Before Independent Hearing Commissioners

Appointed by the Central Otago District Council

In the matter of	The Resource Management Act 1991
And	A requested change to the Central Otago District Council's Operative District Plan – Plan Change 13 ("PC13")

LEGAL SUBMISSIONS for the Proponent

River Terrace Developments Limited

Dated 10 June 2019

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MAY IT PLEASE THE COMMISSION

Introduction and Overview of Submissions

1. The purpose of the Request for PC13 is to create the River Terrace residential neighbourhood to provide and enable 900 new, affordable homes to address a housing crisis.

2. The detail of the Request is set out in the PC13 Request documentation and is well summarised in the s42A Report.

3. Mr Chris Meehan is the principal of the plan change proponent River Terrace Developments Limited (**RTDL**) and the principal of RTDL's parent entity Winton Group. Mr Meehan is the 'visionary' responsible for PC13. Winton Group is one of the largest deliverers of residential product in New Zealand. River Terrace is one of a number of projects currently being undertaken by Winton Partners to help address the serious housing challenges facing New Zealand.

4. The positive benefits which will flow from PC13 are obvious.

5. The primary question being put to the Commission this week is "What is the downside of approving PC13?".

6. The statutory process is agreed between Counsel[1], well understood, and will not be addressed further.

7. Three specific legal issues will be addressed:

   a. Alternatives;

   b. Relevance of the Cromwell Masterplan Process (**CMP**);

   c. The National Policy Statement on Urban Development Capacity 2016 (**NPSUDC**).

8. Relevant objectives and policies of relevant planning instruments have been addressed at length by the numerous planning witnesses. Agreement has been reached on those which are relevant. I do not intend to repeat them. Compliance with many of them is not disputed. Where there is debate, the outcome will largely, if not entirely, be determined on the basis of a factual finding or a determination of how the relevant plan provision should be applied to the facts.

9. There are six areas of debate which I will address below:

   a. Provision of housing;

[1] Joint Memorandum of Counsel 'Statutory Tests for a Plan Change' dated 8 June 2018.

b. Landscape;

c. Soils;

d. Spray drift;

e. Reverse sensitivity;

f. Amenity relating to noise.

Zoning

10. The starting point for consideration of PC13 must be the existing zoning of the site. The importance of that starting point appears to have been overlooked by a number of the expert witnesses. Refer **Attachment 1**.

Alternative sites

11. I touch briefly on the issue of alternative sites, although that is not raised as an issue in the s42A Report or in any of the evidence lodged. The High Court decision of *Brown v Dunedin City Council*[2] remains the principal authority for the long held proposition that there is no mandatory requirement for the consideration of alternative sites when dealing with a site specific plan change. That does not necessarily mean that consideration of alternative sites is never a relevant consideration.

12. In the *King Salmon*[3] case the Supreme Court confirmed that the need to consider alternative sites is not an invariable requirement, but may be required on occasions such as if an application for a plan change involves the use of part of the public domain and not just the applicant's own land, or if an applicant claims that a particular site has features that make it unique or especially suitable for the proposed activity, or where the nature and circumstances of a particular application involving adverse effects on areas such as the coastal environment may warrant consideration of alternatives.

13. I submit that none of the factors which might lead to a requirement to consider alternative sites as suggested by the Supreme Court in *King Salmon* arises in this case. In any event, evidence has been presented about RTDL's consideration of potential alternative sites before settling on River Terrace. That evidence more than adequately addresses any suggestion that alternative sites for a proposal to develop circa 1,000 houses should be considered.

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[2] *Brown v Dunedin City Council [2003] NZRMA 420*

[3] *Environmental Defence Society Inc v The King Salmon Co Limited [2014] NZSC 38, [2014] 1 NZLR 593*

14. I note Mr Mead's suggestion that the current Rural zoning of the site should be retained to protect a future possibility of rezoning the land for industrial purposes. This is not a District Plan Review. There is no statutory principle or case law which would support the proposition that a landowner in RTDL's position should be required to retain a Rural zoning on their land in order to provide for a potential alternative use at some undetermined point in the future.

15. I submit there is no consideration under the heading of Alternatives which counts against PC13 being approved.

Relevance of the Cromwell Masterplan

16. A number of submissions, including the submission lodged by CODC, request that PC13 be rejected either because approval may pre-empt the outcome of the Cromwell Masterplan Process (**CMP**) or because approval would not achieve outcomes consistent with outcomes anticipated from the CMP. I submit for RTDL that those submissions should be rejected, and that the CMP is not and should not be a relevant consideration in this hearing, for the following reasons:

    a. The urgency of Cromwell's housing crisis;

    b. CODC's failure to keep its District Plan current;

    c. The unconcluded state of the CMP;

    d. No weight should be accorded to the Cromwell Masterplan even if completed;

    e. PC13 does not undermine any potential CMP outcome.

The urgency of Cromwell's housing crisis

17. The evidence of Chris Meehan makes crystal clear the urgency and seriousness of Cromwell's housing crisis. The current housing shortfall is clearly evident, as are the adverse consequences arising from that housing shortfall.

18. Projects intended to deliver significant quantities of residential housing take time. The PC13 process commenced in early 2017[4] and has taken two and a half years to reach this stage. Should PC13 be approved (and not appealed) works could commence on site by about the end of 2019 (three years from the starting point) with the first titles available for delivery by late 2020 (almost four years from the starting point).

[4] Primary evidence of Chris Meehan dated 23 April 2019, at paragraph 54 on page 13.

19. At this point in time there is no equivalent or alternative project in train intended to address Cromwell's housing crisis. Any such alternative project, if it started now, could expect to take at least that four year period to deliver titles, and probably significantly longer if the alternative project is a Council rezoning process which goes no further than rezoning land and which is then dependent on individual developers to deliver the housing.

20. All of the above count strongly against the refusal of PC13. Steps to address Cromwell's housing crisis should not simply be put on hold to await the outcome of the CMP (whatever that outcome is) and the implementation of that outcome.

CODC's failure to keep its District Plan current

21. Related to the above is the extent to which CODC has not kept its District Plan current so that it can properly respond to the demands of its district. Relevant timeline dates are:

    a. July 1998 – current CODC District Plan notified;

    b. April 2008 – current CODC District Plan made operative;

    c. April 2013 – CODC commences consultation on its District Plan Review;

    d. Some time in early to mid 2017 – Cromwell Community Board starts working towards CMP;

    e. March 2018 – Cromwell Community Board resolves to commence the CMP;

    f. August 2018 – CODC puts District Plan Review on hold;

    g. June 2019 – CMP still uncompleted.

22. The harsh reality is that the CODC District Plan is seriously out of date and there is no current, confirmed timeline to remedy that situation. This is particularly relevant when one considers the fact that it predates a number of relevant planning instruments, particularly the NPS UDC.

23. The RMA provides for the private plan change process, at least in part in order to address a situation such as that described above and to enable private initiatives to be progressed when the public plan making process is not keeping up with changes and demands in the real world. Under those circumstances it would be entirely inappropriate to refuse PC13 on the grounds that the CMP is under way and may, when the planning processes which result from the CMP are

completed, address the current inadequacies of the District Plan in respect of provision for residential growth in the Cromwell area.

The unconcluded state of the CMP

24. Much of the evidence presented for CODC as submitter appears to be based upon the proposition that PC13 should be refused because of the predicted (but not yet known) outcome of the CMP. The critical point here is that, at this point in time, the CMP is still an ongoing process which has not yet even resulted in a Cromwell Masterplan. As there is no completed plan against which PC13 can be assessed, there can be no contention that PC13 is contrary to that (not yet in existence) plan.

No weight should be accorded to the Cromwell Masterplan even if completed

25. There appears to be no debate about the fact that the Cromwell Masterplan, if and when it is completed, will be a non-statutory plan (as acknowledged by both Ms Brown[5] in her evidence and Mr Whitney in the s42A Report)[6]. Even if the Cromwell Masterplan was availability for consideration, it would be a plan 'in its infancy' so to speak. It will not have been subject to any public consultation process which would be the starting point for its implementation. Even if it had been completed, and had been through some form of public consultation process, it would still not be appropriate to accord it any weight in this hearing.

