

BEFORE THE INDEPENDENT HEARINGS PANEL

UNDER the Resource Management Act
1991 and the Canterbury
Earthquake (Christchurch
Replacement District Plan)
Order 2014

AND

IN THE MATTER of the Proposed Christchurch
Replacement District Plan

SUBMITTER Castle Rock Limited

(Submitter 2168 & 2169)

**CLOSING LEGAL SUBMISSIONS
ON BEHALF OF CASTLE ROCK LIMITED**

16 SEPTEMBER 2015

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May it please the Panel:**1. INTRODUCTION**

- 1.1 These closing submissions are made on behalf of Castle Rock Limited (Submitter 2168 and 2169) (**CRL**) in relation to Stage 2 proposals for the Commercial/Industrial and Residential Chapters of the Proposed Christchurch Replacement District Plan (**the Replacement Plan**).

2. SITE-SPECIFIC REZONING REQUESTS**195 Port Hills Road**

- 2.1 There is agreement between the planners for CRL and Council that the area is generally well located for urban activities and, importantly, that rezoning of this site has merit under the Act.¹
- 2.2 Mr Head's evidence was unchallenged. In his opinion, rezoning of the site achieves a greater degree of compatibility with adjacent land use patterns and the change of topography west of the site provides an ideal urban change point.² In other words, the site is well positioned and achieves a firm urban edge to this part of the City.
- 2.3 Ms Oliver helpfully confirmed that she has no concerns with the Outline Development Plan.³ Ms Oliver conceded that details as to density mix can readily be sorted out at the subdivision consent stage⁴; and that it is good planning to provide the potential future roading connections. Mr Wright undertook a broad desktop study exercise in relation to a number of site-specific rezoning requests. In relation to 195 Port Hills Road, he agreed that any geotechnical issues can be overcome through specific engineering design and simply noted that part of the site falls within the broader coastal hazard mapping area.⁵
- 2.4 On its merits, this site is uncontentious and would appear to be suitable for rezoning. Residual issues related to coastal hazard mapping will be

¹ Transcript, page 159, lines 9-19.

² Transcript, page 528, lines 41-44.

³ Transcript, page 161, lines 18-25.

⁴ Transcript, page 160, lines 12-14.

⁵ Transcript, page 120, lines 30-37.

addressed in Stage 3, but in my submission this does not represent a fundamental impediment to the rezoning of 195 Port Hills Road.

- 2.5 The only issue vexing the Council is the higher order policy, which I will turn to shortly.

123 Scruttons Road

- 2.6 This site has been the subject of considerable technical attention by the Council. However, the issue of concern appears to primarily relate to the filling of the site which is lawful and entirely compliant. A rule is also proposed as part of the site-specific rezoning request that would prevent development of the site until filling is completed. Mr Wright acknowledged that the ground level of a site plays a role in determining the risk of coastal inundation or erosion.⁶ Mr Norton also accepts that on-site mitigation for water quality and quantity can be evaluated at the development stage and is technically feasible.⁷ Remaining technical aspects will be addressed further in Stage 3.
- 2.7 Mr Milne accepted that, if the site is developed under the proposed zone, the anticipated volume of traffic will be well within that expected for a local road and that the wider transport network can readily accommodate the additional traffic safely and efficiently.⁸ The myopic focus by Mr Milne on the exact distance to the nearest bus route or design of the internal roading network are not, in my submission, fundamental impediments in traffic terms that would in themselves necessarily preclude rezoning of the site. For completeness, I note that Mr Head's unchallenged opinion is that rezoning of the site would not erode Christchurch's urban interface.⁹
- 2.8 Again, the Council maintains the position that the higher order policy effectively precludes rezoning of the site at 123 Scruttons Road.

⁶ Transcript, page 122, lines 9-13.

⁷ Transcript, page 90, lines 22-31.

⁸ Transcript, page 104, lines 12-22.

⁹ Transcript, page 529, lines 14-15.

3. **STATUTORY CONSIDERATIONS – HIGHER ORDER MATTERS**

3.1 It is the Council's submission that there is no ambiguity in terms of the reference to Map A, and therefore, there is no need to place an artificial gloss on the relevant objective and policy as currently included in the Canterbury Regional Policy Statement (**CRPS**).

3.2 It is acknowledged that regional policies can, and sometimes do, contain mandatory directives to territorial authorities. However, in this case, serious questions must be asked whether an apparently prescriptive policy is directly binding on the Council in circumstances where the current mapping has not been subject to the rigour of the First Schedule process.

