BEFORE THE HEARING COMMISSIONERS OF
CENTRAL OTAGO DISTRICT COUNCIL

IN THE MATTER	of Proposed Private Plan Change 13 to the Central Otago District Plan
REQUESTOR	**RIVER TERRACES DEVELOPMENTS LIMITED**

LEGAL SUBMISSIONS OF COUNSEL

FOR

CENTRAL OTAGO DISTRICT COUNCIL (FURTHER SUBMITTER #506) AND GREG AND VIVIENNE WILKINSON (SUBMITTER #396)

Dated 2 July 2019

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INTRODUCTION

1. Evidence has been lodged on behalf of my clients from:

   a) Marilyn Brown; and

   b) Edward Guy.

2. Mr Wilkinson has spoken to his submission. As he told you, Mr and Mrs Wilkinson reside at 47 Erris Street, Cromwell. They are not immediate neighbours to PC13. I discuss Mr Wilkinson's evidence below.

3. The extraordinary number of submitters opposing PC13 is unusual, certainly in this district. So too, is the Council's step in lodging its further submission. This has never been done before to my knowledge. Dr Chiles has also confirmed in his evidence that Public Health South has taken an unusual step in opposing this application - it usually lodges a neutral submission. These actions by a significant number of parties should signal to you the extent of community opposition to this proposal.

4. The position of my clients is that PC13 should be refused outright. The plan change does not represent sound resource management practice. It undermines the operative District Plan provisions, the regional planning provisions and the important Cromwell MasterPlan process and adopted Spatial Plan the Council has, and continues to, progress. This land is not suitable for residential development and no amount of mitigation will change that basic planning premise.

5. The expert evidence lodged on behalf of my clients does not address the detail of PC13. That is intentional. Reviewing and tinkering with the detail of the plan change will not address the fundamental position of my clients that PC13 is not needed and is completely inappropriate on this site. I will however address two matters arising from the 21 June 2019 version of the RTRA plan provisions later in these submissions as they raise legal questions.

6. These submissions are structured as follows:

   a. Response to assertions of Proponent against the Council;

   b. Cromwell MasterPlan and Spatial Plan;

   c. Mr Wilkinson's evidence;

   d. Statutory Framework;

e. The so-called "housing crisis";

f. The question of affordability;

g. Reverse sensitivity and no complaint covenants;

h. Conclusions.

RESPONSE TO ASSERTIONS MADE AGAINST THE COUNCIL

7. The opening submissions of counsel for the Proponent made a number of assertions against the Council in its role as further submitter. These will be responded to in the first part of these submissions.

Trade Competitor

8. The Proponent's assertion that the Council is a trade competitor in this process was not supported by any evidence as to why the trade competition point even arises. Mr Meehan referred to Gair Avenue in his primary evidence and noted that his PC13 lots would be cheaper than the prices being marketed for both Gair Avenue and Top 10 Holiday Park.[1] That is not evidence of trade competition.

9. The Act[2] is not helpful is defining a trade competitor. A good example of the Court's assessment of a trade competitor can be found in the *Queenstown Central*[3] case. There, the High Court reviewed the position of two parties who sought to have approvals granted enabling the construction of commercial premises for the lease of land they owned which was suitable for industrial use. The competition was for the use of the limited resource of flat land at Frankton Flats for the commercial purposes sought. The Environment Court had found Queenstown Central to be a trade competitor of Foodstuffs and Cross Roads properties. This was challenged by Queenstown Central on appeal. The High Court made these findings:

- Even while companies were disagreeing on the best zoning for their land, and therefore competing for the use of land, that did not make them trade competitors.[4]
- Two of the parties involved were property developers who "develop property with an eye to the market for that property". That did not

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[1] Evidence of Chris Meehan, paragraphs 75 and 76
[2] Section 308A RMA
[3] *Queenstown Central Limited v QLDC and others* [2013] NZHC 815
[4] Ibid at [155]

make them participants in the trade of the use to which the property is likely to be put.[5]

- There was no justification for extending the phrase "trade competition" to property developers competing for the best use of land.[6]
- Owners of land seeking to get their land zoned for the highest valued use were not trade competitors, the Court noting a finding otherwise would mean numerous planning disputes would be wrongly categorised as trade competition.[7]
- Trade competition presents as "the use of RMA arguments to serve the ulterior purpose of retaining or obtaining market share in unrelated markets. So a supermarket as a trade competitor stops a rival building another supermarket in its customer catchment, and uses every available RMA argument to do so. This is a wholly different game from property owners competing for the best use of their land."[8]

10. In *Kapiti Coast Airport*[9], the Environment Court noted the issues in *Queenstown Central* and compared those facts to the Kapiti situation, which involved competition between parties acting as commercial lessors. Declarations were sought from the Court as to the issue of trade competition, among others. One party wanted to restrict the commercial activities the Applicant wanted to undertake on its land and was seen by the Court as a competing use because the competitor operated in exactly the same market. In *Kuku Mara Partnership*, the Environment Court also noted that competition for resources was not trade competition and that the provision in the Act at it stood at that time addressing trade competition was to "prevent trade competitors frustrating legitimate activities purely for the purpose of avoiding commercial competition."[10]

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[5] Ibid at [157]
[6] Ibid at [158]
[7] Ibid at [160]
[8] Ibid at [161]
[9] *Kapiti Coast Airport Holdings Limited v Alpha Corporation Limited and others* [2016] NZEnvC 137
[10] *Kuku Mara Partnership v Marlborough District Council* W50/2002, 14 November 2002 at [33]

11. There is no trade competition here. The trade competition argument is directed at the Gair Avenue development,[11] which has been mentioned in evidence. Historically, the Council's involvement in this land started in 1996, at which time it purchased 21 hectares of land from the Crown, that land being land previously acquired by the Crown as part of establishing the new Cromwell township associated with the Clyde dam project.

12. In 2004 the Council invited interest from developers to present a concept plan for the whole block, with specific parameters concerning integration with the adjoining reserve, attractive residential housing in well laid out grounds and extension to the Council's reserve areas to present an uninterrupted "garden" to the view of passing traffic. The first four stages were sold as blocks for development as the market demand required, with sections generally ranging from 500-900m^2. I am instructed that Stage 5 has just been completed with 38 lots having been sold so far and 42 remaining available. Titles will issue this month. Lot sizes in Stage 5 range from 350m^2 to 800m^2. The final Stage 6 is explained by Ms Brown and is for smaller lots.

13. The financial returns are used for the benefit of the community within the Cromwell Ward, such as undergrounding of street lights in Cromwell, refurbishment of the Memorial Hall (not yet commenced) and other community projects undertaken by the golf club, the equestrian club and other community organisations.

14. Resource consent has been issued for a multiunit development on lots 25, 26 and 27 of this development but no building consent has yet been issued. This particular part of the development comprises 6 apartments.

15. The reason for the Council's participation in this hearing is very simple. It is not here to compete for land zoning or a land resource. It is not here to frustrate the Proponent's activities so as to avoid commercial competition. It is here because the Council has been undertaking a long-term, strategic planning exercise for Cromwell and considers PC13 will, in the words of Commissioner Lister, "gazump" that process. The Council is here to ensure the Commission has the best information available to it on the wider planning framework, including the MasterPlan process undertaken and the content of the Spatial Plan. That much is obvious from its evidence. The MasterPlan work is being undertaken to assist with the exercise of the Council's RMA functions under

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[11] Goldsmith opening submissions Attachment 11

section 31, which include integrated management of the effects of the use, development or protection of land and associated natural and physical resources of the district[12]; and also to ensure that there is sufficient development capacity in respect of housing and business land to meet the expected demands of the district[13]. I address section 31 in more detail later in these submissions.

16. The Council's concerns about PC13 and the outcome that could result from it in planning terms are very real. That is why the further submission was lodged. As submissions and evidence for Residents explained, it was the submitters who encouraged the Council to participate in this hearing to ensure the Commission understood the Spatial Plan and masterplanning process, including the community's aspiration and vision for the future and why PC13 conflicted with it.

17. The Council completely refutes any suggestion that it is a trade competitor. It is not participating in these proceedings because of the Gair Ave development. It has never considered itself a trade competitor to this proposed development at River Terraces and has not even turned its mind to that possibility. Its focus is on bigger things. The Council did not state in its further submission that it was a trade competitor because it is not one. It has not breached the Act because the provisions Mr Goldsmith refers to are not relevant.

18. Despite making his unfounded assertion about trade competition, and then referring you to your powers under sections 41C and 41D of the Act, Mr Goldsmith did not ask you to strike out the Council's submission on trade competition grounds. He was at least candid enough to admit that the Council's evidence was useful as it provides you with factual background about the Cromwell MasterPlan and Spatial Plan.

