

# Topic investigation

Planning Analysis – Planning options for providing for LFR activity at the Business 2A zone (BS007)

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## Introduction

This short report records the methodology followed in reviewing the effectiveness of operative provisions in the Selwyn District Plan, along with the outcomes of that review and any recommendations.

## Provisions Reviewed

Land Use Recovery Plan Action 27 introduced provisions into the operative district plan to provide for a trade retail and large format retail centre at the RIDL site including an Outline Development Plan showing the general location of the centre. The land, however, remains zoned Business 2A. Key plan provisions for the trade retail and large format centre include:

- Objective B4.3.8 and Policy B4.3.105 which direct that commercial activity is to be primarily focused in the Key Activity Centres (Rolleston and Lincoln).
- Definitions for:
  - Large Format Retail
  - Service station
  - Trade Retail
  - Trade supplier
  - Associated ancillary definitions for activities deemed to be Trade supplies
- Rule 22.10.1.3, containing activity and floorspace limitations, including:
  - Ancillary retail activity up to 20% of the gross floor area of a building or 2000sqm, whichever is the lesser.
  - Service Stations
  - Trade Suppliers
  - LFR up to 17,000sqm and Trade Retail up to 10,000sqm
  - Food and beverage outlets up to 1000sqm across the centre, but no tenancy limit
  - Ancillary offices

Since then, there have been plan administration difficulties relating to the interpretations of Rule 22.10.1.3 and the associated definitions, and the relationship of Rule 22.10.1.3 to Rule 13.1.1. It is also noted that the provisions were introduced to implement a recovery plan requirement.

It should be noted that the site benefits from two current resource consents for the following:

- RC155113 – to establish and operate a trade retail and large format retail development
- RC155392 – to establish and operate an office development

These form part of the environment for the site.

This Topic Investigation seeks specifically to review:

- The continued appropriateness of the current district plan provisions against the wider planning framework (RPS chapter 6 and Selwyn 2031); and
- The efficiency and effectiveness of the current planning provisions.

The district plan provisions in question were introduced into the district plan by way of implementing a LURP action. As such they are subject to s60(2)(f) and can only be changed where the amendments remain consistent with the original LURP action.

## Methodology

The review involved:

This is set out in Project Scope BS007, “Planning analysis – Planning options for providing for LFR activity at the Business 2A zone”.

The DPR team was also provided with the draft report and findings for their comments.

## Findings of the Review

The review discussions are contained in Appendix 1 – Higher order planning documents and strategies, Appendix 2 – Economic Evidence and LURP Action 27 Hearing Panel findings, and Appendix 3 – Rule 22.10.1.3 and plan administration. Recommendations are provided in each Appendix.

Based on the assessment contained in Appendices 1 to 3, key findings were:

- Chapter 6 to the RPS, the Rolleston Structure Plan and Selwyn 2031 all promote the concept of self-sufficiency at township and district level including reducing leakage of retail spend outside of the district. Providing for a LFR and trade retail centre align with these outcomes.
- There is a clear tension between enabling a LFR and trade retail centre at the RIDL block and the requirements of the RPS and Selwyn 2031 to direct new commercial activities primarily to KACs.
- The scale and range of commercial activities enabled at the RIDL site under the current plan provisions reflect those provided for by RC155113, and were found , on balance, to be appropriate by the LURP Action 27 panel.
- Based on current evidence, material amendments to the scale and range of activities enabled at the RIDL block could be contrary to s60(2)(f) of the Greater Christchurch Regeneration Act 2016.
- The Rolleston KAC is a ‘fledgling’ centre that is still being developed to fulfil its potential including implementation of the Rolleston Town Centre Master Plan.
- Economic evidence identified a major leakage of retail spend from the district and that a LFR centre would help stem this, whilst only having a limited effect on the viability of the KAC. Any impact on the KAC would be to its rate of growth rather than its existing viability.
- The viability of a Key Activity Centre is not a stationary concept but is instead to be derived from the context for that centre and involves the future state; not just what is there now. This is important for the Rolleston KAC, an incomplete centre which is in the progress of developing to

fulfil its potential. This centre development is linked to implementation of the Town Centre Master Plan

