TO: CODC Hearings administrator, Tarryn Lines, districtplan@codc.govt.nz

BEFORE HEARING COMMISSIONERS
IN CROMWELL

UNDER THE	Resource Management Act 1991 ("**Act**")
IN THE MATTER OF	of Plan Change 19 Residential Chapter Provisions
BETWEEN	**JOHN AND ROWAN KLEVSTUL**
	Submitter
AND	**SUGARLOAF VINEYARDS LIMITED**
	Submitter
AND	**TOPP PROPERTY INVESTMENTS 2015 LIMITED**
	Submitter
AND	**CENTRAL OTAGO REGIONAL COUNCIL**
	Planning authority

REPRESENTATIONS ON BEHALF OF THE
ABOVE-NAMED SUBMITTERS: STAGE 1 HEARING

Chair: Deputy Mayor Gillespie

Commissioners: Councillors McPherson and Cooney

INTRODUCTION

1. As the Panel will be aware, I am project manager for each of the named submitters above (refer my request for further hearing time for those submitters for the Stage 2 hearing, filed shortly before these representations).

2. While each of the submitters have site specific issues and relief, they have also engaged with the general text of the plan. These representations address matters arising in respect of the general text only, or of general importance or application.

OVERARCHING ISSUES

The District Plan is the community's plan

3. While there are some "fundamentals" set by the RMA itself, as well as by the national policy instruments (such as the National Policy Statement – Urban Development) and the regional planning instruments, the District Plan is supposed to be an expression of the community's wishes. For example, refer:

   (a) The Supreme Court's emphasis on the determination of the district plan **through a public participatory process**, following which "[p]eople and communities can order their lives under it with some assurance".[1]

   (b) The High Court in *Hugh Green Ltd v Auckland Council* [2018] NZHC 2916, while in the context of a judicial review, records (with no dissent) that: "The planning witnesses at the hearing accepted that **a district plan reflects the relevant community's views, hopes and aspirations**."

   (c) The Environment Court's decision in *Transwaste Canterbury Ltd v Canterbury Regional Council* ENV C29/2004, confirming, in respect of the regional instruments, at [61] that: "the District Plan, … **represents the community's interpretation and application** of those documents".

   (d) In an early application for declarations under the RMA, the Planning Tribunal (as it then was) emphasised that: "…the policies and objectives in a District Plan have been **formulated by a community-wide process for the wellbeing of that community** …".[2]

4. As emphasised in my memorandum requesting further time for the submitters for Stage 2, the submitters are part of the community. Their "views, hopes and aspirations", lie at the heart of the plan change process,

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1 *Discount Brands Ltd v Westfield (New Zealand) Ltd* [2005] 2 NZLR 597, at [10].
2 Foodstuffs (South Island) Ltd v Christchurch City Council (1992) 2 NZRMA 154, at p159.

and need to be carefully considered – particularly when supported by cogent and persuasive evidence.

Evidence

5. What the consequences of the views, hopes and aspirations of the community are in terms of effects – both positive and adverse – requires evidence-based testing. Assertion, conclusory statements and circular reasoning is not enough. Where there is unopposed or compelling evidence in support of an outcome sought in a submission, decisions should not be made in the face of (ie contrary to) that evidence.

6. The importance of evidence-based decision making has been highlighted frequently in resource management cases. For example, the Courts have stated:

   (a) "We will not rely on general concerns about overall development: those appear to us to be overly susceptible to an affective fallacy in tending to prefer a particular outcome **rather than being an evidence-based analysis** of all realistically possible outcomes in the context of the relevant statutory planning framework."[3]

   (b) "The NPS-UDC, however, is clear in its application to urban environments, and clear in its direction that planning decisions should align with the purpose and principles of the RMA, as similar language is used. It includes additional direction for **planning to provide in an evidence-based manner for urban environments** where land use, development, development infrastructure and other infrastructure are integrated with each other."[4]

   (c) "**The court relies on robust evidence to inform policy**. We suggest evidence-based policy making in this context means that the content of policies and methods is informed by the sciences (including engineering) and matauranga Maori. …".[5]

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3 *Northern Land Property Limited v Thames-Coromandel District* [2021] NZENVC 180, at [146].
4 *Endsleigh Cottages Ltd v Hastings District Council* [2020] NZENVC 64, at [253].
5 *Aratiatia Livestock Ltd v Southland Regional Council* [2022] NZEnvC 265, at [20].

(d) "The court's decision-making is **an evidence-based public process**, with its judgments supported by full reasons."[6]

7. As for weighing of evidence, often, submitters from the community and their "lay witnesses" feel that their evidence is downplayed. In addition to their hopes and aspirations, community witnesses can give powerful evidence as to primary facts. They are the ones that know their environment. To that extent, residents are "experts" as to their own environment.