26. A number of cases have addressed the question of the weight to be given to a non-statutory plan such as the Cromwell Masterplan. The universal conclusion is that such non-statutory documents alone (which have not resulted in a plan change or variation supported by the non-statutory document) should be given little, if any, weight. I have not cited any of those cases as they all relate to a situation where there is at least a completed non-statutory plan or document. As the CMP has not even reached that stage, I submit that no weight can or should be accorded to what it allegedly might or might not contain if and when it is completed.

PC13 does not undermine any potential CMP outcome

27. In any event, on the basis of all evidence presented for this hearing, I submit that there cannot be any valid contention that PC13 could potentially undermine any possible CMP outcome.

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[5] Evidence of Marilyn Brown dated 20 May 2019 at paragraph 5.1 on page 7.
[6] Section 42A Report at Part 7.2.10.1 second paragraph on page 14.

28. Without trying to predict the CMP outcome, there appears to be general support for the proposition that intensification and densification of central Cromwell (if that can be achieved) is desirable. There is no way in which provision of greenfield, largely standalone, residential development as proposed by PC13, which will target a different market from any market for multi-unit development within central Cromwell (in respect of both the form of residential development and in respect of affordability), would or could undermine that potential desirable outcome.

Conclusion

29. For the reasons detailed above I submit that no aspect of the CMP is a relevant consideration for this hearing. PC13 must be assessed and determined on the basis of an assessment of the purpose of the proposal and its effects on the environment and an assessment against the relevant provisions of the relevant statutory planning instruments and the RMA.

NPSUDC

30. There is one higher order planning instrument directly relevant to this hearing, being the NPSUDC. The direct relevance of that higher order planning instrument arises because:

    a. s45A(1) Contents of national policy statements states:

        "(1) A national policy statement must state objectives and policies for matters of national significance that are relevant to achieving the purpose of this Act."

    b. Under s67(3)(a) of the Act "*A regional plan must give effect to … any national policy statement …*".

    c. Under s74(1)(ea) "*A territorial authority must prepare and change its district plan in accordance with … a national policy statement, a New Zealand coastal policy statement and a national planning standard …*"

        Note: Subclause 74(1)(ea) was inserted by the RMA Amendment Act 2017.

    d. Under s75(3)(a) "*A district plan must give effect to … any national policy statement …*".

    e. There is no doubt that the Operative District Plan (**ODP**) pre-dates the NPSUDC and therefore cannot be assumed to give effect to the NPSUDC.

    f. As a (much) higher order planning instrument, and because of the subject matter of PC13 relating in particular to the provision of housing, the NPSUDC must, if it applies, be directly relevant to consideration of PC13.

31. I first address the debate about whether the NPSUDC applies at all. This issue arises because the relevant Objectives and Policies apply to "*… any urban environment that is expected to experience growth*". There is no issue here about expecting to experience growth. However "*urban environment*" is defined as follows:

> "***Urban environment*** *means an area of land containing, or intending to contain, a concentrated settlement of 10,000 people or more and any associated business land, irrespective of local authority or statistical boundaries.*"

32. I can find no case law guidance on the interpretation of that definition. As definitions go, it is inherently imprecise. In particular:

    a. There is no indication of how the area of land may be determined;

    b. There is no timeframe within which the intended population must be achieved;

    c. It is intended to be a unique definition, unrelated to other possible considerations such as local authority or statistical boundaries;

    d. There is nothing to guide the interpretation or meaning of the critical words "*… concentrated settlement …*".

33. There are a number of dictionary meanings of the word "*concentrated*". One definition (Google search) which may be of assistance is "*clustered or gathered together closely*".

34. One definition (again Google search) of the word "*settlement*" is "*a place, typically one which has previously been uninhabited, where people establish a community*".

35. Guidance may be available from the neighbouring Queenstown Lakes District where the Council is in the throes of a full District Plan Review which includes having to appropriately implement the NPSUDC. As explained in the evidence of Ms Hampson[7], the Queenstown Lakes District Council has defined the 'Urban Settlements' of Queenstown and Wanaka respectively for the purposes of the NPSUDC. Refer **Attachment 2**.

36. Another strong indicator could be the way in which Cromwell sees itself as a community. Refer **Attachment 3**.

[7] Primary evidence of Natalie Hampson dated 23 April 2019, at paragraphs 54-64 on pages 14-16.

37. Taking into account all of the above, and the purpose of the NPSUDC, I submit that Cromwell is an 'urban environment', as explained and defined by Ms Hampson, for the following reasons:

a. It is a logical and sensible interpretation of 'concentrated settlement';

b. It would be artificial to separate the central Cromwell urban area from the nearby smaller settlements which are clearly part of the Cromwell community and depend upon Cromwell for the urban facilities and support which an urban area provides;

c. Given the purpose of the NPSUDC, and the growth pressures being faced by Cromwell, any ambiguity in interpretation should be resolved in favour of Cromwell being an urban environment.

38. In any event I note that s31 of the Act (Functions of territorial authorities under this Act), at s31(1)(aa), specifies one of the functions of a territorial authority as:

> "*(aa) the establishment, implementation, and review of objectives, policies, and methods to ensure that there is sufficient development capacity in respect of housing and business land to meet the expected demands of the district."*

39. When one considers that wording, and particularly the reference to "*… the expected demands of the district",* it is arguable that s31(1)(aa) encapsulates, in one subclause, the more detailed objectives and policies of the NPSUDC.

40. The following statement is quoted from the MFE Introductory Guide to NPSUDC 2016[8] (being effectively an expanded explanation of the effect of s45A(1) referred to above):

> ***"Role of a National Policy Statement***
>
> *A national policy statement provides direction to local authorities and other decision-makes under the RMA on matters of national significance relevant to achieving the purpose of the RMA. A national policy statement sets objectives from a national perspective and identifies policies to achieve those objectives. These objectives and policies must then be recognised and responded to by decision-makers, such as local authorities, in their policy statements and plans prepared under the RMA. A national policy statement cannot direct decisions made under other legislation."*

[8] Introductory Guide to the NPSUDC 2016, page 5.

41. As the NPSUDC post-dates the ODP, the latter has yet to be amended to incorporate objectives and policies to implement the NPSUDC. However the NPSUDC is a planning instrument much higher in the hierarchy than the ODP. Therefore, in order to implement the NPSUDC during the interim period before the ODP is reviewed, the Council must give careful and serious consideration to the NPSUDC when making decisions such as the decision on this plan change. Obviously the NPSUDC cannot be the only consideration, but it must be a document to which this Commission gives serious consideration and significant weight.

42. Given the significance of the NPSUDC, and given the nature of PC13 and what it seeks to achieve, I believe considerable weight must be placed on the relevant aspects of the NPSUDC.

43. I highlight the following Objectives which are applicable to all local authorities:

Objective Group A – Outcomes for planning decisions

QA1: Effective and efficient urban environments that enable people and communities and future generations to provide for their social, economic, cultural and environmental wellbeing.

QA2: Urban environments that have sufficient opportunities for the development of housing and business land to meet demand, and which provide choices that will meet the needs of people and communities and future generations for a range of dwelling types and locations, working environments and places to locate businesses.

QA3: Urban environments that, over time, develop and change in response to the changing needs of people and communities and future generations.

Objective Group C – Responsive planning

OC1: Planning decisions, practices and methods that enable urban development which provides for the social, economic, cultural and environmental wellbeing of people and communities and future generations in the short, medium and long term.

OC2: Local authorities adapt and respond to evidence about urban development, market activity and the social, economic, cultural and environmental wellbeing of people and communities and future generations, in a timely way.

44. I then highlight the following Policies which are applicable to all local authorities:

PA3: When making planning decisions that affect the way and the rate at which development capacity is provided, decision-makers shall provide

for the social, economic, cultural and environmental wellbeing of people and communities and future generations, while having particular regard to:

a. Providing for choices that will meet the needs of people and communities and future generations for a range of dwelling types and locations, working environments and places to locate businesses;

b. Promoting the efficient use of urban land and development infrastructure and other infrastructure; and

c. Limiting as much as possible adverse impacts on the competitive operation of land and development markets.

PA4: When considering the effects of urban development, decision-makers shall take into account:

a. *The benefits that urban development will provide with respect to the ability for people and communities and future generations to provide for their social, economic, cultural and environmental wellbeing; and*

b. *The benefits and costs of urban development at a national, inter-regional, regional and district scale, as well as the local effects.*

45. I leave it to the Commission to consider the facts of PC13 against those objectives and policies. I submit that there can be no doubt that:

a. the objectives and policies quoted above are directly relevant to this hearing;

b. the confirmation of PC13, as proposed by the Proponent, will implement those objectives and policies to a significant extent and will therefore assist the CODC to meet its obligations under the NPSUDC.

