

**BEFORE THE HEARINGS PANEL
FOR PROPOSED PLAN CHANGE 21 TO THE MACKENZIE DISTRICT PLAN**

UNDER the Resource Management Act 1991 (RMA)
IN THE MATTER of Proposed Plan Change 21 to the Mackenzie District
Plan

**LEGAL SUBMISSIONS ON BEHALF OF THE CANTERBURY REGIONAL
COUNCIL**

10 March 2023

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MAY IT PLEASE THE PANEL

Introduction

- 1 Canterbury Regional Council (**CRC** or **Regional Council**) made a submission on Mackenzie District Council's (**MDC**) proposed Plan Change 21 (**PC21**) primarily in order to ensure that PC21 gives effect to the Canterbury Regional Policy Statement (**CRPS**).
- 2 The Regional Council's position is that to assist plan users, further integration between PC21 and the CRPS and other relevant instruments can be achieved, consistent with the RMA.
- 3 The Regional Council lodged a submission (summarised further in Ms Hollier's evidence):
 - (a) supporting MDC in seeking to improve the clarity of the Operative District Plan (**ODP**) and proposing amendments that seek to give effect to the CRPS and national direction;
 - (b) seeking amendments to the ODP's definition of "high flood risk" or alternatively, adding a standard to the Large Lot Residential Zone (**LLRZ**) in order to prevent development within areas subject to significant inundation in Twizel;
 - (c) seeking the addition of an advice note referring to the need to obtain authorisations under the CRC Flood Protection and Drainage Bylaw 2013 (**Bylaw**) in some circumstances;
 - (d) seeking amendments to some of the residential zone chapters (adding additional standards and explanation) in relation to connections to sewers and discharge of waste/stormwater in Twizel, Kimbell and Albury; and
 - (e) seeking some amendments to the provisions for the General Industrial Zone (**GIZ**) as they apply in Twizel, regarding setbacks and relevant matters of control.
- 4 The Regional Council has filed evidence from the following experts:
 - (a) Oliver Hermans, Flood Hazard Scientist at CRC; and
 - (b) Alanna Hollier, Planner at CRC.
- 5 Mr Hermans and Ms Hollier will be present at the hearing to answer any questions that the Hearings Panel may have.

The Regional Council's interest in PC21

- 6 As summarised in Ms Hollier's evidence, the CRC has a number of functions relating to the integrated management of natural resources, and is required to prepare and administer the CRPS,¹ to which a district plan (including PC21) is required to give effect.²
- 7 The purpose of CRC's participation in PC21 is to assist MDC in achieving alignment between the relevant planning instruments, where possible.
- 8 The intention behind CRC's submission is to assist MDC in giving effect to the CRPS, but also to assist with minor amendments that CRC considers could enhance the provisions of PC21 to be as user-friendly as possible (and reduce the duplication of effort for plan users in making enquiries with both the CRC and MDC when planning a development, for example).

Scope matters

- 9 At the outset, I note that there were two matters raised in CRC's submission which were identified within the section 42A report as being out of the scope of PC21 and the submissions lodged on PC21.
- 10 This related to the amendments sought in CRC's original submission to the definition of "high flood risk" in the ODP,³ and the addition of a further subdivision rule in the ODP.⁴
- 11 The CRC accepts that these matters are outside the scope of PC21, as they relate to provisions that are not otherwise amended by PC21 (and therefore do not address a change to the status quo advanced by the proposed plan change⁵).
- 12 However, the CRC's submission did provide alternative relief for both relevant submission points, which it continues to pursue. Scope for each of the amendments sought will be dealt with in turn under the relevant topic heading below.

¹ Evidence of Alanna Hollier, dated 3 March 2023, at [13].

² RMA, s 75(3).

³ CRC original submission (57), at [11].

⁴ CRC original submission (57), at [41].

⁵ *Palmerston North City Council v Motor Machinists Ltd* [2013] NZHC 1290 at [90], endorsing the approach of William Young J in *Clearwater Resort Ltd v Christchurch City Council* HC Christchurch AP34/02, 14 March 2003.

