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 71

REPLY ON BEHALF OF FOUR STARS DEVELOPMENT LIMITED AND GOULD DEVELOPMENT 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

1 SCOPE OF LEGAL SUBMISSIONS

1.1 These submissions in reply address the following matters:

(a) Summary of Parties' in opposition to PC71

(b) A response to matters raised by these parties during the course of the hearing; and

(c) Response to matters raised by the S42A reporting officers.

(d) The issue of alternatives.

2 POSITION OF THE OPPOSING PARTIES

2.1 As a preliminary point, the Applicant has reached an agreement with Foodstuffs South Island Limited. While the detail of this agreement is confidential to the Parties for the time being, I can advise that it incorporates a package of measures which address the interface between the respective sites should consent be granted for the Pak N Save Supermarket. The parties have also agreed to continue to explore a commercial resolution of the issue of the extension to Broadlands Drive traversing Foodstuffs owned land. In light of that agreement it is no longer necessary to address you on the issue of the weight to be given to the consent application recently lodged with the Council, and which is to be publicly notified in the foreseeable future.

2.2 By the same token, the agreement reached ensures that it is no longer either necessary or appropriate to incorporate any amendments to the provisions of ODP to address the possibility of the Pak N Save resource consent being granted.

Canterbury Regional Council/CCC

2.3 CRC & CCC opposed PC71 in its entirety, however their witness Mr. Langman confirmed that he did not oppose a rezoning of the southern portion, being the land identified in the Future Development Area (FDA). CRC & CCC however remain opposed to a rezoning of the northern and middle portions of the Site for the reasons set out in their submissions and evidence.

Christchurch International Airport Limited (CIAL)

2.4 CIAL's submission opposed all of PC71, with Ms. Appleyard explaining that this was on the basis of CIAL's understanding the Applicants were taking an "all or nothing" approach towards approval of PC71.

2.5 Ms Appleyard acknowledged at the hearing that this was not the case, CIAL's position now being that it does not oppose rezoning of those parts of PC71 falling outside of the existing 2008 50 dBA Air Noise Contour. CIAL continues to oppose

a rezoning, deferred or otherwise, for that portion of the land underneath the Contour. Ms Appleyard concluded her legal submissions by stating:

Until the independent review panel has reviewed and finalised the revised contours, it would be inappropriate for a private plan change to pre-empt any outcome of a process.

2.6 The Applicants have been advised by Environment Canterbury that the expert panel of reviewers has been appointed, and will work on the peer review until May 2022. A draft report is to be made available shortly thereafter in June 2022.

3 RESPONSE TO THE CASE PRESENTED BY THE OPPOSING PARTIES

Canterbury Regional Council/ Christchurch City Council

3.1 Mr. Wakefield accepted that Policy 8 of the NPS2020 enables requests such as PC71 to be considered on their merits, however the position of his clients steadfastly remains that Policy 8 of the NPS UD is merely administrative.

3.2 Mr. Wakefield submitted that Policy 8: " ...*opens the door and provides a pathway but it's just that and it's an administrative pathway that provides for the assessment of these on their merits against the statutory frame work but the problem that we're facing in this instance is that the decision that needs to be made at the end of that process runs foul of the regional policy statement and its highly directive avoid framework. And it's our submission that there's no presumption through policy 8 or the NPS that accepting it for processing means that it is also able to be granted on its merits*

3.3 If Mr. Wakefield is to be understood correctly, he is effectively saying that qualifying plan changes under Policy 8 may be declined regardless of their merits. Presumably, by this he was solely referring to plan changes that involve land beyond the urban limit created by Objective 6.2.1 and associated provisions in the RPS. In which case, then all unanticipated plan changes beyond the urban limit, regardless of whether or not they provide significant additional capacity and contribute to a well-functioning urban environment and are otherwise consistent with all relevant objectives and policies of that higher order document must be declined.

