

## LEGAL SUBMISSION

**IN THE MATTER OF:** RESOURCE CONSENT SP/0179/20

3MS of Cambridge Limited Partnership

1863, 1865, 1871 and 1881 Cambridge Road

**STATEMENT OF:** Helen Atkins

**DATE:** 21 May 2021

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- 1 These legal submissions are made on behalf of Waipa District Council (Council) and address:
- a Factual matters that Counsel has directly been involved with and largely addressed in the evidence of Mr. Matthew Smith.
  - b The issue of the relevance of effects in relation to reserve provision.
  - c Legal matters arising out of the evidence – the proposed staging conditions and the meaning of generally in accordance with.

### FACTUAL MATTERS

- 2 In his evidence Mr. Smith includes a section entitled “Dealings between 3MS and Council on land acquisition matters”. As noted at paragraph [26] there are two sides to any story. It is not the purpose of these submissions to counter any matters raised by Mr. Smith. Rather, the purpose is to address the issue of Council land acquisition process that Mr. Smith refers to.

- 3 As correctly noted by Mr. Smith (at [26] the Council and 3MS were not able to reach agreement on the land acquisition of the land required for the infrastructure corridor set out in the Structure Plan. Also as noted by Mr. Smith this was largely due to the different valuation advice received by the parties. The AEE includes (Appendix C) all the correspondence in relation to this matter, as Mr. Smith notes at his paragraph [26].
- 4 Later in his evidence Mr. Smith notes the frustration that 3MS (and other landowners) have towards the Council's approach to land acquisition for public infrastructure. I have been asked by Council to respond to this criticism.
- 5 In the context of the acquisition of the 3MS land Council originally proceeded on the basis of a willing seller / willing buyer scenario. This was because at the time the process began in 2019 there was a Structure Plan showing where the infrastructure was going to be located (i.e. on the 3MS land). Council (and 3MS) were involved in detailed design work for this infrastructure which around mid-way through 2020 was largely complete. At this stage all that remained was the finalization of an infrastructure work agreement, a development contribution agreement and a sale and purchase agreement. All of this documentation was largely completed, and the only outstanding issue was valuation. Mr. Bax and Mr. Miles include further information on this in their statements.
- 6 As Mr. Smith has identified (and the material in Appendix C confirms) Council and 3MS could not reach agreement on the amount of money that Council should pay for the infrastructure. The negotiations stalled and Council considered if it was prepared to pursue the compulsory acquisition process as set out in the Public Works Act (PWA). In addition, Council considered whether it should pursue a notice of requirement over the land to secure the corridor for public infrastructure.
- 7 It was at this time that 3MS started to discuss its alternative proposal which saw the infrastructure no longer located on its land. It is this proposal that is now before the Commissioners.
- 8 Council determined that it did not wish to pursue compulsory acquisition because it prefers to enter into these processes on a willing buyer / willing seller basis. As noted

by Mr. Miles (who has extensive experience in PWA processes for public entities) the compulsory acquisition process can take a considerable time to resolve and does not necessarily end up in an outcome whereby the land can be compulsorily acquired due to the fact that the process is subject to judicial scrutiny.

- 9 Like 3MS Council is desirous to ensure that Cambridge is able to provide for residential housing demand. Without wishing to seem unduly defensive, Council is not accepting of the criticisms made of it by 3MS. In my submission, 3MS appear to be arguing that although the Council was correct in backing away from using the PWA process to purchase its land compulsorily it should now use that process against other landowners on adjoining sites where the infrastructure is indicatively shown in the proposal.
- 10 3MS are correct that if consent is granted by the Commissioners then the provision of that public infrastructure will need to be addressed. Mr. Miles and Mr. Bax provide updates on discussions with affected landowners (all of whom are submitters to this hearing).
- 11 I turn now to consider the reserve effect issue as this is a matter dealt with in the supplementary statement from Ms. McElrea and was the subject of a legal opinion from me at the time of the notification decision.

