

**BEFORE THE HEARINGS COMMISSIONER
FOR SELWYN DISTRICT COUNCIL**

UNDER

the Resource Management
Act 1991 (RMA)

IN THE MATTER

of Private Plan Change 79
(Prebbleton) to the Operative
Selwyn District Plan by
Birchs Village Limited

**LEGAL SUBMISSIONS ON BEHALF OF THE CANTERBURY REGIONAL
COUNCIL**

27 April 2023

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MAY IT PLEASE THE HEARINGS COMMISSIONER

Introduction

- 1 Canterbury Regional Council (**CRC** or **Regional Council**) made a submission on Birchs Village Ltd's (**BVL**) private plan change request to the Operative Selwyn District Plan (**SDP**) being Plan Change 79 (**PC79**), seeking that the request for rezoning is declined.
- 2 The Regional Council's position is that PC79 does not give effect to the Canterbury Regional Policy Statement (**CRPS**) and various other higher order documents, primarily the National Policy Statement on Highly Productive Land (**NPS-HPL**) and the National Policy Statement on Urban Development (**NPS-UD**).
- 3 The Regional Council lodged a submission on PC79 (summarised further in Ms Orr's evidence). The Regional Council opposes PC79 on the basis that it:
 - (a) Is inconsistent with the clear and directive urban framework for Greater Christchurch under the CRPS, including lacking the ability to implement CRPS objectives and policies to avoid urban development outside of existing urban areas, consolidate urban areas, and only develop Greenfield Priority Areas (**GPA**s) identified on Map A in Chapter 6 of the CRPS;
 - (b) Does not contribute to well-functioning urban environments, such that local authorities should be "responsive" to the proposal for out-of-sequence development under Policy 8 of the NPS-UD; and
 - (c) Is highly productive land under the transitional definition in the NPS-HPL, and therefore does not meet the strict criteria for the urban rezoning of highly productive land in clause 3.6 of the NPS-HPL.
- 4 While the Regional Council's position has been consistent in opposing all three recent rezoning proposals in Prebbleton, despite that opposition, the previous two proposals were approved. In this case, there is even more reason to decline PC79, given the other two proposals now will provide additional capacity, and the NPS-HPL has been gazetted since they were decided.

- 5 The Regional Council has filed evidence from Ms Serena Orr, Planner at the Regional Council, in support of its submission.
- 6 Ms Orr will be present at the hearing to answer any questions that the Commissioner may have.
- 7 These submissions have been structured to address the following issues:
- (a) The Regional Council's interest in PC79;
 - (b) The NPS-UD;
 - (c) The NPS-HPL;
 - (d) Reconciliation of the NPS-UD and NPS-HPL; and
 - (e) The CRPS.

The Regional Council's interest in PC79

- 8 As set out in the evidence of Ms Orr, the Regional Council has statutory functions under the Resource Management Act 1991 (**RMA**) (including the establishment, implementation and review of objectives, policies and methods to ensure that there is sufficient development capacity in relation to housing and business land to meet the expected demands of the region,¹ and the strategic integration of infrastructure with land use through objectives, policies and methods²).
- 9 The Regional Council also administers the CRPS, to which the district plan is required to give effect.³
- 10 In addition, and alongside these functions, the Regional Council works collaboratively with territorial authorities across the region.
- 11 As part of the Greater Christchurch Partnership (since 2003), the Regional Council (and SDC) worked together with other territorial authorities which are a part of the Partnership to identify areas for future development within the Greater Christchurch area, consistent with the development capacity required.

¹ RMA, s 30(1)(ba).

² RMA, s 30(1)(gb).

³ RMA, s 75(3).