Provision of housing

46. New Zealand has a housing crisis.

47. Cromwell has a housing crisis:

- Refer Chris Meehan's primary evidence and attachments.

- Refer **Attachments 4 and 5**.

48. The undisputed fact of that housing crisis has the following implications for this hearing:

a. No one else involved in this hearing has recognised it or commented on it. Therefore no one else involved in this hearing has recognised, or even commented on, the single overwhelmingly positive outcome of PC13, being the delivery of a large quantity of new, affordable houses and sections which are desperately needed.

b. Chris Meehan's evidence is completely unchallenged. Therefore there is no doubt that RTDL can deliver a major benefit into Cromwell which no one else has any prospect of delivering, particularly the Council.

c. The existence of that housing crisis is the ultimate proof that the indicative CMP direction of providing for growth through rezoning will not solve the housing crisis.

49. The consequences detailed above are the most important considerations in this hearing. That does not mean there are not other issues which have to be addressed, but they can and will be satisfactorily addressed, leaving the Commission facing that single major housing crisis issue.

50. There can be absolutely no doubt about the benefits PC13 will bring to Cromwell. That leaves the question of the alleged downsides to approving PC13, whether those alleged downsides are in fact valid, and how much weight should be placed on any that have some validity.

Landscape

51. The s42A Report commented that the PC13 Request did not include an expert landscape assessment[9]. That was because the Proponent did not consider that there were landscape issues at large which warranted an expert landscape assessment and decided to rely upon an assessment by its planner Mr Jeff Brown who has extensive experience in applying and assessing plan provisions relating to landscape and visual amenity issues.

52. It is unclear whether that comment was intended as a criticism, but I note that the response in relation to landscape and visual amenity values in the s42A Report is also written by a planner. At that point, technically, we therefore have two non-expert opinions disagreeing with each other.

53. In response to the s42A Report, the Proponent will present the expert landscape evidence of Mr Skelton. That evidence is not challenged by any other landscape expert. I submit that there are no landscape related issues which count against PC13.

[9] Section 42A Report, Section 7.9 on page 36.

54. Having made the previous submission, and in case it may assist, I refer the Commission to the following paragraph from the *Armstrong*[10] decision (being the decision which consented the Highlands Motorsport facility):

> "*[88] We readily accept that this area does not have high natural character or significant scenic values, and to forestall lengthy discussion of the landscape objectives and policies of the Plan, we indicate at this point that neither these nor the ecological provisions of the Plan are in any way offended by the proposal, even though the landscape is perceived by all the senses …".*

55. As the PC13 site is separated from the Highlands Motorsport site only by Sandflat Road, I submit that that finding by the Environment Court can reasonably be taken to apply to the PC13 site as well.

Soils

56. I submit that there are four important components to the issue of soils and the related consideration of PC13 against objectives and policies of the various planning instruments relevant to the use and protection of soils. Those components are:

    a. The extent of high class soils on the site;

    b. The area that will be lost to agricultural production;

    c. The relevance of that area in the wider context;

    d. The alternative use for the soils.

The extent of high class soils on the site

57. Mr Reece Hill, who is presenting evidence for the Proponent, is the only soils expert witness involved in this hearing. That appears to be the main reason that the expert witness conferencing did not occur. Since preparation of his primary evidence, Mr Hill has carried out field tests on the PC13 site to test his earlier desktop conclusions. He will update the position in his evidence to be presented today. The outcome can be illustrated by one of the plans he will produce. Refer **Attachment 6**.

The area that will be lost to agricultural production

58. Referring again to **Attachment 1**, the only area of land potentially available for future horticultural use is the upper terrace containing approximately 13.3ha. Therefore any debate about loss of productive soils must be limited to that area,

[10] *Armstrong & Ors v CODC* Decision No. C131/2008 at paragraph 88 on page 30.

and cannot include the entire PC13 site (as Mr James Dicey does in his evidence). The fact that the upper terrace was marketed for sale or lease, and therefore was available for purchase or lease for horticultural purposes, and was not purchased or leased for that purpose, is also a relevant consideration[11]

The relevance of that area in the wider context

59. At the beginning of 2019, the CODC issued a draft document for public consultation entitled "*Economic Development Strategy 2018-2023*". After considering public submissions, CODC confirmed and approved that document in May 2019. That Strategy contained the following statement on page 9:

> "*There are plans for a 56% increase (465 hectares) of new cherry plantings in the next four to five years with feasibility studies under way to develop a further 495 hectares of cherries. There will be new grape plantings of 284 hectares, a 14% increase over the next four to five years bringing the total Central Otago vineyard estate to 2275 hectares. There is also the possibility of a further 100 hectares of development."* [Refer **Attachment 5**]

60. The potential loss of 13.3ha of productive land, being land which does not appear to have ever been used for productive purposes and is not likely ever to be used for productive purposes, needs to be considered in the context of the numbers quoted above (which just relate to Central Otago).

The alternative use for the soils

61. Urban expansion almost inevitably involves loss of soils for productive purposes. That is evident from the fact that even the urban expansion being recommended by Ms Brown to CODC involves conversion of areas of existing vineyard and existing orchards into land for housing. The soils end up being used by families. That is a change of use which is both acceptable and essential if provision is going to be made for those who need housing.

62. I submit that, at worst the soils issue could only count against PC13 to a very minor degree, and in fact it should not count against PC13 at all.

Spray drift

63. A starting point here is consideration of the wider environment within which PC13 is proposed. Refer **Attachment 7**.

64. Consider Wooing Tree Plan Change 12. Refer **Attachment 8.**

[11] Primary evidence of Chris Meehan, at paragraph 55 on page 13.

65. Notes: 1. Public Health South submitted.

2. No reference in s42A Report.

66. Refer Top 10 Holiday Park consent. Refer **Attachment 9**.

Notes: 1. Publicly notified.

2. No reference in s42A Report.

67. The relevant Regional Air Plan obligations sit with the person carrying out the spraying. Policy 12.1.1 states:

"*(a) Require the applicators of agrichemicals to undertake spraying in a manner that* ***avoids****:*

(i) Spray drift beyond the target area or boundary of the property being sprayed; and

(ii) ***Adverse effects*** *on human health and safety, ecosystems, sensitive areas or places, amenity values and other non-target areas or species.*" [highlighting added]

68. The Regional Air Plan rule regime also focuses on the obligations of the person carrying out the spraying. Agrichemical application on orchards is a permitted activity providing:

"(a) The agrichemical and any associated additive are authorised for use in New Zealand and are used in accordance with the authorisation; and

(b) The ***discharges carried out in accordance with the manufacturer's directions****; and*

(c) The discharge does not exceed the quantity, concentration or rate required for the intended purpose; and

(d) ***The application does not result in any ambient concentrations of contaminants at or beyond the boundary of the property that have noxious or dangerous effects****."* [highlighting added]

69. The industry standard recommended buffer zone distances apply within the property on which the spraying is being carried out (not on the neighbouring property). NZS8409:2004 Table G2 – Buffer zones:

Application method	Distance (metres)	
	With shelter	*Without shelter*
Boom sprayer	2	10
Air blast sprayer	10	30
Aerial application	100	300

70. Refer facts on the ground.

71. Proposed 3m boundary fence (in addition to mature shelterbelt, plus required 2m width planting) will:

    a. Result in the neighbouring Suncrest Orchard achieving the required 10m buffer for air blast spraying;

    b. Possibly constitute the best *in situ* spray drift buffer in the whole of Cromwell.

72. I submit that there has been no evidence presented which would establish, or even suggest, that the proposed boundary treatments with Suncrest Orchard will not completely address any concerns about potential adverse effects from spray drift.

Reverse sensitivity

73. PC13 is presented upon the basis that it will not prevent, hinder, or adversely affect the neighbouring motorsports and horticulture activities.

74. As this is a significant issue in this hearing, I address it thoroughly. I start by demonstrating that restrictive no-complaint covenants are a well established and widely accepted method of addressing potential reverse sensitivity effects. I also respond to the comment in the s42A Report that "*Requiring a restrictive no-complaint covenant via a rule in the District Plan is novel …*"[12]. Refer [second bundle] **Attachments 1-10**.

