

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

Memorandum of counsel on behalf of Rolleston West Residential
Limited

Dated: 21 December 2021

Reference: JM Appleyard (jo.appleyard@chapmantripp.com)
LMN Forrester (lucy.forrester@chapmantripp.com)

chapmantripp.com
T +64 4 499 5999
F +64 4 472 7111

PO Box 993
Wellington 6140
New Zealand

Auckland
Wellington
Christchurch



MEMORANDUM OF COUNSEL

- 1 This memorandum of counsel is made on behalf of Rolleston West Residential Limited, the applicant in relation to Plan Change 73 (PC73) in response to the Commissioner's Minute dated 16 December 2021 regarding the Resource Management (Enabling Housing Supply and Other Matters) Amendment Bill (the *Amendment Bill*).
 - 2 It is accepted that generally where new legislation is enacted after the close of a hearing, but prior to a decision being made, it may be appropriate to re-open the hearing to enable parties to provide further legal submissions as to the impacts of that legislation, and sometimes but not often to provide further evidence.
 - 3 Beyond consideration of the points made in this memorandum no further information is required by the Commissioner and the hearing does not need to be re-opened. The relevant witnesses, and in particular Messrs Jones, Copeland, Colegrave, Akehurst would not be providing any new evidence in response to the Amendment Bill even if the opportunity were provided to them by the Commissioner. Nothing in the Amendment Bill changes the evidence they have already given at the hearing.
- The Amendment Bill and partly completed plan changes**
- 4 The Amendment Bill applies to the Selwyn District Council as a Tier 1 authority. The Amendment Bill requires the Council to take steps to introduce new density standards into relevant residential zones through a change to the operative District Plan or a variation to the proposed District Plan via an 'intensification planning instrument' (or 'IPI') on or before 20 August 2022.
 - 5 The only part of the Amendment Bill which is currently relevant to PC73 is clause 34 which provides that, with regard to private plan changes that have not incorporated the new density standards (which PC73 has not), and have not received a decision at the time the Amendment Bill commences¹ (which PC73 has not), the local authority must notify a variation to that plan change at the same time as it notifies its IPI to incorporate the new standards on or before 22 August 2022.
 - 6 The Amendment Bill therefore places no new obligations on the Commissioner which impacts on concluding his deliberations. The existing obligation on the Council (through the Commissioner) to 'be responsive' to plan changes which would "add significantly to

¹ Being the day after the date on which the Amendment Bill receives Royal assent pursuant to clause 2. The Amendment Bill received Royal assent on 20 December 2021.

development capacity and contribute to well-functioning urban environments” under the NPS-UD remains unchanged.

Housing capacity and demand considerations

- 7 In paragraph 3 of the Minute, the Commissioner states that the Amendment Bill raises some issues in relation to the evidence that was given at PC73 on housing capacity and demand.
- 8 We anticipate the Commissioner is querying whether the Amendment Bill requiring future variation processes to the District Plan alters the existing evidence given at the hearing as to demand for housing in Rolleston and/or signals there will be increased capacity to meet that demand.
- 9 The first point is that the evidence given at the hearing and in particular from Mr Jones as to short and medium term demand for residential sites of 400-500m² in Rolleston is unchanged by the Amendment Bill. No update to the evidence is required as a result of the Amendment Bill.
- 10 In addition the Amendment Bill does nothing to increase the capacity of residential sites of 400-500m² to meet that demand in the short or medium term either.
- 11 In relation to capacity we note that under Policy 2 of the NPS-UD Councils are required to have at least “sufficient” development capacity to meet expected demand for housing at all times. Under clause 3.2 the Council must meet that demand for “both standalone dwellings and attached dwellings” and in the “short, medium and long term”.
- 12 In addition in order to be “sufficient” clause 3.2 of the NPS-UD requires the development to be “plan enabled”, “infrastructure-ready” and “feasible and reasonably expected to be realised”.
- 13 No existing residential zone or proposed new zone within the Selwyn District can be said to meet the definition of “sufficient” at this time. None of the future development areas are “plan enabled” as defined by the NPS-UD and it will take some time before these are provided for as “plan enabled” in both the operative plan and proposed plans. Nor is it known whether any are infrastructure ready and those that are not may not proceed at all or may be significantly less enabled than the density provisions in the Amendment Bill. See the discussion on qualifying matters in relation to infrastructure in paragraphs 20 onwards.
- 14 Lastly it is highly speculative as to whether any theoretical increased density developments are “feasible and reasonably expected to be realised” particularly in the context of Selwyn. Mr Jones and Mr Carter both gave evidence at PC69 hearing that for Selwyn the

