

Before the Independent Hearings Panel
Appointed by the Selwyn District Council

Under the Resource Management Act 1991

In the matter of a hearing on submissions to the proposed Selwyn District Plan
Variation 1: Rezone Rolleston Part A

**Foodstuffs South Island Limited and Foodstuffs (South
Island) Properties Limited**

Submitter ID: V1-0111

**Memorandum for Foodstuffs South Island Limited and Foodstuffs (South Island)
Properties Limited – Rezoning 157 Levi Road**

30 May 2023

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May it please the Commissioners

- 1 These submissions are provided on behalf of Foodstuffs South Island Limited and Foodstuffs (South Island) Properties Limited (Submitter ID: V1-0111, collectively **Foodstuffs**), on Variation 1 (**Variation**) to the proposed Selwyn District Plan (**PSDP**). Foodstuffs' submission (**Submission, rezoning**) seeks the rezoning of 157 Levi Road, Rolleston (**Site**) to a commercial zoning. Evidence provided in support of the Submission considers the rezoning of the Site should be to Large Format Retail Zone (**LFRZ**) with consequential site-specific changes to the LFRZ provisions to manage the residential interface, road network and function and role of the Town Centre Zone (**TCZ**). This is considered by the expert consultants to be the only suitable zone for this activity in this location.
- 2 The 7ha Site was purchased by Foodstuffs after submissions on the PSDP had closed. Foodstuffs did not seek a rezoning of the Site by submission on the PSDP. The Variation was notified in August 2022 and the Site was notified for MDRS (subject to a new Development Area). One month later in September 2022 Foodstuffs obtained, via a publicly notified resource consent process, consent to construct a PAK'nSAVE for the northern 4ha of the Site. This consent is currently being implemented. The residual 3ha of the Site remains vacant.
- 3 The Panel has requested a detailed legal memorandum stepping through why it is considered there is scope to grant the relief requested by Foodstuffs. I set out my submission points below.
- 4 By way of summary, I have considered:
 - (a) Whether the Panel can make a recommendation to rezone a new site for commercial activity in an Intensification Planning Instrument (**IPI**) under the RMA?
 - (b) Is Foodstuffs' request for the Site to be rezoned commercial "on" the Variation?
 - (c) Is the new commercial zone linked to the level of intensification proposed by the Council's exercise of its functions when giving effect to Policy 3?
 - (d) Is the specific commercial zone (i.e. LFRZ with site specific changes) sought in evidence within scope of Foodstuffs' submission?
 - (e) Could the change requested by Foodstuffs to the Variation have been expected by a reasonable person in the community at large genuinely interested in the implications for themselves from the IPI?
 - (f) If the Site is not rezoned as requested, what is the outcome?

Summary

- 5 The Panel has jurisdiction to recommend to rezone the Site, and include site specific provisions within that zone as requested by Foodstuffs' evidence.
- 6 Foodstuffs submission is "on" Variation 1, being a legislatively directed IPI intended to address a significant issue of housing supply in New Zealand's urban environments, which explicitly envisages changes to urban non-residential zones (such as extensions to existing zones, new zones and amendments to those zone provisions).
- 7 It is clear from the Public Notice and the Section 32 report that the scope of the Variation extends to the consideration of additional intensification of centres pursuant to NPS-UD Policy 3(d) (even though it was ultimately not recommended in the Section 32 Report). Given the significant growth of Rolleston, and evidence from its own experts at the commercial chapter PSDP hearings¹, the Council should have provided for additional zoned commercial land within the urban environment of Rolleston, in addition to the three notified Neighbourhood Centre Zones (**NCZ**) of existing consented commercial areas within residential developments.
- 8 Foodstuffs' submission sufficiently notified potentially affected parties of the potential for the type of commercial activities now sought by the LFRZ for the Site.
- 9 The consequence of not exercising the Panel's discretion would be a poor planning outcome and a failure to provide sufficient business land to meet the demands of the fast-growing Rolleston township which would not give effect to Policy 3(d). These are concerns that have been consistently raised since the PSDP was notified.

Can the Panel recommend to rezone a new site for commercial activity in an IPI under the RMA?

- 10 This section considers the jurisdiction of the Panel for an IPI. An IPI can create new urban non-residential zone in carrying out Council's functions to give effect to Policy 3 of the NPS-UD. This is a discretionary element of an IPI under Section 77N(3)(a) of the Resource Management Act 1991 (**RMA**). A new urban non-residential zone should be linked to the level of intensification proposed by the Council's exercise of its functions when giving effect to Policy 3, and may include any provision proposed to be included in that zone.

¹ Noting also that the PSDP did not consider the further residential intensification.

Analysis

- 11 As a Tier 1 Territorial Authority that had notified a proposed district plan (i.e. PSDP)² prior to the commencement date of the Resource Management (Enabling Housing Supply and Other Matters) Amendment Act 2021 (the **Enabling Act**)³, and which was not operative at the commencement date, Selwyn District Council (**the Council**) is required to vary the PSDP in accordance with Part 5 of Schedule 12 RMA.
- 12 The starting point is to consider the transitional provisions in Clause 33, Part 5 Schedule 12 RMA, as the most relevant and specific provisions applying to the Variation. This clause requires, relevantly, the Council is to notify a single variation to the PSDP, which constitutes its IPI, to incorporate the Medium Density Residential Standards (**MDRS**) and give effect to policy 3 of the NPS-UD by 20 August 2022⁴. I will call this IPI "**the Transitional IPI**" for the purposes of this memorandum.
- 13 Relevant to the Variation, the Transitional IPI:
 - (a) must be notified in accordance with section 80F RMA, use the ISPP to incorporate MDRS and give effect to Policy 3 NPS-UD;
 - (b) must ensure that the Council can carry out its functions under section 77N(1) RMA;
 - (c) can create new urban non-residential zones (or amend existing urban non-residential zones) in carrying out its functions to give effect to Policy 3 of the NPS-UD. This is a discretionary element of an IPI under Section 77N(3)(a) RMA. A new urban non-residential zone should be linked to the level of intensification proposed by the Council's exercise of its functions when giving effect to Policy 3 (Section 77N(1)).
 - (d) can include any provision that is proposed to be included in an existing or new non-residential zone (where that zone is giving effect to the intensification policies in accordance with section 77N), and any changes consequential on, or necessary to give effect to, the Variation.

