

Before the Independent Hearings Panel
at Rolleston

under: the Resource Management Act 1991

in the matter of: Submissions and further submissions in relation to the
proposed Selwyn District Plan

and: Strategic Directions Proposal

and: **Midland Port, Lyttelton Port Company Limited**
Submitter DPR-0453

Legal submissions on behalf of Lyttelton Port Company Limited

Dated: 30 July 2021

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LEGAL SUBMISSIONS ON BEHALF OF LYTTTELTON PORT COMPANY LIMITED

INTRODUCTION

- 1 These legal submissions are provided on behalf of Lyttelton Port Company Limited (*LPC*).
- 2 LPC is a submitter (#0453) and further submitter (#0453 FS) on the Strategic Directions Chapter of the proposed Selwyn District Plan (*proposed District Plan*).
- 3 These legal submissions provide a high level overview of LPC's key issues with the Strategic Directions proposal.
- 4 In addition, LPC is calling evidence from:
 - 4.1 **Mr Mike Simmers** – in relation to LPC operations;
 - 4.2 **Mr Mike Copeland** – in relation to economics; and
 - 4.3 **Mr Matthew Bonis** – in relation to planning.

BACKGROUND TO LPC'S INTEREST IN THE SELWYN DISTRICT PLAN

- 5 LPC operates Midland Port – an inland port facility in Rolleston.
- 6 The Lyttelton Port, and therefore Midland Port, is critical, strategic and regionally significant infrastructure as demonstrated in the evidence of **Mr Simmers**, **Mr Copeland** and **Mr Bonis**:
 - 6.1 Lyttelton Port is by far the most significant port in the South Island and is recognised as "strategic infrastructure" at a Canterbury regional level;
 - 6.2 LPC is a lifeline utility and must be able to continue operating port infrastructure, to the fullest extent possible, during and after an emergency;¹
 - 6.3 Midland Port, functions as an integrated freight hub in Rolleston that is interwoven with LPC's portside operations;
 - 6.4 LPC's combined infrastructure is essential to a well-functioning district and regional economy, and the well-being of our communities; and
 - 6.5 Future trends highlight the need to protect and promote the ongoing efficient, safe and effective operation of Midland Port.
- 7 This should be recognised explicitly in the overarching Strategic Directions chapter in the proposed Plan, because the need to ensure protection and enable provision for this important infrastructure (including protection from reverse sensitivity effects) infuses all other parts of the Plan and is a key strategic matter for the District.
- 8 Midland Port is the only hub of LPC's operations that is physically located in Selwyn, but it forms part of an integrated freight hub servicing the wider Canterbury region.

¹ Civil Defence Emergency Management Act 2002.

This is a “cross boundary” issue which requires a joined-up approach to planning provisions that apply in each district. Section 74(2)(c) of the RMA requires the council to have regard to the extent to which the proposed district plan needs to be consistent with those of adjacent territorial authorities. In light of the cross-boundary issues and the regional significance of LPC’s integrated freight hub, this is a highly relevant matter in this case. There is a need for consistency between adjacent district plans in this instance. LPC seeks continuity and consistency within the planning framework between provisions in various chapters which address reverse sensitivity and incompatible activities effects.

- 9 LPC considers that further amendments to the Strategic Directions chapter are necessary:

- 9.1 to properly recognise the significant role of important infrastructure in the district;

- 9.2 to appropriately protect Midland Port from adverse effects arising out of the potential development of incompatible activities in proximity to port infrastructure.

- 10 **Mr Bonis’** evidence explains the amendments that LPC seeks in further detail.

RELIEF SOUGHT

- 11 The Strategic Directions chapter is critical for guiding the interpretation and application of all other provisions of the proposed District Plan.

- 12 The Section 32 Report explains that the Strategic Directions should provide:

- 12.1 the overall context for the District Plan;

- 12.2 direction for other chapters;

- 12.3 an integrated policy framework for the whole District.

- 13 The Report also explains that there is no hierarchy for the strategic objectives, which are read as a whole, but there is a clear hierarchy between the Strategic Directions and all other District Plan provisions.

- 14 Getting the Strategic Directions right is therefore essential for:

- 14.1 a well-functioning District Plan; and

- 14.2 Important Infrastructure operators who are heavily reliant on District Plan provisions for both protecting and enabling their operations.

- 15 LPC seeks that the Strategic Directions are amended to provide clearer guidance to subsequent objectives and policies (and rules and definitions) and reconcile conflicts between provisions. LPC has concerns with the drafting of the strategic objective related to important infrastructure that is currently recommended by the s 42A Report:

- 15.1 It is generalised and does not adequately address either the significance of certain types of infrastructure to the District, nor adverse effects affecting important infrastructure.
- 15.2 It should identify the need to avoid adverse reverse sensitivity effects affecting important infrastructure.

