

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 12E: Residential rezonings

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

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

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

Dated: 9 August 2024

Reference: J M Appleyard (jo.appleyard@chapmantripp.com)
LMN Forrester (lucy.forrester@chapmantripp.com)

chapmantripp.com
T +64 3 353 4130
F +64 4 472 7111

PO Box 2510
Christchurch 8140
New Zealand

Auckland
Wellington
Christchurch



LEGAL SUBMISSIONS ON BEHALF OF CARTER GROUP 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*).
- 2 The Submitters have appeared before the Panel previously, primarily in respect of Hearing Stream 12D relating to their submission seeking to rezone land at Ohoka, but also in respect of Hearing Stream 10A relating to the Future Development Areas.
- 3 Hearing Stream 12D is being set down for a reconvened hearing because the Council officers for that hearing stream were relying on evidence that would be presented in Hearing Stream 12E and that information was not available to the Submitters (or the Panel) at the time of Hearing Stream 12D.
- 4 This is the basis on which the Submitters have lodged evidence and legal submissions in Hearing Stream 12E. The Submitters consider that given how interrelated all of the rezoning requests are being treated by Council officers, there is clear cross over between the hearing streams. Hearing Stream 12E engages with issues directly relevant to, and already traversed at Hearing Stream 12D.
- 5 We note that we have indicated to the Panel¹ that we intend on addressing the Submitters' Variation 1 submission at the Hearing Stream 12D reconvened hearing (given there was no time to address it at the substantive Hearing Stream 12D hearing on 1 – 4 July 2024).
- 6 These legal submissions will cover the following topics as they relate to the Submitters' relief:
 - 6.1 The urban environment;
 - 6.2 The interplay between the National Policy Statement on Urban Development 2020 (*NPS-UD*) and the Canterbury Regional Policy Statement (*CRPS*);
 - 6.3 Sufficiency of development capacity and Mr Yeoman's updated position; and
 - 6.4 Development of high hazard areas in Kaiapoi.

¹ By way of email to Audrey Benbrook dated 2 August 2024.

THE URBAN ENVIRONMENT

- 7 The issue of what constitutes the 'urban environment' for the purposes of the NPS-UD was discussed at length at Hearing Stream 12D and has also been the subject of expert conferencing.
- 8 Mr Wilson spends some 18 pages or so in the section 42A report discussing what he considers to be the urban environment. We do not agree with Mr Wilson's convoluted interpretation. It is over-complicated, is not shared by any other planning witnesses in this process that we are aware of, and simply does not represent the intent of the NPS-UD. For example, Mr Wilson introduces this strange concept of an 'unanticipated urban environment' which is not a term used in the NPS-UD, or a term we have ever heard before.
- 9 Mr Phillips has covered this issue in detail in his evidence for this Hearing Stream. The Submitters' position on this issue is simply that Greater Christchurch (i.e. the area shown on Map A) is the Tier 1 urban environment for the purposes of the NPS-UD:
- 9.1 The Appendix to the NPS-UD defines 'Christchurch' as a Tier 1 urban environment comprising of the three District Councils and the Regional Council. It is therefore not necessary to engage with the definition of 'urban environment' in the NPS-UD which applies to the determination of Tier 3 urban environments not specifically identified in the Appendix.
- 9.2 It is clear from the various planning documents for the region that 'Greater Christchurch' is intended to be the 'urban environment' for Canterbury in the context of the NPS-UD:
- (a) Our Space² 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*".³
- (b) 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

² Our Space 2018-2048: Greater Christchurch Settlement Pattern Update Whakahāngai O Te Hōrapa Nohoanga.

³ Statement of Evidence of Jeremy Phillips for Hearing Stream 12D, 5 March 2024 at [24]-[25].

expressly identifies as an 'existing urban area') is clearly within this.⁴

- (c) The 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.⁵

9.3 In this respect, we go as far as saying that the Panel is not required to factually determine this question by examining the character of parts of the District, as other strategic documents have already carried out that interpretation exercise, and the extent of the urban environment is well established.

