

**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 Four Star
Developments Group
Limited for a plan change
(Private Plan Change 71)
under the First Schedule to
the Resource Management
Act 1991

**LEGAL SUBMISSIONS FOR CHRISTCHURCH CITY COUNCIL AND
CANTERBURY REGIONAL COUNCIL**

10 February 2022



Simpson Grierson

Barristers & Solicitors

M G Wakefield

Telephone: +64 3 365 9914

Facsimile: +64-3-379 5023

Email: mike.wakefield@simpsongrierson.com

PO Box 874

CHRISTCHURCH

CONTENTS

	PAGE
1. INTRODUCTION	1
2. RESPONSE TO LEGAL SUBMISSIONS FOR THE APPLICANT	2
3. ASSESSING PC71 ON ITS MERITS	5
4. CONCLUSION	5

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 71 (**PC71**) to the Selwyn District Plan (**SDP**), which has been requested by Four Star Developments Group Limited.
- 1.2 CCC and CRC both made submissions in opposition to PC71, raising a number of concerns common to both councils. It is for this reason that a joint case is being presented, with evidence presented by Mr Marcus Langman dated 31 January 2022.
- 1.3 CCC and CRC's central concerns with PC71 are:
- (a) First, that the request does not qualify for consideration under the 'responsive planning framework' under the National Policy Statement on Urban Development 2020 (**NPS-UD**); and
 - (b) Second, that PC71 is either inconsistent with or contrary to a number of important policy directions in the Canterbury Regional Policy Statement (**CRPS**).
- 1.4 The CCC / CRC position on the approach to reconciling and applying the NPS-UD and CRPS has been traversed through earlier private plan change hearings and through the Selwyn District Plan review hearings to date. To the extent that those submissions are relevant to this same matter for PC71, they are relied on again in this context.
- 1.5 In addition to opposing PC71, CCC / CRC has also submitted in opposition to PC67, PC69, PC72 and PC73, all of which have been recently heard (with final SDC decisions pending).
- 1.6 Given the consistent legal argument that is being presented by CCC / CRC, in order to avoid repetition these submissions have been prepared to respond to certain points made by counsel for the Applicant only (with reference to the presentation yesterday).

- 1.7** In all other respects, CCC / CRC rely on the submissions previously filed, which are available online on the SDC website.

2. RESPONSE TO LEGAL SUBMISSIONS FOR THE APPLICANT

- 2.1** The legal argument presented for the Applicant is essentially the same as that advanced by counsel for the other applicants involved in the earlier plan change hearings. The argument is that the NPS-UD, and Policy 8 in particular, should be given greater weight than Objective 6.2.1 of the CRPS. As a consequence of this, the argument is advanced that the “responsive” planning provisions provide a way to step around Objective 6.2.1 and Map A.
- 2.2** As previously submitted, it is considered that the responsive planning provisions are, in effect, non-substantive. They open the door, but do not provide all answers in terms of whether proposals should be accepted or not on their merits.
- 2.3** It is *not* our submission that any plan change requests outside of the Map A areas should not be considered. SDCs acceptance of PC71 (and others) for processing under clause 25 of Schedule 1, appears to be consistent with the intention of the responsive planning provisions in the NPS-UD, by requiring consideration of out-of-sequence or unanticipated development. However, neither Policy 8 nor the balance of the NPS-UD give rise to any presumption of acceptance of PC71 on its merits.
- 2.4** Instead, decision-makers on any plan changes are required to consider the statutory framework, the language used in the relevant provisions, and then need to reach a view as to how to reconcile the provisions. If the decision is to recommend approval, this will be in the knowledge that the SDP will end up non-compliant with the CRPS.
- 2.5** In advancing their preferred interpretation, the Applicant has relied on the fact that the NPS-UD is the higher order, and later in time,

document, and that the CRPS (and Change 1 in particular) does not fully give effect to the NPS-UD.

- 2.6** The Applicant raised the issue of perceived delay by CRC in terms of developing any responsive planning criteria under the NPS-UD. On this point, the NPS-UD does not direct that this occur by any particular date, and we note that such criteria are still being prepared by many regional councils across the country.
- 2.7** The Applicant discussed the origin of Chapter 6 of the CRPS, including that it was developed under the CERA legislation, rather than being tested against the purpose and principles of the RMA. While that is correct at the time Chapter 6 was initially developed, Change 1 to the CRPS was progressed through a streamlined planning process and assessed in section 32 terms. As a result, it is submitted that Chapter 6 (post Change 1) is a relevant RMA planning document, and that it forms a valid part of the statutory framework. While we have raised this point, we do not understand there to be any suggestion that the CRPS is invalid.
- 2.8** In comparing the NPS-UD and the CRPS, the Applicant made the submission that the CRPS provides the “foundation for future growth”, but that the NPS-UD provides the more fulsome “articulation in terms of how growth is to be enabled through a range of plan changes and processes”. We disagree.
- 2.9** As discussed in our earlier submissions, the NPS-UD is a higher level policy document that is expressed at a greater level of abstraction than the CRPS. This is to be expected given that it applies across the country. The CRPS provides the more directive regional, and sub-regional, provisions that deal with a multitude of RMA issues, not only limited to urban growth as per the NPS-UD.
- 2.10** There is no provision in the NPS-UD that directs the *enablement* of development by way of plan changes or any other processes. Instead, the NPS-UD relies on the standard Schedule 1 process to evaluate and decide any plan changes, which will engage all relevant RMA matters and the relevant statutory framework.

