Before the Independent Panel appointed by
Central Hawke's Bay District Council

Under	the Resource Management Act 1991
In the matter of	The hearing of an application by **PAOANUI POINT LIMITED** to subdivide part of a 380 hectare rurally zoned property to create 48 residential allotments

OUTLINE OF LEGAL SUBMISSIONS ON BEHALF OF THE HAVELOCK BLUFF TRUST

Dated 12 July 2023

Martin J.E. Williams
BARRISTER

PO Box 754, Napier 4140
T: (06) 835 0665
E: martin@shch.nz

MAY IT PLEASE THE HEARINGS PANEL

Introduction and summary

1. These submissions are made on behalf of Charlie and Melaney Harris, as trustees of the Havelock Bluff Trust. The Trust owns the immediately adjoining farm property, Punawaitai Station, which it purchased in 2018.

2. Punawaitai Station remains, as it has for over 100 years, principally a sheep and beef enterprise, with plans to expand into horticulture on the more fertile flat areas immediately next to the subdivision site.

3. The Trust's submission to this application centres on the impacts of the proposed subdivision on farm operations including in relation to access, traffic congestion, disruption to services, reverse sensitivity, rural character and amenity and, as the submission states:

> ... removing the productive potential of what is probably the best soils on [the] farm may compromise the longer term viability of the property as an effective and productive farming unit.

4. In short, my client's concern is principally over the impacts of the subdivision on farming, on both sides of the fence.

5. Mr Harris will give evidence explaining these concerns, with a particular focus on reverse sensitivity, presently.

6. The purpose of these legal submissions is to place the concerns raised in my client's submission, correctly into the statutory context.

7. While there are other factors militating against the granting of consent to the subdivision, including erosion of rural character,[1] these submissions focus on the national direction to protect highly productive land, set under the National Policy Statement for Highly Productive Land 2022 (**NPS-HPL**).

8. I submit, and strongly, that the NPS-HPL is *fatal* to the application being approved. All other factors aside, the application must be refused, in order to comply with this national direction.

9. The NPS-HPL classifies the very part of the subject property proposed for subdivision as most in need of protection from that prospect, along with the building of some 48 houses on this highly productive land –

[1] Paragraph 11 and paragraphs 4.38-4.45 of the s42A report .

being the inevitable consequence if the subdivision application is approved.

10. With respect, the applicant's case that the subdivision falls within a "loop hole" (or exception) left within the NPS-HPL is not just strained, but wrong.

11. The NPS-HPL instead requires that subdivision of the LUC 3 land on the property be avoided, unless the overall (total, or complete) productive capacity of the whole farm property is retained, *over the long term.*

12. The subdivision necessarily fails that requirement.

13. This much seems obvious. You cannot carve out 18 hectares (or 20%) of the LUC 3 land from a farm and pretend its overall productive capacity is retained. Nor can you assume that the inevitable loss in capacity can be offset elsewhere on the property. *Production* might be increased elsewhere to offset the loss, but that does not retain overall productive *capacity* of the farm as a whole.

14. The subdivision is therefore precluded under the NPS-HPL.

15. Few cases are so open and shut under the RMA.

16. Consent simply must be declined.

17. I now address the specific basis of this fundamental submission in more detail, with reference to the evidence before the Panel in this case, and the requirements of the NPS-HPL in particular.

What Does the NPS-HPL actually say?

18. My client's submission rests firmly and squarely on what the NPS-HPL actually says.

19. I start in that regard with the objective and supporting policies as relevant to this application:

> **Objective (2.1)**
>
> Highly productive land is protected for use in land-based primary production, *both now and for future generations*.

Policy 1

Highly productive land is recognised as a resource with finite characteristics and long term values for land-based primary production.

Policy 7

The subdivision of highly productive land is avoided, except as provided in this National Policy Statement.

Policy 8

Highly productive land is protected from inappropriate use and development.

Policy 9

Reverse sensitivity effects are managed so as not to constrain land-based primary production activities on highly productive land.

20. The NPS-HPL is highly directive. The operative verbs are to "protect" and to "avoid". The future and long term focus is clear, whereby finite (and irreplaceable) resources are at stake.

