

Appendix 2 – Legal Advice

Memo

DATE: 13 September 2021
TO: Benjamin Rhodes and PDPR Team
FROM: Paul Rogers
CLIENT: Selwyn District Council
OUR MATTER: 038777/425
SUBJECT: NPSUD-CRPS- SUBMISSIONS ON THE PDP

Advice - The Issue

- 1 You are seeking advice on how the National Policy Statement on Urban Development 2020 (NPS-UD) (**NPS-UD**) is to be applied, taking into account the highly directive avoidance regime created by Objective 6.2.1 of the Canterbury Regional Policy Statement (**CRPS**) when making decisions on submissions on the proposed district plan (**PDP**).
- 2 Objective 6.2.1 states:

... enables recovery, rebuilding and development within Greater Christchurch through a land use and infrastructure framework that:

1 identifies priority areas for urban development within greater Christchurch

...

3 avoids urban development outside of existing urban areas or Greenfield priority areas for development, unless expressly provided for in the CRPS;

Context and Our Approach

- 3 This advice is set against the context of a number of proponents that are seeking plan changes to the ODP to change zoning to provide for developments. The plan change proponents have lodged companion submissions on the PDP.
- 4 The NPS-UD is engaged in both processes. In addition, there is a particular question whether or not Policy 8 of the NPS-UD applies to submissions on the PDP as well as in the plan change context. We discuss that below.
- 5 You have also sought advice on whether or not the PDP (given it includes an avoid objective) should be amended to better provide for the responsive provisions of the NPS-UD and how amendment could be achieved.
- 6 We have assumed some of the developments being the subject of submissions are located outside of the existing urban areas or Greenfield priority areas for development as identified by objective 6.2.1

- 7 To assist us you have provided us with copies of legal submissions in support of both plan changes and submissions on the PDP. We summarise those submissions below and respond to them in the broader context of undertaking the statutory interpretation exercise so as to establish the purpose and meaning of the NPS-UD. We do consider an interpretative exercise is also required for the directive avoid Objective 6.2.1 within the CRPS as well.
- 8 We consider undertaking the interpretative exercise enables us then to address how to approach the avoid objective in the context of the plan review processes.

Alternative opinions and submissions

- 9 We have been provided with a copy of legal submissions dated 20 August 2021 by Simpson Grierson (**Simpson**) prepared for the Christchurch City Council and the Canterbury Regional Council and presented to the DPR hearing. As well we have legal submissions dated 25 August 2021 by Chapman Tripp (**Chapman**) presented in support of Plan Change 66 and to the PDP hearing panel. Finally, you have also provided further legal submissions from the Christchurch City Council, the Canterbury Regional Council (From **Wynn Williams** dated 3 September 2021) and Kāinga Ora all being in response to the DPR Commissioners Minute 5.
- 10 These submissions address the issue of how in particular the responsive planning provisions of the NPS-UD are to be applied, taking into account the directive avoid Objective 6.2.1 of the CRPS.
- 11 In summary, the Simpsons and Wynn Williams submissions contend that, based on available evidence, given the CRPS gives effect to the NPS-UD, and that the CRPS is a higher order document establishing a directive urban development framework, any planning decision on the PDP and presumably the ODP, must give effect to the avoid Objective.
- 12 In addition, Simpsons submit given the correct interpretation the NPS-UD responsive planning provisions are procedural in nature. Being procedural means the responsive planning provisions are not to be utilised for substantive decision making.
- 13 Also they argue that the NPS-UD responsive planning provisions should not be interpreted and applied selectively in a manner that purports to alter the CRPS directive framework and gives the responsive planning provisions priority or precedence over the balance of the NPS-UD.
- 14 Simpsons consider the NPS-UD identifies Christchurch being the greater Christchurch Area including the Selwyn District as one urban environment. So that context affects the interpretation of the NPS-UD, in that its application is to the Greater Christchurch urban environment and not to the Selwyn Districts urban areas.
- 15 Simpsons submit if the Chapman submission on giving priority to the NPS-UD over the CRPS and its approach to softening or reading down the directive CRPS Objective is accepted, then this will result in question marks over the entire urban growth framework in the CRPS. This will lead to ambiguity that could facilitate or encourage ad hoc unplanned urban growth. Simpsons further submit such an outcome would licence developers under the SDC PDP to second guess and or challenge the strategic planning undertaken by partner councils.

- 16 Simpson's submission is that giving priority to the NPS-UD over the CRPS in its recommendations may be unlawful because the panel would not be following the directive under the RMA (s67 and s75) to give effect to the higher order CRPS.
- 17 Simpsons in responding to the Chapman submission that the Simpsons interpretation of the responsive planning provisions of the NPS-UD leads to an outcome that those provisions are meaningless, counter by submitting this interpretation is wrong and the NPS-UD need be read as a whole so that the responsive provisions do not have primacy over the balance of the NPS-UD.
- 18 In summary, the Chapman submissions consider that the Plan Change 1(PC1) change process evidence supports a conclusion that at best the CRPS only partially gives effect to the NPS-UD. In support of that submission a table detailing a timeline of actions undertaken by the Greater Christchurch Council partners to support the submission that the CRPS includes only the Future Development Areas from the Our Space project of 2019. As well Chapmans refer¹ to planning reports prepared by Environment Canterbury for the PC1 process which acknowledge the PC1 partially gives effect to the NPS-UD.
- 19 Chapmans accept that where possible conflict between the competing planning documents need be reconciled. Chapmans submit the two competing documents can be reconciled by adopting an approach that reads down or softens the directive CRPS Objective 6.2.1.
- 20 Chapmans also contend as a last resort that the NPS-UD being the higher order planning document and being the latest in time to address the issue of urban development impliedly repealed the earlier CRPS in the instance of conflict.
- 21 Simpsons do not accept the Chapmans solution of reading down the directive CRPS Objective or the implied repeal point. Wynn Williams submit that the conflict between the provisions may dissolve if close attention is paid to the way in which the provisions are expressed.²
- 22 Both Chapmans and Simpsons accept that a full merit hearing needs to be had on submissions to the PDP. That full merit hearing needs to include evidence that to accept a submission is supportable under the relevant planning documents and the RMA. Some of that evidence could be directed at the issue of how a favourable decision sits alongside and or respects the directive CRPS objective.

