Before an Independent Hearings Panel
Appointed by Waimakariri District Council

under: the Resource Management Act 1991

in the matter of: Submissions and further submissions on the Proposed Waimakariri District Plan

and: Hearing Stream 12D: Rezoning requests (Ōhoka)

and: **Carter Group Property Limited**
(Submitter 237)

and: **Rolleston Industrial Developments Limited**
(Submitter 160)

Legal submissions on behalf of Carter Group Property Limited and Rolleston Industrial Developments Limited

Dated: 20 June 2024

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LEGAL SUBMISSIONS ON BEHALF OF CARTER GROUP PROPERTY LIMITED AND ROLLESTON INDUSTRIAL DEVELOPMENTS LIMITED

INTRODUCTION

1 These legal submissions are made on behalf of Carter Group Property Limited (Submitter 237) and Rolleston Industrial Developments Limited (Submitter 160) (*Submitters*). The Submitters made submissions to the Waimakariri District Council (*Council*) on the Proposed Waimakariri District Plan (*PDP*) to rezone approximately 156 hectares of rural zone land at Ōhoka.

2 These legal submissions address the following:

2.1 The proposed rezoning, as requested by the Submitters;

2.2 Council's reliance on PC31 evidence and rezoning under Hearing Stream 12E;

2.3 Relevant terminology, policies, and objectives of the National Policy Statement on Urban Development 2020;

2.4 Constraints on urban developments within the Waimakariri District;

2.5 Concerns relating to amenity and character;

2.6 Relevance of versatile soils on the Site;

2.7 Stormwater concerns in regard to the proposed rezoning;

2.8 Provision of infrastructure within the Waimakariri District;

2.9 Application of the Greater Christchurch Spatial Plan; and

2.10 Scope of the Submitter's original submission.

THE PROPOSAL

3 The land that is the subject of the rezoning submission comprises approximately 156 hectares of land at Ōhoka, being 511, 531, 535 & 547 Mill Road and 290 & 344 Bradleys Road (*Site*). It is currently proposed to be zoned Rural Lifestyle Zone (*RLZ*) in the PDP.

4 The Submitters seek to rezone the Site from RLZ to a number of specified zones to enable a residential development supported by a local commercial centre and open space (*Proposal*).

5 As stated in the section 42A report, the Proposal is similar but not identical to the rezoning sought through Private Plan Change RCP031 (*PC31*) to the Operative Waimakariri District Plan, which

was heard by an Independent Hearing Panel in the second half of 2023.

6 The Proposal is not just a residential subdivision enabling 850 new houses in a manner consistent with the objective and national direction noted above. It is a carefully considered and designed master plan development. Great care has been taken to ensure that the Proposal integrates with and enhances the existing Ōhoka village, including through:

6.1 additional commercial retail facilities that cater for local convenience shopping and services with potential for work and office spaces;

6.2 a developer funded bus service for at least 10 years that would connect Ōhoka and Kaiapoi and that would integrate with existing public transport services.

6.3 off-street parking;

6.4 a 106-stall park n ride facility for public transport;

6.5 a hardstand area that could cater for the local farmers' market in the winter season;

6.6 provision for a primary school and a retirement village;

6.7 provision for a polo field and associated facilities;

6.8 a substantial blue-green network that provides opportunities for movement, recreation, and the ecological enhancement of waterways, open green spaces and riparian margins; and

6.9 a well-connected network of multi modal movement and high amenity streets and public facilities that complements the existing setting.

7 The Submitters have proposed bespoke rules and developed an Outline Development Plan (*ODP*) package, which properly manages any potential effects of the Proposal and addresses all concerns raised by the Council and further submitters.

8 The Proposal will satisfy a currently unmet demand for housing within the Greater Christchurch in the context of a district that is currently not providing enough residential development capacity, all while contributing to Greater Christchurch as a well-functioning urban environment.

RELIANCE ON PC31 EVIDENCE AND REZONINGS UNDER HEARING STREAM 12E

9 At the outset, we raise two natural justice issues that have arisen through the course of the PDP process, specifically in relation to the following:

9.1 Council's reliance on evidence and documents from the PC31 process, which are not in evidence before the Panel; and

9.2 Assessment of the Proposal against alternative rezonings within Hearing Stream 12E and which should be the subject of evidence in this hearing stream. These issues are discussed in turn below.

Council reliance on PC31 evidence

10 As noted above, the Proposal, to an extent, was assessed as part of PC31. However, the Submitters have been deliberate in ensuring that the evidence provided by Submitters in relation to the PDP is independent and autonomous to evidence provided through the PC31 process and directly addresses the reasons why PC31 was declined. In other words, the Proposal has 'moved on'.

11 As the Panel is aware, they are not bound by the PC31 decision, and in any instance, the Submitters consider that many issues need to be assessed against a new framework and circumstances and updated evidence. Thus, the Submitters have been very specific not to simply repeat evidence that was presented at the PC31 hearing.

12 The Submitters are concerned by the content of the section 42A report, where **Mr Willis** cherry-picks parts of the PC31 decision and has elected to rely only on these parts. **Mr Willis** also proceeds to disagree with other aspects of the PC31 decision where it does not suit his conclusion, while omitting to mention the findings of the PC31 decision in respect of these.

13 While the Submitters are aware that some issues will be similar to those addressed in the PC31 decision, those findings should not be relied upon, particularly given that decision has been appealed to the Environment Court. The Panel must decide on the legal submissions and evidence it has before it which is not the same as the PC31 panel had before them. Instead, it is the Submitters understanding that each issue must be comprehensively assessed to ensure that any analysis is considered in the context of only the up-to-date information the Panel has before it.

Comparisons with rezoning under Hearing Stream 12E

14 Further, the Submitters are concerned with the standing of information coming forward in the PDP Hearing Stream 12E which is relied on by **Mr Willis** and others. This will occur after hearing Stream 12D.

15 Throughout the section 42A report, **Mr Willis** has made comparisons between the Proposal and the rezonings proposed under Hearing Steam 12E. Of note:

15.1 Paragraphs [96] and [145] indicate that if the Panel identifies insufficient capacity, these should be addressed through the rezoning submissions before the Hearing Panel under Hearing Stream 12E. Further, **Mr Yeoman** indicates that he will be providing overall evidence on growth, supply, demand, and capacity in the context of Hearing Stream 12E.[1]

15.2 Paragraph [163] notes that a comparison of the various rezoning proposals will be provided in section 42A report for Hearing Stream 12E. That is critical information that should be in this hearing with the witnesses able to comment on it in the overall presentation of the Submitters' case.

15.3 Paragraphs [96] and [126] identify specific aspects of the Proposal (connectivity and productive capacity, respectively), and state that these aspects should be considered against alternative rezonings under Hearing Stream 12E. Leaving that information to another hearing stream report is unfair.

16 In consideration of the section 42A report making comparisons to the rezonings proposed under Hearing Stream 12E, the Submitters consider that where information has been referenced and not shared in the section 42A report for Hearing Stream 12D, inherent issues pertaining to natural justice are raised.

17 The Submitters have not had an adequate opportunity to assess updated capacity evidence and alternative rezoning proposals under the PDP, and it is unclear how the Panel will be considering these in relation to their decision on the Proposal.

18 There are issues as to whether there is scope within their submission for the submitters to appear at Hearing Stream 12E, but in any event, this comes after the Submitters have presented their case on Hearing Stream 12D and know what they are facing with the section 42A report and evidence of other submitters.

19 The Submitters note that there is no direction in the National Policy Statement on Urban Development 2020 (*NPS-UD*) that requires councils, where they have a number of proposals providing for significant development capacity before them, to weigh these against each other and choose the best ones. Policy 8 (discussed in further detail later in these submissions) requires councils to be responsive to each and every proposal as it comes forward,

[1] Officer's Report: Rezoning – Ōhoka Rezonings, 31 May 2024 at Appendix C - evidence of Mr Yeoman on Economic Matters, at [1.5].

provided the two limbs are met, that is before them irrespective of any other proposal that may also be before the Council.

20 As set out further in these legal submissions, however, to the extent that the Panel is able to consider the merits of rezoning proposals against each other in the context of the PDP review, this Proposal is not comparable to the rezoning proposals that will be considered in Hearing Stream 12E (which are within Rangiora, Kaiapoi, Woodend/Pegasus). The Proposal, as demonstrated through evidence, is intended to meet a different demand to those three towns. Rezonings in those three towns are not substitutable with what is being proposed here and is one of few proposals before the Panel which would provide significant development capacity outside of the three main towns.

NPS-UD

21 It is agreed that the correct application of the NPS-UD is fundamental to the determination of the Proposal.

22 It should be emphasised that the application of the NPS-UD is as much an evidential matter as a legal matter. These submissions do not repeat all aspects of the relevant evidence that assesses the Proposal in terms of the NPS-UD; however, they highlight the key information and issues of interpretation and contention regarding its application.

What is the urban environment?

23 Clause 1.3(1)(b) of the NPS-UD directs that the NPS-UD applies to planning decisions by any local authority that affect an 'urban environment.'

24 'Urban environment' is defined in the NPS-UD as:

> *"means any area of land (regardless of size, and irrespective of local authority or statistical boundaries) that:*
>
> *(a) is, or is intended to be, predominantly urban in character; and*
>
> *(b) is, or is intended to be, part of a housing and labour market of at least 10,000 people"*

25 The 'urban environment' definition, as contained within the NPS-UD, is extremely broad. In fact, it is defined so broadly that it would be capable of encompassing a number of varying and overlapping urban environments.

26 What constitutes an 'urban environment' under the NPS-UD was the subject of a planning joint witness statement (*JWS*) dated 26 March 2024:

26.1 In respect of the first limb of the definition (subclause (a)):

(a) All experts agreed that:

(i) land contained within the existing urban areas, greenfield priority areas, future development areas and other areas contained within the projected infrastructure boundary[2] are (or are intended to be) predominantly urban in character; and

(ii) in addition to (i), other areas within Greater Christchurch may also be (or are intended to be) predominantly urban in character but would be subject to a case-by-case assessment.

(b) **Mr Thomson, Mr Phillips, Ms Kealey, Ms Brown, Ms Aston, Mr Walsh, Ms Pearson, Ms Edmonds, Ms McClung** and **Ms Mitten** consider that all of the Greater Christchurch area is predominantly urban in character or intended to be. We note that **Ms McClung** is the Council officer for Hearing Stream 8: subdivision, and **Ms Mitten** is giving evidence for Environment Canterbury.

(c) **Mr Willis, Mr Wilson, Mr Buckley, Mr Allan, Ms Ruske-Anderson, Mr McGillan, Ms Manhire** and **Ms Milosavljevic** do not consider that all of the Greater Christchurch area is predominantly urban in character, nor is it intended to be.

26.2 In respect of the second limb in the definition (subclause (b)), all experts agree that all of Greater Christchurch is part of the Christchurch labour and housing market of at least 10,000 people.

27 This is an issue of interpretation. On a plain and ordinary reading, the definition provides that:[3]

27.1 The phrase 'any area of land (regardless of size, and irrespective of local authority or statistical boundaries)' implies that an 'urban environment' will, or can, apply over large geographical areas rather than discrete settlements or urban zones.

27.2 The term 'intended to be' in subclause (a) clearly provides for areas that are not presently urban in character and/or part of a housing and labour market of at least 10,000 people.

27.3 The phrase 'intended to be' does not state who must have the intention (i.e. there is no reference to the intention of a

[2] As identified in Map A of the Canterbury Regional Policy Statement.

[3] Statement of Evidence of Jeremy Phillips, 5 March 2024 at [15].

territorial authority, or an intention expressed in a Future Development Strategy). This is notable when read alongside Policy 8 and Clause 3.8 of the NPS-UD, which contemplates unanticipated or out-of-sequence developments coming forward from private developers.

27.4 The phrase 'predominantly urban in character', anticipates that areas that are non-urban (i.e. rural, open space, etc) in character may also fall within an urban environment. This supports the view that the definition is focused on wider areas (which may include a mix of urban and non-urban land), rather than specific settlements or urban zones which would be exclusively urban.

27.5 The phrase '*part of a… market'* has similar implications as the preceding point, insofar that it anticipates areas that form a component part of a larger market, rather than areas that are a market in and of themselves. If the latter were the intention, the words '*part of'* would not be needed in the definition.

27.6 '*Housing and labour markets of at least 10,000 people'* may not operate within strict geographical boundaries pertaining to specific settlements or urban zones and a broader focus may be required when attempting to define the spatial extent of those markets.

28 Whether Ōhoka is considered to be within an 'urban environment' for the purposes of the NPS-UD goes to the core of whether the NPS-UD applies to the proposed rezoning and is essentially a threshold question.

29 It is clear from the Region's planning documents that 'Greater Christchurch' is intended to by the 'urban environment' for Canterbury in the context of the NPS-UD:

29.1 The NPS-UD Appendix, Table 1, defines "Christchurch" as a Tier 1 urban environment comprising of the Canterbury Regional Council (*ECan*), Christchurch City Council, Selwyn District Council, and Waimakariri District Council as its Tier 1 local authorities.

29.2 Our Space[4] stated on page 6, "*the Partnership has determined that the Greater Christchurch area shown in Figure 1 should be the geographic area of focus for the Update and the relevant urban environment for the purposes of the NPS-UDC requirements*".[5]

[4] Our Space 2018-2048: Greater Christchurch Settlement Pattern Update Whakahāngai O Te Hōrapa Nohoanga.

[5] Statement of Evidence of Jeremy Phillips, 5 March 2024 at [24]-[25].

29.3 The Greater Christchurch Spatial Plan (*GCSP*) (as endorsed on 16 February 2024) is related to the same geographical area as Our Space and provides that Greater Christchurch is the urban environment for the purposes of the NPS-UD and that Ōhoka (which it expressly identifies as an 'existing urban area') is clearly within this.[6]

29.4 The Canterbury Regional Policy Statement (*CRPS*) requires that "at least sufficient development capacity" for housing is enabled in the Greater Christchurch urban environment and states explicitly that the Greater Christchurch area shown in Map A is the Tier 1 urban environment for the purposes of the NPS-UD.[7]

30 In considering the application of the NPS-UD in this case, the Ōhoka township (or other townships or urban settlements within Greater Christchurch such as Prebbleton, Lincoln, West Melton, etc) clearly fall within the 'urban environment' of Greater Christchurch. Other decisions by various Commissioner and the PDP panel in the Selwyn District have adopted this interpretation.

31 Conversely, adopting the view that Ōhoka is not within the urban environment and/or that the Site is not within Ōhoka cannot easily reconcile with the interpretation of the 'urban environment' contained within the NPS-UD.

32 In this context, the term 'urban environment' in the NPS-UD being referenced to Greater Christchurch is the only interpretation that makes sense.

33 In the alternative, if a narrow interpretation was adopted as for example, only including specific existing townships, it would ignore how urban Canterbury functions and would be contrary to the purpose of the NPS-UD in that it would prevent responsiveness and local authorities from adapting to emerging issues, such as climate change.

34 Further, if a specific site was required to itself either be predominantly urban in character and/or identified by a Council in a district plan for the NPS-UD to apply, this would completely cut across the responsive planning framework in the NPS-UD (discussed later in these submissions). In such a case, the NPS-UD would never apply to unanticipated plan changes and Policy 8 and Clause 3.8 of the NPS-UD, which provides for unanticipated or out-of-sequence developments (i.e. the definition cannot prevent the intention being expressed by the proponent of a private plan change or a submitter seeking rezoning that may be unanticipated).

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6 Statement of Evidence of Jeremy Phillips, 5 March 2024 at [26]-[29].

7 Canterbury Regional Policy Statement, Policy 6.2.1a - Principal reasons and explanation.

35 A number of other private plan change decisions[8] and rezoning decisions (now operative)[9] have also determined in the context of the NPS-UD that the 'urban environment' is defined by the boundaries of Greater Christchurch.