² The Proposed Selwyn District Plan was notified on 5 October 2020.

³ The Enabling Act was passed into law on 20 December 2021, and the commencement date is the day after so 21 December 2021 (Clause 32, Part 5, Schedule 12, RMA).

⁴ See Clause 33(2)(b) and (3)(a), Part 5, Schedule 12, RMA.

- 14 The "applicable provisions" of the RMA enacted by the Enabling Act are to apply to the Transitional IPI.⁵ This clause must be interpreted as, "unless the Transitional IPI provides otherwise" or the Transitional IPI process would be redundant.
- 15 Therefore, under the Transitional IPI process, relevant to Foodstuffs' position, the RMA provides for:
- (a) Discretion to create a new commercial zone in the urban environment of Rolleston⁶;
 - (b) The zone should be linked to the level of intensification proposed by the Council's exercise of its functions when giving effect to Policy 3⁷;
 - (c) Inclusion of any provision in that zone;⁸ and
 - (d) Inclusion of any changes consequential on, or necessary to, give effect to Variation 1⁹.
- 16 By contrast, an IPI which is not a Transitional IPI (I will call this a "**Standard IPI**") is more limited in its application relating to urban non-residential zones, and does not provide the additional discretion to include "any other provision that is proposed to be included in a non-residential urban zone" once it is created.
- 17 Such an approach is appropriate when considering context. The Transitional IPI is broadly considering the IPI within an entire district plan review which, in this case, has been notified but urban non-residential zones have not yet been decided on. There is a need for additional flexibility and discretion to ensure the intensification provisions can be implemented appropriately across the PSDP and Variation process, as is the case for the unique circumstances of the Site.

Is Foodstuffs' request for the Site to be rezoned commercial "on" the Variation?

- 18 The Panel must make recommendations "on" an IPI under Schedule 1, Clause 99(1) RMA. Whether something is "on" the Variation must be informed by established case law on scope, but also must be considered in light of the purpose of the IPI and local context, and the ambit of the Transitional IPI (as set out above) which is a national legislative direction requiring the proper exercise of functions.

⁵ Clause 33(4).

⁶ Clause 77N(3)(a), and Section 77F RMA.

⁷ Section 77N(3)(a); and

⁸ Clause 33(3)(d)(ii).

⁹ Clause 33(d)(iii).

- 19 Case law is generally derived from plan change processes under Schedule 1, but the High Court has considered whether orthodox principles of scope applied to special "streamlined" provisions for the Auckland Unitary Plan under the Local Government (Auckland Transitional Provisions) Act 2010 which also required IHP recommendations to be "on" the proposed plan¹⁰ and where recommendations could also be made beyond scope of submissions¹¹. A decision should largely conform and not be materially inconsistent with orthodox jurisprudence dealing with scope¹².
- 20 The well-known *Clearwater* two step test addresses whether a submission is "on" a variation. In essence:
- (a) A submission can only fairly be regarded as "on" a variation if it is addressed to the extent to which the variation changes the pre-existing status quo. This involves a consideration of the extent to which there is a connection between the submission and degree of notified change proposed. One way of analysing that is to ask whether the submission raises matters that should have been addressed in the s 32 evaluation and report. If not, the submission is unlikely to fall within the ambit of the plan change¹³.
 - (b) But if the effect of regarding a submission as "on" a variation would be to permit a planning instrument to be appreciably amended without a real opportunity for participation by those potentially affected, this is a powerful consideration against any argument that the submission is truly "on" the variation. It is common for a submission on a variation or proposed plan to suggest that the particular issue in question be addressed in a way entirely differently from that proposed. In a situation, however, where the proposition advanced by the submitter can be regarded as coming out of "left field", there may be little or no real scope for public participation.
- 21 In *Motor Machinists Limited*, the Court found that the approach outlined above does not exclude altogether zoning extensions by submission. It found that "incidental or consequential" extensions of zoning changes proposed in a plan change are permissible, provided that no substantial further s 32 analysis is required to inform affected persons of the comparative merits of that zoning change¹⁴.

¹⁰ Section 144(1) Local Government (Auckland Transitional Provisions) Act 2010.

¹¹ Section 144(5) Local Government (Auckland Transitional Provisions) Act 2010.

¹² Interpretation Act 1999, section 5; *Commerce Commission v Fonterra Co-operative Group Limited* [2007] NZSC 36. This approach is stated in *Albany Landowners* at [102].

¹³ *Palmerston North City Council v Motor Machinists Ltd*, at [81], cited in *Albany Landowners* at [127]

¹⁴ At [81].

22 Subsequent to this case, the Environment Court found in *Bluehaven Management Limited v Western Bay of Plenty District Council*¹⁵ that a submission which went beyond an alteration to the status quo as entailed in a plan change might still be in scope provided that:

- (a) the plan change proposed some change to the management regime for the relevant activity; and
- (b) the evaluation report prepared for the plan change addresses, or should have addressed, the matter raised in the submission.