3.4 To accept such a proposition would, in my submission, render Policy 8 of the NPSUD functionally meaningless or impotent. I refer to the Commissioner's conclusion on this very point in PC67:

"Policy 8 specifically addresses responsiveness to plan changes. It must be given 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 OSDP) contain avoidance objectives. Development in areas outside of those identified in Map A is clearly "unanticipated"… 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…"

3.5 The Applicants endorse the above conclusion, and say that Mr. Wakefield has added nothing to the argument that would persuade you to adopt a different conclusion in the present case.

3.6 As correctly assumed by Mr. Wakefield, the Applicants rely on the fact that the NPS UD is the later in time statutory document that sits above the RPS. By acknowledging, as he subsequently did, that the Regional Council has not yet included the significance criteria in the RPS, Mr. Wakefield is accepting that the RPS does not, as is required, give effect to the higher order NPS.

3.7 Mr Wakefield promoted a rather novel approach as to how he thought the NPS UD could be reconciled with the prescriptive RPS policies. That is, he proposed a two-tier process whereby you make a recommendation on the merits of PC71 which stopped short of approval but instead recommended that the Selwyn District Council seek a change to the RPS from the Canterbury Regional Council to accommodate the additional area of land within Map A.

3.8 This suggestion raises more questions than answers, in particular whether or not such a course of action is open to you, bearing in mind your role as a Commissioner is to make a recommendation on the merits of the Plan Change. Mr. Wakefield accepted as much.

3.9 Looked at with a critical eye, what if the Regional Council simply declined any such request by the District Council, and continued to maintain the position that the issue of meeting housing demand should be deferred until the RPS review in 2024? Would this mean that the District Council is barred from making a decision on PC71? What if, as part of that review, the CRC decided that additional supply should not be enabled in Rolleston regardless of the level of demand, but instead should be directed towards intensification? Even if the CRC accepted a recommendation to extend Map A to include one or more of the private plan changes outside the GPA's/ FDA's, what process would be chosen under the RMA to achieve this outcome, and how long would it take? Respectfully, this would be a classic case of paralysis by analysis, with the likely outcome simply being planning inertia in face of what all parties accept, or should accept, is a housing crisis for which a responsive or more immediate approach is required.

3.10 Mr. Langman's presentation to the Commissioner can, broadly speaking, be summarised as advocating intensification over greenfield expansion. That is, in responding to questions, he continually deflected the debate back to which of these options for enabling growth should be preferred. In doing so he set aside all of the background documents to the NPS, as referred to in opening submissions and Ms Aston's evidence, which make it explicit that the NPS UD sought to facilitate development both up and out.

3.11 Mr Langman made continued references to the potential for greenfield development to compromise intensification targets in the RPS, effectively saying that one greenfield house means one opportunity lost for intensification: *…if people are able to purchase greenfield land that removes that purchaser from looking to purchase through brownfield or existing urban areas*.

3.12 No data was made available to support either this statement, or to counteract the Applicant's evidence that ample infill development is occurring within Christchurch City. Reference could have been made to the Greater Christchurch Housing Capacity Assessment (p. 34), which suggests that the relationship between infill and greenfield demand is complex. The HCA states:

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.

3.13 All that Mr. Langman could say is that the NPS UD (Clause 3.9) will in the future provide firm data on the uptake of MDRS on a quarterly basis. Clause 3.9 requires the monitoring of, amongst others:

(e) The proportion of housing development capacity that has been realised:

(i) in previously urbanised areas (such as through infill housing or redevelopment); and

(ii) in previously undeveloped (ie, greenfield

3.14 In the 18 months since the NPSUD came into force, this monitoring has not been undertaken. If it has, it should have been made available so as to facilitate evidence- based decision making.

3.15 Mr. Langmans' concerns about cumulative effects on infrastructure have been comprehensively addressed in the evidence, including by Mr. England in his summary on wastewater infrastructure. Mr Mthamo has fully addressed the issue of cumulative effects on productive soils.

3.16 To illustrate his opinion regarding the proper interpretation of "urban environment" Mr Langman stated: *For example, would a 5 lot plan change at be significant be significant in the context of Teddington and there is a number of settlements around Greater Christchurch which have that small size and if you are focusing just on that size of settlement then it's very easy to consider than any scale of plan change could be significant in that context.*

3.17 Apart from being fanciful in the extreme, in my submission Mr Langman's example when compared to the scale of the development proposed by PC71 and its location is simply a meaningless analogy, particular given that Rolleston on its own meets the definition of urban environment in the NPSUD.