8. With that in mind, the observations of the Environment Court in *Whitewater New Zealand Inc v New Zealand and Otago Fish and Game Councils* [2013] NZEnvC 131, at [66], are also relevant:

> I consider kayakers and fishers (in this case) or developers, environmentalists, and farmers (in others) may give opinion evidence if they have some relevant expertise, even if they do have an interest in the outcome. The court will then assess that evidence according to the usual tests for probative value – including **relevance, coherence, consistency, balance, and insight** – while taking particular care to consider the nature of the interest the witness has in the outcome.

9. While in the context of mana whenua evidence, the High Court's finding or approach in *Tauranga Environmental Protection Society Inc v Tauranga City Council & BOP Regional Council* CIV 2020-470-31 at [65] as to evidence for a hapū, could be applied equally to the evidence of the landowner and developer witnesses as to their environment (including their investment environment):

> The Court is entitled to, and must, assess the credibility and reliability of the evidence for Ngāti Hē. But when the considered, consistent, and genuine view of Ngāti Hē is that the proposal would have a significant and adverse impact on an area of cultural significance to them and on Māori values of the ONFL, it is not open to the Court to decide it would not. Ngāti Hē's view is determinative of those findings.

10. Here the "considered, consistent, and genuine view" of the submitters, as to the conditions that affect them, supports the outcomes that they seek. This is reinforced by the expert evidence that they are calling.

11. Unless there is some compelling evidence to dispel the relief sought, there is little or nothing on a policy basis to reject that relief. In fact, it is a significant part of the submitters' case that the higher order policy requirements, such as those in the NPS-UD, support their relief sought. I turn to the NPS-UD next.

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6 *Mainpower Nz Ltd v Hurunui District Council* [2012] NZENVC 56, at [49].

National Policy Statement on Urban Development 2020 (NPS-UD)

Does it apply?

12. The Council's reporting officers have taken the position that the NPS-UD does not apply. This is an important matter for the Panel to resolve. It must make its own decision on the issue (ie not blindly adopt the reporting officer's position, like a nodding automaton), based on *all* the representations, submissions and evidence before it.

13. The importance of this decision is underscored because the District Plan must "give effect to" the NPS-UD if it applies (under s75(3)(a)). This is an important obligation. It requires *implementation*, particularly of the directive policies in the NPS-UD.

14. The reporting officer appears to rely on an email from a Ministry of Housing and Urban Development (**MHUD**) official in support of CODC not being a tier 3 territorial authority. But the email is equivocal, and provides no firm confirmation. It simply states (emphasis added):

> … You mentioned that there is no urban environment within the District; **if** this is the case than the Central Otago District Council (CODC) would not be a tier 3 territorial authority. …

15. Otago Regional Council's s32 Report for the Proposed RPS states at [788]:

> None of Otago's urban environments are identified as Tier 1 but 'Queenstown' and 'Dunedin' are identified as Tier 2. The rest of Otago's urban environments are Tier 3 urban environments. Table 70 below identifies all the potential urban environments within the Otago Region with the Tier implications at the territorial authority level.

16. Table 70 then provides:

Territorial Authority	**NPSUD TA Tier**	**Urban Environment(s)**
Central Otago District	Tier 3*[64]	Cromwell (Tier 3)* Alexandra/Clyde (Tier 3)*

64 Note: Indicative only. Central Otago District Council has yet to formally identify Cromwell and/or Alexandra/Clyde as urban environments, this list identifies that they could arguably meet one or both limbs, but further discussions are required.

17. So, despite the reporting officer's view, it is far from settled as to whether or not CODC is a Tier 3 territorial authority that is subject to the NPS-UD.

18. The submitters say that the correct position is that the NPS-UD does apply, on the basis of:

(a) The wide definition of urban environment in the NPS-UD, which states:

> **urban environment** 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

(b) The definition of "urban environment" refers to an area that is "intended to be" part of a housing and labour market of at least 10,000 people. While Cromwell does not currently meet that threshold, the growth projections for Cromwell identified in the Spatial Plan forecasts the population will reach 10,900 by 2038. That timeframe is consistent with the NPS-UD's identification of "long term" (defined as between 10-30 years) implementation.

(c) On a plain and ordinary meaning the best interpretation of "intended to be" refers to the intention of the relevant local authority as set out in its strategic growth policies. The reference in the Spatial Plan to Cromwell's predicted growth is therefore sufficient to indicate that the CODC has a specific "intention" for Cromwell's population to reach the level within the timeframes anticipated in the NPS-UD.