21. These are not verbs or provisions intended to permit or allow for an "unders and overs" or 'offsetting' approach of the kind being relied on by the applicant, whereby the loss in productive capacity from one part of the property, can be 'mitigated' elsewhere. I return to that point specifically later in these submissions.

22. As I now explain with reference to the findings of the Supreme Court in *Environmental Defence Society v King Salmon,*[2] the Minister for the Environment has made a policy choice to *safeguard* the life supporting capacity of *soil* (under s 5(2)(b) of the RMA).

23. Further, the national direction expressed through that policy choice under the NPS-HPL has to be followed by consent authorities, including (with respect) this Panel.

24. As the Supreme Court found in *King Salmon*:

    (a) The use of the words "protection" and "avoiding" in s 5 of the RMA contemplates that particular environments may need to be protected from the adverse effects of activities in order to

[2] [2014] 17 ELRNZ 441.

implement sustainable management. That is, environmental protection is a 'core element' of sustainable management.[3]

(b) The word "avoid" has an ordinary meaning of "not allow" or "prevent the occurrence of".[4]

(c) Policies of national instruments expressed in directive terms (such as through the use of the word "avoid") carry greater weight, than those expressed in less directive terms.[5]

(d) National Policy Statements (as with the NZCPS at issue in *King Salmon*) reflect policy choices made by the relevant Minister. Where the Minister has set directive policies (such as to 'avoid' and 'protect') that policy choice must be applied by decision makers, it being wrong to subvert such direction through an "overall judgment" approach.[6]

25. The subsequent decision of the Court of Appeal in *R J Davidson Family Trust v Marlborough District Council*[7] confirms application of the reasoning in *King Salmon* to a resource consent context.[8]

26. The Court of Appeal had this to say, (addressing the New Zealand Coastal Policy Statement 2010, being the national direction at issue in that case):

> [71] Where the *NZCPS* is engaged, any resource consent application will necessarily be assessed having regard to its provisions. This follows from s 104(1)(b)(iv). In such cases there will also be consideration under the relevant regional coastal plan. We think it inevitable that *King Salmon* would be applied in such cases. The way in which that would occur would vary. *Suppose there were a proposal to carry out an activity which was demonstrably in breach of one of the policies in the NZCPS, the consent authority could justifiably take the view that the NZCPS had been confirmed as complying with the Act's requirements by the Supreme Court. Separate recourse to pt 2 would not be required, because it is already reflected in the NZCPS*, and (notionally) by the provisions of the regional coastal plan giving effect to the *NZCPS*. Putting that another way, even if the consent authority considered pt 2, it would be unlikely to get any guidance for its decision not already provided by the *NZCPS*. <u>*But more than that,*</u>

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[3] *King Salmon* at [24](d).
[4] Ibid at [96].
[5] Ibid at [129].
[6] *King Salmon* at [90], [131] and [151]-[153].
[7] [2018] 20 ELRNZ 367.
[8] Acknowledging that *King Salmon* addressed a plan change where as for a resource consent assessment under s 104 of the RMA is "subject to Part 2".

resort to pt 2 for the purpose of subverting a clearly relevant restriction in the NZCPS adverse to the applicant would be contrary to King Salmon and expose the consent authority to being overturned on appeal.

[72] On the other hand, if a proposal were affected by different policies so that it was unclear from the *NZCPS* itself as to whether consent should be granted or refused, the consent authority would be in the position where it had to exercise a judgment. It would need to have regard to the regional coastal plan, but in these circumstances, we do not see any reason why the consent authority should not consider pt 2 for such assistance as it might provide. As we see it, *King Salmon* would not prevent that because first, in this example, there is notionally no clear breach of a prescriptive policy in the *NZCPS*, and second the application under consideration is for a resource consent, not a plan change.

