

Before the Selwyn District Council

under: the Resource Management Act 1991

in the matter of: Proposed Private Plan Change 73 to the Operative
District Plan: Dunns Crossing Road, Rolleston

and: **Rolleston West Residential Limited**
Applicant

Closing legal submissions on behalf of Applicant

Dated: 1 November 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 West Residential Limited (*RWRL*) in relation to a private plan change request, known as PC73, to the Selwyn District Council (the *Council*) to change the Operative Selwyn District Plan (the *District Plan*) to rezone approximately 160 hectares of land currently zoned Living 3 to Living Z in two separate locations on Dunns Crossing Road, Rolleston.
- 2 The final proposed rules package, including Outline Development Plans (*ODPs*), are attached at **Appendix 1**. Where any changes have been made to the rules package as provided in the evidence of Mr Phillips at the hearing, we have identified these in these legal submissions.

OVERVIEW

- 3 The hearing for PC73 was held on 28 and 29 September 2021 and traversed a wide range of matters relating to the sites and the plan change. These legal submissions only seek to cover the contentious aspects of the plan change and issues that arose from the hearing.
- 4 Counsel in a memorandum dated 21 October 2021 indicated to the Commissioner the matters to which these legal submissions would reply as follows:
 - 4.1 Identification of submitter locations.
 - 4.2 Further comment on the most appropriate way to enable urban growth.
 - 4.3 Response to some specific points raised in Christchurch City Council (*CCC*) and Environment Canterbury's (*ECan*) legal submissions.
 - 4.4 Response to how water consent transfer is best dealt with.
 - 4.5 Clarification of point of measurement for acoustic setback condition.
 - 4.6 Matters related to odour issues, including:
 - (a) Evidence in reply related to odour issues.
 - (b) Legal submissions on permitted baseline considerations for the plan change, particularly with regard to effects of odour.

- (c) Comment on issues relating to reverse sensitivity and the waste water treatment plan and resource recovery park.

IDENTIFICATION OF SUBMITTER LOCATIONS

- 5 The Commissioner, in Minute No 2 dated 22 September 2021, requested that the Applicant provide a map identifying the locations of local submitters within one kilometre of the sites.
- 6 This is attached at **Appendix 2**.

THE MOST APPROPRIATE WAY TO ENABLE GROWTH

- 7 There was a lot of discussion at the hearing regarding the most appropriate method to enable urban growth in a planning context, and particularly from an urban form perspective.
- 8 Urban design experts for both the Council (Mr Nicholson) and the Applicant (Mr Compton-Moen and Ms Lauenstein) issued a joint witness statement on 24 September 2021 following expert conferencing.
- 9 From this, it became clear that the key area of disagreement between the experts was as to the most appropriate method to enable future urban growth and development in Rolleston and whether this should be through private plan changes or through a comprehensive strategic planning exercise.¹ Mr Nicholson preferring the latter.
- 10 This issue is most appropriately within the skills and experience of those with planning expertise also, and as such, we suggest that Mr Nicholson's view with respect to his preferred method of enabling urban growth is given limited weight. We note that Mr Nicholson was otherwise largely in agreement with the Applicant's urban design experts.
- 11 We reiterate that private plan changes are an entirely valid process for the rezoning of land to enable urban growth and there is nothing in the RMA preventing this process from legitimately being used to expand township boundaries.
- 12 We agree with Ms White's comments made in her summary of evidence that ultimately the plan change should be considered on its merits, and this involves the decision-maker needing "*to weigh up the appropriateness of enabling the capacity now, against waiting*

¹ Joint witness statement at [6].

until the spatial planning exercise is undertaken and then subsequently given effect to through the CRPS and SDP.”²

- 13 Unlike Ms White however, we consider that the merits and benefits of bringing forward this capacity (through approval of this plan change) does outweigh the potential risks of pre-determining the direction of growth in Rolleston in light of:
 - 13.1 The NPS-UD having particular focus on addressing the worsening residential housing crisis in New Zealand as soon as reasonably possible. The evidence of Mr Colegrave, Mr Akehurst, and Mr Jones together clearly demonstrate that this crisis is particularly acute in Rolleston, Selwyn, and Greater Christchurch. The NPS-UD provides clear national direction around enabling urban growth to combat exactly this type of situation.
 - 13.2 The Applicant’s evidence clearly demonstrating that there is not currently sufficient development capacity in the short, medium or long term.
 - 13.3 The NPS-UD and its responsive planning framework which effectively anticipates plan changes like this one are capable of providing for urban growth even where the specific location is not anticipated. This confirms that private plan changes are an appropriate method, if not the most appropriate, given the urgency of the NPS-UD and the delay often associated with spatial planning processes.
 - 13.4 The Applicant’s evidence at the hearing clearly demonstrated that the west is the only direction in Rolleston that urban growth could reasonably expand towards. There are many restricting factors to the north, east and south that would prevent expansion from occurring in this direction.
 - 13.5 Finally, the underlying zoning is Living 3 (effectively a large lot residential zone) and therefore urban growth is already anticipated for the sites. As such, intensifying the amount of residential development to occur on the sites will not inherently change the nature of the use and therefore could not undermine future spatial planning processes as growth (albeit to a lesser degree) could happen there currently anyway.
- 14 As set out in our opening legal submissions, we note that this plan change is exactly the type of plan change Objective 6 and Policy 8 of the NPS-UD sought to enable.