(d) This is consistent with the clear direction under the NPS-UD that local authorities must assess and provide sufficient development capacity to meet demand, including demand in the long-term. It would be consistent with this approach to apply the same timeframes when assessing whether an area is part of a labour and housing market of at least 10,000 people.

(e) This was accepted by the Expert Consenting Panel in the *Wooing Tree* decision, where the Panel concluded:

(i) the proper interpretation of "intended to be" is that stated above;

(ii) Cromwell township itself and areas adjacent to the township that have been identified for future urban

growth would be properly characterised as "predominantly urban in character";

(iii) Cromwell is part of a housing and labour market of at least 10,000 people – and that housing and labour market is not required to be predominantly urban in character; and

> Thus, the Panel accepts the position advanced by the Applicant and Brookfields that Cromwell (and adjacent areas identified for future urban zoning) would fall within the meaning of an "urban environment" under the NPS-UD.

(f) It is noted that the Wooing Tree Panel was chaired by a barrister with more than 20 years' experience, and also included a very senior planner with over 30 years' experience. Their carefully considered view on this issue should be given considerable weight.

Key provisions of the NPS-UD (ie why it matters)

19. Clause 1.5 "strongly encourages" tier 3 local authorities to:

> … do the things that tier 1 or 2 local authorities are obliged to do under Parts 2 and 3 of this National Policy Statement, adopting whatever modifications to the National Policy Statement are necessary or helpful to enable them to do so.

20. A "strong encouragement" is a powerful direction, that cannot be set aside lightly. It creates an expectation that goes beyond "having regard to" or "taking into account". Even those lesser directions require giving "genuine thought and attention" to the relevant matter.[7] A matter is not properly had regard to if it is simply considered for the purpose of putting it on one side.[8]

21. Key objectives that CODC is "strongly encouraged" to apply include:

> **Objective 1**: New Zealand has well-functioning urban environments that enable all people and communities to provide for their social, economic, and cultural wellbeing, and for their health and safety, now and into the future.
>
> **Objective 2**: Planning decisions improve housing affordability by supporting competitive land and development markets.
>
> **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.

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7 Eg *Stirling v Christchurch City Council* (2011) 16 ELRNZ 798, at [52].

8 *RJ Davidson Family Trust v Marlborough District Council* [2018] 3 NZLR 283, at [73].

> **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.

22. Key Policies that CODC is also "strongly encouraged" to apply include:

> **Policy 1**: Planning decisions contribute to well-functioning urban environments, which are urban environments 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
>
> …
>
> …
>
> (d) support, and limit as much as possible adverse impacts on, the competitive operation of land and development markets; and
>
> …
>
> **Policy 8**: Local authority decisions affecting urban environments are responsive to plan changes that would add significantly to development capacity and contribute to wellfunctioning urban environments, even if the development capacity is:
>
> (a) unanticipated by RMA planning documents; or
>
> (b) out-of-sequence with planned land release.

23. Policy 2 and 5 are also direct requirements for a Tier 3 Council, ie not just a strong encouragement:

> **Policy 2:** Tier 1, 2, **<u>and 3</u>** 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**.
>
> **Policy 5**: Regional policy statements and **district plans applying to tier** 2 and **3 urban environments** enable heights and density of urban form commensurate with the greater of:
>
> …
>
> (b) relative demand for housing and business use in that location.

24. Of particular import, as the submitters perceive it, is that the Panel is:

(a) required to provide capacity to meet demand the short term, medium term, and long term (Policy 2) – in other words, just addressing short term (or even medium term) demand is not enough;

(b) required to enable the density required to given demand in the relevant location (Policy 5(b)); and

(c) strongly encouraged to enable a variety of homes, such as different typologies and forms, and in locations to meet the needs (including affordability) of the community (Policy 1).

PARTICULAR (KEY) RELIEF SOUGHT - TEXT

The Klevstuls - Rural Hamlet/ cluster development concept

25. While the traditional or historical approach of large lot sizes for rural and rural-residential areas has its place, a more appropriate and efficient approach (with a grounding in history) for some sites is that of a "hamlet" or of "clustered development". Such developments can both increase density by adopting some smaller lot sizes (assisting with supply and affordability issues) and create real community, as well as maintaining significant openness and rural village character on the balance of the land.

26. The key general outcomes sought were described in the submission as follows:

(a) Provide for large Lot Residential Precinct 6 (or similar) with an average minimum allotment size for residential activity/residential of 1,000m²;

(b) Provide for the urban design principles described and illustrated in the Rural Hamlet Vision;

(c) Enable lot sizes below 1,000m2 where the principles in the Rural Hamlet Vision are given effect; and

(d) …

(e) Any consequential relief and amendments to the CODP.

