

Before the Selwyn District Council

under: the Resource Management Act 1991

in the matter of: Proposed Private Plan Change 80 to the Operative
District Plan

and: **Two Chain Road Limited**
Applicant

Memorandum of counsel in response to Minute 6

Dated: 25 January 2023

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MEMORANDUM OF COUNSEL IN RESPONSE TO MINUTE 6

- 1 This memorandum responds to Minute 6 of Commissioner Caldwell regarding plan change 80 (*PC80*) to the Operative Selwyn District Plan dated 18 January 2023.
- 2 Minute 6 sought comment from parties on the recently released guide to implementation (the *Guide*) of the National Policy Statement for Highly Productive Land (*NPS-HPL*) prepared by the Ministry for the Environment.

THE NPS-HPL

- 3 The PC80 site comprises approximately 18 hectares of LUC 3 class soils on the eastern edge of the site, which under the NPS-HPL is considered 'highly productive land' (*HPL*).
- 4 In summary, the NPS-HPL restricts the urban rezoning of HPL, except as set out in the NPS-HPL.
- 5 Our closing legal submissions of 1 December 2022 set out in detail our view on how the NPS-HPL allows for the rezoning of this land, and we will not repeat that here.
- 6 Rather, this memorandum considers whether our view as expressed in closing legal submissions is consistent with the Guide, and whether the Guide otherwise provides any helpful insights as to the intended interpretation and implementation of the NPS-HPL.

THE GUIDE

- 7 We set out first and foremost, as the Commissioner himself recognised, that the Guide is simply that – just a guide. While it may provide a helpful starting point for interpretation, it does not form part of the NPS-HPL and has no legal effect.
- 8 Nevertheless, having carefully read and considered the Guide, we are of the view that it generally confirms our interpretation of the NPS-HPL as set out in our closing legal submissions. Namely:
 - 8.1 That Clause 3.6 of the NPS-HPL is the appropriate clause when considering a request to rezone HPL.
 - 8.2 That the NPS-HPL takes a more enabling 'restrict' approach (rather than 'avoid') for urban rezoning on HPL. This recognises the need for HPL to be used in some circumstances to provide sufficient development capacity for

housing and business land while also ensuring a robust assessment of alternatives is undertaken before this occurs.¹

- 8.3 That when considering reasonably practicable options under clause 3.6(1)(b), that 'within the same locality and market' must mean within Rolleston:
- (a) *"an option that does not serve the same locality and market that is proposed for development (for example, in a completely different part of the district or within a completely different and distinct part of a large urban city) is not a reasonably practicable option that needs to be assessed."*²
 - (b) *"The specification that an urban rezoning proposal is considered to be in the same locality if it is "in or close to a location where demand for additional development capacity has been identified" through an HBA will require an interpretation of any published HBA and the assessment that underpinned it to understand where demand for housing or business land is anticipated."*³
 - (c) *"a locality should not simply be defined as the entire district administered by the territorial authority (or authorities) that prepared the Future Development Strategy. ... consideration of locality is intended to be finer grained than a district as a whole and will require further analysis to understand where the key demand areas for urban growth are."*⁴
- 8.4 That it is appropriate to look behind a published HBA to ensure that the conclusions it draws about capacity are up to date. If they are not, it will be appropriate to take into account other factors into that assessment.⁵
- 8.5 That urban rezoning may minimise the loss of HPL as required under clause 3.6(5) NPS-HPL by being predominantly on non-HPL and some smaller areas of LUC class 3 land, while deliberately avoiding larger areas of LUC1 and 2 land, and

¹ At page 39.

² At page 44.

³ At page 47.

⁴ At page 47.

⁵ At page 45 (second to last paragraph).

while still maintaining a well-functioning urban environment.⁶
PC80 is a good example of a rezoning that does just that.

Approach in the Guide to clause 3.6(1)(a)

- 9 Clause 3.6(1)(a) reads that a territorial authority may only allow urban rezoning of highly productive land where it:

"is required to provide sufficient development capacity to meet demand for housing or business land to give effect to the NPS-UD"

- 10 This wording is a clear reference to Policy 2 of the NPS-UD, which reads:

"Tier 1, 2, and 3 local authorities, at all times, provide at least sufficient development capacity to meet expected demand for housing and for business land over the short term, medium term, and long term."