[73] *We consider a similar approach should be taken in cases involving applications for resource consent falling for consideration under other kinds of regional plans and district plans.* In all such cases the relevant plan provisions should be considered and brought to bear on the application in accordance with s 104(1)(b). *A relevant plan provision is not properly had regard to (the statutory obligation) if it is simply considered for the purpose of putting it on one side.* Consent authorities are used to the approach that is required in assessing the merits of an application against the relevant objectives and policies in a plan. What is required is what Tipping J referred to as "a fair appraisal of the objectives and policies read as a whole".

[74] *It may be, of course, that a fair appraisal of the policies means the appropriate response to an application is obvious, it effectively presents itself.* Other cases will be more difficult. *If it is clear that a plan has been prepared having regard to pt 2 and with a coherent set of policies designed to achieve clear environmental outcomes, the result of a genuine process that has regard to those policies in accordance with s 104(1) should be to implement those policies in evaluating a resource consent application. Reference to pt 2 in such a case would likely not add anything.* It could not justify an outcome contrary to the thrust of the policies. Equally, if it appears the plan has not been prepared in a manner that appropriately reflects the provisions of pt 2, that will be a case where the consent authority will be required to give emphasis to pt 2.

[75] *If a plan that has been competently prepared under the Act it may be that in many cases the consent authority will feel assured in taking the view that there is no need to refer to pt 2 because doing so would not add anything to the evaluative exercise.* Absent such

> assurance, or if in doubt, it will be appropriate and necessary to do so. That is the implication of the words "subject to Part 2" in s 104(1), the statement of the Act's purpose in s 5, and the mandatory, albeit general, language of ss 6, 7 and 8.
>
> (emphasis added)

27. Based on this direction from our highest Courts, I submit that because consent is not available under the NPS-HPL (Policy 7 requires that the subdivision be 'avoided'[9]), it must be refused. There is really no discretion to stray outside the instrument, and find otherwise.

28. That is all the more so in this case where the Central Hawke's Bay Proposed District Plan (**Proposed Plan**) has moved in a deliberate way towards the same "clear environmental outcomes" as the NPS-HPL, and should be given considerable weight accordingly (as I also return to later in these submissions).

29. Whether the Proposed Plan yet fully gives effect to the NPS-HPL remains to be tested, and to the extent it does not (or yet) do so, the NPS must prevail (section 75(3) of the RMA).

30. In that regard, all planning 'roads' lead to the same result.

31. With this guidance from our most senior Courts firmly in mind, I return to the specific language of the NPS-HPL itself.

Highly Productive Land

32. The first point to note is that the specific part of the subject property being subdivided for 48 new houses is clearly "highly productive land" for the purpose of the NPS-HPL, and indeed this would seem uncontested.[10]

33. As the Goodman Rural Report confirms, the 48 residential (and other associated) lots would be established on land identified as Land Use Capability class 3 (**LUC3**), as mapped by Landcare New Zealand maps (sourced from the Regional Council).[11]

34. The site is zoned General Rural[12] and as such the LUC 3 land being subdivided is "highly productive land" under clause 3.5(7) of the NPS-

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[9] The exception in Clause 3.8 not being available, as addressed below.
[10] Refer Ms Foster's evidence, at paragraph 78.
[11] Figure 2.2 of the Goodman Rural report.
[12] Under the Proposed Plan (and Rural under the Operative District Plan)

HPL, pending completion of the regional mapping exercise envisaged by clause 3.4 of the NPS-HPL.

35. The starting presumption under Policy 7 of the NPS-HPL therefore, is that subdivision of this land is to be avoided, *except as provided under the NPS* (refer Policy 7 as set out above).

36. As I now submit, there is no available exception and the subdivision must be avoided, by refusing consent.

Offsetting argument

37. The applicant says that there *is* an exception available, under clause 3.8(1)(a) of the NPS.[13]

38. This is essentially on the basis that the loss of 18 hectares from the farm property being subdivided would not affect its "overall" productive capacity, with the Goodman Rural Report (and Mr Goodman's evidence) indicating "a marginal reduction of 4.5% carrying capacity and economic farm surplus",[14] which can be offset elsewhere on the property.[15]

39. Mr Grant has similarly reasoned that the limited exception in clause 3.8 could be met, were the applicant to demonstrate that the loss in productive capacity caused by the subdivision could be "mitigated" elsewhere on the property.[16]

40. I submit this is fundamentally wrong.

41. My reasons are as follows.

42. First and foremost, the NPS-HPL must be made to work to its obvious express intent. That is to protect highly productive land for land-based primary production. Carving out 18 hectares of the best and most productive (LUC3) land from the subject property is precisely the opposite of what the NPS-HPL is seeking to achieve.

