

Before the Independent Commissioner
Appointed by the Selwyn District Council

Under the Resource Management Act 1991

In the matter of a hearing on Plan Change 79 to the Operative Selwyn District Plan

Birchs Village Limited

Proponent

Legal submissions on behalf of Birchs Village Limited

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Solicitor:

Alex Booker

Anderson Lloyd

Level 3, 70 Gloucester Street, Christchurch 8013

PO Box 13831, Armagh, Christchurch 8141

DX Mail: WP20309

P + 64 3 379 0037 | f + 64 3 379 0039

**anderson
lloyd.**

May it please the Commissioner:

- 1 These submissions are provided on behalf of Birchs Village Limited (**BVL**), the proponent of Plan Change 79 (**PC79**) to the Operative Selwyn District Plan (**OSDP**).
- 2 PC79 seeks to rezone 36.58ha from Inner Plains to Medium Density Residential and Business 1 at the corner of Hamptons Road and Birchs Road, opposite the new district park, Kakaha Park, in Prebbleton (the **Site**).
- 3 PC79 is a unique offering that will add significantly to development capacity, not only through feasibly serviced allotments (some 527 lots), but also through expression of traditions and cultural norms of Māori. Ngāi Tahu Property will lead the comprehensive future development of the majority of the Site¹ which will express cultural values of Māturanga, Ngāi Tahutanga, Te Ao Turoa and Oranga, and provide opportunities for multigenerational living and papakāinga housing² by partnering with papatipu Rūnanga and whānau.
- 4 The evidence for PC79 demonstrates the rezoning is a logical and most efficient use of the Site. It is suitable for residential use at the scale and intensity that the medium density residential zone anticipates and adverse effects can be managed. PC79 will enable housing diversity for Prebbleton, in terms of offering, price and location, and additional land will help keep prices from escalating as has been occurring due to a supply and demand imbalance³. On balance, PC79 development supports a reduction in GHG emissions⁴ and provides some climate resilience⁵.
- 5 There is good accessibility between housing, jobs, community services, and natural and open spaces. The strategic location adjacent to the urban Kakaha Park should not be undervalued. The significant benefits to Kakaha Park that will be uniquely provided by the PC79 location must be appropriately weighted. PC79 will provide critical passive surveillance needed for the public space and interaction with a complimentary urban activity. It will activate Birchs Road, including through the provision of neighbourhood scale commercial and educational activities to meet the day to day needs of residents and supporting commercial functions for the Park. PC79 provides an adjoining walkable residential area, continuity of the green

¹ Currently 27.3ha is under contract: Mr Geddes, at [14].

² A group or community of collectively owned housing.

³ Mr Jones (Appendix 3, Mr Geddes).

⁴ Mr Farrelly, at [24].

⁵ Due to the Site not being near coastlines or subject to flooding: Mr Farrelly, at [15].

network from the Park, and protection of viewshafts across Birchs Road and Kakaha Park to key landmark features. A threshold to the southern end of the park along Birchs Road is provided through a roundabout at Leadleys Road⁶.

- 6 To not recommend approval of intensifying these existing residential lifestyle properties will be an opportunity lost for the community. Three of the eight sections in the Site range between 0.5ha-2.6ha in size and are used for residential activity only. Positive social impacts of PC79 (enhanced everyday connectivity, increased housing, local economic stability, enhanced liveability and increased amenity and wellbeing) have been assessed as outweighing the current and long-term impacts of any negative social impacts of the loss of any highly productive land based primary production⁷.
- 7 Selwyn District Council (**SDC**) must provide *at all times* at least sufficient development capacity to meet expected demands over the short and medium term⁸. There is and will continue to be demand for housing in Prebbleton. Economics evidence demonstrates a shortfall of 255-569 dwellings in the short-medium term, including when accounting for recent plan changes⁹. Such a significant land holding in majority control of one developer is rare, especially in Prebbleton.¹⁰ Development plans of Ngāi Tahu and BVL have advanced over the course of the last two years, while waiting for PC79 to be processed¹¹. Regardless of the numbers, it is submitted that PC79 is also required to address a demand for housing which expresses tangata whenua values and aspirations for urban development by Ngāi Tahu such as papakāinga. Land is needed for this, and supply is not provided in Prebbleton¹². It is appropriate that the rezoning occur now.
- 8 The Outline Development Plan (**ODP**) has undergone design changes and refinement. It has been designed in a way to ensure land subject to contract with Ngāi Tahu can be developed immediately and ensure a positive environmental outcome¹³. Alterations to the ODP are within scope of the PC79 request. Changes

⁶ N Lauenstein, at [91].

⁷ H Konigkramer, at [11].

⁸ NPS-UD, Policy 2.

⁹ Plan changes 68, 72.

¹⁰ Mr Jones (Appendix 3, Mr Geddes) considers that to have a significant land holding, such as the applicant's, where control over the land is achieved, especially in this location [Prebbleton] is quite rare.

¹¹ Mr Geddes, at [18]. Mr Geddes at [26] also refers to initial rezoning discussions with SDC in November 2020, the Plan Change Application was lodged in June 2021.

¹² Mr Christie, at [17].