23 In *Albany North Landowners*¹⁶, it was considered the review for the Auckland Unitary Plan was wide (as a full district plan review) and not discrete variations and plan changes like *Clearwater*, and *Motor Machinists*. The Court did not accept that a submission would be out of scope if the relief raised was not specifically addressed in the original section 32 report, and that the IHP is not constrained by section 32 for the purpose of establishing whether a submission is "on" the plan change:

[132] To elaborate, the primary function served by s 32 is to ensure that the Council has properly assessed the appropriateness of a proposed planning instrument, including by reference to the costs and benefits of particular provisions prior to notification. Section 32 does not purport to fix the final frame of the instrument as a whole or an individual provision. The section 32 report is amenable to submissional challenge¹⁷ and there is no presumption that the provisions of the proposed plan are correct or appropriate on notification. On the contrary, the schemes of the RMA and Part 4 clearly envisage that the proposed plan will be subject to change over the full course of the hearings process, including in the case of the PAUP, a further s 32 evaluation for any proposed changes which is to be published with (or within) the recommendations on the PAUP. While it may be that some proposed changes are so far removed from the notified plan that they are out of scope (and so require "out of scope" processes), it cannot be that every change to the PAUP is out of scope because it is not specifically subject to the original s 32 evaluation. To hold otherwise would effectively put any submission beyond the precise scope of the s 32 evaluation to the Environment Court appellate procedure. This is not reconcilable with the streamlined scheme of Part 4.

¹⁵ *Bluehaven Management Limited v Western Bay of Plenty District Council* [2016] NZEnvC 191 at [58]-[60].

¹⁶ *Albany North Landowners v Auckland Council* [2016] NZHC 138.

¹⁷ Section 32A

- 24 When considering this case law for guidance, it is important to consider the Variation is contextually very different. Here, the Council has been directed to make changes to its PSDP through legislation set at a national level which provides for what must be given effect to¹⁸, and what functions need to be performed when undertaking the Variation¹⁹. It is within this context that a submission must be considered, especially where there are concerns raised as to whether the Council has correctly fulfilled its functions as required.
- 25 Notwithstanding this comment, it is considered that the Foodstuffs submission does not materially depart from orthodox case law and can be considered to be "on" the Variation as set out below.

The Variation

- 26 The public notice²⁰ for the Variation (Part A the IPI) states the IPI is in response to the Enabling Act which seeks to improve housing in five of the largest urban environments in New Zealand. It says the Council is required to adopt MDRS in residential areas and give effect to Policy 3 in every residential zone in an urban area. These areas are stated as Rolleston, Lincoln and Prebbleton.
- 27 The public notice also states that the Enabling Act requires consideration of how the NPS-UD is to be given effect to with respect to building heights and density within the relevant commercial areas of Rolleston, Lincoln and Prebbleton townships. It includes the Commercial and Mixed-Use Chapter as a Chapter affected by the Variation, and makes specific reference to the Prebbleton Local Centre Zone as being proposed to be rezoned to Town Centre Zone. It identifies that there will be a publicly notified further submission process where the community can support or oppose any submissions made.
- 28 The public notice directs you to the Proposed District ePlan. When you click "Variation 1 to the PDP" the public can see the new "well-functioning urban environment" objective (SD-UFD-O1), some limited changes to Commercial and Mixed-Use Zones (NCZ, TCZ) and Development Areas for Lincoln, Prebbleton and Rolleston are listed, amongst other changes. With respect to the Planning Maps, if you click "Variation 1 - Zones", you immediately see three new pink commercial areas (i.e. NCZ) on the planning map for Rolleston. It is clear that there are changes to some existing centre provisions (NCZ, TCZ) and some new centres proposed

¹⁸ Clause 33(3)(b).

¹⁹ Clause 33(3)(c) referring to Section 77N.

²⁰https://www.selwyn.govt.nz/__data/assets/pdf_file/0008/1762289/SDC-PDP-and-PPC-variations-Public-Notice-003.pdf

as part of the Variation – one within the existing LCZ of Prebbleton as per the notice, and some new areas commensurate with the proposed residential activity.

- 29 The Section 32 Report records that it is recommended that Selwyn does not propose additional intensification under NPS-UD Policy 3(d) with respect to areas within and adjacent to centres²¹, but it is proposed to re-zone the Prebbleton LCZ to TCZ, increase the height limits of the TCZ and the NCZ, and rezone four existing consented commercial areas within residential developments to NCZ and a range of consequential amendments to allow for the change in zoning.
- 30 With respect to the Commercial and Mixed-Use Zones (**CMUZ**)²², a key consideration was if any amendments should be made to the CMUZ as a result of the enabled level of development with the MRZ, and the permitted baseline it created²³. A section 32 evaluation was carried out which:
- (a) identified that the Commercial areas in Rolleston, Prebbleton and Lincoln are important to the District for the well-being of people and communities;
 - (b) acknowledged that changes to provisions directly affect landowners within the TCZ, LCZ and NCZs; indirectly affect the wider community and more specifically those living in adjoining residential zones.
 - (c) The proposed amendments reduce the limitations on landowners by being less restrictive in terms of height and consequentially reduce consenting requirements and therefore to some degree additional costs on landowners.
 - (d) The evaluation provides two options – retaining the status quo or making amendments (re-zone and increase height). Option 2 is the preferred option.
 - (e) Section 32 analysis of re-zoning from rural to commercial was also included, for a change from residential to commercial (NCZ).
- 31 It is clear from the Section 32 report that the scope of the Variation extends to consideration of aspects of the CMUZ to support the residential area growth, even if the Council inadequately (for reasons explained later in this memorandum) assessed whether additional intensification was required.
- 32 In terms of the submissions received, and the Council's response, it is clear that the issue of rezoning business land to support residential intensification was considered as part of the Variation. Submissions from lay submitters sought that

²¹ Section 32, 2.1, last paragraph.

²² This PSDP Zone includes Commercial and Mixed Use Zones, Neighborhood Centre Zone, Local Centre Zone, Large Format Retail Zone and Town Centre Zone.

