BEFORE INDEPENDENT HEARING COMMISSIONERS
APPOINTED BY THE CENTRAL OTAGO DISTRICT COUNCIL

UNDER THE	Resource Management Act 1991 ("**Act**")
IN THE MATTER OF	A requested change to the Central Otago District Council's Operative District Plan – Plan Change 13 ("**PC13**")
BETWEEN	**RIVER TERRACE DEVELOPMENTS LIMITED**
	Requestor
AND	**CENTRAL OTAGO DISTRICT COUNCIL**
	Planning authority

LEGAL SUBMISSIONS FOR RESIDENTS FOR RESPONSIBLE DEVELOPMENT CROMWELL SOCIETY INCORPORATED ("R4RDC"):

13 JUNE 2019

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MAY IT PLEASE THE COMMISSIONERS:

Introduction

1. As the commissioners are aware, I am engaged as Counsel for the Residents for Responsible Development Cromwell ("**R4RDC**", or the "**Society**"), which is a successor to,[1] and a representative body for,[2] a number of submitters on PC13. The Society is also co-ordinating with other submitters and their experts, who have a common interest.[3]

2. No issue appears to have been taken by the Proponent as to the standing of the Society to appear before the Commission.

3. The object of the Society is:

> The responsible, sustainable quality growth and development of Cromwell and surrounding areas in consultation with the residents of these areas.

Approach to legal submissions

4. These legal submissions focus on legal matters, with reference to evidence before the Commission as appropriate. Evidence "from the bar" is to be avoided – although some context setting to assist in understanding the legislation or case authorities may be permissible and / or appropriate.

5. The Society adopts the submissions for Highlands Motorsport and Central Speedway, and does not seek to repeat those submissions. It supplements them in respect of the following matters:

   (a) Part 2 and the community.

   (b) Evidence.

   (c) The Masterplan.

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1 It was incorporated on 26 February 2019. The founding members are: (1) Mr Spencer; (2) Mr Duncan; (3) Ms Wilson; (4) Mr Iremonger; (5) Mr Giles; (6) Mr Faulkner; (7) Mr Tinworth; (8) Mr Lister; (9) Ms Dicey; (10) Mr Dicey; (11) Ms Wallace; (12) Mr Wallace; (13) Ms Katon; (14) Mr Katon; (15) Mr Katon; (16) Mr Murray. Four of these members do not appear to have filed a submission (Duncan, Faulkner, and the Katons). That does not prevent the Society succeeding the original group of founding members who were submitters – and who had a common purpose to oppose PC13 and worked in concert, including in the development of their submissions.

2 The Society has a wide distribution list to submitters in opposition, many of whom have indicated support for the Society, including in providing assistance on the process.

3 Eg Mr James Dicey.

(d) Alternatives.

(e) Covenants (briefly).

(f) Trade competition – the Council as submitter.

(g) The NPS-UD.

6. The Society relies on and adopts the evidence (including the expert evidence) of the "opposing parties", in addition to that of the individual submitters and members of the Society who have been able to co-ordinate with the Society in its opposition to PC13.

Part 2, and the community

7. It is agreed[4] that a council must change its district plan in accordance with:

(a) its functions under section 31; and

(b) the provisions of Part 2.

8. It is also agreed[5] that each proposed objective in a district plan change is to be evaluated by the extent to which it is the most appropriate way to achieve the purpose of the Act.

9. Section 32(3) further provides:

> If the proposal (an amending proposal) will amend a ... plan ... that ... already exists (an existing proposal), the examination under subsection (1)(b) must relate to—
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> (a) the provisions and objectives of the amending proposal; and
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> (b) the objectives of the existing proposal to the extent that those objectives—
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> (i) are relevant to the objectives of the amending proposal; and
>
> (ii) would remain if the amending proposal were to take effect.

10. In addition, in section 32:

> **objectives** means,—

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4 Counsel's agreed statutory tests, at [4].
5 Counsel's agreed statutory tests, at [14].

