IN THE MATTER OF the Resource Management Act 1991

AND

IN THE MATTER OF Proposed Change 7 to the Selwyn District Plan

FURTHER LEGAL SUBMISSIONS ON BEHALF OF CANTERBURY REGIONAL COUNCIL IN RESPONSE TO COMMISSIONERS' MINUTE

WYNN WILLIAMS & CO
SOLICITORS
CHRISTCHURCH

Solicitor: Margo Perpick / Michelle Abernethy

Canterbury Regional Council's Solicitors
Unit B, 195 Marshland Road
PO Box 4341, DX WP 21518
CHRISTCHURCH
Tel 0064 3 3797 622
Fax 0064 353 0247

Introduction

1. These further legal submissions are provided in response to the Commissioners' Minute dated 24 May 2011. They address the following matters:
   a. What weight should be given to Change 1 when considering Proposed Plan Change 7;
   b. The interpretation of Policy 6 of Change 1; and
   c. Comment on the further Denwood Trustees option.

Weight to be given to Change 1

2. The CRC agrees with the legal opinion dated 9 June 2011 attached as Appendix A to the Supplementary Section 42A Officer's Report on submissions relation to Plan Change 7, however, wishes to provide further comment on its legal submissions presented to the Hearing Panel on 4 May 2011.

"have regard to"

3. It is acknowledged that the requirement in section 74(2)(a)(i) of the RMA is for the territorial authority to "have regard to" Proposed Plan Change 7, not to give effect to it.

4. The cases of *Foodstuffs (South Island) Ltd v Christchurch City Council*[1], *New Zealand Fishing Industry Association v Ministry of Agriculture and Fisheries*[2], and *New Zealand Co-operative Dairy Company Limited v Commerce Commission*[3] emphasise the need for genuine consideration to be given to matters to which regard must be had. It is acknowledged in those cases that, having given genuine consideration, the obligation does not amount to giving effect to what has been considered. In *New Zealand Fishing Industry Association*, the Court of Appeal held that, although matters to be had regard to "may in the end be rejected, or accepted only in part. They are not, however, to be rebuffed at the

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[1] *Foodstuffs (South Island) Ltd v Christchurch City Council* [1999] NZRMA 481.
[2] *New Zealand Fishing Industry Association v Ministry of Agriculture and Fisheries* [1988] 1 NZLR 544 (CA).
[3] *New Zealand Co-operative Dairy Company Limited v Commerce Commission* [1992] NZLR 601.

outset by a closed mind so as to make the statutory process some idle exercise."[4]

5. At one end of the spectrum an outcome of a territorial authority having regard to a proposed change to a Regional Policy Statement may be the rejection of the document. However, at the other end of he spectrum, the outcome may be the implementation of the document.

Weight to be given to Change 1

6. In legal submissions presented to the Hearings Panel on 4 May 2011, Counsel for the Canterbury Regional Council ("CRC") referred to the case of *Mapara Valley Preservation Society Incorporated v Taupo District Council* in which the Court referred to the principles set out in *Key Stone Watch Group v Auckland City Council*[5] to be taken into account in determining the weight to be given to proposed plans.

7. The submission by Lincoln Land Development that Change 1 is not worthy of much weight is not supported by a careful assessment of Change 1 against the criteria set out in *Keystone Ridge Limited v Auckland City Council*[6].

8. In *Keystone Ridge Ltd v Auckland City Council* Justice O'Reagan held that the importance of the proposed plan will depend on the extent to which it has proceeded through the objection and appeal process[7]. The Court accepted that the relevant criteria for determining the weight to be given to a proposed plan was correctly identified at paragraph 45 by the Environment Court at first instance. Paragraph 45 says[8]:

> *" ... In considering the weight that we give to it we take into account the following principles which arise from the various cases:*

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[4] *New Zealand Fishing Industry Association v Ministry of Agriculture and Fisheries* [1988] 1 NZLR 544 (CA) at 551.
[5] *Keystone Watch Group v Auckland City Council* EnvC Auckland A007/01.
[6] *Keystone Ridge Ltd v Auckland City Council,* HC Auckland AP24/01, 3 April 2001.
[7] *Keystone Ridge Ltd v Auckland City Council,* HC Auckland AP24/01, 3 April 2001.
[8] *Keystone Ridge Ltd v Auckland City Council*, EnvC, A007/01, 11 January 2001.