Legal Principles-Statutory Interpretation

- 23 Determining answers to the issues above requires interpretation of the relevant provisions of the NPS-UD and the CRPS. That interpretation requires an application of the principles of statutory interpretation.
- 24 Section 76(2) of the RMA states that rules in district plans shall have the force and effect of regulations. This brings into play s5 of the Interpretation Act 1999 which provides the following guidance for ascertaining the meaning of legislation:

Ascertaining Meaning of Legislation

- 1) *the meaning of an enactment must be ascertained from its text and in light of its purpose.*

¹ Paragraphs 23.1-23.4

² Paragraph 12

- 2) *the matters that may be considered in ascertaining the meaning of an enactment include the indications provided in the enactment.*
 - 3) *examples of those indications are preambles, the analysis, a table of contents, headings to Parts and sections, marginal notes, diagrams, graphics, examples and explanatory material, and the organisation and format of the enactment.*
- 25 Taking the above provisions into account, the generally accepted approach for interpreting plans is derived from the decision of the Court of Appeal in *Powell v Dunedin City Council*,³ which accepts the approach of the High Court in *Beach Road Preservation Society v Whangarei District Council*.⁴ In *Powell*, the Court held at paragraph [35] that while it was:
- "... appropriate to seek meaning of a rule from the words themselves it is not appropriate to undertake that exercise in vacuum. As this Court made clear in Rattray, regard must be had to the immediate context (which in this case would include the objectives and policies and methods set out in section 20) and, whether any obscurity or ambiguity arises, it may be necessary to refer to the other sections of the plan and the objectives and policies of the plan itself. Interpreting a rule by a rigid adherence to the wording of the particular rule itself would not, in our view, be consistent with a judgment of this Court in Rattray or with the requirements of the Interpretation Act."*
- 26 Another helpful case which predated *Powell* but occurred after *Beach Road* is the decision of the Environment Court in *Brownlee v Christchurch City Council*,⁵ whilst accepting the decision in *Beach Road*, which identified the following factors as relevant when interpreting a plan under the RMA:
- (a) *The text of the provision;*
 - (b) *The purpose of the provision;*
 - (c) *The context and scheme of the plan*
 - (d) *The history of the plan*
 - (e) *The purpose and scheme of the RMA; and*
 - (f) *Any other permissible guides to meaning (including common law principles, or presumptions of statutory interpretation).*
- 27 Furthermore, the High Court in *Nanden v Wellington City Council*⁶ stated that, when weighing competing interpretations of plan provisions:
- "The fundamental issues of policy associated with which meaning should be adopted are as follows:-*
- 1. It is desirable for an interpretation to be adopted which avoids absurdity or anomalous outcomes.*
 - 2. It is also desirable for an interpretation to be adopted which is likely to be consistent with the expectations of property owners.*

³ [2005]NZRMA 174(CA)

⁴ [2001]NZRMA 176

⁵ [2001]NZRMA 539

⁶ [2000]NZRMA 647

3. *Practicality of administration by... Council officers is also an important consideration. In particular, it is unlikely that the... Council would deliberately adopt a rule which meant that the lawfulness or otherwise of proposed houses or renovations could only be assessed after lengthy historical research had been carried out*"

- 28 So in our view to determine the correct interpretation of a plan provision, a holistic approach that incorporates the relevant factors identified in *Powell* and *Brownlee* should be used, with the policy considerations in *Nanden* serving as a useful test for determining the appropriateness of the conclusions reached.
- 29 We agree with all of the legal submissions that in the instance of conflict between provisions of planning documents and their provisions decision makers are under an obligation to make a "thoroughgoing attempt to find a way to reconcile"⁷ that conflict.

Role and Purpose of the NPS-UD Responsive Planning Provisions

Structure Organisation and Format of NPS-UD

- 30 Before addressing the responsive planning provisions, we consider the structure and organisation and format of the NPS. All of the NPS is in force from 20 August 2020. However, clause 1.2 recognises not all of the NPS can be put into effect as at 20 August. Within Part 4 the NPS sets out the time frames for complying with different parts of the NPS. For example, intensification is to be complied with no later than 2 years from the commencement date.
- 31 The NPS requires monitoring of a range of matters including demand, supply price rents and housing affordability. As well Housing and Business Development Capacity Assessments (**HBA**) are to be undertaken every 3 years. Future Development Strategies are to be prepared and made publicly available.
- 32 So the NPS has a range of measures some of immediate effect such as planning decisions, as well as a range of future steps. Those future steps given their nature as detailed within the NPS will likely take time gathering data, monitoring, consulting and effecting change.
- 33 So we think a contrast emerges between those parts of the NPS that can be seen as more immediate, direct and responsive as opposed to those longer term parts of the NPS which focus on future action steps dependent on data gathering evaluation and engagement.
- 34 We consider that contrast helps distinguish the responsive planning provisions from the balance of the NPS. Perhaps the contrast could be expressed as responsive planning parts of the UDS being immediate action steps compared to the balance NPS being medium- or longer-term action steps.
- 35 In support of our view as to the structure of the NPS-UD we refer to a recent Environment Court case *Eden – Epsom and others v Auckland Council*⁸ considered the question does the NPS-UD apply and if so what parts to a plan change to the Auckland Plan? In particular the Court considered the question: are decision makers, on the likes of plan changes, to move ahead of decision making by Councils on implementation of directive and urgent policies within the NPS-UD?

⁷ *Royal Forest v Bay of Plenty Regional Council*[2017] NZHC 3080 at [38] citing *King Salmon* [2014]NZSC38 at [131]