## **RESERVE EFFECTS**

- 12 In his evidence Mr. Chrisp cites the notification decision at paragraph [149]. His reason for citing this is to support his opinion that Mr. Batchelor is not correct when he states: that not locating the sports fields within the 3Ms site is *“a significant departure from the structure plan with potential for effects on the wider Cambridge community”*.
- 13 It is important to note that Mr. Batchelor refers to the reserve issue in two respects, namely, in terms of the structure plan and in terms of effects. The issue of departure from the structure plan is further addressed in Mr. Batchelor’s supplementary statement and I deal with the issue of what is regarded as ‘generally in accordance

with' in the next section of these submissions. Suffice to say here is in the context of the assessment under s104 RMA it is difficult to uncouple the discussion over whether there is a significant departure from the Structure Plan from the issue of effects. They are in essence interrelated. This is why the evidence for the Council does consider that a significant departure from the Structure Plan results in an adverse effect.

- 14 The notification decision relied on legal advice provided by me on the whether the application for consent ought to be publicly notified in relation to the change in reserve provision as set out in the application. At the time the notification decision was made in the context of the fact that the Council is engaged in a Reserves Levels of Services review, to review and recommend the appropriate Levels of Service for reserves in the general vicinity of the site. As noted in the notification decision this review was in response to the 3MS application, the proposal to vary the operative structure plan reserves (purpose and layout), and the need for the Council and the public to have confidence that the reserves indicated in the Operative Structure Plan (purpose and location) are still applicable.
- 15 It was further noted that any changes to the reserves Levels of Service will follow a Local Government Act Special Consultative Procedure and may result in changes to the Waipa District Plan (via a plan change process). The notification decision determined that the off-site impact of the proposal to vary the reserves (purpose and layout) from the operative Structure Plan, was not an RMA adverse effect that is able to be considered for the purposes of the notification decision.
- 16 The supplementary evidence of Ms. McElrea is that not providing sports fields in the C2 growth cell does result in a significant departure to the structure plan with potential for effects on the wider Cambridge community. It is the departure from the Structure Plan that is the key to the consideration under s104 as this is not a matter that could be considered in the context of the notification decision. As noted in the evidence considerable effort (including from Council staff) has gone into securing the active reserve and destination playground land. It has reached a point of an agreed Sale and Purchase Agreement (as noted by Mr. Smith). If this land is secured then there will be no need to look elsewhere for alternatives.

17 I now discuss the main contentious point as between the applicant and the Council – is the application generally in accordance with the Structure Plan.

### **GENERALLY IN ACCORDANCE WITH**

18 As noted by Mr. Batchelor (and I do not consider this is a contentious point) the Structure Plan is it forms part of the District Plan. There is case law on this point, but as it is not a matter the applicant takes issue with, I do not propose to take this matter further.

19 The phrase “generally in accordance with” or words to that effect has been looked at judicially in the context of resource consent conditions. The leading case is *Palmerston North City Council v New Zealand Windfarms*<sup>1</sup> who noted that the word “generally”:  
*... is intended to permit minor variations to the activity described in the application for resource consent. It does not permit the consent holder to conduct the activity in a materially different way from that described.*

20 So, the assessment of whether the application is generally in accordance with the Structure Plan is a matter of fact which the planning witnesses cover in their evidence. In short, both Mr. Batchelor and Mr. Phizacklea do not agree with Mr. Chrisp that the proposal is generally in accordance with the Structure Plan. This is a core issue for the Commissioners to determine.

21 I now discuss the issue of the staging conditions that 3MS are concerned about.

### **STAGING CONDITIONS**

22 In his evidence Mr. Smith raises concerns with regards to the ‘staging’ conditions recommended by the reporting planner, Mr. Batchelor. The purpose of this part of my submissions is to comment on the legality of such conditions.

