Before the Independent Commissioners appointed by the Waimakakriri District Council

In the matter of	the Resource Management Act 1991 (**the Act**)
and	
In the matter of	Proposed Private Plan Change 31 (PC31) to the Waimakariri Operative District Plan by Rolleston Industrial Developments Limited

Supplementary legal submissions on behalf of Waimakariri District Council (as Submitter)

Dated: 15 August 2023

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Supplementary legal submissions for Waimakariri District Council (as submitter):

1. These supplementary submissions have been prepared in response to the following (paraphrased) question from the panel:

> What level of information is required of a private plan change applicant, in support of a plan change application to establish that services can be established, and that mitigation can be carried out to the extent that is required to implement the plan change as applied for? In other words, what level of certainty needs to be provided for the panel to find the proposed solutions viable, with final detail left as a matter to be considered at resource consent stage?

2. This issue is considered important as the applicant has indicated the view that all that needs to be established is that there may be a viable solution (which will be funded) in order for issues, such as water supply, stormwater management, wastewater and transport, to be considered resolved and no longer an issue in terms of the proposal.

3. The answer requires consideration of the task that the panel must carry out. The various matters for consideration are as set out in *Colonial Vineyard* [1] but the matter is potentially further complicated in respect of PC31 because:

   3.1. The plan change application does not rely on or seek to amend the OWDP objectives; and

   3.2. It does not seek to amend the policies (except for, it appears, a minor change in the explanation that accompanies the key policy 18.1.1.9): and

   3.3. It does not claim to give effect to the CRPS: but

   3.4. Rather it relies almost entirely on the objectives and policies in the NPS-UD to justify the proposal and requirement in s.32 as to "whether the provisions are the most appropriate way to achieve <u>the objectives</u>" (s.32(1)(b)).

4. Objectives here would normally (or perhaps previously) be expected to refer to plan objectives, with reference to s.31(1)(a) and the local authority function of:

> The establishment, implementation and review of objectives, policies, and methods to achieve integrated management of the effects of the use.

[1] [2014] NZEnvC 55

5. Section 32 now defines objectives, in terms of a proposal that does not amend objectives, as "the purpose of the proposal"[2]. However, the proposal must still be "the most appropriate way to achieve the purpose of [the] Act".

Types of information

6. Other aspects of the evaluation under s.32 that prescribe the types of information required include information that enables the:

    - Identification of other reasonably practicable options for achieving the objectives[3]:
    - Assessment of the *efficiency and effectiveness* of the provisions[4]:
    - Summarising of the reasons for deciding on the provisions[5]:
    - Identification and assessment of the benefits and costs of the environmental, economic, social and cultural effects[6]:
    - Assessment of the risk of acting or not acting *if there is uncertain or insufficient information* [7]: and
    - Summarising of any advice from iwi authorities and any responses to that advice[8].

7. Also, and importantly, it is expected that an evaluation under s.32 will "contain a level of detail that corresponds to the scale and significance of the environmental, economic, social, and cultural effects that are anticipated from the implementation of the proposal"[9].

8. Other provisions that signal the types of information considered necessary in plans generally, include that a District Plan may state:

    - the environmental results expected from the policies and methods[10]:

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[2] S.32(6)(b), Resource Management Act 1991.

[3] S.32(1)(b)(i), Resource Management Act 1991.

[4] S.32(1)(b)(ii), Resource Management Act 1991.

[5] S.32(1)(b)(iii), Resource Management Act 1991.

[6] S.32(2)(a), Resource Management Act 1991.

[7] S.32(2)(c), Resource Management Act 1991.

[8] S.32(4A), Resource Management Act 1991.

[9] S.32(1)(c), Resource Management Act 1991.

[10] S.75(2)(d), Resource Management Act 1991.

- the information to be contained in an application for a resource consent[11]: and

- any other information required for the purpose of the territorial authorities functions, powers, and duties under the Act[12].

9. There is also the need, referred to in the *Colonial Vineyards* summary of relevant or potentially relevant considerations, that under s.76(3):

> In making a rule, the territorial authority shall have regard to the actual or potential effect on the environment of activities including, in particular, any adverse effect.

Extent of information

10. Moving more particularly to the extent of the information that needs to be provided at Plan Change stage, which should be satisfied and not left until detailed design or resource consent stage. Clause 22 of Schedule 1 details the form of an application for a plan change as follows:

> **22 Form of request**
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> (1) A request made under clause 21 shall be made to the appropriate local authority in writing and shall explain the purpose of, and reasons for, the proposed plan or change to a policy statement or plan and contain an evaluation report prepared in accordance with section 32 for the proposed plan or change.
>
> (2) Where environmental effects are anticipated, the request shall describe those effects, taking into account clauses 6 and 7 of Schedule 4, in such detail as corresponds with the scale and significance of the actual or potential environmental effects anticipated from the implementation of the change, policy statement, or plan.
>
> [underlining added]

11. Plan Change applications will also frequently be subject to further information requests under cl.23, which will usually be responded to, though can be declined on the understanding that they may be rejected for insufficient information.

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[11] S.75(2)(g), Resource Management Act 1991.

[12] S.75(2)(h), Resource Management Act 1991.