9.4 Even if we are wrong, and the definition of 'urban environment' in the NPS-UD must be considered, the whole Greater Christchurch area would meet this definition on a plain and ordinary reading, noting:

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

⁴ Statement of Evidence of Jeremy Phillips for Hearing Stream 12D, 5 March 2024 at [26]-[29].

⁵ Canterbury Regional Policy Statement, Policy 6.2.1a - Principal reasons and explanation.

definition is focused on wider areas (which may include a mix of urban and non-urban land⁶), rather than specific settlements or urban zones which would be exclusively urban.

- (e) 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.
- (f) '*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.

- 10 Greater Christchurch (i.e. the area shown on Map A) is the Tier 1 urban environment of 'Christchurch' for the purposes of the NPS-UD.

THE INTERPLAY BETWEEN THE CRPS AND THE NPS-UD

- 11 We have set out in detail how we see the interplay between the CRPS and the NPS-UD in our legal submissions for Hearing Stream 12D. In summary, the Submitters' position is that where the CRPS has not given effect to the NPS-UD, the provisions of the CRPS must be read alongside and reconciled with the provisions of the NPS-UD which is a later in time, higher order document.
- 12 There are a number of comments made by Mr Wilson that the Submitters do not agree with, as set out in the evidence of Mr Phillips. In particular:
- 12.1 Mr Wilson is wrong in his view that Objective 6.2.1(a) of the CRPS defines what "at least sufficient development capacity" is in the context of Greater Christchurch. Policy 2 requires sufficiency at all times. This means it is an everchanging and moving consideration that cannot simply be reduced to numbers recorded in the CRPS at one particular point in time. The CRPS is not an expert witness itself.
 - 12.2 Mr Wilson suggests throughout his report that in order for Policy 8 to be engaged, a shortfall in development capacity

⁶ Noting that the non-urban areas of Greater Christchurch include attributes that influences the predominant character of the area, including for example: regional parks, public and private recreational facilities (e.g. golf courses, motorsports, bike parks), quarries and landfills, research facilities, hazard buffers, airfields, urban infrastructure (power generation / transmission, transport corridors, 3-waters) rural-based businesses (e.g. function centres, cafes, camping grounds, contractors yards), and rural-residential activity.

must be demonstrated. This is not what Policy 8 says. Policy 8 applies to certain proposals that meet the criteria irrespective of whether there is a shortfall or not.

SUFFICIENCY OF DEVELOPMENT CAPACITY AND MR YEOMAN'S UPDATED POSITION

- 13 As noted above, Hearing Stream 12D will be reconvened as the Council's section 42A report for that hearing stream relied on information that was being presented at this hearing, and was not at that point in time before any of the parties (or the Panel). This largely related to the reliance on and reference to Mr Yeoman's economic assessment for Hearing Stream 12E.
- 14 Mr Yeoman, in his response dated 24 July 2024 to the Panel's request for information in Minute 31, confirmed that he has not assessed demand or sufficiency for any settlement or large lot residential zones outside of the three main towns.
- 15 On this basis, we do not consider his report included in the Hearing Stream 12E section 42A report is of any relevance to Hearing Stream 12D.
- 16 The Submitters' position is that:
- 16.1 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 Hearing Stream 12D evidence,⁷ 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:
- (a) 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; [...]"*

⁷ Statement of Evidence of Chris Jones for Hearing Stream 12D, dated 5 March 2024 at [15]-[23]; Statement of Evidence of Natalie Hampson for Hearing Stream 12D, 4 March 2024; Statement of Evidence of Gregory Akehurst for Hearing Stream 12D, 4 March 2024.

- (b) 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*".
- (c) 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*'.

16.2 The only evidence the Panel have before them on the demand for residential capacity in Ōhoka is from Mr Jones, Mr Davidson, Mr Sellars, Mr Akehurst, and Ms Hampson. And the only evidence the Panel have before them on the sufficiency of residential capacity outside of the main towns, and specifically for Ōhoka, is from Mr Akehurst and Ms Hampson.