¹³ Mr Geddes, at [14].

are within the notified area and further mitigate any potential adverse effects, and do not change the extent that other persons could be affected¹⁴.

- 9 Given the particular site-specific circumstances, retaining the status quo would not be responsive to unmet demand in Prebbleton or the most appropriate outcome for PC79. It is submitted that PC79 should be approved, subject to the refinements provided in the ODP and associated narrative in the evidence of Ms Lauenstein.

Key matters

- 10 The following key matters are addressed:
- (a) Will PC79 add significantly to development capacity in accordance with the National Policy Statement on Urban Development 2020 (**NPS-UD**)?
 - (b) Will PC79 contribute to a well-functioning urban environment?
 - (c) Does the National Policy Statement for Highly Productive Land 2022 (**NPS-HPL**) apply to PC79?
 - (d) If the NPS-HPL applies to PC79, is Clause 3.6 met?
 - (e) Can PC79 be appropriately serviced for wastewater?
- 11 These issues have been comprehensively addressed in the evidence for PC79, and these submissions address relevant legal aspects.
- 12 Matters such as land suitability (geotechnical, contamination and flood hazard risks)¹⁵, water and stormwater servicing¹⁶ and transportation/traffic¹⁷ which are supported as having acceptable outcomes by the Reporting Officer (subject to suggested and accepted ODP changes) have not been addressed further in these legal submissions. No expert evidence has been provided by submitters on these matters.

Legal tests

- 13 The statutory tests when preparing and changing a district plan are well known, are set out in the Section 42A report¹⁸, and summarised with reference to *Colonial*

¹⁴ *Palmerston North City Council v Challenge Manawatu Limited (W006/2009)*

¹⁵Section 42A Report at [68], [75] and [77].

¹⁶Section 42A Report at [86], [96].

¹⁷Section 42A Report at [115].

¹⁸ Section 42A Report, at [12]-[20].

*Vineyard Ltd v Marlborough District Council*¹⁹ in **Appendix 1**. Ms Elford has undertaken a further section 32AA based on the changes made to the ODP and associated narrative²⁰.

- 14 Of particular relevance, PC79 must give effect to any national policy statement or operative regional policy statement;²¹ and assist the Council in carrying out its functions, including:²²
 - (a) Achieving integrated management of effects of the use, development and protection of land and associated natural and physical resources;
 - (b) Ensuring that there is sufficient development capacity in respect of housing and business land to meet the expected demands of the district; and
 - (c) Controlling any actual or potential effects of the use, development, or protection of land.
- 15 PC79 seeks to implement a Medium Density Residential Zone (Living MD) with rules that align to the Resource Management (Enabling Housing Supply and Other Matters) Amendment Act (the **Enabling Act**)²³. Provisions were provided by SDC Officers (with input from the Proponent) with the intention of providing a pathway for the PC79 area, if approved, to transition into the Proposed Selwyn District Plan (**PSDP**). Ms Elford considers that PC79 is consistent with the Living MD which in themselves give effect to the requirements of the NPS-UD and the Enabling Housing Act.²⁴ It is significant that no submissions or evidence seek to change the provisions of the Living MD Zone in the OSDP.
- 16 I agree with the Section 42A Report that the focus of this hearing is to determine whether the zoning of the plan change site is more appropriate for medium density residential activity than the status quo.²⁵
- 17 I also agree with the Section 42A Report that the statutory framework focus should be on PC79 alignment with the NPS-UD, and the interplay of the NPS-UD with the CRPS (and the NPS-HPL if applicable). This is because:

¹⁹ *Colonial Vineyard Ltd v Marlborough District Council* [2014] NZEnvC 55 at [17] onwards, and more recently in *Edens v Thames-Coromandel District Council* [2020] NZEnvC 13 at [10].

²⁰ Ms Elford, at [132], [133] and Appendix B.

²¹ Section 75(3)(a) and (c)

²² Section 31(1)(a), (aa) and (b)

²³ The Enabling Act, and MDRS requirements commenced after lodgement of PC79.

²⁴ Ms Elford, at [76].

²⁵ Section 42A report, at [28].

- (a) The RMA creates a planning hierarchy of national, regional and district planning documents. A RPS is required to give effect to a NPS, while a district plan is required to give effect to both a NPS and a RPS. Effort should be made to reconcile a NPS and RPS to ensure they are read in a consistent manner. However, a NPS will prevail over a RPS in the case of conflict between the provisions of the two documents.
 - (b) The Canterbury Regional Policy Statement (**CRPS**) pre-dates the NPS-UD, and does not reflect the NPS-UD direction for responsive planning to provide sufficient capacity for residential development. The recent Change 1 to the CRPS did not give effect to all provisions of the NPS-UD²⁶. The NPS-UD "responsive planning" provisions and the "avoid" policy within the CRPS has been debated extensively within Selwyn. Greatest weight should be given to the newest and higher order planning document. Ms Orr, planner for Canterbury Regional Council (**CRC**), accepts in her evidence that Policy 8 NPS-UD enables consideration of "out of sequence" proposals and the responsive framework where its conditions are met²⁷.
 - (c) As the Operative Selwyn District Plan (**OSDP**) also precedes the NPS-UD, the NPS-UD may be given "considerable weight" by the Commissioner²⁸, as a recent expression of Part 2 of the RMA.
- 18 The Section 42A report summarises the existing township planning for Prebbleton²⁹. The key takeaway for the Commissioner is that these documents are significantly out of date, as are the related policies in the OSDP. Not one of them refers to the Kakaha Park, a significant community urban infrastructure investment, or has accounted for the NPS-UD, or the Enabling Act which identifies Prebbleton as an urban environment enabling MDRS.

