

**BEFORE THE INDEPENDENT HEARING COMMISSIONER
FOR SELWYN DISTRICT COUNCIL**

UNDER

the Resource Management
Act 1991

AND

IN THE MATTER

of a request by Birchs
Village Limited for a plan
change (Private Plan
Change 79 – Prebbleton)
under the First Schedule to
the Resource Management
Act 1991

LEGAL SUBMISSIONS FOR CHRISTCHURCH CITY COUNCIL

Private Plan Change 79 – Prebbleton

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1. INTRODUCTION

- 1.1 These legal submissions are made on behalf of Christchurch City Council (**CCC**) in relation to Private Plan Change 79 (**PC79**) to the Operative Selwyn District Plan (**ODP**), which has been requested by Birchs Village Limited (**BVL**).
- 1.2 CCC made a submission in opposition to PC79¹. Mr Kirk Lightbody has prepared expert planning evidence on behalf of CCC dated 24 April 2023.
- 1.3 The central concerns for CCC are:
- (a) First, that the PC79 land meets the interim criteria set out in clause 3.5(7) in the National Policy Statement for Highly Productive Land 2022 (**NPS-HPL**). Because of this, the land (as “highly productive land”) needs to meet the additional NPS-HPL criteria before it can be rezoned for urban use. Those criteria are not met;
 - (b) Second, that PC79 does not qualify for consideration under the ‘responsive planning framework’ under the National Policy Statement on Urban Development 2020 (**NPS-UD**); and
 - (c) Third, that PC79 is either inconsistent with or contrary to a number of important policy directions in the Canterbury Regional Policy Statement (**CRPS**).
- 1.4 The author of Selwyn District Council’s (**SDC**) section 42A report (**s42A Report**) recommends decline of PC79.²
- 1.5 The evidence in support and in opposition provides two different opinions in relation to the applicability of the NPS-HPL, and how the NPS-UD and CRPS should interact with each other.

1 CCC is submitter 37.

2 Mr Cleese, s42A Report, dated 10 April 2023.

1.6 For the reasons set out in these submissions, and in reliance on the evidence of Mr Lightbody, CCC agrees with the recommendation in the s42A Report.

1.7 In summary, it is submitted that for the BVL request:

- (a) the NPS-HPL is engaged and there are no exceptions met to enable the rezoning of the PC79 land;
- (b) there is no basis for relying on the 'responsive planning framework' in Policy 8 of the NPS-UD to facilitate a pathway for this request;
- (c) on strategic policy and legal interpretation grounds, the CRPS framework remains relevant in terms of guiding where growth should be located and/or provided for across Greater Christchurch (and CCC notes that the CRPS engages with fundamentally the same subject matter and issues as the NPS-UD);
- (d) PC79 would not contribute to, or achieve, a well-functioning urban environment, as required by the NPS-UD;
- (e) the statutory requirement to "give effect" to the CRPS engages the avoid framework established by the CRPS, which remains relevant for the BVL request; and
- (f) properly reading the NPS-HPL, NPS-UD and the CRPS together within the RMA framework means that the rezoning proposed by PC79 cannot be confirmed.

2. RELEVANT STATUTORY FRAMEWORK

2.1 The now widely accepted *Long Bay* test for plan changes, which was more recently updated in *Colonial Vineyard Limited v Marlborough District Council*,³ requires consideration of *all* the relevant issues for the purposes of assessing plan changes, including the "higher order directions" of sections 72, 74 and 76 of the RMA.

³ *Colonial Vineyard Limited v Marlborough District Council* [2014] NZEnvC 55.

- 2.2** In this instance, there are relevant issues emerging from the “higher order” planning documents, which includes the NPS-HPL, NPS-UD and CRPS.
- 2.3** The NPS-HPL came into force on 17 October 2022 and applies to the management of highly productive land.⁴ The NPS-HPL provides policy direction to protect highly productive land for land-based primary production. For the reasons set out in the evidence of Mr Lightbody and later in these submissions, it is directly relevant to the consideration of PC79.
- 2.4** In relation to the NPS-UD and the CRPS, it is accepted that the NPS-UD is the *higher* of the two documents, but that in and of itself, does not demand that greater emphasis or precedence is placed on the NPS-UD in the circumstances.
- 2.5** As recognised by the Supreme Court in *King Salmon*,⁵ the cascade of planning documents under the RMA are intended to give effect to section 5 and Part 2 of the Resource Management Act 1991 (**RMA**), by giving:⁶ (emphasis added)
- ... substance to its [*the RMAs*] purpose by identifying objectives, policies, methods and rules **with increasing particularity both as to substantive content and locality**.
- 2.6** That is precisely the case here, with the NPS-UD providing higher level direction,⁷ and the CRPS providing more particularised regional (and, in particular, sub-regional) direction in relation to similar matters, as well as other relevant policy matters for the purpose of giving effect to other NPS’, and the other requirements of Part 2 of the RMA.
- 2.7** Section 75(3) of the RMA requires that a district plan ‘must give effect to’ any NPS and any regional policy statement.