19. In my submission, the assertion of trade competition should be disregarded.

The question of independence

20. Mr Goldsmith's submission that Mr Whitney's engagement as the reporting planner to the Council on all resource management matters somehow jeopardises his credibility in this proceeding[14] is unfair and professionally inappropriate. No doubt Mr Whitney will respond to it when he speaks to his

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[12] Section 31(1)(a)
[13] Section 31(1)(aa)
[14] Goldsmith opening submissions para 111(a)

report. Mr Whitney is entirely independent of the Council, as he is in all planning hearings before this Council.

21. This submission appears to be premised on a perception of the Proponent that the Council is so adamantly opposed to PC13 that it will take any step to ensure it does not proceed. That is unfounded and completely incorrect. Under its planning function hat, the Council is absolutely entitled to give its views to this hearing on the proposal before you. That view does not have to be shared by Mr Whitney, or other witnesses, or any other party to the hearing.

22. The Commission is of course entirely independent of the Council. The Commission made clear at the start of the hearing that it had delegated authority to make the decision on PC13. This means no recommendation will be made to the Council as to whether or not to grant the Request. That is appropriate and removes the decision from the Council itself.

The alleged lack of response to the proponent's submission on the Cromwell Masterplan

23. Mr Bretherton and Ms Hampson complained that the Council did not take account of the Winton submission on the Cromwell MasterPlan. I attach as **Attachment A** an email from Ms Jacobs, the Council's CEO, to Mr Bretherton, dated 22 January 2019, confirming that the Winton submission was received and read and given due consideration in the same way as other responses. Ms Jacobs advised Mr Bretherton that the Council did not refer to any individual responses directly in the MasterPlan documents other than pulling out some comments that clearly articulated mentioned themes. She said:

> "The purpose of the analysis was to show trends rather than specifics. Your feedback was quite specific and therefore is not coming through strongly in the trends, despite it being well circulated with relevant people related to the project."

24. Winton was not ignored. Its submission was considered.

25. The Council also refutes the suggestions of Mr Meehan and Mr Bretherton that its consultation process did not involve the right players, particularly developers. I attach as **Attachment B** the meeting advertised for developers, primary producers and business owners which took place on 16 June 2018. This meeting commenced with a presentation by Rationale and discussion followed. While Mr Bretherton has complained about his perception of the process, there is no doubt that the consultation occurred with these members of the

community. Other submitters have given evidence of their involvement in that process and the positive experience of the process.

26. Mr Guy will be happy to answer any questions you may have on this meeting, and other meetings with the community.

The lack of other development options

27. As regards the many assertions made by the Proponent that it is the developer best placed to develop land for Cromwell's benefit, the Council can confirm that other developers in Cromwell fully intend to develop their land in the immediate future and are considering how those developments might align with the adopted Spatial Plan. This has provided them with the certainty they require to move forward.

28. **Attachment C** to these submissions is a letter from Mr Sew Hoy dated 11 June 2019 confirming that Sew Hoy Estate, as the owners of Goldfields Estate, are in the planning stages of their development and propose to proceed as soon as possible. This was forwarded to Ms van der Voort at the Council. Mr Sew Hoy also confirms in that letter that the company is waiting the final Council approval for a concept plan (now consented) for its complying development and that it has had conversations with the Council about progressing a more intensified development consistent with the Spatial Plan outcomes that have now been made public.

29. **Attachment D** to these submissions is an email from the developer of the Freeway land, Peter Cooney, to the Council dated 12 June 2019. This confirms that this developer will be preparing a private plan change to advance the development of that site within 3 months. It confirms those sites will be 270-350m^2 in size. The price for land and house will be packaged in the range $520,000 – $590,000.

30. Both the Sew Hoy and Freeway Orchard proposals are factored into Ms Brown's evidence (refer her summary and Attachment 1).

31. Clearly, Mr Meehan is not the only developer in the market delivering these products.

32. The Proponent has also been quick to shoot down any prospect of the golf course land being developed. I am instructed that the golf course has in fact been relocated in Cromwell three times in the last 116 years. The Council has had discussions with some golf club members in anticipation of approval of the Spatial Plan. Accordingly, the Council will meet with golf club members with a

view to commencing negotiations about the future use of that land. The many golf club members are also members of the Cromwell community and have participated in the consultation process. I also note that the Council's consultation with the community through the MasterPlan process did not raise significant opposition to the concept of building a new golf course so that the existing golf course site could be developed to accommodate growth in the town centre.[15] There are of course processes to be worked through. This is normal practice. The Spatial Plan includes reserve space within this site and envisages the relocation of the golf club to Council land elsewhere.

CROMWELL "EYE TO THE FUTURE" MASTERPLAN SPATIAL FRAMEWORK

The Cromwell MasterPlan process

33. The Cromwell MasterPlan process started in May 2018. It is not two years old as suggested by Mr Goldsmith. It is just over one year old. The detail of the process is set out in the evidence of Ms Brown and Mr Guy. I do not intend to repeat that detail but will highlight central points of relevance. The statutory relevance of the MasterPlan and Spatial Plan will be addressed in the Statutory Framework of these submissions.

34. Mr Goldsmith has criticised the Council for not progressing its district plan review, implicitly suggesting that had it gone on with that process, it would have addressed the district's demands and Mr Meehan may not have needed to advance his private plan change. That assertion does not align with the facts. Mr Meehan's work on PC13 was underway in 2017, as set out in his evidence and that of Mr Bretherton. This suggests Mr Meehan would have progressed PC13 with or without the Council's planning work. The Council's processes have had no impact on that private intention.

35. The Council decided not to pursue its district plan review for several reasons. The Council has been working on the district plan since 2013. Two rounds of consultation have been undertaken including submissions and informal hearings by Council's Hearings Panel. In 2018, the Council resolved to delay the district plan review until the National Planning Standards were finalised as it did not consider it financially prudent to complete the work twice. It also wanted to

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[15] Let's Talk Options Survey Analysis November 2018 page 6 notes that 6 respondents out of 29 wanted the golf course to stay where it is. Page 12 of the same document records that those respondents who seemed to accept the golf course development suggested places the golf course could move to.

carefully consider the growth issues in Cromwell and how that should be planned for and wanted to understand the outcomes of the NPS on Biodiversity.

36. Mr Guy's evidence addresses the Cromwell MasterPlan process, where the Council started from and how it got to the Spatial Plan adopted recently by the Cromwell Community Board. Along with Ms Brown's evidence, Mr Guy's evidence is intended to assist the Commission to understand the work the Council has been doing and where it is going to next.

37. Mr Guy explains in his evidence the use of an integrated planning approach which follows the New Zealand Treasury Better Business Case ("BBC") framework. As he states, this is a framework intended "to enable local government to produce evidence-based and transparent decision making for delivery management and performance monitoring of any scheme".[16]

38. Unlike so many long-term planning exercises that have occurred in New Zealand in the past, this process has taken a "bottom up" approach, drawing on extensive consultation with the community. The BBC process involved repeated engagement with key stakeholders and the community. Over several months, it has been that community that has defined what it wants, where and why.

39. The process has incorporated the Central Otago "A World of Difference Values" outlined in both Mr Guy's evidence and Ms Brown's evidence. Mr Guy's evidence is that the importance of these values became apparent early in the engagement process for the Cromwell MasterPlan and continue to be relevant today. It is intended that the planning for Cromwell's future remains true to these values. They have been central to the Council's development of the Spatial Plan. As Ms Brown notes in her primary evidence at paragraphs 7.3.1 to 7.3.3:

> "The rural frame to Cromwell is highly valued by the community for its amenity, visual and landscape qualities, and for the employment and other economic benefits it beings to the town.
>
> An important characteristic of the rural frame is that it assist containment of urban development, and in doing so protects 'World of Difference' values and brand, and retains the distinctiveness of Cromwell as a town within the Basin.

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[16] Evidence of Edward Guy, paragraph 8

> The immediacy of setting and connectivity to the rural frame is an important element to Cromwell's urban amenity, and 'welcome' within entry corridors."

40. Ms Brown then notes at paragraph 7.3.6 of her primary evidence the link between these important values and Section 4.6.2 of the Operative District Plan and goes on to explain in her paragraph 7.3.7 how the approval of PC13 would impact on that presently expansive rural environment.

41. Ms Brown's evidence discusses the detail of the three growth options both as to Spatial Framework (i.e. the future land use precincts as a whole) and the implications of each option for the Town Centre and Arts and Culture Precinct. As she explains, this is because for each option there are different consequences. In committing to the "Growth within Cromwell" option, this also enables a walkable community, a vibrant town centre and an arts and culture precinct which is potentially of regional significance. The community understood this inter-relationship.