⁸ [2021] NZEnvC 082

- 36 The Court explored the term “planning decision” noting it is defined in the NPS-UD as meaning a decision on a district plan or a proposed plan. The Court then explored the words “District Plan” and “Proposed Plan” referring to relevant sections of the RMA to determine the meaning of the same.
- 37 Notably the Court referred to section 43AAC of the RMA which provides the meaning of a proposed plan. It noted under the RMA, subject to context, a proposed plan means a proposed plan, a variation or change or a change to a plan proposed by a local authority that has been notified under clause 5 of schedule 1 but has not become operative under clause 20 of that schedule. Effectively then the RMA equates a proposed plan and a plan change as being the same.
- 38 The Court also noted there is a definition of “change” in s43AA RMA meaning a change proposed by a local authority under clause 2 of schedule 1 and a change proposed by a person under clause 21 of schedule 1. The Court noted this was somewhat confusing. Presumably because the meaning of a proposed plan included a plan change making a separate definition of a “change” superfluous as s43AAC sufficiently dealt with the matter.
- 39 So one possible conclusion from the above is that there is no real difference between a plan change and a plan review. We comment on this point again later when considering the application of Policy 8 to decisions on submissions to the PDP.
- 40 The Court went on to consider NPS clause 3.8 that refers to plan changes. The Court did not explicitly reference NPS policy 8. The Court then found within the next paragraph of its decision:
- “... from that clause [our words -we assume clause 3.8] it may be found that some provisions of the national instrument may be considered in a “planning decision” on the merits of a requested plan change including on appeal to the Environment Court.”*
- 41 The Court found decision makers are not required to give effect, in the context of a decision on a plan change, to any NPS-UD objectives and policies that are not requiring “planning decisions”. So all of the objectives and policies of the NPS-UD that include those two words “*planning decisions*” are engaged when a plan change is under consideration.
- 42 We also consider the same approach applies when planning decisions for the DPR are being made. So Objectives 2, 5 and 6 and Policies 1, 6 and possibly 8 and Part 3 Implementation apply, as required by the context, to planning decisions made for the DPR. As well the NPS definition of “planning decision” supports this view.
- 43 The Court was of the view the balance of the NPS-UD required steps to be undertaken in the future following gathering and review of relevant information. To apply those objectives and policies before councils made decisions would following the Courts decision pre-empts those processes.
- 44 The Court identified those parts of the NPS-UD that are engaged directly in the plan change process and those other parts of the NPS-UD that are engaged later in time. So we consider this decision supports our view that the structure of the NPS is such some parts require immediate engagement in planning decisions

while others are deferred while actions such as data gathering and consultation occur.

- 45 The NPS preliminary provisions in Part 1 make it very clear the NPS-UD applies relevantly to any tier 1 council and any planning decision by a local authority affecting an urban environment. An urban environment is defined in the NPS-UD as "*any area of land that is or is intended to be predominantly urban in character.*"
- 46 We do not agree with the Simpson submission that the responsive planning provisions of the NPS-UD do not have primacy over the balance provisions of the NPS.
- 47 While we would not use the word primacy, we do consider the responsive planning provisions should be seen as being distinctive from the balance provisions. As well the responsive planning provisions are engaged now while other NPS provisions have a much longer time frame for action. We consider this point links with the purpose of those responsive provisions which we see as in part to make planning decisions now in a manner that urgently seeks to address the housing crisis.
- 48 The responsive provisions deal with planning decision taken now, seeking to deal expeditiously with land supply issues, more expeditiously than standard planning processes. The balance provisions of the NPS-UD are different and relate to a range of future action steps⁹ delivered following a plan review process.

Purpose- The Text of the NPS-UD

- 49 The NPS allows the Government to prescribe objectives and policies for matters of national significance relevant to sustainable management under the RMA. This circumstance needs to be borne in mind because we consider it has an influence on the interpretative exercise because the NPS-UD is dealing with matters of national significance.
- 50 We refer to a non-RMA case¹⁰ on finding the purpose of an enactment from the Supreme Court where it stated:

*[22] It is necessary to bear in mind that section 5 of the Interpretation Act 1999 makes text and purpose the key driver of statutory interpretation. The meaning of an enactment must be ascertained from its text and in the light of its purpose. Even if the meaning of the text may appear plain in isolation of purpose that meaning should always be cross-checked against purpose in order to observe the dual requirements of section 5. In determining purpose the court must obviously have regard to both the immediate and the general legislative context. **Of relevance too may be the social, commercial or other objective of the enactment.***

- 51 We have highlighted the last sentence because in our opinion the social objective of the NPS-UD is influential, if not critical in the interpretive exercise. That social objective is recorded within Objective 2 which states:

"Planning decisions improve housing affordability by supporting competitive land and development markets."

⁹ See Part 4 Timing

¹⁰ *commerce commission v Fonterra Cooperative Group Ltd* [2007] NZSC 36

- 52 The NPS-UD particularly the responsive planning provisions have come into force against a context of what is frequently described as a national housing supply crisis. The supply crisis impacts upon affordability of housing nationally.
- 53 In our view the responsive planning provisions of the NPS-UD need to be interpreted and applied taking into account the relevant context of the housing land supply crisis. Moreover based on what follows we consider the purpose, particularly of the response planning provisions, is to endeavour to address and resolve housing land supply.
- 54 Objective 2 NPS-UD provides for planning decisions to improve housing affordability by supporting competitive land in development markets. Policy 1 (a) (i) refers to type, price, and location. Price, in particular, picks up the purpose of competition impacting on price and improving affordability.
- 55 Policy 1(d) more pointedly addresses competition in land development markets. It seeks to:
- ... have planning decisions contribute to well-functioning urban environments which are urban environments that, as a minimum support, and limit as much as possible adverse impacts on, the competitive operation of land and development markets.*
- 56 Objective 6 states that:
- Local authority decisions on urban development that affect urban environments are integrated with infrastructure planning and funding decisions and strategic over the medium term and be responsive, particularly in relation to proposals that would supply significant development capacity.*
- 57 So we see Objective 6 as applicable to decisions on both the plan changes and on the PDP because both involve decisions on urban environments. So decisions on urban development that affect urban environments are to be responsive, particularly in relation to proposals that would supply significant development capacity.
- 58 The word "*proposal*" as it appears in Objective 6 is not defined in the NPS-UD. Admittedly the word *proposal* has a linkage with a proposed plan change or a plan change proposal. But the word *proposal* is capable of supporting a wider meaning such as to put forward for consideration, or advance something to be dealt with.
- 59 So a *proposal* could include a submission, on the PDP that seeks additional zoning. However we acknowledge the words in Objective 6 do not include submissions on a PDP. However, given the broad application of Objective 6 and the broad language utilised within it and considering the purpose (as we see it) of the responsive planning provisions of the NPS-UD, reading the word *proposal* to include a submission is an available and reasonable interpretation.
- 60 Policy 8 states Local Authority decisions affecting urban environments are responsive to plan changes that would add significantly to development capacity and contribute to well-functioning urban environments, even if the development capacity is unanticipated by RMA planning documents or out of sequence with planned land releases.