Requirement to "give effect" to CRPS

3.3 "Give effect to" simply means "implement". On the face of it, this is a strong directive that creates a firm obligation.¹⁰ However, the implementation of such a directive will be affected by what it relates to and, I submit, the context in which the underlying policy was developed.

3.4 Under normal circumstances, the requirement to give effect to a policy which is framed in a specific and unqualified way does appear to leave little in the way of discretion. However, Map A and the associated regional policy were not imposed under normal circumstances. The policy framework arose out of an exceptional post-earthquake environment. It was imposed and amendments made under Ministerial direction, with existing appeal rights extinguished. As such, the current policy has not been subject to the First Schedule process and the rigour that would normally be applied to higher order policy documents. It cannot therefore be assumed that the policy in fact achieves Part 2 of the Act. This is an entirely different factual situation to that faced by the Supreme Court in *King Salmon*.

3.5 This, in my submission, raises a genuine issue of procedural fairness for submitters such as Castle Rock Limited who had been active participants in PC1 until such time as their rights were effectively taken

¹⁰ *Environmental Defence Society Inc v New Zealand King Salmon Co Ltd* (2014) 17 ELRNZ 442.

away. We are now left with the situation of a territorial authority agreeing on the merits with certain site-specific rezoning requests, but claiming that "its hands are tied" as a result of a higher order policy that was never properly tested under normal RMA processes and is now subject to a comprehensive review. This cannot be good planning for the City.

- 3.6 I submit that this Panel must surely have the discretion to give effect to the higher order policy document (read as a whole) in a way that achieves sustainable management, without feeling completely bound by the relatively prescriptive wording of a policy within that document in circumstances where the mapping is, quite frankly, suspect and is now under review. Sustainable management of urban growth and related higher policy imperatives of urban consolidation and intensification can still be achieved while enabling site-specific rezoning of land on the periphery of the City in appropriate areas.
- 3.7 What the decision of the Supreme Court in *King Salmon* does highlight is the need for regulatory authorities to be very careful with mapping, taking a robust approach with clear methodology that is justified in terms of section 32.
- 3.8 Given that Map A in its current form was not subject to an extensive RMA process, can it be safely assumed that this aspect of the CRPS in fact deemed to be achieving Part 2? If there is any doubt about this, then in my submission it is open to the Panel to turn to Part 2 in order to make decisions on site-specific rezoning requests under the Replacement Plan.

Meaning of "avoid"

- 3.9 In my submission, it may be appropriate to go beyond the ordinary and plain meaning of this term given the context in which Map A was developed.
- 3.10 The Environment Court has expressed the view in the context of a regional policy statement that the word "avoid" does not mean

"prohibit".¹¹ In other words, it is not a given that an avoidance-style policy should be interpreted as imposing a blanket prohibition on development in affected areas. We also need to remember that the Supreme Court in *King Salmon* was applying a particular set of facts to the NZCPS.

Cumulative effect and precedent – relevant considerations, or not?

- 3.11 The question has been asked whether cumulative effect is a relevant consideration. Ms Scott acknowledged during closing that the Council's evidence has not specifically addressed this issue as part of Stage 2. In my submission, there is no empirical evidence to suggest that the scale of the rezoning requests in Stage 2 would give rise to a material cumulative effect.
- 3.12 We are not talking about tens of thousands of new homes. Rather, based on a brief review of the site-specific rezoning requests, this generally involves very minor boundary anomalies or small scale proposals that are located for the most part in areas of the City where there is demonstrable need and where there are currently no identified greenfield priority areas. In my submission, it is not necessary to impose a prohibition if rezoning of a site would have a minor effect and can be achieved in a way that still implements the overall intent of the CRPS.¹²
- 3.13 The Council also says there is no evidence from submitters addressing the precedent issue of allowing site-specific specific rezoning requests. The concern seems to be that this might undermine the entire strategic direction of the Replacement Plan. In my submission, it is questionable whether the issue of precedent arises in these proceedings. This is not a resource consent hearing. It is about the bigger picture of how we enable Christchurch to recover and lay an appropriate foundation for future sustainable management of the City.

¹¹ *Man O'War Station v Auckland Council* [2013] NZEnvC 233 at [48].

¹² *Cook Adam v QLDC* [2014] NZEnvC 117 (applying *King Salmon*).