75. It is well settled law that reverse sensitivity is an adverse effect, and is therefore to be avoided, remedied or mitigated[13].

76. A widely cited definition of reverse sensitivity is as follows[14]: [underlining added]

[12] Section 42A Report, Section 70.10.2.6, first paragraph on page 47.
[13] *Ngatarawa Development Trust Limited v Hawkes Bay Gliding Club & Ors Decision No. W017/2008, at paragraph 22.*
[14] Ibid.

"*Reverse sensitivity is 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 the 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 not to adversely affect the new activity."*

77. This issue does not require to be extensively addressed because it is a well settled issue. The starting point is some hundreds of years of English land law setting well established principles that covenants, whether positive or negative, are fully and legally binding. Countless cases have upheld that principle.

78. Prior to 2008 there was some academic suggestion that there may be a question mark about the enforceability of such covenants, particularly under the RMA. However that question was definitively settled in the *Powerland*[15] case. The Court stated at paragraph 61:

> *"[61] I am likewise satisfied that reverse sensitivity covenants like the Covenant in this case do not contravene the principles or provisions of the RMA. In my view, the rights to public participation of the RMA can be waived by an individual giving free and informed consent – as, clearly, the defendant did here."*

79. In the same case the Court went on to say at paragraph 65:

> *"[65] As I see it "no complaints" covenants can be used in fact to advance the public interest in other respects – for example to achieve both of the otherwise conflicting public interests in protecting the continued existence of a necessary effects-producing activity (such as tyre manufacturing) and enabling needed residential development to proceed. Indeed, as noted by Mr Davidson (at 231) and implicit in Tipping J's remarks in Christchurch International Airport (at 585, 11, 16-24), the effect of such covenants can be understood as relegating private property rights – to, for example, sue or object under the RMA – in favour of these two public interests."*

80. There has been no evidence presented which even suggests that a well drafted restrictive no-complaint covenant will not fully and completely protect the existing motorsports and horticulture activities from any adverse reverse sensitivity effect.

81. One concern raised a number of times is the possibility that the enforcement of such a covenant will create an administrative cost or burden for the noise generating activity. Any such concern is unfounded. The feature of the proposed draft covenants is that they are effectively 'do nothing' covenants in the sense

[15] *South Pacific Tyres NZ Limited v Powerland (NZ) Limited, (High Court CIV2008-485-427.*

that the benefitting landowner does not have to take any proactive step to enforce them.

82. Another concern expressed by some of the witnesses is a potential increase in monitoring requirements. However any of the significant activities in the neighbourhood, such as Highland Motorsports, who have to comply with resource consent or other statutory requirements, must have in place a robust internal monitoring and management system to ensure that they meet those requirements. Those obligations exist regardless of who lives next door. There is no reason to suggest that the approval of PC13 would add to those existing monitoring requirements.

83. The only situation in which the benefitting landowner would have to do anything would be in a very unusual situation (as in the *Powerland* case) where somebody with the burden of the covenant issues legal proceedings which are forbidden by the covenant. In the *Powerland* case that attempt was thrown out on summary judgment and, at that time, there was a potential degree of uncertainty about the enforceability of such covenants. Since the *Powerland* case there is no such uncertainty. It is simply unreasonable to suggest that someone will incur the cost and effort of legal proceedings which have no prospect whatsoever of success. The relevant case law, which accepts the validity of the no complaint covenant procedure, effectively recognises that fact.

84. I submit that this Commission need have no concern at all about the potential for adverse reverse sensitivity effects.

Amenity related noise issues

85. The acoustic JWT records agreement about the various levels of noise that will be emitted by the various relevant activities. That sets the base line against which to assess the effects of that noise.

86. The acoustic experts have not agreed on the appropriate indoor noise criterion. RTDL accepts that there must be acoustic insulation to achieve appropriate indoor amenity in relation to noise. What that indoor noise criterion should be is a matter for determination by the Commissioners on the basis of expert evidence presented. I do however note that:

    a. The acoustic experts have agreed that an internal noise level of 40dB $L_{Aeq(24h)}$ is appropriate in relation to road noise from SH6;

    b. Dr Childs is advocating an internal noise level of 30 dB $L_{Aeq(24h)}$ for motorsport noise and horticultural noise at night;

c. Dr Childs presented evidence dated 14 September 2016 to the Queenstown Lakes District Council District Plan Review Hearing Panel, on behalf of Queenstown Lakes District. Acknowledging that he was addressing road noise and airport noise, rather than motorsports noise and horticultural noise, at paragraph 5.8 of his evidence he stated:

> *"For most noise sensitivity activities, the criterion of 40* dB $L_{Aeq(24h)}$ *proposed inside houses is also appropriate. In some particularly sensitive spaces, such as lecture theatres or music rooms, a slightly lower criterion would be preferable. However, for the purposes of providing an efficient and practical control in the PDP, a single criterion of 40* dB $L_{Aeq(24h)}$ *for road traffic noise <u>could be a minimum standard for all noise sensitive activities</u>."* [underlining added]

87. I also note the various noise levels specified in some of the covenants referred to previously, none of which specified a 30dB level.

88. With respect to outdoor amenity, the Proponent's case is very simple. Future terrace homeowners will be forewarned by the registered covenants. They will have a choice. They can choose to purchase or not to purchase. That is their choice, and it should be their choice to make.

89. There are people who choose to buy houses in places such as just below the western end of the Queenstown Airport runway where they are subject to very significant noise levels, on a regular basis, 365 days of the year. They have a choice. There is no reason why potential River Terrace residents should not be allowed a similar choice.

90. In support of that submission I point to one aspect of s5 of the Act which is reflected in a significant number of objectives and policies relevant to this issue:

> "*In this Act,* ***sustainable management*** *means managing the use, development, and protection of natural and physical resources in a way, or at a rate, <u>which enables people and communities to provide for their</u> social, economic and cultural wellbeing and for their health and safety while …*" [underlining added]

Section 42A Report

91. To the extent that there are issues which are not disputed, the s42A Report is of some benefit and assistance to the Commission. By way of example, the s42A Report confirms the Proponent's assessment of virtually all infrastructure issues. However beyond that, I submit, the s42A Report is of no assistance and its conclusions and recommendations should be discounted completely, for the following reasons.

92. The primary and obvious concern is the almost completely one sided nature of the recommendations. On virtually every issue under debate, and on some issues that are not really under debate, the s42A Report finds against PC13. I submit that the bias against PC13 is clear and obvious, and is evidenced by a number of aspects of the Report.

93. The next point is the complete failure of the s42A Report, which represents and reflects the combined local wisdom of Council, to even acknowledge, let alone comment on, Cromwell's housing crisis.

94. The next point of concern, relating to the previous point, is the complete failure of the s42A Report to acknowledge the primary benefit of PC13 which, however you look at things, has to be a major factor in the 'plus' column.

95. Taking the previous point one step further, the s42A Report does not find a single positive element of PC13. How is it possible that a plan change of this nature, seeking to address a major community problem, does not achieve a single tick in the 'plus' column.

96. The next point is inconsistencies in the assessment which favour an adverse view of PC13. By way of example:

    a. In section 7.1.2 on page 9, particularly in the last paragraph on that page, the report talks about Rural Resource Areas 'within Cromwell's urban limits' (where that favours the analysis being undertaken) whereas in section 7.2.10.1 on page 14, second last paragraph on that page, the report criticises Mr Ray's analysis of the 'urban form' of Cromwell by pointing out that the term 'Urban area' is defined on page 18.12 of the Operative District Plan as meaning a range of areas not including the Rural Resource Area.

    b. In Section 7.2.10.1 on page 14 the Report refrains from discussing Mr Ray's comments on the options presented in the "Let's Talk Options" Masterplan discussion document, on the basis that the Masterplan is not a statutory document and therefore no particular weight should be placed upon it in the context of PC13, and then in Section 7.15 on page 59 concludes that PC13 will have an adverse effect in terms of potentially compromising the Cromwell Masterplan process.

    c. At one point the Report recommends that PC13 be declined due to the value of the soil resource for horticultural purposes and at another point recommends that PC13 be declined in order to maintain the potential of the site for industrial subdivision and development.

