

Before the Selwyn District Council

---

*under:* the Resource Management Act 1991

*in the matter of:* Proposed Private Plan Changes 81 and 82 to the  
Operative District Plan: Dunns Crossing Road, Rolleston

*and:* **Rolleston Industrial Developments Limited** and  
**Brookside Road Residential Limited**  
*Applicants*

Closing legal submissions on behalf of the Applicants

---

Dated: 5 December 2022

---

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

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

PO Box 993  
Wellington 6140  
New Zealand

Auckland  
Wellington  
Christchurch



## **CLOSING LEGAL SUBMISSIONS ON BEHALF OF THE APPLICANTS**

### **INTRODUCTION**

- 1 These closing submissions legal submissions are made on behalf of the Applicants, Rolleston Industrial Developments Limited and Brookside Road Residential Limited, subsidiaries of the Carter Group Limited (the *Applicant*) to the Selwyn District Council (the *Council*) to change the Operative Selwyn District Plan (the District Plan) to rezone approximately 138 hectares of currently rural (outer plains) land to Living MD and Business 1 (Local Centre) as follows:
  - 1.1 The plan change application by Rolleston Industrial Developments Limited to rezone approximately 28 hectares of rural land in Rolleston to Living MD (*PC81*); and
  - 1.2 The plan change application by Brookside Road Residential Limited to rezone approximately 110 hectares of rural land in Rolleston to Living MD and Business 1 (*PC82*);together, the *Plan Changes*
- 2 The Plan Changes provide a unique opportunity to the District for a comprehensive and integrated development that will result in good urban form outcomes, in the only appropriate location for growth in Rolleston. The rezoning of these Plan Changes, together with others, will ensure that house prices remain stable in the context of the current housing crisis.
- 3 An updated ODP and rule set has been provided in the supplementary evidence of **Mr Phillips**.
- 4 These legal submissions cover the following legal issues:
  - 4.1 Clause 26 of Schedule 1 of the RMA;
  - 4.2 Other processes occurring in Selwyn;
  - 4.3 Reverse sensitivity issues of the Pines Resource Recovery Park (*PRRP*); and
  - 4.4 Residential supply in Rolleston.

### **CLAUSE 26 OF SCHEDULE 1 OF THE RMA**

- 5 The Commissioner, in his Minute 3, requested that these closing submissions address the memorandum prepared by Mr Rogers dated 17 August 2022 (the *Memorandum*) regarding clause 26 of Schedule 1 of the RMA, and the consequences of this to the

Commissioner's jurisdiction to make a recommendation on submissions to a notified private plan change.

- 6 Firstly, we note that this is the first time this issue has arisen and the Council has taken the same approach to many private plan changes over the last 24 months or so.
- 7 In any case, we have read and considered the Memorandum and agree with its conclusions as to the proper interpretation of clause 26, namely that:
  - 7.1 Clause 26 is procedural in nature and not substantive. It relates to the preparation of the plan change for the purpose of notifying the plan change (not for the purpose of preparing the private plan change itself which the RMA clearly contemplates would be done by the applicant for a private plan change).
  - 7.2 The use of the word 'accepts' in clause 26(1) refers to the decision the Council makes under clause 25 to either adopt, accept, or reject a plan change.
  - 7.3 For PC81 and PC82, Selwyn District Council accepted the plan changes for processing, and prior to notification the Council engaged and consulted with the Applicant to ensure it had the appropriate information required for notification of the Plan Changes.
  - 7.4 It would not be consistent with the wider context of the RMA and the process it provides for private plan changes if clause 26 were to be read as requiring the Council to make a merits assessment prior to the hearing of public submissions.
- 8 We do not consider that clause 26 is relevant to the Commissioner's jurisdiction to decide these Plan Changes which is afforded by clause 25(3), Schedule 1 and section 100A of the RMA.

#### **OTHER PROCESSES OCCURRING IN SELWYN**

- 9 There are a number of other processes occurring around Selwyn which include the land subject to these Plan Changes. We set out a brief summary of each of these below:

##### **The Proposed Selwyn District Plan**

- 10 The Proposed Selwyn District Plan (the *Proposed Plan*) was notified by Council on 5 October 2020.
- 11 The Applicant through submissions on the Proposed Plan sought to rezone the land subject to PC81 and 82 from general rural zone, to general residential zone. It is noted the Applicant is pursuing the

rezoning of the PC81 and 82 land alongside the PC73 land, as one cohesive development.