43. As submitted earlier, this is not an instrument intended to provide for an "unders and overs" or "offsetting" type approach.

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[13] Counsel's submissions , Ms Foster's evidence at paragraph 78.
[14] Refer also paragraph 5 of Mr Goodman's evidence.
[15] Refer paragraphs 9 to 14 of Mr Goodman's evidence.
[16] Paragraphs 11.7 and 11.12 of Mr Grant's evidence.

44. What clause 3.8(1) of the NPS-HPL, being relied on by the applicant, actually states, is this:

> 1. Territorial authorities must avoid the subdivision of highly productive land unless one of the following applies to the subdivision, and the measures in subclause (2) are applied:
>
> (a) The applicant demonstrates that the proposed lots will retain the overall productive capacity of the subject land over the longer term;
>
> (b) [Not applicable].
>
> (c) [Not applicable].
>
> 2. Territorial authorities must take measures to ensure that any subdivision of highly productive land:
>
> (a) Avoids if possible, or otherwise mitigates, any potential cumulative loss of the availability and productive capacity of highly productive land in their district; and
>
> (b) Avoids, if possible, or otherwise mitigates, any actual or potential reverse sensitivity effects on surrounding land-based primary production activities.

45. Read in context, I submit that the word "overall" in clause 3.8(1)(a) means "total" or "complete", and across the whole farm .

46. In addition, the reference is to productive *capacity* ... *over the long term.*

47. The NPS-HPL defines productive capacity as follows:

> **Productive capacity**, in relation to land, means the *ability of the land* to support land-based primary production *over the long term*, based on an assessment of:
>
> (a) Physical characteristics (such as soil type, properties, and versatility); and
>
> (b) Legal constraints (such as consent notices, local authority covenants, and easements); and
>
> (c) The size and shape of existing and proposed land parcels.

48. This definition, as with the wording of clause 3.8 itself, confirms the future focus of the NPS (apposite in a sustainable management context), in dealing with productive capacity over the long term.

49. No sensible argument can be made that converting 18 hectares or 20% of the most productive part of a farm property (the LUC land portion) to housing, retains its productive *capacity* (or "ability to support land based primary production") *over the long term*.

50. As Mr Tither explains in his evidence, preserving yield potential across the property as a whole will be important in the future, for physical and financial viability,[17] and farming can at times, be a marginal proposition.

51. As matters stand (current state scenario), or at any point in the future, the owner of the subject farm property could increase *production* through alternative uses of (or improvements to) any or all of that property. This includes on the 18 hectares of land being subdivided for housing (with Mr Tither giving an example of planting herb plantain on that LUC3 land area[18]).

52. However, the entire 377 hectare area of the property has the *capacity* to be enhanced in this way, and likely more so on the 86ha of LUC 3 land within the farm (20% of which is being removed from production).[19]

53. Both existing and future productive capacity are necessarily and unavoidably reduced if options including use or management changes to increase production across the property as a whole (or 'overall') are removed by carving out 18 hectares of the most productive soils, which the farm currently holds.

54. All that is really being achieved though the applicant's suggested approach is increasing *production* (or productive potential) on one part of the property through drainage, to offset the complete loss of productive *capacity* from another.

55. But that is not how Clause 3.8 is worded, and not what the NPS-HPL intends.

56. The NPS (including clause 3.8) is about keeping options open for the future, not foreclosing them for part of the property; or forcing them to be applied on the remainder, in order to achieve "no net loss".

57. Once exercised in that way (through offsetting or 'mitigation'), the management or enhancement option is spent. That is the antithesis of sustainable management of a *finite* resource (NPS Policy 1). It does not

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[17] Mr Tither's evidence, at paragraph 108.
[18] Mr Tither's evidence, at paragraph 71-76.
[19] Mr Tither's evidence, at paragraph 28.

serve to protect highly productive land for use in land based primary production, for future generations (NPS, Objective 2.1).