97. The report repeatedly expresses a concern about relying on SH6 to provide for local traffic movements between the RTRA and the centre of Cromwell without:

a. placing any weight on the fact that NZTA, the body responsible for operation of SH6, has lodged a submission to PC13 and has not expressed any such concerns;

b. recognising that if Sandflat Road were to be fully sealed (now proposed by the Proponent) there would be an obviously available and equally suitable route to central Cromwell which does not require the use of SH6.

98. In Section 7.4.2 on page 30 the report refers to the route of the proposed new wastewater and potable water pipelines and states: "*It therefore appears that construction of the wastewater main and water main would depend upon negotiations with the affected landowner to secure any easements necessary for these works.*". That land is owned by the Council, and the Council has already advised its support for those infrastructure upgrades. One would expect this s42A Report author to know that, or at least check. Refer **Attachment 10**.

99. I suggest there must be a concern about the extent to which the Report reflects the old Town & Country Planning Act way of doing things where a single planner often used to be an expert in everything. If a Report such as this is going to make significant adverse findings against a proposal such as PC13, the Report should be based upon the appropriate expert assessments. Examples of this deficiency in this Report include:

a. A finding that the proposal will have a significant adverse effect on landscape and visual amenity values in the locality, without any expert landscape opinion supporting that finding, and also not taking into account the finding in the Environment Court *Armstrong* decision quoted above which is directly relevant.

b. Reaching conclusions about high class soils without the benefit of any expert advice on the issue (and arriving at conclusions which the only soils expert involved in this hearing has subsequently advised are not correct).

100. In Sections 7.1.2 and 7.1.3 on pages 9 and 10 the Report refers to the Cromwell Golf Course land as being potentially suitable for residential development, and refers to one Submitter who expresses that view. However the Report makes no mention of the obvious significant challenges that suggestion would raise in relation to land ownership, zoning, and the views of the golf club members. I return to this point later in these submissions.

101. In Section 70.10.2.6 commencing on page 46 the Report expresses legal opinions about the effectiveness of restrictive no-complaint covenants without (it appears) taking opportunity of obtaining advice from CODC's solicitors on what is essentially a legal matter.

102. In Section 7.18 there is a discussion about potential adverse effects on the Cromwell Aerodrome without the support of any expert advice on the subject and without even any submission having been lodged by whoever owns and/or operates the Cromwell Aerodrome.

103. Taking all of the above into account, I submit that the Report's bias against PC13 is obvious, and that the Commission cannot reasonably place any weight on the recommendations of the s42A Report in respect of issues under debate in this hearing.

104. I draw the Commission's attention to the fact that I have not gone down to the next level of detail in terms of commenting on a considerable number of specific points raised in the s42A Report which have been addressed in the amended PC13 plan provisions now being proposed. Examples of those issues include the sealing of the full length of Sandflat Road, the upgrade of Pearson Road, the provision of a walkway/cycleway connection to Bannockburn Road, and the like. I anticipate that any outstanding issues will 'float to the surface' as it were by the end of this hearing and can be addressed then.

105. I have also not addressed issues which may be resolved through joint witness conferencing. The primary example of that relates to Transportation issues. Numerous Transportation issues were raised in the s42A Report. Hopefully they will mostly be resolved through the joint witness conferencing. Any outstanding issues can be addressed at a later point if needed.

Response to Submitters

106. I have responded above to the primary issues raised by most submitters. I do not intend to repeat response points individually. The following section of these Submissions respond to specific issues raised by submitters not already covered.

Comments on evidence for CODC

<u>CODC is a trade competitor</u>

107. CODC is a trade competitor of the Proponent – refer **Attachment 11**.

108. When a Council prepares and notifies a change to its District Plan, the trade competition provisions of the Act do not apply (refer Schedule 1 clause 8). The situation is different with a private plan change where the Council, as a submitter, is no different from any other submitter. The trade competition provisions apply.

109. Schedule 1 subclauses 29(1A) and (1B) read:

"(1A) Any person may make a submission but, if the person is a trade competitor of the person who made the request, the person's right to make a submission is limited by subclause (1B).

(1B) A trade competitor of the person who made the request may make a submission only if directly affected by an effect of the plan or change that –

(a) adversely affects the environment; and

(b) does not relate to trade competition or the effects of trade competition."

110. CODC lodged a Further Submission in opposition to PC13. The Further Submission does not identify that, or make any claim that, CODC is directly affected by an effect of the plan change which adversely affects the environment. The lodging of that Further Submission by CODC is in contravention of the trade competition provisions of the Act.

111. This (very unusual) situation has (at least) two potential consequences:

a. Bearing in mind the relationship between the author of the s42A Report and the CODC, I submit that the Commission should have even greater reluctance to place any weight on the s42A Report.

b. The Commission needs to consider how to deal with the proposed presentation of evidence by a trade competitor to the Proponent who has lodged a Further Submission in contravention of the trade competition provisions of the Act.

112. I draw the Commission's attention to the following provisions of the Act:

a. *"Section 41C(6) – At the hearing, the authority may direct a person presenting a submission not to present –*

(a) the whole submission, if all of it is irrelevant or not in dispute; or

(b) any part of it that is irrelevant or not in dispute."

b. *"Section 41D: Striking out submissions*

(1) An authority conducting a hearing on a matter described in section 39(1) may direct that a submission or part of a submission be struck out if the authority is satisfied that at least one of the following applies to the submission or the part:

(a) …

(b) it discloses no reasonable or relevant case;

(c) it would be an abuse of the hearing process to allow the submission or the part to be taken further."

113. When considering the above options I submit that the Commission should have regard to what course of action can best achieve an outcome which prevents any potential challenge to the validity or credibility of the Commission's decision, should an appeal be pursued and the Environment Court gets to the point of having regard to the decision subject to the appeal under s290A of the Act.

114. The following submissions are made without prejudice to the issue of what course of action the Commission may decide to take with respect to CODC's Further Submission.

<u>Edward Guy</u>

115. Mr Guy states at paragraph 5 that he has been asked by Counsel for CODC to assess the impact PC13 will have upon the ability to achieve the desired outcomes of the Cromwell Masterplan (Masterplan). The Masterplan process is not yet complete. There are no completed outcomes against which PC13 can be measured. Even if there were, they would not be relevant to this hearing for reasons I have detailed above. That evidence should be discounted completely.

116. Mr Guy's evidence extensively addresses a Better Business Case (BBC) model of investment management and decision making. Interestingly, and potentially relevant to this hearing, is the identification of one desired outcome of the BBC process which reads[16]:

"*Housing is affordable & available to meet demand and meet the needs of a productive and strong community."*

117. That is followed by Problem Statement 3[17] which reads:

"Problem Statement 3: Housing Options and Affordability – Resistance to change driven by a desire to keep Cromwell as it is and uncertainty about its future is reducing housing options and affordability, which is distorting the fabric of the community."

118. Unfortunately Mr Guy's evidence merely examines and details a process of decision making. The evidence does not arrive at any conclusions, properly substantiated by expert evidence, and therefore does not assist this Commission at all.

[16] Evidence of Edward Guy dated 20 May 2019, at paragraph 33 on page 8.
[17] Ibid at paragraph 48 on page 12.

119. In Part 3 on page 17 Mr Guy lists aspects of PC13 which are alleged to be inconsistent with the Masterplan[18]. Putting to one side the starting point that there is as yet no Masterplan for PC13 to be inconsistent with, the statements made are not supported by expert evidence and are beyond Mr Guy's expertise. As an example I note:

a. Mr Guy's paragraph 81 reads:

> "*Increased density in the form of townhouse infill development would offer affordable housing options without impacting on the way Cromwell functions."*

b. Mr Guy is not qualified to make that statement and does not reference any expert evidence which supports that statement.

c. In making that statement Mr Guy completely ignores Mr Meehan's unchallenged evidence relating to the costs of developing townhouse infill development and the consequences those costs have on the affordability of multi-unit housing.

120. I submit that Mr Guy's evidence is of no assistance to this Commission at all.

<u>Marilyn Brown</u>

121. Ms Brown comments extensively on two documents, being the Cromwell Spatial Framework (CSF) and the Urban Planning and Design Report (UPDR). Those documents are not public documents. Their status is unclear. There is no public evidence that they have even been completed. Whatever stage they have reached, the Proponent has not seen them. All of Ms Brown's evidence relating to those documents should be completely discounted.