3.18 In answers to questions regarding Objective 3 of the NPS, Mr. Langman responded that PC71 would "potentially" enable more residents in areas of an urban environment in or near employment centres and where this is high demand relative to other areas. Leaving aside the undisputed evidence that Rolleston is an area of high demand relative to other areas in Greater Christchurch, Mr. Langman's acknowledgement must be viewed in light of his acceptance that the FDA portion of the PC71 land can be rezoned. That is, if the FDA portion of the Plan Change meets Objective 3 (and indeed all other objectives and policies of the NPSUD), how could it logically be the case that the remainder of the land, which is located closer to Rolleston Town centre, does not?

3.19 In the same vein, how could the non FDA portion of the land be said to be inconsistent with the "*reduction of greenhouse gases*" component of a "*well-functioning urban environment*", if the opposite conclusion has, self-evidently, been reached in Change 1 for all FDAs in Rolleston. I refer here to Appendix 7 to the Report provided to the Minister on Change 1 to the RPS, in particular the following passage at paras [90] – [92]:

3. Effects on greenhouse emissions and climate change

[90] Three submissions seek changes to the effect that:

a) there would be no net change in total private vehicle use in Rolleston, Rangiora and Kaiapoi;

b) there would be no additional development before carbon neutral transport is available; and

c) development that contributes to emissions, climate change and sea level rise, or result in significant private car dependency would be avoided.

Other submissions raised related issues as well as the Climate Change Emergency declared by CRC and others.

[91] While the Report accepts that the potential effect on greenhouse gas emissions and climate change are essential considerations, it notes that this must be balanced with other considerations, including the need to meet future demand for housing and business. CRC considers that the settlement pattern promoted through Change 1 will produce a compact urban form that will in fact support reductions in emissions.

[92] In my view the Council's reasoning is robust.

3.20 The reference to a compact urban form supporting a reduction in emissions is of note, particularly given Mr. Langman's acceptance at para 113 of his evidence that *"…development in this location would result in a compact urban form…"*

3.21 In my submission the benefits of the land's location in terms of proximity to Rolleston centre (a Key Activity Centre) and its proximity to employment areas[1] are such that it represents consolidated development of Rolleston. Under the RPS the benefits of consolidated development for the entire region are recognised in Chapter 5 in the following terms:[2]

The pattern of development in the region strongly influences the use of energy, whether this is as a result of the demand for transport or energy required to establish and undertake the activity. As development intensifies and spreads, the demand for transport and energy use increases.

A consolidated pattern of urban development, as the primary focus for accommodating the region's growth, together with a limitation on the extent of areas of rural-residential activity, will:

1. minimise energy use;

2. promote more sustainable forms of development;

3. encourage greater modal choice, reduced trip distances and promote healthier transport options;

4. provide for the efficient use of existing infrastructure; and

5. maintain regional identity and character.

3.22 Approving consolidated development such as PC71 inherently supports a minimising of energy use and provides greater modal choice etc… All of these features support a reduction in emissions.

Response to Christchurch International Airport Limited.

3.23 Within this section, the following matters are addressed:

(a) *Narrow focus of CIAL's Opposition*

(b) *What is the best available information?*

(c) *Appropriateness of a deferred zoning*

3.24 In NPSUD context, CIAL's opposition is based on an assertion that a rezoning of the contour affected land would not result in a "*well-functioning urban environment*". The case for CIAL is not holistic in the sense that its planning witnesses, Mr Bonis, has not undertaken an overall analysis of the merits of rezoning. Rather, the sole issue which CIAL says is determinative is the potential

[1] Of note is the operative status of PC66, which has rezoned an additional 27ha of industrial land in Rolleston.
[2] Principal Explanation and Reasons – Objective 5.2.1 Location, Design and Function of Development (Entire Region)- CRPS P 47

for people living under the 50 dBA Ldn contour to be exposed to aircraft noise, which may in turn lead to a reverse sensitivity issue arising.