- 12 This resulted in the preparation of “Our Space 2018-2048 – Greater Christchurch Settlement Pattern Update” (adopted by each of the partner Councils in July 2019).⁴ Our Space was an update to the existing Greater Christchurch Urban Development Strategy, and was intended to satisfy the requirements of a “future development strategy” under the previous National Policy Statement on Urban Development Capacity.
- 13 Our Space included a further implementation step for the Regional Council to “prepare a proposed change to Chapter 6 of the CRPS at the earliest opportunity” to identify future urban development areas identified in Our Space, and to enable that land to be rezoned for urban development if there is a projected shortfall in housing development capacity.⁵
- 14 This change to the CRPS (in particular Map A), in order to give effect to the identified future development areas in Our Space, was promulgated in 2020 through the streamlined planning process. The Change was subsequently made operative on 28 July 2021. This means that the CRPS now includes the identified future development areas as part of the Our Space project, which considered required capacity across Greater Christchurch.
- 15 As identified in Ms Orr’s evidence, the Regional Council also participated in two recent private plan change processes in Prebbleton (PC68 and PC72).⁶ The Regional Council also opposed both of these proposals to rezone rural land to residential, for similar reasons to which it is opposing PC79.
- 16 Although both of these private plan changes were ultimately approved, the Regional Council continues to consider that PC79 should be declined, as it is out of sequence with planned infrastructure and development in Greater Christchurch, and does not contribute to a well-functioning urban environment. The NPS-HPL was introduced following

⁴ Greater Christchurch Partnership “Our Space 2018-2048: Greater Christchurch Settlement Pattern Update”, July 2019. Accessed at <https://www.greaterchristchurch.org.nz/assets/Documents/greaterchristchurch/Our-Space-final/Our-Space-2018-2048-WEB-FINAL.pdf>

⁵ “Our Space”, page 41.

⁶ Statement of Evidence of Serena Orr on behalf of CRC dated 21 April 2023, at [26].

the ultimate approval of these plan changes, which does not change (and if anything, strengthens) the position of the Regional Council.

NPS-UD

- 17 The NPS-UD came into force in August 2020, and identifies Christchurch as a Tier 1 urban environment (with both SDC and the Regional Council being Tier 1 local authorities).⁷
- 18 The key policy under the NPS-UD to this proposal is Policy 8. This policy directs local authorities to be responsive to plan changes that would add significantly to development capacity and contribute to well-functioning urban environments.⁸
- 19 Policy 8 therefore contains two limbs that must be met for an out-of-sequence / unanticipated development to be considered:
 - (a) The plan change must add significantly to development capacity; and
 - (b) It must contribute to well-functioning urban environments.

Does PC79 add significantly to development capacity?

- 20 Clause 3.8, which implements Policy 8, requires a local authority to have particular regard to the development capacity provided by the plan change if that development capacity:
 - (a) Would contribute to a well-functioning urban environment; and
 - (b) Is well-connected along transport corridors; and
 - (c) Meets the criteria set under subclause (3).
- 21 Clause 3.8(3) of the NPS-UD requires criteria to be included in a regional policy statement for determining what plan changes will be treated as adding significantly to development capacity.⁹
- 22 These criteria have not yet been added to the CRPS, and I am not aware of any case law that has considered what may meet the standard for adding “significantly” to development capacity, so as to enable the out-of-sequence development.

⁷ Statement of Evidence of Serena Orr on behalf of CRC dated 21 April 2023, at [38]-[39].

⁸ NPS-UD, Policy 8.

⁹ NPS-UD, Clause 3.8(3).

- 23 Whether PC79 would contribute to a well-functioning urban environment and is well-connected along transport corridors is dealt with further below in respect of the second limb in Policy 8. However, it is still necessary to consider the meaning of adding “significantly” to development capacity under Policy 8, in advance of significance criteria being added to the CRPS.
- 24 As Ms Orr’s evidence states the ability of PC79 to add “significantly” to development capacity is limited by the NPS-HPL, which requires that only the minimum highly productive land necessary to provide the required capacity is rezoned, which ultimately restricts SDC from rezoning highly productive land into a state of surplus capacity.¹⁰
- 25 Ms Orr considers that there is ample capacity provided for in Prebbleton in the medium term, preferring the assessment of SDC performed by Formative to Mr Colegrave’s estimates (based on a 22-year average). The Formative report conclusions are also consistent with the 2021 Greater Christchurch Housing and Business Development Capacity Assessment, and the housing bottom lines inserted into the CRPS.¹¹
- 26 In this circumstance, particularly considering the recent additions to capacity in Prebbleton through PC68 and PC72, it is difficult to see how PC79 could be considered to add “significantly” to development capacity, in order to enable it out of sequence from other planned development in the Selwyn District. This is particularly so in light of the potential infrastructure challenges regarding wastewater conveyance capacity identified in the section 42A report.¹²

Does PC79 contribute to a well-functioning urban environment?

