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Request for information - Wooing Tree Estate resource consent application under COVID-19 Recovery (Fast-track Consenting) Act 2020 (CRFCA) (Application)

Introduction

1. We refer to the request for further information in relation to the above Application, which was issued by the EPA on 21 June 2021. You have asked us, as Wooing Tree Property Development LP (**WTPD**)'s legal advisors, to provide a legal opinion on questions 2(c), 4, 10, 16 and 19.
2. We understand that this opinion will be provided directly to the EPA as part of WTPD's response to the request for information.

Question 2(c): "No complaints" covenants

3. WTPD has been asked for an explanation as to the rationale for, and efficacy of, no complaints covenants in terms of the *avoid remedy and mitigate* approach promoted by Part 2 of the RMA.
4. No complaints covenants are a commonly used tool to address reverse sensitivity effects. The mostly widely cited definition of reverse sensitivity is from *Auckland Regional Council v Auckland City Council* where the Environment Court stated that reverse sensitivity:¹

refers to the effects of the existence of sensitive activities on other activities in their vicinity, particularly by leading to restraints in carrying on of those other activities.

5. In *Affco New Zealand v Napier City Council* the Court adopted a description of the concept of reverse sensitivity as:²

the legal vulnerability of an established activity to complaint from a new land use. It arises when an established use is causing adverse environmental impact to nearby land, and a new, benign activity is proposed for that land. The "sensitivity" is this: if the new use is permitted, the established use may be required to restrict its operations or mitigate its effects so as to not adversely affect the new activity.

¹ *Auckland Regional Council v Auckland City Council* [1997] NZRMA 205 (NZEnvC) at 206.

² *Affco New Zealand Ltd v Napier City Council* NZEnvC W082/2004, 4 November 2004 at [29].
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6. In the case of this Application, no complaints covenants will be registered over the titles for much of the Wooing Tree Estate, to address the potential for reverse sensitivity effects on the orchards on the other side of Stage Highway 6. The conditions show the extent of the area to which this requirement relates and a copy of the covenant is attached to the Application at Attachment S. Under the covenant the future residents covenant not to:
- (a) carry out any activity on their land that unreasonably restricts or interferes with “farming” on the benefitted land; or
 - (b) make any objection (including bringing legal proceedings, making complaints and objecting to building and resource consents) to the use of any of the benefitted land for farming, or object to noise arising from “farming” on that land.
7. “Farming” is defined to include the growing and harvesting of fruits or products and includes a range of listed activities including the operation of orchard sprayers with associated noise, the use of helicopters, operation of wind machines and the running of irrigation and frost fighting pumps and engines.
8. The rationale of this covenant is not to “avoid, remedy or mitigate” any adverse effects of the orchard operations on the future residents of the Wooing Tree Estate. Its purpose is to avoid potential adverse effects *on the orchard operations*³.
9. Any adverse effects *on the future residents* from the orchard operations will be avoided, remedied and mitigated by other measures. First, in relation to air quality effects, we refer to the assessment carried out by PDP which is being provided as part of WTPD’s response to the request for information. This concludes that:
- (a) dust discharges from the established horticultural fruit tree blocks and a vineyard to the west of the Wooing Tree Estate are expected to be negligible;
 - (b) the effects of smoke discharges will be avoided because the operators are already required by the relevant good practice guidance to avoid or minimise the risk of smoke in the vicinity of State Highway 6;
 - (c) odour sources are expected to be negligible; and
 - (d) effects from the application of agrichemicals will be addressed by the retention of the buffer around the perimeter of the Wooing Tree Estate boundary. While the width of the buffer will be reduced as a result of this application, a minimum separation distance between residents and the orchard operations of 40m will be retained. This exceeds the minimum buffer distance set out in the applicable standard⁴.
10. Similarly, in their report that was prepared as part of this further information response, WTPD’s expert noise consultant Marshall Day Acoustics concludes that the condition framework and subdivision layout are adequate to address noise effects from surrounding rural land uses. In particular they note in their assessment that the noise attenuation requirements in the conditions which are intended to deal with the state highway noise will also be effective in addressing the noise from the orchards’ frost fans. The noise attenuation conditions proposed by WTPD are set out in condition 47.