36 This was also the position taken by the Panel in PC31 (which is not referenced by **Mr Willis**), where it stated:[10]

> *"In our view, what is the "urban environment", or "urban environments" is contextual and is not able to be determined in a vacuum. It will depend on what is being considered and whether it is at a regional, subregional, or district scale. Here we are concerned with a plan change to the Waimakariri District Plan, and the site falls within an area that is included within the Greater Christchurch sub regional area. We have considered the issues both in terms of the urban environment of the Waimakariri District and the urban environment of Greater Christchurch Area."*

36.1 And concluded that:[11]

> *"For the purposes of the NPS-UD Ōhoka township is within the Greater Christchurch Urban Environment and it is part of the Waimakariri and Greater Christchurch housing and labour market of more than 10,000 people."*

37 While **Mr Willis** in the section 42A report expresses some reservations on this issue, he ultimately considers that on the balance of probabilities, the Site is likely part of the 'urban environment'.[12]

38 Having established Ōhoka as being within the 'urban environment' for the purposes of the NPS-UD, we now turn to some of the key provisions of the NPS-UD the Panel must consider in making decisions on this rezoning request.

Objective 2

39 Objective 2 of the NPS-UD provides:

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

40 **Mr Akehurst's** evidence is that the Proposal will achieve this objective by improving competition as house buyers in the district

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8 PC67 and PC68 to the Selwyn District Plan.

9 Including PC66, PC75, PC76, PC79 and PC80 at Rolleston, PC67 at West Melton and PC68 in Prebbleton.

10 Independent Hearing Panel Decision Report on Plan Change 31, 27 October 2023 at [50].

11 Independent Hearing Panel Decision Report on Plan Change 31, 27 October 2023 at [53].

12 Officer's Report: Rezoning – Ōhoka Rezonings, 31 May 2024 at [197].

are provided more choice, and this has the effect of ensuing housing affordability is improved.[13]

41 In his evidence **Mr Yeoman** has stated that the average lot from the Proposal will be relatively unaffordable (at over $550,000 per lot) and therefore dwellings built in the area will not improve affordability within the wider market as they will have a sale price of over $1 million.[14] It is not clear what **Mr Yeoman** would consider 'affordable' or on what basis he makes this statement.

42 We do not agree and point out **Mr Jones'** response in his supplementary evidence that:[15]

42.1 The housing market changes all of the time, and he now estimates a 600m^2 residential section likely be around $450,000.

42.2 He does not agree that $550,000 for such a section is unaffordable and notes this is quite typical for similar sections of this size in similar locations around Greater Christchurch.

42.3 In his experience, the price of housing is significantly influenced by the amount of supply available – which currently for the Ōhoka area is very limited.

Objective 6

43 Objective 6 of the NPS-UD is highly relevant to this Proposal and relates to the responsive planning framework (Policy 8) discussed further below. It provides:

> "*Local authority decisions on urban development that affect urban environments are:*
>
> (a) *integrated with infrastructure planning and funding decisions; and*
>
> (b) *strategic over the medium term and long term; and*
>
> (c) *responsive, particularly in relation to proposals that would supply significant development capacity."*

44 All of these factors are relevant to the Proposal. However, we note that these subsections can pull against each other and therefore should be considered in the round.

45 For example, subclause (c) refers to the requirement in Policy 8 for Councils to be responsive to proposals that would supply significant

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13 Statement of Evidence of Gregory Akehurst, 5 March 2024 at [75].

14 Officer's Report: Rezoning – Ōhoka Rezonings, 31 May 2024 at [149].

15 Supplementary Statement of Evidence of Christ Jones, 13 June 2024 at [50].

development capacity. We discuss Policy 8 in further detail later in these submissions, and note that it relates to 'unanticipated' plan changes. It is difficult to see a situation where an unanticipated development could demonstrate it was, from the very start, integrated with existing funding and planning decisions. In this context, we consider:

45.1 A Proposal must demonstrate that it is at least -*co* for it to integrate, in time, with infrastructure planning and funding decisions (we discuss this further in the specific context of the Proposal below at [182]);

45.2 Subclause (a) needs to be read together with subclause (c). To this end, Objective 6 would require infrastructure planning and funding decisions to themselves be responsive to proposals that would supply significant development capacity.

45.3 It would not be responsive, and would not be in accordance with the NPS-UD, to decline proposals that would supply significant development capacity simply on the basis that they are not integrated with current infrastructure planning and funding documents as that would be circular and would render the NPS-UD nugatory.

46 In respect of subclause (b), and the requirement for decisions to be strategic over the medium and long term, the Panel is referred to the evidence of **Mr Walsh** that the Proposal would meet this on the basis that:[16]

46.1 There is an identified shortfall in capacity in the medium and long terms, discussed in further detail below, and the Proposal would contribute significantly to development capacity to meet this shortfall;

46.2 The Site is located adjacent to an existing urban area within the Greater Christchurch urban environment with relatively few constraints to development when compared to other land across the District; and

46.3 The Proposal would contribute to the Greater Christchurch urban environment (as set out in the next section of these submissions) and would significantly improve the amenities and facilities of the existing Ōhoka urban area (including, for example, through the provision of public transport to the area which would not have occurred otherwise).

47 On this basis, the Proposal is consistent with and supported by Objective 6 of the NPS-UD.

[16] Statement of Evidence of Tim Walsh, 5 March 2024 at [341].

Policy 1: Well-functioning urban environments

48 Policy 1 of the NPS-UD states that planning decisions must contribute to well-functioning urban environments; as stated above, the 'urban environment' in the Proposal's context is Greater Christchurch.

49 A well-functioning urban environment is defined in Policy 1 as an urban environment that, as a minimum:

> *"(a) have or enable a variety of homes that:*
>
> *(i) meet the needs, in terms of type, price, and location, of different households; and*
>
> *(ii) enable Māori to express their cultural traditions and norms; and*
>
> *(b) have or enable a variety of sites that are suitable for different business sectors in terms of location and site size; and*
>
> *(c) have good accessibility for all people between housing, jobs, community services, natural spaces, and open spaces, including by way of public or active transport; and*
>
> *(d) support, and limit as much as possible adverse impacts on, the competitive operation of land and development markets; and*
>
> *(e) support reductions in greenhouse gas emissions; and*
>
> *(f) are resilient to the likely current and future effects of climate change."*

50 In regard to the Proposal, Policy 1 requires that it must ***contribute*** to the well-functioning urban environment of Greater Christchurch. The list of matters contained in Policy 1 is not a set list of criteria that must each be met by the particular Proposal, but rather, the Proposal is required to contribute towards a well-functioning urban environment, which, at a *minimum*, exhibits the above features.

51 The Submitters agree with **Mr Willis** in the section 42A report that the Proposal should contribute to the well-functioning urban environment in a positive or at least a neutral way.[17]

52 The criteria outlined in Policy 1 from (a)-(f) can inherently pull against each other. For example, supporting the accessibility and creation of natural and open spaces will not usually limit as much as possible the adverse impacts on the competitive operations of land and development markets. It is, therefore, a requirement for the Council to make planning decisions that, on their balance, contribute toward a 'well-functioning urban environment' overall. Provided a proposal contributes to at least some, and not substantially detract the other criteria, on balance, that proposal would 'contribute' to the wider urban environment being well-functioning.

53 Further, the wording of 'at a minimum' contained in Policy 1 further indicates that additional criteria may be identified, in addition to

[17] Officer's Report: Rezoning – Ōhoka Rezonings, 31 May 2024 at [206].

those outlined in Policy 1 above, which help contribute towards a 'well-functioning urban environment'.

54 In any case, the Submitter's case is that the Proposal will contribute to all of the matters in (a)-(f) for the Greater Christchurch well-functioning urban environment, and for completeness, we have discussed each of the 'minimum' criteria in turn below.

Enable a Variety of Homes – subsection (a)

55 There are currently two residential zones proposed within the Site, one with a minimum lot size of 600m^2 and the other with a minimum lot size of 2500m^2 with an average size of 3,300m^2. This differentiates from the lifestyle blocks (minimum 4 hectares) currently offered within Ōhoka, but is consistent with the proposed zoning for Ōhoka in the PDP – which provides for Settlement Zone (*SETZ*) and Large Lot Residential Zone (*LLRZ*) at the same densities as proposed in the Proposal.

56 The rezoning would contribute to the provision of a variety of homes that meet the needs of people in terms of type, price, and location of different households within the Greater Christchurch context. The Submitters agree with **Mr Willis** that one development does not need to provide for a full range of housing types on its own.[18] The minimum attributes in Policy 1 relate to Greater Christchurch as the urban environment, and this proposal need only contribute to these.

Enable a Variety of Sites – subsection (b)

57 **Mr Walsh** states that the provision for local convenience goods and services for existing and future residents of Ōhoka is made via the proposed Local Centre Zone, including hosting the farmer's market.[19] This contributes towards provision of a variety of business sector sites.

58 Regardless, as stated above and by **Mr Willis** in the section 42A report, it is not for (nor possible for) this Proposal alone to provide fully for subsection (b) requirements for the entirety of the Greater Christchurch urban environment.[20]

59 Instead, each subsection must be assessed against the framework of contributing to the Greater Christchurch urban environment in totality so that it can function well.

Accessibility – subsection (c)

60 This subclause is concerned with ensuring urban environments have good accessibility for all people between housing, jobs, community

[18] Officer's Report: Rezoning – Ōhoka Rezonings, 31 May 2024 at [207].

[19] Statement of Evidence of Tim Walsh, 5 March 2024 at [170].

[20] Officer's Report: Rezoning – Ōhoka Rezonings, 31 May 2024 at [209].

services, natural spaces, and open spaces, including by way of public or active transport.

61 Firstly, it is emphasised that good accessibility in the context of this criterion relates to Greater Christchurch having good accessibility, not every single urban area in Greater Christchurch. In any event though, the Proposal does achieve this in that it:[21]

61.1 It has expressly been designed to facilitate good accessibility (including in terms of walking and cycling facilities) internally within the Site, and provide good connections to the existing Ōhoka area, which provide good accessibility to community services, natural spaces, and open spaces.[22]

61.2 While accessibility to wider Greater Christchurch in terms of cycling and pedestrian connections is more limited,[23] subsection (c) does not require that all accessibility be by way of active transport. Ōhoka is one of the closest urban areas to Christchurch City, and Christchurch International Airport in the Waimakariri District, and is easily accessible from the State Highway.[24] This provides people with good accessibility to jobs.

61.3 In terms of public transport, the conclusions that **Mr Willis** reaches that the Proposal would not be well serviced by exiting of planned public transport is not supported by evidence.[25] The section 42A report disregards the significance of the Proposal proffering a frequent and integrated bus service from Ōhoka to Kaiapoi for 10 years. He relied on **Mr Binder**'s evidence who questions whether people will use the service, and therefore raises concerns with the viability of this service after the 10 years.[26] **Mr Milner** has responded to these concerns[27] and notes that the proposed service provides far greater certainty than existing public transport services provided by ECan. The provision of this bus service alone would mean the Proposal would

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21 And for the same reasons (and the Statement of Evidence of Tim Walsh, 5 March 2024) we consider the Proposal is Objective 3 which only requires one or more of the subsections to be met.

22 Statement of Evidence of Garth Falconer, 5 March 2024.

23 Noting that the Proposal is located along a proposed cycleway in the Council's Walking and Cycling Network Plan. Refer to the Statement of Evidence of Nick Fuller, 5 March 2024.

24 Statement of Evidence of Carl Davidson, 13 June 2024; Supplementary Statement of Evidence of Chris Jones, 13 June 2024 at [6.2(a)(i) and (ii)].

25 Officer's Report: Rezoning – Ōhoka Rezonings, 31 May 2024 at [241].

26 Officer's Report: Rezoning – Ōhoka Rezonings, 31 May 2024 at Appendix D: Proposed District Plan – Servicing, Geotech, Hazards, Transport – Ōhoka, 16 May 2024; Shane Binder Memorandum, 27 May 2024.

27 Statement of Evidence of Simon Milner, 5 March 2024.

'contribute' to the good accessibility of Greater Christchurch as contemplated by Policy 1.

62 We note that decision-makers elsewhere in Greater Christchurch have found that similarly located areas (for example, West Melton in the Selwyn District) are able to meet this criterion.

63 This criterion is also closely related to Clause 3.8(2)(b) which requires the Proposal to be 'well-connected along transport corridors'. The Ministry for the Environment's guide on understanding and implementing the responsive planning policies (the *MfE Guide*) provides some guidance on what is meant:

> "*Ideally, the transport corridors should be connected via a range of transport modes or there should be plans for this in the future. At a minimum, the corridors should be designed to allow for a range of modes in the future… This would enable genuine transport choices and less reliance on private vehicles. While transport infrastructure may not exist when the plan change is promoted, there needs to be confidence the infrastructure will be funded for delivery and maintenance in the future... If possible, people should not need to rely solely on private vehicles to travel within the proposed development, to and/or from other urban areas, or to access essential services like employment, and health or community services.*"

64 For the same reasons as we set out above, we consider the Proposal is 'well-connected along transport corridors.'

Competitive Operation of Land and Development Markets – subsection (d)

65 These submissions have covered how the Proposal supports the competitive operation of land and development markets above in the context of Objective 2. That is not repeated that here.

66 As discussed further below, the evidence of **Mr Akehurst** and **Ms Hampson** shows that the Proposal will help to meet identified shortfalls in development capacity in the medium-term and long-term (plus the required competitive margin) within the urban environment of Greater Christchurch. Meeting demand (plus the required competitive margin) ensures the competitive operation of land and development markets, especially in Ōhoka, ensuring that a fair price is achieved.

67 As such, the Proposal will support the competitive operation of land and development markets.

Greenhouse Gas Emissions – subsection (e)

68 Under subclause (e) of Policy 1 of the NPS-UD, 'well-functioning urban environments' are required to support reductions in greenhouse gas (*GHG*) emissions.

69 Foremost, in regard to the application of subclause (e), we note that the implementation of the Proposal itself is not required to reduce greenhouse gas emissions but to ***contribute*** toward Greater Christchurch supporting reductions in greenhouse emissions, by enabling and encouraging people to live lower emission lifestyles.

70 This can be done by ensuring new development is of a form and design that practically takes steps to support people (i.e., residents of the proposed rezoning/development) in reducing their overall GHG footprint, such as those being proposed as part of this rezoning request.[28]

71 Requiring every planning decision to demonstrate an actual reduction in GHGs is an onerous and unrealistic expectation and not in alignment with the purpose of its inclusion. Implementing this as a strict test would always prevent the construction of greenfield development, bare land which will inevitably generate less greenhouse gas emissions than developed land. That would be a counter intuitive interpretation.

72 In the section 42A report, **Mr Willis** applies an incorrect test of actually requiring individual developments to demonstrate actual reductions in GHG emissions.[29] He relies on the findings outlined in the Becca Report.[30] **Mr Willis** quotes the conclusions of the Becca Report which states:[31]

> *"This review indicates that the GHG emissions associated with this Proposal would be higher than either the existing agricultural land use or similar scale development in planned growth areas in existing centres such as Kaiapoi, Rangiora, Woodend or Pegasus."*

73 As **Mr Farrelly** has outlined in his supplementary evidence, nowhere in the NPS-UD does it require the proponent of a Proposal to calculate the Proposal's GHG emissions against a baseline scenario and demonstrate that the Proposal's GHGs will be less than the baseline scenario,[32] whether that baseline be the existing land use, or other proposals for development in the district.

74 Additionally, although the NPS-UD does not require a reduction in absolute emissions to be achieved from a change in land use, **Mr Farrelly** has regardless assessed the assumptions made in the BECA report and pointed out a number of flaws.

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28 Supplementary Statement of Evidence of Paul Farrelly, 13 June 2024 at [19].