- 61 The use of the words local authority decisions suggests the scope of decisions under policy 8 is broader than just planning decisions. Policy 8 links to Subpart 2 clause 3.8 which deals with unanticipated or out of sequence developments. Clause 3.8 (3) is the sub clause that requires the Regional Council to include criteria within its regional policy statement for determining what plan changes will be treated for the purposes of implementing Policy 8, as adding significantly to development capacity.
- 62 The choice of the word "*Responsive*" raises the questions responsive to what and why? We consider as detailed below what is being responded to are two matters. The first is, subject to conditions, to be responsive to the plan change, and the second is to respond to provisions in planning documents that either constrain or do not enable land supply and or do not provide for at least, assessment of out of sequence developments. The reason, or the why, is the need to respond to a housing crisis by increasing land supply in a timely way resulting in competitive land markets and to respond to Planning documents that constrain development.
- 63 Planning decisions under the NPS-UD must satisfy the requirements of Policy 1 that detail what a well-functioning urban environment will as a minimum include. Policy 6 directs decision makers to have particular regard to a number of matters when making decisions that affect urban environments.
- 64 The choice of words in Policy 6 "have particular regard to" are familiar to resource management practitioners as they are the same words used in s7 RMA.
- 65 The balance of Policy 6 sets out a range of matters to which particular regard is to be had all of which inform and guide the planning decision.
- 66 Policy 8, including its linkage to Subpart 2 clause 3.8, also includes the matters for decision-makers to take into account in the shaping of their decision.
- 67 We consider the above paragraphs adequately respond to the concerns raised in the Simpson submission including that developers will be licenced under the PDP to second guess or challenge the strategic planning undertaken by the Christchurch partners, and that such an approach raises question marks over the entire urban growth framework set out in the CRPS.
- 68 That is because as noted above there are ample directions within the NPS as to how and what should be considered in making planning decisions on development opportunities. Applying those NPS directions will ensure ad hoc decisions do not occur nor will those decisions cause the CRPS urban growth framework be compromised.

Purpose- Recourse to Explanatory Material

- 69 Given the NPS-UD is relatively new with very limited guidance from case law available there are a number of fact sheets¹¹ (attached) issued by the Ministry for the Environment to provide guidance and understanding in implementing the responsive planning policies of the NPS-UD.
- 70 The fact sheets record they are not legal advice. However they state the policy intent behind the NPS-UD. Critically, given they are guidance documents issued by a Government Department it follows they should be considered to be the views

¹¹ Guidance document titled Responsive planning published in July 2020 and Understanding and implementing the responsive planning policies published in September 2020.

from the Executive (The Government) as to why the national instrument has been promulgated and to what effect, again in the view of the Executive.

71 So we consider as the Environment Court¹² in *Eden* when interpreting the NPS-UD, utilising these fact sheets is valid as part of the interpretive exercise because the facts sheets are explanatory material. As well s5 of the Interpretation Act allows examples and explanatory materials to be utilised in the interpretive exercise.

72 The July 2020 Fact sheet provides information on Objective 6 (c), Policy 8 and Sub part 2 of Part 3 of the NPS-UD, Under the heading *Purpose* states:

Purpose

This direction seeks to ensure that local authorities respond to development proposals that would add significantly to development capacity and contribute to well-functioning urban environments, regardless of whether they are planned for or anticipated in existing planning documents. It applies to development proposals in both Greenfield and brownfield locations.

Local authorities routinely receive plan change requests that would result in significantly increased development capacity. The NPS-UD requires local authority decisions on these plan changes to be responsive if the plan change proposal meets a set of criteria. This increases the responsiveness of the planning system to significant opportunities and removes constraints to urban development.

73 Clearly approving development proposals that add significantly to development capacity is a core purpose. Increasing the responsiveness of the planning system to development proposals regardless of whether they are planned for or anticipated is a further purpose.

74 The delivery mechanism or the how is through local authority decisions through planning decisions. So we consider there is a strong signal that planning and local authority decisions are seen as being the responsive tools to remove constraints to urban development. Other fact sheets elaborate on what the constraints to urban development might be.

75 The July fact sheet under the heading "*Requirements*" on page 1 specifically records that

...regional councils under NPS-UD clause 3.8 (3) are to include criteria within regional policy statements to determine what plan changes will be treated as adding significantly to development capacity for the purposes of implementing Policy 8.

76 Moreover the fact sheet records those changes must be made as soon as practicable.¹³

77 The introductory guide published in July 2020 on page 6 deals with the intent of the NPS – UD. In particular we observe that the guide states that the NPS-UD is designed to improve the responsiveness and competitiveness of land and development markets. In particular, it requires local authorities to open up more development capacity, so more homes can be built in response to demand.

¹² *Eden- Epsom v Auckland Council* [2021]NZEnvC082

¹³ NPS-UD Part 4: Timing 4.1 (1)

- 78 The September fact sheet includes detail on the intent of responsive planning policies. In terms of Objective 6 (c) the fact sheet notes that local authorities cannot predict the location or timing of all possible opportunities for urban development. It therefore directs local authorities to be responsive to significant development opportunities when they are proposed.
- 79 The September fact sheet on page 2 states the intent of Policy 8 and Part3, subpart 2 is to:
- enable transparency and responsiveness in planning decisions
 - improve competition inland markets
 - accelerate land supply
 - discourage land banking
- 80 The fact sheet continues noting that this approach will support improved housing affordability. The sheet again notes that the proposed development may be unanticipated in the existing plans.
- 81 The September fact sheet on page 3 under the heading of *Expected Outcomes* states the responsive planning policy in the NPS-UD limits a local authority's ability to refuse certain private plan change requests without considering evidence. The sheet goes on to note:
- implementing this policy is expected to result in more plan change proposals being progressed where they meet the specified criteria, which in turn will lead to proposals being put forward for development in areas which Council planning documents have not identified as growth areas.*
- 82 At the bottom of page 3 the September fact sheet notes that
- identified areas for development within planning documents must give effect to the responsive planning policies in the NPS-UD and therefore should not represent an immovable line. It further notes Council policies including those in regional policy statements relating to out of sequence development, will need to be reviewed and, in some cases amended to reflect the responsive planning policies of the NPS-UD.*
- 83 Under the heading "Timing" on page 7 the September fact sheets specifically states:
- the responsive planning requirements apply to all tier 1 local authorities and came into effect on 20 August 2020 and further the policies will need to be implemented continuously, as and when relevant requests for plan changes are made. Specifically for the purpose of implementing Policy 8 regional councils are to include the criteria as soon as practicable.*
- 84 The September fact sheet on page 2 when considering Objective 6 (c) states "It therefore directs local authorities to be responsive to significant development opportunities when they are proposed". So we consider this broad wording supports our interpretation as to the application of Objective 6.