Will PC79 add significantly to development capacity?

- 19 Policy 8 NPS-UD requires local authority decisions affecting urban environments to be responsive to plan changes that *would add significantly to development capacity and contribute to well-functioning urban environments*, even if the development capacity³⁰ is unanticipated by RMA planning documents or out-of-

²⁶ Report to the Minister on Change 1 to Chapter 6 of the CRPS, at paragraph 133.

²⁷ Ms Orr, at [64].

²⁸ *Infinity Investment Group Holdings Ltd v Canterbury Regional Council* [2017] NZEnvC 36, at [32].

²⁹ Section 42A Report, from [119].

³⁰ Development capacity means the capacity of land to be developed for housing or for business use, based on: (a) the zoning, objectives, policies, rules, and overlays that apply in the relevant proposed and operative RMA planning documents; and (b) the provision of adequate development infrastructure to support the development of land for housing or business use.

sequence with planned land release. Mr Colegrave considers that PC79 represents a significant addition to Prebbleton supply because it will boost short-medium term supply by at least 50%³¹. Ms Elford confirms that the evidence provided by PC79 meets the requirements of Policy 8³².

- 20 The Section 42A Report considers PC79 passes the threshold for significant capacity³³ and that if evidence is provided as to how wastewater capacity issues can be resolved then the application will provide significant development capacity³⁴. Wastewater capacity is addressed later in this submission.
- 21 In addition, PC79 adds significantly to development capacity as it will enable Ngāi Tahu Property to achieve all three of its strategic goals and outcomes: enable papatipu Rūnanga and whānau to achieve economic self-determination (including through partnership with Ngāi Tahu Property); protect and grow sustainable capital distribution, and expand the presence and expression of Ngāi Tahu mana³⁵. That PC79 is strategically located adjacent to the Kahaka Park with views of Te Poho o Tamatea as a significant landmark representing ancestors, and is an appropriate size for comprehensive medium density development is significant.³⁶ This proposition is unique, and is not being offered by any other plan changes or proposed rezoning in Prebbleton. Ngāi Tahu Property need a future land supply, and there is a shortage of available development land in Prebbleton to purchase which meets the needs of Ngāi Tahu³⁷.
- 22 There is no need to consider only the benefits realised during the lifetime of the OSDP when considering PC79 as suggested by Mr Lightbody, CCC planner³⁸. The

Development infrastructure means the following, to the extent they are controlled by a local authority or council controlled organisation (as defined in section 6 of the Local Government Act 2002): (a) network infrastructure for water supply, wastewater, or stormwater; and (b) land transport (as defined in section 5 of the Land Transport Management Act 2003).

³¹ Mr Colegrave, at [103].

³² Ms Elford, at [103].

³³ Section 42A at [163].

³⁴ Section 42A at [168].

³⁵ Mr Christie, NTP, at [8].

³⁶ MfE Guidance lists relevant criteria that can be used to determine whether the development capacity contribution is 'significant': Significance of scale and location (includes contributing to a well-functioning urban environment and is large enough to support a range of transport modes); Fulfilling identified demand (including where it fills certain gaps such as Māori housing, where the market signals future demand and the yield compared to qualitative needs such as housing typologies); timing of development (if it can be delivered at pace), and infrastructure provision (in terms of viable options for funding and financing infrastructure required for the development). See: <https://environment.govt.nz/assets/Publications/Files/Understanding-and-implementing-responsive-planning-policies.pdf>

³⁷ Mr Christie, NTP, at [17].

³⁸ Mr Lightbody, at [6.5].

NPS-UD directs the *SDC* to *at all times* provide at least sufficient development capacity³⁹ to meet the expected demand for housing and for business land over the short term, medium term and long term⁴⁰. It contemplates both infill and greenfield expansion. Growth is anticipated both up and out. Any suggestion of waiting for the District Plan review decisions (and resolution of any appeals to the Environment Court and High Court) is inconsistent with:

- (a) the NPS-UD direction for responsive planning and the requirement to provide sufficient development capacity *at all times*. The Courts have previously rejected an approach of deferring planning decisions to await the outcome of future plan processes, noting that this has the potential to cause review paralysis⁴¹.
- (b) the Enabling Act. The Act when it commenced, specifically provided for the situation of private plan changes to continue to be accepted and processed alongside timeframes set to implement that legislation⁴², as has occurred with PC79.

- 23 The provision of sufficient housing at all times is a priority. Given the location of the Kakaha Park and extension of infrastructure, and constraints in other parts of Prebbleton, this is a unique opportunity which cannot be offered in another location in Prebbleton. PC79 promotes sustainable management to enable people and communities to provide for their social, economic and cultural wellbeing, and assists the Council to achieve its functions.