58. In short the word "overall" under clause 3.8 does not provide for an "unders and overs" approach. It means simply what it says – overall, that is total. The subdivision necessarily fails this requirement, and so must be avoided under Policy 7, by refusing consent.

59. Mr Wiffin will address this offsetting issue in his evidence as well, from a planning perspective, and on the facts of this case.

Actual Loss in Productive Capacity

60. Putting offsetting to one side, the actual (real) loss in productive capacity can them be considered.

61. Mr Tither explains that the Farmax model draws on a number of the key aspects of the definition of productive capacity under the NPS-HPL, including physical characteristics such as slope, aspect, drainage and pasture composition, along with the size of the different blocks of land, to determine productive capacity.[20]

62. Mr Tither's modelling demonstrates that removal of 18 hectares of the most productive land on the farm would result in a 7.6% decrease in total (meat and wool) production,[21] as a measure of loss in productive capacity.

63. Mr Tither refers to Mr Grant's assessment (in the technical memorandum referred to by the reporting officer) based on the "carrying capacity" of the land in terms of stock units,[22]at 5.9%.

64. Whichever metric is correct, the short point is that overall or total productive capacity is not retained through the loss of 18 hectares of the most productive land currently available within the overall farm property concerned.

Productive Capacity v Farm Surplus

65. My next substantive point is to distinguish between 'economic farm surplus' (the focus of Mr Goodman's assessment) and productive capacity.

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[20] Mr Tither's evidence, at paragraph 64.
[21] Mr Tither's evidence, at paragraph 21.
[22] Paragraphs 11.5-11.6 of Mr Grant's evidence.

66. A snapshot (point in time) 4.5% reduction in economic farm surplus (as assessed by Mr Goodman) does not demonstrate that overall productive capacity is retained, either on a current state basis, or over the longer term.

67. In short, farm surplus and productive capacity are different things.

68. Whether the farm might continue to make profit under current settings is beside the point. As Mr Tither explains, at present wool production might be significant in volume terms, but still make a loss.[23] That does not mean the farm has marginal productive capacity, for wool production or otherwise.

69. That is why Mr Tither has based his assessment on physical production of wool and meat (as determined under the Farmax model) as a better measure of productive capacity, than farm surplus.

Loss of Most productive Land

70. That further point aside, as Mr Tither's evidence also demonstrates, the reduction in economic farm surplus is actually much greater than assumed (or assessed) by Mr Goodman, taking into account:

- The higher pasture growth rates and higher feed quality from the more productive flats (18 hectares of which is being lost through subdivision), with Mr Tither assessing that this area has a 39% higher pasture growth than the farm average.[24]

- That some of the costs assumed in the modelling are fixed, and do not reduce with the reduction in available land area.[25]

71. On this basis, Mr Tither determines that revenue actually declines by as much as 15%, with up to a 65% reduction in economic farm surplus.[26]

72. As Mr Tither also explains, and in terms of the overall productive *capacity* of the farm, removing the high quality flat land in turn removes a number of "policy choices" otherwise available on the property, including the more productive stock finishing options.[27]

73. That is, the hill country on the property (which is left in greater proportion) is more suited to a combination of breeding stock and lower

[23] Mr Tither's evidence, at paragraph 65
[24] Mr Tither's evidence, at paragraph 35.
[25] Mr Tither's evidence, at paragraph 22.
[26] Mr Tither's evidence, at paragraph 15.
[27] Mr Tither's evidence, at paragraphs 38-48.

growth rates on finishing stock. The subdivision potentially removes the more productive options from the farm system.

Summary- Productive Capacity under the NPS-HPL

74. In summary, I respectfully submit that the Goodman Rural Report modelling assumptions and conclusions as produced through Mr Goodman's evidence are wrong, both conceptually and in terms of the specific metrics generated.

75. Reducing the available farm enterprise options through removal of 18 hectares (or about 20%) of the most highly productive land on the property, would not retain the ability of the farm to support land-based primary production over the longer term; that is, retain its overall productive *capacity*.