29 Officer's Report: Rezoning – Ōhoka Rezonings, 31 May 2024 at [223]: "*I therefore consider that the proposed level of development at this location would not contribute to a reduction in GHG…*"

30 Officer's Report: Rezoning – Ōhoka Rezonings, 31 May 2024 at [131]- [132] and [223]-[225].

31 Officer's Report: Rezoning – Ōhoka Rezonings, 31 May 2024 at [131].

32 Supplementary Statement of Evidence of Paul Farrelly, 13 June 2024 at [6].

Resilient to Climate Change – subsection (f)

75 **Mr Bacon** states he is satisfied with the flood risk for the Site and understands that the flood modelling includes an allowance for climate change. On this basis, **Mr Willis** has stated that he agrees with **Mr Wash** the proposed rezoning will contribute to Greater Christchurch being resilient to the effects of climate change.[33]

Policy 2: Provide 'at all times' at least 'sufficient development capacity'

76 Policy 2 of the NPS-UD requires that:

> *"Tier 1, 2, and 3 local authorities, at all times, provide at least sufficient development capacity to meet expected demand for housing and for business land over the short term, medium term, and long term."*
>
> *(Emphasis ours).*

77 'Sufficient development capacity' is defined in Clause 3.2 of the NPS-UD, which states:

> ***"3.2 Sufficient development capacity for housing***
>
> (1) *Every tier 1, 2, and 3 local authority must provide at least sufficient development capacity in its region or district to meet expected demand for housing:*
>
> *(a) in existing and new urban areas; and*
>
> *(b) for both standalone dwellings and attached dwellings; and*
>
> *(c) in the short term, medium term, and long term.*

78 The word 'sufficient' is further defined in Clause 3.2(2) of the NPS-UD as:

> (2) *In order to be **sufficient** to meet expected demand for housing, the development capacity must be:*
>
> *(a) plan-enabled (see clause 3.4(1)); and*
>
> *(b) infrastructure-ready (see clause 3.4(3)); and*
>
> *(c) feasible and reasonably expected to be realised (see clause 3.26); and*
>
> *(d) for tier 1 and 2 local authorities only, meet the expected demand plus the appropriate competitiveness margin (see clause 3.22)."*

[33] Officer's Report: Rezoning – Ōhoka Rezonings, 31 May 2024 at [227].

79 The definitions of what is considered short, medium, and long-term "plan-enabled" and "infrastructure-ready" are contained in Clause 3.4 of the NPSUD and are as follows:

> ***"3.4 Meaning of plan-enabled and infrastructure-ready***
>
> (3) *Development capacity is **plan-enabled** for housing or for business land if:*
>
> *(a) in relation to the short term, it is on land that is zoned for housing or for business use (as applicable) in an operative district plan*
>
> *(b) in relation to the medium term, either paragraph (a) applies, or it is on land that is zoned for housing or for business use (as applicable) in a proposed district plan*
>
> *(c) in relation to the long term, either paragraph (b) applies, or it is on land identified by the local authority for future urban use or urban intensification in an FDS or, if the local authority is not required to have an FDS, any other relevant plan or strategy. in relation to the short term, there is adequate existing development infrastructure to support the development of the land*
>
> (4) *For the purpose of subclause (1), land is **zoned** for housing or for business use (as applicable) only if housing or business use is a permitted, controlled, or restricted discretionary activity on that land.*
>
> (5) *Development capacity is **infrastructure-ready** if:*
>
> *(a) In relation to the short term, there is adequate existing development infrastructure to support the development of the land*
>
> *(b) in relation to the medium term, either paragraph (a) applies, or funding for adequate development infrastructure to support development of the land is identified in a long-term plan*
>
> *(c) in relation to the long term, either paragraph (b) applies, or the development infrastructure to support the development capacity is identified in the local authority's infrastructure strategy (as required as part of its long-term plan)."*

80 If the Council identifies an insufficiency in development capacity over the short, medium, or long term, Clause 3.7 the NPS-UD requires the local authority to immediately notify the Minister for the Environment and amend Resource Management Act 1991 (*RMA*) planning documents to increase development capacity for housing.

81 The NPS-UD sufficiency test is framed as a minimum level of development capacity required, not a maximum.

82 We note that the PDP was notified on 18 September 2021. In accordance with section 79(1) of the RMA, it fulfils the Council's

obligation to review the Waimakariri district plan every 10 years and make sure that it is "*up to date with national policies and regulations that have come into force since the last District Plan was prepared*."[34] This includes the NPS-UD.

83 The NPS-UD is directive in its requirement under Policy 2 that local authorities **must** 'at all times' provide at least sufficient development capacity to meet the expected demand for housing and business land over the short, medium, and long term.

84 The direction of 'at all times' is supported by ECan and the Council's requirement to undertake quarterly monitoring under Clause 3.9 of the NPS-UD, including in relation to monitoring the proportion of development that has been realised in each zone. Clause 3.37(2) and 3.7 of the NPS-UD further state that where it has been identified that development outcomes are not being realized and/or there is an insufficiency in short, medium, or long-term capacity, planning documents must be amended.

85 In the context of the PDP process, 'at all times' in Policy 2 must mean at all times during the life of the plan, not just at the start of its life. In this respect:

85.1 At the end of the life of the plan, in ~2034, the short-term, medium-term, and long-term will have shifted such that the short-term would be 2034-2037, the medium-term would be 2034-2044, and the long-term would be 2034–2064).

85.2 On the assumption that the PDP will not be replaced until at least ~2034, Policy 2 of the NPS-UD requires consideration of the provisions of plan-enabled housing capacity for the short, medium, and long term at all times through the life of the plan, right through to 2034.

85.3 As the definition of medium-term plan-enabled development capacity, under Clause 3.4 of the NPS-UD, requires the development capacity be zoned land in either an operative district plan or in a proposed district plan, and the Council is not resolving to undertake another district plan review until at least ~2034, the PDP is required to provide zoned land to meet capacity for development until 2044 (i.e., a 20-year perspective, being the medium term in 2034 when the Council is likely to have its next full district plan review).

85.4 We note that Mr Yeoman has not considered the potential sufficiency of development capacity at any other point in time during the plan's life. Irrespective of whether there is currently sufficient development capacity or not (discussed further below), it is highly likely that there will be an insufficiency at some point in time during the life of the plan.

[34] https://www.waimakariri.govt.nz/council/district-development/district-plan.

As such, it is inevitable and foreseeable that at some point in time during the life of the plan, the Council will be non-compliant with the 'at all times' requirement in the NPS-UD. When this occurs, the Council would need to notify the Minister for the Environment under Clause 3.7 of the NPS-UD and change the PDP to provide for medium-term development capacity for housing.[35]

85.5 While we accept that there may be other methods the Council could provide capacity during the life of the plan, such as through Council initiated plan changes,[36] acceptance of private plan changes by developers,[37] or changes to strategic planning documents, there is little certainty in these. It would be an irresponsible council that puts itself in that position at the beginning of the life of the plan knowing that it cannot meet the requirement to provide sufficient development capacity under the NPS-UD and rely instead on some other future and unplanned mechanism to remedy a foreseeable shortfall.

86 Further, we emphasise that nothing in the NPS-UD directs the Council to avoid the oversupply of development capacity and that the minimum requirement under the NPS-UD is the provision of housing capacity to meet expected demand, plus the competitiveness margin. In fact, if anything, oversupply is encouraged.

87 We turn now to consider the current sufficiency of development capacity situation.

Waimakariri District Plan Development Capacity

88 The Waimakariri Capacity for Growth Model 2022 (*WCGM22*) has been used to demonstrate development capacity sufficiency within the Waimakariri District and demonstrate that the Council is meeting its requirements under the NPS-UD. **Mr Yeoman** says the WCGM22 has indicated that there is sufficient development capacity in the short-medium term (2023-2033) and the long-term (2023-2053).

89 Primarily, we point out that the capacity assessment in terms of the short-term, medium-term, and long-term of the WCGM22 is based on the time the model was developed. Given time has passed, it is likely that the model would indicate a short-term, medium-term,

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35 Officer's Report: Rezoning – Ōhoka Rezonings, 31 May 2024 at [158]: We note Mr Willis agrees that a shortfall in capacity is identified, and the NPS-UD requires this to be addressed.

36 Noting the inherent difficulty in obtaining sufficiently large and unconstrained land in order to be able to provide capacity of any significance.

37 Noting the inherent uncertainty of relying on private individual's intentions to bring forward land for development.

and long-term shortfall towards the end of the life of the PDP (i.e ~2034) if it were updated.

90 At the PC31 hearing, **Mr Akehurst** and **Mr Sexton** demonstrated that the WCGM22 overestimated capacity in the district for the medium term. The evidence found that there was a medium-term development capacity shortfall of 1,239 dwellings in the district and that this shortfall may persist into the long term.

91 The panel for PC31 agreed with this evidence stating:

> "*We have reviewed the explanations to our questions in Minute 5 provided in Mr Yeoman's response and the memoranda of Mr Sexton and Mr Walsh attached to Mr Akehurst's supplementary evidence and accept that it does demonstrate the limitations of the modelling exercise undertaken by Formative, due to the fact that it presents a theoretical picture of development capacity and was not extensively ground truthed by Formative. We conclude on the evidence of Mr Sexton, Mr Walsh and Mr Akehurst that there is a very real likelihood that the model has overstated residential capacity. It was also Mr Yeoman's opinion, that the WCGM22 modelling results illustrated that the margin (without accounting for the additional matters identified by Mr Sexton in Figure 1), is small. The degree to which Mr Yeoman's modelling is reliant on additional capacity as a consequence of the Housing Intensification Planning Instrument being advanced as part of the District Plan review is not clear, and will no doubt be subject to scrutiny in the review of the District Plan currently underway.*"[38]
>
> "*If Mr Akehurst is correct, then the Council has not provided sufficient housing capacity in the medium and long term and positive action is required by the Council. We note here that the Council is currently reviewing the District Plan and Environment Canterbury is intending to notify a review of the CRPS later next year. We would strongly recommend that irrespective of the outcome of this application the Council take steps to review the calculations provided by Formative and review realisability of the areas currently identified for future urban growth within the district.*"[39]
>
> "*We note that the NPS-UD addresses how Councils should respond to identified shortfalls in capacity. Part 3, clause 3.7 directs steps that a Council is required to follow in the event that a shortfall is identified, including alerting the Minister, and amending the relevant planning documents, which could,*

[38] Independent Hearing Panel Decision Report on Plan Change 31, 27 October 2023 at [81].

[39] Independent Hearing Panel Decision Report on Plan Change 31, 27 October 2023 at [84].

as occurred with Change 1, be subject to a streamlined process, rather than the standard Schedule 1 process. We accept that consideration of a private plan change, which delivers significant development capacity and contributes to a well-functioning environment within a timeframe where a shortfall might exist is another legitimate process."[40]

92 **Mr Willis** acknowledges that the Council has not yet addressed the issues of the model overstating residential capacity and says the concerns will be addressed generally through the PDP process.[41] However, **Mr Yeoman** maintains that the WCGM22 is conservative, as it consistently overestimates demand and underestimates capacity, and that the modelling is reliable.[42]

93 The Formative Report[43] (which sets out the results of the WCGM22 for the purposes of the PDP) concludes that there is sufficient development capacity to meet demand in the medium and long terms for the district as a whole (noting that the Formative Report does find insufficiency for Woodend/Pegasus in the medium and long terms). We note that the Formative Report does not to take into account the findings of the PC31 decision, nor does it correct any of the errors in the WCGM22 which **Mr Yeoman** acknowledged in the course of the PC31 hearing.[44]

94 In respect of district wide capacity, the Submitters' economic evidence for this hearing stream addresses:

94.1 The matter of the WCGM22 continuing to overestimate feasible development capacity, and **Mr Akehurst** and **Ms Hampson** both express concerns in their evidence about the veracity of the WCGM22.[45]

94.2 That based on the WCGM22 demand projections (inclusive of the competitiveness margin), there is a shortfall of capacity to meet demand for the district in the medium-term.[46]

95 **Mr Willis** considers that the issue of residential development capacity within the Waimakariri District is central to the

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40 Independent Hearing Panel Decision Report on Plan Change 31, 27 October 2023 at [85].

41 Officer's Report: Rezoning – Ōhoka Rezonings, 31 May 2024 at [145].

42 Officer's Report: Rezoning – Ōhoka Rezonings, 31 May 2024 at Appendix C - evidence of Mr Yeoman on Economic Matters, at [2.5].

43 Waimakariri Residential Capacity and Demand Model – IPI 2023, prepared by Formative Limited, 8 December 2023.

44 Statement of Evidence of Gregory Akehurst, 5 March 2024 at [17] and [32]; Statement of Evidence of Chris Sexton, 5 March 2024 at [32].

45 Statement of Evidence of Natalie Hampson, 4 March 2024; Statement of Evidence of Gregory Akehurst, 4 March 2024.

46 Statement of Evidence of Natalie Hampson, 4 March 2024 at [12], [67] and [69]; Statement of Evidence of Gregory Akehurst, 4 March 2024 at [58].

consideration of the proposed rezoning.[47] While we do not disagree, it is noted that even if the Panel do not find on the evidence that there is any form of capacity shortfall in the medium and long terms, it is not precluded from recommending the Site be rezoned. As set out later in these submissions, the responsive planning framework under Policy 8 does not require a shortfall in order for the Council to be responsive.

Location-specific development capacity

96 As outlined in **Mr Akehurst's** evidence, the WCGM22 (and the associated Formative Report) does not clearly explain how demand has been estimated for different areas within the Waimakariri District, other than for the three townships of Rangiora, Kaiapoi, and Woodend/ Pegasus.[48]

97 We understand **Mr Yeoman** is of the view that the NPS-UD does not require Council's to provide development capacity to meet specific locational demands.[49]

98 This is not a correct interpretation of the NPS-UD. While Policy 2 of the NPS-UD does not specifically use the word 'location' in terms of needing to provide sufficient development capacity, it is a necessary implication deriving from the words "*to meet expected demand*". Demand, as demonstrated in the evidence,[50] is necessarily location-specific as different locations provide different types of housing which appeal to different peoples' needs. Further, reading the NPS-UD as a whole, it is clear that local authorities are required to assess capacity and sufficiency in different locations:

98.1 Clause 3.24(1)(b) requires housing demand assessments (which the WCGM22 forms part of for the Greater Christchurch urban environments):

> "*…estimate, for the short term, medium term, and long term, the demand for additional housing in the region and each constituent district of the tier 1 or tier 2 urban environment:*
>
> *(a) in different locations; […]"*

98.2 Clause 3.25(2)(a) requires that within housing demand assessments the development capacity must be quantified as numbers of dwellings "*in different locations, including in existing and new urban areas*".

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47 Officer's Report: Rezoning – Ōhoka Rezonings, 31 May 2024 at [143].

48 Statement of Evidence of Gregory Akehurst, 4 March 2024 at [36].

49 Officer's Report: Rezoning – Ōhoka Rezonings, 31 May 2024 at Appendix C - evidence of Mr Yeoman on Economic Matters, at [5.16].

50 Statement of Evidence of Chris Jones, dated 5 March 2024 at [15]-[23]; Statement of Evidence of Natalie Hampson, 4 March 2024; Statement of Evidence of Gregory Akehurst, 4 March 2024.

98.3 Clause 3.2(a) requires a local authority to provide sufficient development capacity in '*existing and new urban areas*', and the GCSP Map 2: The Greater Christchurch spatial strategy (1 million people) identifies a range of locations, including Ōhoka as an existing urban area.

99 Because Council's requirements under Policy 2 are fundamentally based on its monitoring and assessment of development capacity (as set out in the clauses of the NPS-UD), this necessarily means that Council must provide sufficient development capacity in different locations of demand within its urban environment (i.e. the Greater Christchurch part of the Waimakariri District).

100 The evidence of **Mr Akehurst** demonstrates clearly that there is demand for residential development capacity within Greater Christchurch outside of the three main Waimakariri District towns, and that at present, there is insufficient development capacity to meet this demand in both the medium and long terms.[51]

101 We understand **Mr Yeoman's** response is that any demand from outside of the three main towns can be met by (i.e. is substitutable with) the capacity being provided in the three main towns. **Ms Hampson** in her supplementary evidence does not agree with this,[52] and her views in this respect are strongly supported by the more qualitative evidence of **Mr Jones** and **Mr Davidson**.