3.25 In submissions, Ms Appleyard referred to the *Robinson's Bay* Decision, where the Court was faced with a choice between discouraging (as opposed to avoiding) noise sensitive activities within either the 50 or 55 Contour line in the then Proposed City Plan.

3.26 Ultimately, the Court adopted the 50 dBA Contour largely for the reason that the land affected at that time was subject to a wide matrix of policies which would otherwise limit its development potential. In other words, the discourage policy did not sit on its own as a barrier to development and, accordingly, the Court found that the costs [in s 32 terms] of imposing the 50 dBA Contour on landowners with development aspirations would be limited.

3.27 The Court went on to say:

> *[58] By the same token, we are unable to conclude firmly from the evidence that we have heard that there is in fact any significant cost imposed upon the airport from the imposition of the 55 dBA Ldn as opposed to the 50 dBA Ldn contour. Many witnesses gave evidence based on an assumption that higher density would lead to curfews on the airport. The only distinction between 50-55 dBA Ldn noise contours was that a 55 dBA Ldn contour may introduce a higher concentration of noise sensitive activities to the land between 50 and 55 dBA Ldn. The proposition was that with a higher population in the low noise area there would be more agitation for a curfew. Having heard all the evidence, we have concluded that a curfew due only to the inclusion of buildings between the 50 and 55 dBA Ldn noise contour is unlikely. We do accept that there are likely to be a percentage of persons highly annoyed even below the 50 dBA Ldn noise contour. Although that percentage is significantly less than at the 55 dBA Ldn contour, we accept this may lead to an increased level of complaints. In our view such complaints are going to be inevitable in any event as the noise levels for airport activity within the existing urban area moves towards the 50 and 55 dBA Ldn contours in the next twenty to thirty years.*
>
> *[59] We have concluded as a fact that a greater number of dwellings between the 50 and 55 dBA Ldn contour will lead to an increased number of persons being highly annoyed by aircraft traffic. That effect is one on the amenity of the persons who may reside under the flight path and accordingly is an effect which we should properly take into account, particularly under section 5 of the Act. However, it is also an effect which has a cost (in the wider meaning of that term) in terms of its effect on the local amenity. It is an effect which is not internalised to the airport and its land and is therefore shifted to the owners of land under the flight path. Thus, although there is no prospect of curfew on the airport at this time, there is likely to be an adverse effect on amenity of persons living within the 50 dBA Ldn contour line and thus an environmental cost imposed.*

3.28 It is trite to say that the policy matrix against which PC71 is to be considered is different to that occurring in *Robinsons Bay*. In particular the objectives and policies of the NPSUD are of fundamental significance.

3.29 The definition of "*well-functioning environment*" is set out in Policy 1 of the NPS UD. The criteria listed in Policy 1 are expressed as a minimum, and certainly do not include any reference to the potential risk of reverse sensitivity effects on infrastructure such as the Airport. Rather, infrastructure is specifically identified

as a "qualifying matter" in the context of identifying areas suitable for intensification.

3.30 That is not to say that amenity effects and the risk of potential reverse sensivity effects arising at some undetermined point in time are not irrelevant, rather I am simply stating that such matters are not expressed as the minimum requirements of a well-functioning urban environment.

Best Available Information

3.31 The Court was not asked in *Robinsons Bay* to rule on the reliability of the City Plan contours. Instead, as pointed out in Ms Aston's evidence, the passage of time revealed that the growth projections on which they were based has proven to be incorrect, as of course is the case for the existing 2008 contours.

3.32 Ms Appleyard submitted that there is no evidence to assist you with what the final contours will look like. She maintained the position that the best available information at the moment is the Air Noise Contour contained in the CRPS and operative and proposed district plans.

3.33 Respectfully, this is a difficult submission to sustain given the now publicly available technical reports prepared by CIAL's experts from 2018-2021[3] (the Expert Update), as referred to in evidence on behalf of the Applicant and CIAL.