3 Derek Nolan and Kristen Gunnell Reverse sensitivity and “no complaints” covenants (2007) 7 BRMB 50 at 54.

4 New Zealand Standard, Management of Agrichemicals (NZS 8409:2004)

11. WTPD has also been asked to confirm the effects basis for the limit of coverage of the “no complaints” covenant within the site.
12. We understand that the area over which the covenants are required to be registered replicate the area for which the previous landowner agreed to impose covenants as part of the settlement reached in relation to Plan Change 12 to the Central Otago District Plan. WTPD is proposing to register covenants over the same area to be consistent with the terms of that agreement. We understand that the area extends approximately 160m from the benefitted land. PDP has confirmed the appropriateness of the area to address reverse sensitive effects from an air quality perspective.
13. In light of the above, our opinion is that the use of no complaints covenants is a lawfully accepted method to avoid reverse sensitivity effects and is appropriate in this context. The effects on the residents from the orchard operations will also be avoided, remedied and mitigated by the measures described above.

Question 4: Urban Design Guidelines

14. The Panel has asked what reliance it can and/or should place on the Wooing Tree Design Guidelines to achieve the outcomes proposed in the Application, given that they are not imposed through conditions of consent. The Design Guidelines were developed by WTPD’s consultant urban designers Baxter Design and the 10 September 2020 version was provided at Attachment L to the Application. An updated version (25 June 2021) is being provided as part of the response to this information request (at Attachment V).
15. The sale and purchase agreements for the individual lots will also include a requirement that purchasers shall not commence construction of any building or any landscaping on any lot without having first obtained the written approval of WTPD to the plans and specifications of that building and/or landscaping. The terms of sale will require the registration of a covenant to this effect.
16. WTPD now proposes an additional condition of consent that will require the registration of a covenant on the title for each residential lot stating that any building constructed on the lot must comply with the Design Guidelines and is subject to the design approval process as set out in the guidelines.
17. Given that compliance with the Design Guidelines will be secured by both a contractual arrangement and a consent condition requiring a covenant, in our opinion the Panel can, and should, rely on the outcomes that will be secured by the Design Guidelines. These guidelines will ensure the development of a high quality estate reflecting a Central Otago style, materiality and colour palette. Attachment W to the response to the response to this information request includes imagery of houses along the proposed road 5 that comply with the Design Guidelines and demonstrate the high amenity outcomes that will be achieved. As noted in the Application the Wooing Tree Estate will have positive effects on the built character of Cromwell and less than minor landscape effects.

Questions 10 and 19: Relevance of National Policy Statement on Urban Development (NPS UD)

18. At question 10 of the request for future information WTPD has been asked for confirmation as to whether the NPS-UD is a relevant and applicable document pursuant to Schedule 6, clause 31(1)(c) of the CRFCA.
19. The NPS-UD came into force in August 2020. It applies to planning decisions by any local authority that affect an urban environment⁵.
20. “Planning decisions” are defined to include decisions on resource consents. Pursuant to section 12(2)(b) a resource consent granted under the CRFCA has the same force and effect as if it were granted under the RMA. We consider that the Panel’s decision constitutes a “planning decision” for the purposes of the NPS-UD.
21. What is less clear is whether Cromwell is an “urban environment”. The NPS-UD definition is:
- urban environment means any area of land (regardless of size, and irrespective of local authority or statistical boundaries) that:
 - (a) is, or is intended to be, predominantly urban in character; and
 - (b) is, or is intended to be, part of a housing and labour market of at least 10,000 people
22. Cromwell’s population is currently less than 10,000 people⁶. It is for that reason that Mr Duthie has reached the conclusion in the Application that there are no relevant national policy statements. The Panel has asked for confirmation of this position.
23. When the definition of “urban environment” is examined, our view is that Cromwell could be considered to fall under the definition for two reasons.
24. The first reason is on the basis of growth projections for Cromwell. The Cromwell Spatial Framework – Spatial Plan (**Framework Plan**) forecasts that the population will reach 10,900 by 2038⁷. We note that the urban environment definition refers to an area that is, or *is intended to be*, part of a housing and labour market of at least 10,000 people. The Panel has asked for comment on the implication or effect of the terminology “intended to be”, and whether it enables or requires the Panel to apply the NPS-UD given that Cromwell’s population is expected to exceed 10,000. It also asks whether the anticipated timing for crossing the 10,000 person threshold is relevant.
25. We have not been able to locate any commentary as to what is meant by “intended to be” and why this terminology was included in the definition. We note that the National Policy Statement on Urban Development Capacity 2016 (**NPS-UDC**), which was replaced by the NPS-UD, also used the phrase “intended to” in its definition of “urban environment”⁸ (although the trigger was different, as discussed below), but we are not aware of any commentary on its meaning in that context either.
26. We consider that on its plain and ordinary meaning, the best interpretation of “intended to be” is that it refers to the intention of the relevant local authority, as set out in its strategic growth policy documents. In Cromwell’s case that would be the Framework Plan, which forecasts that Cromwell will meet the 10,000 threshold by 2038 – some 19 years from the date of the document (May 2019). This is within the timeframes the NPS-