(a) for a proposal that contains or states objectives, those objectives:

(b) for all other proposals, the purpose of the proposal

11. The "shortcut" that the proponent appears to be taking is:

(a) that the objective of PC13 is to provide 900 lots to meet a purported immediate "housing crisis" – as if this is a "given" and it is the Commission's duty to accommodate those 900 lots in some way (rather than to consider the 10 proposed objectives of PC13 individually or collectively) ; and

(b) to dismiss any alternatives as there is (apparently) no one other site that can deliver 900 lots – and therefore will not achieve the "objective" of PC13; and

(c) then to focus on the detail of PC13 – including the management or reduction of effects, eg through covenants etc.

12. Importantly, in my submission:

(a) The request is for a *private plan change*. It is not for a notice of requirement for a designation, where (for example), the objectives of the requiring authority are relevant. In that context, under section 171(1)(c) the decision maker must consider:

> ... whether the work and designation are reasonably necessary for achieving the objectives of the requiring authority for which the designation is sought

(b) Applying a broad-brush approach to the "objective" of PC13 (ie to respond to the urgent housing crisis) is essentially irrelevant. There is no requirement for the Commission to provide for 900 lots (say), or to resolve how 900 lots might be provided in Cromwell.

(c) The requirement of the Act is for the Commission to consider whether the proposed *objectives* of PC13 are:

(i) "in accordance with" ... "the provisions of Part 2"; and

(ii) "the most appropriate way to achieve the purpose of the Act".

(d) A council's functions under section 31(1)(a) include achieving "integrated management":[6]

> Although **integrated management** of resources may not be able to be fully achieved under the Act, it is intended to be more than an empty slogan.

13. In respect of Part 2:

(a) The Supreme Court in *New Zealand King Salmon*[7] limited the ability to access Part 2 when considering a plan change where there was a directive policy in a superior planning instrument (in that case, the NZCPS). Recourse to Part 2 was only allowed in cases of invalidity, incomplete coverage, or uncertainty as to meaning.

(b) In the context of a resource consent, the Court of Appeal in *RJ Davidson*[8] also considered when access to Part 2 may be "appropriate or necessary". It stated:

> **If a plan that has been competently prepared under the Act** it may be that in many cases the consent authority will feel assured in taking the view that there is no need to refer to pt 2 because doing so would not add anything to the evaluative exercise. Absent such assurance, or if in doubt, it will be appropriate and necessary to do so.
>
> We prefer to put the position as we have in the preceding paragraphs rather than adopting the expression "invalidity, incomplete coverage or uncertainty" which was employed by the Supreme Court in *King Salmon* when defining circumstances in which resort to pt 2 could be either necessary or helpful in order to interpret the NZCPS. **While that language was appropriate in the context of the NZCPS, we think more flexibility may be required in the case of other kinds of plan prepared without the need to comply with ministerial directions**.

(c) There is no suggestion that the RPS, or the NPS-UD (if applicable) dictates the outcome of P13. On that basis, there is no bar to accessing Part 2.

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6 *Application by North Shore City Council* [1995] NZRMA 74.

7 *Environmental Defence Society v New Zealand King Salmon* [2014] NZSC 38; [2014] 1 NZLR 593.

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

(d) The Proponent has also submitted at [22] that the Council's plan is "seriously out of date". If that were the case, that would qualify as "incomplete coverage" or a plan that is no longer "competently prepared", further reinforcing the need to access Part 2.

14. This is a classic "Part 2" case. Even if just taking noise effects, the proposal will impose direct noise effects on future residents, as well as "annoyance" and potential health effects on future residents. The proponent says these, and all other effects, are outweighed by PC13 solving the purported immediate "housing crisis" facing Cromwell.