42. The Cromwell economy is supported by both its urban and rural productive environments, the latter contributing significantly to export earnings. Continued viticulture and horticulture investment is occurring and new plantings are evident on the Jones Orchard and other nearby land within the Ripponvale area. It is critical that these rural based activities are not compromised by the addition of urban residential housing. Accordingly, the Spatial Plan recognises the significance of the rural frame and the operational needs of the rural environment in a number of strategic objectives which will be carried through to rezoning processes.

43. The Cromwell MasterPlan process has also involved wider considerations such as infrastructure. As Mr Copeland noted in his economic evidence, infrastructure costs associated with development affect the Council's own infrastructure programme and the setting of rates. The efficiencies associated with consolidated development have also been recognised in the Spatial Plan.

The adoption of the Spatial Plan

44. The Spatial Plan was adopted by the Cromwell Community Board at its meeting on 29 May 2019. The adoption of the Spatial Plan does not mean the work stops there.

45. Ms Brown has explained the Spatial Plan in her supplementary evidence dated 21 June 2019. At paragraph 10 of that evidence, she notes that at this stage,

the Spatial Plan does not include some of the detailed mechanisms to implement the Cromwell MasterPlan. Examples of intended work streams include further analysis of housing affordability and preference factors, and the commencement of detailed evaluations for District Plan Review or Council initiated plan changes addressing residential, business and rural environments. Several work streams are underway.

EVIDENCE OF GREG WILKINSON

46. Mr Wilkinson told you that he lives in old Cromwell. He holds several community roles – he a Trustee of the Central Lakes Trust, he was until recently the Chair of the school board, he is a member of the Cromwell Business organisation and a member of Cromwell Lions. He supports the community's wider opposition to PC13.

47. It is his view that PC13 does not meet any of Cromwell's needs. The Proponent's manner of bringing its development before the community was not, as Mr Wilkinson put it, "the way to do business in Cromwell." He referred you back to the points in his submission, noting he supported the Council's MasterPlan's process and its direction to intensify the Town Centre, and considered that process to be appropriate for long term planning for the town. He was of the opinion that PC13 "put the cart before the horse". He did not consider Cromwell needed another satellite town. He questioned the validity of Mr Meehan's statement in his additional evidence of 11 June asserting that many organisations in Cromwell thought there was a housing crisis. He confirmed that Cromwell Lions did not hold a collective view on this.

STATUTORY FRAMEWORK

48. The accepted legal parameters for considering a plan change were outlined in the Joint Memorandum of Counsel dated 8 June 2019. This includes the need for the Council's District Plan to be prepared in accordance with its functions under section 31 and Part 2.

49. Mr Goldsmith's submission that you should not give much weight to the Cromwell MasterPlan conflicts directly with his own willingness to accept its factual basis. He has also submitted that you should have regard to the Council's Economic Development Strategy (Tab 5 to Goldsmith opening submissions). That document is also a non-statutory document, yet Mr Goldsmith has submitted it is relevant.

50. In my submission, the statutory basis for the Cromwell MasterPlan and the Spatial Plan arises through:

    - the legal requirement for the preparation, implementation and administration of a District Plan to assist the Council to carry out its functions under section 31 – see section 72;
    - development of the District Plan (and therefore any consideration of PC13) to have regard to the Otago Regional Policy Statement ("ORPS") and other relevant regional plans and to give effect to the ORPS – see sections 74 and 75;
    - the Council's functions in section 31; and
    - an assessment of the costs and benefits and effective use of land under section 32 and Part 2.

Sections 72, 74 and 75

51. Counsel agree that a council must change its district plan in accordance with its functions under section 31 and the provisions of Part 2.[17] I adopt the submissions of counsel for Residents for Responsible Development Cromwell ("Residents") on Part 2 of the Act and have nothing further to add, other than to say that the question of a community's wellbeing is clearly at the heart of this hearing.

52. Section 72 states that the purpose of the preparation, implementation and administration of district plans "is to assist territorial authorities to carry out their functions in order to achieve the purpose of the Act."

53. Section 74(2)(a) requires that the preparation of a District Plan must have regard to the provisions of any proposed RPS or proposed regional plan. This is mandatory. The District Plan must also give effect to[18] the operative regional policy statement.[19] This is also mandatory.

54. CODC's work in developing the Cromwell MasterPlan and Spatial Plan has followed those directives. It is not optional. CODC has developed a strategic and co-ordinated approach to the future planning for Cromwell, based very much on integrated management.

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[17] Joint Memorandum of Counsel, paragraph 4

[18] Section 75(3) RMA

[19] While section 75(3) refers to "any" regional policy statement, regional policy statement is defined in the Act as one that is operative

55. Section 74(2)(b)(i) also states that when preparing or changing a district plan, a territorial authority shall have regard to "Any ...Management plans or strategies prepared under other Acts". The Cromwell MasterPlan and the Spatial Plan are clearly a management plan prepared under another Act, namely the Local Government Act.

56. The Cromwell MasterPlan and the Spatial Plan clearly have statutory relevance and should be carefully weighted by the Commission.

57. The Joint Witness Statement resulting from the planners' conferencing dated 10 June 2019 sets out the relevant regional plan provisions for your reference. Mr Whitney also sets them out at section 9.2 of his Section 42A Report. The Partially Operative ORPS 2019 has been approved by the Environment Court and is the most recent enunciation of important resource management matters for the region. In reviewing these provisions, I ask that you pay particular regard to these themes, expressed in various forms throughout the document:

- sustainable management and sustainability;
- integration and integrated management;
- the wellbeing of people and communities; and
- strategic planning and co-ordination.

58. The Partially Operative ORPS 2019 develops these themes through the following:

Chapter 1 heading – Resource management in Otago is integrated.

Objective 1.1 – resources are used sustainably to promote economic, social, and cultural wellbeing for the region's people and communities.

Policy 1.1.2 – social and cultural wellbeing is to be provided for in undertaking subdivision, use and development and protect natural and physical resources. This includes avoiding significant adverse effects on human health and promoting good quality and accessible infrastructure and public services.

Objective 1.2 – recognise and provide for the integrated management of natural and physical resources to support the wellbeing of people and communities.

Policy 1.2.1 – integrated resource management is to be achieved by a number of things including coordinating the management of interconnected

natural and physical resources; taking into account the impact of management of one natural or physical resource on the values of another, or on the environment; recognising the value of the resource may extend beyond the immediate or directly adjacent area of interest; ensuring consistent cross boundary approaches to resource management; ensuring that effects of activities on the whole of the natural or physical resource is considered when the resource is managed as subunits; managing adverse effects of activities to give effect to the objectives and policies of the RPS; promoting healthy ecosystems and ecosystem services; promoting methods to reduce or negate the risk of exceeding sustainable resource limits.

Objective 4.3 and Policy 4.3.1 – infrastructure is to be managed and developed in a sustainable way

Objective 4.5 – urban growth and development is well designed, occurs in a strategic and co-ordinated way, and integrates effectively with adjoining urban and rural environs. Policy 4.5.1 implements this objective.

Policy 4.5.2 – integrating infrastructure with land use – this is part of redevelopment planning.

Policy 5.3.1 – addresses other activities that have a functional need to locate in rural areas.

59. As noted by counsel for Highlands, Objective 4.5 and its associated policy are the linchpin of the relevant ORPS provisions here. They focus on integration, co-ordination and strategy and require that planning be undertaken holistically.

60. The Council's Cromwell MasterPlan process and Spatial Plan has followed these regional planning directives and undertaken a wide planning exercise:

    a) It has taken a bottom-up approach to strategic planning, seeking out the community's view on what the community wants for Cromwell. That includes developers and landowners.

    b) It has carefully considered how the growth required for the town can be linked up to existing infrastructure and roading networks in a sustainable way, rather than having to provide new and expensive infrastructure links.

    c) It has linked the provision of growth to the protection of values expressed by the community in consultation. These include landscape values and the protection of the orchards and vineyards.

d) It has carefully considered incompatible activities and reached the conclusion that residential growth should not occur in the part of Cromwell where the PC13 land sits because it will conflict with important existing activities that bring economic benefit to Cromwell.

e) Finally, in light of the above, it has carefully considered how land can be developed within existing residential areas, involving infilling and achieving higher densities. This will also assist in improving the dynamic of the Cromwell Town Centre. That is what the community wants.

61. In contrast, PC13 does not consider the bigger picture for Cromwell and how the development picture links together. Rather, it focuses on what PC13 requires to deliver the end product to the market it perceives would be interested in this product. It is internally focused.