² Liz White, summary of evidence, at [12].

RESPONSE TO CCC AND ECAN'S LEGAL SUBMISSIONS AND EVIDENCE

Legal submissions

- 15 Our opening legal submissions covered our interpretation of the CRPS and the NPS-UD, which is the core area of disagreement between the Applicant and the CCC and ECan. This interpretation will not be repeated here. We refer the Commissioner to these submissions which largely cover off most of the points raised by the Councils at hearing.
- 16 However, we do make the following additional responses:
- 16.1 The Councils' legal submissions do not appear to engage with the fact that the NPS-UD is the later in time planning document and the provisions of the CRPS were not drafted bearing in mind the context it provides. They assert that the CRPS gives a more particularised expression of the objectives and policies in the NPS-UD. It is difficult to see how this conclusion was reached when the NPS-UD was not even in existence when those objectives and policies in the CRPS were drafted.
- 16.2 The legal submissions assert that Plan Change 1 to the CRPS satisfies the requirement to provide sufficient development capacity. We note that Policy 2 of the NPS-UD requires Councils to provide "at all times" "at least sufficient" development capacity. We submit that the use of these words effectively means that sufficient development capacity is an evidential matter. The CRPS is not an expert witness, and certainly is not in and of itself an authority on development capacity at all times. The applicant provided clear evidence that there is not sufficient capacity at this point in time. We further note that in any case the capacity provided for by Plan Change 1 is not 'plan-enabled' and therefore would not meet the threshold of 'sufficient' under the NPS-UD.³
- 16.3 CCC and ECan continue to assert that the responsive planning framework only operates where it can be demonstrated that early release is warranted on the merits and in a manner that "*complements existing strategic planning*". No further explanation is provided to this comment. We do not see how one could possibly read this into the wording of the NPS-UD. If this had been the intention, it would have expressly been stated.

³ NPS-UD, clause 3.4(1).

16.4 The legal submissions do not include any direct responses to our opening legal submissions but instead go on to respond directly to the advice of Paul Rodgers, Adderley Head to the Selwyn District Council on this issue. This is somewhat surprising given the Adderley Head advice (while coming to a similar conclusion) is not the same as ours and was provided in the context of the proposed district plan. It is not clear why no direct response has been given to our legal submissions on the particular plan change.

- 17 We further emphasise that other than the inconsistency with the prescriptive provisions in Chapter 6 directing new residential zones to be located within identified greenfield priority areas (a tension resolved by the NPS-UD), the plan change is otherwise consistent with the outcomes sought for Chapter 6 and the overarching direction of the CRPS. See for example Policy 6.4 of the CRPS which lists "Anticipated Environmental Results" of Chapter 6.
- 18 Our interpretation does not open the 'flood-gates' to the granting of unanticipated and out of sequence plan changes regardless of their merits. The tests provided for in Policy 8 of the NPS-UD establish a high bar and will prevent this from occurring.

Evidence of Mr Tallentire

- 19 Mr Tallentire in his response to questions by the Commissioner accepted that the FDAs in Map A of the CRPS are not 'plan enabled' as defined in the NPS-UD in the short or medium term.
- 20 Mr Tallentire considered this to be a 'technicality'. He stated that if you read the NPS-UD to the letter then technically no, FDAs are not plan enabled. But that the effect of them is that those areas are plan enabled. He therefore relies on these to state that there is an excess of development capacity in the medium term.
- 21 With respect, this cannot be correct. The Councils cannot change or interpret the NPS-UD definition of 'plan enabled' in a way that suits their particular view on how urban development should be enabled. Particularly not when the definition in the NPS-UD is so clear and specific.
- 22 FDAs would fall within the definition of 'plan enabled' in the long term. This confirms a clear intention that these sorts of areas were not intended to be included as 'plan enabled' in any assessment for the short or medium term.
- 23 Mr Tallentire also does not consider the development capacity that would be provided by this plan change is significant because of the likely pace of development.