3.34 The Expert Update is of direct relevance. Amongst other matters, it specifically states that several of the assumptions in the 2008 Contours need updating[4].

3.35 A particular assumption that needed to be updated is the recent roll out of newer technology to manage aircraft approach and departure paths.[5]

> ***10. Flight paths and precise navigation***
>
> *Newer navigation technology can change aircraft flight paths - such as Required Navigation Performance (RNP). RNP is satellite-based aircraft navigation technology specifications under Performance Based Navigation (PBN) to help aircraft operate along a precise flight path with a high level of accuracy. PBN offers safety and efficiency benefits compared to visual navigation of flight paths. Over time this permits new flight paths to be considered in addition to existing arrival and departure paths and change the distribution of traffic across existing and new flight paths as more aircraft, airlines and pilots use the new technologies. Precise navigation can, where possible, help aircraft to avoid sensitive areas but in doing so can concentrate noise along these precise flight paths. Historically, aircraft approached and departed the airport straight on, but flight path design and procedures changes from time to time. Since 2018, aircraft have been turning earlier on their approach - angling away from urban areas. This affects the shape of the noise contours.*

[3] https://www.christchurchairport.co.nz/globalassets/about-us/sustainability/noise/noise-contours/2021_cial_expert_update_of_the_operative_plan_noise_contours.pdf
[4] For example, see Expert Update, p.22 at paras 28 - 29.
[5] Expert Update at p.7

Another way in which flight paths have changed in recent years is air traffic control now require aircraft to depart the airport using the Divergent Missed Approach Protection System (DMAPS). DMAPS are departure tracks that turn at an angle soon after take-off, instead of flying straight and then turning when instructed by Air Traffic Control. Aircraft have been required to use DMAPS departures since 2020. When DMAPS procedures were designed, the opportunity was taken to mitigate noise impacts by making the turns in the direction of less populated areas, namely to the north-west and south-west, rather than north-east and south-east

3.36 Consistent with Ms Blackmore's evidence, the newer aviation technology replaces conventional visual and ground-based navigation. This old school technology is described in the Expert Update as:

…no longer suitable for a modern aviation industry which requires denser air routes and creates higher demands on safety and efficiency in terms of aircraft fuel burn, emissions, noise impact, and maximising airspace and runway capacity. [6]

3.37 Ms Blackmore referred in her evidence to flight tracks being one of the main assumptions used in the remodelling of the contours, such flight tracks provided to CIAL by Airways and using the new aviation technology. This is in contrast to the 2008 Contours that were based on straight flight tracks used by aircraft at that time. Ms Blackmore stated that the assumptions around the flight tracks could change and, as sole illustration of that point, attached an image to her evidence which illustrated the contours using straight tracks together with a capacity of 200,000 aircraft movements. This Ms Blackmore described as... *a sort of* ***counterfactual*** *contour...if we stuck with using straight tracks so it's got all of the 2021 updated assumptions and the* ***old*** *flight tracks in it.*

3.38 The description of this image as counter factual i.e something that is counter to the facts or relates to something that is not the case is particularly apt, given that it relies on flight tracks that have been replaced by newer aviation technology. As Ms Blackmore put it so succinctly: "*…it's almost like aircraft now fly using Google Maps whereas previously they relied on paper procedures."*

3.39 Ms Blackmore went on to describe how the use of new technology [RNP arrivals and DMaps Departures] represents a *"once in a generational shift in aviation this doesn't happen very often… and it's happened now because of advances in technology and the capability of aircraft...* Ms Appleyard referred to Ms Blackmore description as explanation of: "... *a paradigm shift in airspace management and is not something that was foreseen in 2008"*

3.40 The reference to a once in a generational or paradigm shift unforeseen in 2008 is explicit evidence that the information supporting the current 50 Contour line is not the best available information at all; instead, it is based on assumptions that are significantly out of date and fundamentally irrelevant for determining the

[6] Expert Update at page 9

Contour line. Put simply, if these assumptions were relevant, they would not be described as counter factual.