- In terms of floorspace, the Rolleston KAC is dominated by larger tenancies so there is no justification to direct these away from the KAC to other locations.
- Administration of Rule 22.10 has proven to be difficult including the interplay of this rule with Rule 13.1.1.1, the definitions incorporated into the district plan under LURP Action 27 and the lack of a definition for 'commercial activities'. These problems will be resolved, in part, by a move to an activities based plan.
- Whilst not identified in the correspondence between the parties on the difficulties in the administration of Rule 22.10, another issue is the planning method used to provide for the LFR and trade retail centre. In essence it operates as an 'exemption' from the wider Business 2A provisions and in particular from the controls on commercial activities since the land in question remains zoned Business 2A. The current plan provisions do not recognise that the LFR and trade retail centre will result in an environment different to the surrounding Business 2A zone, and there is a corresponding lack of policy direction on the development of this environment.
- The current plan provisions cannot be considered efficient or effective given the difficulties in their administration.

The District Plan Review team was consulted on the draft report and its findings/recommendations. Comments were received from the Residential topic lead and these have been incorporated into the final report. The comments were principally concerned with issues of format and clarity.

## Recommendation:

1. That the range and scale of commercial activities provided for under the current plan provisions be retained in the replacement district plan. This will need to be reviewed when the results of the Selwyn Growth Model are available. Further legal advice on the extent of change allowed under s60(2)(f) of the Greater Christchurch Regeneration Act 2016 might also be required at this time.
2. That the activity status for a breach of Rule 22.10.1.3 be reviewed in light of recent judicial rulings on this matter
3. Consider the need for the policy framework for the Rolleston KAC to define 'viability' and to recognise its role to accommodate both larger and smaller tenancies
4. Identify and assess planning methods to more appropriately recognise and manage the establishment and operation of a LFR and trade retail centre at the RIDL site
5. Review the rules and definitions in light of the plan administration problems and, where necessary, recommend amendments to improve their clarity

The above translate into two distinct 'next-stage' work streams:

1. Planning package for LFR and trade retail centre at RIDL site:

- Identify options for planning methods to recognise and manage the establishment and operations of a LFR and trade retail centre at the RIDL site. This should include the use of tools such as a bespoke zone for the site or an overlay.
  - Review rules and definitions, including activity status in light of recent judicial rulings, to overcome the identified plan administration issues
  - As part of this engage with the landowner and their planning consultant
2. As part of developing the objectives and policies for the business topic area for the replacement district plan:
- Consider the appropriateness and need to incorporate direction/guidance on 'viability' and how it is to be applied to the Rolleston KAC
  - Consider the appropriateness and need to recognise the role of the KAC to accommodate both smaller and larger tenancies

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## Appendix 1

### Higher order planning documents and strategies

#### ***Canterbury Regional Policy Statement***

The key policy direction for this topic are contained in Objectives 6.2.1, 6.2.2, 6.2.5 and 6.2.6; and policies 6.3.1 and 6.3.6. In summary they require:

- Encouraging sustainable and self-sufficient growth of Rolleston
- A distribution of commercial activity which avoids significant adverse effects on the function and viability of the centres
- New commercial activities primarily directed to KACs
- Give effect to the settlement pattern in Map A to Chapter 6
- A range of other business activities are provided for in appropriate locations

The RPS also provides a definition of commercial activity in the Chapter 6 area:

“..means retail, office and other commercial activities but does not include industrial activities.”

#### **Selwyn 2031**

The outcomes identified in this strategy support self-sufficiency at a district-wide level including in terms of access to employment, retail and other services. The strategy also identifies Rolleston as the District Centre and that it will be the primary commercial and industrial base of the district. Action 25 requires that district plan provisions support the development of the Activity Centres in the district and manage the distribution of commercial activities that could adversely affect the function, viability or investment in those centres.

#### **Rolleston Structure Plan**

This includes the following key principles:

- Self-sufficiency including in relation to local shops, shopping and recreation (pg15)
- A well designed town with a clear hierarchy of centres (pg16). Centres are to provide a wide range of facilities and services. Also to establish complementary centres to the town centre.

The structure plan provides guidelines for the location of the complementary centres. These are to be located within residential areas as well as a neighbourhood centre in IZone (pg60-61).

The list of activities for the town centre include supermarkets and department stores but no mention is made of large format retailing.