- 2.11** The issue, when evaluating this request (and the others), is how the weighting exercise should be undertaken as between the NPS-UD and CRPS, and on that point we note again that the CRPS contains the more far more directive provisions.
- 2.12** The issues of precedent and cumulative effects were discussed during the hearing, with reference to the Environment Court decision in *Canterbury Fields*.¹ In that decision, it was held that the issue of cumulative effects is better addressed or considered in terms of whether the plan change would implement the policies and objectives of the relevant planning instruments. Here, there is a question as to whether there are constraints associated with the requested development (namely three waters), and there are policies (in the CRPS) that seek to ensure that development is “co-ordinated” with infrastructure and that it does not occur until the necessary infrastructure is in place. It is in this context that Mr Langman has raised cumulative effects as a concern.
- 2.13** A question was raised by the Commissioner in relation to whether a different method could be within scope of PC71, for example whether a future planning process could be considered a more appropriate outcome, and how that would fit within section 32 and the assessment of alternatives. The decision in *Waitemata Infrastructure Ltd v Auckland City Council* (EnvC A055/05) provides authority for the potential that the consideration of alternatives could “be extended to considering whether a forthcoming review of the district plan is another option”, but on the facts in that case it was held that this would “not provide the full answer”.²
- 2.14** Finally, in relation to the GPA and FPAs in Map A, the Applicant raised uncertainty in relation to the uptake of development within those areas. CCC and CRC query the relevance of that issue, as that concern (and perceived uncertainty) could equally effect zoned land to the same extent. The question to be asked is whether the development capacity is reasonably expected to be realised (as per

¹ [2011] NZEnvC 199.

² At [41] to [42].

clause 3.26 of the NPS-UD), which can be guided by landowner and developer intentions. In this case, there is land within the FDAs that is subject to private plan change requests, and submissions seeking rezoning have been made on the SDC PDP. Both can, in our submission, provide a signal that this land can be reasonably be expected to be developed across the three temporal periods contemplated by the NPS-UD.

3. ASSESSING PC71 ON ITS MERITS

- 3.1** Mr Langman has prepared and filed evidence on behalf of CCC and CRC which addresses the statutory framework, the relationship between the CRPS and NPS-UD, and the plan provisions of relevance to PC71.
- 3.2** Mr Langman raises concerns with the interpretation advanced by the Applicant's evidence, and prefers an interpretation which does not result in an undermining of the CRPS avoid framework.
- 3.3** Overall, Mr Langman is not satisfied that PC71 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** For completeness, Mr Langman's evidence is that even if PC71 was found to provide significant development capacity (which he disagrees with), it would not satisfy the requirement to contribute to a well-functioning urban environment, nor satisfy the policy direction taken by the CRPS.

4. CONCLUSION

- 4.1** As previously submitted, the Commissioner is obliged to assess this request against the relevant statutory tests, which includes section 75(3) of the RMA, and the requirement that both the CRPS and NPS-UD are given effect to by a district plan.

- 4.2** This statutory exercise, when correctly applied and undertaken, does not need to involve a contest between the NPS-UD and CRPS, and giving preference to one over the other.
- 4.3** In our submission, the two can be reconciled together, with an additional local authority decision (by either SDC or CRC, or both) required before this or any other plan change can be approved in a way that satisfies section 75(3) (if that is the eventual recommendation). It is submitted that this approach is consistent with Policy 10(a) of the NPS-UD, which anticipates collaboration between local authorities when implementing the NPS-UD, and Objective 6(b), which requires strategic decision-making.
- 4.4** We have considered whether a contingent, or deferred, approval of PC71 could be a solution pending a change to the CRPS, but in our view there are issues with that approach. For one, it would involve an approval that is meaningless until a statutory decision is made by a different local authority (CRC), with no certainty that PC71 could ever be implemented until after that decision has been made. This would then create potential uncertainty for plan users, the community, the landowner, SDC and other key stakeholders (including the Greater Christchurch Partnership) who may feel that they need to adjust their own strategic plans in the meantime. That said, if this situation were to transpire and CRC was requested to change the CRPS, it would also need to consider the NPS-UD and its responsive planning framework when making its decision.
- 4.5** The only other option available would be to recommend to SDC that it request a change to the CRPS now, but as noted earlier, this would not provide any substantive outcome on PC71 as it relies on a statutory decision that is not within the scope of clause 10 of Schedule 1.

DATED this 10th day of February 2022

A handwritten signature in blue ink, appearing to read 'M G Wakefield', is positioned above a horizontal line.

M G Wakefield

Counsel for Christchurch City Council / Canterbury Regional Council