- *The Act does not accord proposed plans equal importance with operative plans, rather the importance of the proposed plan will depend on the extent to which it has proceeded through the objection and appeal process.*
- *The extent to which the provisions of a proposed plan are relevant should be considered on a case by case basis and might include:*

(i) *the extent (if any) to which the proposed measure might have been exposed to testing and independent decision-making;*

(ii) *circumstances of injustice;*

(iii) *the extent to which a new measure, or the absence of one, might implement a coherent pattern of objectives and policies in a plan.*

- *In assessing the weight to be accorded to the provisions of a proposed plan each case should be considered on its merits. Where there had been a significant shift in Council policy and the new provisions are in accord with Part II, the Court may give more weight to the proposed plan."*

9. As set out in earlier legal submissions for CRC, this approach was applied by the Environment Court in *Mapara Valley Preservation Society Incorporated v Taupo District Council*[9], where the relevant planning instruments included the Taupo District Plan and the Proposed District Plan. Whilst the Court recognised that Variations 19 and 21 were at a relatively early stage in the process with submissions and cross submissions not yet heard, the Court held that the Proposed District Plan should be given substantial respect and weight, because Variations 19 and 21:

a. Were aimed at implementing a coherent strategy of objectives and policies in the Taupo District Plan where none previously existed;

b. Represented a significant shift in Council policy; and

[9] *Mapara Valley Preservation Society v Taupo District Council* EnvC Auckland A083/2007, 1 October 2007.

c. Were, in contrast to the provisions they were replacing, in accordance with Part 2 of the RMA.

10. For completeness, I note that the Court in *Mapara* acknowledged that the position as to weight might change, and that the Variations were still going through the process of determination of their final form. In that case, although the position might change, the Court held that that does not outweigh the other factors requiring that the Variations were to be given substantial weight in that case.

The extent to which Change 1 has proceeded through the objection and appeal process

11. The first consideration identified in *Keystone* is the extent to which the proposed Plan has proceeded through the objection and appeal process. It is submitted that the historical development of Change 1 is a relevant consideration. In *Mapara*, the Court stated:

> *"The merits of a particular case need to be assessed in their factual context. It is therefore necessary to look at the historical development that led to the Variations being notified."*

12. The Court then went on to consider the Taupo District Council's Growth Management Strategy, called Taupo District 2050 ("TD2050") in the context of the weight to be given to the RMA documents which sought to implement TD2050:

> *"...In our view, Variations 19 and 21 are based on, and informed by, a comprehensive growth strategy which the Council has carried out for its district. We acknowledge it is not a statutory document. However, it is based upon professional reports the Council has received, including an extensive landscape study referred to by Ms Maresca in her evidence. The TD2050 was publicly notified for consultation in conjunction with the 2006-16 Long Term Council Community Plan using the special consultative procedures under the Local Government Act 2002. We thus find that the Variations should be given substantial respect and weight."*

13. As set out above (and in Mr Rachlin's evidence), Change 1 is based on the UDS which has gone through LGA processes, including

public consultation. Change 1 implements but is not predetermined by the UDS. The UDS is a starting point for Change 1 and in my submission, is similar in nature to the Taupo District's TD2050.

14. There is, therefore, authority for the view that proposed RMA documents can be given greater weight in circumstances where their subject matter has been developed, consulted on, and tested through other statutory processes. The UDS therefore has some relevance to the weight to be given to Change 1.

15. It can not be said that Change 1 is in its infancy. Submissions have been received, hearings held, and notification of decisions on submissions and further submissions occurred in December 2009. Whilst some 50 appeals have been lodged, with three of those appeals seeking the deletion of Change 1 in its entirety as an alternative to the inclusion of the land subject to those appeals within the Urban Limit, that does not mean that no, or little weight should be given to Change 1.

16. Attached and marked **"A"** to CRC's earlier legal submissions was a table setting out those parts of the objectives and policies in Change 1 relevant to Proposed Plan Change 7 that are currently under appeal.

17. The table does not include the site-specific appeal points (such as the relief sought by Lincoln Land Development or Denwood Trustees Limited) as those appeal points do not seek specific changes to the objectives and policies.

18. As noted in Mr Carranceja's legal opinion, some appeals have been withdrawn in part, whilst the Court has received consent memoranda in respect of other appeals. Of note, the Court has received consent memoranda (signed by the UDS Partners and the respective Appellant) or partial withdrawals of appeals by those appellants seeking to delete urban limits or Change 1 in its entirety who produced evidence to support their position in the Stage 1 hearing of the Change 1 proceedings.

Exposure to testing and independent decision-making

19. The decision on Change 1 was made by independent Commissioners having heard all of the submissions and evidence.

In my submission, the involvement of independent Commissioners suggests that greater weight may be able to be attributed to their decision compared with a decision made by elected members. Parties have had an opportunity to be heard, and the views of those parties have been independently tested and assessed.