- 12 Hearings for the Proposed Plan have almost all been heard in 2022. The rezoning hearings, however, remain outstanding. The rezoning hearing for Rolleston has been set down for 30 January to 10 February where the Applicant will be advancing its evidence in support of the rezoning requests it has sought in Rolleston.
- 13 The Council has indicated that the decisions on the Proposed Plan will be released at the same time as the decisions on the Variations (discussed below), being no later than 20 August 2023.<sup>1</sup>

#### **The Variations to the Proposed Selwyn District Plan**

- 14 The Variations to the Proposed District Plan have been made pursuant to the Resource Management (Enabling Housing Supply and Other Matters) Amendment Act 2021 where the Government required certain Councils to implement the medium density residential standards (*MDRS*) into all relevant residential zones.
- 15 The Variations (both to the District Plan, and certain plan changes to the operative district plan) were notified on 20 August 2022, and have just been through the further submission process. Hearings are expected to be held April to May 2023. Decisions must be released no later than 20 August 2023.
- 16 We understand that the decisions on the Variations are being made by a different panel than of the Proposed Plan panel.
- 17 We note that the Plan Changes before the Commissioner today have already been amended to incorporate the MDRS. This was done through consultation with the Council who provided the Applicant with their preferred drafting for the rules, consistent with the Proposed Plan format, which the Applicant adopted and incorporated. It is anticipated that should these Plan Changes be approved, the rules are capable of just being rolled through to the new District Plan.
- 18 We emphasise that while those other processes are relevant to the wider context of these Plan Changes, they do not in any way impede this Commissioner's ability to decide whether these Plan Changes should be approved on their merits.

#### **ODOUR ISSUES**

- 19 The key outstanding issue between the Applicant and Council is in regards to the potential for reverse sensitivity effects to arise from

---

<sup>1</sup> <https://gazette.govt.nz/notice/id/2022-sl1594>

the Plan Changes on the operation of its composting activities at the Pines Resource Recovery Park (PRRP).

### **Upset conditions**

- 20 Through previous processes, and particularly PC73, it has been the Council's view that reverse sensitivity effects might be experienced by the PRRP as a result of 'upset conditions'. It was generally accepted that the effects from the normal operation of the PRRP were considered acceptable.
- 21 **Mr Curtis'** evidence is now concerned with the normal operation of the PRRP resulting in reverse sensitivity effects. We disagree with the proposition he seems to imply that any observable odour beyond the boundary will result in reverse sensitivity effects.
- 22 After all, the reason that the PRRP had to obtain consent in the first place under the Canterbury Air Regional Plan is because there would be observable odours beyond the boundary.
- 23 The PRRP consent was granted non-notified on the basis that odour effects beyond the boundary, properly managed through the conditions of consent, would be less than minor.<sup>2</sup> It appears that **Mr Curtis** is saying this might not be the case, yet he does not seem to engage at all with the context of the consent application.
- 24 Further, we are struggling to see on what basis the Council is now requiring that the separation distances be measured from the mature composting area given its own consent application considered separation distances from the odour producing activities as being the active composting area.<sup>3</sup> **Mr Curtis** has explained why a different approach is appropriate for these Plan Changes.
- 25 We are also somewhat surprised at the Council's view on this issue given that the Council's own "Reconnect Project"<sup>4</sup> at the PRRP site proposes a range of activities just as sensitive as a residential dwelling within 100 metres of the PRRP's active composting area. **Mr Curtis** does not engage at all with the fact that the Council is introducing a number of sensitive activities into its own site.
- 26 **Mr Van Kekem's** supplementary evidence notes he does not consider that the Council would have invested as much as it has in the Reconnect Project if it considered there was a risk of nuisance odours (i.e. those that are offensive and objectionable) on the site that might adversely affect these activities. If anything, any reverse

---

<sup>2</sup> Section 42A Report and Decision for CRC211594, dated 30 April 2021 at [99], [120], and [173].

<sup>3</sup> Section 42A Report and Decision for CRC211594, dated 30 April 2021 at Figure 2.

