

**BEFORE THE HEARINGS PANEL  
FOR THE PROPOSED SELWYN DISTRICT PLAN**

**UNDER** the Resource Management Act 1991 (RMA)  
**IN THE MATTER** of the Proposed Selwyn District Plan  
**AND**  
**IN THE MATTER** of Hearing 1: Strategic Directions

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**LEGAL SUBMISSIONS ON BEHALF OF  
CANTERBURY REGIONAL COUNCIL  
3 September 2021**

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**WYNNWILLIAMS**

## **MAY IT PLEASE THE PANEL:**

### **Introduction**

- 1 These legal submissions are filed on behalf of the Canterbury Regional Council (**CRC** or **Regional Council**) in response to direction of the Hearing Panel in its Minute 5 that submitters on the Strategic Directions chapter who presented legal submissions to Hearing 1 may provide further legal submissions addressing the matters set out in the Memorandum of Counsel on behalf of Carter Group Companies (**Carter Group Memorandum**).

### **Matters to be addressed**

- 2 The matters set out in the Carter Group Memorandum have been addressed in the evidence of Tamara Phillips and legal submissions for the Canterbury Regional Council for Hearing 3: Urban Growth, together with the legal submissions filed for the Christchurch City Council.
- 3 I do not intend to repeat that material here but do wish to wish to directly respond to the following matters raised in the Carter Group Memorandum:
  - (a) Key aspects of the streamlined planning process for Proposed Change 1 (**Change 1**) to the Canterbury Regional Policy Statement (**CRPS**) that have been omitted from the Carter Group Memorandum;
  - (b) The submission made that the CRPS as amended by Change 1 could only ever identify the minimum amount of development capacity that is required to be enabled by the National Policy Statement on Urban Development 2020 (**NPS-UD**);
  - (c) The approach to the interpretation of the CRPS and the NPS-UD; and
  - (d) The reference to legal submissions of Canterbury Regional Council stating that the Our Space process was undertaken to give effect to the NPS-UD 2020.
- 4 As these matters are addressed in evidence and legal submissions for Hearing 3: Urban Growth, Counsel can address any further questions that the Hearing Panel may have at that hearing.

### **Streamlined planning process for Change 1 and the identification of development capacity**

- 5 Counsel for the Carter Group has summarised key aspects of the streamlined planning process and described the Change 1 streamlined planning process. However, there are some notable omissions from this summary.
- 6 Key aspects of the Change 1 process that have been omitted are:
  - (a) A 120 day extension to the streamlined planning process was granted by the Minister for the Environment (**Minister**) so that the Regional Council could re-evaluate its draft proposed change to Chapter 6 of the CRPS to reflect the NPS-UD prior to notification.
  - (b) The recommendation report provided to the Minister on Change 1 included an evaluation of Change 1 against the relevant statutory framework, which included the NPS-UD.
  - (c) The draft recommendation report was peer reviewed by retired High Court Judge Lester Chisholm before it was provided to the Minister. This key step in the process was included in the Minister's direction to the Regional Council to use the streamlined planning process.
  - (d) The Minister was satisfied that Change 1 complied with the RMA and any relevant national direction.
- 7 The background to Change 1 and the process has been addressed in the evidence of Ms Tamara Phillips and Legal submissions for the Canterbury Regional Council on Hearing 3: Urban Growth. Ms Phillips has an in-depth knowledge of the process, having been directly involved. These matters are also again addressed in legal submissions for Christchurch City Council.
- 8 It is clear that whilst the preparation of Change 1 commenced under the former National Policy Statement on Urban Development Capacity (**NPS-UDC**) it progressed and was completed under the NPS-UD.

Given this, it is difficult to understand the submission made by Counsel for the Carter Group that it is:<sup>1</sup>

clear that the CRPS, as amended by PC1, could only ever identify the minimum amount of development capacity that is required to be enabled by the NPS-UD. This is because Our Space determined only the 'sufficient development capacity' required in the short, medium, and long term as required under the NPS-UDC.

- 9 As a future development strategy under the NPS-UDC, Our Space was required to demonstrate that there will be sufficient, feasible development capacity in the medium and long term. It identified that capacity in Selwyn and Waimakariri may not be sufficient to meet demand over the medium term. Given the projected shortfalls, a change to the CRPS was proposed to allow Chapter 6 and Map A the flexibility to respond to identified medium term capacity needs. This change progressed under the NPS-UD. The recent updated Housing Capacity Assessment (**HCA**) published by the Greater Christchurch Partnership, also prepared in accordance with the NPS-UD, shows that with the inclusion of the FDAs identified through Change 1, there is a surplus of (i.e. at least sufficient) development capacity within Selwyn, Waimakariri and Christchurch City districts, to meet expected housing demand over the medium term (i.e. 2021 to 2031).