Does PC79 achieve a well-functioning urban environment?

- 24 The National Policy Statement for Urban Development 2020 (**NPS-UD**) is designed to improve responsiveness⁴³, and recognises the national significance of:

³⁹ NPS-UD at 3.2(2). To be sufficient, housing capacity must be Plan-enabled (zoned for housing or identified for future urban use); Infrastructure ready (adequate existing infrastructure or identified in a long term plan); Feasible and reasonably expected to be realised (appropriate method to be used to assess the amount of development capacity); and meet the expected demand plus the appropriate competitiveness margin. This margin is over and above the expected demand that Council is expected to provide in order to support choice and competitiveness in the housing market.

⁴⁰ Policy 2, NPS-UD.

⁴¹ *Kennedys Bush Road Neighbourhood Association v Christchurch City Council* EnvC W063/97

⁴² Part 5, Schedule 12, Enabling Act. Clauses 34-35.

⁴³ NPS-UD Objective 6, Policy 8.

- (a) having well-functioning urban environments that enable all people and communities to provide for their social, economic and cultural wellbeing, and for their health and safety, now and in the future⁴⁴;
- (b) providing as a minimum sufficient development capacity at all times to meet the different needs of people and communities⁴⁵.

25 For context, the Recommendations and Decisions report for the NPS-UD states, in relation to responsiveness⁴⁶:

Urban areas are dynamic and complex, continually changing in response to wider economic and social change. **The current planning system can be slow to respond to these changing circumstances and opportunities, which can lead to a mismatch between what is enabled by planning and where development opportunity (or demand) exists. This can lead to delays in supply** or incentivise land banking. The intent of the responsive planning provisions in the National Policy Statement on Urban Development (NPS-UD) is to:

- enable the planning system to work responsively towards more competitive development markets, through developments at scale
- **ensure that plan change requests are considered on their own merits, irrespective of infrastructure funding constraints, and to ensure that decision-making supports developments that are of scale and contribute to well-functioning urban environments.**

...

The [responsiveness] policy would recognise the benefits of plan changes that would add significantly to development capacity and contribute to well-functioning urban environments. Because the intent is responsiveness in the planning system, this would apply to both greenfield and brownfield developments. **Significance would be determined by councils and could include development capacity significant to Māori that contributes to a well-functioning urban environment and has the necessary transport connections.**

⁴⁴ Objective 6 and Policy 8 NPS-UD 2020.

⁴⁵ Such as type, price and location of households (NPS-UD, Policy 1(a)(i)).

⁴⁶ Ministry of Housing and Urban Development and Ministry for the Environment *Recommendations and decisions report of the National Policy Statement on Urban Development*: <https://environment.govt.nz/assets/Publications/Files/Recommendations-and-decisions-report-NPS-UD-final.pdf>, at [59].

- 26 Ms Elford has considered all the evidence provided and disagrees with the Section 42A Report. She concludes PC79 meets the requirement of a well-functioning urban environment⁴⁷. It is acknowledged that the Officer's Report did not have the PC79 evidence at the time of writing his report.
- 27 Mr Nicholson (urban designer for SDC) states that he has reviewed the urban form in PC79 in terms of⁴⁸
- (a) The extent to which it creates a consolidated and compact urban form⁴⁹;
 - (b) The level of connectivity with the existing urban environment;
 - (c) The accessibility to a range of services using a range of travel modes including walking, cycling and public transport;
 - (d) The residential amenity values and character, and the treatment of the urban/rural interface.
- 28 In forming the above criteria for his assessment, it is clear that Mr Nicholson has not prioritised the NPS-UD Policy 1 criteria which defines the recent thinking of a well-functioning urban environment. I note:
- (a) There is no reference to a requirement for a consolidated or compact urban form in the NPS-UD criteria for a well-functioning urban environment, or connectivity with the existing urban environment. Such criteria could waterdown Policy 8 which enables out-of-sequence land release and plan changes which are unanticipated. The Section 42A report also emphasises urban form and township edges.
 - (b) For the Kakaha Park not to be considered as an urban use (but as an open space beyond Hampton Road as the southern boundary of Prebbleton) is surprising. Kakaha Park is clearly an urban use, and intended to be considered as such by the latest national policy. For example, the NPS-HPL defines what is "urban" for the purposes of a zone, to include residential, commercial, industrial, as well as "any open space zone (other than a Natural Open Space zone), and sport and active recreation"⁵⁰. PC79 expands the direction of growth provided by SDC for the Kakaha Park site.

⁴⁷ Ms Elford, at [99].

⁴⁸ Mr Nicholson, at [4.13].

⁴⁹ Mr Nicholson, at [4.7, 4.8, 4.13, 6.1-6.8, 13.2, 14.1].

⁵⁰ Definition of "urban", as a description of a zone, NPS-HPL, page 6.