²³ Section 32, at [3.6].

more land be zoned for commercial/retail to support residential growth²⁴, and that the town centre was too small and should be increased (Prebbleton).²⁵ Developers sought NCZ²⁶ and TCZ²⁷, and the Council sought NCZ for PC70 area.²⁸ CCC made a further submission rejecting the expansion of Prebbleton Town Centre (unless it could be demonstrated it doesn't impact other centres).²⁹ The Section 42A Report has recommended the rezoning of a new requested commercial area in the TCZ Lincoln³⁰. In short, lay (and professional) submitters were alive to the potential of commercial rezonings and submitted where they thought relevant. The lack of further submissions on Foodstuffs' rezoning submission is not the result of Foodstuffs' request being unexpected in nature (addressed later in this memorandum).

33 Based on the purpose of the IPI, the acknowledgment of building heights and density within the relevant commercial areas of Rolleston needing to be assessed, the considerations in the section 32 report, and the submissions and further submissions received, the proposed rezoning of the Site to commercial cannot be considered to be "out of left field"³¹, novel³², or to substantially alter or add to relevant objectives of the plan change³³. It impacts only the submitters land. That the Site wasn't, and should have been, included specifically in the Section 32 analysis can be explained by the Consent decision on the PAK'nSAVE only being publicly issued between the submission and further submission period.

34 It is considered that seeking a new urban non-residential zone (i.e. a commercial zone) to address residential needs within the urban environment in Rolleston is "on" the plan change.

Is a new commercial zone on the Site connected to the level of intensification proposed by the Council's exercise of its functions when giving effect to Policy 3?

35 A commercial zone on the Site would give effect to Policy 3(d) NPS-UD.

²⁴V1-008, Jeff Elias. A property owner in Rolleston.

²⁵ V1-0013, Jig Dhakal. In relation to Prebbleton.

²⁶ V1-0055 AgResearch Ltd; V1-0054 Mon Group Ltd, V1-0066 Birchs Village,

²⁷ V1-0023 Broadfield Estates.

²⁸ V1-0092 (49) SDC.

²⁹ V1-0080, FS001 CCC

³⁰ For example, 12 Vernon Drive (0.6ha), in Lincoln to TCZ (V1-0023 Broadfield Estates).

³¹ *Motor Machinist*, at 55.

³² *Clearwater* at 89.

³³ *Bluehaven* at 37.

- 36 An urban non-residential zone is defined as "*any zone in an urban environment that is not a residential zone*", and an "urban environment" is any area of land that is intended to be predominantly urban in character, and is intended by the Council to be part of a housing and labour market of at least 10,000 people.³⁴ The Site is within the Rolleston urban environment and is currently zoned MDR (with immediate legal effect) in the Variation, and subject to a new (now out of date) Development Area.
- 37 Commercial zones are provided in the CMUZ Chapter. In Rolleston (a District Centre) the following zones apply: Neighbourhood Centre Zone (**NCZ**), Large Format Retail Zone (**LFRZ**), and Town Centre Zone (**TCZ**). CMUZ-01 states "The Commercial and Mixed Use Zones provide for the District's commercial needs based on a hierarchy that has the Town Centre Zone as the prime commercial and community focal point, supported by the Local Centre Zone, Neighbourhood Centre Zone and Large Format Retail Zone. These zones are collectively referred to as "Commercial and Mixed Use Zones", and referred to together throughout the objectives and policies in the PSDP.
- 38 Policy 3(d) refers to NCZ, LCZ and TCZ "or equivalent". It is clear the LFRZ (as proposed by Foodstuffs for the Site) is an equivalent zone in that it substantially performs the same supporting function to the Town Centre as does a Local Centre. It also includes similar permitted activities provided for across all of these zones including the TCZ. This is addressed below.
- 39 The rezoning of the Site is directly linked to the level of intensification proposed by the Council's exercise of its functions when giving effect to Policy 3:
- (a) The 7ha Site is surrounded by areas which have been rezoned MDR in the Variation (with immediate legal effect, to the north, south, west), and a new 53ha area proposed to be rezoned to MDR (the adjoining land to the east subject to Plan Change 71). The Rolleston TCZ is approximately 400m from the Site. There are no other commercial areas servicing the needs of these existing intensified and new greenfield residential areas.
 - (b) The permitted height of residential activity in MDR is 11m + 1m (Variation 1). The permitted height in commercial areas in Rolleston is: NCZ is 11m +1m (Variation 1³⁵), Rolleston TCZ is 10m (or 15m Prec 1, 12m in Prec 2)³⁶, LFRZ is 15m, 5m setback (PSDP). The Consented PAK'nSAVE on the Site is 10m in height. The context specific relief sought by Foodstuffs for the Site

³⁴ Section 77F RMA.

³⁵ NCZ-REQ2.

³⁶ TCZ-REQ2.

proposes a larger minimum 10m setback to ensure the combination of height and density of commercial activity and community services is "commensurate" with surrounding urban form.

- (c) The activities proposed for the Site are commercial activities *and* community services³⁷. Mr Smith and Ms Parish are clear in their evidence that the supermarket and hardware activities proposed on the Site are servicing, and providing employment for, the Rolleston residential catchments.