- 3.14 The Council is urging the Panel not to entertain special cases on the merits because of a possible precedent risk that would be created. The Council's position, put simply, appears to be that the integrity of the urban limits must be maintained at all costs even where it is accepted that site-specific rezoning requests have merit and in fact achieve the purpose of the Act.
- 3.15 This is like circling the wagons with blindfolds on and shooting blindly at anyone who approaches over the horizon, be they friend or foe, in order to "hold the line". Such an approach fails to properly achieve the sustainable management of natural and physical resources and it certainly does not represent good planning for the future of this city.
- 3.16 The Map A policy issue has been elevated by the Council to a blanket prohibition. With respect, this is compounded by the fact that Strategic Objective 3.3.7 in its current form essentially replicates the wording of the relevant policy contained in the Canterbury Regional Policy Statement. Set out below is a possible way forward for consideration by the Panel.

4. **A POSSIBLE WAY FORWARD**

- 4.1 As a starting point, it is respectfully submitted that it may be appropriate for the Panel to reflect on the wording of Strategic Objective 3.3.7, given the Land Use Recovery Plan (and CRPS) is up for review and now that you have the benefit of detailed evidence supporting site-specific rezoning requests.
- 4.2 It is noted that the Panel, in delivering the Strategic Directions decision at an early stage, intended to keep under continuing review the question of whether any aspect should be revisited in light of later stages of your inquiry into the Replacement Plan.¹³ In my submission, this is clearly a situation where it is appropriate to review Strategic Objective 3.3.7. As I noted during the hearing, this would avoid the Panel inadvertently falling into the same trap of applying highly prescriptive policy wording that may well be found to be redundant in a matter of months.

¹³ Strategic Directions Decision, para [316].

- 4.3 Ms Aston has considered this from a planning perspective and suggested wording is included as **Attachment A**. The proposed amendments include policy criteria that are intended to provide greater clarity on implementing the intent of the CRPS, thus "giving effect to" the higher order policy document. As signalled during the hearing, Ms Aston is available to work constructively with Ms Oliver over the final wording. For completeness, I submit that the Panel has the jurisdiction to make these amendments based on its earlier decision on Strategic Directions but also as a result of submissions that included, as relief sought, consequential amendments to the Replacement Plan.
- 4.4 For the reasons outlined above, I submit that the Panel does have the ability to entertain site-specific rezoning requests by exercising its discretion to give effect to the overall intent of the CRPS rather than focussing on one policy.
- 4.5 However, in the event that the Panel determines that it does not have any discretion to rezone any sites that lie outside Map A, I submit that it would nonetheless be of value to both submitters and the Council alike for a merit-based decision to be made by the Panel in relation to each site-specific rezoning request. This then becomes a question of timing. There may be an opportunity to consider the merits further once the LURP review is completed or, if not, then a merits-based decision would at least provide the factual foundation to enable rezoning of sites to take place at a future date where appropriate.

Date: 16 September 2015



J M Crawford
Counsel for Castle Rock Limited

Attachment A – Proposed Amendments to Replacement Plan Objective 3.3.7

3.3.7 Objective – Urban growth, form and design

A well integrated pattern of development and infrastructure, a consolidated urban form and a high quality urban environment that...

(c) Provides for urban activities only:

(i) within existing **developed or zoned** urban areas; and

(ii) on greenfield land contained within an Outline Development Plan area included in this Plan; and

(iii) on greenfield land contiguous with areas covered by (i) or (ii) above where:-

- the area of greenfield land and/or number of additional households to be accommodated is relatively small (generally around 15 ha or less, or less than 150 households); and/or

- the greenfield land will provide replacement housing or business land within or close to (generally within 5km of) a community where properties have been 'red zoned' due to damage sustained in the Canterbury 2010 and 2011 earthquakes; and

- the urban activity will not compromise long term planning for strategic, network or social infrastructure; and

- urban development of the land will consolidate urban form and create a logical and defensible urban boundary; and

- the area to be rezoned will not compromise achievement of the intensification targets specified in the Canterbury Regional Policy Statement; and

- the alternative of a rural zoning is not an efficient and effective use of the land resource; and

- is consistent with other Replacement District Plan objectives and policies.

~~- on the periphery of Christchurch's urban area identified in accordance with the Greenfield Priority Areas in the Canterbury Regional Policy Statement Chapter 6 Map A~~

(d) Increases the housing intensification opportunities in the urban area to meet the intensification targets specified in the Canterbury Regional Policy Statement Chapter 6, Objective 6.2.2 in particular...

(iv) **On greenfield land provided for under Policy 3.3.7 (c) (ii) and (iii) as specified above.** ~~In those parts of the Residential Greenfield Priority Areas identified on Map A, Chapter 6 of the Canterbury Regional Policy Statement.~~