76. The offsetting approach is flawed, and the limited exception in Clause 3.8 is not available.

77. The application must therefore be declined, to "avoid" (prevent the occurrence of) the subdivision of highly productive land under policy 7, and meet Objective 2.1 of the NPS (being to protect the highly productive land within the subject farm for use in land- based primary production, both now and for future generations).

78. The remaining submissions now addressed, to that extent, are in the alternative.

Ministry for the Environment Guide to Implementation – NPS-HPL

79. It is accepted that there is Environment Court authority to the effect that little weight should be given to the Ministry for the Environment "*Guide to Implementation*" on the NPS-HPL.[28]

80. As that document itself records, it has no official status and does not alter the law of New Zealand, nor constitute legal advice.[29]

81. I nevertheless respectfully submit that while the focus should be on the actual wording of the NPS-HPL (as I have addressed to this point), some assistance can at least be obtained from the guidance document, ie that it is open to the Hearings Panel to be at least *informed* by that guidance document, as a relevant factor under s 104(1)(c) of the RMA.

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[28] *Gray v Dunedin City Council* [2023] NZEnvC 45 at [206].
[29] Disclaimer on the inside of the cover page.

82. The Guidance document makes the following relevant points in relation to the exemption clause (3.8), upon which the applicant 'hangs its hat':

(a) Consideration of the application in terms of cumulative loss of highly productive land may be relevant, including previous subdivision and planning history of the site and neighbouring sites.[30]

(b) Retaining the overall productive capacity of land over the long term means there is *no loss* in the potential of the subject land for land-based primary production, when viewed over a 30 year timeframe, based on reasonably foreseeable conditions.[31]

(c) It is unlikely that subdivision into rural lifestyle lots would meet the productive capacity test, as opposed to subdivisions such as boundary adjustments or for amalgamation or smaller lots still capable of being used for a range of primary production purposes.[32]

(d) Economic viability is not a consideration in an assessment of productive capacity.[33]

(e) An assessment of productive capacity should be at a sufficient level of detail appropriate to the proposal, to ensure an informed decision can be reached and needs to be considered over at least a 30 year timeframe.[34]

83. While not relying on his Guideline in its own right , I submit that it is consistent with the submissions I have made based on the express wording of the NPS-HPL, and the authorities I have cited from the Senior Courts, as to how that wording should be interpreted and applied.

Cumulative Loss

84. Any argument that a "negligible", small (or otherwise) percentage reduction in economic farm surplus or stock carrying capacity is available under the NPS-HPL, must be wrong in principle.

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[30] Page 23.
[31] Ibid.
[32] Ibid.
[33] Page 24.
[34] Ibid.

85. That argument raises the classic "death by a thousand cuts" proposition, which the Environment Court has rejected in many cases dealing with issues of cumulative effect.

86. For example, as the Environment Court found in *McKenna v Hastings District Council,* even a very small (5,000 m^2) reduction in productive land area can offend the policy framework (in that case seeking to sustain the life supporting capacity of the Heretaunga Plains). [35] The Environment Court stated:

> That said, the reason why its adverse effects are not significant is because the area of land thus removed from the pool of *Plains* productive soils is, percentage-wise, rather insignificant. *The same argument could be mounted in support of an application to subdivide off a 4,000-5,000 m^2 house site from any Plains zoned horticultural lot, of which there are any number.*

87. The fact that the percentage reduction in the instant case may seem small, does not mean it should be condoned.

88. To the extent relevant,[36] as the wording of clause 3.8 makes clear, cumulative loss across the District is to be avoided, where possible.

89. As Mr Ryan notes in the s42A report,[37] it is *possible* to avoid the cumulative loss of productive capacity across the District by refusing resource consent to subdivisions seeking to convert highly productive land to housing.

90. In that regard, it is notable that the s 42A report refers to this proposal being a "logical extension" to a previous 20 lot rural lifestyle subdivision, which was granted resource consent in March 2020.[38]

91. I submit that the application amounts to a form of "environmental creep", and that the preceding subdivision sets a poor precedent which both should not (and now cannot, as a result of the NPS-HPL), be followed.