40 The economic evidence provided in support of Foodstuffs' submission is:

- (a) Selwyn is New Zealand's fastest growing territorial authority, but it has an anomalously low level of hardware building and garden retail supply. It has 10 times lower than the national average relative to building activity in 2022, and 5 times lower than the national average relative to population size last year. A commercial zone would respond directly to this acute shortage by enabling trade retail activity and have enduring economic benefits, including: the economic stimulus of store construction and operation, with 65 full-time workers permanently employed over the longer term; and reduced commuting compared to the status quo, where nearly all district hardware/building/garden retail needs are currently met in Christchurch City. It would not compete with the Rolleston TCZ as there are no hardware stores, and could not otherwise locate in the TCZ as there is no available land of the size needed for operational and functional requirements³⁸.
- (b) The district needs to accommodate several new supermarkets to keep pace with demand. There is insufficient space in the Rolleston TCZ, and noting the strict site/operating criteria of supermarkets, supermarkets will need to be accommodated elsewhere in the district. Doing so will not only help improve district retail self-sufficiency, but also secure an enduring stream of social and economic benefits for current and future residents.
- (c) At the CMUZ hearing for the PSDP, the economists representing Foodstuffs and the Council both agreed there is demand for several additional district supermarkets and that there is insufficient space to accommodate them within existing centres. Accordingly, it was accepted that the PSDP needed

³⁷ It is prudent to consider the definition of Community services in the NPS-UD when interpreting Policy 3. Community services means the following: community facilities; educational facilities; *those commercial activities that serve the needs of the community*.

³⁸ Mr Colegrave, at [19]-[22].

[https://extranet.selwyn.govt.nz/sites/consultation/PartA/Shared%20Documents/7.%20Rolleston%20Hearing/S%20submitter%20evidence/V1-0111%20%20Foodstuffs%20\(South%20Island\)%20Properties%20Ltd/V1-0111%20Foodstuffs%20-%20Fraser%20Colegrave%20\(Economics\).pdf](https://extranet.selwyn.govt.nz/sites/consultation/PartA/Shared%20Documents/7.%20Rolleston%20Hearing/S%20submitter%20evidence/V1-0111%20%20Foodstuffs%20(South%20Island)%20Properties%20Ltd/V1-0111%20Foodstuffs%20-%20Fraser%20Colegrave%20(Economics).pdf)

to explicitly provide for supermarkets outside the TCZ³⁹ in order to provide for sufficient development capacity to meet anticipated demands for business activities, and to give effect to the Strategic Direction of the PSDP, and NPS-UD⁴⁰. Evidence was provided that small NCZ dotted around residential activity was not going to keep up pace with the growth (which in that process did not include the MDRS).

- (d) While supermarkets were notified in the PSDP as non-complying activities in the LFRZ, all experts participating in the planning Joint Witness Statement (JWS) for Hearing 23 on the PSDP agreed that supermarkets should be permitted activities in the LFRZ. Mr Foy, the Council's economist, agreed. So, too, did the Council's Section 42A report⁴¹. It was considered by Mr Foy this could enable rezoning on a site-specific basis in Selwyn for supermarkets.
 - (e) Despite this agreement by experts in the PSDP that there is a need and demand for supermarket activities to support residential catchments, no new commercial zones or amendments to existing commercial zones large enough to accommodate a modern supermarket were proposed in the Variation to respond to Policy 3. Supermarkets (more than 450m² GFA) and trade retail activities are non-complying activities in the NCZ, so could not be accommodated within the new zones notified with the Variation.
 - (f) The Rolleston TCZ provides for trade retail activity and supermarkets as permitted activities, but there is insufficient space for these activities. The changes to the LFRZ recommended by the experts to the Panel in the PSDP hearing would provide for supermarkets as permitted activities. The evidence by Foodstuffs for the Variation was provided on this basis.
- 41 It is submitted that it is clear that the IPI provides jurisdiction to create a new commercial zone for resident's needs, and the Variation should have included one. This is consistent with the expectation of the Select Committee Report: *"Our expectation is that the intensification instruments will provide for the non-residential activities that residents need. We note our understanding that the NPS-UD enables councils to use the ISPP process to provide for commercial activities, such as*

³⁹ Mr Colegrave, at [58]

[https://extranet.selwyn.govt.nz/sites/consultation/DPR/Shared%20Documents/Hearing%2023%20Commercial%20&%20Mixed%20Use%20Zones/Hearing%2023%20Submitter%20Evidence/DPR-0373%20Foodstuffs%20South%20Island%20-%20Fraser%20Colegrave%20\(Economics\).pdf](https://extranet.selwyn.govt.nz/sites/consultation/DPR/Shared%20Documents/Hearing%2023%20Commercial%20&%20Mixed%20Use%20Zones/Hearing%2023%20Submitter%20Evidence/DPR-0373%20Foodstuffs%20South%20Island%20-%20Fraser%20Colegrave%20(Economics).pdf)

⁴⁰ PSDP - SD-UFD-03 – requiring sufficient development capacity to meet anticipated demands for housing and business activities; SD-UFD-02 – relating to urban growth being located in and around townships and responding to community needs; SD-UFD-04 - relating to the integration of urban growth and development.

⁴¹ Mr Colegrave, above, at [57].

shops, to service the needs of new residential dwellings"⁴². "We note that urban non-residential zones include: any industrial zone, commercial zone, large format retail zone, mixed use zone, special purpose zone, city centre zone, metropolitan centre zone, town centre zone, local centre zone, and neighbourhood centre zone."⁴³

- 42 NPS-UD Objective 3 sets an objective for Council to enable greater intensity of residential activity, business and community services in areas of high access or demand. Policy 3 gives effect to this objective⁴⁴. Creation of new commercial zones within existing urban areas are linked to the level of intensification required to give effect to Policy 3(d) NPS-UD. When considering the flexibility provided for a Transitional IPI, and the broad intentions of the Enabling Act which gives effect to Objective 3 NPS.
- 43 More specifically, a commercial zone on the Site responds to a direct local need for commercial activity and community services as demonstrated by the economic and planning evidence.

Is the relief now sought by the evidence within Foodstuffs submission? Did Foodstuffs' relief need to specify the specific zone (i.e. LFRZ) and outcomes that it was seeking?