Residential zones regarding wastewater infrastructure

- 13 Given its functions in relation to the control of the use of land for the purpose of the maintenance and enhancement of the quality of water in water bodies,⁶ the CRC has a particular interest in the provisions of PC21 that provide additional development capacity in areas where there is the potential for on-site wastewater discharges to occur.
- 14 As currently framed, the provisions of PC21 allow for further development to occur in the areas of Twizel, Kimbell and Albury, as a permitted activity. This creates an expectation for plan users that they are able to further intensify in those areas (within the limits set by the district plan), given that “people and communities can order their lives by [the district plan] with some assurance”.⁷
- 15 Whether further development can actually occur within those areas will depend on a method of wastewater disposal being achieved, including whether a development is connected to a sewer (where available), or whether a resource consent is able to be obtained from the CRC for that wastewater discharge.
- 16 The intention of the CRC’s submission was to include provisions and statements that make this potentially limiting factor apparent to plan users, and to align any resource consent requirements across both CRC and MDC’s planning documents, in order to streamline processes for both councils and the plan users.
- 17 Based on the section 42A report, it appears that MDC and CRC are aligned in their intention. The section 42A report notes that it is the intention that all development in Twizel and Fairlie is intended to be connected to MDC’s reticulated sewer network, but considers this is best addressed through the subdivision provisions.⁸
- 18 However, as addressed in the evidence of Ms Hollier, not all intensification occurs through subdivision, and therefore relying on these provisions alone to achieve the relief sought may not be sufficient.⁹ Providing a direct link between the development that is permitted and the requirement to connect to the sewer through the particular provisions

⁶ RMA, s 30(1)(c)(ii).

⁷ *Westfield (New Zealand) Ltd v North Shore City Council* [2005] NZSC 17, at [10].

⁸ Section 42A report, dated 17 February 2023, at [49].

⁹ Evidence of Alanna Hollier, dated 3 March 2023, at [31]-[34].

that enable intensification would ensure that the outcome sought is achieved.

- 19 In respect of Kimbell and Albury, where reticulated sewerage is not available, the section 42A report recommended that CRC's submission was adopted in part by including a new servicing standard.¹⁰
- 20 CRC agrees with the intent of these changes (as it is aligned with the intent of CRC's submission points), but suggests some further amendments to improve the clarity of the provisions (and to ensure that stormwater is also captured). The intent behind the suggested amendments is set out in the evidence of Ms Hollier.¹¹
- 21 CRC seeks that these servicing standards are applicable to any activity requiring a discharge permit from CRC.
- 22 The section 42A report also does not address the additional relief sought in CRC's submission in the form of policies and the introduction to the zone chapters. CRC continues to consider that these amendments are necessary in order to provide guidance both to MDC and to plan users when implementing the servicing standard recommended to be added to PC21.
- 23 For these reasons, CRC requests that the provisions of PC21 are amended as set out in Appendix 1 of the evidence of Ms Hollier.¹²

Scope for this change

- 24 While CRC accepts that its initial relief sought, the addition of a restricted discretionary rule to the subdivision chapter of the ODP, is outside the scope of PC21, it considers that MDC has scope to make the changes requested in Appendix 1 as:
- (a) The relevant matters were reasonably and fairly raised in CRC's original submission,¹³ such that the amendments now proposed would not be unanticipated by any person;
 - (b) The proposed amendments fall within the ambit of the plan change, as the amendments are addressing the purpose of PC21

¹⁰ Section 42A report, dated 17 February 2023, at [50].

¹¹ Evidence of Alanna Hollier dated 3 March 2023, at [46]-[56].

¹² Evidence of Alanna Hollier dated 3 March 2023, at Appendix 1.

¹³ CRC original submission (57), at [40]-[46].

and relate to provisions which are sought to be newly introduced to the ODP as part of PC21.

Management of flood inundation risk

- 25 CRC acknowledges that the natural hazards chapter is yet to be reviewed as part of the ODP review process. CRC looks forward to working closely with MDC on this part of the process to assist MDC in giving effect to the CRPS and ensuring consistency with other relevant regional plans.
- 26 However, CRC considers that an amendment to the provisions of PC21 as notified is necessary ahead of the natural hazard chapter review, to prevent the further development enabled by PC21 occurring in areas subject to high hazard risk.
- 27 As demonstrated by the evidence of Mr Hermans, based on modelling conducted by the CRC, the area between Glen Lyon Road and the Twizel River is at risk of significant flooding. The model's outputs indicate that parts of this area would be subject to flooding which would meet the criteria for a high hazard area under the definition of the CRPS.¹⁴
- 28 In addition, due to modelling uncertainties, it is possible that the model is underpredicting overflows from the stream toward the area of floodplain directly below the terrace.¹⁵ This means that areas that are not currently modelled as reaching the "high hazard" criteria in the CRPS, may in reality be subject to floods that do reach this level.
- 29 Notably, whilst it is acknowledged there are modelling uncertainties, the evidence is that the modelling may underestimate the hazard, not overestimate it.
- 30 The evidence of Ms Hollier sets out the CRPS provisions relevant to development in a high hazard area, which seek to avoid new subdivision, use or development of land within high hazard areas.¹⁶
- 31 CRC's concern in this respect is a result of the staged review process of the ODP, in that the PC21 provisions that enable further development

¹⁴ Evidence of Oliver Hermans, dated 3 March 2023, at [24].