- (c) Under the heading "accessibility" and when forming a conclusion of *low* accessibility, Mr Nicholson focusses on walking, cycling and bus routes and the lack of certainty around the proposed Business 1 land (now remedied)⁵¹. No reference is made to the Kakaha Park, a significant community investment SDC has made for sport and active recreation and open space.
- 29 Comparatively, the evidence of Mr. Compton-Moen and Ms. Lauenstein specifically addresses Policy 1 of the NPS-UD, and should be preferred. Their review of PC79 has been guided by these specific criteria in a wholistic and detailed manner, with references to housing variety and choice, cultural expression and diversity, accessibility and connectivity and resilience⁵².
- 30 That said, the matters of concern raised by Mr Nicholson are also addressed through a high-level analysis of the urban form of Prebbleton, and an overall growth model which provides a clear rationale to the direction of growth for the township to the south. This takes into consideration the long-term limitations to growth presented by features to the north, east and west of Prebbleton. PC79 sits strategically adjoining the already functional urban park (Kakaha Park), on land predominantly used for residential lifestyle activity, and forms an appropriate focal point in the logical extension of the growth of Prebbleton. Changes have also been proposed to the ODP consistent with Mr Nicholson's recommendations.
- 31 A decision maker has to have *particular regard* (i.e. giving more weight to the benefits of PC79) to the development capacity provided if that development capacity, relevantly⁵³ would contribute to a well-functioning urban environment (in accordance with Policy 1 NPS-UD) and is well-connected along transport corridors. On the evidence, PC79 easily meets these criteria.

Does the National Policy Statement for Highly Productive Land apply?

- 32 It is my opinion that the NPS-HPL does not apply to the PC79 Site, as set out below.
- 33 The NPS-HPL provides additional requirements for urban rezoning of highly productive land. An interim definition of highly productive land applies until highly productive land is mapped and included as part of an operative RPS.

⁵¹ Mr Nicholson, at [10.1]-[10.7]

⁵² Ms Lauenstein, at [31].

⁵³ CRC has still not included criteria in its CRPS for determining what plan changes would be treated as adding significantly to development capacity.

34 The interim definition⁵⁴ provides that highly productive land, at the commencement⁵⁵ of the NPS-HPL, is land that:

(a) Is:

(i) zoned general rural or rural production; and

(ii) LUC 1, 2, or 3 land; but

(b) Is not:

(i) Identified for future urban development; or

(ii) Subject to a council initiated, or an adopted, notified plan change to rezone it from general rural or rural production to urban or rural lifestyle.

35 PC79 contains primarily LUC 2 land with small pockets of LUC 1 along the Birchs Road frontage. At the commencement of the NPS-HPL, PC79 was zoned Rural: Inner Plains in the OSDP. A residential zone has been sought pursuant to the PSDP, however, a zoning under the PSDP does not have legal effect until decisions are made on submissions.

36 Clause 3.5(7)(a) is clear the NPS-HPL is only relevant to land zoned general rural or rural production, and all other zones are excluded from the transitional definition of HPL⁵⁶.

37 General rural, rural production and rural lifestyle are not defined in the NPS-HPL and for local authorities (such as SDC) which have not yet implemented the Zone Framework Standard of the National Planning Standards, a reference to a zone is to be read as reference to "the nearest equivalent zone"⁵⁷. The OSDP has not implemented the Zone Framework Standard and contains Living, Business and Rural zones.

38 The NPS⁵⁸ provides the following zones and descriptions:

(a) **General rural zone** - Areas used predominantly for primary production activities, including intensive indoor primary production. The zone may also

⁵⁴ Clause 3.5(7) of the NPS-HPL 2022.

⁵⁵ Commencement date of NPS-HPL is 17 October 2022.

⁵⁶ NPS Highly Productive Land Guide to implementation, <https://environment.govt.nz/assets/publications/NPS-Highly-Productive-Land-Guide-to-implementation.pdf> at page 14.

⁵⁷ NPS-HPL, Clause 1.3(4).

⁵⁸ National Planning Standards November 2019, <https://environment.govt.nz/assets/publications/national-planning-standards-november-2019-updated-2022.pdf>

be used for a range of activities that support primary production activities, including associated rural industry, and other activities that require a rural location.

- (b) **Rural production zone** – Areas used predominantly for primary production activities that rely on the productive nature of the land and intensive indoor primary production. The zone may also be used for a range of activities that support primary production activities, including associated rural industry, and other activities that *require a rural location*.
- (c) **Rural lifestyle zone** – Areas used predominantly for a residential lifestyle within a rural environment on lots smaller than those of the General rural and Rural production zones, while still enabling primary production to occur.
- (d) **Settlement zone** - Areas used predominantly for a cluster of residential, commercial, light industrial and/or community activities that are located in rural areas or coastal environments.

39 It's important to note that the NPS Descriptions refer to "*areas used*" which requires an assessment against activities taking place in the zone, rather than what the planning framework provides for. It is clear on the evidence provided that the PC79 area is that it is not *used predominantly*⁵⁹ for primary production activities⁶⁰. The PC79 area is:

- (a) used predominantly for a residential lifestyle;
- (b) on lots smaller than can be expected than those of the general rural and rural production zones⁶¹;
- (c) still enabling of primary production (with the exception of three properties of 0.59 ha, 2ha and 2.6 ha which are used for residential use only and no primary production). Noting also that only two from eight properties receive

⁵⁹ Predominant in the Oxford English Dictionary means superior, ascendant or prevalent i.e. the primary outcome.