122. The following submissions are made in case that submission is not accepted.

123. Ms Brown's evidence is fundamentally and significantly predicated on her assessment of future development capacity contained in her Table 3[19] which essentially suggests that there is more than enough development capacity available in the foreseeable future to address Cromwell's housing needs without any contribution from PC13. If that basic premise were correct, Cromwell would not have a housing crisis. Ms Brown completely fails to acknowledge Cromwell's existing housing crisis, the existence of which automatically and significantly undermines the basic premise of her evidence.

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[18] Ibid paragraphs 64-84.
[19] Memo of Marilyn Brown dated 31 May 2019, Table 3 on page 2.

124. A number of the figures in Ms Brown's Table 3 appear to depend upon future rezoning proposals, the detail of which have not been revealed and none of which have commenced. Other assumptions are made which are uncertain and cannot be relied on. Those figures therefore cannot be relied on. Refer **Attachment 12**.

125. Ms Brown completely fails to address the practical and economic aspects of the path forward (for housing in Cromwell) which she espouses. By way of example, she states[20]:

> "*The infill component is an important contributor to accommodating growth and also enables development within the urban setting and urban fabric. Correlating with the other assessed yield locations, this development would take place in contiguous locations, creating efficiencies in the supply of facilities and infrastructures and upgrading Cromwell's housing stock."*

126. Putting to one side the point just made that Ms Brown's infill figures appear to depend upon future rezoning which may or may not occur, and also putting to one side the reference to the Spatial Framework which is not a public document, that statement fails to address:

a. the practical and logistical challenges in achieving development "*… in contiguous locations …*" large enough to achieve the "*… efficiencies …"* referred to and the desired infill density outcomes;

b. the cost implications of amalgamating properties to achieve such infill developments and the consequential affordability outcomes;

c. the unchallenged evidence of Mr Meehan relating to cost and affordability considerations when it comes to infill multi-unit development.

127. In all of the evidence for CODC (and in fact in all of the evidence against PC13) there is one paragraph which perhaps, indirectly, responds to Mr Meehan's unchallenged evidence relating to the realities of development in the real world. That is the following statement by Ms Brown[21]:

> "*As to feasibility and achievability 'on the ground' there are a number of measures to be worked through over time; this situation being common to 'development' everywhere. I note that the Spatial Framework recognises and promotes wide-ranging implementation measures to effect and support planning and growth management, and coordinated actions within the public and private sector. To my knowledge*

[20] Evidence of Marilyn Brown dated 20 May 2019, at paragraph 6.6.8 on page 13.
[21] Ibid at paragraph 6.6.12 on page 14.

Cromwell has a highly motivated community, with a diverse skillset, with the wherewithal to obtain specialist advice and skills sets as appropriate. These considerations/expectations were part of the community's support for the preferred option, and their aspirations for 'Cromwell 2050'."

128. The above statement is an extraordinary example of 'consultant-speak'.

129. The above statement is also apparently the totality of CODC's response to Mr Meehan's unchallenged evidence relating to development realities, signalling how CODC intends to address those realities.

130. Ms Brown makes a number of very unusual statements about 'commuters'[22]:

"*7.1.3 Development on the PPC13 site appears to be primarily intended for commuter occupancy (Mr Meehan at paras 52, 53 and 94, Ms Bretherton at paras 16 and 16, and Mr Carr at paras 6.2.1 and 6.2.2). In this regard Mr Carr estimates 80% of peak hour movements towards Queenstown, 25% towards Cromwell in addition to the vehicle movements associated with retirement housing.*

…

7.1.10 Feedback at the CMP workshops noted that commuter households can be absent for much of the day and therefore rely on services and facilities assisting families with childcare, after school services and participation in sports. These are social costs borne by wider Cromwell community and they also be replicated by needs associated with retirement age groups."

131. The implication appears to be that commuters are somehow second class citizens who do not deserve to be catered for.

132. There is no explanation of why a 'commuter' who lives within 1km of central Cromwell is any different from a 'commuter' who lives 5km from central Cromwell.

133. There is no analysis, recognition or appreciation of the extent to which a PC13 community containing perhaps 2,500 people would add to and enhance the vitality and cohesiveness of the Cromwell community.

134. Ms Brown states[23]:

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[22] Ibid, at paragraphs 7.1.3 and 7.1.10 on pages 14 and 15.
[23] Ibid at paragraph 7.1.19 on page 15.

> "*I note PPC13 is close to the entrance to the Kawarau Gorge and thus potentially a commuter suburb to Queenstown. Should satellite development occur at the western end of the gorge, and on the Frankton Flats then a series of ribbon developments may occur in the long term …"*

135. This statement makes no sense at all, and certainly does not provide any foundation for a contention that PC13 may lead to further expansion towards the gorge (which appears to be the implication).

136. In her conclusion[24], Ms Brown identifies a number of ways in which PPC13, if approved, would conflict with the CODC's strategic direction. I list them below, and comment on them briefly, noting that they will also be addressed by the witnesses for RTDL.

137. *PPC13, if approved, would conflict with CODC's strategic direction to:*

a. *Accommodate growth within the Cromwell urban area, promoting a well-connected and walkable community*

   Comment 1: PC13 complements that strategic direction and does not conflict with it at all. CODC will still be free to seek to intensify and densify the Cromwell town centre. That is an essential component of the Cromwell Masterplan 'Balanced Growth' option which RTDL experts contend is the only feasible option for Cromwell's growth going forward.

b. *Significantly consolidate development within and nearby the town centre*

   Comment 2: Comment 1 above also applies to this strategic direction.

c. *Foster a mixed use town centre in a combination of retail, office and other commercial premises, residential and civic spaces, a refreshed public realm and open space environment*

   Comment 3: PC13 does not conflict with that strategic direction in any way.

d. *Develop a significantly scaled community, visitor and cultural precinct hub in the Old Cromwell bringing vitality, viability and diversity*

   Comment 4: Comment 3 above also applies to this strategic direction.

e. *Enable greenfield development and/or infill opportunities where consistent with a consolidated urban form and higher density objectives in locations contiguous with existing subdivision and development and existing infrastructure*

[24] Ibid at paragraph 8.6 on page 20.

Comment 5: Comment 1 above also applies to this strategic direction.

f. *Retain the productive capacity of rural areas, protecting rural land around the town and within the wider Basin acknowledging the significance of climate and other factors including localised growing environments, allied productive outputs and GDP, and World of Difference values*

Comment 6: PC 13 conflicts with this strategic direction to a minor degree, applicable only to the 13.3ha located in the Rural zone. Two points should be noted:

a. That land was available for purchase or lease for a number of months before it was acquired by RTDL. The lack of interest in the market for that land for productive purposes is a highly relevant factor.

b. CODC is apparently willing to sacrifice land currently being used for productive purposes (Freeway Orchard, some of the land in Ms Brown's 'Cromwell North' area), presumably because the need of the land for housing overrides the need of the land for productive purposes. The same choice applies to the PC13 land, except that it is not being used for productive purposes and does not appear to be likely to be used for productive purposes.

138. Ms Brown's second last paragraph[25] reads:

"I concur with Mr Whitney's conclusion at para 7.1.3 'that while PPC13 is intended to respond to demand for residential land to help address an estimated shortfall in long term capacity such a response can be achieved by utilising other land for development'".

139. In response I submit that:

a. The statement by Mr Whitney quoted above by Ms Brown demonstrates (some of) the fatal flaws in the assessments of both experts.

b. PC13 is not intended to help address an estimated shortfall in long term capacity. It is intended to address an immediate and urgent housing crisis which neither Mr Whitney nor Ms Brown appear to understand even exists (they certainly do not acknowledge it).

c. There is no evidence presented for CODC as to how both short term and long term housing demand will be addressed, other than by rezoning. As Mr

[25] Ibid, at paragraph 8.11 on page 20.

Meehan clearly points out in his evidence[26] achieving zoning does not deliver housing. It is only one step in a process. The subsequent steps are beyond the power of the Council.

d. There is no mention of, let alone any consideration of, how to achieve affordability as part of a package of delivering housing.

140. This issue also potentially brings into focus another small elephant sitting quietly in one corner of the room. That 'elephant' is the extent to which prevention of additional residential capacity benefits existing homeowners to the detriment of the prospective future homeowners which PC13 will target.