#### ***Discussion***

Both Chapter 6 to the CRPS and the Council’s strategies promote self-sufficiency at township and district level, whilst leakage of retail spend outside of the district is specifically identified as an issue in Selwyn 2031. Providing for LFR and trade retail activity at Rolleston aligns with this outcome. However there is tension between the enabling of LFR and trade retail at the RIDL block which represents an out-of-centre location, and the requirements of the RPS and Selwyn 2031 to direct

new commercial activities primarily to KACs. This is supported by the broad definition of commercial activities in the RPS which would include LFR and trade retail.

Objective 6.2.5 and Policy 6.3.6 of the CRPS seek to avoid significant adverse effects on the function and viability of the town centre (KAC). As such it is the scale of commercial activity enabled in an out-of-centre location that is in issue. In relation to this, resource consent RC155113 provides for a trade retail and LFR centre (subject to meeting consent conditions) and so must be considered as part of the existing environment. The current district plan provisions and the conditions and scale of development enabled by the RC align.

#### **Recommendation:**

In view of the above and s60 (2) (f) it is not considered that a change in the range and scale of commercial activities provided for under the current plan provisions should be changed.

## **Appendix 2**

### **Economic Evidence and Hearing Panel findings**

As part of the LURP Action 27 process the following economic reports/evidence were prepared:

- Rolleston Large Format Retail Market Assessment – March 2014. Prepared for the Carter Group and SDC (Property Economics)
- Selwyn District Commercial Centres Assessment – December 2012 (Property Economics)
- Economic evidence from Derek Foy (Market Economics) as part of Council report for hearing.
- Right of Reply from Derek Foy
- Statement of evidence for Mike Copeland (Economist representing Rolleston Industrial Holdings Ltd and Rolleston Industrial Developments Ltd.)
- Statement of evidence for Fraser Colegrave (Economist representing Rolleston Industrial Holdings Ltd and Rolleston Industrial Developments Ltd.)

The Rolleston Large Format Retail Market Assessment report identified that the primary catchment for the LFR centre would include the whole of Ellesmere, extending into Malvern (Hororata) and over into Ashburton district. The remainder of the district, namely Kirwee and Darfield north and westwards would fall within a secondary catchment. The secondary catchments were identified given their likelihood to utilise the new centre. The assessment concluded that it was unlikely to be a need for another one. It also identified an undersupply of LFR competitors in the primary catchment with this instead mostly being exported to Christchurch. It also noted:

- Leakage of retail dollars is not unexpected for areas located close to large population centres, instead for Selwyn it is the scale that is the issue.
- The propensity for the LFR centre to harm Rolleston KAC is low due to the scale of undersupply of the LFR floor space but that an “appropriate planning policy and rules framework” was required.
- Land requirement was 5.7ha-8.4ha
- No supermarket was likely to be required in the study area before 2021
- On paper there is an undersupply of a department store but in reality this need is being met by the larger centres nearby and that this was unlikely to change. As the population grows this need might arise at some future date. This can be reviewed in 2021 to see if one is needed and if so whether it should locate in the LFR centre.

***A summary of the Fraser Colegrave and Mike Copeland evidence includes:***

- Impact on Rolleston town centre from the LFR and trade retail centre would be limited
- The type of activities locating at a LFR centre are different from those that locate in town centres
- 96% of tenancies in Rolleston town centre are not LFR, reinforcing likely lack of impact between the LFR centre and the town centre
- Proposed district plan provisions restricted supply and it is better to allow retailing to locate at the LFR centre to reduce leakage and to boost Rolleston.
- Growth of Rolleston's population will encourage town centre to grow.
- Key impact of LFR centre would be an impact on the rate of growth of the KAC and not its viability.