- 85 We consider utilisation of planning decisions¹⁴ to give effect to the NPS-UD recognises the planning regime is dynamic. Moreover the NPS-UD requiring planning decisions to take into account¹⁵ and have particular regard to¹⁶ certain matters support the view that planning decisions should give effect now, to those parts of the NPS-UD that commence with the words "*Planning Decisions*".
- 86 We also suggest this deliberate approach supports the view that the NPS-UD particularly the responsive planning and housing land supply issues require urgent implementation.
- 87 Those planning decisions are to be made by individual local authorities when considering plan changes and or plan reviews and recognise and require those decision to be responsive to developments that would significantly add to development capacity while contributing to a well-functioning urban environment, even if the plan changes¹⁷ are unanticipated or out of sequence with planned land release.
- 88 However we consider the environment under consideration in those decisions is the district environment and not the wider Christchurch environment as suggested by Simpsons.
- 89 We note "*urban environment*" is defined under the NPS-UD to include any area of land regardless of size and irrespective of local authority boundaries that is predominantly urban in character and is or is intended to be part of a housing and labour market of at least 10,000 people.
- 90 So we are of the view this definition pulls against the thrust of the Simpsons submission relating to the Christchurch environment being the environment under consideration when planning decisions are made.
- 91 As well the NPS-UD requires councils to develop criteria as soon as practicable¹⁸ for determining which plan changes would add significantly to development capacity and contribute to well-functioning urban environments, even if the development capacity is unanticipated by RMA planning documents or out of sequence with planned land release.
- 92 On Timing Part 4 also requires amendment to a district plan to give effect to the provisions of the NPS-UD as soon as practicable. So decisions on a proposed plan, subject to scope constraints, could be a "*soon as practicable*" opportunity.
- 93 We agree that the CRPS is to be included as part of any merits assessment but not in the determining manner which Simpsons Grierson advance. To apply and weight Objective 6.2.1 in that manner in our view clashes directly against NPS-UD responsive planning provisions that would frustrate the objective of the NPS-UD.

Conclusion on Interpretation of the NPS-UD responsive Planning Provisions.

- 94 Giving the words as they appear within the NPS-UD their ordinary meaning our view is that the role and purpose of the NPS-UD responsive planning provisions,

¹⁴ NPS-UD- definitions, Objective 2,5,Policy1,6,8

¹⁵ NPS-UD-objective 5

¹⁶ NPS-UD-policy 6

¹⁷ We return to the scope of application of Policy 8 below.

¹⁸ See Part 4 Timing clause 4.1 (,1)

is to through planning decisions, on district plans and plan changes improve housing affordability by supporting competitive land and development markets by ensuring unanticipated or out of sequence qualifying land development opportunities are not rejected without a merits assessment.

- 95 We consider planning decisions under the NPS-UD are intended to be to be both responsive, immediate and to an extent unconstrained by existing provisions in planning documents that restrict or limit development to identified locations.
- 96 However we readily accept planning decisions under the NPS-UD must also ensure that those out of sequence or unanticipated developments qualify by contributing to a well-functioning urban environment. So planning decisions are not completely unrestrained. Evidence will be needed to satisfy those NPS-UD requirements.
- 97 More broadly the NPS-UD is designed to speedily improve the responsiveness and competitiveness of land and development markets to meet the community needs for more housing and differing preferences for different types of housing, such as intensification.
- 98 Addressing land supply to increase competitiveness in housing markets and consequently provide for more and affordable housing is a matter of national significance to be addressed responsively, in a timely way. Planning documents that constrain development to particular locations need to be amended as soon as practicable to allow consideration of alternative development options.
- 99 The structure of the NPS-UD being divided into parts and through the deliberate choice of words such as "planning decisions" provides for steps or actions on an immediate basis and other steps over the longer term.
- 100 We consider the responsive planning provisions to be distinctive compared to the balance NPS provisions. While the responsive planning provisions operate under the entire framework of the NPS-UD we do not agree with Simpsons view that the responsive planning provisions should not be seen as separate or distinctive.
- 101 Comparing the responsive planning provisions with the balance provisions of the NPS-UD in our view amplifies the difference between them. Also other than in a broad general way, primarily because of this difference, we do not consider the balance provisions of the NPS-UD are particularly informing on the interpretation of the responsive provisions.
- 102 As well we do not support Simpsons view that the NPS-UD need be interpreted and applied as a whole with the consequence the responsive planning provisions are read down or somehow limited.
- 103 Also we do not support the Wynn Williams view that there is not a conflict between the provisions because as they submit if close attention is paid to the way in which the provisions are expressed then the conflict dissipates. Wynn Williams submit that the "avoid" framework does not preclude the merits of a proposal for unanticipated or unplanned urban development or for local authority decisions to be responsive.¹⁹ But they submit the planning documents including the CRPS have already provided sufficient development capacity. As well consequent on future quarterly monitoring and three yearly capacity assessments any insufficiency can be addressed and provided for.

¹⁹ Paragraph 23

- 104 We disagree because we consider Wynn Williams are not correctly interpreting the responsive provisions of the NPS-UD in particularly they are not acknowledging the NPS-UD seeks a responsive approach on a much more urgent basis than a CRPS review that may happen in 2024. As well the NPS recognises that there may be unanticipated and unplanned developments that are available for consideration and approval in planning decisions taken now under the NPS-UD.