102 **Mr Jones**, through his extensive experience in real estate, has identified the independent market for residential land in the Ōhoka area.[53] Further, he states that buyers who are unable to secure properties in Ōhoka will generally opt for alternatives in the adjacent areas of Mandeville, Swannanoa, Fernside, or Clarkville, which are separate but similar markets to Ōhoka. **Mr Jones** is confident that the residential product that would be enabled by the Proposal would be in high demand. In his experience, there is a significant shortage in supply in Ōhoka specifically. The research conducted by **Mr Davidson** demonstrates that there is a clear preference for Ōhoka as a location to live, when compared to other areas in the District.[54]

103 We note that there are very few (if any) alternative proposals seeking rezoning of land in the PDP process that would meet the above-identified shortfall in development capacity outside Rangiora, Kaiapoi, and Woodend/Pegasus.

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51 Noting that **Mr Akehurst's** identified capacity shortfalls do not account for the shortfall in capacity at the end of the PDP's life (i.e., ~2034), which would ultimately be significantly worse than the shortfall identified currently.

52 Supplementary Statement of Evidence of Natalie Hampson, 18 June 2024 at [62].

53 Statement of Evidence of Chris Jones, 5 March 2024 at [9].

54 Statement of Evidence of Carl Davidson, 13 June 2024.

104 The rezoning sought by the Submitters in Ōhoka provides an appropriate solution to:

104.1 Meet the Council's obligations under Clause 3.2 of the NPS-UD to provide 'at all times' development capacity (including the shortfall identified by **Mr Akehurst** and **Ms Hampson**); and

104.2 Provide for development capacity to meet identified demand outside of the three main towns, and within the Ōhoka area.

105 It is the Submitter's case that the Proposal is required to provide at least sufficient development capacity at all times, and for the Council to meet its obligations under Policy 2 of the NPS-UD.

Policy 8: Responsive planning framework

106 Objective 6 and Policy 8 of the NPS-UD establish what is now referred to as the 'responsive planning framework'.

107 Policy 8 of the NPS-UD states that:

> "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:
>
> (a) unanticipated by RMA planning documents; or
>
> (b) out-of-sequence with planned land release."

108 It is well accepted by now that the NPS-UD overcomes 'hard-lines' in planning documents dictating where growth in a region/district should or should not occur. In Canterbury, plan changes and rezoning proposals have been successful in areas outside Map A of the CRPS.

109 The CRPS needs to be read alongside and reconciled with the higher-order and later in time, national direction of the NPS-UD. Notably, Objective 6.2.1.3 of the CRPS provides:

> *Recover, rebuilding and development are enabled in Greater Christchurch through a land use and infrastructure framework that: […]*
>
> *3. <u>avoids</u> urban development outside of existing urban areas or greenfield priority areas for development, unless expressly provided for in the CRPS;*

110 'Avoid' in the context of this objective, which previously significantly constrained new locations for growth in Greater Christchurch, should be read down in light of the NPS-UD to be read as meaning: "*except if otherwise provided for in the NPS-UD, avoid…*" or "*…unless*

expressly provided for in the CRPS or by Objective 6 and Policy 8 of the NPS-UD."

111 **Mr Willis** accepts this in his section 42A report, which states:

> *"Where the NPS-UD applies (i.e. within an urban environment), this higher order document carries significant weight as the Proposed Plan must give effect to it. Of direct relevance to this s42A report are the responsive planning provisions (e.g. Objective 6(c) and Policy 8), which enable consideration of unanticipated or out of sequence development Proposals. In my opinion, these responsive provisions enable consideration of urban development outside of the areas identified in the CRPS Map A for urban growth (existing urban areas, greenfield priority areas and FUDAs), subject to meeting the tests set out in the NPS-UD and with further assessment against the remaining provisions of Chapter 6 of the CRPS as required."*[55]
>
> *"Whether the Proposal gives effect to the directive provisions of the CRPS (and is consistent with the GCSP) is not in dispute - both myself and Mr Walsh agree that the Proposal does not give effect to these.32 That the NPS-UD responsive planning provisions provide a pathway to step outside the directive provisions in Chapter 6 of the CRPS (and the GCSP and DDS) is also not in dispute – both Mr Walsh and I agree on that."*[56]

112 For completeness, we provide our full analysis of the interaction between the NPS-UD and CRPS in **Appendix 1**.[57]

113 Having demonstrated that the responsive planning framework in the NPS-UD does apply to the Proposal and that it is not precluded by any avoid provisions in the CRPS, we turn to consider whether the proposed rezoning would meet Policy 8 of the NPS-UD.

114 It is clear that this rezoning request is unanticipated by RMA planning documents – in short, if it was anticipated or planned, it would have been identified in Map A of the CRPS and in the Proposed District Plan. Therefore, the responsive planning framework is invoked, which requires decision-makers to be 'responsive' to plan changes where the tests in Policy 8 are met.

115 Being 'responsive' in the context of the NPS-UD refers to the Council's response to private plan changes or rezoning proposals. Clause 3.8 of the NPS-UD expresses this as needing to give "*particular regard*" to a plan change. This includes being receptive to, catering to, and adapting to proposals that meet the tests in Policy 8. It requires a willingness and openness from the Council to consider and turn their mind to the merits of new proposals even when these are not planned or anticipated by the Council. For

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55 Officer's Report: Rezoning – Ōhoka Rezonings, 31 May 2024 at [50].

56 Officer's Report: Rezoning – Ōhoka Rezonings, 31 May 2024 at [328].

57 This legal analysis has been provided and accepted by independent decision-makers at other hearings in the Selwyn District.

example, it would not be responsive of the Council to, in respect of such proposals:

115.1 To decline a proposal on the sole basis that:

(a) it is not part of planned future development in current planning documents; and/or

(b) the infrastructure required to service the proposal is not planned for in the Council's current funding strategy; and/or

115.2 To ignore clear market signals that capacity is required in certain locations to meet specific residential housing demands; and/or

115.3 To lack flexibility and adhere too strictly to current planning documents which dictate where growth is to be located within a district or region.

116 We note that there is no requirement in Policy 8 that a proponent must demonstrate an insufficiency or shortfall in development capacity in order to invoke the responsive planning framework, although this may be a relevant factor in considering whether a proposal 'adds significantly to development capacity'.

117 We now turn to the tests in Policy 8. For the responsive planning framework to apply, the rezoning request must demonstrate that:

117.1 It will add significantly to development capacity; and

117.2 It will contribute to well-functioning urban environments, including that it is well-connected along transport corridors as per Clause 3.8.

118 We consider these against the Proposal.

Add significantly to development capacity

119 We note that Clause 3.8(3) of the NPS-UD requires that regional councils are to include criteria in their RPS for determining what rezoning requests will be treated, for the purpose of implementing Policy 8, as "*adding significantly to development capacity*". This criteria has not yet been added to the CRPS and we understand this to also be covered in ECan's intended review of the CRPS which is not anticipated to be notified until December 2024.

120 Nevertheless, these criteria are not required for local authorities to give effect to Policy 8 in the interim (i.e., prior to the criteria being developed), and it is appropriate for a decision maker to consider whether a particular rezoning request would add significantly to development capacity on a case-by-case basis. We note that this is an evidential matter.

121 The MfE Guide, for example, notes that such criteria could include:[58]

1. Significance of scale and location

The extent to which the scale and location of the proposed development:

- *contributes to a well-functioning urban environment, recognising its spatial context. For example, is the size of the development (in terms of housing numbers) large enough to make a substantial contribution to the housing bottom lines and housing needs that have been identified through housing and business development capacity assessments or other evidence?*

- *is large enough to support a range of transport modes in the future, or is located in an area already well connected to transport (discussed below).*

2. Fulfilling identified demand

- *The extent to which the proposed development provides for identified demand. Demand may be identified in several ways including:*

    - *housing and business development capacity assessments and information monitored under subpart 3 will help identify gaps in the supply of certain types of housing and business land (eg, demand for dwellings, land for Māori housing, one- and two-bedroom dwellings and affordable houses)*

    - *the market will signal where there is a future demand for housing and business land*

- *The yield of the Proposal relative to identified future needs (eg, a mix of land uses, higher housing densities to provide more houses and the provision of a range of housing typologies).*

3. Timing of development

Whether the development can be delivered at pace. If a development is proposed to occur earlier than planned for in council planning documents, it needs to be shown there is a commitment to, and capacity available, for delivering houses and businesses within this earlier timeframe.

4. Infrastructure provision (development infrastructure and additional infrastructure)

[58] https://environment.govt.nz/assets/Publications/Files/Understanding-and-implementing-responsive-planning-policies.pdf

The extent to which the Proposal demonstrates viable options for funding and financing infrastructure required for the development.

122 The MfE Guide also states that the criteria should not undermine competitive land markets and responsive planning by setting unreasonable thresholds and that the criteria should have a strong evidence base.

123 **Mr Willis** and **Mr Boyes** both refer to the definition of 'development capacity' in the NPS-UD, which states:

> *the capacity of land to be developed for housing or for business, based on:*
>
> *(a) the zoning, objectives, policies, rules and overlays that apply in the relevant proposed and operative RMA planning documents; and*
>
> *(b) the provision of adequate development infrastructure[59] to support the development land for housing or business use.*

124 **Mr Willis** notes[60] a tension between subclause (a) of this definition and the Policy 8 of the NPS-UD, as the development capacity from an unanticipated development could never be based on the zoning or rules etc of RMA planning documents, or it wouldn't be unanticipated.

125 He fails to apply the same logic to subclause (b) of the definition regarding the provision of infrastructure, and instead states that in order to meet the 'significant development capacity test' the Proposal needs to be serviced with infrastructure.[61] He concludes that based on his concerns regarding stormwater infrastructure (which we address in further detail below) "*there is sufficient uncertainty that it cannot currently be argued that the Proposal adds significantly to development capacity*."[62]

126 It would be non-sensical for a proposal to constitute 'development capacity' only if it is serviced (currently) with development infrastructure, as implied by **Mr Willis**. Rather, that it can be serviced with development infrastructure. To take any other view would likely render the responsive planning framework redundant as it is nonsensical for unanticipated development to have existing

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59 Which itself is further defined in the NPS-UD as "*to the extent they are controlled by a local authority or council controlled organisation…: (a) network infrastructure for water supply, wastewater, or stormwater (b) land transport.*"

60 Officer's Report: Rezoning – Ōhoka Rezonings, 31 May 2024 at [264].

61 Officer's Report: Rezoning – Ōhoka Rezonings, 31 May 2024 at [265].

62 Officer's Report: Rezoning – Ōhoka Rezonings, 31 May 2024 at [266].

servicing. Councils do not plan infrastructure to service developments that are not anticipated.

127 With reference to the MfE Guide, the Proposal will 'add significantly to development capacity' because:

Significance of scale and location

127.1 The Proposal will contribute to well-functioning urban environments (as set out at paragraph [48]);

127.2 The size of the development (in terms of housing numbers) is large and will make a substantial contribution to the housing bottom lines and the housing needs identified in capacity assessments. **Mr Akehurst** considers the potential for 850 dwellings proposed would be a significant addition of capacity.[63] We note both **Mr Willis** and **Mr Yeoman** agree that the number of lots is significant.[64]

127.3 The Proposal is large enough to support a range of transport modes in the future. It is a large enough for the Submitters to proffer to fund a 10-year bus service, and the critical mass which will come with the rezoning is likely to influence Council transport decisions on different modes into the future – such as potentially bringing forward funding of the proposed cycle network.[65]

Fulfilling identified demand

127.4 As set out in the evidence of **Mr Walsh, Mr Akehurst**, and **Mr Jones** the capacity provided by the Proposal will contribute significantly to the demonstrated market demand for housing outside of the main towns of the Waimakariri District.

127.5 The Proposal will provide for a mix of housing typologies which are not currently readily available in this location of demand.

127.6 This is particularly important in the context of a district that is not currently meeting the requirement to provide sufficient development capacity (as discussed at paragraph [76]) to meet demand and particularly the specific demand in Ōhoka, outside of the three towns, that the Proposal seeks to cater to.

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63 Statement of Evidence of Gregory Akehurst, 5 March 2024 at [85].

64 Officer's Report: Rezoning – Ōhoka Rezonings, 31 May 2024 at [263]; Officer's Report: Rezoning – Ōhoka Rezonings, 31 May 2024 at Appendix C - evidence of Mr Yeoman on Economic Matters, at [3.20].

65 The proposal is located along a proposed cycleway in the Council's Walking and Cycling Network Plan. Refer to the Statement of Evidence of Nick Fuller, 5 March 2024.

127.7 **Mr Willis** has stated in his section 42A report that it is less clear what happens if a shortfall in development capacity is not identified for the district.[66] He goes on to state that 'at least' in Policy 2 suggests additional capacity could be provided, but that "*without a clear capacity requirement driving the rezoning, the need to be responsive under Policy 8 is significantly lessened.*"

127.8 We do not agree. While sufficiency in development capacity across the District is one of the relevant considerations of whether a proposal 'adds significantly to development capacity', Policy 8 and the requirement to be responsive exists regardless of this whether there is sufficient capacity or not. If the NPS-UD had intended that Councils don't need to be as responsive where it is shown the district has sufficient capacity, it would have expressly stated so.

Timing of development

127.9 Should the rezoning be approved, the Submitters will commence the delivery of development capacity as soon as possible. **Mr Carter** has stated in his evidence[67] that the first stage of the development is likely to be built and occupied by 2028, which we understand is the earliest this could occur accounting for infrastructure connections, subdivision, and construction. His evidence states that he expects the final stage to be built and occupied by around 2038-2040.

Infrastructure provision (development infrastructure[68] and additional infrastructure[69])

127.10 The evidence of the Submitters demonstrates that there are viable options for funding and financing of both development infrastructure and additional infrastructure. We discuss infrastructure provision in more detail later in these submissions.

128 On the basis of the above, the Proposal clearly would add significantly to development capacity and therefore meets the first test in Policy 8 of the NPS-UD.

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66 Officer's Report: Rezoning – Ōhoka Rezonings, 31 May 2024 at [158].

67 Statement of Evidence of Tim Carter, 13 June 2024 at [21].

68 Defined in the NPS-UD as "*to the extent they are controlled by a local authority or council controlled organisation…: (a) network infrastructure for water supply, wastewater, or stormwater (b) land transport.*"

69 Defined in the NPS-UD as "*(a) public open space (b) community infrastructure as defined in section 197 of the Local Government Act 2002 (c) and transport (as defined in the Land Transport Management Act 2003) that is not controlled by local authorities (d) social infrastructure, such as schools and healthcare facilities (e) a network operated for the purpose of telecommunications (as defined in section 5 of the Telecommunications Act 2001) (f) a network operated for the purpose of transmitting or distributing electricity or gas*"

Contribute to well-functioning urban environments

129 As set out earlier in these legal submissions (paragraph [48]), the Proposal would contribute to the well-functioning urban environment of Greater Christchurch.

130 We note the requirement to be "well-connected along transport corridors" under Clause 3.8(2)(b) is also considered in paragraph [63] as it relates to Policy 1(c).

131 The Proposal meets both limbs of the Policy 8 test, so the responsive planning framework is invoked, and the Council is required to be responsive to this rezoning request.

CONSTRAINTS

132 In the section 42A report, **Mr Willis** comments on a number of planning constraints in the Waimakariri District, identified by **Mr Walsh**. The constraints are discussed in the context of consideration of urban growth options spatially.

133 We note that the discussion of the Waimakariri District's constraints, as they relate to the Proposal and its wider context, is inherently relevant to Hearing Stream 12E and whether development capacity may be provided in alternative locations.

134 We have raised natural justice concerns in paragraphs [14]—[20] above regarding how the Proposal can be compared to submissions under Hearing Stream 12E. For completeness, however, we address the comments of **Mr Willis** within the section 42A report.

135 Ultimately, this analysis indicates that there are few opportunities for providing development capacity in the Waimakariri District.

