-UD to be given effect to by a district plan. This statutory exercise, when correctly applied and undertaken, will not involve a contest between the NPS-UD and CRPS, and giving preference to one over the other.

4.3 Chapter 6 provides a tested, and directive, urban growth strategy that aligns with strategic planning decisions at a sub-regional level, and which responds to the multitude of RMA issues relevant to urban growth within Greater Christchurch. Giving effect to Chapter 6 of the CRPS demands that PC69 cannot be granted. There is no

flexibility to decide otherwise. It is submitted that this outcome would be entirely consistent with an interpretation of the NPS-UD as a whole, in accordance with well-established legal principles.

4.4 While Selwyn District Council is faced with arguments on these private plan change requests that the CRPS framework must be softened as a result of the NPS-UD, these arguments are being made by developers who do not want to confront the CRPS avoid framework. In any event, the Applicant has elected to take on the risk of pursuing PC69 in knowledge of the CRPS framework, and ultimately bears that risk.

4.5 It is clearly an easier option for these developers to advance a change to the lower order district plan, instead of facing up to the CRPS at the outset. This "tail wagging the dog" or bottom-up planning approach runs counter to the hierarchy of planning documents under the RMA, and the lack of any express direction that the CRPS framework can be superseded by the NPS-UD and its responsive planning provisions.

4.6 A contingent approval of PC69 pending resolution of a later, consequential change to the CRPS is neither legally available, nor would it be an appropriate option. Even if it was legally possible, it is submitted that it would be inappropriate.

4.7 Adopting that approach would involve an approval that is meaningless until another significant statutory decision is adopted by another local authority (CRC), with no certainty that PC69 could ever be implemented. It would also create a significant degree of uncertainty and confusion in that:

(a) it would create a perception that development of PC69 is appropriate, in circumstances where that development relies on a separate statutory process being completed;

(b) it would result in unnecessary and undesirable uncertainty for the community, landowner and SDC;

(c) it would create confusion and a precedent for SDC, and other Independent Commissioners / Panels, when

determining the various other requests for plan changes involving a similar context;

(d) it would fail to satisfy section 75(3) of the RMA; and

(e) it could be taken as support for a legal interpretation that elevates a procedural pathway in the NPSUD into a merits test, and in a manner which prevails over a clear and directive approach to strategic urban growth and infrastructure for Greater Christchurch.

4.8 The only other option available would be to recommend to SDC that it request a change to the CRPS, but as noted above, that will not provide any substantive outcome as it relies on a statutory decision by SDC that is not within the scope of clause of clause 10 of Schedule 1.

DATED this 24th day of November 2021

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