- 44 A Council must consider whether any amendment made to a proposed plan or plan change as notified goes beyond what is reasonably and fairly raised in submissions on the proposed plan or plan change⁴⁵. The assessment of whether any amendment was reasonably and fairly raised in the course of submissions should be approached in a realistic workable fashion rather than from the perspective of legal nicety⁴⁶. It is sufficient if the changes made can fairly be said to be foreseeable consequences of any changes directly proposed in the reference⁴⁷.
- 45 Foodstuffs sought that the Site be rezoned from MRZ to an "appropriate commercial zoning" to reflect the intended and future use of the Site. The submission states the PSDP must give effect to Policy 3 of the NPS-UD, as the Variation seeks to do, and the Enabling Act explicitly allows the Council to create

⁴² Final report (Resource Management (Enabling Housing Supply and Other Matters) Amendment Bill, at 4.

⁴³ Above, at 19.

⁴⁴ Page 9, Introductory guide to the NPS-UD 2020.

⁴⁵ Countdown Properties (Northlands) Ltd v Dunedin City Council (1994) 1B ELRNZ 150 (HC), at [90], cited in *Albany Landowners* at [115].

⁴⁶ *Royal Forest and Bird Protection Society of New Zealand v Buller Coal* [2012] NZHC 2156, at [13], cited in *Albany Landowners* at [115].

⁴⁷ *Westfield (New Zealand) Ltd v Hamilton City Council* [2004] NZRMA 556 (HC), at [73]-[74]; cited in *Albany Landowners* at [115].

new urban non-residential zones (with reference to Section 77N(3)). The request was summarised by the Council and notified for Further Submissions as:

Considers that MRZ does not reflect the intended and future use of 157 Levi Road and that the land should be rezoned to an appropriate commercial zoning. Refer to original submission for full reason.

Rezone 157 Levi Road from MRZ to an appropriate commercial zone to reflect the intended and future use, and such further consequential amendments as may be required by the rezoning.

- 46 A further submission was made on Foodstuffs' submission by Four Stars Development and Gould Developments Ltd (from the only adjoining neighbour) concerned that "rezoning for commercial purposes will negate the ability to manage the residential/current and potential future commercial development interface by way of resource consent processes".⁴⁸
- 47 Foodstuffs' evidence provides that the LFRZ with site specific provisions are most appropriate. These changes are in Ms Collie's evidence⁴⁹ and are in direct response to the concern raised in the further submission that rezoning for commercial purposes will negate the ability to manage the residential/current and potential future commercial development interface by way of resource consent processes.
- 48 It is relevant that all possible "appropriate commercial zones" in the PSDP for the 7ha Site provide for the same type of activities as permitted activities, albeit at different scales. The activities that could locate in these commercial zones include:
- (a) TCZ permitted rule list includes - **Commercial activities**, Food and Beverage Activities, **Retail Activities**, **Trade Retail and Trade Supply Activities**, Office Activities and Community Facilities;
 - (b) LFRZ permitted rule list includes - Food and Beverage Activities, **Retail Activities (excluding supermarkets)**⁵⁰, **Trade Retail and Trade Supply Activities**, Automotive Activities, Office Activities.

⁴⁸ V1-0053 (FS006).

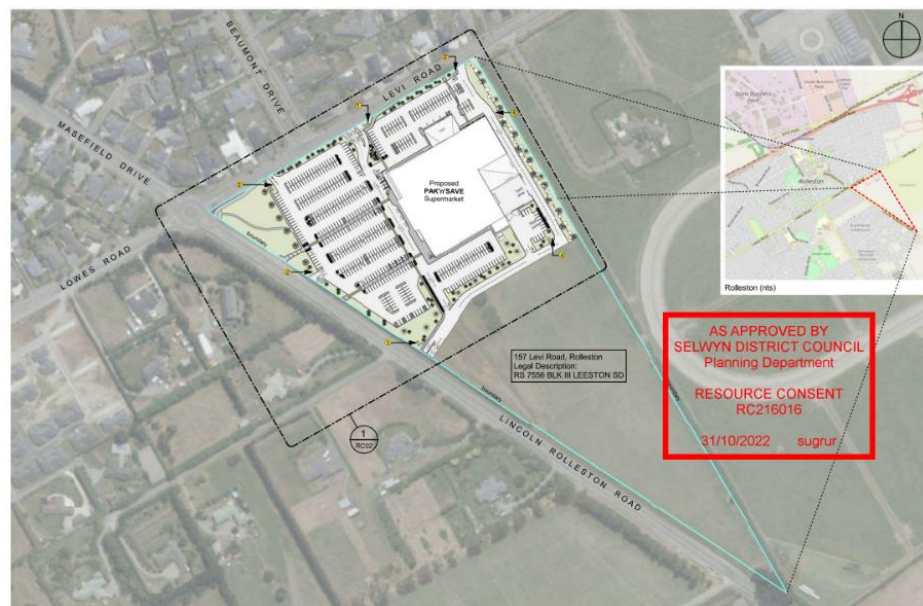
⁴⁹[https://extranet.selwyn.govt.nz/sites/consultation/PartA/Shared%20Documents/7.%20Rolleston%20Hearing/Submitter%20evidence/V1-0111%20%20Foodstuffs%20\(South%20Island\)%20Properties%20Ltd/V1-0111%20Foodstuffs%20-%20Anita%20Collie%20\(Planning\).pdf](https://extranet.selwyn.govt.nz/sites/consultation/PartA/Shared%20Documents/7.%20Rolleston%20Hearing/Submitter%20evidence/V1-0111%20%20Foodstuffs%20(South%20Island)%20Properties%20Ltd/V1-0111%20Foodstuffs%20-%20Anita%20Collie%20(Planning).pdf)

⁵⁰ Noting that the experts in the CMUZ hearing of the PSDP seek to change this to include supermarkets as permitted activities.