5 National Policy Statement on Urban Development 2020, 1.3(1)(b).

6 According to the 2018 Census the total population for the three relevant areas forming the Cromwell Ward - Cromwell East, Cromwell West and the surrounding rural catchment, the Lindis-Nevis Valleys, was 8,001.

7 Cromwell Spatial Framework - Stage 1 Spatial Plan at [2.4]

8 The definition of “Urban environment” in the NPS-UDC was “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”.

UD anticipates for implementation – “long term” is defined as between 10-30 years. In our opinion, the reference in the Framework Plan to Cromwell’s predicted growth is sufficient to indicate that the Central Otago District Council (**CODC**) has a specific “intention” for Cromwell’s population to grow to this level within the timeframes anticipated in the NPS-UD.

27. On balance, we consider that Cromwell’s forecasted long term population growth is enough to establish that Cromwell is “intended to be” a housing and labour market of at least 10,000 people in its own right and so meets the definition or “urban environment”.
28. We have also considered whether Cromwell could fall within the definition of an urban environment because it forms *part* of the Queenstown and Wanaka housing and labour markets. The Economic Assessment provided with the Application notes that many households who work in either Wanaka or Queenstown are choosing to rent or purchase dwellings in Cromwell and commute. 13% of Cromwell’s population leaves Cromwell each day for work/school, with more than half travelling to Wanaka and Queenstown⁹. The change to the reference to “housing and labour market” in the definition, from the earlier definition in the NPS-UDC which referred to a “concentrated settlement” appears to be a deliberate attempt to broaden the number and extent of urban areas captured by the NPS-UD, to include groupings of smaller urban areas and settlements that operate as a functional housing or labour market of the necessary scale.
29. We consider that this further strengthens the argument that Cromwell is an “urban environment”, forming part of a housing and labour market of more than 10,000 people, and so the NPS-UD is a relevant national policy statement for the purposes of section 31(1)(c).
30. As noted by the Expert Consenting Panel in its decision on the Comprehensive Care Retirement Village in Kohimarama, Auckland (a referred project under the CRFCA), if the NPS-UD applies then what the Panel is required to do is consider the relevant NPSUD objectives and policies applicable at the present time, rather than speculate on the outcome of future plan change processes undertaken to implement the NPS-UD¹⁰. The Application included, for completeness, an assessment of the Wooing Tree Estate against the relevant objectives and policies¹¹. It concludes that this Application is consistent with the NPS-UD and will advance a number of its objectives and policies. In particular, Mr Duthie demonstrates how the project will contribute to a well-functioning urban environment for the purposes of Policy 1.
31. We note that the comments provided by the CODC include additional commentary on population growth that appears to cast doubt on the population forecasts within the Framework Plan. The comments also note that Cromwell “may not” be an urban environment. This commentary is being reviewed by WTPD’s technical experts and further comments will be provided on this issue in accordance with the timeframes under the CRFCA.