Regional Air Plan

62. In preparing its District Plan, a further statutory requirement arises through the Regional Air Plan. As noted in the Joint Memorandum of Counsel dated 8 June 2019[20], a District Plan must not be inconsistent with a regional plan for any matter specified in section 30(1). This includes the Regional Plan: Air for Otago 2009.[21]

63. The Regional Air Plan includes Method 17.2.1.2 - the regional council will encourage the Otago district councils to control adverse effects on air quality from land uses through...district plans... by achieving physical separation of incompatible land uses through buffer zones or shelter belts, by recognising existing use rights and reverse sensitivity and by encouraging people undertaking land use activities to manage their effects through codes of practice or environmental management.[22]

64. This Method is relevant to Objective 6.1.2, Policy 8.2.8 and Policy 12.1.1 of the Regional Air Plan which address discharges and effects on human health and safety. Policy 12.1.1 includes encouraging district councils to use land use planning mechanisms and other land management techniques to mitigate adverse effects from spray drift.

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[20] Joint Memorandum of Counsel dated 8 June 2019, paragraph 10
[21] Joint Witness Statement from Expert Planner Conferencing, Schedule D
[22] Method 17.2.1.2

65. You have heard from the orchardists and horticultural industry on why the placement of PC13 on this site is unacceptable. The Council has been particularly cognisant of those concerns in the development of its MasterPlan and Spatial Plan. It started its planning process by talking to the community, which includes these land users.

66. The Council's approach is to ensure incompatible land uses are not located next door to each other. The surest way to avoid any adverse effect on human health and to achieve a community's wellbeing is to **avoid** the sensitive land users (the PC13 residents) being placed near the existing and lawful land users (in this instance, the orchardists and viticulturists).

67. The Cromwell masterplanning process and Spatial Plan are consistent with the Regional Air Plan. PC13 is plainly in direct conflict with it.

Section 31(1) – functions of a territorial authority

68. I have already referred the Commission to the starting points of sections 72 and 74(1), which refer directly to the Council's functions as a territorial authority under section 31. There are numerous functions stated in Section 31 and they all relate back to the Act's purpose. Section 31 states:

"31 Functions of territorial authorities under this Act

(1) Every territorial authority shall have the following functions for the purpose of giving effect to this Act in its district:

(a) The establishment, implementation, and review of objectives, policies, and methods to achieve integrated management of the effects of the use, development or protection of land and associated natural and physical resources of the district:

(aa) The establishment, implementation, and review of objectives, policies, and methods to ensure there is sufficient development capacity in respect of housing and business land to meet the expected demands of the district:

(b) The control of any actual or potential effects of the use, development, or protection of land, including for the purpose of –

(i) The avoidance or mitigation of natural hazards; and

(ii) *Repealed*;

(iia) The prevention or mitigation of any adverse effects of the development, subdivision, or use of contaminated land:

(iii) The maintenance of indigenous biological diversity:

(c) *Repealed*.

(d) The control of the emission of noise and the mitigation of the effects of noise:

(e) The control of any actual or potential effects of activities in relation to the surface of water in rivers and lakes.

(f) Any other functions specified in this Act.

(2) The methods used to carry out any functions under subsection (1) may include the control of subdivision."

69. Integrated management is clearly at the heart of a territorial authority's functions and it underpins all of the work the Council has undertaken on the Cromwell MasterPlan over the past year or so, at a cost of some $1 million, for the purpose of meeting that function. The same work has also been directed at ensuring there is sufficient development capacity for housing and business land to meet expected demand in Cromwell as also required by section 31. The Cromwell MasterPlan process has also considered the section 31(1)(d) functions related to noise.

70. Importantly, the Council's Cromwell MasterPlan work is not just about the provision of housing. That is not the only matter it must consider under section 31. It also considers the provision of recreational areas, art and heritage areas, transport and infrastructure. That is integrated management. The Council's work represents long-term planning in its purest sense, and it is being undertaken for the benefit of this community for the next 30 years. It represents sound resource management practice and is forward thinking. The final Spatial Plan now arrived at reflects the very clear aspirations of this community arrived at through that process.

Central Otago District Plan

71. Counsel agree that the Commission's assessment of PC13 must relate to both the provisions of the Plan Change itself and the existing district plan.[23] The proposed Chapter 20 does not sit on its own. Your assessment must consider how Chapter 20 fits with the rest of the District Plan. Mr Whitney has addressed this at Section 8.2 of his Section 42A Report.

72. The planners have set out the provisions of the Operative District Plan that they consider relevant.[24] PC13's land is contained in the Rural Resource Area zone.

73. I address only some of the Operative District Plan objectives and policies here.

Objective 4.3.1

74. Objective 4.3.1 is that communities need to provide for their social, economic and cultural wellbeing and for their health and safety at the same time as ensuring environmental quality is maintained and enhanced. In this case, this objective goes directly to the effect of noise on health and safety and whether the wellbeing of 2000- 3000 new residents will be provided through locating this development on this land, in this noisy environment.

75. As counsel for Highlands noted at paragraph 25 of her submissions, three noise experts (Staples, Chiles and Reeve) are all of the opinion that the proposed zoning is incompatible with the existing environment. Mr Styles' opinion is essentially founded on the provision of a no complaint covenant. Importantly, his evidence was that the covenant does not address noise effects.

76. While Mr Styles put forward various noise mitigation measures such as insulation, mechanical ventilation and residents staying indoors during noise events, other experts raised with you the likely additional costs of those measures. They maintained their opinions that the incompatibility factor meant the rezoning should not proceed at all.

77. The Council is of the same opinion. Locating this development on this site, in the existing environment, will not achieve a high level of wellbeing for residents, nor will it provide for their health and safety. They will have to stay inside their homes for many days a year, in summer, when they should be outside enjoying this special environment. Notably, parties such as Highlands have indicated in this hearing their difficulties with the covenant and the

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[23] Joint Memorandum of Counsel 8 June 2019 paragraph 15; section 32(3) RMA
[24] Joint Witness Statement from Expert Planning Conferencing Schedule E

practical reality of what could follow. The noise experts have all told you the mitigation proposed to be included within the construction of the homes on the PC13 land will add cost.

78. Dr Chiles' evidence was that the location of housing on the PC13 site was a "fatal flaw" and that the noise effects could not be mitigated. Dr Chiles told the Commission that while Mr Styles' evidence was that noise could be ameliorated by some mitigation measures, it was Dr Chiles' view that people would remain exposed to very high levels of noise in this environment and that such an outcome was unsatisfactory. Dr Chiles stressed that the use of a covenant was not noise mitigation.

79. Dr Chiles even went so far as to say that Mr Styles had paraphrased the Joint Witness Statement, and encouraged the Commission to read the JWS carefully for accuracy. While there were some areas of agreement, Dr Chiles remained of the view that this residential land use was incompatible in this environment. The difference between the opinions of Mr Styles and Dr Chiles was described by Dr Chiles as "a gaping chasm".

80. Dr Chiles also noted that Mr Goldsmith's references in his opening submissions to Dr Chiles' evidence did not accurately record what his evidence said, noting again that his opinion was that the PC13 site was incompatible with surrounding land uses. In answering questions from the Commission on noise levels from Highlands, Dr Chiles referred to Tier 2 noise events as "off the scale of descriptions as to how bad it is". He noted that noise annoyance is a health effect. Highlands' noise expert, Mr Staples also described the Tier 2 events in particular as very high and noted that the effect of that high level of noise could not be communicated through any covenant supplied to future residents.

<u>Policies 4.4.2, 4.4.8, 4.4.9 and 4.4.10</u>

81. In the Rural Resource zone, the same issue of incompatibility of land use is expressed in these four policies.

82. Policy 4.4.2 is "To manage the effects of land use activities and subdivision to ensure that adverse effects on the ....amenity values of the rural environment are avoided or mitigated through:

....

(b) Development which is compatible with the surrounding environment including the amenity values of adjoining properties".

83. Policy 4.4.8 is headed Adverse effects on the Amenity Values of Neighbouring Properties and, like Policy 4.4.2, refers to noise. The last part of the policy includes a requirement that the activity in question should "not adversely affect the amenity values and privacy of neighbouring properties....". Again, this policy is directed at avoiding incompatible activities being located next to each other.

84. Policy 4.4.9 seeks that the Plan recognise that rural activities often generate noise and other effects that can disturb neighbours by "ensuring that new developments locating near such activities recognise and accept the prevailing environmental characteristics associated with production and other activities found in the Rural Resource Area." The Proponent may "recognise and accept" that noise, but the expert evidence before you suggests it is unlikely the future residents will.