15. However, the Proponent has all but ignored Part 2. Section 5 and its focus on "communities" is critical. So too is the requirement to have particular regard to the section 7 requirements to recognise and provide for:

(a) the efficient use and development of natural and physical resources [s7(b)]; and

(b) the maintenance and enhancement of amenity values [s7(c)]; and

(c) maintenance and enhancement of the quality of the environment [s7(f)].

16. To assist in understanding these directives:

(a) Amenity values is defined as:

> **amenity values** means those natural or physical qualities and characteristics of an area that contribute to people's appreciation of its pleasantness, aesthetic coherence, and cultural and recreational attributes.

(b) The "**environment**" includes —

> (a) ecosystems and their constituent parts, including people and communities; and
>
> (b) all natural and physical resources; and
>
> (c) amenity values; and
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> (d) the social, economic, aesthetic, and cultural conditions which affect the matters stated in paragraphs (a) to (c) or which are affected by those matters.

17. It is also well accepted that the District Plan is the "community's plan", and the frame against which future applications are to be assessed. As the Supreme Court stated:[9]

> The district plan is key to the Act's purpose of enabling "people and communities to provide for their social, economic, and cultural well being". It is arrived at through a participatory process, including through appeal to the Environment Court. The district plan has legislative status. People and communities can order their lives under it with some assurance. A local authority is required by s 84 of the Act to observe and enforce the observance of the policy statement or plan adopted by it. A district plan is a frame within which resource consent has to be assessed.

18. The Supreme Court further illustrated the importance of the District Plan, and of societies in participating in the process:

> The district plan envisages a role for community organisations in advocating for the amenity values represented by existing centres. It emphasises the importance of the existing centres as focal points for their communities. It stresses the cultural and social importance of the centres. A society which is set up to protect the amenity values of one of the centres identified in the district plan is, I think, a person capable of being directly affected by a proposal to set up a new shopping outlet outside the existing centres.

19. Earlier in time, the Environment Court had said that the "District Plan ... represents the community's interpretation and application of [the NZCPS and RPS]".[10]

20. More recently, the High Court has recognised the views of planners that:[11]

> ... a district plan reflects the relevant community's views, hopes and aspirations. And in this case, the community's views, hopes and aspirations in relation to public open space. This reinforces that, in the context of ss 10 and 11 of the LGA 2002, provisions of a district plan relevant to the decision to be taken are a mandatory relevant consideration.

21. Accordingly, when a plan is being changed, the relevant community's "views, hopes and aspirations" must be afforded significant weight by the Commission. How does the Commission understand what those views, hopes and aspirations are?; by listening to the community, as it puts forward its position though:

    (a) the original written submissions and further submissions;

    (b) evidence, including lay evidence; and

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9 *Discount Brands Ltd v Westfield (New Zealand) Ltd* [2005] 2 NZLR 597.
10 *Transwaste Canterbury Limited v Canterbury Regional Council* C29/2004.
11 *Hugh Green Ltd v Auckland Council* [2018] NZHC 2916, at [227].

(c) submissions / representations at the hearing.

22. The Masterplan is also evidence, and an expression of, the community's views. I address the relevance and weight of the Masterplan further below.

Evidence

23. Under s276 of the RMA, the Environment Court may receive any evidence it considers appropriate. However, it will generally apply the traditional approach to evidence as now codified in the Evidence Act 2006 ("**Evidence Act**").

24. Under s23 of the Evidence Act, a statement of opinion is generally not admissible in a proceeding unless it comes within the exceptions provided for in sections 24 and 25 of the Evidence Act. Section 25 is most relevant to this case and provides that an *opinion* by an expert is admissible if the fact-finder is likely to obtain substantial help from the opinion in understanding other evidence in the proceeding, or ascertaining any fact that is of consequence to the determination of the proceedings.

25. The Environment Court in *Meridian Energy*[12] explained further as follows:

> In the Evidence Act, an "expert" is defined as a person who has specialist knowledge or skill based on training or experience in a particular field of endeavour or study, and "expert evidence" means the evidence of an expert based on the specialised knowledge or skill of that expert and includes evidence given in the form of an opinion. An "opinion" in relation to a statement offered in evidence, means a statement of opinion that tends to prove or disprove a fact.