Alignment - CRPS with NPS-UD –“give effect to”

Alignment

- 105 Is the CRPS aligned with and does it give effect to the NPS-UD, so as to respect the vertical alignment between statutory planning documents as required by the RMA in particular the “give effect to” sections 62 (3), and 67 RMA?
- 106 The answer to this question is important as we think the answer affects the weighting that could be given the CRPS. The answer is also important in terms of the matters under Policy 6 (a) decision makers are to have particular regard to.
- 107 Notwithstanding that PC1 to Chapter 6 postdates the coming into force of the NPS-UD, the CRPS does not include any criteria for determining what plan changes will be treated, for the purposes of implementing Policy 8, as adding significantly to development capacity, (the criteria) as directed by the NPS-UD. We understand conversations occurred between District and Regional Councils but inclusion of any criteria within the CRPS did not result.
- 108 The absence of the Policy 8 criteria must raise the question whether or not in its current form the CRPS gives effect to or is aligned with the NPS-UD. Also the CRPS is now being scrutinised in a context where lack of that criteria is important. The materials referenced²⁰ by Chapman disclose that the Regional Council being aware of the need to include criteria to assess developments determined that criteria would be later included in the CRPS.
- 109 We note the Simpsons submissions while acknowledging that the Regional Council clearly considered the NPS-UD, does not explain why the criteria were not included in PC1. The absence of any criteria within the CRPS creates a vacuum in which planning decisions now need to be made.
- 110 On page 2 of the July fact sheet it states that the NPS-UD requires councils to respond to out of sequence development proposals. It continues, *“noting councils will need to review the policies relating to unplanned and out of sequence development and in some cases, their policies will need to change to implement the NPS-UD”*. For example, a hard rural urban boundary without the ability to consider change or movement of the boundary would not meet the requirements of the NPS-UD responsive planning provisions.
- 111 In our view the CRPS, and in particular Objective 6.2.1, which seeks to avoid urban development outside of existing urban areas or greenfield priority areas for development, unless expressly provided for in the CRPS, is precisely the type of hard line boundary type provision that the NPS- UD identifies as requiring attention.

²⁰ Appendix 5 and paragraphs 20 -23.4 Chapman Submissions on Strategic Directions 25 August 2021

- 112 So given the clear and direct tensions between CRPS Objective 6.2.1 and Objective 2, Policy 1(a) and (d), Policy 6(d), and Policy 8 and Subpart 2 clause 3.8 we conclude that the CRPS only partially gives effect to the NPS-UD as required by the RMA.²¹
- 113 The NPS-UD directs amendment to regional policy statements and/or district plans to give effect to the provisions of the NPS-UD as soon as practicable. We accept that does not mean urgently. However inaction and/or the absence of an explanation as to why there has been no change and or when the change will occur, would not be in accord with the direction to change as soon as practicable.
- 114 Given the extent of effects on communities, nationally, timeliness in interventions to address the housing crisis appears to us to be very important.
- 115 The Chapman submissions as well as referencing the Regional Councils own planning reports on PC1 in our view certainly provides strong support to the submission properly viewed; the CPRS only partially gives effect to the NPS-UD. However we do note in later submissions²² Wynn Williams challenge the accuracy of those submissions. We are not in a position to validate one view over the other.
- 116 However given the CRPS includes housing targets that originated from the now replaced or superseded NPS-UDC (2016), and given the housing requirements under the NPS-UD are both different and are yet to be entered (as soon as practicable) after a Housing Capacity Assessment (HCA) is made, we agree with the Chapman submission that this is another reason why the CRPS is at best partially giving effect to the NPS-UD.
- 117 We do acknowledge Minister Parker's letter dated 28 May 2021²³ to the Chief Executive Environment Canterbury records on page 1 that Environment Canterbury has complied with the Resource Management Act 1991, regulations made under it, and any relevant national direction.
- 118 However, the letter is broad in its ambit and primarily addresses the issue of the CRPS PC1 streamlined planning process. We accept that at the time the letter was written given the requirement to include the Policy 8 criteria was a future requirement the CRPS could be taken to give effect to the NPS-UD.
- 119 However the letter, understandably, does not include a consideration of the current context of applying the NPS-UD to planning decisions relating to plan changes and the district plan review. So we consider the weight given to this letter should reflect the absence of detailed considerations of the current context and absence of explanations as to why the criteria given the opportunity to include them was not taken.
- 120 As well given the earlier discussion on how and what materials can be utilised when planning documents interpreted we do think relying on this letter to assist in interpreting whether or not PC1 gives effect to the NPS-UD is going beyond what is allowed. So while the letter provides context in our view it does not have a role in the interpretative exercise.

²¹ RMA- s62(3)

²² Canterbury Regional Council Legal Submission Minute 5 response 3 September 2021 Paragraphs 25 and 26.

²³ Copy attached.

- 121 We emphasise that a NPS is a tool the government utilises to prescribe directions for matters of national significance. So this point needs to be borne in mind when considering the alignment issue.

Give Effect To

- 122 We draw attention to section 75(3) which details the contents of district plans. Relevantly subsection (3) (a) provides a district plan that must give effect to any national policy statement.
- 123 So if decision-makers accorded, when making planning decisions under the NPS-UD, the CRPS priority, as contended for by Simpsons, it is very difficult to see how decision-makers would be complying with, let alone respecting, both the directive to have particular regard²⁴ to the NPS-UD in reaching a decision as well as satisfying s75(3)(a).
- 124 This is particularly so when the CRPS is not fully giving effect to the NPS-UD. Such an outcome does not recognise an NPS prescribed actions via objectives and policies for matters of national significance which we consider must and should prevail over regional matters.
- 125 So recognising the hierarchy of plans as well as recognising an NPS deals with matters of national significance assists in resolving what at first may appear to be an irreconcilable choice for decision makers.

Requirement for Companion Plan Changes to the CRPS

- 126 Simpsons also contend that without any companion changes to the CRPS there is no clear pathway for approval of a non-compliant proposal as it will fail to give effect to the regime established by the CRPS as required under section 75(3).
- 127 We do not think there is a need for a plan change applicant to make companion changes to the CRPS. We say this because the NPS-UD already directs a Regional Council to make changes to the CRPS to provide for the responsive planning objectives and policies of the NPS-UD. Further we contend the pathway is not absent but is provided by the responsive planning provisions of NPS-UD.
- 128 Admittedly until the CRPS change occurs there would be a level of disconnect between the district plan and the CRPS but that reason for disconnect is that the Regional Council has not responded in a timely way to include the necessary criteria in its regional plan. That is not a matter for an applicant seeking a plan change to an operative plan to seek.
- 129 How long that level of disconnect remains is in the hands of the Regional Council.

Conclusion

- 130 In conclusion then it is our view that the CRPS, Objective 6.2.1 in particular, is not well aligned nor does it give full effect to the responsive planning provisions within the NPS-UD. At best the CRPS is partially compliant.
- 131 Given the purpose of the NPS-UD, the fact it is a higher order document dealing with matters of national significance containing express and specific provisions as to what decision makers when making planning decisions are to take into account

²⁴ NPS-UD Policy 6

and have particular regard to as we consider the NPS-UD should receive greater weight than the CRPS Objective 6.2.1 when planning decisions are made. We do not consider there is any available information supporting the view that the NPS-UD has not been competently prepared or does not give effect to Part 2.