85. Policy 4.4.10 is to ensure that subdivision and use of land in the Rural Resource Area avoids, remedies or mitigates adverse effects on a number of matters, including natural character amenity values of the rural environment and the production and amenity values of neighbouring properties.

86. The District Plan is clearly intended to ensure land use conflicts do not arise. It specifically addresses rural production and the protection of amenity values.

<u>Objective 6.3.1 and Policy 6.4.2</u>

87. Sustainability, wellbeing and health and safety are the focus of Objective 6.3.1, relevant to urban areas. Policy 6.4.2 is to enable the expansion of urban areas or urban infrastructure in a manner that avoid, remedies or mitigates adverse effects on a number of things, including adjoining rural areas. Evidence for other submitters explains why this proposal will conflict with activities in rural areas. The Council's approach has been, and continues to be, to plan to develop the future urban area so as to avoid that conflict. That is why infill and consolidation is so important and is addressed in the Spatial Plan. That approach also delivers on recognised principles of urban design. Cromwell is a community that is not just about houses. Its rural resources are potentially of far greater significance than the productivity achieved by housing. This is one of the major flaws in the Proponent's case – the lack of appreciation of that basic premise.

Objectives 7.1.2 and 7.1.3

88. These two objectives refer to the management of the use of land "to promote a pleasant living environment" (and accommodating appropriate change at the interface); recognising that a change in the use of land is inevitable over the period of the plan in order to enable the community to provide for its wellbeing – it may occur "randomly" within the various resource areas but the management of the change is to be through the district plan.

89. While both objectives consider the possibility of change, they cannot be read in isolation. The Plan's management of such change must be read alongside the other Plan provisions.

Policy 7.2.1

90. Policy 7.2.1 deals with residential character. The relevant parts of this policy are:

"To ensure that the character and amenity values of residential areas are protected by ensuring that the adverse effects of:

(a) Excessive noise including noise associated with traffic generation and night time operations,

(e) A reduction in privacy, access to daylight and sunlight

(i) The loss of a sense of amenity, security and companionship caused by non-residential activities

are avoided, remedied or mitigated."

91. This policy is directed at a high residential quality of life. The noise evidence I have referred to clearly indicates that PC13 clashes head on with this policy.

Policy 7.2.2

92. This is headed Amenity Values and is directed at ensuring that amenity values of residential sites are not significantly compromised by the effects of adjoining development.

93. Overall, these Operative District Plan provisions have a very consistent theme. Incompatible activities should not be located next to each other.

Section 32

94. The legal submissions of counsel for Residents provided the Commission with a careful analysis of the most relevant words of section 32. I adopt those

submissions, in particular the submission that the Act must consider whether the proposed **objectives** of PC13 are in accordance with the provisions of Part 2 and are the **most appropriate way** to achieve the Act's purpose.[25]

95. Section 32(1)(b) requires you to examine whether the **provisions** in the **proposal** are the **most appropriate way** to achieve the objectives. That examination must include the three methods stated in subparagraphs (i)-(iii).

96. Note that section 32(6) defines the meanings of "objectives", "proposal" and "provisions".

97. In response to questioning from Commissioner McMahon, counsel for Residents confirmed that section 32 differs from section 171 of the Act, which requires adequate consideration of alternative sites and methods but the requiring authority is not required to choose the best. As submitted by counsel for Residents, the assessment under section 32 of the **most appropriate way** of achieving the Act's purpose must be directed at a wide consideration of alternatives, whereby the decision maker must choose **the best of** the alternatives.

98. As counsel for Residents submitted, that assessment can include the Cromwell MasterPlan process, the Spatial Plan and the plan changes that follow. The reference to the words "most appropriate" in section 32 directs the optimum planning solution.

99. The Operative District Plan contains an appropriate set of objectives and policies to achieve the purpose of the Act on this land through the provisions in Chapter 4 (Rural Resource Area). Further objectives and policies relevant to Residential land are set out in Chapter 7. It would be a failure to not achieve the same outcomes in any new zone. Under section 32, the Commission must assess whether the objectives and policies of PC13 are **more appropriate** than the current provisions in the Operative District Plan in giving effect to the Act's purpose.

100. Section 5 of the Act states the Act's purpose as "to promote the sustainable management of natural and physical resources.". Sustainable management is then defined in section 5(2) and will be well known to you. It includes these important components:

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[25] Legal submissions for Residents for Responsible Development Cromwell, paragraph 12(c); section 32(1)(a)

> Managing the use, development and protection of natural and physical resources
>
> In a way or at a rate which enables people and communities to provide for their social, economic, and cultural wellbeing and for their health and safety
>
> While achieving the three parts of section 5(2)(a), (b) and (c).

101. Wellbeing and health and safety are at the heart of section 5. That is clearly relevant to evaluating whether PC13 should be located next to noisy activities and where it may compromise existing agricultural and horticultural activities.

102. Section 32 now also includes the identification of "the reasonably practicable options for achieving the objectives".[26] In *Royal Forest and Bird Protection Society v Whakatane District Council*, the Environment Court noted that these new words qualified the options assessment in section 32.[27] As the RMA does not define "practicable" or "reasonably practicable", the Court considered the meaning of "best practicable option" in section 2 of the Act was helpful in defining "practicable" and how that should be analysed. While that definition refers to the discharge of a contaminant or an emission of noise, the relevant parts of the definition for the purpose of assessing a plan change refer to "the best method for preventing or minimising the adverse effects on the environment".

103. The Court noted that the word "reasonably" used in both legislation and case law had been accepted as allowing some tolerance to the meaning of the word "necessary" as "falling between expedient or desirable on the one hand and essential on the other."[28] Other cases had determined that "reasonably practicable" was a "narrower term than "physically possible" and implies a computation of the quantum of risk against the measures involved in averting the risk (in money, time or trouble), so that if there is a gross disproportion between them, then extensive measures are not required to meet an insignificant risk."[29]

104. The Court went on to say:[30]

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[26] Section 32(1)(b)(i)
[27] *Royal Forest and Bird Protection Society Inc v Whakatane District Council* [2017] NZEnvC 51, at [45]
[28] Ibid, at [48]
[29] Ibid, at [51]
[30] Ibid, at [51]

> "Conversely, "not reasonably practicable" should not be equated with "virtually impossible" as the obligation to do something which is "reasonably practicable" is not absolute, but is an objective test which must be considered in relation to the purpose of the requirement and the problems involved in complying with it, such that a weighting exercise is involved with the weight of the considerations varying according to the circumstances; where human safety is involved, factors impinging on that must be given appropriate weight."

105. The Court in *Royal Forest and Bird* then assessed the plan provisions before it by identifying reasonably practicable options for achieving the intended purpose and examining the options before it (In that case, a range of suggested appropriate activity status for an activity) through having regard to, among other things:[31]

> "(i) The nature of the activity and its effects;
>
> (ii) The sensitivity of the environment to adverse effects generally and to the identified effects of the activity in particular;
>
> (iii) The likelihood of adverse effects occurring;
>
> (iv) The financial implications and other effects on the environment of the option compared to other options;
>
> (v) The current state of knowledge of the activity, its effects, the likelihood of adverse effects and the availability of suitable ways to avoid or mitigate those effects;
>
> (vi) The likelihood of success of the option; and
>
> (vii) An allowance of some tolerance in such considerations."

106. I submit those factors are directly relevant here, particularly the sensitivity of the environment and the likelihood of adverse effects occurring. Those matters are not in dispute.

107. Mr Brown's supplementary evidence dated 21 June 2019 measures Options A, B and C, but only against PC13 Objective 20.3.1. While this may meet section 32, it fails to take account of the Proponent's (and the Commission's) responsibility under section 74 to address wider planning policies and Part 2. Chapter 20 is not the only relevant matter. On Mr Brown's argument, of course PC13 will be

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[31] Ibid, at [53]

a "reasonably practicable" option if measured up against its own PC13 Objective 20.3.1.

108. The Proponent is approaching the plan change as if it were a notice of requirement in the sense of a designation. It is not. Nor is the plan change a special zone. While QLDC provides for special zones in its District Plan, this Council does not. Even with a special zone before it, the Environment Court in *Appealing Wanaka* assessed the Northlake private plan change application against the relevant parts of the QLDC District Plan as it stood at that time.[32] In *Colonial Vineyards*, the Court measured up that private plan change application against the relevant provisions of the regional policy statement and the objectives and policies of the district plan.[33] This case is no different.

109. I refer you back to my submissions above on the meaning of "reasonably practicable". Mr Brown has stated in his 21 June 2019 evidence that Options A and B can deliver housing. In my submission, there are real problems with Option A, for the reasons outlined in these submissions, the submissions of others and much of the evidence.