National Planning Standards

- 16 The National Planning Standards require a 'strategic directions' heading to be included in district plans, with chapters underneath that heading relating to key strategic or significant resource management matters.² The National Planning Standards (Standard 7) state that:³
 - 16.1 The following matters **must** be located under a 'strategic directions' heading:
 - (a) Outline of key strategic or significant resource management matters for the district;
 - (b) Issues and objectives that address key strategic or significant matters for the district and guide decision making;
 - (c) Policies that address those matters, unless those policies are better located in other more specific chapters; and
 - (d) How resource management issues of significance to iwi authorities are addressed in the plan.
 - 16.2 Rules must not be included under the 'strategic directions' heading; and
 - 16.3 Each strategic direction matter must be its own chapter under the 'strategic directions' heading, and an 'urban form and development' chapter must be included.
- 17 The protection, functioning and future development of LPC's Midland Port falls squarely within the matters that must be located under a 'strategic directions' heading⁴ as a key strategic and significant resource management matter for the Selwyn District.
- 18 A strategic objective that supports the continued safe and efficient operation, use and development of Midland Port is essential and should be included in the proposed Plan. The avoidance of reverse sensitivity effects is a key part of this.
- 19 We note that in its decision on the Strategic Directions chapter in the Christchurch District Plan the Independent Hearings Panel, including retired High Court Judge Hansen and current Environment Court Judge Hassan, decided that strategic directions should explicitly have primacy, providing 'overarching direction' for other chapters in

² National Planning Standards 2019, District Plan Structure Standard (Standard 4) and District-wide Matters Standard (Standard 7), directions 1 to 4; see also Ministry for the Environment "Guidance for District Plans Structure and Chapter Standards" April 2019, available at <http://www.mfe.govt.nz/sites/default/files/media/RMA/guidance-for-district-plans-structure-and-chapters-standards.pdf>

³ Ibid.

⁴ National Planning Standards (Standard 7).

the Plan.⁵ The Panel held that objectives and policies in the rest of the plan are to be expressed and achieved in a manner consistent with the objectives in the Strategic Directions chapter. Further, the Panel went on to say that strategic directions should be designed to identify and give overarching direction on district-wide sustainable management priorities. This reasoning on the function of strategic directions foreshadowed the formal acknowledgement of this approach in the National Planning Standards and provides valuable guidance in the development of the proposed Selwyn District Plan.

Higher order planning documents

- 20 **Mr Bonis** explores the relevant higher order planning documents in his evidence. These submissions highlight particular policies of relevance.

NPS Urban Development

- 21 The NPS Urban Development directs (of particular relevance to LPC's relief) that local authority decisions on urban development are integrated with infrastructure planning decisions,⁶ and that planning decisions contribute to well-functioning urban environments.⁷
- 22 LPC submits that a well-functioning urban environment is one in which:
- 22.1 infrastructure – particularly infrastructure such as the Midland Port as a vital freight hub for the South Island – is not adversely affected by incompatible activities; and
 - 22.2 urban growth is planned with infrastructure provisions in mind, recognising that the two run hand in hand.

Canterbury Regional Policy Statement

- 23 The Canterbury Regional Policy Statement (2013) (CRPS) identifies both the Port of Lyttelton (including associated facilities) and Significant Regional Transport Hubs as Strategic Infrastructure. These facilities are also defined as Regionally Significant Infrastructure, which extends to Transport Hubs. Transport Hubs is defined as including the exchange or storage of cargo at a regional facility, between vehicles or between transport modes.
- 24 The CRPS seeks to ensure that development does not adversely affect the efficient operation, use, development and future planning of strategic infrastructure and freight hubs (Objective 6.2.1(10)), and correspondingly Policy 6.3.5 provides for:
- 24.1 The continued safe, efficient and effective use of regionally significant infrastructure;⁸

⁵ Independent Hearings Panel Christchurch Replacement District Plan "Decision 1: Strategic directions and strategic outcomes" 19 March 2015, available at <http://www.chchplan.ihp.govt.nz/wp-content/uploads/2015/03/Strategic-Directions-and-Strategic-Outcomes-Decision.pdf>, at [99]-[107].

⁶ Objective 6.

⁷ Policy 1.

⁸ CRPS. Objective 5.2.1(2)(g). Definitions: Regionally Significant Infrastructure includes Port of Lyttelton and associated facilities.