- 27 The other requirement that must be met in order to enable an out-of-sequence development is to contribute to a well-functioning urban environment. Ms Orr agrees with Mr Cleave for the SDC that the transport modal choice and connectivity due to the location of PC79, its urban form, and wastewater pump capacity constraints limits PC79 such that it does not conclusively achieve the requirements of Policy 8.¹³

¹⁰ Statement of Evidence of Serena Orr on behalf of CRC dated 21 April 2023, at [42].

¹¹ Statement of Evidence of Serena Orr on behalf of CRC dated 21 April 2023, at [43]-[45].

¹² Statement of Evidence of Serena Orr on behalf of CRC dated 21 April 2023, at [46].

¹³ Statement of Evidence of Serena Orr on behalf of CRC dated 21 April 2023, at [46]-[51].

- 28 One of the relevant considerations in this case is “supporting reductions in greenhouse gas emissions”. Limited guidance is available as to how this policy should be interpreted. Even if this is considered in light of comparisons with other greenfield developments in Canterbury, it is submitted that Mr Farrelly’s evidence should be treated with care in this regard, particularly regarding assumptions around future travel and working trends.
- 29 Further, it is submitted that the density of PC79 (i.e. its comparative increase in density compared to other previously proposed greenfield developments) in supporting a reduction in greenhouse gas emissions is of less relevance in light of the Medium Density Residential Standards, which are intended to increase density in all urban areas to which they apply (including Christchurch and Selwyn).
- 30 For these reasons, the Regional Council considers that compliance with the requirements of Policy 8 of the NPS-UD has not been demonstrated, and therefore approving PC79 as an out-of-sequence development has not been sufficiently justified.

NPS-HPL

- 31 A further issue in this case, and a key reason why the Regional Council considers PC79 must be declined, is the policy direction in the NPS-HPL. As a national policy statement, the district plan is required to give effect to the NPS-HPL.¹⁴
- 32 The subject site is affected by the NPS-HPL, as it is currently zoned rural, is made up of LUC 1 and LUC 2 land, not identified for future development, and is not subject to a Council-notified or adopted plan change. The entirety of the site is highly productive land within the meaning of the NPS-HPL, ahead of the Regional Council undertaking its required mapping exercise.¹⁵
- 33 As noted recently by the Environment Court, the transitional provisions (providing for the definition of highly productive land in advance of the mapping processes) can be assumed to take a deliberate holding position, with the clear intention that highly productive land is not to be given any kind of planning permission for development for urban or

¹⁴ RMA, s 75(3).

¹⁵ Statement of Evidence of Serena Orr on behalf of CRC dated 21 April 2023, at [54].

lifestyle purposes before the mapping exercises are completed by regional councils and given effect to by district councils.¹⁶

- 34 As noted in the evidence of Ms Orr, the NPS-HPL is directive towards the protection of productive land and avoidance of inappropriate development.¹⁷ Policy 5 of the NPS-HPL requires that the urban rezoning of highly productive land is avoided, except as provided in the NPS-HPL.
- 35 The Supreme Court has considered that the word “avoid” (in the context of the hierarchy of “avoid, remedy, mitigate”) has its ordinary meaning of “not allow” or “prevent the occurrence of”.¹⁸
- 36 This policy direction is given effect to through clause 3.6. Ms Orr’s evidence demonstrates that the three sub-clauses in clause 3.6 are conjunctive, and all are required to be demonstrated before a rezoning could be considered.¹⁹
- 37 While clause 3.6 is in a policy document, rather than a rule, the nature of the strong directive to “give effect to” this document (i.e. implement its clauses), and in the context of the policy indicating avoidance of this development unless the criteria are met, this effectively means clause 3.6 is a “test” to be met. Clause 3.6 contains the only relevant tests in this scenario (as the considerations in clause 3.10 for example relate to other proposals).²⁰
- 38 As will be well understood by the Commissioner, to “give effect to” a document means to implement it – it is a strong directive, creating a firm obligation on the part of those subject to it.²¹ Importantly, 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

¹⁶ *Balmoral Developments (Outram) Limited v Dunedin City Council* [2023] NZEnvC 59, at [97]-[98].

¹⁷ Statement of Evidence of Serena Orr on behalf of CRC dated 21 April 2023, at [53].