- 132 We emphasize again a full merits decision on a plan change and mirror submission on the PDP needs to consider all relevant evidence including all relevant planning provisions their purpose and that of the RMA.

Applying the NPS-UD responsive planning framework absent criteria and effects on CRPS Urban Planning Framework

- 133 How should the responsive planning framework be interpreted and applied when making decisions on privately initiated plan changes to the Selwyn District Council's ODP, and decisions on zoning submissions on the PDP in the absence of any criteria determining what plan changes will be treated, for the purposes of implementing Policy 8, as adding significantly to development capacity?
- 134 We consider the absence of the criteria within the CRPS is not a barrier to making a planning decision. The July fact sheet at page 2 provides details on the subject matter and nature of the criteria to be included in regional policy statements by regional councils for determining what plan changes will be treated as adding significantly to development capacity.
- 135 As well the September 2020 fact sheet explains how local authorities must consider private plan-change proposals for developments that are unanticipated or out of sequence as outlined in the NPS-UD Objective 6(c) Policy 8 and Part 3 sub part 2-responsive planning.
- 136 Policy 8 provides local authority decisions affecting urban environments are to be responsive to plan changes that would add significantly to development capacity and contribute to well-functioning urban environments, even if the development capacity is unanticipated by RMA planning documents or out of sequence with planned land release.
- 137 Once satisfied under Policy 8 that the development proposal provides significant development capacity that is not otherwise enabled in a plan Sub part 2 in particular 3.8 (2) (a) and (b) are additional matters that a local authority must have particular regard to.
- 138 The September fact sheet picks up the significance of these words "*particular regard to*" noting that such matters are important to the relevant decision and therefore must be considered and carefully weighed in coming to a conclusion.
- 139 The September fact sheet on page 4 details and expands on the three aspects local authorities need to consider when determining if a plan change proposal should be considered under the responsive planning policies.
- 140 It details what contributing to a well-functioning urban environment includes. It also addresses what adding significantly to development capacity means in the context of responsive planning policy. It also discusses in detail the criteria for determining significant development capacity. Finally, it addresses what well-connected along transport corridors is intended to mean.

- 141 So in the absence of inclusion by the Regional Council of criteria in its regional plan, in our view there exists adequate direction²⁵ within the NPS-UD with further support available from the fact sheets, for a decision maker to consider on the merits whether or not the proposed plan change and or a new zoning submission would add significantly to development capacity. Adopting this approach provides for the vacuum created by the failure of the Regional Council to include such criteria within its regional plan.
- 142 We also consider the above paragraphs provides a response to the possible argument that because the criteria to identify, in terms of Policy 8, which plan changes will add significantly to development capacity, has not yet been included in the CRPS, Policy 8 cannot be deployed.
- 143 We accept if decisions are made approving developments which are located outside of the prescribed limited locations included within the CRPS there will be a disconnect until the Regional Council includes the criteria within the CRPS.
- 144 So on the basis planning decisions approving the developments carefully apply the now available criteria within the NPS and the fact sheets alignment will be resorted. Developments that are now approved should be able to satisfy the criteria which is subsequently inserted by the Regional Council into the CRPS albeit retrospectively.

How is the conflict between CRPS Objective 6.2.1 and the NPS-UD to be resolved?

- 145 We agree with both Simpsons and Chapmans submissions that the correct approach as a first step to conflicting planning provisions is through an interpretative exercise to try to make a "thoroughgoing attempt to find a way to reconcile" provisions in plans that are in conflict.²⁶
- 146 Chapmans submit the CRPS only partially gives effect to NPS-UD for a range of reasons and so Objective 6.2.1 should be read down. As well Chapmans submit the NPS-UD is the latest word and is the higher order document so it should prevail as it impliedly repeals the earlier.
- 147 That approach is rejected by Simpsons as it does not satisfy the RMA requirement for a lower order document, the PDP or ODP to give effect to the higher order document the CRPS.
- 148 As we read the Simpsons submissions they interpret and apply Objective 6.2.1 as a veto or a complete "no go". Based on the words in the objective and relying on case law such as *King Salmon* such a literal interpretation is available. However in this particular context applying an overly literal approach delivers a very unusual if not absurd outcome giving the need to apply a more purposive approach to the interpretative exercise.
- 149 We are taking a different approach in trying to resolve the conflict. Our approach, utilising the interpretative approach detailed earlier, is to place more emphasis on understanding the purpose of Objective 6.2.1. Then once understood, to bear in mind the purpose of the responsive planning provisions of the NPS- UD, if an approval of a development meets or at least partially meets the purpose of the Objective.

²⁵ For example Obj 1,2,6,Policy 1,6,8 and subpart 2 3.8

²⁶ *Royal Forest and Bird Protection v Bay of Plenty Regional Council* [2017] NZHC 3080 at [98] citing *Environmental Defense Society v King Salmon* [2014] NZSC 38 at [131]

- 150 We consider if it can be demonstrated that application of the NPS does meet the purpose of Objective 6.2.1 then it is possible to resolve that conflict (whilst not completely resolving it).
- 151 Giving the words in Objective 6.2.1 their plan ordinary meaning, if the location of the intended development is outside of the existing urban areas or greenfield priority areas for development and unless it is otherwise expressly provided for in the CRPS, then a direct clash results.
- 152 As we understand it the purpose of the Objective is to avoid ad hoc development, particularly urban development in locations that are not supported by infrastructure and transportation services and networks, employment opportunities, and proximity to community assets services and supplies.
- 153 As well the size of the area identified for development within the CRPS is intended to meet anticipated demand for development, for which demand has been assessed by a number of exercises such as Our Space. So expressed another way the size of the area equates with likely demand over time for development.
- 154 However provided the criteria ascertained from the facts sheets and the NPS itself for determining what plan changes will be treated for the purposes of Policy 8 as adding significantly to development capacity are satisfied and provided other matters provided for in NPS such as Objective 2, Policy 1 and Policy 6 are applied and addressed through the provision of acceptable evidence then the purpose of Objective 6.2.1 (other than the location of the development) will be achieved.
- 155 This is because the NPS-UD properly applied will not support developments that do not contribute to well-functioning urban environments. So to that extent there will not be a direct clash with the Objective 6.2.1. Properly interpreted, the NPS does not allow for ad hoc decisions to be made which will lead to the undermining of the CRPS urban development framework. Rather in our opinion the NPS responsive planning provisions, including guidance within the facts sheets, properly applied allows for an exception to Objective 6.2.1, authorised by a higher order document addressing a matter of national significance.
- 156 We say exception because the NPS fact sheets clearly recognise that it is not always possible for an authority to predict with certainty where and when urban growth will occur. So, when Simpsons claim that the CRPS provides all of the required land for development based on demand, while that may be correct, what the CRPS cannot control is the timing when that development may occur.
- 157 The NPS by facilitating consideration of development opportunities for locations outside of hard-line boundaries supported by restrictive objectives is allowing for additional development opportunities to foster increased competition leading to increased supply of land for housing and impacting favourably on housing affordability. But those developments must meet and satisfy the NPS criteria. Consequently, they will not be causing offence to the core purpose of the avoid Objective. We accept the locational part of the Objective will not be satisfied if the proposed development is located outside of the line.
- 158 However, the purpose of the NPS-UD responsive planning provisions through planning decisions, is to improve housing affordability by supporting competitive land and development markets by ensuring unanticipated or out of sequence land development opportunities are not rejected without a merits assessment.