- 17 Mr Yeoman's report does not assist the Panel in determining housing sufficiency in terms of Policy 2 of the NPS-UD across the full range of locations in the District.

DEVELOPMENT OF HIGH HAZARD AREAS IN KAIAPOI

- 18 As noted in the introduction to these legal submissions, we also appeared before the Panel at Hearing Stream 10A opposing the proposed Kaiapoi New Development Area.
- 19 Those legal submissions equally apply to this hearing stream where the Panel is considering whether it is appropriate to rezone the same land.
- 20 The RMA requires that a District Plan must give effect to any regional policy statement.⁸ The Panel must therefore ensure that its decisions give effect to the CRPS.
- 21 The rezoning of the Kaiapoi land would not give effect to the CRPS because it would allow development contrary to:
- 21.1 Policy 11.3.1 which provides for the avoidance of development in high hazard areas; and
 - 21.2 Policy 6.3.5(4) which seeks to avoid noise sensitive activities within the 50dBA Ldn airport noise contour for Christchurch International Airport.

⁸ Resource Management Act 1991, s 75(3)(c).

Policy 11.3.1 – Avoidance of inappropriate development in high hazard areas

- 22 The Kaiapoi land is located in a high hazard area as defined in the CRPS.⁹ The CRPS provides:

Policy 11.3.1 Avoidance of inappropriate development in high hazard areas

To avoid new subdivision, use and development (except as provided for in Policy 11.3.4) of land in high hazard areas, unless the subdivision, use or development:

...

3. is not likely to require new or upgraded hazard mitigation works to mitigate or avoid the natural hazard; and

4. is not likely to exacerbate the effects of the natural hazard;

- 23 Policy 11.3.1 places a clear requirement of 'avoidance' of inappropriate development in high hazard areas. It is well established from *King Salmon*, that the term 'avoid' "has its ordinary meaning of "not allowing" or "preventing the occurrence of"."¹⁰

- 24 The meaning of the word "avoid" has recently been re-examined and refined in the Supreme Court case of *Port Otago Ltd v Environmental Defence Society*.¹¹ Relevantly, the Court found that:¹²

"The language in which the policies are expressed will nevertheless be significant, particularly in determining how directive they are intended to be and thus how much or how little flexibility a subordinate decision-maker might have. As this Court said in King Salmon, the various objectives and policies in the NZCPS have been expressed in different ways deliberately. Some give decision-makers more flexibility or are less prescriptive than others. Others are expressed in more specific and directive terms. These differences in expression matter."

⁹ Canterbury Regional Policy Statement, definition of 'high hazard area', page 170; as modelled in <https://waimakariri.maps.arcgis.com/apps/MapSeries/index.html?appid=16d97d92a45f4b3081ffa3930b534553>

¹⁰ *Environmental Defence Society Inc v New Zealand King Salmon Company Ltd* [2014] NZSC 38 at [24].

¹¹ *Port Otago Ltd v Environmental Defence Society Inc* [2023] NZSC 112.

¹² *Port Otago* at [61].

- 25 In this sense, there are different types of 'avoid' activities. For example, some avoid policies in planning documents seek the avoidance of activities, and others seek the avoidance of certain adverse effects:
- 25.1 Where an avoid policy relates to the avoidance of a specific activity (such as Policy 11.3.1 of the CRPS, which prescribes the avoidance of new subdivision, use and development), are framed in a prescriptive, specific, and unqualified way and are therefore directive.
- 25.2 Where an avoid policy relates to the avoidance of certain adverse effects total prohibition would not likely be necessary in all circumstances.¹³ In such cases, decision makers must either be satisfied there will be no material harm or alternatively, be satisfied that conditions can be imposed that mean:¹⁴
- (a) material harm will be avoided;
 - (b) any harm will be mitigated so that the harm is no longer material; and
 - (c) any harm will be remedied within a reasonable timeframe so that overall, it is not material.
- 26 Applying the reasoning of the Supreme Court above, the term "avoid" in Policy 11.3.1 of the CRPS is directive and requires the avoidance of that activity. It is not possible to circumvent the application of this policy by simply mitigating adverse effects.
- 27 Further, while there are exceptions to this requirement in Policy 11.3.1(6), these are not relevant and would not apply to the Kaiapoi land.
- 28 The section 42A report notes that mitigation of flood risk for the site can be mitigated through the substantial raising of the land by 1.5m-3m.¹⁵
- 29 These works would clearly constitute new hazard mitigation works with the intent of mitigating or avoiding the high flood natural hazard that exists over the land.
- 30 The development of this land would therefore be contrary, and would not give effect, to the CRPS. To allow this development area against the backdrop of an avoidance policy to be included in the