- 24.2 The provision for efficient and effectively functioning infrastructure⁹; and
- 24.3 Seek to ensure that land use activities¹⁰ and new development¹¹ are managed including avoiding activities that have the potential to limit the efficient and effective, *'provision, operation, maintenance or upgrade of strategic infrastructure and freight hubs'*.
- 25 Objective 5.2.1(f) requires that *'development is located so that it functions in a way that ... is compatible with, and will result in the continued safe, efficient and effective use of regionally significant infrastructure'*.
- 26 The CRPS provisions regarding Important Infrastructure are directive and must be given effect in the proposed District Plan.¹²
- Incompatible activities and reverse sensitivity**
- 27 A number of submitters have opposed the Strategic Directions being amended to direct that reverse sensitivity effects are avoided. The adverse effect of establishing sensitive/incompatible activities in the vicinity of existing lawful uses, and the potential for that establishment to lead to restraints on the carrying out of the existing uses, is known as a "reverse sensitivity" effect. The Court has stated that *"it is the effect of the new use on existing uses that is the problem, not because of the direct effects of the new use but because of incompatibility which in turn may lead to pressure for change"*¹³.
- 28 The proposed District Plan must meet the sustainable management purpose of the RMA. This requires a balance of often competing interests and effects. Reverse sensitivity effects are an adverse effect for the purposes of the RMA. Therefore, the Council has a duty under section 17 of the RMA to avoid, remedy or mitigate those effects so as to achieve the Act's sustainable management purpose.
- 29 The general principle, established in case law, is that activities should internalise effects wherever reasonably possible.¹⁴ However, total internalisation of effects is not feasible in all cases and there is no requirement under the RMA that this must be achieved.¹⁵
- 30 The Midland Port site was deliberately selected at the edge of Rolleston, at some distance from residential development, so that the sensitive effects of Midland Port activities could be appropriately managed. LPC internalises any residual effects wherever reasonable possible, however total internalisation of effects is not feasible. Midland Port operates continuously and its activities create noise and require sufficient lighting at all times. The noise and lighting generated by Midland Port is not compatible with amenity levels in residential areas. At present there is no residential development

⁹ CRPS. Policy 6.3.5(3)

¹⁰ CRPS. Policy 6.3.5(5)

¹¹ CRPS. Policy 6.3.5(4). Definitions: Strategic Infrastructure includes Port of Lyttelton and associated facilities.

¹² Section 75(3)(c) of the RMA.

¹³ *Joyce Building Limited v North Shore City Council* [2004] NZRMA 535, para [22].

¹⁴ *Winstone Aggregates v Matamata-Piako District Council* (2005) 11 ELRNZ 48, para [7-9].

¹⁵ *Winstone Aggregates v Matamata-Piako District Council* (2005) 11 ELRNZ 48, para [7-9] and *Catchpole v Rangitikei District Council*, W35/03.

in close proximity to Midland Port, which is appropriate. LPC seeks that the provisions of the Proposed Plan continue to ensure that sensitive land uses are not enabled close to Midland Port.

- 31 The most effective way to avoid incompatible activities, adverse effects on landowners, and reverse sensitivity effects on the Midland Port is to manage the location of urban growth and sensitive land uses in a proactive manner.

Sensitive activities and the Port Zone Noise Control Overlay

- 32 Noise-sensitive land uses must be avoided within the 55dB L_{Aeq} Noise Control Boundary (55dB Boundary) and mitigation via insulation must be required within the 45dB L_{Aeq} Noise Control Boundary (45dB Boundary) in order to avoid reverse sensitivity effects arising due to incompatible activities that may establish on neighbouring land.
- 33 Future hearings will deal with the mechanics and specific provisions seeking to avoid noise sensitive activities and buildings within close proximity to Midland Port. LPC will be bringing further evidence on this matter at the hearings dealing with specific planning provisions and rules that it seeks. However, the core principle of avoiding sensitive activities in close proximity to Important Infrastructure should be appropriately recognised as a strategic matter which will inform the remainder of the plan.

CONCLUSION

- 34 LPC's principal concern is to ensure that rules managing land use in close proximity to Midland Port are located in the part of the plan where they will be most visible and clear to landowners and Council planning and enforcement staff. LPC suggests that the Strategic Directions Chapter is best placed to establish a high level, cohesive framework for the remainder of the proposed District Plan chapters. It is critical that the Strategic Directions chapter adequately safeguards LPC's operations at Midland Port.
- 35 LPC therefore requests the Hearing Panel accepts the relief sought in LPC's submissions and further submission, as amended in the attachment to **Mr Bonis'** evidence.

Dated: 30 July 2021



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