(c) LCZ permitted rule list includes - **Commercial activities**, Food and Beverage Activities, **Retail Activities**, **Trade Retail and Trade Supply Activities**, Automotive Activities, and Community Facilities.

49 There could be any range of these activities on a commercial zoned site. The amendments proposed by Foodstuffs in evidence simply reduce the type and number of activities that can occur on the Site to just one supermarket and one trade retail activity. This provides certainty of outcome and ensures there would not be any adverse impacts on the Rolleston TCZ, being the primary centre.

50 There could be no doubt that the Site would be used for a supermarket through the submission by Foodstuffs. There can also be no doubt that the submission intended the Site to be used for additional commercial activity, as it was publicly known at the time of further submissions that the PAK'nSAVE activity as notified and granted only used 4ha of the 7ha Site. The resource consent application, material and decision is publicly notified on the Council Website and for ease of reference the plan is set out **below**.



51 A commercial zone which provides for at least one large format retail activity is a reasonably foreseen consequence of Foodstuffs submission.

52 By way of background, at the time of writing the submission on the Variation, an "appropriate commercial zoning" for Rolleston needed to be able to provide for a supermarket within it and could have been NCZ, LCZ and LFRZ. However, both the NCZ and LFRZ as notified in the PSDP included supermarkets as non-complying activities. In the LCZ retail activity was only permitted up to 450m², and if the activity was not a supermarket. The TCZ permits supermarkets but the Site

does not adjoin this zone. Foodstuffs had made submissions on the PSDP to make changes to all of these zones⁵¹, and submitted concerns with respect to:

- (a) there is inadequate provision for both existing and planned future supermarket activity;
- (b) supermarkets were only provided in the Town Centre Zone (and not other commercial and mixed-use centre zones, or outside centres);
- (c) there is no suitable land for a new large format activity within existing Town Centre Zones despite it being permitted (and that Foodstuffs search for land is ongoing);
- (d) There is otherwise no provisions to enable a supermarket, including through well-considered resource consent applications.

53 It was submitted to the PSDP process that to give effect to the requirements of the NPS-UD, the provisions of the PSDP must contribute to a well-functioning urban environment which, as a minimum, enabled suitable sites (in terms of both location and size) for business activities to be realised and supported by an associated policy framework⁵², and that the PSDP did not do this. Nor did it provide sufficient development capacity to meet anticipated demands for business activities (Strategic Objective SD-UFD-03). The Variation as notified does not fulfil this "gap".

Could this change have been expected by a reasonable person in the community at large genuinely interested in the implications for themselves?

54 Participation by the public in district plan processes is a long-standing policy of the RMA, although it is noted for completeness that the Variation process provides for more limited participation.

55 In *Albany North Landowners*, the Court considered that the IHP's Panel for each recommendation to be a "reasonably foreseen consequence of a submission point is consistent with the attainment of this policy", as "it enables robust recognition of the right to make a submission while ensuring the public are not caught by changes that could not have been reasonably anticipated"⁵³.

⁵¹[https://extranet.selwyn.govt.nz/sites/consultation/DPR/Shared%20Documents/PDF%20for%20markup%20Foodstuffs%20South%20Island%20Limited%20&%20Foodstuffs%20\(South%20Island\)%20Properties%20Limited.pdf](https://extranet.selwyn.govt.nz/sites/consultation/DPR/Shared%20Documents/PDF%20for%20markup%20Foodstuffs%20South%20Island%20Limited%20&%20Foodstuffs%20(South%20Island)%20Properties%20Limited.pdf)

⁵² Well-functioning Urban Environment is defined in Policy 1 NPS-UD 2020; Policy 1(b) and (d) are referenced in this statement. Nothing in Part 3 limits the general obligation under the Act to give effect to objectives and policies (Part 3, 3.1 NPS-UD 2020).

⁵³ *Albany Landowners*, at [112].

- 56 However, a reasonable level of diligence is to be expected by landowners genuinely interested in preserving the status quo, whether at a site specific or more general neighbourhood or zone level. The Court in *Albany North Landowners* considered the assessment should be approached on the basis of "what might be expected of a reasonable person in the community at large genuinely interested in the implications of the [change] for him or her", as this "is the type of assessment that Judges must regularly make on behalf of the community in resource management matters"⁵⁴.
- 57 The Court in *Albany North Landowners* also considered that the important matter of protecting affected persons must also be considered alongside the enabling of communities and people to provide for their wellbeing (and in this process, a well-functioning urban environment) via the submission process. Foodstuffs made a submission which is within scope of the Transitional IPI.

Are the proposed changes reasonably anticipated?

- 58 There is little risk that people affected by the submission have been denied an opportunity to participate.
- 59 The land is in one ownership and the entire Site was clearly identified in Foodstuffs' Submission for an appropriate commercial zone. Any changes to the zone impact only this Site and ensure a better outcome for adjoining properties than could be achieved under the commercial zones without amendments.
- 60 A reasonable level of diligence would have located Foodstuffs' submission as a result of the Public Notice on the Variation and understood the Site was sought to be rezoned to Commercial. Due to the consistency in activities across the CMUZ, any type of commercial activity would have invoked a similar response from a party if genuinely interested.
- 61 The planning context of the Rolleston urban area is important to consider. The notification of the Variation, and the granting of the PAK'nSAVE consent has collectively brought significantly changes and opportunities to the immediate urban environment of the Site. There are only four properties (two very large ones, and two 1ha blocks) which have an interface with the residual 3ha area of the Site (not subject to the PAK'nSAVE) – three of these properties are owned by developers or future developers as opposed to private owners, and one is owned by the Council:
- (a) Directly adjoining Four Stars Development and Gould Developments Ltd to the east of the Site (28ha) is the future developer who made a further submission. While it carries no weight at the Variation hearing, affected party

⁵⁴ *Watercare Services Ltd v Minihinnick* [1998] 1 NZLR 294 (CA) at 304-305.

approval was provided by the landowners and this future developer to Foodstuffs' resource consent application, and the proposed buffers and landscaping agreed with this developer has been implemented in the changes sought.