#### **Interpretation of the CRPS and the NPS-UD**

- 10 Counsel for the Carter Group has referred to the principles of statutory interpretation, including the doctrine of implied repeal.
- 11 The authorities are clear the doctrine of implied repeal is a last resort and is only available where there is irreconcilable conflict between the provisions (if available at all in the context of a policies rather than legislation). In this particular case, it is submitted that the CRPS and the NPS-UD are not inconsistent and can be reconciled.
- 12 One of the decision-maker's obligations is to make a "thoroughgoing attempt to find a way to reconcile" provisions considered to be in tension, and the High Court has previously considered a failure to do so

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<sup>1</sup> Memorandum of Counsel on behalf of Carter Group Companies for Topic 1: Strategic Directions dated 25 August 2021 at [20].

an error of law (in the context of the NZCPS and a regional policy statement).<sup>2</sup> While policies may appear in conflict, the apparent conflict may dissolve if close attention is paid to the way in which the provisions are expressed.<sup>3</sup>

- 13 The analysis of provisions in the Carter Group Memorandum is focussed on clause (c) of Objective 6 and Policy 8 (and relevant clauses) of the NPSUD in isolation of other provisions of the NPS-UD, including clauses (a) and (b) of Objective 6. In my submission this approach is flawed.
- 14 No one objective or policy in the NPSUD is expressed as having primacy over another in the NPS-UD. Therefore, the NPS-UD must be read as a whole and careful attention must be paid to the wording of the provisions and how they are framed. When this is done, in my submission, any apparent conflict between the CRPS and NPS-UD falls away.
- 15 Objective 6 of the NPS-UD not only requires local authority decisions on urban development that affect urban areas to be responsive, but they are also required to be integrated with infrastructure planning and funding decisions (clause (a)) and strategic over the medium term and long term (clause (b)). The matters in Objective 6 are a conjunctive list.
- 16 Clause (c) of the objective is not just about responding to plan changes that would supply significant development capacity. Clause (c) refers to 'local authority decisions' not 'planning decisions' and 'proposals' that would supply significant development capacity not 'plan changes'. It also does not specify what it means for a local authority decision to be responsive.
- 17 The Canterbury Regional Council through Change 1 has responded to a projected shortfall in capacity by identifying Future Development Areas in Rolleston, Rangiora and Kaiapoi and removing impediments in Chapter 6 of the CRPS to the rezoning of those areas in district plans. Likewise, Selwyn District Council has been responsive by including the FDAs in the notified version of the proposed Selwyn District Plan.

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<sup>2</sup> *Royal Forest and Bird Protection Society of New Zealand Inc v Bay of Plenty Regional Council* [2017] NZHC 3080 at [98], citing *Environmental Defence Society Inc The New Zealand King Salmon Co Ltd* [2014] NZSC 38 at [131].

<sup>3</sup> *Environmental Defence Society Inc The New Zealand King Salmon Co Ltd* [2014] NZSC 38 at [129].

- 18 In relation to Policy 8, local authority decisions affecting urban environments are required to be responsive to plan changes that would add significantly to development capacity and contribute to well-functioning urban environments. Policy 1 of the NPS-UD also requires that planning decisions contribute to well-functioning urban environments.
- 19 Clause 3.8 of the NPS-UD applies to plan changes only. However, again the local authority must have particular regard to the development capacity provided by a plan change that provides significant development capacity, only if it would contribute to a well-functioning urban environment, is well-connected along transport corridors and meets the criteria set by the regional council in its regional policy statement.
- 20 Notably, it is the regional council that must include criteria in its regional policy statement for determining what plan changes will be treated, for the purpose of implementing Policy 8, as adding significantly to development capacity. This is not a task for district councils in their district plans.
- 21 Again, Policy 8 does not articulate what it means for a decision to be responsive to plan changes. It does not provide that significant development capacity must be enabled or that a plan change meeting all of the criteria in Policy 8 and Clause 3.8 be approved.
- 22 The NPS-UD does not direct that development capacity be provided in an unconstrained manner. On the contrary, the NPS-UD seeks that New Zealand has well-functioning urban environments and urban environments that support reductions in greenhouse gas emissions. Decisions on urban development that affect urban environments are required to be integrated with infrastructure planning and funding decisions and strategic over the medium term and long term. The Regional Council and Selwyn District Council have been responsive by including FDAs in the CRPS and pSDP respectively and have done so in an integrated and strategic way as required by the NPS-UD.
- 23 The directive 'avoid' framework in the CRPS does not preclude the consideration of the merits of a proposal for a proposal for unanticipated or unplanned urban development or for local authority decisions to be responsive. That pathway for the consideration of plan changes is still

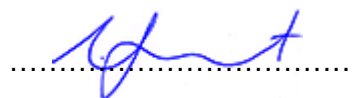
available. Further, as is required by clause 3.7 of the NPS-UD, if a local authority determines that there is insufficient development capacity (which would be informed by quarterly monitoring and the three-yearly capacity assessments), if the insufficiency is wholly or partly as a result of RMA planning documents, the local authority must change those documents to increase development capacity as soon as practicable.

- 24 In my submission if the NPS-UD is read as a whole and careful attention is paid to the wording of the provisions and how they are framed, any apparent conflict between the CRPS and NPS-UD falls away.

**Reference to legal submissions of Canterbury Regional Council stating that the Our Space process was undertaken to give effect to the NPS-UD 2020**

- 25 At paragraph [53] of the Carter Group Memorandum, counsel sets out that the legal submissions for the Regional Council state that the Our Space process was undertaken to give effect to the NPS-UD 2020. Counsel has referred to paragraph [21] of those submissions.
- 26 Paragraph [21] sets out that Change 1 of the CRPS was progressed under the Streamlined Planning Process and sought to implement an action in Our Space and give effect to the requirement in the NPS-UD 2020 for local authorities to provide at least sufficient development capacity to meet expected demand for housing and business land over the short, medium, and long term. It does not say that Our Space was progressed under the NPS-UD. In fact, the following paragraph 22 clearly sets out that Our Space was undertaken to meet the requirements of the former National Policy Statement on Urban Development Capacity (**NPS-UDC**). As set out in paragraph 8 above, whilst the development of Change 1 commenced under the NPS-UDC it was progressed and completed in accordance with the NPS-UD 2020.

Dated this 3<sup>rd</sup> day of September 2021



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