27. Mr Barr has provided evidence on behalf of the Klevstuls for the general text hearing. The general relief sought has been refined to seeking, in the Large Lot Residential Zone, provision for an average allotment size for residential activity of 1,000m². This could be applied more generally than in respect of the Klevstuls' site. Doing so would broadly allow for the sort of hamlet or clustered development envisaged by the Klevstuls on large sites. Such approaches are provided for in district plans elsewhere. If some further controls (such as overall site coverage for buildings) were also considered necessary, to ensure that the scale and fee of enabled development remains appropriate that is some that could be explored further.

Rob Hay (Sugarloaf) - Large Lot Residential Zone relief

28. Mr Hay is seeking:

    (a) a reduction in the minimum lot size proposed for the Large Lot Residential Zone – Precinct 2 from 3,000m^2 to 1,500m^2, and

    (b) for Comprehensive (or Multi-Unit) Residential Development to apply to all LLRZs (across all precincts) allowing a density of 250m^2 for any such developments, rather than the currently proposed very low (eg 3,000m^2) densities proposed. Retaining low density requirements as part of any Comprehensive Residential Development rules defeats the very purpose of the regime.

29. For the benefit of the district, this relief is sought generally not just to the Sugarloaf site.

Lindsey Topp – Future Growth Overlay, Low Density Residential Zone relief

30. Mr Topp is seeking:

    (a) Conversion of the Future Growth Overlay to Low Density Residential Zone;

    (b) provision for Comprehensive Residential Development the LDRZ as a fully discretionary activity, to allow infrastructure capacity to be addressed; and

(c) allowing a density of $250m^2$ as part of any such discretionary Comprehensive Residential Development, rather than the currently proposed density of $450m^2$.

31. Ms Skuse has provided evidence in support of both Mr Hay and Mr Topp's submissions

Common themes and justification

32. Each of the above submitters, in different ways, are seeking to enable greater densities in the LLRZ and LDRZ than are currently proposed under PC19. Other submitters have also sought similar outcomes. In other words, there is a strong community voice seeking this outcome.

33. The relief sought by the Klevstuls is the most conservative, as they are only seeking provision of an average allotment size for residential activity of $1,000m^2$ in the LLRZ. For large sites, they consider this to allow flexibility for the Hamlet or Cluster development that they say is an appropriate option to have available in the District Plan. Their issues would also be resolved by the Comprehensive Residential Development approach sought by Mr Hay in the LLRZ. In a sense, any Hamlet or Cluster development is a "comprehensive" one.

34. Mr Hay and Mr Topp's approach is to ensure, for the smaller sites within the LLRZ (Mr Hay) and the LDRZ (Mr Topp) that the Comprehensive Development provisions are meaningful, rather than adopting a Clayton's Rule that in reality provides no certain consent pathway for Comprehensive Developments because the minimum lot size is to great.

35. This is all in the context where:

(a) The current District Plan generally provides a Comprehensive Development Pathway for all zones, with a $250m^2$ minimum lot size.

(b) So, rather than enabling greater intensification and choice, PC19 is reducing it.

(c) This is contrary to the requirements of the NPS-UD. Even if the NPS-UD does not strictly apply (eg if CODC is not, in fact, a Tier

3 Council), it is still a relevant consideration that should not be lightly set aside.

(d) The relief sought will give effect to the NPS-UD. In particular it will:

(i) contribute to a well functioning and efficient urban form;

(i) provide for development of a type favoured by some people, including with benefits to housing affordability and demand in the relevant areas; and

(ii) support positive competition in the market.

36. Leaving landowners, developers, and/or investors to run the gauntlet with non-complying resource consents in order to achieve the outcomes required by the NPS-UD is not appropriate. It is simply too uncertain and costly to risk taking such a gamble. You can easily see a reporting officer and subsequently a commissioner considering a consent application saying "sorry, you are out of zone or beyond the densities set through the recent PC19 process, and so must be declined" – no matter how sensible the proposal might be.

37. For all these reasons, the submitters respectfully ask for their relief, or something similar, to be granted. It is within scope and requires genuine consideration. Their experts would also be available to conference on the issue with the Council's experts, if that would assist the Panel. Clause 8AA provides the Panel with wide powers to narrow the matters in dispute, by directing meetings, or even mediation, and the submitters also urge the Panel to exercise those powers to assist it in its decision making.

DATED 21 April 2023

J D K Gardner-Hopkins
Project Manager for the Submitters