3.41 Related to the accuracy of information, Ms Appleyard referred to comments about the relevance of factors such as wildly inaccurate growth projections and fleet mix to where the contours are drawn. To paraphrase, Ms Appleyard stated (without any apparent evidential basis) that playing with such matters are not the things that make a lot of difference. No weight should be given to such a statement, which is of course disputed.

Will the Amenity of Future Residents Be Affected?

3.42 As stated in *Robinsons Bay,* the key function of the contours is to protect residents from being exposed to aircraft noise.

3.43 In that respect, I submit there is no evidence before you of the required standard which would support a finding that that the amenity of future residents within the current 50 Contour will be affected. CIAL's opposition can only be sustained if you accept that past evidence on the effects of exposure to noise within the 50 dBA Contour <u>generally</u> is sufficient to establish that those effects will <u>specifically</u> occur on the PC71 land. However, the sole basis for such a specific finding is information that is significantly out of date, and which has to date proven to be unreliable and inaccurate. It is submitted this reality should be factored into any judgement as to whether or not a rezoning of the contour affected land would constitute a well-functioning environment.

Appropriateness of a Deferred Zone/ Rezoning Plus Consenting Mechanism

3.44 Ms. White's opinion is that a deferred zoning meets the relevant objectives and policies, but remains opposed to a deferred zoning for the reasons advanced by CIAL.

3.45 CIAL has submitted [para 9] that a deferred zoning is only appropriate where the event in anticipation of which the zoning is deferred is <u>certain</u> to occur, or is within the power of the Council or applicant to make it happen. The case law referred to by Ms Hill and Ms Appleyard do not support that submission. In particular, the Courts have never stated that certainty is a pre-requisite of a zoning (deferred or otherwise) being considered appropriate. Indeed, it is submitted that to do so would create an extremely high barrier that may well be impossible to achieve for numerous rezoning proposals.

3.46 The case of *Dixon v Invercargill City Council* referred to in CIAL's submissions centred entirely on the question of whether an individual submitter's land could be spot zoned without supporting reticulated infrastructure in advance of a wider area that was to be subject to a deferred zoning. As such the factual matrix of *Dixon* is entirely different to the present. In any event, the Court did not make

any statement of general application regarding the circumstances where a deferred zoning would/would not be appropriate.

3.47 Of note, the mechanism for lifting deferred zoning in *Dixon* was the passing of a Council resolution, which of course is the administrative mechanism proposed in the present case. This very same mechanism was endorsed for the Operative District Plan in *Akaroa Orchards Ltd v Selwyn District Council* C85/06 where the Environment Court acknowledged that: "… *there is no certainty that such a resolution will be passed at any time during the lifetime of the Plan. However this limitation is accepted not only by Akaroa Orchards, but by a number of other land owners in Prebbleton.*[7] Certainty of outcome was therefore not elevated to be a pre-requisite of approval of the deferred Living Zone.

3.48 The case of *Boyd v Queenstown Lakes District Council*[8] referred to by CIAL is essentially a procedural decision to notify a s 293 application. While the Court commented (as opposed to held) that a staged approach that was contingent in part on the disestablishment of a frost fan on one property within the s 293 area "…*would appear problematic*" for a range of reasons, it nevertheless approved notification of the application.

3.49 *Brookers Resource Management* at A 76.01 states:

> *It is bad resource management practice and contrary to the purpose of the RMA to zone land for an activity when the infrastructure necessary to allow that activity to occur without adverse effects on the environment does not exist, and there is no commitment to provide it: Fore World Developments Ltd v Napier CCC EnvC W008/05. Such an approach, eg deferred zoning, creates unmeetable expectations and puts the council under pressure to spend money that may be committed elsewhere.*

3.50 The present case is not one of unmeetable expectations, nor is it a case where pressure can possibly be brought to bear on the Council to resolve to lift deferred zoning status. The Applicant is well aware, and fully accepts, the limiting fact of the requirement for a peer review of the Experts Update. However, the Applicant has a justifiable expectation on the basis of the rigorous analysis in the Experts Update that the affected land will shortly be freed from the constraint of the 50 Contour. In the extremely unlikely event this does not occur, the Applicants cannot possibly be said to have an expectation (unrealistic or otherwise) that residential development can proceed without the deferral being lifted.