Circumstances of injustice

20. The Courts have recognised that in some cases there may have been a shift in emphasis in planning controls which has the effect of frustrating legitimately held expectations about what may be done on a person's property. Such changes or uncertainty about what a proposed plan may eventually comprise, may lead to situations of injustice meaning that less weight should be accorded to such changes. However, in these circumstances, Change 1 does not seek to remove legitimately held expectations about urban development in Selwyn. It does not seek to prevent landowners from developing their land that is currently able to be developed for urban use. As such, no circumstances of injustice arise in this particular instance.

The implementation of a coherent pattern

21. This factor has rarely been invoked in its literal form, but does recognise that where one of the planning instruments is ambiguous or internally incoherent then it should be given less weight. The Court in *Keystone* expanded on this factor by considering not just internal coherence, but also coherence within the RMA itself. In my submission, this factor is relevant in the present instance. Change 1 seeks to introduce a coherent pattern of development in the Greater Christchurch Region. It seeks to direct the locations where urban development can take place to ensure that such development is well integrated and serviced with appropriate infrastructure.

22. In order to achieve this, a coherent pattern of development needs to be recognised in the District Plans. As the RPS must be given effect to by the District Plans, the coherent pattern of development contained within Change 1 is important to ensure a coherent pattern of development in the Greater Christchurch Region.

23. It is submitted that Change 1 is not ambiguous or incoherent in relation to the coherent pattern of development which it seeks to implement. As such, it is submitted that additional weight should be given to Change 1 in this regard. Change 1 is directly focussed on the implementation of a coherent patters of development.

A significant policy shift

24. Whilst urban consolidation aims have been inherent in the relevant regional and district policy framework since well before Change 1 was first conceived, it is submitted that Change 1 provides a more prescriptive direction and a shift towards introducing a higher degree of detail and direction about timing and location of urban development.

25. The Environment Court has determined in several cases that the operative Regional Policy Statement does not provide meaningful or effective direction as to where urban growth in the region should and should not occur. In *Canterbury Regional Council v Waimakariri District Council (re Pegasus Bay)*[10] the Court stated at paragraph 91:

> *It was suggested by a witness that to take the approach we have taken would largely render the RPS toothless. If that is the result then our views appear to be consistent with the views of the various Commissioners and* ***we join in with them in noting that the RPS is a document almost totally lacking in meaningful directives to District Councils in respect of the location of settlements and/or the expansion of existing settlements in and about Christchurch and within the Canterbury region.*** *It is certainly not for this Court to try and make the RPS more directive than it presently is particularly having regard to the fact that the neutering provisions were inserted in the plan with the consent of the Regional Council following references from affected District Councils.* [My emphasis]

26. Change 1 provides a more coherent set of objectives and policies for managing urban growth. In my submission, this represents a significant change in approach and represents a significant policy

[10] *Canterbury Regional Council v Waimakariri District Council (re Pegasus Bay)* EnvC Christchurch C5/2002, 25 January 2002.

shift . Whilst Change 1 is considered to be consistent with the existing operative RPS, it sets out a more specific and detailed policy approach as to how urban development is to occur and how those existing polices and objectives are to be achieved.

The implications of the 22 February 2011 earthquake for Change 1

27. It is submitted that Change 1 remains an appropriate strategic policy approach to managing urban growth in greater Christchurch. Change 1 is a long term document that takes account of the residential and business growth anticipated over the next 35 years. The monitoring and review provisions of Policy 16 are robust enough to deal with any uncertainties arising from the earthquake.

Summary as to weight

28. It is still the CRC's position that Change 1 should be given significant weight when considering these requests for Plan Changes.

Interpretation of Policy 6 of Change 1

29. CRC agrees with the interpretation of Policy 6 set out in the legal opinion dated 9 June 2011 attached as Appendix A to the Supplementary Section 42A Officer's Report. At paragraph 2.9 of the Supplementary Section 42A Officer's Report, Mr Wood has referred to evidence given by Mr Rachlin that in his opinion ""new growth" in Table 2 for Lincoln and Rolleston relates to Greenfield areas and not existing zoned land". It is accepted that when looking at Change 1 and Policy 6 as a whole, it also seems logical to come to the conclusion that Table 2 includes both new growth areas and existing zoned land for the Selwyn District, even though the words aren't completely there.

Further Denwood Trustees Option

30. Mr Rachlin has produced a Supplementary Statement addressing this matter.

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M Perpick / M Abernethy,

Counsel for the Canterbury Regional Council

15 June 2011