12. The reference to the matters in clause 6 and 7 (reproduced as an Appendix to these submissions), and Schedule 4 more generally under cl.23, which are required to be considered in the case of resource consents, does not suggest that all details in terms of actual methods of implementation should be left to considered as part of a subsequent resource consent process. As cl.22 clearly states the level of detail should correspond to the scale and significance of actual or potential environmental effects anticipated.

13. And for a plan change that will introduce rules, s.76(3) indicates that the decision maker shall have regard to the effects of the activities, in particular adverse effects. This formulation does appear to be another way of saying that the decision maker should have particular regard to adverse effects.

14. The direction to "have regard to" particular matters provides a decision maker with discretion regarding the weight to be given to a matter. The High Court in *NZ Co-operative Dairy Co Ltd v Commerce Commissioner* [13]commented:

> *"*We do not think there is any magic in the words 'have regard to'. They mean no more than they say. The tribunal may not ignore the statement. It must be given genuine attention and thought, and such weight as the tribunal considers appropriate. But having done that the tribunal is entitled to conclude it is not of sufficient significance either alone or together with other matters to outweigh other contrary considerations which it must take into account in accordance with the statutory function."

15. While, according to the Planning Tribuanal in *Marlborough District Council v Southern Ocean Seafoods Ltd* [14], having particular regard:

> "… is an injunction to take the matter into account, recognising it as something important to the particular decision and therefore to be considered and carefully weighed in coming to a conclusion."

16. The injunction under s.32 is to "examine" the matters listed under s.32(1). The change is then also subject to further evaluation under s.32AA "for any changes that have been made to or are proposed for, the proposal since the [s.32] evaluation report was completed". Again, the examinations under s.32 are repeated and the must "be undertaken at a level that corresponds to the scale and significance of the changes".

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[13] [1992] 1NZLR 601 at 612. [no nzlii link available – copy can be provided if required]

[14] http://www.nzlii.org/cgi-bin/sinodisp/nz/cases/NZPT/1995/15.html [1995] NZRMA 220 at 228.

17. A review of plan change decisions reveals that the approach to the level of information and satisfaction required of the decision maker will vary, as the above summary suggests, according to the scale and significance of the effects and of the changes. In some cases, the information provided is considered insufficient on key issues (e.g. *Self Family Trust v Auckland Council* [15]). In *Orewa Land Ltd v Auckland Council* [16] the High Court considered that the Environment Court had failed to analyse rules to determine whether adverse effects would be adequately covered under future resource consents. However, the approach in *Orewa* was distinguished in *Rational Transport Society Inc v NZTA* [17], an appeal against a Board of Enquiry decision on Transmission Gully, where "most appropriate" was seen as not necessarily the same as "superior" but rather was analogous to "suitable".

18. However, that decision did not clarify the extent of information required to satisfy the decision maker. It was focused on whether the decision makers conclusions were open to them.

19. It is accepted that, for most plan changes, there will be a point at which the decision maker is satisfied of the fact that the proposal, including any mitigation measures, are achievable and will sufficiently address any actual or potential adverse effects. However, it is submitted that there will be a spectrum upon which a plan change sits. The spectrum can be seen as extending from the creation of straightforward and foreseeable effects for which mitigation is clearly available and achievable, to those in which the effects themselves are more complex, which in turn makes the applicability and availability of mitigation less certain, and therefore requiring further justification when considering the plan change itself.

20. There are three reasons why WDC submits that the panel does need to be particularly sure regarding the outcomes proposed by PC31:

    20.1. The history of the site and the previous conclusions that this level of intensification is not justified at this site and is likely to have adverse effects:

    20.2. The fact that the Applicant is seeking to utilise the responsive provisions and the NPS-UD to overcome the absence of strategic compatibility with the proposal. This should require an applicant to

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[15] http://www.nzlii.org/nz/cases/NZEnvC/2018/49.html [2018] NZEnvC 49, [2018] NZRMA 323, see: Part 5 [202]-[310] re assessing effectiveness of options.

[16] http://www.nzlii.org/cgi-bin/sinodisp/nz/cases/NZHC/2011/82.html CIV-2010-404-6912, (2011) 16 ELRNZ 417

[17] http://www.nzlii.org/cgi-bin/sinodisp/nz/cases/NZHC/2011/1776.html CIV-2011-485-2259, [2012] NZRMA 298

leave no doubt that what they are proposing is appropriate and will, in all circumstances be the most appropriate way to fulfil the purpose of the RMA: and

20.3. That the nature of potential effects, in particular as they relate to constraints on transport, wastewater and stormwater. These carry the potential that an inability to effectively mitigate effects or provide infrastructure could limit the ultimate total of dwellings that can be built, thereby undermining the overall significance of the proposal, as judged under the NPS-UD.

21. It remains unclear why, for example, more testing of the water table to better identify the likely impacts from stormwater, and the mitigations that have been suggested, could not have been carried out. In the context of a proposal like PC31, that the WDC says is novel to the extent that it seeks to achieve an outcome that has previously been deemed unworkable, the need for greater certainty on the effectiveness of mitigation should be required. The same could be said for transport concerns and purported solutions.

22. In the circumstances and having regard to the numerous matters that need to be considered, the WDC says that there needs to be a high level of confidence in terms of potential mitigation methods. To date it is not accepted (pending the outcomes of witness caucusing) that this has been fully achieved.

Dated: 15 August 2023

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Andrew Schulte
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(as submitter)