Flooding in Kaiapoi

136 In regard to flooding in Kaiapoi, **Mr Willis** has suggested that if the land is raised sufficiently, it would no longer be identified as 'high hazard' and no longer exhibit the same flooding characteristics and flood risks.[70]

137 We note the Submitters provided the Panel with comprehensive legal submissions (9 February 2024) on this issue in Hearing Stream 10A. We do not repeat these here, but in summary, there are serious policy and planning constraints to the development of 'high hazard' land in the CRPS that cannot be overcome by the simple raising of 'high hazard' land.

138 **Mr Willis** further dismisses **Mr Walsh's** suggestions that raising the land would be considered a non-complying activity under the operative or PDP, noting past greenfield developments in Kaiapoi.[71]

[70] Officer's Report: Rezoning – Ōhoka Rezonings, 31 May 2024 at [168].

[71] Officer's Report: Rezoning – Ōhoka Rezonings, 31 May 2024 at [171].

However, **Mr Walsh** anticipated this retort and, in his supplementary evidence, has revisited his primary evidence, identifying the difference between those greenfield developments and the rest of the Kaiapoi future development area.[72]

139 In the context of these flooding constraints in Kaiapoi and the inability to raise the land, there are serious issue with the development of new development area in Kaiapoi that we do not consider can be overcome under the current planning framework.

140 In contrast, flooding can be managed within the Site. Flooding concerns in relation to the Proposal are addressed below in paragraphs [171]-[181].

Airport Noise

141 In relation to the remodelled aircraft noise contours, **Mr Willis,** in the section 42A report, considers that the noise contours that apply are the noise contours shown in Map A of the CRPS and not a version of the amended remodelled contours that will be included in the RPS.[73] This is incorrect.

142 The direction in Policy 6.3.5(4) of the CRPS is to avoid new development within the land subject to levels of 50dBA Ldn or greater, as shown by a noise contour. The emphasis of the policy is on land which is subject to levels of 50dbA Ldn as established by the evidence before the Panel in Hearing Stream 10A and not the noise contour (as shown by Map A of the CRPS).

143 Overall, the policy thrust of the CRPS is clear, as it:

143.1 recognises the social and economic importance of Christchurch Airport, and the need to integrate land use development with infrastructure;

143.2 seeks to avoid incompatible activities within areas subjected to 50dBA Ldn or more which may result in reverse sensitivity effects on Christchurch Airport;

143.3 recognises that Christchurch Airport should not be compromised by urban growth and intensification; and

143.4 enables Christchurch Airport's safe, efficient and effective operation and development.

144 The Submitter's position is that Policy 6.3.5(4) applies to land within the remodelled contour as this is based on the most up-to-date technical information as to where noise-sensitive activities are likely to experience noise of 50dBA Ldn or greater.

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[72] Supplementary Statement of Evidence of Tim Walsh, 13 June 2024 at [70].

[73] Officer's Report: Rezoning – Ōhoka Rezonings, 31 May 2024 at [174].

145 The remodelled contour imposes a significant development constraint (by way of an avoid policy) on Kaiapoi and areas which the Council relies on as providing sufficient capacity under the NPS-UD. It would be contrary to the CRPS to allow new development under the remodelled contour.

146 Notwithstanding these legal obligations, as stated in **Mr Walsh's** planning evidence, the planning experts endorse a precautionary approach to considering the potential impact of aircraft noise, whereas **Mr Willis** seems to be of the view that the remodelled contours ought to be ignored until the RPS review is complete.[74] This was not the view taken by the Council Officer (Ms Oliver) in the context of Christchurch's Plan Change 14 where she adopted the approach of applying the remodelled 50 dB Ldn contour in the interim as the best current evidence of where effects will be experienced.

Versatile Soils

147 We address the issue of versatile soils in more detail later in these submissions in the specific context of the soils on the Site.

148 In the context of constraints on other land, we do not disagree with **Mr Willis** that urban development is not necessarily precluded on land where the National Policy Statement of Highly Productive Land 2022 (*NPS-HPL*) applies.[75] However, the tests for allowing development on such land contain high thresholds, and one cannot be certain without undertaking a case-by-case analysis of a site whether or not those tests could be met.[76]

Sites of Significance to Māori / Special Purpose Zone

149 In the section 42A report, **Mr Willis** assesses the sites and areas of significance to Māori (*SASM*), including the Kaianga Nohanga Special Purpose Zone, and states that they are not determinative of where urban development can and cannot be located.[77]

150 Regarding **Mr Willis's** statements, we note that under the NPS-UD, a 'well-functioning urban environment' under subsection (a) must enable Māori to express their cultural traditions and norms at minimum.

151 While we agree that urban development within the SASM and the Kaianga Nohanga Special Purpose Zone is not impossible, in accordance with the NPS-UD, development in these areas must be

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[74] Supplementary Statement of Evidence of Tim Walsh, 13 June 2024.

[75] Officer's Report: Rezoning – Ōhoka Rezonings, 31 May 2024 at [181].

[76] National Policy Statement for Highly Productive Land 2022 (September 2022), clause 3.7.

[77] Officer's Report: Rezoning – Ōhoka Rezonings, 31 May 2024 at [182].

led by tangata whenua. This places constraints on large portions of the development community.

CONCERNS RELATING TO AMENITY AND CHARACTER

152 Much of **Mr Willis'**, **Mr Nicholson's**, **Mr Boyes'**, **Mr Goodfellow's**, and **Mr Knott's** concerns relating to amenity and character turn on the policy directions in the Proposed Plan or the District Development Strategy (*DDS*),[78] which require 'recognizing' or 'retaining' the existing character of Ōhoka.[79]

153 **Mr Willis**, **Mr Nicholson**, **Mr Boyes**, **Mr Goodfellow**, and **Mr Knott**, and some of the proposed provisions of the PDP, largely (and in some cases completely[80]) disregard the clear direction in the NPS-UD that:

> *Objective 4: New Zealand's urban environments, including their amenity values, develop and change over time in response to the diverse and changing needs of people, communities, and future generations.*
>
> *Policy 6: When making planning decisions that affect urban environments, decision-makers have particular regard to the following matters: […]*
>
> *(b) that the planned urban built form in those RMA planning documents may involve significant changes to an area, and those changes:*
>
> *(i) may detract from amenity values appreciated by some people but improve amenity values appreciated by other people, communities, and future generations, including by providing increased and varied housing densities and types; and*
>
> *(ii) are not, of themselves, an adverse effect*

154 These experts treat this issue as a requirement that must be demonstrated in order for the rezoning to be capable of being approved by the Panel. This view is based on:

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78 'Our District, Our Future' Waimakariri 2048 District Development Strategy, July 2018.

79 Officer's Report: Rezoning – Ōhoka Rezonings, 31 May 2024 at [119]; Mr Nicholson's evidence at [10.6]; Mr Boyes' evidence at [43]; Mr Goodfellow's evidence at [23]; and Mr Knott's evidence at [37].

80 In the case of Mr Goodfellow.

154.1 the statement in the DDS that "*the character of existing small settlements in the District will be retained*".[81]

154.2 the following provisions of the PDP:

> ***SD-O2 Urban development***
>
> *Urban development and infrastructure that: […]*
>
> *2. that recognises existing character, amenity values, and is attractive and functional to residents, businesses and visitors; […]*
>
> ***SETZ-O1 Settlement Zone***
>
> *Existing settlements are recognised and retain their existing character, while providing for a mixture of commercial and residential use on larger sites.*

155 It is submitted that the correct approach is taken in the supplementary evidence of **Mr Walsh**[82] where he expresses the view that references to 'existing character' in SD-O2 and SETZ-O1 of the PDP must relate to the anticipated character in the PDP, and not the current level and composition of development. **Mr Walsh** notes that the proposed SETZ zoning for Ōhoka under the PDP would allow subdivision into allotments with a minimum area of 600m^2. This would not 'retain' the currently experienced character of the settlement either. The requested rezoning simply seeks to expand the same zone south of the existing settlement.

156 Should the rezoning request be approved, it would then form part of the 'existing character' in SD-O2 and SETZ-O1, as this would be the anticipated character enabled for Ōhoka by the District Plan.

157 The PDP process provides for comprehensive consideration of all the planning provisions for the district within the legislative context, and with any necessary consequential changes. In this sense, he proposed provisions are not yet set in stone. The Panel has full discretion to amend these provisions as appropriate based on:

157.1 Submissions on these provisions; and

157.2 The consistency of these provisions against other, higher-order planning documents such as the NPS-UD.

158 If the meaning of SD-O2 and SETZ-O1 is in fact to retain the currently experienced level of development and character for settlements (which is not the case) then the minimum allotment size

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[81] 'Our District, Our Future' Waimakariri 2048 District Development Strategy, July 2018, at page 5.

[82] Supplementary Statement of Evidence of Tim Walsh, 13 June 2024 at [58]-[59].

would need to be substantially increased in Ōhoka. More fundamentally, we consider these provisions would not then be giving effect to the NPS-UD because:

158.1 This would be entirely contrary to the direction in Objective 4 and Policy 6 of the NPS-UD regarding urban environments, including amenity values (such as 'character' of a place) changing over time.

158.2 In light of this national direction, it is not appropriate for planning documents to effectively prohibit change to certain parts of the urban environment such that they are locked or frozen in time.

158.3 To do so would also have the effect of making the responsive planning framework (Policy 8) redundant in the same way that the avoid policies in the CRPS do if not properly read alongside the NPS-UD (as discussed at paragraph [126]). It would not be responsive simply to decline a proposal, that adds significantly to development capacity and contributes to well-functioning urban environments, on the basis that it would change the currently experienced amenity values.

158.4 As such, it is incumbent on the Panel to amend these provisions in a way that gives effect to the NPS-UD.[83]

159 We note **Mr Walsh** also suggests that the word 'character' in SETZ-O1 could be changed to 'characteristics'.[84] This could be another way of softening this policy to not be so rigid and restrictive of change.

VERSATILE SOILS

160 It seems to be universally accepted that the NPS-HPL does not apply to the Site because the interim definition of HPL in Clause 3.5(7)(b)(ii) excludes land subject to a Council initiated notified plan change to rezone it from general rural or rural production to urban or rural lifestyle.[85]

161 **Mr Willis** in his Section 42A report notes that the status of the Site under the NPS-HPL might change once ECan carries out its mapping of HPL land in Canterbury under Clause 3.4 of the NPS-HPL.[86]

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83 As is required under the RMA, section 75(3)(a) "*A district plan must give effect to– (a) any national policy statement; and […]*"

84 Statement of Evidence of Tim Walsh, 5 March 2024 at [290].

85 Officer's Report: Rezoning – Ōhoka Rezonings, 31 May 2024 at [42]; Memorandum of Mark Buckley (Officer for Rural Zones) to the Panel, 30 June 2023 at [19]; Memorandum of Mark Buckley (Officer for Rural Zones) to the Panel, 22 July 2023 at [8].

86 Officer's Report: Rezoning – Ōhoka Rezonings, 31 May 2024 at [125].

162 We understand the mapping will be undertaken as part of the review of the CRPS which is due to be notified in late 2024/early 2025, with submissions, hearings, and appeals on this likely to take 2+ years.

163 By this stage, the Panel will have released its decision on the PDP and the plan is likely to be operative.

164 Clause 3.4(1)(a) of the NPS-HPL provides that land mapped as HPL by the regional council must be in a general rural zone, or rural production zone. There is no ability in the NPS-HPL for a regional council to map as HPL urban or rural lifestyle zoned land.

165 In any case, the land still contains LUC 1-3 soils (being predominantly LUC 2-3) and therefore the potential loss of productive land remains a relevant issue for consideration.

166 **Mr Willis** relies on the evidence of **Mr Ford** to say "*the current rural land use is viable and that there is no compelling productivity argument to convert it to urban activities*"[87].

167 **Mr Mthamo** has thoroughly rebutted the evidence of Mr Ford insofar as it related to his evidence and the various constraints **Mr Mthamo** has identified as affecting the Site's productive use now and into the future.[88]

168 We note that **Mr Ford** refers throughout his evidence to a report prepared by Mr Everest provided at the PC31 hearing. **Mr Ford** selectively chooses parts of that report to support his view that the constraints on the Site are not significantly limiting on production, and that there is therefore a viable rural productive use for the Site.[89] In response:

168.1 We note that Mr Everest's report was included as part of the evidence package for this hearing stream (Appendix 6 to **Mr Walsh's** evidence).

168.2 While **Mr Ford** mentions[90] that Mr Everest tested each productive option for commercial viability against his criteria of achieving a specified remuneration to the owners and achieving a return on capital (*ROC*) of 4%, he fails to mention that none of the options Mr Everest considered in his report met this test, and ultimately the conclusion in that report was "*I therefore do not consider productive agriculture or*

87 Officer's Report: Rezoning – Ōhoka Rezonings, 31 May 2024 at [123].

88 Supplementary Statement of Evidence of Victor Mthamo, 13 June 2024.

89 Officer's Report: Rezoning – Ōhoka Rezonings, 31 May 2024 at Appendix F. Evidence of Mr Ford on Farm Productivity Matters, at [15] and [35].

90 Officer's Report: Rezoning – Ōhoka Rezonings, 31 May 2024 at Appendix F. Evidence of Mr Ford on Farm Productivity Matters, at [36].

horticulture to be economically viable uses of the land at the PC31 site having considered a 30 year timeframe."

168.3 In any case, we note that Mr Everest's report was prepared for the PC31 land at a time where it was not clear whether the NPS-HPL applied to the land and the purpose of the report was to inform the Submitters whether, if the NPS-HPL did apply, the exemption in Clause 3.10(1)(a) could be relied on. Because it is now clear that the NPS-HPL does not apply to the Site, there is no requirement to demonstrate that productive use is not economically viable in order for the Site to be capable of rezoning. However, it was included in **Mr Walsh's** evidence as it may be relevant to the Panel's under consideration of the potential loss of productive land as a result of the rezoning.

169 As **Mr Mthamo** rightly points out,[91] **Mr Ford** has not turned his mind to the fact that the land is zoned RLZ under the notified version of the PDP and that the subdivision of the Site into 4ha lots as anticipated by the RLZ will inevitably lead to the loss of the productive potential of this land. **Mr Mthamo** points out **Mr Ford** clearly agrees with this, as he has used this as an argument in evidence for hearing stream 12C in support of submissions seeking rezoning to LLRZ in Hearing Stream 12C.[92]

170 **Mr Willis** is of the view that it is not certain that the Site will be converted to 4ha blocks and that productive potential can still occur on 4ha blocks.[93] In response:

170.1 **Mr Carter** confirms that if the land is not rezoned, the Site will be subdivided into to 36 4ha blocks to on-sell.[94] It is therefore certain that this will occur.

170.2 The 2018 Waimakariri District Rural Character Assessment acknowledged that activity on four-hectare rural lifestyle blocks "*is typically focused on rural residential use with the balance land simply maintained as ancillary or used for small scale primary production.*"[95]

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91 Supplementary Statement of Evidence of Victor Mthamo, 13 June 2024 at [49]-[54].

92 We note Mr Sellars' supplementary evidence at [34] has considered this in some detail in response to Mr Ford's evidence and concludes the highest and best use (and therefore value) of the land is for lifestyle subdivision.

93 Officer's Report: Rezoning – Ōhoka Rezonings, 31 May 2024 at [125].

94 We note Mr Sellars' supplementary evidence at [34] concludes the highest and best use (and therefore value) of the land is for lifestyle subdivision.

95 The 2018 Boffa Miskell Waimakariri District – Rural Character Assessment, at page 2.

STORMWATER

171 The section 42A report raises a number of issues regarding the stormwater servicing for the Site.

Potential consent challenges with Regional Council

172 **Mr Willis** and **Mr Roxburgh** state that there are potential challenges in gaining consent from the Regional Council for stormwater systems that intercept the groundwater table and that these have resulted in the Proposal demonstrating that there are stormwater solutions that would avoid interception of groundwater.[96]

173 As acknowledged by **Mr Willis,**[97] this issue arises from an interpretation ECan are taking in respect of certain rules in their Land and Water Regional Plan (*LWRP*) following the Court of Appeal's decision in *Aotearoa Water Action Inc v Canterbury Regional Council*.[98]

174 To be clear, we do not agree with ECan's position on its interpretation of the rules in the LWRP as a result of the Court of Appeal's decision. We set out our reasoning in full (noting that we also presented this argument to the PC31 panel) at **Appendix 2**. We also note that **Mr Willis** does not refer to legal advice given by Buddle Finday to the Waimakariri District Council which also disagrees with ECan's interpretation.