3.51 In submitting that a deferred zoning creates an expectation of a change in use, CIAL refer to *Trotman v Tasman District Council* NZEnvC 51, a case involving a land use consent application to build a dwelling on an existing rural scale parcel of land within a deferred residential zone. The key issue there was whether or not granting consent would impede residential development of the land in accordance

[7] *Akaroa Orchards Ltd v Selwyn District Council* C85/06 at para 12.
[8] Environment Court, ENV -2018-CHC-163

with the deferred zone. The Court held that it would not. So, *Trotman* is not particularly relevant to the present circumstances, if at all.

3.52 Similarly, the Applicants do not accept, and it is fanciful to assert otherwise, that if the land is rezoned now and a consenting mechanism is put in place which focuses on the key issue of the potential impact of aircraft noise on residential amenity it would be impossible to decline an application for consent. CIAL would not, as Ms Appleyard submitted, be powerless to resist any such application. Instead, it would almost inevitably be identified as an affected party and would be in a position to fully participate in the consent process.

Response to Section 42A Reporting Officers

3.53 **Attached** to these submissions is a brief statement of evidence in reply by Ms Lauenstein, which responds to the matters raised by Mr. Nicholson in his presentation. In particular, Ms Lauenstein responds to the development line introduced by Mr. Nicholson for the northern portion of the Site. As Ms Lauenstein says, the rationale for this line is such that it is unnecessary in the present context.

3.54 Also **attached** is a revised ODP, including updated narrative. Essentially, these documents reflect Applicants' position on matters such as appropriateness of a deferred zoning and also incorporates the amendments recommended by Ms Lauenstein in her evidence in reply. In respect of the narrative, a clean version only has been provided with comments attached identifying the substantive changes to the amended version of the narrative presented by Ms White at the hearing.

3.55 Also, for the Commissioner's benefit, it is highlighted that deferred zoning has been removed from that part of the middle portion of the site fronting Lincoln–Rolleston Road which falls outside of the 50 dBA Contour i.e. approximately 2ha. The Applicants' position is that there is no rationale for delaying a rezoning of this land now. Rezoning this portion of land now was not opposed by Ms. White, albeit mention was made by her of the issue of scope or the jurisdiction to consider this amendment.

3.56 In *Oyster Bay Developments Limited v Marlborough District Council*[9], the Environment Court referred with approval to Wylie J's High Court decision in *General Distributors v Waipa District Council*[10]:

> *[22] From that Judgement we identify these elements for deciding whether an amendment to a change to a planning instrument is within or beyond jurisdiction (citing the relevant paragraphs in General Distributors):*

[9] C081/09
[10] (2008) 15 ELRNZ 59

[a] The terms of the proposed change and the content of submissions filed delimit the Environment Court's jurisdiction [64];

[b] Whether an amendment goes beyond what is reasonably and fairly raised in submissions on the plan change will usually be a question of degree to be judged by the terms of the plan change and of the content of the submissions [58];

[c] That should be approached in a realistic workable fashion rather than from the perspective of legal nicety, and requires that the whole relief package detailed in submissions be considered [59][60].

3.57 As to the terms of the proposed change (a above), the Applicant sought deferred zoning, deferral being lifted once the noise contour no longer applied to the area of land identified on the ODP. Allowing for the fact that part of the middle portion of the Site is actually not affected by the contours, the Applicants see no reason why a rezoning of this part should not be approved at this point in time. Put simply, the trigger for removal already exists, which is consistent with the overall terms or intent of the Plan Change.

3.58 Furthermore, as discussed in evidence and submissions on the Applicants behalf, lifting of the deferral is essentially one of timing. If a lifting of part of the deferral is effected now, that could reasonably be said to be within the terms of the Plan Change.

3.59 CIAL aside, the sole submitters to address the timing of the removal of the deferred zoning were the Courts. Mr Court attended the hearing to speak to their submission in support of PC71, which specifically referred to issue of timing. Mr Court was candid in his view that the air noise contours should not impede rezoning of any of the land.