demand for high density housing is likely to be very low as the demand is for standalone houses on 400-500m² sections, and the costs of building three stories are likely to be prohibitive.

- 15 Therefore for the parties and the Commissioner to embark on a highly speculative exercise as to what the outcome of plan variation processes that the Council has not even commenced yet might be, let alone whether they would be feasible or would come to fruition would be inappropriate at this time. The Commissioner has the best evidence available to him as to short and medium term supply and demand which the witnesses do not feel the need to update.
- 16 In any event, even if the Amendment Bill were theoretically to open up more capacity, that does not prevent PC73 from demonstrating that they meet the tests of the responsive planning framework under Policy 8 of the NPS-UD by showing it will provide significant development capacity. The NPS-UD does not require the Council to be responsive only where there is a shortage in capacity. Councils are required to provide "at least" sufficient development capacity.
- 17 There is nothing in the Amendment Bill that suggests that decisions on plan changes be delayed to await new evidence of the likely outcome of future and uncertain Council variation processes. That is the opposite of what the Amendment Bill is contemplating. The legislation provides for those plan change processes to continue ahead of Council's embarking on and notifying its IPI and variations.
- 18 This approach is consistent with the Select Committee's proposed amendments to ensure that current plan changes underway at the time the Amendment Bill is passed will not be thwarted (with the effect of disabling, or at least significantly delaying, the housing that would be enabled by those plan changes):²

"We recommend amending the transitional provision to enable the following:

- *Plan changes, including private plan changes, that have been notified at the time of enactment could proceed. In a case where a decision on the plan change had not been notified at the time of enactment, a variation to the plan change could then be notified alongside the relevant council's IPI to ensure that the plan change incorporates the MDRS and the NPS-UD."*

- 19 It is submitted the Commissioner should stay on course and proceed with his consideration of PC73 on the best evidence currently

² Resource Management (Enabling Housing Supply and Other Matters) Amendment Bill, Report of the Environment Committee, December 2021 at page 20.

available and allow the Amendment Bill to operate as intended with the Council responding to its obligations regarding a future plan change to the extent appropriate at the relevant time. The Commissioner has evidence of short and medium term supply and demand, and crystal ball gazing as to the potential outcome of future Council processes would be inconsistent with the intent of the Amendment Bill and the NPS-UD.

Infrastructure

- 20 The Commissioner at paragraph 4 of the Minute also expresses concern about the potential issues around demand on infrastructure as a result of the Amendment Bill.
- 21 We understand the concern to be that the Amendment Bill could apply much denser housing standards to the PC73 area than is currently contemplated which could then place pressure on relevant infrastructure. In the context of PC73 the relevant infrastructure would include impacts of higher density on the state highway, or the Council's waste water facility.
- 22 PC73 has been the subject of considerable evidence as to the appropriate limits to apply to density and restrictions on when development can occur to ensure that development keeps pace with infrastructure provision, and infrastructure is protected from reverse sensitivity effects.
- 23 This issue of whether an existing residential zone under an operative District Plan is infrastructure ready for the changes that will arise under the increased density of the Amendment Bill applies throughout the country, not only to those sites which are currently subject to plan change processes.
- 24 Many existing residential areas will not be suitable for intensification because of the constraints they will place on infrastructure or the reverse sensitivity effects that will arise. This will be a matter for the local authority to consider in detail and on a site by site basis at the time it prepares its IPI. Clause 77F(6) allows a Council to make development "less enabling" than provided for in the Amendment Bill if authorised to do so by clause 77G.
- 25 Clause 77G then provides a range of 'qualifying matters' which allow a local authority to make the standards "less enabling". This includes accommodating:
 - (a) a matter of national importance that decision makers are required to recognise and provide for under section 6;
 - (b) a matter required in order to give effect to a national policy statement (other than the NPS-UD);