⁴ NPS-HPL, Objective 2.1.

⁵ *Environmental Defence Society Incorporated v New Zealand King Salmon Company Limited* [2014] NZSC 38.

⁶ At [30].

⁷ As anticipated by s45, RMA.

2.8 The Supreme Court in *King Salmon* went on to note that, while the requirement (to give effect) is a strong directive, it is context dependent:⁸

...The implementation of such a directive will be affected by what it relates to, that is, what must be given effect to. A requirement to give effect to a policy which is framed in a specific and unqualified way may, in a practical sense, be more prescriptive than a requirement to give effect to a policy which is worded at a higher level of abstraction.

2.9 In this instance, there are a number of relevant directions in both the NPS-UD, and the CRPS, that have varying degrees of directiveness. This is relevant when seeking to reconcile these planning documents, with the nature and expression of the relevant objectives and policies being significant.

2.10 The NPS-UD, given its national application, contains a number of directions expressed with a higher degree of abstraction. It is, however, more explicit for Tier 1 local authorities in relation to certain requirements, than for Tier 2 and 3 local authorities (for example, in relation to intensification⁹).

2.11 The CRPS, given its regional focus, provides more specific direction on a multitude of resource management matters, including urban growth (particularly that of Greater Christchurch). This is because the CRPS represents the 'more particularised' expression of the higher order objectives and policies, and direction on other Part 2 matters (in accordance with the functions of regional councils under section 30 (ie. ss(1)(ba) and (gb))). Of particular relevance, the CRPS establishes a highly directive framework for urban growth which is underpinned by long-standing strategic planning work.

2.12 While this framework has been altered by recent SDC decisions to approve other private plan change requests, for Prebbleton the CRPS remains intact and should continue to be adhered to. This is particularly given that there is no obvious need to provide the

8 At [80].
9 Policy 3.

significant additional development capacity that Policy 8 of the NPS-UD concerns.

- 2.13** CCC notes, for completeness, that the CRPS has been amended post NPS-UD, to provide additional development capacity in a manner that implements the NPS-UD requirements. We consider this matter further below, when addressing the CCC view about the requirements of the ‘responsive planning framework’ when properly understood and interpreted.

3. NATIONAL POLICY STATEMENT FOR HIGHLY PRODUCTIVE LAND

NPS-HPL applies to the PC79 land

- 3.1** Without wanting to repeat Mr Lightbody’s evidence¹⁰, it is undisputed that PC79 land:

- (a) is currently zoned Rural (Inner Plains) under the ODP; is zoned General Rural Zone under the proposed Selwyn District Plan (**PDP**);¹¹ and
- (b) is mapped as having LUC 1 and 2 soils.¹²

- 3.2** The consequence of these factors is that the land is “highly productive land” under the NPS-HPL.

- 3.3** In the event that BVL attempts to cast doubt on this position, it is submitted for CCC that the Rural (Inner Plains) Zone is the equivalent to the General Rural or Rural Production Zone in the National Planning Standards (which satisfies clause 3.5(7) of the NPS-HPL. This question was considered in a detailed legal opinion that was provided to the PDP Hearing Panel, and was referenced in the s42A Report for PC79.¹³ We do not repeat that analysis here,

¹⁰ At paragraph 5.2.

¹¹ Acknowledged in the planning evidence of Ms Elford dated 17 April 2023, at paragraphs 10 and 77.

¹² As identified in section 6.3 of the application for PC79 and in the versatile soils evidence of Mr Mthamo dated 17 April 2023, at paragraph 26.

¹³ Refer to footnote 40 and paragraph 200.

but record our agreement with the overall conclusion reached. In particular:¹⁴

The application of the NPS-HPL depends on whether the land is zoned the equivalent of Rural Lifestyle (as defined in the National Planning Standards (NPS)), either in the ODP, or, if not in the ODP, in the PDP. The assessment required is a comparison between the way the land is described in the relevant plan (in the round), and the descriptions of the zones in the NPS.