175 We note that the panel in the PC31 decision agreed with our interpretation in this respect:[99]

> "*However, having considered the legal and evidential risks associated with groundwater interception and interpretation issues surrounding CLWRP consenting pathways, we are sufficiently confident that the Proposal has been designed to either entirely avoid the interception of groundwater or that there is a legitimate consenting pathway available to the applicant should this be required to address the risk of interception of groundwater, which may more accurately described as a diversion of water or a non-consumptive take or use, or fall within minor permitted takes (as distinct from planned interception equating to a take and use of water).*"

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96 Officer's Report: Rezoning – Ōhoka Rezonings, 31 May 2024 at [102]; Officer's Report: Rezoning – Ōhoka Rezonings, 31 May 2024 at Appendix D: Proposed District Plan – Servicing, Geotech, Hazards, Transport – Ōhoka; Colin Roxburgh Memorandum at [22(b)].

97 Officer's Report: Rezoning – Ōhoka Rezonings, 31 May 2024 at [108].

98 *Aotearoa Water Action Inc v Canterbury Regional Council* [2022] NZCA 325.

99 Independent Hearing Panel Decision Report on Plan Change 31, 27 October 2023 at [170].

176 In any case, the evidence of **Mr O'Neill** and **Mr McLeod** demonstrates that there are practical and viable options for managing stormwater from the proposed rezoning development in a way that would avoid engaging with this consenting/interpretation issue.

177 We note this is a significant issue being faced by developers all over the region, who have for some time now been designing stormwater systems to avoid needing to engage in ECan's complex interpretation. We also understand that ECan are currently considering a plan change to their LWRP to remedy this issue.

Concerns with stormwater servicing

178 **Mr Willis** and **Mr Roxburgh** raise issues regarding the proposed stormwater servicing for the Site that has resulted from the need to avoid groundwater interception.

179 **Mr O'Neill** and **Mr McLeod** have responded to those concerns in their supplementary evidence and maintain their view that the methods proposed for servicing stormwater for the Site are viable and appropriately manage any effects.

180 We further emphasise that:

180.1 Given this process relates to a rezoning request, there is currently no proposed subdivision plan. **Mr O'Neill** confirms that the proposed stormwater management for the Site will be further tested, and will need to be approved by Council (in terms of acceptability of effects) at subdivision stage. What the experts have demonstrated is that there are viable and appropriate solutions available to manage stormwater. It is not appropriate, or necessary, at this stage to go beyond that and require a subdivision plan to be prepared and a final stormwater solution to be developed.

180.2 We note that should the consenting/interpretation issue with the LWRP be resolved (i.e. ECan remedy the situation through a plan change to the LWRP), then it may well be that more conventional stormwater systems (that may intercept groundwater) will be used for the Site, such as those noted in the evidence of **Mr Keenan**.[100]

180.3 These same issues raised by **Mr Willis** and **Mr Roxburgh** were debated extensively at the PC31 hearing, where ultimately decision-makers found:[101]

"*We are satisfied that RCP031 can be adequately serviced with three waters infrastructure and that detailed design*

[100] Statement of Evidence of Mr Keenan, 13 June 2024 at [25].

[101] Independent Hearing Panel Decision Report on Plan Change 31, 27 October 2023 at [173].

matters can be appropriately addressed at subdivision stage. We are therefore satisfied that infrastructural concerns have been adequately addressed."

181 The Proposal can be adequately serviced with three waters infrastructure.

THE PROVISION OF INFRASTRUCTURE

182 It is submitter that for the purposes of rezoning, proponents must demonstrate that there are *viable* options for servicing a proposal with infrastructure,[102] as opposed to demonstrating that the current existing infrastructure is sufficient to accommodate a proposal or demonstrating exactly when and how this infrastructure would be provided.

183 It is common for developments to rely on future infrastructure upgrades in the context of a rezoning or plan change.

184 In terms of funding of such infrastructure, there are a number of commonly used mechanisms used to ensure that the costs of infrastructure are not borne by the rate payer, or solely by the Council and decision makers can be assured an option is viable or available.

Development contributions

185 Development contributions are the primary mechanism through which councils are able to obtain funding for infrastructure needed to cater for growth. The Government introduced the charges via the Local Government Act 2002 (*LGA*) to enable councils to recover from persons undertaking development a fair, equitable, and proportionate portion of the total cost of capital expenditure necessary to service growth.[103]

186 Development contributions may be charged when a council provides new or additional assessment of increased capacity and as a consequence incurs capital expenditure to provide appropriately for reserves, network infrastructure (including provision of roads and other transport, water, wastewater, and stormwater collection and management), and community infrastructure.[104] Under the LGA development contributions must be charged in accordance with a council's Development Contributions Policy.

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[102] As contemplated in the Ministry for the Environment's guide on understanding and implementing the responsive planning policies.

[103] Local Government Act 2002, s 197AA.

[104] Local Government Act 2002, s 197 and 199.

187 Under the LGA a council may require development contributions to be made, in relation to a development, when:[105]

187.1 a resource consent is granted under the RMA within its district; or

187.2 a building consent is granted under the Building Act 2004; or

187.3 an authorisation for a service connection is granted.

188 The development contribution required by the council must be consistent with the content of the Development Contributions Policy in force at the time that the application for the resource consent, building consent, or service connection was submitted, accompanied by all the required information.[106]

189 Development contributions may be charged in addition to financial contributions (in a manner described in a plan or proposed plan),[107] but a council may not require both for the same purpose in respect of the same development.[108]

190 Public consultation occurs in relation to development contributions when a council amends its Development Contributions Policy and in relation to financial contributions when a council amends this section of its plan or proposed plan.

191 The Waimakariri District Council in June 2023 adopted its Development Contributions Policy 2023/24.[109] The policy states that development contributions will be invoiced when:[110]

191.1 a Section 224(c) application is received for a subdivision consent;

191.2 a building consent for a new residential or non-residential unit is uplifted;

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105 Local Government Act 2002, pt 8, subpt 5 (ss 197AA–211). "Development" is defined in s 197 as "any subdivision or other development that generates a demand for reserves, network infrastructure, or community infrastructure; but does not include the pipes or lines of a network utility operator". See *Neil Construction Ltd v North Shore City Council* [2008] NZRMA 275

106 Local Government Act 2002, s 198(2).

107 Local Government Act 2002, s 211. Under s 108(10) of the RMA, financial contribution conditions can be imposed in accordance with the purposes and level specified in the relevant district plan.

108 Local Government Act 2002, s 200.

109 See https://www.waimakariri.govt.nz/__data/assets/pdf_file/0021/120639/Updated-Final-Development-Contributions-Policy-2023-24.PDF, which was approved at the Council meeting on 20 June 2023.

110 Waimakariri Development Contributions Policy 2023/2024 at [4.6.6].

191.3 an application to connect to a Council network service is made; or

191.4 Council deems a change of property use has occurred resulting in an increased demand for network services.

192 Development contributions are not, and cannot be, charged or assessed at the point at which land is rezoned, either through a public or private plan change.

193 The Development Contributions Policy 2023/24 further states that a review is made every year in preparation for the Annual Plan or the Long Term Plan (with a full review undertaken every three years).

Financial contributions

194 Financial contributions can be levied under section 108(10) of the RMA, where these are imposed under the Council's plan or proposed plan.

195 The Council's Development Contributions Policy 2023/2024 states, "*Financial contributions will be used when the effect of development directly contributes to the need for physical works on Council services and when the effect of the development has not been foreseen in the Long Term Plan (LTP)*."[111]

196 We note that as part of the PDP process (and specifically Variation 2), the Council is proposing extensive financial contribution provisions and standards which include comprehensive provisions setting out the methodology for determining these and a wide range of matters for which financial contributions can be calculated.

Developer agreements

197 It is common practice for developers of large developments to enter into agreements with councils on the quantum or method for assessing both development contributions and financial contributions that may be applicable, and the timing of any such payments. Development agreements can facilitate opportunities for negotiation between developers and councils, to deal with unusual, complicated or lengthy development projects in a holistic and integrated way.

198 Either a developer or the territorial authority can request to enter a development agreement.[112] The LGA outlines a process for requesting, amending or terminating a development agreement and the content of such an agreement.

[111] Waimakariri Development Contributions Policy 2023/2024 at [2.1.2].

[112] Local Government Act 2002, s 207A(1).

199 The Council's Development Contributions Policy 2023/204 relevantly states that:[113]

199.1 when a development contributions agreement is established, the Council will work with the developer or developers of the area concerned to establish which party or parties will undertake various works;

199.2 the Council will only charge development contributions for infrastructure work that is undertaken and funded by the Council;

199.3 the extent of the infrastructure work undertaken by the Council in each development agreement will vary according to the nature of the development and the type of work involved;

199.4 the developer is responsible for providing infrastructure solutions for the proposed development area, where the Council requests additional capacity in the infrastructure or improvements to existing infrastructure affected by the development, Council will fund the extra-over portion of the work.

200 These submissions are not suggesting a development agreement is required right now (and in fact, based on *Bletchley Developments v Palmerston North City Council*[114] it would appear to be inappropriate for a resource consent application – or by analogy, a submission on a plan process – to be put on hold while it negotiates with the applicant the cost of works it would like the applicant to do).

201 It is also important to recognise that the RMA and LGA provide mechanisms through which infrastructure required for development is funded or otherwise provided by developers. As the Tribunal made clear in *Bletchley*, it is not necessary or appropriate for the details of that arrangement to be worked out by the resource consenting stage let alone at the prior point when the land might be rezoned for development.

Transport infrastructure

202 The Submitters' position that the roading upgrade/improvement requirements for the rezoning are the responsibility of the Council. **Mr Willis** and **Mr Binder** disagree.[115]

203 **Mr Fuller's** evidence is that transport improvements are required based on expected future traffic growth by 2028 irrespective of

[113] Waimakariri Development Contributions Policy 2023/2024 at [4.6.10].

[114] *Bletchley Developments Ltd v Palmerston North City Council* [1995] NZRMA 337.

[115] Officer's Report: Rezoning – Ōhoka Rezonings, 31 May 2024 at [253]; Officer's Report: Rezoning – Ōhoka Rezonings, 31 May 2024 at Appendix D: Proposed District Plan – Servicing, Geotech, Hazards, Transport – Ōhoka, 16 May 2024; Shane Binder Memorandum, 27 May 2024 at [20].

whether the rezoning is approved or not.[116] We note the evidence of **Mr Carter** is that the first stage of the development is not anticipated to be built and occupied until 2028,[117] at which point in time, the intersections are predicted to already be over-capacity and action will have to be undertaken.

204 It is incumbent on the Council to maintain its roading network, and to schedule required upgrades and improvements across the district as appropriate and when these are required.

205 In relation to a private plan change, in *Landco Mt Wellington v Auckland City Council,* the Court stated:[118]

> *" The proposal stands or falls on its own merits, and its proponents are not required to resolve infrastructure problems outside its boundaries although they may be required to contribute, by way of financial contributions, to the cost of doing so"*
>
> *…*
>
> *"We are certainly not sanguine about the traffic situation, but then nobody is. The best that can be said about it is that the expert evidence is that the traffic effects within and immediately surrounding Stonefields can be managed effectively" It is for the Council and the other roading and transport organisations to manage the wider network, and public transport, to cope with the present loads and future growth, wherever in the region that might occur."*

206 It is entirely appropriate for the Council, following its PDP being made operative (including any rezoning(s) included in this) to be expected to review its future planning documents (such as the LTP which occurs periodically every 3 years in any case) and plan accordingly. It would not be surprising if as the result of other rezonings approved through the PDP, and general population growth, that the Council's planned roading improvements and priorities might shift or be brought forward.

207 Four intersections are identified as requiring improvements to accommodate the proposed rezoning:

207.1 The Bradleys Road / Tram Road roundabout is already included in the LTP and planned for construction prior to 2028. As such, the Council could require development contributions to be paid in respect of this upgrade should the Development Contributions Policy be triggered (refer at

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116 Statement of Evidence of Nick Fuller, 5 March 2024 at [20].

117 Statement of Evidence of Tim Carter, 13 June 2024 at [21].

118 *Landco Mt Wellington Limited v The Auckland City Council* EnvC 035/2007, 19 April 2007 at [11] and [18].

paragraph [193] above) by the development prior to this occurring.

207.2 With respect to the Flaxton Road / Threlkelds Road intersection roundabout and the Whites Road / Tram Road roundabout, while these are not currently included in the LTP:

(a) It is likely that irrespective of the Site being rezoned (and particularly so if it is rezoned) that the Council would include these upgrades in the 2027-2037 LTP in order to be able to capture development contributions.[119]

(b) In any case, the PDP proposes a detailed requirement and calculation for financial contributions from development in respect of roading,[120] which would enable the Council to levy funds from the development for these upgrades irrespective of not being included in the LTP.

(c) Further, there is nothing preventing the developers from entering into a development agreement with the Council in respect of timing and finding of these upgrades.

207.3 In terms of the Tram Road / State Highway 1 interchange capacity upgrade, this is the purview of Waka Kotahi and therefore policies in respect of development and financial contributions would not apply. However:

(a) As identified in the supplementary evidence of **Mr Fuller**, Waka Kotahi have now identified this section of State Highway 1 as a Road of National Significance.[121] As such, an upgrade to this location (which again is required irrespective of this rezoning) is likely and entirely consistent with the objectives in Waka Kotahi's recently released State Highway Investment Proposal 2024-34.

(b) In any case, and as is the case in respect of all the transport improvements required, any proposed subdivision of the land ahead of these upgrades which are identified in the ODP would require a discretionary consent[122] on the basis that the upgrades had not yet occurred, at which time Council would have full discretion to consider any adverse effects on the

[119] Statement of Evidence of Tim Walsh, 5 March 2024 at [69].

[120] Proposed District Plan, 18 September 2021 at FC-S4.

[121] Statement of Evidence of Nick Fuller, 5 March 2024 at [36].

[122] Proposed District Plan, 18 September 2021 at SUB-R2 and SUB-S4.

transport network from a particular stage of development ahead of any of these upgrades.

208 The requirement for these upgrades to occur is not an impediment to rezoning the land. The Submitters have demonstrated that the required transport infrastructure, and their required upgrades, are viable.

209 We do not consider it would be 'responsive' of the Council to decline significant but unanticipated proposals simply on the basis that it may require a shift or reconsideration of funding and timing of improvements in an LTP. No proposal that is not currently anticipated in planning documents would likely be anticipated in an existing long term plan.

210 Being responsive in this context would require the Council to be open to adapting its LTP to accommodate such a proposal should it be approved. We note Objective 6(c) of the NPS-UD specifically requires Councils to be responsive to proposals that would supply significant development capacity in decisions it makes in respect of its LTPs.

GREATER CHRISTCHURCH SPATIAL PLAN

211 The GCSP was unanimously endorsed by the Christchurch Partnership Committee on Friday 16 February 2024. The GCSP satisfies the requirement of the NPS-UD for Greater Christchurch to prepare a FDS.

212 Subpart 4 of the NPS-UD outlines requirements for creating a FDS for a local authority. Under Clause 3.12 of the NPS-UD, every tier 1 and tier 2 local authority must prepare and make publicly available an FDS for the tier 1 or 2 urban environment.

213 Under Clause 3.13(1)(a)(ii), the FDS aims to provide at least sufficient development capacity, as required by Clause 3.2, over the next 30 years to meet expected demand and requires the FDS to, under Clause 3.13(2)(a) spatially identify broad locations in which development capacity will be provided for over the long term.

214 In this regard, the GCSP states that:[123]

> *"The Spatial Plan satisfies the requirements of a future development strategy under the National Policy Statement on Urban Development. This includes setting out how well-functioning urban environments will be achieved and how sufficient housing and business development capacity will be provided to meet expected demand over the next 30 years."*

[123] Greater Christchurch Spatial Plan (February 2024) at 18.