9 Wooing Tree Fast Track Consent Application Economic Assessment, Market Economics, 29 October 2020 at [2.1.1]

10 Final decision of Expert Consenting Panel on application under CRFCA at [249].

11 Planning Report, Attachment A to Application, at [15.3].

Question 16: Consideration of the Framework Plan

32. The Application asks the Panel to consider the Framework Plan as a matter that is “relevant and reasonably necessary to determine the consent application” pursuant to clause 31(1)(d) of the Sixth Schedule.
33. The Framework Plan was completed as part of a masterplanning exercise being undertaken by the CODC (Cromwell “Eye to the Future Masterplan”). It was informed by consultation and engagement with the Cromwell community and other stakeholders and was adopted by the Cromwell Local Board in June 2019. The EPA has asked a number of questions regarding the relevance of the Framework Plan.
34. The first is whether a non-statutory strategic framework plan may be considered pursuant to clause 31(1)(d). In our opinion this document is both “relevant” and “reasonably necessary”. The Framework Plan assists in identifying the types of changes necessary to strategically position Cromwell within the wider Central Otago region over the next 30 years. It is described as an indicative plan of Cromwell based on a strategic vision to assist in guiding and coordinating infrastructure, services and investment. One of its stated intended uses is to “inform decision-making within both the public and private sector”. In our view this document provides valuable guidance as to where additional growth should be accommodated in Cromwell. It is directly relevant to the decision the Panel needs to make.
35. While there is no case law under the CRFCA as of yet, we consider that decisions relating to the equivalent provision in the Resource Management Act 1991 (**RMA**) are analogous. A consent authority may, under section 104(1)(c) of the RMA, have regard to management plans developed by the local authority which relate to the resource in question¹²: for example, the Environment Court has held that the Wellington Waterfront Framework, a non-statutory document that set out the vision and matters to guide the development of the Wellington waterfront, was a relevant and reasonably necessary document for deciding an application for consent for a project in that location¹³.
36. We note that in the recent comments on the Application provided by the CODC, the CODC’s consultant planner agrees that the Framework Plan is a relevant document for the purposes of clause 31(1)(d).
37. The second question we have been asked is whether the Minister’s decision not to specify the Framework Plan as a relevant matter under section 19(f) has any implications for the Panel in the context of clause 31(1)(d).
38. We do not consider that it does. The decision that that Minister was required to make under section 19 was whether the Wooing Tree Estate would help to achieve the purpose of the CRFCA. That is a different decision than the decision that is now before the Panel. It is open to the Panel to determine, in the context of its decision whether to grant consent to the Application under clause 31, that the Framework Plan is a relevant and reasonably necessary document.
39. Finally, we have been asked whether any issues as to weight arise in considering the Framework Plan.
40. The weight to be assigned to the Framework Plan is a matter for the Panel to determine. We agree with the Panel’s summary of some of the relevant considerations as to weight to be applied to a growth strategy in the RMA context. As we have noted above, we

¹² *Goodall v Queenstown Lakes D C W105/95* (PT).

¹³ *Re Site 10 Redevelopment Limited Partnership* [2015] NZEnvC 173 at [121].

consider that the case law under section 104(1)(c) is analogous. We acknowledge that the Framework Plan is not a RMA document and has not yet been incorporated into the Central Otago District Plan. Notwithstanding that, it has been the subject of extensive stakeholder and wider community engagement¹⁴ and is the key strategic policy document intended to guide planning decisions in Cromwell. The Environment Court has given weight to similar documents when deciding consent applications under the RMA¹⁵ and we consider that the Panel should do so here.

Yours faithfully
SIMPSON GRIERSON



Bill Loutit/Sarah Mitchell
Partner/Senior Associate

14 Information about this process, including survey results, is available on the CODC website at <https://www.codc.govt.nz/your-council/project-updates/cromwelleyetothefuture>

15 Such as the development being considered in the *Site 10* decision, which was a direct referral application under s 87G of the RMA.