Following such an assessment, we have concluded that land identified as Rural: Inner Plains in the ODP is not the equivalent of the Rural Lifestyle Zone in the NPS. Instead, General Rural or Rural Production is the appropriate equivalent.

Land identified as GRUZ: Inner Plains in the PDP is the equivalent of the General Rural Zone in the NPS, not the Rural Lifestyle Zone.

Given this, the NPS-HPL applies to land identified as Rural: Inner Plains in the ODP, and GRUZ: Inner Plains in the PDP (provided the other requirements of the NPS-HPL are met).

This interpretation is consistent with the intent of the NPS-HPL, to avoid the loss of productive land to the rural lifestyle activities, and to allow for preservation of productive land pending a more detailed assessment under the NPS-HPL.

The NPS zone descriptions refer to 'use'. We have not been provided evidence of on the ground use, so have completed our assessment on the basis of the planning provisions. Evidence of on the ground use of the relevant land could alter the assessment below.

14 Refer to the summary at paragraph 4.

- 3.4** In response to the last statement, the PC79 land is currently understood to be used for purposes that are anticipated in a General Rural Zone.

Implications of applying the NPS-HPL to the land and request

- 3.5** The objective and policies of the NPS-HPL make it clear that highly productive land is to be protected for productive use, except in limited circumstances. Policy 5 is of particular relevance to PC79:

The urban rezoning of highly productive land is avoided, except as provided in this National Policy Statement.

- 3.6** Clause 3.6 of the NPS-HPL sets criteria for the urban rezoning of highly productive land. The criteria in clause 3.6 must therefore be met before an urban rezoning of the PC79 land is allowed.

- 3.7** Mr Lightbody outlines the clause 3.6 criteria in paragraphs [5.8] – [5.9] of his evidence. In summary, it is submitted for CCC that:

- (a) Any additional capacity provided by PC79¹⁵ is not considered to be required to meet a demand for housing in accordance with the NPS-UD.
- (b) As discussed by Mr Lightbody, according to the Housing Capacity Assessment updated in July 2021 (**HCA**), there is sufficient development capacity across the Greater Christchurch urban area in the long-term and *at least* sufficient capacity in the Selwyn District in the medium term.¹⁶
- (c) As set out in CCC's submission on PC79, and Mr Lightbody's evidence, the greater intensification of development in Greater Christchurch through the implementation of the MDRS¹⁷ and the rezoning of urban

¹⁵ Approximately 440 households at 12hh/hh, or 530 at 15 hh/ha, refer to s42A Report, at paragraph 33.

¹⁶ At paragraphs 6.1 – 6.3.

¹⁷ At paragraph 8 of CCC's submission on PC79 dated 5 October 2022.

land or land identified as being appropriate for development will address any shortfall of development capacity (clause 3.6(1)(a) – (b) and (2)).¹⁸

- (d) The Selwyn Capacity and Growth Model 2022 (**SCGM22**) has more recently identified an estimated development sufficiency of 1,160 households in Prebbleton over the short-medium term (10 years).¹⁹ Based on this more recent assessment, it is submitted that sufficient development capacity exists in Prebbleton for the lifetime of the ODP and therefore PC79 does not satisfy clause 3.6(1)(a) of the NPS-HPL.²⁰
- (e) As the SCGM22 provides that there is sufficient development capacity in Prebbleton, it is submitted that there are other “reasonably practical and feasible” options within Prebbleton (clause 3.6(1)(b) and (3)).
- (f) With no identified need for the rezoning of this land to satisfy any development capacity shortfall, it is submitted that there is insufficient evidence that identifies how the benefits of rezoning the PC79 land would outweigh the long-term costs (including environmental, social, cultural and economic costs) associated with removing this land from primary production (clause 3.6(1(c))).
- (g) Clause 3.6(5) indicates that the SDC needs to be cautious in undertaking urban rezoning of highly productive land as it “must take measures to ensure that the spatial extent of any urban zone covering highly productive land is the **minimum necessary** to provide the required development capacity while achieving a well-functioning urban environment.”

18 At paragraphs 6.1 – 6.3, noting that the recent Selwyn PC68 and PC72 have addressed any previous short/medium term shortfall in Prebbleton (refer to s42A Report at paragraph 209).

19 Refer to s42A Report, Appendix 3 Selwyn Residential Capacity and Demand IPI 2023, Figure 4-6, and paragraph 208 that references how the MfE guidance on clause 3.6(5) backs up the medium term focus by noting that “significant additional development capacity (beyond what is required for the next 10 years) should not generally be provided on HPL”.

20 Mr Lightbody, at paragraph 6.4.

- (h) In our submission there has been insufficient evidence of the need for the rezoning of this land.