110. Option B already forms part of the Council's Spatial Plan.

111. Option C is also reasonably practicable. While there may be some legal matters to work around concerning the golf course land and the racecourse land, the end use of that land is not impossible or unrealistic, nor is it reasonably impracticable. As outlined earlier in these submissions, the Council is already in discussions with the golf club about the relocation of the golf club and the use of the current golf club land for development.

112. Ms Scott's supplementary evidence dated 28 June 2019 addresses Option C. She notes that the company of which she is a director is working on a number of subdivision proposals within the district and that more enquiries are being made. A large number of them relate to greenfield rezoning as well as the upzoning of existing brownfields sites. In her opinion, Option C is reasonably practicable and should be considered as being capable of providing short, medium and long term residential housing needs within the broader Cromwell

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[32] *Appealing Wanaka Inc v QLDC* [2015] NZEnvC 139, at [37] and Sections 3, 4, 5, 6 of that decision

[33] *Colonial Vineyards Limited v Marlborough District Council* [2014] NZEnvC 55, see for example paragraphs [22] , [25] to [44], [181]

area in accordance with the objectives of the Operative District Plan and the Cromwell MasterPlan.[34] That position aligns with the Council's approach.

113. Interestingly, Mr Brown's conclusion that Options A and B combined will satisfy a housing demand concedes that Option B can deliver housing to Cromwell. This is not consistent with his client's position that Mr Meehan is the only developer in town who can deliver on any housing required.

114. The question of housing demand has been addressed by Ms Brown and Ms Hampson. I return to that topic later in these submissions. The implications of the Spatial Plan in accommodating residential development compared to the assessed demand of Ms Hampson is addressed by Ms Brown.

115. In considering PC13 against all of the regional and district planning provisions I have referred you to, it is in my submission quite clear that PC13 is not the most appropriate way to achieve the purpose of the Act. PC13 undermines the planning policy for the region and the district, raising serious issues of plan integrity. It does not achieve the Act's purpose, expressed through those regional and planning documents.

National Policy Statement – Urban Development (NPS-UDC)

116. As noted in the Joint Memorandum of Counsel, there is no agreement between counsel on whether the NPS-UDC applies. The planners are in the same position. There is no debate that the NPS-UDC is a higher order planning document and feeds into section 31(aa) of the Act, if it is relevant.

117. Ms Brown has set out her views of its relevance in her evidence. Her evidence is supported by evidence of Mr Mead, Ms Wharfe and Mr Shaw and the report of Mr Whitney. Together, their view is that Cromwell is not an urban environment as defined by the NPS-UDC as it does not constitute a "concentrated" settlement with a population of more than 10,000 people. In my submission, that approach is correct.

118. The definition of urban development in the NPS is:

> "Urban environment means an area of land containing, or intended to contain, a concentrated settlement of 10,000 people or more and any associated business land, irrespective of local authority or statistical boundaries."

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[34] Supplementary evidence of Kate Scott dated 28 June 2019, paragraphs 2.16-2.18

119. The Commission has sought legal submissions on the meaning of "intended to" in this definition. I agree with the submissions of counsel for Residents that this phrase must include some futurity due to the use of the word "contain" otherwise it would have been phrased "contains". I also agree that it necessarily requires someone to intend the containment of 10,000 people or more.[35] That "someone" is logically the relevant local authority. As noted by counsel for Residents, the context of the NPS is directed at the local authority having to discharge the burden imposed by the NPS.

120. I also agree with the submissions of counsel for Highlands that "intending to contain" must be read in light of the regulatory process being engaged with and that the short, medium and long term growth must not just include zoning, but the provision of infrastructure, the provision of funding for infrastructure development or infrastructure planning (Policy PA1). As its very heart is planning, and the dovetailing of that planning with the Council's need to achieve integrated management under section 31. [36]

121. Counsel for Residents also addressed the meaning of "concentrated settlements" in the NPS.[37] I agree with those submissions. The word "concentrated" does not align with a district-wide or sub-district amalgamation of numbers to reach 10,000 or more.

122. In his discussion of settlements, Mr Goldsmith provided you with examples of what he considered to be urban settlements in the Queenstown District. I submit this information was somewhat misleading. Instead of using the latest Proposed District Plan maps, he provided you with aerial images. The Proposed District Plan maps in fact show urban boundaries for Arrowtown, Wanaka and Hawea, as well as Queenstown. These urban boundaries do not pull in each and every satellite community nearby. The settlements are clearly marked out.

123. Should the Commission decide that the NPS-UDC is in fact relevant, the next part of these submissions address it in more detail. The NPS-UDC is not fatal to the Cromwell MasterPlan. In fact, it supports it.

124. The Preamble to the NPS-UDC includes this statement, particularly relevant to the Council's position here:

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[35] Legal submissions for Residents, paragraph 69
[36] Legal submissions for Highlands, paragraph 59-63
[37] Legal submissions for Residents, paragraph 70

> "Local authorities play an important role in shaping the success of our cities by planning for growth and change and providing critical infrastructure. Ideally, urban planning should enable people and communities to provide for their social, economic, cultural and environmental wellbeing through development, while managing its effects. This is a challenging role, because cities are complex places; they develop as a result of numerous individual decisions, and this often involved conflict between diverse preferences."

125. Three things stand out from this statement: The need for local authorities to plan for growth and provide crucial infrastructure, the focus on wellbeing and the need to manage effects. No-one is suggesting Cromwell is a city. The Cromwell MasterPlan complies with the overall direction in the above statement. PC13 does not. In particular, it does not link in to existing infrastructure and it does not provide wellbeing through development.

126. The Preamble notes that planning can involve both intensifying existing urban areas and releasing land in greenfield areas. Mobility and connectivity are stated as being important to achieving well-functioning urban environments. The Cromwell Master Plan achieves this. PC13 does not – it fails to take up the option of intensifying existing urban areas and it does not create a well-functioning urban environment.

127. The wellbeing direction of the NPS-UDC features again on page 4 of the NPS, stating the need to provide for both current and future generations' wellbeing. It states:

> "The overarching theme running through this national policy statement is that planning decisions must actively enable development in urban environments, and **do that in a way that maximises wellbeing now and in the future**." (my emphasis)

128. Even if you find that Cromwell is an urban area, I submit PC13 does not come even close to the test of "maximises wellbeing now and in the future". How can it? At a very basic level, the "wellbeing" for residents in River Terraces will be that they live out of town, they will have to drive to most services they require in Cromwell, (including retail), they will live in a very noisy environment and be potentially subject to spray drift. Consequently, their lifestyle will be significantly compromised.

129. There are plenty of other themes and messages in the Preamble, which I will not detail. All of them have been met by the Council's work on the Cromwell MasterPlan.

130. The planners agree that all of the Objectives on page 10 of the NPS are relevant. So are Policies PA1-PA4. I briefly address those policies:

    a. PA1 refers to sufficient housing and business land. The Council's position is that PC13 is not required to provide sufficient housing and business land. It can be provided through other means.

    b. PA2 requires that other infrastructure to support urban development is available. This cannot be met by PC13.

    c. PA3 refers to wellbeing in the context of a Council making planning decisions that affect the way and rate at which development is provided. PC13 may provide a housing choice, but the integrated manner in which the Council is providing for growth is far preferable. The Cromwell MasterPlan represents an efficient use of land and infrastructure in the whole of this part of the district. PC13 does not achieve that outcome.

    d. PA4 – once again, the focus is on wellbeing. PC13 does not enable this community, which is wider than any potential residents of the PC13 land, to provide for its social, economic and cultural wellbeing, now or in the future. The Cromwell MasterPlan achieves this. The adverse effects of PC13 on the local environment are considerable.

THE "HOUSING CRISIS"

131. Mr Goldsmith's opening submissions referred to the purpose of this plan change as being " to provide and enable 900 new, affordable homes to address a housing crisis."[38] He returned to this theme several times during his 6 hour presentation. The statement requires careful consideration in light of the evidence, or lack of it, on the topic.

132. At the end of Mr Goldsmith's opening submissions, Commissioner McMahon put to Mr Goldsmith that the Proponent's case appeared to be very much based on the assertion of a "housing crisis" and noted the importance of the evidence to follow on supply and demand.

133. I myself have noted that Mr Goldsmith's opening written submissions referred to a "crisis" of some sort some **18 times**. Sometimes the word is used three times in one paragraph, no doubt for additional emphasis. This count does not

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[38] Goldsmith opening submissions, paragraph 1

include the additional oral submissions of Mr Goldsmith which included this word repeatedly. The assertion was also repeatedly made by Mr Meehan.

134. The Council does not accept there is a "crisis". Its own analysis is that there is a need for more housing, but there is no "crisis".