- (c) a matter required for the purpose of ensuring the safe or efficient operation of nationally significant infrastructure; [...]
 - (h) any other matter that makes higher density as provided for by the MDRS inappropriate in an area, but only if section 77I is satisfied.
- 26 PC73 has already been designed with an eye to these qualifying matters. It therefore includes a number of rules constraining the number of houses that can be built and when these can be occupied to accommodate qualifying matters including the safe and efficient operation of nationally significant infrastructure. This would clearly cover the provisions included in PC73 which provide for the safe and efficient operation of the state highway.
- 27 We also note clause 77G(h) which provides for “any other matter” which would make higher density inappropriate in a specific area. The appropriateness of this qualifying matter involves evaluating “specific characteristics on a site-by-site basis”, according to additional analysis and justification for reducing the enabling powers of the MDRS and NPS-UD.³
- 28 Clause 77G(h) is a provision designed to cover impacts of higher density on site specific matters such as the provision and capacity of district and regional infrastructure (such as wastewater, local roading infrastructure, storm water, water supply) and to deal with reverse sensitivity effects such as setbacks from Council infrastructure that produces odour or noise.
- 29 This interpretation is also consistent with the requirement for Councils (under clause 4A of the Amendment Bill) to include an Objective in their District Plans relating to ‘well-functioning urban environments’. The definition of a well-functioning urban environment in the NPS-UD is such that a situation where density increases which result in an outcome where infrastructure is not ready to support that density increase are not contemplated. Such an outcome would fall foul of the overall objective to provide for a well-functioning urban environment through the variation processes.
- 30 It will therefore be a requirement on Council, at the time it prepares its IPI and variations, to carefully analyse the impacts of higher density on infrastructure and restrict the application of the enabling standards as it deems appropriate to ensure it meets the objective of a well-functioning urban environment.

³ (14 December 2021) 756 NZPD (Resource Management (Enabling Housing Supply and Other Matters) Amendment Bill – Third Reading, Hon David Parker)

- 31 To conclude, it is appropriate for the Commissioner to continue his deliberations on these plan changes without re-opening the hearing. Nothing in the Amendment Bill results in the applicant for PC73 needing to produce any new evidence or to update any existing evidence.
- 32 The Amendment Bill will become relevant to the Council later next year after the PC73 decision has been given. It then needs to decide whether it varies any decision to grant PC73. The extent to which PC73 might become more enabling than proposed now is a matter for Council to consider at the appropriate time but taking into account all qualifying matters including impacts on infrastructure.
- 33 Having said that the Commissioner's attention is drawn to clause 77MA of the Amendment Bill which sets out that where there are "existing qualifying matters" relating to a site at the time the Council goes to undertake its variation process then it can include those existing qualifying matters without undertaking a full evaluation process.
- 34 Without binding the Council it would be surprising if given the proximity of this hearing and a decision to the requirement for the Council to start its variation process if it were to embark on a complete reassessment of matters such as the provisions designed to match housing occupation to state highway upgrades when those matters would fall within the definition of "existing qualifying matter".
- 35 We trust this memorandum assists the Commissioner on this issue.

Dated: 21 December 2021



Jo Appleyard / Lucy Forrester
Counsel for Rolleston West Residential Limited