- (b) Selwyn District Council (12ha) – adjacent to the Site across Lincoln Rolleston Road;
- (c) Developer BT Builders (1 ha) - adjacent to the Site across Lincoln Rolleston Road;
- (d) Developer Harbour Building Partnership Ltd (1ha) - adjacent to the Site across Lincoln Rolleston Road. This owner was actively involved seeking changes, via informal expert conferencing, to the resource consent with Foodstuffs' consultant representatives.

62 It can reasonably be expected that these developers would have been aware of the Variation and made a submission if they were genuinely interested in preserving the status quo.

63 Foodstuffs has developed retail activity surrounding supermarkets previously in Rolleston. Foodstuffs has been a longstanding operator and stakeholder in Selwyn District, and specifically Rolleston. It owns Rolleston New World (84-92 Rolleston Drive) in the TCZ, which was built 21 years ago and at this time Foodstuffs also developed the surrounding retail activity at the request of the Council.⁵⁵

64 With respect to the PAK'nSAVE, the community has reasonable certainty of the outcome of the use of 4ha of the Site for this activity and have been involved in a publicly notified process. Resource consent was robustly considered at a hearing held 2-3 August 2022 and granted. 49 Submissions were made, 22 of those were in support, and 27 submitters were in opposition. Approximately 7 submitters appeared⁵⁶, the proximity of submitters to the Site can be seen on a map prepared for the hearing⁵⁷. The build up to the hearing and the hearing itself took an iterative approach of working with submitters, and adding to conditions to mitigate effects through landscaping and urban design. It is these conditions which are sought to be implemented now across the entire Site through site specific provisions. The

⁵⁵ Evidence of Ms Parish, at [6], https://www.selwyn.govt.nz/__data/assets/pdf_file/0008/965519/Statement-of-Evidence-Rebecca-Parish-Foodstuffs-representative.pdf (provided during the PNS Consent hearing).

⁵⁶ Schedule of appearance can be found here:
https://www.selwyn.govt.nz/__data/assets/pdf_file/0010/1006111/Hearing-timetable-Day-Two-Wednesday-3-August-2022-Updated.pdf

⁵⁷ https://www.selwyn.govt.nz/__data/assets/pdf_file/0005/1012694/Submitter-Location-Plan-Exhibit-1.pdf

decision was reported in the local paper, and nationally.⁵⁸ The Variation was notified on 20 August 2022. This was after the Consent hearing was held but before the Decision was issued on 29 September 2022. No appeals were received. No submissions were made on the Variation by active submitters despite the proposal for Commercial on the Site going on concurrently.

65 The urban design experts for the Council and Applicant used the Business 1 provisions (OSDP) to assess the effects of the proposal on the adjacent properties⁵⁹. The Decision found:

- (a) both the NPS-UD and Enabling Act direct the Council to provide for more housing and businesses to be built in places close to jobs, community services and public transport and respond to market demand.
- (b) that the proposal is consistent with a well-functioning urban environment. It will meet the general directive of the NPS-UD. It provides development capacity. The urban design evidence underlying the planning assessments was clear that the location of the proposal supported a compact and consolidated urban form for Rolleston, and one which was on a location which was readily accessible for all modes of transport.⁶⁰

If the Site is not rezoned, what are the consequences?

66 The Panel asked about if the request to rezone wasn't granted. The Site (157 Levi Road) was notified in the Variation from General Residential Zone to MDR subject to a new Rolleston 1 Development Area, and with new links through the site (as a result of Plan Change 71).

67 A PAK'nSAVE supermarket will be constructed on the northern 4ha of the Site. It will sit within a MDRZ, subject to a Development Area that can't be given effect, and by an activity not anticipated in that zone. The MDRZ role, function and character is not to be compromised by non-residential activities⁶¹, which are a non-complying activity. Any Variations to the supermarket will likely be a non-complying activity. The provisions applying to this activity will not be the most efficient or effective means to achieve the purpose of the RMA.

⁵⁸ <https://www.odt.co.nz/star-news/star-districts/star-selwyn/foodstuffs-joins-airport-oppose-rolleston-rezoning-application>; <https://www.stuff.co.nz/business/130035968/canterburys-fastest-growing-town-gets-green-light-to-build-a-new-paknsave>

⁵⁹ Decision at [135], https://www.selwyn.govt.nz/__data/assets/pdf_file/0019/1175311/RC216016-Commissioner-Decision-and-Approved-Plans.pdf.

⁶⁰ Decision at [246]-[247].

⁶¹ RESZ-06 - PSDP

- 68 A trade retailer would also be a non-complying activity and could not establish on the Site, despite the economic evidence of the acute shortage and need for this activity for the current and future residents in Rolleston, and there being no sufficient suitable business land in the Rolleston TCZ.
- 69 Ultimately the consequence of not exercising the Panel's discretion would be a poor planning outcome and a failure to provide sufficient business land to meet the demands of the fast-growing Rolleston township. This will be despite having gone through two comprehensive District Plan planning processes (PSDP, Variation) over a period of two years, and being directed by the Government to be responsive and provide for sufficient development capacity to meet expected demands for business land *at all times* under the NPS-UD⁶².

Dated this 30th day of May 2023

A handwritten signature in black ink that reads "A Booker". The signature is written in a cursive, flowing style.

Alex Booker

**Counsel for Foodstuffs South Island Limited and Foodstuffs (South Island)
Properties Limited**

⁶² Policy 2 NPS-UD.