215 **Mr Willis** states in the section 42A report that the GCSP does not identify Ōhoka nor its surroundings for future urban growth as it is not featured in Map 2: The Greater Christchurch spatial strategy.[124] **Mr Willis** then goes on to state that because the GCSP contains goals for the protection of highly productive land within Greater Christchurch, the Proposal does not align with the GCSP.[125] We do not agree, for the same reasons as set out in paragraphs [96]—[105] above.

216 Further, unlike what **Mr Willis** has suggested above, the GCSP does not exhaustively identify urban development locations in Map 2: The Greater Christchurch spatial strategy. Instead, the GCSP has identified a shortfall in development capacity for parts of Greater Christchurch and suggested criteria for potential 'broad locations' for residential growth.

217 In regard to this, the GCSP states that:[126]

> *"The term 'broad' is used to reflect the language in the National Policy Statement on Urban Development (NPS-UD). The NPS-UD, in Section 3.13(2)(a), requires Future Development Strategies (FDS) to spatially identify the broad locations in which development capacity will be provided over the long term in both existing and future urban areas. The Greater Christchurch Spatial Plan (GCSP), as the FDS for Greater Christchurch, has identified these areas. In this context, the GCSP continues to reference 'broad location' in setting guidance and parameters for the identification and consideration of future growth direction and broad locations beyond that identified in the GCSP."*

218 It is clear from this extract that Map 2 is not an exhaustive account of locations where growth could occur; alternatively, the GSCP has elected to identify these potential areas for future growth through guidance and parameters.

219 The guidance and parameters contained in the GSCP, in relation to the identification of 'broad locations', then goes on to state that 'broad locations' at a minimum should:

> *"1. Be adjacent to, near, or within a Significant Urban Centre, Major Town or a Locally Important Urban Centre in Greater Christchurch;*
>
> *2. Be accessible to either MRT, Core Public Transport Routes or New / Enhanced Public Transport Routes;*
>
> *3. Protect, restore and enhance the natural environment, historic heritage, and sites and areas of significance to Māori;*
>
> *4. Be free from significant risks arising from natural hazards and the effects of climate change; and*
>
> *5. Be cognisant of the landscape and visual context, integrate with natural features and align with good urban design principles."*

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[124] Officer's Report: Rezoning – Ōhoka Rezonings, 31 May 2024 at [293].

[125] Officer's Report: Rezoning – Ōhoka Rezonings, 31 May 2024 at [293].

[126] Greater Christchurch Spatial Plan (February 2024) at 37.

220 While the GCSP intends for urban growth to focus in and around the main towns, the evidence provided by the Submitters supports a view that the Site meets the minimum requirements for 'broad locations' contained within the GSCP.

221 In reference to the above criteria, **Mr Walsh** has stated that although the Site is not identified in Map 2: The Greater Christchurch spatial strategy, the 'Areas to protect, avoid and enhance' section shows Ōhoka as a location with very few constraints, with the proposed potential also supported by the potential future mass transit extending out to Belfast to transport future residents into Christchurch.

SCOPE – PROPOSED PLAN AND REQUESTED CHANGES

222 In the section 42A report, **Mr Willis** agrees that there is scope within the original submission to seek SETZ,[127] but questions whether there is scope to change the activity status of from permitted to discretionary within the SETZ.

223 To this extent, in the section 42A report **Mr Willis** states that:[128]

> "*It is also not clear to me that there is scope within the RIDL [160] and Carter Group [237] submissions for this change which sought a change in zone for the subject site (and existing Ōhoka SETZ), not a change to SETZ-O1. I am also unsure of the scope for this change which applies beyond Ōhoka and would for example include Sefton, Ashley and Cust. I consider the submitter would need to demonstrate that there is scope for this change from across the various RIDL and Carter Group submissions on the Proposed Plan*."
>
> ..
>
> *"I have reviewed the RIDL [160] and Carter Group [237] submissions, and cannot see any reference to changing the SETZ provisions themselves, just the zones. As some of these activities are also permitted or restricted discretionary in the GRZ (for example: GRZ-R15 Health care facilities; GRZ-R20 Retirement village) there is no scope provided for some of these changes from seeking that alternative zone."*

The relief sought is within the scope of the original submission(s)

224 The caselaw on whether relief sought is within the scope of a submission is relatively settled.

225 *Re Otago Regional Council*[129] provides a useful summary of the key authorities and the process to address the question as to whether

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[127] Officer's Report: Rezoning – Ōhoka Rezonings, 31 May 2024 at [300].

[128] Officer's Report: Rezoning – Ōhoka Rezonings, 31 May 2024 at [308].

[129] *Re Otago Regional Council* [2021] NZEnvC 164.

relief sought is within the scope of original submissions. In that case, the Court stated that: [130]

> It is not unusual for relief to be amended in response to evidence called by other parties and its testing during a hearing. Even so, any proposed amendments must remain within the general scope of the notified plan change or the original submissions on the plan change or somewhere in between.

226 The Court also went on to note:[131]

> …the question about whether the submission is on or about the plan change will usually be a question of degree to be judged by the terms of the proposed change and of the content of the submissions. It is important to keep in mind that the court cannot permit the plan change to be appreciably changed without a real opportunity for participation by those who are potentially affected.

227 As **Mr Walsh** highlighted, the Submitters are seeking the above amendments to the proposed zoning to SETZ as, in the context of PDP provisions, this was the simplest and most effective way of drafting the development area provisions.[132] Additionally, **Mr Walsh** has made recommendations regarding amendments to the SETZ as they were not entirely fit for purpose in the context of the Ōhoka SETZ.

228 This amendment is sought in the context of the Submitter's original submission in light of evidence received and decisions made during the course of the PDP process.

229 Further, as stated by **Mr Walsh** in his supplementary evidence, given that the submission originally sought the proposed SETZ to be GRZ, and most of these activities are either discretionary or non-complying in the GRZ, there is scope for the proposed changes.[133]

230 The *Otago Regional Council* case also refers to the High Court case of *Albany North Landowners v Auckland Council*[134] case, which addressed scope questions under a similar legislative regime as here. In that case, the Court characterised the "orthodox" scope test as whether an amendment was "reasonably and fairly" raised in the course of submissions on a plan change. The Court found that this question should be approached in a realistic workable fashion, including taking into account the whole package of relief detailed in each submission.[135] It is sufficient if the changes made can fairly be

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130 Annexure 2, at [16].

131 Annexure 2, at [21].

132 Statement of Evidence of Tim Walsh, 5 March 2024 at [41].

133 Supplementary Statement of Evidence of Tim Walsh, 13 June 2024 at [77].

134 *Albany North Landowners v Auckland Council* [2016] NZHC 138.

135 At [115].

said to be foreseeable consequences of any changes directly proposed.[136]

231 The updated SETZ provisions in relation to the Proposal provide a more refined and comprehensive package of provisions for the Proposal and the wider Ōhoka township. They also better integrate the Proposal into the existing PDP provisions and thus are a foreseeable change taking into account the whole package of relief sought.

232 In addition, it is also noted in the submission the Submitters sought relief to:

> *"enable the equivalent outcomes as sought in the PC31 request, and accordingly, [any] consequential change [which] may be required to other provisions in the Proposed Variation in order to provide the requested relief"*
>
> *(Emphasis Ours).*

233 Accordingly, the amendments sought in Mr Walsh's evidence can also be viewed as 'consequential change(s)' in light of the Submitter's involvement in PDP processes.

234 In any instance, as stated by **Mr Walsh**, the Submitters would not be concerned if it is decided that these activities should be permitted in the SETZ (as notified) because (a) the likelihood of these activities being established in the zone is low (particularly a retirement village), and (b) if they were established**,** they would have little impact on the functional settlement as a whole.[137]

CONCLUSION

235 The Proposal is consistent with the NPS-UD and there is nothing preventing the rezoning of the Site.

Dated: 20 June 2024

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J M Appleyard / Lucy M N Forrester
Counsel for Carter Group Property Limited and Rolleston Industrial Developments Limited

[136] At [115].

[137] Supplementary Statement of Evidence of Tim Walsh, 13 June 2024 at [77].

APPENDIX 1: THE NPS-UD AND THE CRPS INTERACTION

1 Objective 6 and Policy 8 of the NPS-UD establish what is now referred to as the 'responsive planning framework'.

2 One of the key issues for the Panel to determine is whether the rezoning request can be approved given the objective in the CRPS directing that urban development falling outside of the greenfield priority areas is to be 'avoided' (Objective 6.2.1.3).

3 The pertinent question is: how should the CRPS be interpreted in light of the higher order and more recent NPS-UD? In more detail, this question needs to address how the express CRPS reference to "avoid" with respect to development outside areas identified in Map A when the NPS-UD contains Objective 6(c) and Policy 8 which require a "*responsive*" planning approach to out-of-sequence and unanticipated development.

4 As with any interpretive exercise where two pieces of legislation might look on their face to be in conflict with each other it is important to start with basic principles of statutory interpretation.

Principles of statutory interpretation

5 Modern statutory interpretation requires a purposive approach and a consideration of the context surrounding a word or phrase.[138]

6 When interpreting rules in planning documents, *Powell v Dunedin City Council* established that (in summary):[139]

6.1 the words of the document are to be given their ordinary meaning unless it is clearly contrary to the statutory purpose or social policy behind the plan or otherwise creates an injustice or anomaly;

6.2 the language must be given its plain and ordinary meaning, the test being "what would an ordinary reasonable member of the public examining the plan, have taken from" the planning document;

6.3 the interpretation should not prevent the plan from achieving its purpose; and

6.4 if there is an element of doubt, the matter is to be looked at in context and it is appropriate to examine the composite planning document.

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[138] The most fundamental principle of statutory interpretation is contained in section 5(1) of the Interpretation Act 1999: "The meaning of an enactment must be ascertained from its text and in light of its purpose".

[139] *Powell v Dunedin City Council* [2004] NZRMA 49 (HC), at [35], affirmed by the Court of Appeal in *Powell v Dunedin City Council* [2005] NZRMA 174 (CA), at [12].

7 Reading the words of a planning document with reference to its plain and ordinary meaning is therefore the starting point to any interpretation exercise. Where that meaning, however, creates an anomaly, inconsistency, or absurdity (such as is the case here where there is possible conflict between two pieces of legislation with one saying "avoid" and the other saying "be responsive") other principles of statutory interpretation must be considered to help shed light on how a planning document should properly be interpreted. We touch on some of those relevant concepts now.

8 It is widely accepted that the RMA provides for a three tiered management system – national, regional and district. This establishes a 'hierarchy' of planning documents:[140]

8.1 first, there are documents which are the responsibility of central government. These include national policy statements. Policy statements of whatever type state objectives and policies, which must be "given effect to" in lower order planning documents.

8.2 second, there are documents which are the responsibility of regional councils, namely regional policy statements and regional plans; and

8.3 third, there are documents which are the responsibility of territorial authorities, specifically district plans.

9 Therefore, subordinate planning documents, such as a regional policy statement, must give effect to national policy statements. This is expressly provided in section 62(3) of the RMA. The Supreme Court has held that the "give effect to" requirement is a strong directive[141] and that the notion that decision makers are entitled to decline to implement aspects of a national policy statement if they consider that appropriate does not fit readily into the hierarchical scheme of the RMA.[142] The requirement to "give effect to" a national policy statement is intended to constrain decision makers.[143]

10 Where there is an apparent inconsistency between two documents, particularly where one is a higher order document, the Courts will

[140] *Environmental Defence Society v New Zealand King Salmon* [2014] NZSC 38 at [10]-[11].

[141] *Environmental Defence Society v New Zealand King Salmon* [2014] NZSC 38 at [80].

[142] *Environmental Defence Society v New Zealand King Salmon* [2014] NZSC 38 at [90].

[143] *Environmental Defence Society v New Zealand King Salmon* [2014] NZSC 38 at [91].

first seek to reconcile this inconsistency and allow the two provisions to stand together.[144]

11 Where two provisions are totally inconsistent (such that they cannot be reconciled in a way that they can be read together), then it is appropriate to consider whether the doctrine of implied repeal applies. The doctrine provides that a provision that is later in time, impliedly repeals the earlier inconsistent provision. It is however a doctrine of last resort and should only be applied where all attempts at reconciliation fail.[145]

The extent of inconsistency between the CRPS and the NPS-UD

12 Objective 6.2.1.3 of the CRPS provides:

> *Recover, rebuilding and development are enabled in Greater Christchurch through a land use and infrastructure framework that: […]*
>
> *3. avoids urban development outside of existing urban areas or greenfield priority areas for development, unless expressly provided for in the CRPS;*

13 Read in a vacuum, the objective provides that decision makers must not allow urban development outside of existing urban areas or the greenfield priority areas identified in Map A.

14 However, adopting this interpretation of the CRPS would not reconcile the CRPS with Objective 6(c) and Policy 8 of the NPS-UD and would lead to the type of problems identified by the Court in *Powell* as the NPS-UD would be undermined. Namely, the interpretation would be contrary to the very purpose of Objective 6(c) and Policy 8, would prevent the NPS-UD from achieving its purpose and would interpret the word "*avoid*" outside the proper legislative context of reading the CRPS and the NPS-UD together.

15 Objective 6 and Policy 8 provide that:

> ***Objective 6:*** *Local authority decisions on urban development that affect urban environments are:*
>
> *(a) integrated with infrastructure planning and funding decisions; and*
>
> *(b) strategic over the medium term and long term; and*
>
> *(c) responsive, particularly in relation to Proposals that would supply significant development capacity.*

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144 *R v Taylor* [2009] 1 NZLR 654.

145 *Taylor v Attorney-General* [2014] NZHC 2225; *Kutner v Phillips* [1891] 2 QB 267 (QB).

> ***Policy 8:*** *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:*
>
> *(a) unanticipated by RMA planning documents; or*
>
> *(b) out-of-sequence with planned land release.*

16 Or, to put this another way - a rigid interpretation of the word "avoid" in the CRPS would practically prevent local authorities from being responsive in the way required by the NPS-UD, as it would prevent them from even considering the merits of a rezoning request that might otherwise add significantly to development capacity and contribute to well-functioning urban environments (i.e. the criteria for Policy 8 NPS-UD), despite such areas falling outside of greenfield priority areas.

17 This is further affirmed by the MfE Guide which states that:

> "***Objective 6(c) recognises 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.*** *[…]*
>
> *Expected outcomes*
>
> ***The responsive planning policy in the NPS-UD limits a local authority's ability to refuse certain private plan-change requests without considering evidence.*** *This is because Policy 8 requires local authorities to make responsive decisions where these affect urban environments****. Implementing this policy is expected to result in more plan-change Proposals being progressed where they meet the specified criteria*** *(see section on criteria below).* ***This will likely lead to Proposals being brought forward for development in greenfield (land previously undeveloped) and brownfield (existing urban land) locations, which council planning documents have not identified as growth areas.*** *[…]*
>
> *Local authorities may choose to identify in RMA plans and future development strategies where they intend:*
>
> - *development to occur*
> - *urban services and infrastructure to be provided.*
>
> ***The identified areas must give effect to the responsive planning policies in the NPS-UD and therefore should not represent an immovable line. 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."

[emphasis added]

Reconciling the inconsistency?

18 It is necessary, as a matter of interpretation, to first attempt to try and reconcile the inconsistency between the two documents before reverting to the issue of implied repeal as a matter of last resort.

19 In this context, it is relevant that:

19.1 the NPS-UD provides a clear national level direction to enable development capacity and is therefore a higher order document than the CRPS in terms of the resource management hierarchy; and

19.2 the NPS-UD is also the most recent in time planning document. While Plan Change 1 to the CRPS did in part give effect to the NPS-UD, this was not in relation to Policy 8 where it was noted[146] more work would be required to give full effect to the responsive planning framework established by the NPS-UD.

20 In light of this, it appears it is appropriate to 'read down' or 'soften' the interpretation of 'avoid' in the CRPS to give effect to the NPS-UD by grafting a further limited exception onto the objective but only in those limited circumstances where a development would meet the NPS-UD because it adds significantly to development capacity and contributes to a well-functioning urban environment.