26. The Court in *Meridian Energy* also referred to *Rangitaiki Gardens Society,*[13] which stated:

> The evidence of lay witnesses identifying those aspects of the environment which are appreciated by them, the reasons for that appreciation, and expressing their views as to how their appreciation might be reduced by a particular proposal, are legitimate subjects of lay evidence. We have had due regard to such evidence. ...

27. In respect of some issues, the distinction between expert and lay evidence may be less important than in respect of other issues; for example, the Board of Inquiry in the *King Salmon* decision noted that:

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12 *Meridian Energy Ltd v Hurunui District Council* [2013] NZENVC 59.

13 *Rangitaiki Gardens Society Ltd v Manawatu-Wanganui Regional Council* [2010] NZEnvC 14 at [11].

> ... visual amenity, being in part subjective, is one of those areas where the distinction between expert and non-expert becomes less important in some respects.

28. In my submission therefore:

(a) The Commission can take a pragmatic and "real-world" approach to the testing of any evidence put before it, for example the categorisation of the site as rural or "peri"-urban, or otherwise.

(b) The Commission can (or must, where appropriate) treat "submissions" by lay submitters before it as "evidence", to the extent required in light of the above-stated principles. Some submitters may appear before the Commission and give both evidence and submissions.

Masterplan

29. Much has been made of the Masterplan being a "non-statutory" document. To the extent that it is not a planning instrument required under the Act (unlike, say, the RPS or a NPS), the Masterplan is not a specified mandatory relevant consideration. However, in the circumstances, it is clearly relevant to the issues (in particular the Community's views), and to disregard it or give it no weight would be an error of law – ie a failure to have regard to a relevant consideration.

30. While Mr Goldsmith said there were authorities on point, he elected not to cite them; and now should not be entitled to revisit that issue.

31. In addition, despite submitting that the Masterplan is irrelevant, under questioning from the Commission, Mr Goldsmith appeared to accept that it could be considered. In terms of weight, it is all a matter of context and judgment. While in the context of a consent application, the decision of the Environment Court in *Sandspit Yacht Club Marina Society*[14] is a useful example. In that case, the relevance of structure plans was discussed, with the Court stating at [172]-[173]:

> We have identified several non-statutory documents relevant to this hearing. We have already had a general discussion concerning the question of effects and cumulative effects. Whether these should be properly addressed under

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14 *Sandspit Yacht Club Marina Society Inc v Auckland Council* [2012] NZENVC 52, at [78].

> s 104(1)(c) of the Act, or as part of the effects, is a matter on which there are different views.
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> For our part, we have already included them within the discussion of effects. In the event that this was the wrong place to consider them, we would otherwise see them as other matters and address such effects under that heading.

32. In *Sandspit*, the non-statutory documents were over ten years old, and had been overtaken by the operative plan. Nevertheless, the Court had regard to them, both in terms of its consideration of effects (ie as identifying potentially relevant effects and the significance of them) as well as "any other matter" under section 104(1)(c).

33. In the context of clause 25(b), the Environment Court has also recognised the relevance of non-statutory plans, stating:[15]

> I am not prepared to hold, in an absolute way, that cl 25(4)(b) applies only to statutory processes (which will usually lead to notification, submissions and a merits assessment) and can never apply to non-statutory processes. Nor am I prepared to hold in an absolute or general way that all non-statutory processes will fall inside the ambit of the subclause.

34. In the context of Plan Change 13, the Masterplan is clearly relevant, and, in my submission should be given considerable weight:

(a) It is very recent (ie not out of date).

(b) It addresses many of the critical issues raised by PC13.

(c) While its process may not be complete, it is advanced, and the Spatial dimension is now final.

(d) It is the result of significant community participation.