<sup>4</sup> <https://www.selwyn.govt.nz/services/rubbish-recycling-And-organics/recovery-park/reconnect-project>

sensitivities on the PRRP will first arise from these activities well before any reverse sensitivities effects from persons 600 metres away. This is because odour intensity/concentrations decrease exponentially from the source.

- 27 Should such effects be occurring at the site itself, then the Council will be incentivised to further mitigate its odour emissions from the PRRP, or risk jeopardising the success of its own project.

**What is reverse sensitivity?**

- 28 At the hearing, **Mr Curtis** provided a definition of reverse sensitivity from the Proposed Selwyn District Plan (the *Proposed Plan*) which reads:

*"The potential for an approved (whether by consent or designation), existing or permitted activity to be compromised, constrained, or curtailed by the more recent establishment or alteration of another activity which may be sensitive to the actual, potential or perceived adverse environmental effects generated by an approved, existing or permitted activity."*

- 29 One critical aspect of this definition is that the existing activity must be lawfully authorised. Reverse sensitivity effects cannot arise from an activity that is not authorised or that breaches the conditions of a consent. Reverse sensitivity should not be used as some form of relief from a consent holders inability to comply at all times with the conditions of its consent and the so called upset conditions.
- 30 Nevertheless, we caution the Commissioner against relying solely on this definition of reverse sensitivity given decisions on the Proposed Plan have not yet been released and a number of submitters sought changes to that definition.<sup>5</sup> It is more helpful in this respect, to look at what the Courts have said about reverse sensitivity.
- 31 Reverse sensitivity relates to the effect of a new use on an existing and lawful use. An adverse reverse sensitivity effect refers to the incompatibility of the existing use and the new use, as opposed to the direct effects that arise from the new use.<sup>6</sup> For example, in *Aratiki Honey Ltd v Rotorua District Council* it was explained that reverse sensitivity will arise in cases:<sup>7</sup>

*"where an established use is opposing the introduction of a new use in the neighbourhood because of what the*

---

<sup>5</sup> 17 submissions on this definition in total.

<sup>6</sup> *Joyce Building Ltd v North Shore City Council* [2004] NZRMA 53 at [22].

<sup>7</sup> *Aratiki Honey Ltd v Rotorua District Council* (1984) 10 NZTPA 180 at p183.

*established use perceives as its likely effect on the proposed use."*

- 32 In *Auckland Regional Council v Auckland City Council* 'reverse sensitivity' was explained as a term which:<sup>8</sup>

*"is used to refer to the effects of the existence of sensitive activities on other activities in their vicinity, particularly by leading to restraints in the carrying on of those other activities."*

- 33 Another key aspect to the meaning is that the 'effect' of reverse sensitivity is the restraint on the lawfully established activity to carry on with normal operations. Complaints in and of themselves are not an 'effect' unless they are likely to lead to a constraint.

***The subjective nature of 'perceived' adverse effects***

- 34 The definition provided by **Mr Curtis** includes 'perceived' adverse effects. We caution against placing too much weight on the potential for perceived effects. A perceived effect in and of itself is not an effect under the RMA and if it were, there would be far fewer applications being granted on the basis that there could be perceived effects. This would not result in an efficient use of resources.
- 35 Perceived effects will be heavily influenced by an individual's background and personal tolerance and are therefore highly subjective in nature. As such, the reactions of people to the same emission or odour can vary significantly. Such effects have the potential generate irrational responses in certain individuals or communities. These responses cannot be accurately predicted, particularly in the case of hyper sensitive individuals.
- 36 The inherent difficulties in undertaking odour assessments was recognised by the Environment Court in *Waikato Environmental Protection Society Inc v Waikato Regional Council*.<sup>9</sup> Although there is a subjective element in the determination of whether an odour is offensive or objectionable, the Court said that:<sup>10</sup>

*"Ultimately, assessment of offensiveness or objectionability is a subjective assessment made by persons receiving the odour and may vary from person to person. Notwithstanding the subjective element involved, the assessment as to whether an odour is offensive or objectionable must be done in an objective manner. It is not enough (in this case) that NZ*

---

<sup>8</sup> *Auckland Regional Council v Auckland City Council* [1997] NZRMA 205 at p213.