- 24 He noted that the intersection (against which the deferral is proposed) will be completed around 2024-2026 and that he did not consider that 5 years would deliver the proposal 'at pace' and that therefore the development capacity it provides would not be significant.
- 25 However, he fairly conceded to the Commissioner that he was 'not really' involved in the development of sites.
- 26 We respond as follows:
- 26.1 We note that Ms White on behalf of Waka Kotahi at the hearing stated that the entire upgrade package for Rolleston will commence in 2024 and be completed by 2026, with the intersection to Dunns Crossing Road being the first of the works to commence and expected to take approximately 6 months. This means the intersection upgrade is likely to be completed at some point in 2024.
- 26.2 Development, particularly of some 2,000 homes, will inherently take some years to develop, noting that earthworks and subdivision are required. This is not unusual. There is only so quickly development can occur.
- 26.3 Mr Tallentire referred to Mr Wheelans evidence at Plan Change 67 that he could construct houses in a year. PC67 only related some 130 residential sites, as opposed to some 2,000 in this plan change. The amount of work required is significantly greater.
- 26.4 In any case we note that the deferral does not prevent the actual construction of homes in any event as the proposed condition relates to the occupation of the homes and not construction.
- 27 We therefore do not consider the deferral has any effect on the significance of the development.
- 28 Mr Tallentire asserts that this plan change is not an appropriate forum to challenge the findings of the 2021 Housing Capacity Assessment (*HCA*). We do not agree. As noted above development capacity is an evidential matter and there is nothing preventing an applicant advancing such evidence, even if it does not accord with the HCA. The HCA is not statute. Nor did any of the Councils call as expert witnesses any of the authors of the HCA.

WATER CONSENT TRANSFER

- 29 At the hearing, Mr England noted that his preference was for the water consents to be transferred to Council as part of this plan change.
- 30 The planners for the Applicant and Council have agreed that the most appropriate way to do this is through amendment to the ODP text. The final rules and ODP package attached at **Appendix 1** includes this change.

CLARIFICATION OF ACOUSTIC SETBACK CONDITION

- 31 Mr Collins at the hearing raised a question in terms of the point of measurement for the acoustic setback condition related to Burnham School Road and whether this should be measured from the carriageway or the road boundary.
- 32 We accept that a road boundary is generally fixed, whereas the position of the carriageway over time may change and therefore the road boundary provides a preferable point of reference for determining the setback.
- 33 The Council's Code of Practice for subdivision requires a minimum berm of 0.7m width and a minimum footpath of 1.5m, meaning the separation between the road boundary and carriageway would be at least 2.2m at all times (although this is very narrow and would generally be wider). On this basis, if this 2.2m minimum width is subtracted from the recommended acoustic setback from the carriageway to require a 12.8m acoustic setback from the road boundary, the noise performance outcomes recommended by the acoustic experts are still achieved.

ODOUR ISSUES

Evidence in response

- 34 As indicated in our memorandum, attached at **Appendix 3** and **Appendix 4** is evidence in reply of Ms Nieuwenhuijsen and Mr Van Kekem respectively related to odour issues raised by Mr England, Mr Bender and Mr Murray.

Permitted baseline and odour

- 35 At the hearing, the Commissioner asked Ms Nieuwenhuijsen what she considered the change in sensitivity of the environment would be if the underlying zone was not zoned residential.
- 36 We are of the view that the existing zoning does provide for a quasi-permitted baseline to be considered as part of the existing environment. Under the existing Living 3 zoning, residential land use is a permitted activity but subdivision requires consent. As

subdivision would likely occur prior to the land use, a resource consent would be required for the subdivision in order for the land to be used for residential purposes.

- 37 The relevant matters of consent for subdivision of the zone are pro forma and not unusual for a subdivision application and could easily be accommodated by the Applicant.
- 38 In a real world analysis the existing zoning, and in particular the likelihood that houses can establish at the densities provided for in the Living 3 zone forms the existing environment against which the change brought about by the plan change is to be assessed.

Reverse sensitivity and odour

- 39 We again emphasise (as we did in our opening) that reverse sensitivity effects do not arise where the first in line activities are being conducted outside the scope of a resource consent, or where an activity is not yet consented.
- 40 This is the case for both the resource recovery park (concerns relating to upset conditions that would be in breach of their conditions of consent) and the waste water treatment plant (concerns relating to the Council's intention to upgrade the facility).
- 41 Nevertheless, the Applicant has proposed conditions, supported by multiple experts, to alleviate these concerns and otherwise manage effects to an appropriate level.

RESPONSIVE PLANNING GUIDANCE AND FACT SHEETS

- 42 Finally, and as requested at the hearing, we **attach** both the Ministry for the Environment's Guidance and Factsheet in **Appendix 5** and **6** respectively.

Dated: 1 November 2021



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