135. In oral comments at the end of Day 1 of this hearing, Mr Goldsmith submitted that PC13 can address the "housing crisis" better than the public process that the Council is undertaking. The Council does not accept that submission. As the evidence for the Council explains, the Council's planning process is strategic and integrated considers connectivity. It will lead to far better planning outcomes than PC13, which is ad hoc.

136. You have been told by Mr Goldsmith, again repeatedly, that Mr Meehan's evidence on the delivery of housing is unchallenged, that he knows the market best and that he is an expert in this field. Of course Mr Meehan will tell you that there is demand for this development, that there is a "crisis" and that it is urgent. It is in his best financial interest to do so.

137. I ask you to read Mr Meehan's evidence very carefully, but not for the same reasons as Mr Goldsmith. Mr Meehan did not refer to the Expert Witness Code of Conduct. He is a lay witness, with a vested financial interest in the outcome of this hearing. He is not an expert witness. As a lay witness, he can only provide factual evidence. Any opinions he has provided should be disregarded. That is a basic rule of the law of evidence. I submit that his evidence should be given no weight.

138. A number of very well qualified experts have challenged the reasons Mr Meehan professes for this development proceeding. In that regard, the evidence is not "unchallenged" as asserted by Mr Goldsmith. These experts <u>are</u> expert, they are objective and they are appropriately qualified in their respective disciplines.

139. Both Ms Brown and Ms Hampson have provided you with considerable evidence on supply and demand. Ms Brown will summarise that evidence when she presents her evidence today and will take you through that carefully due to its complexity. The end result of that assessment is that there is no "crisis". On my checking, Ms Hampson's evidence does not once refer to a "crisis". It is an emotive word, used by Mr Goldsmith and Mr Meehan to elevate the desired urgency for this plan change to be approved.

THE QUESTION OF AFFORDABILITY

140. I now turn to the assertion of PC13 providing "affordable" lots and homes. This stated purpose of PC13 must be carefully assessed. It is easy to be distracted by the offer made by Mr Meehan and to spend a lot of time editing the plan provisions Mr Brown has now tabled to achieve a result, that, in my submission, is not achievable at all.

141. Three questions immediately arise:

- Is there any affordability issue at all?
- If so, can the District Plan address it?
- Can the Council as regulator enforce it?

142. In my submission, the Act does not enable a territorial authority to control the price of housing. There is no statutory provision specifying that power.

143. The Proponent's case very much rests on Mr Meehan's repeated assertions that there is an immediate need, a crisis that requires an urgent response. Apparently that demand is created by demand for housing in Queenstown and Wanaka, both towns that lie outside this district. Mr Meehan has told you he is the best placed developer to deliver "affordable" housing for this district and for nearby Queenstown. To emphasise this point, Mr Meehan offered to provide 200 "affordable" lots and 200 "affordable" homes within three years, or the plan change could be "taken away" from him. This was not part of PC13 as lodged and publicly notified and appeared somewhat out of the blue in Mr Meehan's presentation of his evidence. Aside from the merit of the proposal, its sudden appearance in this hearing raises questions about whether the plan change should be renotified. The proposal raises all sorts of economic questions that are not addressed in economic evidence before the Commission and with the time constraints of the hearing, cannot be addressed in economic evidence before the Commission.

144. Legally, the plan change cannot "be taken away" once it is granted. That would require a further plan change process.

145. Before I discuss affordability in more detail, I note that Winton's Bridesdale development proceeded as a Special Housing Area. The HASSHA legislation explicitly refers to affordability. The RMA does not. That is an important difference.

146. On the first question of whether there is an affordability issue at all, I submit it is unsatisfactory for a Proponent to simply raise affordability but fail to provide credible evidence in support of it.

147. I raise the following points:

a. First, the valuation evidence of Mr Tristram did not provide any indicators of affordable housing prices, but rather indicated what the open market prices have been, including for entry level housing.

b. Second, there is no evidence before you of the delivery of affordable housing? There is no analysis of what it means. Mr Meehan's evidence on Bridesdale was that the 137 lots went onto the market in 2015 as house and land packages for $450,000. But four years later, they are selling for over $800,000.[39] Even if the first figure of $450,000 was affordable in 2015, the on-sale value to current purchasers is nearly double that and, I suggest, is not affordable at all. This is a classic example of the market at work, but it isn't something that can be controlled by a District Plan. Nor does it provide evidence of Mr Meehan's delivery of affordable housing in the long term.

c. Third, Mr Meehan didn't mention in his written evidence the lack of sales of the so-called "affordable" Kiwibuild homes in the Northlake development. That evidence was tabled by Ms Spillane from Highlands.[40] Clearly, the Kiwibuild product at Northlake was not regarded as "affordable" by those seeking housing in that market as residents did not buy the houses.

d. Fourth, there is no evidence from purchasers of the lots in other developments and what they considered "affordable". Not one resident from Northlake or Bridesdale has given evidence in support of the Proponent's case. Mr Meehan's evidence suggests the development is designed to satisfy the housing demand of those who cannot afford to live elsewhere. If that is the case, the Council asks this question - why should those persons be forced to live on this land, with all of its conflicts with adjacent land uses, when other

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[39] Evidence of Chris Meehan, paragraph 42

[40] Evidence of Josie Spillane Appendix 3

better housing options are available? The only person who benefits from developing the PC13 land is Mr Meehan.

e. Fifth, in my submission the Plan and the Act cannot control the prices at which land is sold, or the price at which it is on-sold. A common trend in this district is for land entering the market initially to be bought by investors, who then on-sell at a profit when the margins are right. That is not addressing affordability. It is lining the pockets of those who already have the cash to buy the lots in the first place. There is nothing the territorial authority can do about that.

148. The Proponent has now lodged a version of PC13 which endeavours to define what "affordable" might mean. I emphasise that these provisions are only relevant if you conclude that there is in fact an issue of affordability and that there is a housing crisis that requires short and medium term housing to be provided. Equally, the plan provisions being promoted by the Proponent must be effective and efficient, as required by section 32(1)(b)(ii).

149. The new rules included within the 21 June 2019 version of the PC13 provisions can only be described as unusually creative in trying to pin down Mr Meehan's promise. The provisions are unenforceable, unworkable, ineffective and inefficient. With respect, I am surprised this approach is supported by a planner as experienced as Mr Brown.

150. Rule 20.7.6(ii)(a) specifies the delivery of 200 affordable lots and 200 affordable homes within three years of the plan change becoming operative.

151. That requirement is then immediately undermined by Rule 20.7.6(ii)(b), which contains a number of situations where the delivery of this product may be extended beyond the stated three year time limit. Most of the exemptions referred to in Rule 20.7.6(ii)(b) relate to the Council's failure to do something – a failure to process a resource consent application within three months, a failure to process a subdivision application within three months, a failure to process a section 224(c) certification within one month and a failure to process a building consent application within three months. None of these consider the possibility that the application may not be processed by the Council because the Proponent/ Applicant has not lodged an appropriate application or has failed to provide information sought by the Council relevant to any application.

152. Rule 20.7.6(ii)(b) also suffers from the problem that the Council has no comeback on the extension. It must simply accept the position, enabling the Proponent to extend the period for compliance as long as it likes.

153. Rule 20.7.6(ii)(c) is founded on the premise that the failure to deliver the 200 affordable lots and 200 affordable houses within three years of PC13 becoming operative will prohibit any subdivision or land use requiring consent to proceed "between the date of breach and the date the breach is remedied". The prohibition rule does not apply to any application for subdivision or land use consent required to remedy the breach.

154. The ability to extend the three year timeframe provided for in Rule 20.7.6(ii)(b) must, in my submission, also apply to Rule 20.7.6(ii)(c) given it is a breach of the standard referred to in Rule 20.7.6(ii)(a) that raises the prohibition in Rule 20.7.6(ii)(c).

155. On a first reading perhaps, it appears that the intention of Rule 20.7.6(ii) is that if the 200 affordable lots and homes is not achieved within the three years, the prohibition applies and there is a brake put on further development. But that is not what the rule actually delivers. If the Proponent can claim one of the extensions in 20.7.6(ii)(b), the prohibition won't apply at all. And apparently, most of the responsibility for any extension will lie at the Council's table. It will have little to do with the actions of the Proponent.

156. The basic legal point to fall out of this convoluted rule wording is that the provision does not control a land use. The control of pricing is, quite simply, not a land use. The rule therefore has no legal basis.

157. Mr Brown's additional wording in Objective 20.3.1 to achieve a level of short term and medium term affordable housing "as soon as possible" simply opens up the possibility that Mr Meehan's promise will not be delivered within his stated three years.