¹⁸ *Environmental Defence Society Inc v New Zealand King Salmon Company* [2014] 1 NZLR 593 (SC) at [96].

¹⁹ Statement of Evidence of Serena Orr on behalf of CRC dated 21 April 2023, at [57].

²⁰ Statement of Evidence of Serena Orr on behalf of CRC dated 21 April 2023, at [55].

²¹ *Environmental Defence Society Inc v New Zealand King Salmon Company* [2014] 1 NZLR 593 (SC) at [77].

to give effect to a policy which is worded at a higher level of abstraction.²²

- 39 Given that clause 3.6 implements Policy 5 of the NPS-HPL, which requires avoidance of urban rezoning on highly productive land (except as otherwise provided), the exceptions should be read strictly in order to implement the direction to avoid urban rezoning.

Clause 3.6 of the NPS-HPL

- 40 The Council's position on the tests in the sub-clauses of clause 3.6 is as follows:

- (a) The urban rezoning is not required to provide sufficient development capacity to meet demand to give effect to the NPS-UD. The Formative report (Appendix 3 to the section 42A report) suggests that there is sufficient supply of housing in Prebbleton in the medium and long term. Rezoning to provide capacity in the longer term is inconsistent with the requirement to only rezone urban land to the minimum extent necessary to provide the required capacity, and the Ministry for the Environment's guidance indicating that the intention of the NPS-HPL was only to provide for capacity on highly productive land where it is required in the short-medium term.²³
- (b) It has not been demonstrated that there are no other reasonably practicable and feasible options for providing at least sufficient development capacity within the same locality and market. Ms Orr's evidence demonstrates her view that proportional reductions of highly productive land are not relevant in the context of whether rezoning is appropriate, consistent with the Ministry for the Environment's guidance indicating that highly productive land is intended to be assessed inherently (i.e. through its LUC

²² *Environmental Defence Society Inc v New Zealand King Salmon Company* [2014] 1 NZLR 593 (SC) at [80].

²³ Statement of Evidence of Serena Orr on behalf of CRC dated 21 April 2023, at [57]. It is recognised that the weight that can be placed on guidance notes, including on the NPS-HPL guidance, may be limited, in accordance with *Gray v Dunedin City Council* [2023] NZEnvC 45, at [206]. In this case it is submitted that while the guidance is not determinative (not having any statutory basis, and not legally binding), the guidance remains a useful indication of the Government's intention behind the passage of the NPS-HPL, and the types of activities that it is designed to protect against. The weight that is placed on the guidance material is ultimately up to the Commissioner.

classification), rather than in light of any additional factors which may or may not contribute to its useability.²⁴

- (i) The inherent assessment of the productive capacity of the highly productive land is emphasised through the guidance material, which states that “an urban rezoning proposal on LUC class 1 land [will be required] to consider whether urban rezoning on LUC class 2 or 3 is a reasonably practicable and feasible option to provide sufficient development capacity and achieve a well-functioning urban environment.”²⁵ This demonstrates that the intention is for this consideration to be in terms of the LUC class, rather than any other factors that may contribute (or detract) from a particular piece of land’s useability.
- (ii) Further, the Ministry for the Environment’s guidance indicates that this test would not be met if there is already sufficient capacity “within the district”,²⁶ indicating that this assessment is to be taken at a relatively broad scale (and consistent with the approach of generally treating the Selwyn Inner Plains townships as part of the same market).²⁷
- (c) It has not been established that the environmental, social, cultural and economic benefits outweigh the long-term costs associated with the loss of the highly productive land, including the intangible values such as the value to future generations, finite characteristics and limited supply.²⁸

41 Given the directive nature of the provisions of the NPS-HPL, it is submitted that it is a high bar that needs to be overcome, for all three of the tests in clause 3.6 to be met.

²⁴ Statement of Evidence of Serena Orr on behalf of CRC dated 21 April 2023, at [56] and [58].

²⁵ Ministry for the Environment, “National Policy Statement for Highly Productive Land – guide to implementation”, December 2022, at p 46.

²⁶ Ministry for the Environment, “National Policy Statement for Highly Productive Land – guide to implementation”, March 2023, at p 44.

²⁷ Statement of Evidence of Serena Orr on behalf of CRC dated 21 April 2023, at [59].

²⁸ Statement of Evidence of Serena Orr on behalf of CRC dated 21 April 2023, at [60]-[61].