141. This 'elephant' was commented on by Ms Hampson in the Economic Assessment dated December 2017 which forms part of the PC13 Request, when she stated[27]:

> "*To avoid exacerbating these [increases in residential land values/dwelling values/rental costs in Cromwell] even further, or ideally slowing the rate of dwelling price increase, it is important that adequate capacity for residential growth in the Cromwell urban area is enabled to increase competition between land owners and to provide the market with confidence that sections and/or dwellings are not in short supply (which increases prices and speculative behaviour). This issue sits at the core of the NPS UDC*[F]*.*
>
> [F] *On average, three households are better off from price rises for every one household which is worse off because it cannot afford a house/faces higher rents, etc. So, the conundrum is that society as a whole is worse off (greater inequality), even though the majority of households are individually better off materially. Hence the importance of government's confirmation that it is important to limit housing price rises for the good of community wellbeing.*

142. The uncomfortable reality is that the refusal of PC13 would financially benefit most, if not all, existing homeowners in Cromwell to the extent that the confirmation of PC13 would otherwise lead to increased price competition and a reduction in the rate of increase in property values.

143. The consequence of that uncomfortable reality is that the only party fighting for the interests of prospective future purchasers of houses within River Terrace,

[26] Evidence of Chris Meehan dated 23 April 2019, at paragraph 14 on page 3.
[27] Economic Assessment by m.e consulting dated December 2017, at page 23.

who do not already own a home somewhere else and who desperately want to achieve their own home, is the Proponent.

Highlands Motorsport and Cromwell Speedway

144. The only point on which RTDL takes issue with Highlands Motorsport is its objection to being bound to its existing consented activities and its stated desire to want to have the freedom to expand its operations in the future. This is simply unreasonable. A good analogy is Queenstown Airport with its Airnoise Boundary.

145. In any event it seems highly unlikely that Highlands Motorsport would be able to extend its existing consent by the addition of further noise generating activities. The evidence of Josie Spillane records that their last consenting round cost in the order of $750,000 and that most of those costs arose due to the complaints from 2-3 landowners[28]. In relation to that issue Ms Spillane stated[29]:

> "*55. During the consultation we tested the possibility of increasing the number of event days. The feedback from the community on that issue was emphatic. It was clear that any application to increase the number of event days will be a matter with significant opposition. As a result of that we did not seek any further event days."*

146. Given the statement quoted above and the costs indicated above, any suggestion that Highland Motorsport would want to increase its 'noise boundary' in the future seems fanciful.

147. The Cromwell Motorsport consent clearly enables a very wide range of activities, which in turn enables Highland Motorsport to operate a very successful business. This is evident from the detailed evidence to that effect presented by Ms Spillane. There is no evidence presented which establishes any possibility that approval to PC13 would have any adverse effect on that activity.

148. Mr Copeland has presented economic evidence on behalf of these two Submitters and on behalf of D J Jones Family Trust and Suncrest Orchard Limited. I highlight two aspects of his evidence. The first is his paragraph 27 which reads:

> "*27. The remainder of my evidence focuses on the economic externality costs and benefits arising from PC13. It does not consider the costs and benefits that are internalised to the developer and in turn the residents and businesses that will be located on the PC13 land."*

[28] Evidence of Josie Spillane dated 16 May 2019, at paragraph 59.
[29] Ibid, at paragraph 55.

149. The statement quoted above is symptomatic of virtually every brief of evidence presented against PC13, as I have stated above. When it comes to the weighing of all of the relevant considerations by all of those witnesses, there is no benefit put on to the scales to represent the very positive and long term beneficial outcomes for the 900 future families living in and enjoying River Terrace. That fundamental failure weakens the credibility of all of that evidence.

150. My second concern about Mr Copeland's evidence relates to his paragraphs 49-51 where he purports to assess the economic benefits of PC13. However he concludes that there are no benefits because he relies upon the s42A Report's conclusion that PC13 will not provide any housing beyond what will otherwise be provided within the urban limits of Cromwell. With respect to Mr Copeland, that demonstrates a complete absence of critical analysis of the s42A Report conclusion relied upon.

151. In particular Mr Copeland fails to accord any weight to the unchallenged evidence of Mr Meehan which comprehensively establishes that the s42A Report conclusion relied upon by Mr Copeland cannot possibly be correct.

152. Turning to the planning evidence of Ms Kate Scott, at her paragraph 5.70 on page 25 she states that: "*… Mr Staples comments on the difficulty that Ports of Auckland have encountered in terms to administering no-complaints covenants*".

153. Mr Staples makes no such statement. What he does say in his paragraph 8.10 on page 10 of his evidence is that Auckland Council receives complaints from time to time despite a no-complaints covenant being in place. Such complaints can simply be ignored. There is no evidence that that situation causes any difficulty or cost to Auckland Council.

154. My only other comment in relation to Highlands Motorsport relates to the extent to which that business has contributed to the number of submissions lodged to this proposal as a consequence of the Newsletter they issue on a regular basis. Refer **Attachment 13**.

155. Highlands Motorsport also relies upon a restrictive no-complaints covenant. Refer **Attachment 14**.

156. Note Highlands Golf Resort proposal. Refer **Attachment 15**.

Public Health South

157. The planning evidence of Megan Justice for Public Health South contains the only statement which suggests there is any concern about the effectiveness of no-complaint covenants. Ms Justice states[30]:

> "*No-complaints covenants are occasionally utilised to manage potential reverse sensitivity effects. I am aware through the considerable airport work undertaken by my firm, that no-complaints covenants are not an effective, long term solution for managing reverse sensitivity effects, as they do not manage the environmental effects …*"

158. However Ms Justice provides no evidence to support that statement. Given the fact that (at least) Auckland Airport, Wellington Airport and Queenstown Airport place significant reliance on the effectiveness of no-complaint covenants, I submit that that statement cannot be accepted without the support of detailed evidence which establishes the contention made.

159. Ms Justice's contention at her paragraph 3.24 that a District Plan Rule requiring a no-complaint covenant can be entered into does not meet the territorial authority's obligation under section 31 does not appear to have the support of the Unitary Plan Hearings Panel, chaired by His Honour Judge Kirkpatrick, which had no difficulty approving the Ports of Auckland no-complaint covenant provisions I have already referred to.

160. I acknowledge that Ms Justice does record[31] that the RTRA will provide considerable choice in housing options and benefits in terms of increasing the supply of housing land. However that acknowledgement consists of one sentence in her entire Brief of Evidence. Given the concerns publicly expressed by Public Health South about the housing situation in Cromwell (refer **Attachment 4**) one might reasonably have expected a considerably more thorough and balanced evaluation of the costs v the benefits of PC13. The brevity of that one short sentence strongly suggests that no such balanced evaluation has been carried out.

Horticulture New Zealand

161. My three questions for Horticulture New Zealand are:

a. Where was that organisation when all of the other instances in and around Cromwell of housing adjoining horticulture were implemented? In particular where was that organisation during the publicly notified Wooing Tree Plan Change 12 (putting houses in amongst existing vineyards) and the publicly

[30] Evidence of Megan Justice dated 16 May 2019, at paragraph 3.22 on page 12.
[31] Ibid at paragraph 4.4 on page 14.

notified Top 10 Holiday Park application (putting housing right alongside the Freeway Orchard)?

b. What is different about the PC13 land, to attract such opposition from Horticulture New Zealand, compared to all those other examples?

c. Where is the evidence that those other examples (which presumably do not have the protection of the no-complaint covenants being opposed for PC13) created problems which legally hindered the relevant ongoing horticultural activities?

D J Jones Family Trust and Suncrest Orchards Limited

162. In paragraph 8 of the evidence of Michael Jones dated 16 May 2019, he states:

> "*… Spray notification requirements for some chemicals mean that neighbouring properties must be given advance notification of spraying. Included in the Appendix is the label of one of the chemicals used on the orchard which requires advanced spray notification. Notifying all the potential neighbours in RTDL would be a considerable undertaking …"*

163. With respect to Mr Jones, he does not correctly record the requirement or the implications arising from PC13. What the label actually states is:

> "*Written notice must be given to anyone likely to be directly affected by the application, these persons include occupiers and owners of land, dwellings or buildings on property that is immediately abutting the application area."*

164. Another part of the label states:

> "*SPRAY DRIFT: The person applying this substance must not cause adverse effects beyond the boundary of the treated property, and must also avoid adverse effects from any spray drift occurring …"*

165. Putting those two obligations together, there should be little or no concern about potential effects on immediately abutting neighbours, particularly given the proposed 3m high solid fence (together with the existing shelter belt and proposed boundary planting).