92. As Mr Tither also demonstrates through his evidence, the cumulative loss to the farm property being subdivided of both this and the preceding subdivision stage is a total reduction in productive capacity of some 9.5%.[39]

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[35] *McKenna v Hastings District Council* W06/2008 at [32].
[36] As Mr Ryan explains, if clause 3.8(1) is not met, clause 3.8(2) is not engaged (paragraph 4.121 of the s42A report).
[37] Paragraph 4.122.
[38] Paragraph 3 of the s 42A report.
[39] Paragraph 91 of Mr Tither's evidence.

93. Again, the Environment Court has confirmed that cumulative effects can embrace the impacts of prior approvals.

94. As the Environment Court found in *Outstanding Landscape Protection Society v Hastings District Council*:[40]

> [50] The definition of *effect* in s3 of the Act includes ... *any cumulative effect which arises over time or in combination with other effects ... regardless of the scale, intensity, duration or frequency of the effect* ... If an existing activity (or, in terms of *Queenstown Lakes DC v Hawthorn Estate Ltd* (2006) 12 ELRNZ 299, *a consented and probable activity), has adverse effects, and the proposed activity also has an adverse effect which would add to the existing effects, then to comply with the definition one would have regard to the combined effects of both.* That is because the proposal will have an impact *in combination with other effects* even if its ... *scale, intensity, duration or frequency* ... is not, of itself, more than minor. That would comply with the ordinary meaning of *cumulative.*
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> [51] There is a passage in the Court of Appeal's Judgment in *Dye v Auckland Regional Council* [2001] NZRMA 513 which, taken literally, appears to hold that *cumulative effect* can only be one that arises from the proposed activity: ... *.All of these are effects which are going to happen as a result of the activity which is under consideration* [para [38]]. The consequence of that would be that only adverse effects emanating from the proposal itself could be brought to account. *There could be no cumulative effects [properly so called] created by combining existing or permitted effects with effects arising from the proposal. In turn, that would mean that so long as the adverse effects of the proposed activity are not of themselves more than minor a consent authority could never say ... This site has reached saturation point; it can take no more.*

95. I submit that the proposed subdivision would neither retain overall productive capacity in the instant case, nor avoid (where it is possible to do so by refusing consent) the cumulative loss of productive capacity in Central Hawke's Bay District.

Environmental Factors

96. A further dimension of the Goodman Rural Report which I submit is misconceived, is the argument that the land being removed from production is subject to pugging and consequent effects of sediment loss to the adjacent stream.

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[40] W24/2007.

97. Again, as addressed by Mr Tither in his evidence,[41] the response is that the land area concerned should be farmed properly, in accordance with best practice and stock fencing regulations, to avoid or minimise those environmental impacts, rather than using this as a pretext to convert the land into housing.

Proposed Plan

98. Mr Wiffin's evidence supports the findings in the s 42A report to the effect that as well as being contrary to the NPS-HPL,[42] granting the application would be contrary to those objectives and policies of the Proposed Plan which serve to give effect to the NPS-HPL.

99. Specifically, Mr Wiffin supports the finding in the s 42A report that the proposed subdivision would be contrary to the Proposed Plan objectives underpinning the Strategic Direction for rural land under the Proposed Plan.[43]

100. I further submit that the s 42 report rightly finds that the Proposed Plan should be given greater weight than the operative District Plan on this question.

101. As the reporting officer records, the Proposed Plan introduces a new strategic direction for the rural land resource which largely aligns with the NPS-HPL.[44] It represents a significant policy shift from the strategic direction in the operative District Plan.[45]

102. Case law under the RMA on the question of District Plan weighting (operative versus proposed) is well established and clear.