158. What is the Council, and this community, to do about that if this scenario arises? There is no turning back the clock on the granting of the plan change. I invite you to think very carefully about <u>why</u> this proposition has been put to you and whether it can be achieved. It is a carrot, nothing more.

159. Highlands' planning witness, Ms Scott, has addressed the uncertain and circular nature of these provisions in her supplementary evidence of 28 June, noting that Rule 20.7.6(ii)(c):[41]

> "..is an open ended method that would enable the proponent to apply for a consent at any point even if the 200 affordable lots and 200 affordable houses had not been completed, as it would be an easy assertion to make that an application is for the purposes of remedying the situation where the affordable houses and lots have not in fact been provided for."

160. She also rightly notes that the new rules would give rise to a significant compliance burden for the Council through the management of the rules proposed.

161. I now address Rule 20.7.6(xii) - sale prices. Again, this relates to affordability and it is only relevant if you conclude that affordability is an issue.

162. The enforcement of the prices stated in this rule is dependent on the Council receiving a copy of the relevant sale and purchase agreement together with written confirmation from a law firm that the affordable lot or house was sold at the price specified in the sale and purchase agreement. The penalty for not achieving the said sum is that a subsequent stage of subdivision within the Resource Area may be conditioned such that section 224(c) for that later subdivision shall not issue until the standard has been achieved – that is, the price stated in the standard has been achieved.

163. This process is unworkable and unenforceable. The Council would not be a party to the sale and purchase agreement. It has no statutory power under the Act to impose a price on any sale of land. The apparent punishment of the vendor failing to meet the price in the standard would not apply to the stage of subdivision under which the sale arises, but to the next stage of subdivision. What happens if the standard is breached in the last stage of subdivision?

164. Another potential problem is the possibility of the Proponent setting up a shell company and selling the "affordable" lots and homes to that company at the prices set out in Rule 20.7.6(xii). The Council has no control over that process and could only check the price in the sale and purchase agreement against the relevant plan standard (and as I have said, it has no statutory power to control land prices in any event). The identity of the purchaser would not be relevant

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[41] Supplementary evidence of Kate Scott dated 28 June 2019, paragraph 2.9

and the Council would have no power to stop this process. The likely outcome then would be that the shell company would sell on the "affordable" lots and homes to other purchasers at a higher price, that did not meet the standard in the Plan. That process could not be checked by the Council either as by then the first sale will have occurred and the rule will have become redundant.

165. This same process could continue with future vendors and purchasers. None of those prices could be controlled by the Council, even if had the statutory power to control land price.

166. In conclusion on this topic, I ask that you treat the whole approach to affordability with absolute caution. It is a distraction. There is no evidence to support the Proponent's assertions that affordable housing is even an issue, nor is there credible evidence that it can deliver on its promise of affordable housing.

REVERSE SENSITIVITY AND NO COMPLAINT COVENANTS

167. Other counsel for submitters in opposition have addressed this topic in their submissions and I adopt those submissions. There are two matters I wish to address, because they relate specifically to the Council's functions under the Act and the Cromwell MasterPlan work.

168. *Independent News Auckland Limited v Manukau City Council* (A103/2003) involved the potential for conflict between the owners and users of Auckland International Airport and future residents of household units (apartments, terraced houses and studio warehouses) likely to be affected by the noise of landing aircraft. The proposed development comprised 349 household units. In the District Plan, household units were classified as activities sensitive to noise. Much of the decision addressed the potential land use conflict.

169. The discussion of reverse sensitivity commences at paragraph 54 of that decision. It includes discussion of the proposed acoustic protection and ventilations systems required to provide a high quality internal environment. Submissions were also made about the potential for a potential group of opponents being formed to oppose airport operations.

170. At paragraph [85] the Environment Court said this:

> "This raises the question of whether the court should intervene to protect people from an adverse effect they have knowingly subjected themselves to. For the respondent council, which took a neutral stance in the proceedings, Mr Brownhill appositely referred us to the view taken by the Court in

Auckland Regional Council v Auckland City Council. Referring to submissions based on leaving promoters of enterprises to judge their own locational needs, not protecting them from their own folly or failing to consider the position of these who come to the nuisance, the Court said:[42]

> We consider that these submissions do not respond to the functions of territorial authorities under the RMA...To reject provisions of the kind proposed on the basis of leaving promoters to judge their own needs, or not protecting them from their folly and to failing [sic] to consider the effects [on] those who may come to the nuisance would be to fail to perform the functions prescribed for territorial authorities. It would also fail to consider the effects on the safety and amenities of people who come to the premises.

With respect, we agree."

171. The Court in *Independent News* found that there would be an adverse effect of noise on occupants of the premises and that those effects were "properly of concern."[43] While proposed noise attenuation and ventilation measures would apply to the indoor recreational facilities and the residential units, those would not adequately protect recreation areas that would be used by approximately 1000 residents.[44]

172. I submit the same principles apply here. The above quote from Independent News succinctly summarises the basis of the Council's concerns about PC13 and the concerns raised by many other submitters. Through its own planning work, the Council's function is to avoid the folly of placing residents in a residential area where they will clearly be subject to a high level of noise that cannot be mitigated. Put simply, that is not good planning. The Cromwell MasterPlan and Spatial Plan avoid that land use conflict by directing development elsewhere.

EFFECT OF PC13 ON MASTERPLAN PROCESS AND SPATIAL PLAN

173. PC13 does not take account of the wider community's aspirations and does not consider the wider planning policy required for the future of the town.

174. Evidence from Ms Brown and Mr Guy sets out why PC13 is inconsistent with the Cromwell MasterPlan and the effect it would have on the Council's Cromwell MasterPlan and Spatial Plan. It would alter the Cromwell MasterPlan's dynamic

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[42] *Auckland Regional Council v Auckland City Council* [1997] NZRMA 205 at 214
[43] At paragraph [86]
[44] At paragraph [123]

and render many of the desired outcomes unachievable. The clear intent, and the desire, is to focus residential growth within existing Cromwell and to move into the town centre. The community is behind this focus.

175. PC13 is the polar opposite of that desired outcome. Even the Proponent's urban designer, Mr Ray, had to concede that PC13 does not sit comfortably with the Cromwell MasterPlan.

176. As witnesses for other parties have mentioned, once the PC13 land is used for residential activity, it is "gone" forever. It cannot be used for horticultural or viticultural activity. Mr Dicey's evidence explains the potential viticultural value of this land block. Mr Mead's evidence raises the possibility of this land being used for business and/ or industrial purposes in the future. Both of those scenarios avoid reverse sensitivity conflicts and locate "like with like" in this part of Cromwell. Again, a sound resource management outcome.

177. PC13 will adversely impact on all four problems the Cromwell MasterPlan is trying to address. It will dilute the number of people using the Cromwell Town Centre. The intention is to increase the interest, diversity and use of the Town Centre by bringing residents into that area. PC13 will continue ad hoc development instead of consolidating and infilling existing residential areas. The community has been very clear in saying that it does not want a satellite suburb on the outskirts of Cromwell. Increased density in the form of townhouse infill development would offer affordable housing options without impacting on the way that Cromwell functions. It would also increase the vibrancy and sense of community in the Town Centre.

178. PC13 would result in the opposite effect.

CONCLUDING SUBMISSIONS

179. As counsel for Residents submitted, if there is no "housing crisis", the reason for this plan change falls away. The Council's position is that there is no crisis.

180. PC13 represents one private developer's interest in developing its land for its financial return. Once the land is sold, the developer exits. As the developer, the Proponent will not be there to respond to noise complaints and spray drift complaints, or to address the reduction in amenity the River Terraces residents are likely to suffer. It will have moved on to another development, on another site.

181. One of the parties who will be there and will be required to respond to these matters is the Council. The Council does not have an option to ignore

complaints from future residents. It is obliged to respond. As counsel for Highlands submitted, it is very likely that any new residents at River Terraces will not understand compliant noise levels. The current problems experienced by Highlands of this nature were explained by Ms Spillane. The complaints are made, whether or not the noise complies.

182. Like the current land users in this environment, the Council does not consider the use of the PC13 land for this development to be appropriate or sustainable. There are other, far more appropriate and sustainable options for the development of Cromwell than PC13. These options avoid land use conflicts and ensure the town develops in an integrated way, as a whole.

183. PC13 is a classic example of bad planning and a failure to consider the wider planning framework for this town. It does not satisfy the statutory requirements set out in the Act.

184. On behalf of my clients, I request that you decline this plan change request in its entirety.

Dated 2 July 2019

Jan Caunter

Counsel for Central Otago District Council and Mr and Mrs Wilkinson

ATTACHMENTS A-D