***LURP Action 27 Hearing Panel's Findings***

The panel addressed the economic evidence and noted the following:

- The term 'viability' needed to be assessed within the Rolleston context and is linked to the implementation of the Town Centre Master Plan. Viability is not a stationary concept based on what is there today (para. 6.9.5) but also includes the future state. Thus the future success and development component of viability was important in the context of a 'fledgling' KAC.
- The Rolleston KAC is dominated by LFR floor space (para. 6.9.12) and any 'leakage' issue needs to be balanced against the outcomes sought for KACs and Neighbourhood Centres (para.6.9.16)
- Only ancillary offices are to be provided for in the Business 2A zone to reduce risk in achieving the KAC and town centre implementation outcomes.
- Controls on commercial activities can only take place on the Business 2A land and cannot be extended to other industrial areas since they are not covered by the LURP Action 27 requirements. (para. 6.9.22-23)
- The Panel supported the limitations on the scale and range of activities incorporated into the proposals from RC155113.
- Overall they concluded that the evidence did not justify excluding the incorporation of the LFR consent; it was not so inconsistent with the policy framework.
- They arrived at a different conclusion in respect of RC155392 and in particular considered the scale of the office development would be contrary to Objectives B4.3.8 and B4.3.105. They also deemed that the development provided for in this consent was unlikely to be implemented to its full extent.
- The Panel supported non-complying activity status for breaches of Rule 22.10.1.3 as opposed to discretionary which was put forward by the Carter Group. The Panel considered that the scale of development enabled by RC155113 justified a higher activity status.

***Discussion***

The Panel placed weight on the 'fledgling' context for the Rolleston KAC and linked it to implementation of the Town Centre Master Plan. The KAC at Rolleston is different from a more established KAC elsewhere given that it is still in the process of being developed to fulfil its potential. In the panel's view the issue was not only whether the scale and range of activities at the RIDL Block would harm the viability of the current KAC, but its ability to fulfil its role including implementation of the Town Centre Master Plan. They also noted that the existing KAC, in terms of floor space, is



dominated by LFRs and as such assumptions that only small tenancies should locate there and larger tenancies should locate in areas such as the RIDL block are not justified.

The above provide important guiding principles; namely that the meaning of ‘viability’ is context derived and particularly involves a future state, and that the KAC is an appropriate location for both smaller and larger commercial tenancies. Whilst these principles have not been specifically recognised in the operative objective and policy framework for the Rolleston KAC, this should be reconsidered as part of the district plan review given the importance of these when assessing harm to the viability of the KAC from proposed out of centre activities.

It is also clear that the existence of RC155113 to establish the LFR and Trade Retail centre influenced the panel’s decision but not RC155392, to establish and operate an office development.

It should be noted that the panel’s discussion on whether a breach of Rule 22.10.1.3 should be non-complying or discretionary took place before the High Court decision, R J Davidson Family Trust v Marlborough District Council [2017] NZHC 52, which followed the Supreme Court’s King Salmon decision. The High Court’s decision in the R J Davidson Family Trust case clarified the meaning of “subject to Part 2” and when this will apply versus the previously adopted ‘overall judgement’ approach for determining resource consents. The High Court’s decision was upheld by the Court of Appeal. This has implications for determining the activity status appropriate for a breach of Rule 22.10.1.3.

## Recommendations

That the range and scale of commercial activities provided for under the current plan provisions at the RIDL site be carried over into the replacement district plan.

That the most appropriate activity status for a breach of Rule 22.10.1.3 be reviewed in light of recent judicial authority on when Part 2 applies to a resource consent.

When developing the business objectives and policies:

- consider the need to better define ‘viability’ in the policy framework to better reflect its meaning and application to the Rolleston KAC, along the lines identified by the LURP Action 27 hearings panel
- better recognise the role of the Rolleston KAC as the primary location for the establishment of both larger and smaller tenancies.

## Appendix 3

### **Rule 22.10.1.3 and plan administration**

In 2016 this was the subject of discussion between the Carter Group and Selwyn District Council, and resulted in legal opinions being received from Greenwood Roche on behalf of the Carter Group and Adderley Head for the Council.