3.8 In addition, and with reference to the evidence of Mr Mthamo for the applicant, while the Applicant has identified what they consider to be relevant constraints to the lands productive capacity,²¹ it is submitted that the focus should be on clause 3.6, which is not focussed on constraints in the same way as clauses 3.7 to 3.10. As outlined by the s42A report²², these are merits based considerations that can be considered in the regional council mapping process. CCC agrees.

3.9 The NPS-HPL deliberately sets a high bar for applications to rezone highly productive land for urban use. The “avoid” threshold in Policy 5 means that where a site is considered to be highly productive land, and does not meet the criteria in clause 3.6, the land cannot be rezoned in this way. PC79 does not meet that high bar and therefore should be declined.

4. NATIONAL POLICY STATEMENT FOR URBAN DEVELOPMENT

4.1 The applicant has placed weight on Policy 8 of the NPS-UD²³ to justify rezoning the PC79 land, based on the land not being identified for urban development in the CRPS, PDP or ODP. It is, however, submitted that the applicant has not adequately demonstrated that it will significantly improve housing diversity or affordability in Prebbleton or the wider sub-region particularly given the proposed site is not currently nor planned to be serviced by public transport.

4.2 CCC's submission on PC79²⁴ sets out the importance of giving effect to the NPS-UD, and outlines the indicators of a well-functioning environment that the NPS-UD seeks to achieve while enabling development.

²¹ At paragraph 11.

²² S42A Report, at paragraph 203.

²³ Ms Elford, at paragraph 103.

²⁴ At paragraphs 12 – 15.

- 4.3** CCC's agrees with the section 42A report on this matter, and the NPS-UD more broadly. In particular, it is submitted that this request amounts to an ad hoc proposal that cannot satisfy Policy 8 or the NPS-UD more broadly, and which would not achieve a well-functioning urban environment.²⁵

5. THE CANTERBURY REGIONAL POLICY STATEMENT

- 5.1** As highlighted in the evidence of Mr Lightbody, the CRPS must be given effect to.²⁶ Within the CRPS, Chapter 6 is relevant.²⁷ Key features of Chapter 6 include:

- (a) Identification of the existing urban area, along with a Projected Infrastructure Boundary (**PIB**);
- (b) Greenfield Priority Areas (**GPA**) adjacent to the Christchurch urban area and certain towns in the Selwyn and Waimakariri Districts;
- (c) Policies to avoid urban development outside of identified locations; and
- (d) Inclusion of Map A, which accompanies the policy provisions clearly depicts Greater Christchurch and identifies FDAs.

- 5.2** The growth direction in Chapter 6 has been developed to ensure that urban growth occurs in accordance with regional spatial planning, and in locations where it can be appropriately supported by infrastructure. This has included identifying specific areas for greenfield development and enabling intensification within existing urban areas. The PC79 land is not as a GPA, FDA and falls outside the PIB.

- 5.3** In addition to the above, PC79 does not meet objectives 6.2.1, 6.2.4 and Policies 6.3.4, 6.3.5, 6.3.7 and 6.3.11 of the CRPS, nor contribute to a well-functioning urban environment, a key component of which being to support a reduction in greenhouse gas emissions which has not been sufficiently demonstrated by the

²⁵ At paragraph 281.

²⁶ At paragraph 4.2 and RMA s 75(3)(c).

²⁷ At paragraph 5.4.

Applicant. In our submission these objectives and policies should be read as providing a regional lens to strategic growth enablement as required by the NPS-UD. Although these provisions pre-date the NPS-UD they collectively ensure that sufficient, appropriate and feasible development land is available in Greater Christchurch. The purpose of these provisions is to ensure that development occurs in appropriate locations to maximise infrastructure capacity, to manage urban sprawl whilst ensuring there is sufficient market capacity. In our submission Chapter 6 of the CRPS remains highly relevant to the Commissioners' decision-making on PC79.

6. CONCLUSION

- 6.1** The Commissioner is obliged to apply the relevant statutory tests. Correctly applied, this engages the NPS-HPL and its highly directive avoid framework for proposals to rezone highly productive land for urban use.
- 6.2** Giving effect to the NPS-HPL and Chapter 6 of the CRPS requires that PC79 be declined. It is submitted that such an outcome would be entirely consistent with a correct interpretation of the NPS-HPL, and NPS-UD (when applied as a whole).
- 6.3** It is therefore submitted that PC79 should be declined.

DATED this 27th day of April 2023



M G Wakefield / K E Viskovic

Counsel for Christchurch City Council