⁶⁰ NPS defines primary production as: means: (a) any aquaculture, agricultural, pastoral, horticultural, mining, quarrying or forestry activities; and (b) includes initial processing, as an ancillary activity, of commodities that result from the listed activities in a); (c) includes any land and buildings used for the production of the commodities from a) and used for the initial processing of the commodities in b); but (d) excludes further processing of those commodities into a different product.

⁶¹ Residential density in other areas of the Inner Plains remain on larger allotments (such as to the south of the PC79 Site). The Outer Plains, Malvern Hills density is dwellings per hectare 1:20; and High Country is 1:120 dwellings per hectare (Policy B4.1.1).

a small economic benefit from land-based primary production (i.e. grazing 26 sheep)⁶².

- 40 A review of the OSDP provisions against the use of the PC79 area also supports an assessment that the nearest equivalent zone⁶³ is the Rural Lifestyle Zone. The provisions enable residential development at densities of 1 per 4 hectares, and in this particular area all lots have been subdivided to be used beyond this, or to at least this with one exception only⁶⁴. Objectives and policies at Rural Volume B4.1 specifically address residential density and subdivision in the rural area, and include direction for:
- (a) The provision of a variety of residential section sizes in the rural area, while maintaining a low overall residential density (Objective B4.1.1)
 - (b) Residential density is low enough to maintain the character of the rural area and to avoid adverse effects on natural and physical resources or reverse sensitivity effects (Objective B4.1.2)
- 41 This is consistent with the Rural Lifestyle Zone which anticipates residential activity that occurs "within a rural environment", and on lots that "still enable primary production to occur". There are no objectives or policies that directly address rural activities or primary production in the Rural zone. Provisions related to versatile soils are concerned only with limiting residential development to densities of 1 per 4 hectares.⁶⁵
- 42 The cumulative loss of HPL to rural lifestyle development on the fringes of urban areas is one of the most significant issues that the NPS-HPL seeks to address on the basis that *"this development often causes the fragmentation of productive land, resulting in irreversible land use change, and the loss of land or underutilisation of land for primary production purposes"*. The evidence demonstrates this has occurred on the Site.
- 43 Further, it is noted in the same Guidance document *"the NPS-HPL deliberately does not contain direction on the size of a lot that will guarantee the productive capacity of HPL will be retained... whether or not a particular lot can remain productive will vary depending on, for example, fluctuating markets or local*

⁶² H Konigkramer, Assessment 5.2.1 - Table 5-3- Current Land Use Activities and Estimate of Potential Household Benefit from Land Based Primary Production; Mr Geddes at [7]-[8].

⁶³ As required by NPS-HPL clause 1.3(4)

⁶⁴ 144 Birchs Road and 57 Hamptons Road remains as 7.23ha but currently has no productive land use activity on the land. For 2 months a year a neighbour's sheep are grazed intermittently to keep grass growth down. This lot borders the access and carpark of the adjacent Park, and the small residential lot on the corner.

⁶⁵ Policy B1.1.8 and associated Explanation and Reason

conditions in each district. As discussed above, the determining factor is whether the site is large enough so that the predominant use of the site is land-based primary production and not residential lifestyle⁶⁶.

- 44 The Section 42 Report and CCC and CRC Planners do not consider the use of the PC79 area when forming their conclusions that the NPS-HPL applies. The Section 42A Report presumes that land to be subject to NPS-HPL on the premise that "the application site is zoned for general rural use (through a single 'Rural Zone' in the Operative Plan and as a "General Rural Zone" in the Proposed Plan)"⁶⁷. I disagree with this assessment.
- 45 I am aware of the legal opinion provided by Adderley Head/DLA Piper to support the conclusion that the Rural (Inner Plains) zone is more analogous with a General Rural Zone than a Rural Lifestyle Zone. The advice was broadly provided for the Proposed Selwyn District Plan process. It does not change my opinion. I note the Adderley Head/DLA Piper advice acknowledged that the NPS Descriptions "*refer to 'areas used', which suggest that the assessment should be completed against activities taking place in the zones, rather than what the planning framework provides for. We understand that land identified as Rural: Inner Plains includes several large land holdings, but at this stage we have not being provided with evidence to review on land use. Accordingly, we have completed our assessment based on the words in the ODP but note that additional evidence could change our assessment*"⁶⁸.
- 46 A site-specific analysis of the area subject to PC79's use inevitably leads to a different conclusion. The nearest equivalent zone for the PC79 area is the Rural Lifestyle Zone, and accordingly the NPS-HPL does not apply to consideration of the Site.
- 47 The significance of this assessment is that the Section 42A report concludes that Significant development capacity can be met as per the NPS-UD (subject to wastewater servicing), but is not required pursuant to the NPS-HPL. On the evidence, it is submitted the NPS-HPL does not apply to PC79.

What if the NPS-HPL applies?

- 48 As a precaution, I instructed the experts to consider whether PC79 is consistent with the NPS-HPL, and can meet the requirements of Policy 5 NPS-HPL (i.e. urban rezoning should be avoided on HPL unless all relevant tests in Clause 3.6 can be

⁶⁶ <https://environment.govt.nz/assets/publications/National-Policy-Statement-Highly-Productive-Land-Guide-to-implementation-March-2023.pdf>, pg 22.