166. Earlier I stated on behalf of RTDL that the intention is that there be no adverse effect on the existing neighbouring orchard activities. I acknowledge I was unaware of the notification requirement. I also acknowledge that that notification requirement would extend to more properties, while noting that it only applies to properties immediately adjoining the common boundary. I submit that this is a relatively minor issue, for the following reasons:

a. It is very easy to put a notification regime in place. I am advised that RTDL is notified by Suncrest Orchard by email every time that spraying is proposed. There is no reason that that cannot be extended to a greater number of properties because it still only involves one email to a number of email addresses.

b. The covenant can include an obligation to provide email addresses and/or other contact details to Suncrest Orchard.

c. Given the number of examples around Cromwell of orchards immediately adjoining considerable numbers of residential properties, this must be a common and easily understood protocol.

d. This would constitute a very minor inconvenience in the context of what is at stake with PC13.

167. RTDL wants to work with Suncrest Orchard and the other neighbours to ensure ongoing good neighbourly relations in general and in particular to ensure that a bulletproof regime is put in place to protect neighbouring activities from any adverse reverse sensitivity effects. I return to that point in the next section of these submissions.

168. RTDL can actually take steps to provide Suncrest Orchard with greater security for its current orcharding operations than it has now – refer the gas guns issue addressed in paragraphs 4.13-4.16 of the Acoustic JWT dated 29 May 2019.

NZTA

169. NZTA has requested that PC13 include a rule providing for some RTDL land at the Sandflat Road/SH6 intersection to be vested in NZTA to enable a possible future intersection upgrade. RTDL has agreed to that request. The details are still being worked through. That rule amendment has not yet been made.

170. Any other issues relevant to NZTA await the outcome of the transportation joint witness conferencing.

Covenant related issues

171. The Third Version (clean) PC13 Plan Provisions lodged with the Council on Friday last week included amended Rules 20.7.7(viii) and (ix) relating to the restrictive no-complaint covenant requirements. I set out below a copy of Rule 20.7.7(viii). I comment:

a. It has been carefully drafted;

b. Any rule of that nature can usually be improved;

c. Feedback is requested;

d. Other properties can be included;

e. A Direction from the Commission is requested.

"(viii) <u>Reverse sensitivity – Motorsports Activities</u>

(a) Activities enabled under Rules 20.7.1, 20.7.3 and 20.7.4 must be subject to a restrictive no-complaint covenant in favour of:

(i) Cromwell Motorsport Park Trust Limited in respect of Lot 400 DP466637 and Lot 1 DP 307492 as the benefitting land;

(ii) Central Otago District Council in respect of Lot 1 DP 403966 as the benefitting land.

(b) For the purposes of this rule a "restrictive no-complaint covenant" is a restrictive covenant which:

(i) is registered against the title(s) to the servient land on which the activities will take place in favour of the benefitting land;

(ii) in the case of Lot 400 DP466637and Lot 1 DP 307492, prevents any owner or occupier of the servient land from complaining about or taking any steps to prevent motorsports and related activities lawfully carried out as authorised by the terms and conditions of resource consent numbers RC150225 including any variations operative prior to 19 May 2018.

(iii) in the case of Lot 1 DP 403966, prevents any owner or occupier of the servient land from complaining about or taking any steps to prevent speedway and stock car track and related activities lawfully carried out as authorised by the terms and conditions of the planning consent for those activities issued by the (former) Vincent County Council dated 29 September 1980 including any variations operative prior to 19 May 2018;

(iv) is binding on successors in title<u>; and</u>

(v) is in the format detailed in Rule 20.7.13 or Rule 20.7.14 (whichever is applicable) or alternative wording approved by the Council.

(c) This rule shall be complied with by one of the following methods (listed in order of preference):

(i) by registration of a restrictive covenant (under the Property Law Act 2007 and the Land Transfer Act 2017) registered against the titles to the servient land and the benefitting land, if the owner of the benefitting land allows and enables such registration;

(ii) if the owner of the benefitting land does not allow and enable registration under (i) above, by subdivision consent condition imposing the restrictions required by this rule and recorded in a consent notice registered against the title(s) to the servient land;

(iii) by land use consent condition imposing the restrictions required by this rule and the requiring registration of a covenant under s108(2)(d) of the Resource Management Act 1991 against the titles to the servient land;

Reason:
Existing motorsports and speedway activities on land near the Resource Area are entitled to protection from reverse sensitivity effects caused by residents and occupiers within the Resource Area."

172. A similar situation applies to the draft restrictive no-complaint covenants. By letter dated 21 December 2018 RTDL wrote to the D J Jones Family Trust and Suncrest Orchard Limited, Public Health South, the trustees of the McKay Family Trust, the solicitors acting for Highlands Motorsport Park Limited and Central Speedway Club Cromwell Incorporated and the solicitors acting for Kawarau Trust Orchard Limited and 45 South Group of Companies. Each letter included a copy of the (relevant) draft restrictive covenant, requested that the detail of the draft covenant be considered, and requested a response with suggestions as to amended and/or improved drafting. Those letters did not generate any responses in terms of suggestions to improve the drafting of the covenants.

173. The covenants have been carefully drafted. I am confident they will achieve their intended outcome. However any covenant of that nature is improved if there is genuine engagement about the detail in drafting of the covenant.

174. Following consideration of evidence lodged by the Submitters, and after further consideration of the draft covenants, at least the following amendments will be made:

a. Updating some terms to reflect recent legislation;

b. Inclusion of spray drift related provisions in the Orchard Covenant;

c. Inclusion in the Orchard Covenant of a requirement to notify Suncrest Orchard Limited of contact details for the purposes of notification of proposed spraying;

d. Anything else that may arise from further consultation.

175. In addition RTDL invites those adjoining neighbours to give consideration to potential future applications for resource consent which could be 'pre-approved' by RTDL and its successors in title. Refer [Second Bundle] **Attachment 10** - *Coneburn Planning Limited* Environment Court Decision. The obvious example of this possibility is the gas gun device issue addressed above. Another one could be a restaurant within Highlands (for example).

176. RTDL seeks a Direction from the Commission in respect of the above.

Conclusion

177. New Zealand has a housing crisis. This hearing demonstrates exactly why New Zealand has that housing crisis. Contrast the responses to Cromwell's housing crisis:

a. The Proponent's response;

b. CODC's response.

178. Cromwell has an opportunity to get ahead of the housing curve which may be unique in New Zealand.

Suggestion of Interim Decision

179. The s42A Report comments that no attention has been given to the detail of the PC13 rules, and that an Interim Decision could be issued to enable that to be attended to. The Proponent resists that suggestion, simply because an Interim Decision creates appeal rights and, if there is going to be any appeal, the Proponent would prefer the entire plan change be able to be considered and not just part of it. I submit that the suggestion made in the s42A Report could easily be addressed by way of a Minute or Direction issued by the Commission before close of the hearing.

Evidence

180. Evidence will be presented by the following witnesses for the Proponent:

a. Chris Meehan – evidence on behalf of RTDL;

b. Marc Bretherton – evidence on behalf of RTDL;

c. David Tristram – valuation;

d. Stephen Skelton – landscape;

e. Reece Hill – soils;

f. Natalie Hampson – economics;

g. Alistair Ray – urban design;

h. Jon Styles – acoustic;

i. Andy Carr – transportation;

j. Jeff Brown – planning.

181. No evidence has been pre-circulated or prepared in relation to infrastructure due to the fact that the s42A Report did not raise any concerns relating to infrastructure and no specific concerns were raised in any submissions which had not already been addressed in the Request documentation. A representative of Paterson Pitts Group will be available to answer any questions relating to the Infrastructure Reports contained in the Request documentation.

182. The previous paragraph also applies to geotechnical, soil contamination and archaeological matters, except that arrangements have not been made for the authors of those reports to be present on the assumption it seemed very unlikely there would be any questions. If there are any questions, arrangements can be made for them to be answered.

Dated this 10th day of June 2019

Warwick Goldsmith
Counsel for River Terrace Developments Limited