<sup>9</sup> *Waikato Environmental Protection Society Inc v Waikato Regional Council* [2008] NZRMA 431.

<sup>10</sup> At [34].

*Mushrooms' neighbours might think that the odours generated by it are offensive or objectionable nor that the Court might think the same on the basis of its own assessment of the odours. The test is whether or not an "ordinary reasonable person" would find the odour offensive or objectionable."*

- 37 It was not enough for the Court merely to find that neighbours consider a smell to be offensive or objectionable, and in this case the appropriate test was whether the odours could be perceived as offensive and objectionable by an ordinary reasonable person exposed to them on a recurring basis in their home or workplace.<sup>11</sup>

***Hypersensitivity and Unjustified Complaints***

- 38 The Court in *Waikato Environmental Protection Society Inc* considered whether a hypersensitive individual could be considered an "ordinary reasonable person". Given that hypersensitivity is an abnormal reaction by definition<sup>12</sup>, the court considered that the reactions of hypertensive individuals:

*"did not equate to the reactions of 'ordinary reasonable' people for the purposes of the legal test."*

- 39 An assessment of effects under the Resource Management Act 1991 (RMA) is to be *"based on normal physiological responses and cannot seek to protect those whose sensitivities might be at the higher end of the scale."*<sup>13</sup>

- 40 It must also be considered that where the source of the complaint has been minimised to the point where any complaint can be labelled frivolous or vexatious, the complaint will not be justified. Such complaints cannot be regarded as reverse sensitivity effects. This is a view supported in *Winstone Aggregates v Matamata-Piako District Council (Winstone)*:<sup>14</sup>

*"The reactions of people to a real or perceived emitted effect can vary widely, often being conditioned by their background. Some may stoically endure it, not notice or place weight on it, while others may complain vociferously. Those subjective, sometimes even irrational, responses cannot be accurately*

---

<sup>11</sup> At [160]; Also see *Zdrahal v Wellington City Council* [1995] NZRMA 289; *Watercare Services Ltd v Minhinnick* [1998] 1 NZLR 294.

<sup>12</sup> Blacks Medical Dictionary defines hypersensitivity as "the abnormal immunological reaction produced in certain individuals when re-exposed to antigens that are innocuous to normal individuals"; *Waikato Environmental Protection Society Inc*, above n 4, at [138].

<sup>13</sup> *Motorimu Wind Farm Ltd v Palmerston North City Council* W067/08 26 September 2008 at [327]; *Re Meridian Energy Limited* [2013] NZEnvC 59 at [299].

<sup>14</sup> *Winstone Aggregates v Matamata-Piako District Council* (2004) 11 ELRNZ 48, 2004 WL 2005844 at [4].



*predicted, save that it may be assumed that if there is anything to complain about, sooner or later somebody almost certainly will do so. We recognise the corrosive effect that continued complaints at a high level can have on a company's continued confidence, in operating in an area. That said, we do not accept that unjustified complaints need have, or be regarded as, an adverse reverse sensitivity effect. Such complaints can and should be recognised for what they are."*

- 41 This view does not ignore the fact that continued complaints at a high level can have a negative effect on a company's continued confidence in operating at in a specific area. However, it is necessary to acknowledge that complaints must be justified and have an effect on the continued operation of the existing activity in order to give rise to a reverse sensitivity effect. The evidence of the Applicant is that such complaints on the PRRP would not be justified as the actual effects of the odour discharge are, when assessed objectively, not offensive or objectionable.
- 42 Even if a proposal does have the potential to generate adverse reverse sensitivity effects, the decision maker must approach this issue with a measure of robustness. The need for robustness in situations which turn on reverse sensitivity was discussed by the Environment Court in the *Winstone* case<sup>15</sup> and *Ngatarawa Development Trust Ltd v The Hasting District Council*.<sup>16</sup> It may be that individuals who come to the proposed development may have to come to expect and accept some effect from the existing activity. This is where no complaints covenants can assist.