⁶⁷ Section 42A Report, [192]-[201], with reference to a legal opinion from Adderley Head/DLA Piper.

⁶⁸ at [30].

met). This has been set out in the evidence of Ms Elford who concludes that PC79 meets the requirements of Clauses 3.6(1)-(3),(5) and may be rezoned⁶⁹. It is submitted, that on the evidence:

- (a) *Clause 3.6(1)(a) – sufficient development capacity.* PC79 is required to provide sufficient development capacity to meet demand for housing or business land to give effect to the NPS-UD. This is demonstrated by evidence from Mr Colegrave⁷⁰. Mr Colegrave highlights fundamental flaws in the Selwyn Residential Capacity and Demand – IPI 2023 attached to the Section 42A Report. Further, PC79 proposes a unique housing proposition which expands the presence and expression of Ngāi Tahu mana. The evidence of Mr Christie is there is otherwise a shortage of land in Prebbleton to sufficiently provide for this type of culturally focused urban development.
- (b) *Clause 3.6(1)(b), Clause 3.6(2) – no other reasonably practicable and feasible options for at least sufficient development capacity.* PC79 can be allowed if there are no other reasonably practicable *and* feasible options for providing *at least* sufficient development capacity within the same locality and market while achieving a well-functioning urban environment. A range of reasonably practicable options has been considered in detail by Mr Colegrave⁷¹, Ms Lauenstein⁷² and Mr Mthamo⁷³, Mr Jones⁷⁴, and Ms Elford. It is clear from the references in the recent Selwyn Residential Capacity and Demand – IPI 2023⁷⁵, and through its incorporation in Variation 1 to the PSDP that Prebbleton is a market and locality required to give effect to the medium density residential standards⁷⁶. In my submission, options that are not commercially viable for developers or legally possible (due to land use covenants) do not need to be assessed, and a private plan change proponent can't be expected to acquire a range of other landholdings for development.
- (c) *Clause 3.6(1)(c) – cost-benefit assessment.* The environmental, social, cultural and economic benefits of PC79 outweigh the long-term environmental, social, cultural and economic costs associated with the loss

⁶⁹ Ms Elford, at [108].

⁷⁰ Mr Colegrave, at [77]-[104].

⁷¹ Mr Colegrave, at [105]-[116].

⁷² Ms Lauenstein at [40]-[48], and

⁷³ Mr Mthamo, at [76- 82].

⁷⁴ Mr Geddes, Appendix 3.

⁷⁵ Appendix 3, Section 42A Report.

⁷⁶ Confirmed also in the evidence of Mr Colegrave, at [52] and [106].

of HPL for land-based primary production, taking into account both tangible and intangible values. This is demonstrated in the social impact evidence and assessment of Ms Konigkramer, and further in the evidence of Mr Christie⁷⁷, Mr Everest⁷⁸, Mr Colegrave⁷⁹ and Ms Elford⁸⁰.

- (d) *Clause 3.6(5) – loss of HPL to be minimised.* Measures have been taken to ensure 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. This is demonstrated in the evidence of Mr Geddes⁸¹, Ms Lauenstein⁸², Mr Colegrave⁸³ Ms Elford⁸⁴.

- 49 It is important to note, if the Commissioner considers completing this assessment is necessary, the NPS-HPL does not seek to provide absolute protection of HPL. The NPS-UD and NPS-HPL directly interact and the NPS-HPL allows the SDC to implement the NPS-HPL to effectively fulfil their obligation to provide sufficient development capacity to meet demand for housing and business land under the NPS-UD. As is clear in the evidence, Prebbleton is an urban environment which is highly constrained in terms of where it can grow in relation to HPL, and PC79 is a Site highly fragmented in a local environment with restricted solutions (if any) to enable future land-based primary production use. Mr Everest does not consider productive agriculture or horticulture to be economically viable uses (having considered this over a 30-year timeframe) of the PC79 Site⁸⁵.

Can PC79 be appropriately serviced for wastewater?

- 50 The Section 42A Report considers out of sequence growth proposals can utilise any existing capacity in the network, or where no such capacity exists enter into a developer agreement for the necessary infrastructure upgrades. The Section 42A report considers the funding of any upgrades necessitated by the plan change is not an impediment to the rezoning⁸⁶. I agree, and note that the NPS-UD specifically

⁷⁷ Mr Christie, at [14].

⁷⁸ Mr Everest, at [70]-[71].

⁷⁹ Mr Colegrave, at [117]-[146].

⁸⁰ Ms Elford, at [109]-[117].

⁸¹ Mr Geddes, at [14(d)].

⁸² Ms Lauenstein at [77]-[80].

⁸³ Mr Colegrave, at [146].

⁸⁴ Ms Elford, at [118].

⁸⁵ Mr Everest, at [74].

⁸⁶ Section 42A at [82].

seeks to ensure that plan change requests are considered on their own merits, irrespective of infrastructure funding constraints.