Reconciliation of the policy direction in NPS-UD and NPS-HPL

- 42 In light of the NPS-UD and the NPS-HPL provisions, it is also important to consider how the two documents can be read together.
- 43 Having been drafted in a scenario where the NPS-UD already applies, the NPS-HPL specifically anticipates and provides for this interaction. The NPS-HPL recognises that some development may need to occur on highly productive land in order to provide development capacity required under the NPS-UD. Both documents use the same terminology where possible, to ensure that the application is consistent.
- 44 However, the directive nature of the NPS-HPL demonstrates that the circumstances in which this rezoning can and should occur are limited. The two policy documents can be read together in that:
- (a) The NPS-UD requires sufficient development capacity to be provided;
 - (b) The NPS-UD enables out-of-sequence development where this adds “significantly” to the required capacity, in limited circumstances; and
 - (c) The NPS-HPL limits where this out-of-sequence development may be able to occur – highly productive land is to be protected and only rezoned for urban development where specific criteria are met.
- 45 This reading is consistent with Ms Orr’s position (and the position of the section 42A officer) in this respect, particularly that the extent to which an out-of-sequence development *can* provide significant capacity is necessarily limited by the NPS-HPL, which requires the protection of highly productive land and only provides for the minimum necessary land to be rezoned.²⁹

CRPS

- 46 As set out above, the CRPS was changed in July 2021, to incorporate the amendments to Map A identified through the Our Space process (including the identification of the Greenfield Priority Areas in Selwyn and Waimakariri for future development).

²⁹

Statement of Evidence of Serena Orr on behalf of CRC dated 21 April 2023, at [42].

- 47 The purpose of Change 1 to the CRPS was undertaken to “give effect to Policy 2 and Clause 3.7 of the NPS-UD and enable sufficient land in Greater Christchurch to be rezoned for the medium term (10 years) and identified for the long term (30 years)”.³⁰
- 48 As noted above, a district plan is required to give effect to both national policy statements and regional policy statements.³¹ Simply because there is a direction in a national policy statement (Policy 8 of the NPS-UD) which on its face appears to conflict with the CRPS direction to only enable development in areas identified on Map A of the CRPS, that does not mean that there is an inherent tension between the documents.
- 49 Ultimately, this will come down to a weighting exercise, in terms of how both the CRPS and the NPS-UD can be given effect to. In this case, it is submitted that the CRPS can be given relatively more weight, on the basis that it has been changed specifically to give effect to the NPS-UD.
- 50 Further, (in accordance with the Housing Capacity Assessment conducted by the Greater Christchurch Partnership in July 2021) when those Greenfield Priority Areas identified as part of Change 1 are taken into account, there is a surplus of housing sufficiency in Selwyn over the medium term.³²
- 51 For these reasons, the CRPS (as a document also required to be given effect to by a district plan) should not be cast aside due to a potential inconsistency on its face with Policy 8 of the NPS-UD. The strategic planning process that has been conducted in order to implement Change 1 of the CRPS demonstrates that considerable thought has been given to appropriate areas for further development, even in light of the NPS-UD policies.
- 52 The CRPS is the most recent expression of the strategic outcomes sought for Greater Christchurch as a whole, that has been through a

³⁰ Report to the Minister for the Environment on Proposed Change 1 to Chapter 6 of the Canterbury Regional Policy Statement, March 2021, at [22].

³¹ RMA, s 75(3).

³² Greater Christchurch Partnership “Housing Development Capacity Assessment – 30 July 2021”, at Table 3 - greaterchristchurch.org.nz/assets/Documents/greaterchristchurch/Capacity-Assessment-reports-2021/Greater-Christchurch-Housing-Development-Capacity-Assessment-July-2021.pdf

public submission process, and therefore Policy 8 of the NPS-UD should be given less weight in this circumstance.

Conclusion

- 53 The Regional Council considers, based on the evidence provided, that PC79 is inconsistent with the NPS-UD (in particular Policy 8), the NPS-HPL (in particular Policy 5 and clause 3.6), and the CRPS (in particular Map A, which was amended through a recent plan change to provide for further development areas where capacity was considered to be required).
- 54 For these reasons, the Regional Council seeks that PC79 is declined.

Dated this 27th day of April 2023



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