21 Therefore, read in light of the NPS-UD, the objective in the CRPS should now be read as meaning "*except if otherwise provided for in the NPS-UD, avoid…*" or "*unless expressly provided for in the CRPS or by Objective 6 and Policy 8 of the NPS-UD*."

22 Further, the NPS-UD requires local authorities to give effect to it "*as soon as practicable*".[147] This interpretation of the CRPS (i.e. in light of the NPS-UD) requires the District Council to give effect to Objective 6(c) and Policy 8 even though the CRPS has not formally amended its wording yet. This is especially so given that an amendment to the CRPS is unlikely to occur for some time.

[146] Report to Minister for the Environment on Proposed Change 1 to Chapter 6 of the CRPS, March 2021, Environment Canterbury at [133]

[147] NPS-UD, Clause 4.1(1).

APPENDIX 2 – ISSUES WITH ECAN'S INTERPRETATION OF RULES IN THE LWRP AS A RESULT OF THE COURT OF APPEAL'S DECISION

Aotearoa Water Action Inc v Canterbury Regional Council

1 The reason groundwater interception is potentially problematic is a result of the Regional Council's interpretation of the Court of Appeal's recent decision in *Aotearoa Water Action Inc v Canterbury Regional Council* (the *AWA Decision*).[148]

2 The facts of the case are different to those here. The AWA Decision followed a judicial review of the Regional Council's decision to grant a new 'standalone' use alongside existing consents that authorised the take and use of water for different industrial purposes. The 'standalone' use consent was intended to enable the consent holders to use water previously consented for wool scouring for water bottling in the Christchurch-West Melton groundwater allocation zone (in effect without 'touching' the take).

3 The Court grappled with whether the grant of a 'standalone use' was open for the Regional Council to grant within the framework of the CLWRP.

4 The Court of Appeal held that:

4.1 The RMA does not prevent the Council from granting a separate consent for a use and a separate consent for a take. Whether or not that is possible in a given situation will depend on the terms of the regional plan and the controls it contains in relation to water.

4.2 In the case of the CLWRP different wording had been used across the various rules that addressed water. Some rules referred to the "*take and use*" of water, whereas other rules referred to the "*take or use*" of water. As the Court of Appeal advised:[149]

> "*But it does not necessarily follow from the drafting of ss 14 and 30 that the Council is able to grant a separate consent for a use and a separate consent for a take. Whether or not that is possible will in our view depend on the terms of the regional plan and the controls it contains in relation to water. In this case, the LWRP as has been seen refers variously to "taking or use" and "taking and use". We consider the different wording is important and must have been intended. Thus, where the expression used is "taking or use of water" the plan contemplates that there might be an activity involving one or the other or both. Where the expression used is "taking and use"*

[148] *Aotearoa Water Action Inc v Canterbury Regional Council* [2022] NZCA 325.

[149] At [113].

the intent appears to be that the activity will involve both."

4.3 The relevant rule in the AWA Decision was Rule 5.128 of the CLWRP that uses the expression "take and use". Given the use of the word "and" the Court concluded that this was deliberate and therefore Environment Canterbury could not have lawfully granted a new 'standalone' use (i.e. as it was not entitled to consider the use independent from the take).

4.4 In respect of an alternative argument that was presented to the Court, the Court also concluded that it was not open to the Regional Council to utilise "catch-all" CLWRP Rule 5.6 to consider a stand-alone application for consent for only one of a "taking" or a "use" where ultimately the activity was still a "take and use".

5 As is consistent with the Court of Appeal's findings in its paragraph [113], it was careful to state that its decision was with reference to the specific context that was present before it, which was a proposal that involved both a take and use of water. Care should therefore be taken in any assumption that the AWA Decision has wider application.

6 The Court of Appeal ultimately set aside the Regional Council's decision to grant resource consent for a 'standalone' use of water for water botting activities.

7 We further note that the AWA Decision has been the subject of an appeal to the Supreme Court which has been heard, but a decision of the Supreme Court is not expected until sometime next year.

The Regional Council's subsequent interpretation of the CLWRP

The advice note

8 Following the AWA Decision released on 20 July 2022, the Regional Council issued a technical advice note on 19 August 2022 (the *Advice Note*) setting out its view on the repercussions of the AWA Decision for the interpretation of the CLWRP and therefore the way they will process resource consents related to water takes moving forward.

9 The Advice Note "*outlines the approach Environment Canterbury will be taking to implementing [the AWA Decision].*" The Advice Note sets out the issue as follows:

9.1 there are a number of specific situations where the CLWRP contemplated a "take or use";

9.2 there have been applications lodged (and consented) for activities historically over the last decade that appeared to also fit into a "take or use" classification, but which did not

appear to be managed under the existing rules (and it lists a number of examples, including stormwater treatment infrastructure that intercepts groundwater);

9.3 it appears the examples set out were previously consented through the default catchall rule 5.6 in the CLWRP as they are not specifically for a "take and use" but rather, a "take or use" for which there are no specific rules;

9.4 the result of the AWA Decision, as advised by ECan (in its words) is that "*[t]he Court of Appeal has now said that this approach is not correct in some of the circumstances highlighted above. Where an activity to take and/or use water is to be consented under the CLWRP and is not managed under an activity specific rule (e.g. for community supply, dewatering etc.), it must be considered under the general "take and use" rules.*";

9.5 the general rules with respect to takes and uses of groundwater are rules 5.128-5.132 of the CLWRP, or relevant sub-regional rules where these prevail over the regional-wide rules.

10 If rules 5.128-5.132 of the CLWRP do in fact apply then, in some circumstances, this is likely to be problematic as they prohibit a "take and use" consent from being granted in over-allocated groundwater zones.[150] In this regard, most of Canterbury, and in particular the Waimakariri area, is fully or over-allocated.

11 The Advice Note then goes on to consider what repercussions this interpretation has for consents already granted, applications in progress, new activities/potential applications, and transfers of consent.

12 With respect to new activities in over-allocated zones, the Advice Note states that it will now typically be prohibited under the CWLRP to apply for a 'consumptive' take and use, and therefore no application can be made except for replacement of existing activities affected by the provisions of section 124-124C RMA.

13 Needless to say a number of property and infrastructure owners, Territorial Authorities and consultants have taken issue with the Regional Council's interpretation.

The mayoral forum presentation

14 On 8 December 2022, the Regional Council prepared a memorandum (the *Mayoral Forum Memorandum*) that was to be presented at the Mayoral Forum for Mayors and CEOs. This was accompanied by a PowerPoint presentation (the *PowerPoint*).

[150] Refer conditions 2 and 3 of Rule 5.128 CLWRP, and Rule 5.130 CLWRP.

15 The Mayoral Forum Memorandum restates the Regional Council's view as set out in the Advice Note. It also appears to clarify why the Regional Council consider rules related to stormwater infrastructure have changed as a result (which was not necessarily obvious from the Advice Note):

> "*The Court of Appeal's decision directs that where the phrase "take and use" is included in the rule it applied to both takes and uses of water, even if only a "take" or a "use" applies. This means the "take" of water for a stormwater or drainage infrastructure must be put through the "take and use" framework. These rules prohibit infrastructure that permanently intercepts groundwater where the groundwater resource is considered fully- or over-allocated.*"

16 It is noted that the Mayoral Forum Memorandum and the PowerPoint both emphasise that the Regional Council has been working with applicants to amend their proposals so that they either:

16.1 are redesigned so as to not intercept groundwater (noting that the PowerPoint provides examples of how this has been done successfully to date); or

16.2 are framed in a manner which provides an alternative consenting pathway (such as the provisions for deemed permitted activities under the RMA).

17 The Mayoral Forum Memorandum concludes by stating that consent applicants (and in particular the District Councils) have been offered the opportunity to seek their own legal advice to demonstrate a pathway to allow applications to progress. If the Regional Council was convinced by and agreed with such advice, then there may be a pathway for consent.

18 It is noted that many developers have not sought to take up the invitation to provide their own advice and have simply opted to engineer their way around the legal problems, as the Applicant has done in this case and as contemplated in paragraph 23.1 above.

The Waimakariri District Council interpretation

19 Following the Mayoral Forum Memorandum, the Waimakariri District Council took up the opportunity to obtain legal advice which was obtained from Buddle Findlay (in conjunction with Christchurch City Council) (the *WDC Interpretation*).

20 The WDC Interpretation has been circulated widely and specifically covers the interpretation of the CLWRP as it applies to stormwater basins and sub-soil drainage infrastructure.

21 The WDC Interpretation also sets out the shared understanding between the District and Regional Councils:

"*There is a shared understanding between CCC, WDC and ECan that outrightly prohibiting Stormwater Basin and Sub-Soil Drainage Activities in overallocated or fully allocated groundwater zones is an unintended and undesirable outcome, with numerous beneficial and critical/essential infrastructural projects capable of providing good environmental outcomes now unable to be progressed. For example, Stormwater Basins are critical for achieving the [C]LWRP's water quality and quantity outcomes, and prohibiting these cause material harm to the environment and communities. There is general agreement that a change to the [C]LWRP should be pursued so that such critical and essential projects are not prohibited.*"

22 The WDC Interpretation then goes on to recognise that a plan change is time-consuming, and that therefore the District Councils wish to investigate whether the Regional Council's interpretation of the CLWRP groundwater take and use provisions is correct, and whether stormwater basin and sub-soil drainage activities might be capable of being consented by alternative means (that would not be prohibited by the CLWRP).

23 The WDC Interpretation is in summary:

23.1 Stormwater basins and sub-soil drainage activities do not involve a "take and use" of groundwater, and therefore the prohibited activity rule does not apply as those activities involve "taking" only, with no intervening use by a person.

23.2 The Regional Council has incorrectly interpreted the implications of the AWA Decision because:

(a) The AWA Decision does not require the LWRP "take and use" groundwater rules (5.128-5.130) to apply to a proposal that genuinely involves only a take of groundwater and no associated use.

(b) The AWA Decision only makes it necessary for activities genuinely involving both a "take and use" of groundwater to have both the taking and use of water considered together under the "take and use" groundwater rules of the CLWRP, with no ability to grant a consent for a take separate from a use (or vice versa). However, the "take and use" rules do not apply to activities or proposals that do not involve both a taking and use, such as Stormwater Basin and Sub-Soil Drainage Activities where no "use" is involved.

(c) The AWA Decision supports a conclusion that rule 5.130 (being prohibited activity rule) only applies where the reality of a particular proposal involves both a taking and use of groundwater (e.g. a water bottling activity that requires both take and use), but not where

a proposal genuinely involves only a "take" with no "use".

(d) The WDC Interpretation goes on to outline the legal submissions of each party in the Supreme Court case, and notes that no arguments were made for an interpretation of the "take and use" rules that requires those rules to apply to a genuine "take" only proposal (e.g. stormwater basin and sub-soil drainage activities) and that therefore it was highly unlikely that the Court had made a ruling to the effect of the Regional Council interpretation.

Our interpretation

24 We agree with the WDC Interpretation's reasoning as to why the Regional Council has wrongly interpreted the AWA Decision with respect to rules relating to the provision of stormwater infrastructure:

24.1 The AWA Decision found that where the expression "take and use" of water is used in the CLWRP, the intent is that the activity will (or must) involve both. The "take" and the "use" cannot be uncoupled.

24.2 Yet the Regional Council has taken the view that activities which only "take" water must now also be considered under the "take and use" rules. This goes against the clear findings of the AWA Decision that those rules only apply to activities which involve both "take and use" of water.

24.3 Under the AWA Decision, the "take and use" rules cannot apply to the interception of groundwater by stormwater infrastructure because those sorts of activities do not involve a "use" and are therefore not contemplated by those rules. Those rules provide that a "take and use" is prohibited in over-allocated groundwater zones, not a "take" in itself *per se*.

25 While the WDC Interpretation does not go on to specify what rules it considers would apply to a "take" only of this kind under the CLWRP, we understand it to be suggesting that the Regional Council can either process such activities under rules that refer to the "take or use", or alternatively go back to the status quo for processing such applications under the catch-all rule 5.6 of the CWLRP where there is no specific "take or use" rule for the activity.

26 We agree with the view that such applications should be processed under the CLWRP but also offer an alternative interpretation that this is because the activity is not actually a "take" (or "use") of water at all but rather simply a "diversion" of water:

26.1 Section 14 of the RMA sets out that no person "*may take, use, dam, or divert*" water in a manner that contravenes a regional rule unless the activity is expressly authorised by resource consent.

26.2 Consistent with previous decisions of the Environment Court, excavations that intercept groundwater amount to a **diversion** of water (rather than a take) under section 14 of the RMA.[151] As the Court in *Chatham Island Seafoods* (a similar 'groundwater interception' case) found:

> *"[35] We find that with the excavation of the channel and the pond, the water followed a path that was different from that preceding the excavation. The channel and excavation had the effect that groundwater was intercepted and collected in the excavation that would not have done if the work had not been done. The result is that water was turned aside and displaced to take a different position than it would if the excavation and channel had not been made, even though it ultimately passes through the beach wall.*
>
> *[36] We hold that this was a diversion of water to which section 14 applies."*

26.3 In this context we think the alternative (and better) to that provided in the WDC Interpretation is that:

(a) Rule 5.130, CLWRP only applies to the "*take and use*" of water, and expressly does not include the 'diversion' of water; and

(b) as there is no express rule in the CLWRP concerning the diversion of groundwater, this activity would require resource consent as a discretionary activity under the catch-all Rule 5.6 of the CLWRP.

26.4 On that basis resource consent could simply be sought as a discretionary activity for the diversion of water (and any wider allocation issues or prohibited activity status would not arise).

27 Further, even if either the WDC Interpretation, or our interpretation is not correct and rule 5.6 of the CLWRP cannot be relied on, then there is still a valid further alternative consenting pathway for the activity as a non-consumptive 'take and use' under Rules 5.131-5.132 of the CLWRP.

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[151] *Chatham Islands Seafoods Ltd v Wellington Regional Council* EC Wellington A018/2004, 13 February 2004 at [36]; with reference to *Stewart v Kaniere Gold Dredging Ltd* [1982] 1 NZLR 329 at 337.

28 The interception of groundwater by stormwater infrastructure is inherently "non-consumptive" as it does not remove water from the overall system (because the water is not used).

29 This makes sense even if there is no obvious or apparent associated use (at least for any proposal that does not rely on groundwater to for example 'dilute' contaminants). Rule 5.132, CLWRP simply provides:

> **5.132 The non-consumptive taking and use of ground water and associated discharge to groundwater that does not meet one or more of the conditions in Rule 5.131 is a discretionary activity.**

30 As to the relevance and applicability of this rule, we further note that the CLWRP includes reasoning as to why Rule 5.130 does not apply to non-consumptive takes. This is expressly recognised in Policy 4.58 of the LWRP:

> "*Non-consumptive groundwater takes, including the taking of heat from or adding heat to groundwater and any taking which in conjunction with other activities on a site results in a neutral or positive water balance, will not be subject to any groundwater allocation zone limits, and will generally be supported, provided the water either remains in the aquifer, or is returned to the same groundwater allocation zone within 24 hours and is protected from contamination, other than heat.*"

31 Accordingly, it is our interpretation that the activity (whether, as we assert, it is more correctly labelled as a 'diversion', or alternatively, a 'non-consumptive take and use' – or even if it is a take (as per the WDC Interpretation)) can properly be the subject of a resource consent application.

32 For completeness, we note that there is further (i.e. fourth) fall back in that, the CLWRP also provides specifically for small takes of groundwater as a permitted or restricted discretionary activity under rules 5.113 to 5.114A of the CLWRP. For such takes there is no prohibited activity rule. These rules are referenced by ECan in its various documents as being a possible way through its own interpretation of the CLWRP (and, as a further fall back, would cover any smaller 'interception' in relation to PC31 such as small leaks over time into infrastructure as discussed below at paragraphs 57 to 61).

33 If the Panel would be assisted by any of the documents referred to above, we would be happy to provide these.