3.60 Overall therefore, it is submitted that this minor amendment is fairly and reasonably within jurisdiction.

4 ISSUE OF ALTERNATIVES

Can the Consideration of Alternatives Under s 32 be extended to awaiting District Plan Reviews/ Reviews of an RPS? What About Alternative Sites, including other Plan Changes?

4.1 The issue of alternatives was raised in questioning during the first day of the hearing.

4.2 Both Mr. Wakefield & I referred to decisions of the Court that have dealt with these in the past, my friend referring to *Waitemata Infrastructure Limited v Auckland City Council.* On considering the matter further, it is noted that both *Waitemata* and the *Kennedys Bush Road Neighbourhood Assn v Christchurch City*

Council[11] decision relied on by myself were decided in the context of different versions of s 32 of the Act. To illustrate, in *Waitemata,* the then s 32 specifically imposed a duty on decision makers to consider alternatives, a duty that no longer exists under the present version of s 32.

4.3 Given this fundamental change in s 32, it is submitted that further consideration of the alternative of awaiting the outcome of either the Proposed District Plan, or for that matter a review of the RPS in 2024 is unnecessary. The first process has been paused because of MDRS complications, and the second process is so distant that awaiting its outcome would not be a responsive approach to adopt.

4.4 Having said the above, it is accepted that Clause 23 of the First Schedule entitles a local authority to request information from a plan change proposed as to:

(c) The benefits and costs, the efficiency and effectiveness, and <u>any possible alternatives to the request</u>

…

If such information is appropriate to the scale and significance of the actual or potential environmental effects anticipated from the implementation of the change or plan.

4.5 Accordingly, it seems that alternative sites <u>may</u> be of relevance. Indeed, the Supreme Court said as much in *King Salmon*[12], albeit the particular context in that case i.e. a proposed salmon farm which would have had significant adverse effects on outstanding natural values. To paraphrase the Court's findings:

(a) There may be instances where a decision-maker must consider the possibility of alternative sites when destemming a plan change. The words "*alternatives to the request*" refer to alternatives to the plan change sought, which must bring into play the issue of alternative sites. At the very least, the ability of a local authority to require provision of this information supports the view that consideration of alternative sites may be relevant to the determination of a plan change application. The question of alternative sites may have even greater relevance where an application for a plan change involves not the use of the applicant's own land, but the use of part of the public domain for a private commercial purpose, as here. (paras 157, 168, 169)

(b) Given that the need to consider alternative sites is not an invariable requirement but rather a contextual one, this will not create an undue burden for applicants. The need for consideration of alternatives will arise from the nature and circumstances of the application, and the reasons advanced in support of it. Particularly where the applicant for the plan

[11] Environment Court W63/97
[12] *Environmental Defence Society Inc v New Zealand King Salmon Company Ltd* [2014] NZSC 38

change is seeking exclusive use of a public resource for private gain and the proposed use will have significant adverse effects on the natural attributes of the relevant coastal area, this does not seem an unfairly onerous requirement. (para 173).

4.6 Applied to the present circumstances, it is noted the Council did not request any further information from the Applicant as to alternatives to the request. Implicitly therefore, the Council did not consider the environmental effects of the plan change to be of particular significance.

4.7 As is seemingly accepted by all parties, the NPS UD essential confirms that plan changes such as PC71 be considered on their own merits without specific regard to alternative plan changes. To embark on an exercise of comparing different applications would in any event be problematic given the wide variety of changes sought and the extent of distinguishing characteristics. Some are small scale plan changes within FDA's, whereas others are of a large scale, and wholly outside of the urban limit.

4.8 A meaningful comparison between plan changes therefore be difficult to undertake, even putting to one side the obvious natural justice implications. That is, those involved in individual plan change applications have prepared on the basis that it was inappropriate and unnecessary to test their individual application against other proposals. To contemplate such a comparative analysis at this stage would have untold implications in terms of delay, cost and uncertainty.

G J Cleary

04 March 2022.