- 159 Directive policies constraining development inside metropolitan urban limits have been identified by the NPS-UD and its supporting fact sheets as a form of planning that can adversely impact upon housing affordability and the supporting of competitive land and development markets.
- 160 Landowners and developers whose development opportunities fall within the likes of Metropolitan Urban Limits can adopt behaviours such as land banking that adversely impact upon supporting competitive land and development markets.
- 161 The NPS-UD seeks to addresses those effects of directive policies through the application of the responsive planning provisions. So, a decision according Objective 6.2.1 determinative weight cuts directly across the intention and purpose of the NPS-UD.
- 162 So it seems counter-intuitive, if not an absurd outcome to arrive at a planning decision after considering the merits that is ultimately determined by a irreconcilable opposing restrictive Objective such as 6.2.1.
- 163 While we accept that the CRPS is to be included as part of any merits assessment we do not accept that it be applied in the determining manner which Simpsons advance. To apply and weigh Objective 6.2.1 in that manner in our view clashes directly against the purpose of the NPS-UD responsive planning provisions that would frustrate their purpose.
- 164 If the Simpsons view on Objective 6.2.1 is to be followed then there would be no point in undertaking a merits assessment of a development proposal because, no matter how compelling the merits assessment is, the decision must always be to decline as the Objective is being applied as a form of veto.
- 165 Also if the Simpsons view is correct then effectively within the Greater Christchurch Area the responsive planning provisions of the NPS-UD would be placed on hold until such time the CRPS is reviewed next schedule for 2024. Such an outcome given the context of a housing affordability crisis as well as considering the purpose of the NPS-UD responsive planning provisions is irreconcilable.
- 166 Given the NPS-UD seeks to ensure unanticipated and or out of sequence developments are considered responsively, provided they add significantly to development capacity and contribute to well-functioning urban environments, the NPS-UD specifically recognises and provides for an exception or legitimate departure from restrictive Objectives such as CRPS Objective 6.2.1.
- 167 We have earlier commented on the Wynn Williams approach to resolving the conflict above at paragraphs 103 and 104 above.
- 168 Consequently, provided the plan change and companion zone submissions via evidence submitted at a merits hearing delivers on the development capacity and well-functioning urban environments outcomes sought by the NPS-UD and proper regard is had to the purpose of restrictive Objective 6.2.1 then a positive planning decision determined following a full merits hearing can be seen as a well-considered and supportable decision and not an unlawful one.

Including Policy 8 - Criteria in the PDP Process.

- 169 We agree that the avoid development direction currently in the PDP need stay. We also agree utilising existing PDP wording as much as possible and relying on

in scope submissions to seek to include guidance as to what unanticipated or out of sequence developments would need satisfy before approval is available.

- 170 Wording can leverage off objective 6(c) directing local authorities to be responsive to significant development opportunities when proposed. So, notwithstanding the avoid direction those significant developments that are unanticipated or out of sequence that satisfy the criteria can be considered.
- 171 The actual criteria can be gleaned from the intent of Policy 8 and Part 3. The intent is to enable transparency and responsiveness in planning decisions, to improve competition in land markets, to accelerate land supply and finally to discourage land banking. All of these intents or purposes support improved housing affordability.
- 172 As well as referring to the fact sheets for wording the PDP wording should include requirements that the proposed development has clear and realistic plans to be well connected to employment, amenities and public and active transport modes. As well the development need contribute to well-functioning urban environments.
- 173 We also refer to NPS-UD Part 4 Timing in particular 4.1 (1) that requires local authorities to give effect to the provisions of the NPS-UD as soon as practicable. So subject to content of the notified plan and scope of submissions decisions on the PDP could be a soon as practicable opportunity.

Does Policy 8 apply to planning decisions on the DPR given it contains the words “plan changes” or is its application restricted to plan changes?

- 174 Policy 8 is clearly engaged by the plan change context. Rather than being procedural Policy 8 is a qualifier in that it qualifies only certain plan changes to be determined on their merits. Only those that will add significantly to development capacity are able to be considered on the merits.
- 175 In our earlier views on Policy 8 we expressed the view that given the wording in Policy 8 (primarily the explicit reference to plan changes) we did consider its application was restricted to plan changes. Now for the reasons stated we are less forceful in our thinking that Policy 8 should be restricted to just plan changes.
- 176 The first of those reasons is based on the recent Environment Court decision in *Eden* and others earlier referenced. In particular the discussion by the Court around s 43AA and 43AC could be utilised in support an argument so as to say given there is little distinction in planning terms as to the effect of and process for a plan review and plan change then notwithstanding the use of the words “*plan change*” within policy 8 policy 8 should apply to both.
- 177 We do note in the recent Commissioners decision on the *Sleepyhead Factory and Residential Development proposal*, the Commissioners at paragraphs 314 and 5 accepted Policy 8 did apply to a submission on a proposed plan.
- 178 The reasoning given by the Commissioners is very brief. Effectively they considered that a plan review was the same as or similar to a plan change. They considered there was little difference between the two. Therefore, they did not consider that policy 8 need be restricted to plan changes and applied it to a submission on a proposed plan.