(e) In other words, it can be taken as strong and direct evidence of the community's wishes, which the district plan is intended to express and reflect (including plan changes to it).

35. The longstanding authority of *Imrie Family Trust v Whangarei District Council*[16] is of key relevance here. In that case, the Imrie Family Trust had sought an extension to the Kiripaka Shopping Centre at Tikipunga (a suburb in the northeast of Whangarei). The rezoning was declined.

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15 *Malory Corporation Ltd v Rodney District Council* [2010] NZRMA 392, at [78].
16 *Imrie Family Trust v Whangarei District Council* [1994] NZRMA 453.

36. In declining the plan change, the Planning Tribunal (as it was then) found that there was a need for additional provision for retail to be provided, stating, at 468:

> In our judgment the evidence does show that a need exists for more shopping opportunities for Tikipunga that it is not being met by the zoning for the Tikipunga Suburban Centre zone, and is not provided for by the transitional district plan. To that extent the proposed extension of the Commercial Neighbourhood zone is one means of meeting that need. However the test is not whether the demand supports the extension of the Commercial Neighbourhood zoning, but whether the proposed measure is necessary in achieving the purpose of the Act.

37. The test of "necessary" that applied under section 32 at the time was equated with "expedient or desirable". The test is now "most appropriate", where the term "appropriate" has been equated with "suitable".[17] I note that the authorities have not generally focused on the requirement of being "most" appropriate (or "most" suitable) – although, where there are a number of options, the Court will look at which is "better"[18] or what is the "optimum planning solution".[19] There is also no presumption in favour of the original plan provisions or the proposed plan change. [20]

38. In practice, I submit that the "most appropriate" test does not seem to be significantly different to the "necessary" test, and the approach in *Imire* is not distinguishable on the basis of this change to the Act.

39. The Planning Tribunal went on in *Imrie* to consider alternatives. It concluded at 470:

> The principal alternative means available is for the respondent to make its own review. The reasons in favour of that, in summary, are that it would be a fulfilment of its statutory function; would have a broader scope than a developer-led measure would be likely to have, examining all the various alternatives; and would be a public process allowing for participation by the commercial interests involved and by the residential community of Tikipunga. Principal reasons against adopting that means are that it would involve delay and public cost. In our opinion those adverse features are bearable in the expectation of a better quality outcome.

40. The Tribunal's overall conclusion at [471] was as follows:

> In our judgment, the present proposal would not be satisfactory in achieving the statutory purpose; and we do not accept that implementing it would more fully serve the statutory purpose than cancelling it. For those reasons the

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17 *Rational Transport Society Inc v Board of Inquiry Appointed under s 149J of the Resource Management Act* High Court Wellington Registry CIV-2011-485-002259.

18 Eg *Moturoa Island Ltd v Northland Regional Council* [2013] NZEnvC 227.

19 Eg *Eldamos Investments Ltd v Gisborne District Council* W047/2005, at [129].

20 *Eldamos*, at [124].

> Tribunal's determinations are that the respondent's decision declining to adopt the plan change is confirmed; and that IFT's request for a change to the district plan is refused. That determination is without prejudice to a further request in due course, especially if the respondent does not promptly undertake the review contemplated by this decision.

41. The factors arising in *Imrie* are present to an even greater extent in respect of PC13. In *Imrie*, there was no current review process in train. At least here, there is a current Masterplan process underway and part completed. That is intended to feed into the next plan review.

42. In addition, the position for the Society is that the Proponent has not demonstrated that there is such an urgent need for PC13 that would displace the need for an integrated solution – in terms of being "most appropriate" as required under section 32.

Alternatives

43. If *Imrie* hasn't resolved the ability of the Commission to consider alternatives, the Supreme Court has in *King Salmon*, finding:

(a) at [166]:

> If consideration of alternatives is permissible, there must surely be something about the circumstances of particular cases that make it so. Indeed, those **circumstances may make consideration of alternatives not simply permissible but necessary**.