¹³ *Port Otago* at [64].

¹⁴ *Port Otago* at [66].

¹⁵ Section 42A report, at [983].

Proposed Plan subject to the certification process would be contrary to the RMA.

- 31 While we have focussed here on the CRPS, we understand from the evidence of Ms Mitten that the high flood hazard on this site is the result of a coastal hazard risk.¹⁶ In this respect, the rezoning of the Kaiapoi development area would be contrary to the New Zealand Coastal Policy Statement (*NZCPS*), and specifically Policy 25 which provides that areas potentially affected by coastal hazards over at least the next 100 years, among other things:
- 31.1 avoid increasing the risk of social, environmental and economic harm from coastal hazards;
 - 31.2 avoid redevelopment, or change in land use, that would increase the risk of adverse effects from coastal hazards; and
 - 31.3 discourage hard protection structures (such as bunding and filling) and promote the use of alternatives to them, including natural defences.
- 32 We note that unlike the avoid direction in Objective 6.2.1.3, which restricts urban development outside of the identified areas of Map A which can be overcome by reading the provision together with the NPS-UD, the avoid policy related to high hazard areas can be distinguished. It goes directly to the fundamental merits of making land available for urban development and the adverse effects of hazard areas.
- 33 Development of high hazard areas would also clearly be contrary to the requirement in Policy 1(f) of the NPS-UD which requires decisions to contribute to well-functioning urban environments which are resilient to the likely current and future effects of climate change.
- 34 Despite Mr Wilson paying close attention to the provisions of the CRPS and how they relate to the various rezoning requests, his section 42A report does not engage at all with the clear direction in Policy 11.3.1 of the CRPS. Nor does he consider Policy 1(f) of the NPS-UD at all.

Policy 6.3.5 – Integration of land use and infrastructure

- 35 We refer to the evidence and legal submissions prepared on behalf of Christchurch International Airport Limited (*CIAL*) for this hearing with respect to Policy 6.3.5(4) which seeks to avoid noise sensitive activities within the 50dBA Ldn airport noise contour for Christchurch International Airport.

¹⁶ Evidence of Ms Joanne Mitten on behalf of Canterbury Regional Council for Hearing Stream 10A, 1 February 2024 at [45].

- 36 As set out in separate submissions for CIAL, the Officer is wrong in his interpretation of the exception in the CRPS for Kaiapoi. The wording of the CRPS is clear that any such exception does not apply to future development areas. The Hearings Panel recommendation for PC1 explicitly stated that "*there is no exemption for noise sensitive activities in FDAs and any development would therefore need to comply with Policy 6.3.5*".¹⁷ It therefore makes sense that FDAs were deliberately not added to the list of land types that are granted an automatic exemption from the direction in Policy 6.3.5(4).
- 37 The land is therefore subject to an avoidance policy unless and until the CRPS is changed.
- 38 For all of the reasons above, rezoning of the Kaiapoi development area is contrary to the CRPS and the RMA (and possibly the NZCPS).

Dated: 9 August 2024



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

¹⁷ *Report to the Minister for the Environment on Proposed Change 1 to Chapter 6 of the Canterbury Regional Policy Statement*, dated March 2021 at paragraph 152.