- 11 The Guide makes the following statement in respect of clause 3.6(1)(a) of the NPS-HPL:

*"The intent is the test could support the rezoning of HPL to an urban zone if needed to provide for short term (within next 3 years) and/or medium term (3-10 years) sufficient development capacity as this is required to be zoned for housing and business land for it to be 'plan-enabled' (refer to Clause 3.4 of the NPS-UD). Rezoning HPL to an urban zone to provide for long term development would not meet this test. This is to avoid the premature loss of HPL to urban rezoning and ensure the maximum amount of HPL remains available for land-based primary production until it is actually needed to be rezoned to provide sufficient development capacity."*⁷

- 12 This statement is inconsistent insofar as it applies to meeting long term demand. We consider the Guide has wrongly interpreted both clauses 3.4 of the NPS-UD and 3.6(1)(a) of the NPS-HPL. Below, we outline why.

- 13 The Guide relies on clause 3.4 of the NPS-UD which provides that in order for development capacity to be 'sufficient', it must (among other things) be 'plan enabled' which is defined as:⁸

⁶ At page 49.

⁷ At page 42.

⁸ Clauses 3.3(2) and 3.4 NPS-UD.

"Development capacity is plan enabled for housing or for business land if:

- (a) in relation to the short term, it is on land that is zoned for housing or for business use (as applicable) in an operative district plan*
- (b) in relation to the medium term, either paragraph (a) applies, or it is on land that is zoned for housing or for business use (as applicable) in a proposed district plan*
- (c) in relation to the long term, either paragraph (b) applies, or it is on land identified by the local authority for future urban use or urban intensification in an FDS or, if the local authority is not required to have an FDS, any other relevant plan or strategy."*

[emphasis added]

- 14 We note that 'plan enabled' development capacity into the long term requires either that the land:
 - 14.1 is zoned for business use in an operative or proposed plan; or
 - 14.2 is identified by the local authority for future urban use or urban intensification in a relevant plan or strategy.
- 15 This means that development capacity is 'plan enabled' into the long term if, at the very minimum, the land is identified for future development in some strategic plan. However, this is in the alternative to the land being rezoned in an operative or proposed district plan.
- 16 We consider the Guide's view on this matter focusses too heavily on the second aspect of the definition of 'plan enabled' in a way that concludes that under the clause 3.6 of the NPS-HPL land to enable capacity into the long term cannot be rezoned if it is not included in an FDS or strategic document. In other words, that long term capacity can only be provided for under the NPS-HPL if it is already identified for future development.
- 17 That is not what the plain and ordinary meaning of clause 3.6 says. Nowhere in clause 3.6 does it state that this test for rezoning only applies where land is required for short or medium term capacity, but not long term. The obligation under the NPS-UD is to provide for all short, medium, and long terms. If the Government had intended the NPS-HPL to apply in the way asserted by the Guide, then it would have expressly stated so.

- 18 It is difficult to see how clause 3.6 of the NPS-HPL could be read in a way that would prevent the rezoning of required long-term capacity, when clearly the NPS-UD contemplates that long term capacity must be provided for and that this can be done through rezoning.
- 19 For PC80 both the Applicant's and the Council's economic evidence concluded that there is a shortfall in long-term industrial land capacity. This means that the Council is not currently meeting its obligations in relation to providing sufficient business development capacity in the long term under Policy 2 of the NPS-UD.
- 20 We say that therefore clause 3.6 of the NPS-HPL applies to PC80 on a plain and simple reading of that clause. Selwyn District is not currently meeting its long-term capacity requirements, and therefore the rezoning of PC80 in its entirety is required to provide sufficient development capacity under the NPS-UD.
- 21 Again, we reiterate that this Guide has no legal effect or weight when it comes to interpretation. We consider a Court would be extremely unlikely to find that the Guide is correct on this aspect given the plain and ordinary reading of the clause.

CONCLUSION

- 22 Nothing in our interpretation of the NPS-HPL set out in our closing legal submissions has changed as a result of the Guide. Rather, the Guide confirms the position we have put forward, despite it having no real legal effect.

Dated: 25 January 2023



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