(b) And later at [170]:

> ... **an applicant may claim that that a particular activity needs to occur in part of the coastal environment**. If that activity would adversely affect the preservation of natural character in the coastal environment, **the decision-maker ought to consider whether the activity does in fact need to occur in the coastal environment**. **Almost inevitably, this will involve the consideration of alternative localities**. Similarly, even where it is clear that an activity must occur in the coastal environment, **if the applicant claims that a particular site has features that make it uniquely, or even especially, suitable for the activity, the decision-maker will be obliged to test that claim; that may well involve consideration of alternative sites**, particularly where the decision-maker considers that the activity will have significant adverse effects on the natural attributes of the proposed site. In short, **the need to consider alternatives will be determined by the nature and circumstances of the particular application relating to the coastal environment, and the justifications advanced in support of it**.

44. This is consistent with the earlier authorities of *Brown*,[21] and others.[22]

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21 *Brown v Dunedin City Council* [2003] NZRMA 420 (HC).

22 *Director-General of Conservation (Nelson-Marlborough Conservancy) v Marlborough District Council* [2010] NZEnvC 403 at [690].

45. The Proponent has put alternatives in play, in the way anticipated by the Supreme Court:

(a) The Proponent has claimed that the site is not just the best location for its proposal, but that it is the *only* location for its 900-lot proposal.

(b) This Commission will need to test that claim, which will necessarily require consideration of alternative sites to accommodate 900 lots – as well as the precursor question of whether there is in fact an urgent need for that much, and type of, residential development.

46. In addition, Mr Goldsmith also accepted under questioning that a valid part of the assessment under section 32 was alternatives (in the sense that if the objective of P13 is to deliver more housing, whether that can be delivered elsewhere).

47. The Commission will also need to test the claim that the only alternative use that will be made of the site will be residential, of a scale that meets the controlled activity standards, ie 18 lots. Unfortunately, developers often give evidence in RMA proceedings that there is no alternative to their proposal, or that a proposal has to be of a certain scale, density, height, etc in order to be viable; but, if declined, they go on to find an alternative.[23]

48. Ultimately, a developer will generally make its decisions based on financial considerations – ie the return on its investment. The Proponent here, if PC13 is declined, has a large number of choices available to it, including:

(a) continuing to participate in the completion of the Masterplan process, and any subsequent plan review – some rezoning might ultimately be considered appropriate through an integrated plan review (as was foreshadowed in the context in *Imrie*);

(b) if that task is considered too difficult (or lengthy) for the Proponent, then it might:

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23 Eg see the *Harcourts* litigation in Wellington.

(i) undertake its controlled activity option (if it will generate a sufficient return on investment);

(ii) reconsider the viticulture options, or industrial options; or

(iii) if it does not wish to pursue those options, to sell the site to someone who will pursue them.

49. The future is uncertain – and the assertion of a developer is an insufficient basis upon which to make a finding that other options will be precluded.

50. If that sounds unfair, the Proponent's own evidence on its approach to development needs to be given very careful consideration by the Commission. In simple terms, the Proponent's business model can be described as opportunistic, or speculative, in the sense that it generally:

(a) acquires land that is not zoned for residential purposes – at significantly lower cost than if it had already been zoned for those purposes;

(b) pursues a zoning change, which it has the "resources" and "wherewithal" to push through (when others may not) – ie it can beat opposition down with its greater resources;

(c) achieves "upzoning", with resultant uplift in land value; and

(d) then develops that land, with economies of scale that may reduce costs for purchasers, but which almost inevitably increases the margins for the developers.

51. Clearly, the strategy has proved to be a lucrative one. How else can the Proponent (proudly) proclaim that it has 28 (or so) development managers ready and waiting, and the funds ready to turn dirt immediately?

52. If PC13 is declined, that will no doubt be disappointing for the Proponent. However, that is its risk, given its strategy as described above. It is no different to circumstances where (eg) Foodstuffs takes a gamble on out-of-centre supermarket locations. Sometimes the gamble pays off. Sometimes it does not.