In brief the following points were put forward:

Greenwood Roche on behalf of RIDL

- Activities that are specifically excluded from the definition of retail activities are permitted on the basis that there is no rule in the plan that otherwise determines them to be controlled, discretionary or non-complying. Rule 13.1.1.1 specifically provide for these other activities
- Wording of the rules are ambiguous and so greater weight should be afforded to their plain and ordinary meaning rather than having to rely on a complex series of interpretation and assumptions as suggested by the Council.
- ‘Commercial activities’ are not defined in the district plan. These can encompass a range of activities that occur in commerce.
- The Council’s interpretation relies on the assumption that commercial activities (located at the Carter Block) can harm the town centre. The evidence did not support this position and similar restrictions are not applied in other business areas such as the nearby Business 2 zone.
- The Council’s approach to interpreting the rules and definitions is not tenable. For example the definition of ‘service station’ excludes “any industrial activity” which following the Council’s approach would be considered non-complying. This is inconsistent with the broad purpose of the zone.
- Key to issue is the interplay between Rule 13.1.1.1 and Rule 22.10.
- The correct approach is to follow the structure of the district plan whereby ‘effects based’ rules list the conditions that determine whether an activity is permitted and ‘listed activities’ rules specify certain activities as permitted, discretionary or non-complying in zones. It is therefore not necessary to go further than this (i.e. no need to read the rule against Policy B4.3.105) when determining whether an activity is permitted or not.

#### Adderley Head

- S76 (2) RMA states that rules in district plans have the force and effect of regulations. As such this brings into play s5 of the Interpretation Act 1999. A holistic approach is required that considers the meaning of the words, interpreted in light of their purpose, context and scheme of the district plan.
- Rule 22.10.1.3 should be treated as an exhaustive list of permitted activities and any activity not listed does not comply with that rule. This is consistent with case law on the interpretation of plan provisions and with the purpose of the plan provisions (Policy B4.3.105).
- It is important to interpret the meaning of “any activity” within the context of the District Plan. To this end Policy B4.3.105 seeks to control commercial activities.
- It would be inappropriate to classify commercial services, garages and workshops etc. as “related activities” (as contained in the heading to Rule 22.10.3) given that they have been specifically excluded from the definition of retail.
- The broader interpretation whereby any commercial activity that is not specifically listed in the rule requires consent is preferred following the above approach to interpreting the rule.
- It is agreed that the rule is not clear and is difficult to interpret.

#### Discussion

It is agreed by all parties that Rule 22.10 has proven difficult to administer. In part this stems from the interplay with Rule 13.1.1.1 and the definitions introduced into the District Plan under LURP Action 27. Concern is also raised, principally by Greenwood Roche that no definition of ‘commercial activity’ was provided to assist in implementing Rule B4.3.105. Whilst not identified by either

Greenwood Roche or Adderley Head, it should be noted that the Canterbury Regional Policy Statement does have a definition which only applies in the Chapter 6 area. This states that commercial activities mean retail, office and other commercial service activities but does not include industrial activities. The scheme of Chapter 6 requires this broader range of activities to be primarily directed towards KACs and Neighbourhood Centres. This supports the Adderley Head broader approach to the interpretation of Rule 22.10.1.3.

The move to an activities based plan will help, in part, to remove the plan administration difficulties encountered with the current provisions. However the plan administration problems also stem from the planning method adopted for the LFR and trade retail centre. This relies on the identification of the centre on an ODP within the wider Business 2A zone, which was incorporated into the District Plan under the LURP Action 27 actions. As such the land remains zoned Business 2A but the plan provides for a range and scale of commercial activities (RPS definition) not otherwise anticipated in that zone. The LFR and trade retail provisions are operating as 'exemptions' from the controls on commercial activities that otherwise apply in the Business 2A zone.

Allied to the above there is no policy recognition for the LFR and retail trade centre nor policy guidance for its development, yet it will result in an environment distinctly different to the surrounding Business 2A zone and indeed to any other business zone. It also cannot be treated as a town centre type zone given its location and the fact that it has not been identified as a KAC under LURP Action 27.

It is clear that the current plan provisions for the LFR and trade retail centre are not efficient or effective, and need to be reviewed. This includes the planning method to provide for this centre and a policy and rules (including definitions) framework to manage its establishment and operation. The move to an activities based plan will improve plan administration but consideration should also be provided to whether the centre should be subject to a bespoke zoning (or sub-zone) or overlay to better recognise and manage the environment to be established there. This will be influenced by the national standards including zone types.

### **Recommendation**

That planning methods to more appropriately recognise and manage the establishment and operation of the LFR and trade retail centre are identified and assessed

That the rules and definitions associated with the establishment of the LFR and trade retail centre are reviewed in light of the plan administration problems and, where necessary, recommend amendments to improve their clarity