¹⁵ Evidence of Oliver Hermans, dated 3 March 2023, at [18] and [20].

¹⁶ Evidence of Alanna Hollier, dated 3 March 2023, at [62].

will likely have legal effect (and therefore be able to be relied on by plan users seeking to further intensify), ahead of any provisions that seek to restrict development in areas subject to natural hazards, as part of that stage of the ODP review.

- 32 While the ODP provisions do have some protection through the form of activities that are subject to the ODP definition of “high flood risk”, this does not include the same depth requirement as the CRPS definition, so does not capture areas where floodwaters may pond. Therefore, there are areas that are not subject to the ODP definition of high flood risk, which may meet the definition of high hazard area under the CRPS.¹⁷
- 33 It is also noted that section 6(h) of the RMA, which provides for “the management of significant risks from natural hazards” as a matter of national importance, was inserted into the RMA in April 2017, which was after the current ODP provisions had been developed.
- 34 In light of this information, CRC considers that an additional restriction on development in the area below the relevant terrace is necessary, in order to give effect to the CRPS and Part 2 of the RMA. While the section 42A officers placed weight on the majority of lots along Glen Lyon Road already having residential dwellings on them,¹⁸ CRC submits that the potential for sites to be further developed cannot be excluded in future. It is consistent with a precautionary approach to ensure that PC21 does not allow for this outcome, even if it may be unlikely.
- 35 For these reasons, CRC considers that the additional standard sought (as set out in Appendix 1 to the evidence of Ms Hollier) is the most efficient and effective way to avoid new development in areas that could be subject to high flood hazard risk.

Scope for this change

- 36 While CRC accepts that the amendment initially proposed in its submission (to amend the definition of “High Flood Risk” in the ODP) is outside the scope of PC21, it considers that scope is available to make the requested changes for the following reasons:

¹⁷ Evidence of Alanna Hollier, dated 3 March 2023, at [61].

¹⁸ Section 42A report, dated 17 February 2023, at [304].

- (a) The relief now sought was specifically raised as alternative relief within the submission itself,¹⁹ ensuring that any person would be aware of the potential for this amendment to be made;
- (b) The relief directly relates to the subject matter of PC21, which allows additional development than what would be permitted under the ODP in the relevant areas;
- (c) The relief sought (being the addition of a further standard for development) is in relation to a new zone chapter (so it addresses a change to the status quo).

Advice note referring to the Flood Protection and Drainage Bylaw 2013

Relationship between bylaw and district plan

- 37 The Regional Council is responsible for the administration of the Bylaw. The purpose of the Bylaw is to “manage, regulate and protect flood protection and flood control works (including drainage networks) belonging to or under the control of the Canterbury Regional Council from damage or misuse”, and “only controls activities that may affect the integrity or effective operation and maintenance of the flood protection and flood control works.”²⁰
- 38 The RMA does not specifically provide for the relationship between bylaws and district / regional plans. Bylaws are not one of the listed matters that district plans must give effect to, or not be inconsistent with.²¹
- 39 However, bylaws made by a local authority are secondary legislation for the purposes of the Legislation Act 2019.²²
- 40 Bylaws are an important regulatory tool that sit alongside district and regional plans to manage activities with particular effects. Bylaws cover a wide range of activities (as provided for in the Local Government Act 2002) that in some instances are not within the functions of a council to control under the RMA.

¹⁹ CRC original submission (57), at [12].

²⁰ CRC Flood Protection and Drainage Bylaw 2013 (as amended 2018), cl 3.

²¹ RMA, s 75.

²² Local Government Act 2002, s 161A.

- 41 Territorial authorities have the function of the control of any actual or potential effects of the use, development or protection of land including for the purpose of the avoidance or mitigation of natural hazards.²³
- 42 While a bylaw may not be specifically listed as being required to be taken into account when preparing a district plan, it is submitted that it has a similar effect to “management plans and strategies prepared under other Acts”, which the territorial authority is required to “have regard to” when preparing or changing a district plan.²⁴
- 43 Arguably, as secondary legislation, a bylaw has more legal force than a management plan or strategy, and therefore should be considered through a district plan process.