Covenants

53. The Proponent has made much of its covenants as the solution to its various reverse sensitivity activities. It relies heavily on *South Pacific Tyres* and *Coneburn*. Ms Irving has addresses *South Pacific Tyres* and the issue more generally.

54. In respect of *Coneburn*,[24] I submit:

(a) *Coneburn* was unopposed by the party subject to the covenant – and so there was no primary contradictor to the party seeking to rely on the covenant. It cannot be relied on as good law.

(b) *Coneburn* was an example of a "wide" covenant (ie a "**do nothing**") preventing a person from objecting to "anything", and deeming written approval to be given to "anything". It is contrary to public policy and the purpose of the RMA, and unenforceable. In respect of written approvals, for example, the RMA envisages that any written approval is specific to the activity in question, as evidenced by Form 8, which states as follows:

> This is written approval to the following activity that is the subject of a resource consent application: [*description of proposal*].
>
> I have read the full application for resource consent, the Assessment of Environmental Effects, and any site plans as follows: [*list document names and dates*].

(c) The enforceability and/or any question of breach of the covenant is a separate civil matter outside the jurisdiction of the Council.

(d) Examples exist (eg in respect of the *Schrantzes* at Jacks Point) where a "do nothing" covenant existed, but despite that, no direct challenge was mounted, eg to the Schrantzes' opposition through a plan change and the PDP.

55. More generally, I support the submission that no complaints covenants are not "battle tested" and cannot therefore be relied upon by the Commission.

56. In addition, as Ms Irving has submitted, a covenant will not resolve:

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24 *Coneburn Planning Limited v QLDC* [2014] NZEnvC 267.

(a) section 16 issues;

(b) opposition to any variation or further consent process, or any "social licence" to operate (and the real-world pressure that an operator may come under irrespective of the legal position);

(c) the outcome of any review condition that may allow the reopening of a consent should circumstances (ie the wider environment) change.

Trade competition – the Council as submitter

57. The Proponent alleges that the Council is a trade competitor. However, it falls short of asking the Commission to strike out the submission as an abuse of process. That should be the end of the matter.

58. The Council (as submitter) will no doubt address this issue.

59. However, the Society wishes to do so, in advance of that.

60. This is because it is very significant that the Council has (further) submitted against PC13. The Council did not need to further submit. Clearly it felt strongly enough to do so. While the position of a Council as submitter cannot be determinative of an issue, it is highly relevant, and potentially of greater weight and significance than the position of "other" submitters.[25] The Society and its members have been active in seeking to ensure that the Council (as submitter) participates and is appropriately held to account in the process (as a representative of the Council's community), rather than being a "nodding automaton", asleep at the wheel. The purpose of local government, after all, is to "enable democratic local decision-making and action by, and on behalf of, communities".[26]

61. A local authority can, and does, wear multiple hats. It has certain statutory responsibilities, such as to act as a "planning authority" and consider and determine requests for private plan changes. This Council is discharging

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25 There is no "statutory" basis for this, but analysis of the authorities would show, where a Council is opposed to a proposal and actively participates against it, that the proposal is more likely to be declined by the Environment Court than where it has been neutral.

26 Section 10 Local Government Act 2002.

those duties through the appointment of Commissioners to hear and determine the request.

62. A local authority can then participate in a private plan change request (or, for that matter a consent, designation, or other planning process) in various other capacities. For example, if it were concerned about the provision of infrastructure, it could make a submission in capacity as "infrastructure provider". If a local authority were advancing its interests as a (competing) "land developer", then it could fall foul of the trade competition provisions of the Act.

63. The Society understands that its Council has heard the views of its communities and is pursuing a position in support of those communities against PC13.