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<sup>1</sup> 18 ELRNZ 149 at paragraph [5]

- 23 Throughout the section 42A report Mr. Batchelor notes his concern with regard to the provision of reserves and other infrastructure. Mr. Smith has listed the various paragraphs of concern in his evidence at paragraphs [32] to [50].
- 24 With regard to reserves acquisition Mr. Batchelor notes (paragraph [2.15]) the status of the sale and purchase agreement between Council and 3MS for the reserve. Factually, Mr. Batchelor is correct but equally the elaboration of this in Mr. Smith's statement (at [33]) is also correct. The issue here is not a factual dispute but rather whether the proposed condition 2 in the section 42A report is appropriate – legally and factually.
- 25 Factually, Mr. Smith says the hold up on 3MS signing the sale and purchase agreement is the staging restriction on the development. Mr. Batchelor proposes this condition (which is a pre-condition rather than a staging one) because it is his evidence that without it there are effects that need to be mitigated (at [3.21] and [7.1.2.iii]). It is submitted that this is a factual matter for the Commissioners to determine. If you determine that Mr. Batchelor is correct that there are effects that will not be mitigated without certainty around the provision of reserves then the pre-condition is a valid condition that you can legally impose. If you disagree then you can follow the path that Mr. Smith is seeking and remove that condition.
- 26 The staging condition that Mr. Smith refers to relates to the infrastructure corridor. As correctly noted by Mr. Batchelor that condition [#3] cannot be legally imposed on the applicant as it is reliant on other parties (Council and affected landowners) acting in a particular way. It is an onerous condition that can only be imposed if the Applicant agrees to it. Again, there is a factual matter that needs to be considered. If the Commissioners agree with Mr. Batchelor that the effects of the proposal are acceptable as long as the issue of where the public (road and stormwater) infrastructure is located is resolved then a resolution of that issue will be needed. One way it could be resolved is for the Applicant to volunteer a condition to the effect set out as condition 3 in the section 42A report.

- 27 I note the evidence of Mr. Chrisp who correctly states (at paragraph [44]) that there is no resource management reason that necessitates the corridor to be located on 3MS property to the extent that there is no requirement in the District Plan that the infrastructure be provided exactly in the manner shown in the Structure Plan. Mr. Chrisp makes the same comment in relation to the reserve (at paragraph [45]).
- 28 Mr. Chrisp does not agree that the changes to the corridor and the provision of reserves result in adverse effects (significant or otherwise). As compared to Mr. Batchelor and Mr. Phizacklea
- 29 Mr. Chrisp notes that the “alternative spatial layout of the north/south infrastructure corridor on any landowner to the west ... are little or no different to the effects of the corridor being on the 3MS land. The effects of the corridor (wherever it is ultimately located) will be fully mitigated by compensation paid by the Waipa District Council through the land acquisition process.” (see paragraph [84]).
- 30 Mr. Batchelor notes in various places that the issue of the infrastructure location does cause effects of those whose land it is that that infrastructure will be located on. This is likewise the view of Mr. Phizacklea.
- 31 In relation to District Plan provisions Mr. Chrisp considers that the changes made to the location of the corridor and reserve from those in the Structure Plan are generally in accordance with the Structure Plan and the outcomes of the Structure Plan can and will be met by the proposal. He further notes that the Plan provides for activities that are not generally in accordance with an approved Structure Plan as a Discretionary Activity (paragraph [107]).
- 32 Mr. Batchelor’s evidence is essentially that, without the certainty of the infrastructure provision at this stage the outcomes of the Structure Plan are frustrated. This is echoed by Mr. Phizacklea.
- 33 From a legal point of view the Commissioners first have to determine:

- a Are there environmental effects arising as a result of this subdivision consent showing an indicative alternative infrastructure corridor and reserve provision?
  - b If there are effects who is affected?
  - c Does the proposal result in the outcomes of the approved Structure Plan not being able to be achieved?
  - d If the answer to these matters is affirmative, then the Commissioners need to decide if these matters can be addressed by conditions on the resource consent or via an alternative method.
- 34 This is largely a factual determination based on the Commissioners view of the planning evidence before it. What can be submitted is that the experience the Council has had to date with trying to purchase the 3MS land and the responses from those landowners who consider the 3MS proposal does have a significant adverse effect on them means at the very least in practical terms that the ultimate delivery of the outcomes in the Structure Plan is far from certain at this point in time.

## **CONCLUSION**

- 35 These submissions are deliberately not advocating for a particular position. Rather they are intended to comment on factual matters that are relevant for me to comment on and provide legal commentary in those areas that warrant such commentary.

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**Signed**



Helen Atkins

**COUNSEL FOR WAIPA DISTRICT COUNCIL**