- 51 There is concern with the recent shift to MDRS to determine how much additional capacity will remain available for PC79, and the Section 42A report considers there is a risk that the existing pump station upgrade will need to be an entirely new pump station (and new rising main to Rolleston) in the short-medium term⁸⁷.
- 52 The evidence of Mr Marshall is the required wastewater conveyancing infrastructure is capable of being delivered in accordance with the proposed Living Medium Density Prebbleton and Business 1 zoning. Feasible wastewater conveyancing disposal solutions exist that will not generate adverse effects on the receiving environment and any new infrastructure upgrades can be identified during the detailed design of any future subdivision and through the subdivision resource consent process⁸⁸.
- 53 Constraints around current capacity consider PC68 and 72 being fully developed and intensified pursuant to the MDRS. However, Mr Marshall would expect this to occur over time (if it occurs at all). The evidence of Mr Geddes⁸⁹ and Mr Colegrave⁹⁰ also consider that development in Prebbleton (across the 72, 68 and 79 plan change areas) will have staged lead times to development. Indeed, the evidence of a submitter is there are landowners (PC72) who will choose not develop their land⁹¹. There is currently capacity available within the Prebbleton Terminal Pump Station in the short term with capacity expected to be reached (with upgrades to the pump station) in 2030 at the earliest. An appropriately engineered solution can be achieved to service the site within the capacities of the network at the time it is required and through subdivision consent.
- 54 Mr Geddes has had initial discussions with another developer in Prebbleton and there is a willingness to work together, and with the Council, to ensure cost efficient and appropriate wastewater conveyancing⁹², and funding as necessary⁹³.

⁸⁷ Section 42A at [91].

⁸⁸ Mr Marshall, at [22]-[33].

⁸⁹ Mr Geddes, at [16] acknowledges the different opportunity that PC79 presents in that it can be developed and come to market before PC68 and PC72 due to the nature of multiple landowners, most of which are not developers.

⁹⁰ Mr Colegrave, at [63]-[66].

⁹¹ Mr Tom Fraser.

⁹² Mr Geddes, at [52].

⁹³ In this respect, BVL has made a submission on the Annual Plan seeking appropriate wastewater conveyancing provision to be included from Prebbleton.

Evidence

55 The following witnesses have provided evidence in support of PC79:

- (a) Dave Compton-Moen – Urban Design and Landscape
- (b) Nicole Lauenstein – Urban Design
- (c) Lisa Williams – Transport
- (d) Paul Farrelly – Greenhouse Gases
- (e) Simon Marshall – Servicing
- (f) Andrew Jordan – Geotechnical
- (g) Nicola Peacock – Contamination
- (h) Fraser Colegrave – Economics
- (i) Victor Mthamo – Versatile Soils
- (j) Mark Everest – Farm Consultant
- (k) Hilary Konigkramer – Social
- (l) Dean Christie – NTP
- (m) Ryan Geddes – Company
- (n) Sally Elford – Planning

Conclusion

56 PC79 presents an exciting opportunity for Prebbleton, and for Ngāi Tahu. The Proponent has been agile to respond to new legislation, process and policy since its lodgement some two years ago, and the evidence before supports you to be responsive and recommend approval of PC79 on its merits now.

Dated this 27th day of April 2023

A handwritten signature in black ink, appearing to read 'A Booker'.

Alex Booker
Counsel for Birchs Village Limited

Appendix 1 – Statutory framework

57 The statutory tests when preparing and changing a district plan, are as set out in *Colonial Vineyard Ltd v Marlborough District Council*⁹⁴. In summary, these require that the operative Selwyn District Plan:

- (a) Accord with and assist Council in carrying out its functions, including:⁹⁵
 - (i) Achieving integrated management of effects of the use, development and protection of land and associated natural and physical resources;
 - (ii) Ensuring that there is sufficient development capacity in respect of housing and business land to meet the expected demands of the district; and
 - (iii) Controlling any actual or potential effects of the use, development, or protection of land, including for the purposes of the avoidance or mitigation of natural hazards;
- (b) Have regard to the actual and potential effects on the environment, including in particular any adverse effect;⁹⁶
- (c) Accord with Part 2 of the Act;⁹⁷
- (d) In respect of the existing statutory documents:
 - (i) Give effect to any national policy statement or operative regional policy statement;⁹⁸
 - (ii) Have regard to any proposed regional policy statement, and management plans and strategies prepared under any other Acts;⁹⁹

⁹⁴ *Colonial Vineyard Ltd v Marlborough District Council* [2014] NZEnvC 55 at [17] onwards. See also *Adams and others v Auckland Council* [2018] NZEnvC 8 at [53]; and more recently in *Trojan Holdings Limited and Skyline Enterprises Limited v Queenstown Lakes District Council* at [2020] NZEnvC 79 at [23]; *Edens v Thames-Coromandel District Council* [2020] NZEnvC 13 at [10]

⁹⁵ Section 31(1)(a), (aa) and (b)

⁹⁶ Section 76(3)

⁹⁷ Section 74(1)(b)

⁹⁸ Section 75(3)(a) and (c)

⁹⁹ Section 74(2)

- (iii) Have regard to the extent to which the plan is consistent with the plans of adjacent territorial authorities;¹⁰⁰ and
- (e) Establish the most appropriate method for achieving the objectives and policies of the District Plan, undertaking the assessment detailed in section 32.

¹⁰⁰ Section 74(2)(c)