Reasoning for the inclusion of advice note

- 44 As noted by Ms Hollier, the Bylaw provides additional requirements on activities that are commonly managed through a District Plan’s zone chapters. This includes planting or growing vegetation, constructing or locating structures, and dumping or depositing any thing.²⁵
- 45 This requirement may not be immediately apparent to a plan user looking at the District Plan, as in some circumstances the PC21 provisions permit activities that may require an authorisation under the Bylaw.
- 46 These activities being permitted means they are not likely to come before MDC for assessment at all (unless a certificate of compliance is applied for), and therefore there will be no opportunity for MDC to alert plan users that their activities may also require authorisation under the Bylaw.
- 47 An advice note is valuable in order to alert plan users to this additional requirement. It would not impose any additional consenting requirements, and simply notifies plan users as to the existence and potential application of the Bylaw.

²³ RMA, s 31(1)(b)(i).

²⁴ RMA, s 74(2)(b).

²⁵ Evidence of Alanna Hollier dated 3 March 2023, at [84].

- 48 While the section 42A report authors have suggested any such advice note would be best located within the natural hazards chapters,²⁶ the CRC's evidence is that the focus of the Bylaw is not about protecting land use activities from flood hazards (as would be expected to be the focus of the natural hazards chapters), but managing adverse effects of activities (including those permitted under district plans) on the flood mitigation infrastructure and works.²⁷ An advice note within the relevant zone chapters would be appropriate as it is these activities that may have an effect on the infrastructure sought to be protected.
- 49 As demonstrated by the evidence of Ms Hollier, the addition of an advice note would also be consistent with a number of the objectives and policies of the CRPS.²⁸
- 50 For these reasons, in order to achieve consistency and clarity across both regional and territorial regulatory instruments, the CRC seeks the addition of an advice note as set out in Appendix 1 to the evidence of Ms Hollier.
- 51 This relief was sought in the CRC's submission, and is within the scope of PC21 as it seeks amendments to the chapters which are entirely new to the ODP (and would not be unanticipated when considering the purpose of PC21).

Industrial zone and reverse sensitivity

- 52 The changes sought by CRC intended to protect the amenity of residential-zoned land adjoining Twizel's GIZ, particularly in relation to air quality, consistent with the provisions of the CRPS.
- 53 At the outset, based on the section 42A report it appears that the section 42A officers have recommended an amendment that largely gives effect to CRC's submission point. However, there is a difference between the narrative text and the suggested amendment – the narrative text refers to a 30 metre setback, whereas the amendment itself is for a 50 metre setback (as requested by CRC). CRC wishes to clarify that it continues to seek the 50 metre setback.

²⁶ Section 42A Report, dated 17 February 2023, at [305].

²⁷ Evidence of Alanna Hollier, dated 3 March 2023, at [85].

²⁸ Evidence of Alanna Hollier, dated 3 March 2023, at [90]-[91].

- 54 Further, the section 42A report appeared to accept CRC's submission in respect of GIZ-R1, but not GIZ-R2. CRC considers that for consistency the same setback should be provided in respect of both rules, as without it, any "heavy industrial activity" could locate anywhere within the GIZ as a permitted activity without being subject to any standards or matters of discretion.²⁹
- 55 As noted by the CRC's submission and the evidence of Ms Hollier, activities subject to GIZ-R2 may still be incompatible with residential land uses and may still require resource consent under the Canterbury Air Regional Plan.³⁰
- 56 CRC continues to consider that the matters of control (as set out in Appendix 1 to the evidence of Ms Hollier) are appropriate, and ensure that residential amenity is maintained.
- 57 For these reasons, CRC seeks that the amendments proposed in Appendix 1 to the evidence of Ms Hollier are adopted by MDC.

Scope for the requested changes

- 58 This relief is similar to that sought in the CRC's original submission,³¹ and is within the scope of PC21 as it seeks amendments to the chapters which are entirely new to the ODP (and would not be unanticipated when considering the purpose of PC21).

Conclusion

- 59 CRC reiterates that the amendments it proposes are to fulfil its intent of ensuring clarity and consistency between the relevant planning and regulatory documents in the region.

²⁹ Evidence of Alanna Hollier, dated 3 March 2023, at [103].

³⁰ Evidence of Alanna Hollier, dated 3 March 2023, at [104].

³¹ CRC original submission (57), at [63] and [64].

60 The provisions of PC21 are required to give effect to the CRPS. While on the whole this is achieved, there are further suggested amendments that could be made to achieve greater alignment.

Dated this 10th day of March 2023



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K T Dickson

Counsel for Canterbury Regional Council