64. In other words, as the Society understands it, the Council is not pursuing any position as a competing developer. If it were doing so, then it would have brought different evidence about its development aspirations. As a responsible authority it would have disclosed that (and different "parts" of the Council would have been giving the instructions). There is no credible evidence or basis on which the Commission can determine the Council to be a trade competitor, and therefore strike out or give the Council's submissions and evidence less weight.

65. Accordingly, the Council's submission and evidence in opposition to PC13 must be treated in the usual way, ie without any discount because of a baseless allegation of trade competition.

NPS – UD

66. In my submission, the NPS-UD does not apply. The simple point is that it applies to urban environments that are "intended to contain a concentrated settlement of 10,000 people or more".

67. This is a factual determination to be made – but on the basis of the legal position / interpretation of the requirement.

68. In that regard, and acknowledging that there is some ambiguity in what is captured by the NPS, the longstanding decision of the Court of Appeal in

Centrepoint Community Growth Trust v Takapuna City Council[27] is relevant. The Court of Appeal in that case confirmed the "analytical" approach to be followed in the interpretation of planning terminology. It stated, at [706]:

> Before a Planning Tribunal can apply the facts to some definition in a Code of Ordinances it will need to consider the term in question and decide on its essential characteristics, although in many instances that part of the exercise will be taken for granted because the expression is one in everyday use in planning language if not in ordinary speech. The second step is to find the facts, the third to decide whether they fit the term in question. The first is generally recognised as a question of law, although where as in *Brutus v Cozens* it involves ordinary English words it may be categorised as involving fact alone. The third is a question of fact; but the Tribunal's conclusion can be attacked in law if the decision is unreasonable in the sense that no Tribunal acquainted with the ordinary use of language could reasonably reach that conclusion: *Brutus v Cozens*; *Edwards v Bairstow*. The Tribunal will also be exposed to attack in law if in reaching its determination it has applied a wrong legal test: *Blencraft Manufacturing Co Ltd v Fletcher Development Co Ltd* [1974] 1 NZLR 295.

69. In this case, the phrase "intended to contain":

(a) must include some futurity, as otherwise it would have been phrased "contains"; and

(b) necessarily requires "someone" to "intend" the containment of 100,000 people or more – and, logically, that can only be the relevant local authority. This follows from the context of the NPS, and its general focus on the relevant local authority having to discharge the burdens that it imposes.

70. The term "concentrated" is also important. In context it means (ordinary dictionary definition):

> ... present in a high proportion relative to other substances;

71. This suggests a "cumulative" or "summing" approach across multiple diverse areas to get to the threshold is not the approach intended by the NPS. The focus is on a "concentrated" area, not a district-wide amalgamation.

72. While expert opinion can inform the Commission's decision on this matter, it is ultimately a judgment for the Commission as to whether the NPS-UD applies – but based on the "essential characteristics" of the trigger or

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27 *Centrepoint Community Growth Trust v Takapuna City Council* [1985] 1 NZLR 702 (CA).

threshold for the NPS-UD to apply. In my submission, the requirement of "a concentrated settlement" dispels a cumulative or summation approach to the NPS, irrespective of how QLDC might have approached the task. (It may not have been a threshold question for QLDC, or challenged, and therefore its approach may have little or no precedent value.)

Concluding submissions

73. The Proponent has sought to manufacture, or hang its hat on, an alleged "housing crisis for Cromwell". Media articles referring to the issue are not evidence (or, with respect, are not reliable evidence in the world of click-bait headlining).

74. If there is no such crisis, then the entire justification for the plan change falls away.

75. Using the Proponent's own analogy, it is the McDonalds of housing, seeking to locate on a site of its own choosing, some way away from the local hamburger take-away enterprise. While McDonalds might not be the death-knell for the local hamburger joint, it may well not be "most appropriate" for the community. In a context where the community has spoken loudly and forcefully against McBurglar, the Commission should be very wary against approving PC13.

76. For all the above reasons, the Society respectfully requests the Commission refuse PC13.

DATED 13 June 2019

J D K Gardner-Hopkins
Counsel for the Society