#### **No complaints covenants**

- 43 While the use of no complaints covenants is not expressly anticipated in the RMA, they have been recognised as a genuine tool to assist in the management of adverse effects. Importantly, they flag to the potential purchaser (and all subsequent purchasers) that there is an activity in the vicinity that might emit a particular effect.<sup>17</sup>
- 44 It is also **Mr Van Kekem's** view that it will be unlikely that there will be hypersensitive individuals locating within these nearest points to the PRRP composting operations as a result of the proposed no complaints covenants because individuals who are sensitive to odour will be warned and will make an informed decision

---

<sup>15</sup> *Winstone Aggregates v Matamata-Piako District Council*, above n 4, at [12].

<sup>16</sup> *Ngatarawa Development Trust Ltd v The Hasting District Council* NZEnC W017/2008 15 April 2008 at [29].

<sup>17</sup> Derek Nolan and Kristen Gunnell 'Reverse sensitivity and "no complaints" covenants' (2007) 7 BRMB 50.

when purchasing as to whether they can tolerate these potential effects.

- 45 **Mr Curtis** at the hearing mentioned a recent Environment Court case that he was involved in that was relevant to PC82 and odour effects. He could not recall the name of the case at the hearing but subsequently provided it to us.
- 46 *Kombi Properties v Auckland Council*<sup>18</sup> is an environment court case which considered a resource consent application for a number of units to be used for a mix of industrial, residential and ancillary office activities on land located on a coastal site zoned for light industrial use. The case considered reverse sensitivity effects.
- 47 We have reviewed the case and found it of no relevance to the applications before the Commissioner for these Plan Changes. The case involved a resource consent, under different plans, in a different context and is very fact specific. There is little useful commentary on reverse sensitivity beyond the fundamental principles we have already established above. However, with respect to no complaints covenants, the Court:

*"would not rule out the use of a no-complaints covenant in another site-specific case. An appropriately drafted covenant is a private means of reconciling conflicting public interests. They do not contravene the principles of the RMA and are enforceable, albeit in a civil jurisdiction and not by the relevant council."*

#### **The underlying zoning and activities of any buffer area**

- 48 In the event that the Commissioner does not agree with the Applicant's experts regarding the odour issues, we note this should not prevent the grant of PC82.
- 49 An alternative rules package and ODP has been provided in the joint witness statements of the planners and urban designers which provide the Commissioner with the option of providing an 'odour constrained area' (OCA) within 1,000m of the active composting area and appropriate uses within that area.
- 50 The Applicant's position is that the OCA should have an underlying residential zoning, which as per the supplementary evidence of **Mr Phillips** would be the most appropriate way of managing this area and the activities contemplated (and not an underlying rural zoning which wouldn't allow many of the activities contemplated as appropriate).

---

<sup>18</sup> [2021] NZEnvC 62.

## RESIDENTIAL SUPPLY

- 51 At the Commissioner's request, a joint schedule has been prepared by the Applicant and the Council of the recorded dwelling yield within Rolleston. This demonstrated that the difference in calculations between the Applicant and the Council's dwelling yield was as a result of slightly differing methodologies, but that this difference is negligible and demonstrates that there is a shortfall in residential capacity in Rolleston, such that the Council are not meeting their obligations under the NPS-UD.
- 52 With this in mind, it is important to consider where additional residential capacity could be provided in Rolleston. We attach again at **Appendix 1** the map of Rolleston showing the various development constraints. From this it is clear that there are little to no other options for expanding the Rolleston township noting that:
- 52.1 The NPS-HPL will make it significantly more difficult to rezone any land that also contains highly productive soils;
- 52.2 It would not be good urban form to jump the state highway and rezone land to the north, where the industrial areas and inland ports are located; and
- 52.3 While the uptake of development at MDRS is currently unknown, it is unlikely to substantially have an impact on the residential shortfall in Rolleston given the typology of the housing stock.
- 53 Rolleston is certain to grow west. The Council should already be considering this and asking themselves whether the location and technology for their various assets is the most appropriate. It is only a matter of time before this land is developed, and to rezone it now would add significant surety to the housing supply market in Rolleston.

## CONCLUSION

- 54 The granting of PC81 and 82 is the most appropriate use under the RMA. All effects on the environment have been demonstrated to be acceptable.

Dated: 5 December 2022



---

Jo Appleyard / Lucy Forrester  
Counsel for Rolleston Industrial Developments Limited and Brookside Road  
Residential Limited

## **APPENDIX 1**