103. As the Environment Court recently recorded in *Guthrie v Queenstown Lakes District Council:*[46]

> [68] The leading case on the weight to be applied to operative and proposed plans is *Keystone Ridge Ltd v Auckland City Council.* The extent to which the provisions of a proposed plan are relevant should be considered on a case by case basis, and might include: *the extent to which a provision has been exposed to independent decision-making*; circumstances of injustice; *and the extent to which the new measure, or absence of one, might implement a coherent pattern of objectives and policies in a plan.* In assessing weight, each case

[41] Paragraphs 95-97 of Mr Tither's evidence.
[42] Paragraphs 8 and 4.131 of the s 42A report.
[43] Paragraphs 4.33 and 4.34 of the s 42A report.
[44] Paragraph 9 of the s 42A report.
[45] Paragraphs 4.109-4.113 of the s 42A report.
[46] [2021] NZEnvC 079 at [68].

should be considered on its merits. *Where there had been significant change in Council policy, and the new provisions are in accord with Part 2, the Court may give more weight to the proposed plan.*

104. While notified prior to the NPS-HPL, there is now a greater degree of alignment between the Proposed Plan and the requirements of the overriding national direction, reflecting the Minister's 'policy choice' as to how productive land is to be sustainably managed to meet the Act's purpose.

105. The Proposed Plan has been tested through submissions and hearings; implements a coherent pattern of objectives and policies, and otherwise reflects a more recent expression of the RMA purpose and principles set through Part 2 of the Act.

106. Drawing again on the findings of the Court of Appeal in *R J Davidson* in this respect ,"a fair appraisal of the policies" of the Proposed Plan means the appropriate response to this application is obvious, "it effectively presents itself".[47]

107. That is, having regard to the provisions of both the NPS-HPL and the Proposed Plan on the question of highly productive land and the District's Strategic Direction for the rural land resource, consent should be refused.

108. As submitted earlier however, to the extent that the Proposed Plan does not yet (however) give effect to the NPS-HPL, the latter must prevail. That necessarily follows from the direction in s 75(3).

109. To that extent, I submit that Ms Foster's planning opinion that the provisions of the Proposed Plan are met on the basis that "highly productive land" is undefined under the Proposed Plan (and confined to land within the Rural Production zone), is also wrong.[48]

110. Ms Foster has managed to assess the subdivision proposal as being consistent with the Proposed Plan, on basis that the property falls within the General Rural zone (rather than Rural Production zone), such that (for example) no 'highly productive land' is being fragmented (contrary to Objective RLR-03).

111. I submit you cannot treat highly productive land in the way advanced by Ms Foster.

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[47] *Davidson* at [74] as cited above.
[48] Refer for example paragraphs 87-89 of Ms Foster's evidence.

112. The intention of the Proposed Plan, in moving in the direction of the NPS-HPL to maintain the productive capacity of highly productive land and protect it from further fragmentation, must be sheeted to highly productive land as defined under the NPS-HPL, in order for the objectives and policies of the Proposed Plan to give effect to that higher order planning instrument.

Reverse Sensitivity

113. Clause 3.8 also addresses the issue of reverse sensitivity effects.

114. As the immediately adjoining land owner, Mr Harris will give detailed evidence regarding his concerns over the potential for 48 houses being established from as close as 20 metres to the boundary of his farm, with those houses being reliant on roof water as a drinking water supply, and within a development clearly intended for beach lifestyle accommodation.

115. He will also explain his concerns regarding constraints on access to the farm and otherwise as to the overall productive capacity of Punawaitai Station as a whole.

116. My client disagrees with the finding in the s 42A report that reverse sensitivity effects can be adequately managed (appropriately mitigated).[49] Mr Wiffin will also address this point further in his evidence.

117. In any event, and as set out above, that is not the test under the NPS-HPL, but instead (and first) to avoid such effects *if possible*.

118. In real world farming terms, a 20 metre distance is nothing at all as between a beach side bach and a farm unit on which livestock and machinery graze and operate on a 24-7 /365 day a year basis generating noise, odour and other effects not expected within a residential setting.

119. For this further reason, my client submits that consent should be refused.

Conclusion

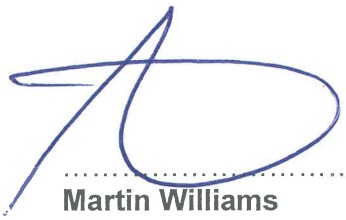
120. I firmly but respectfully submit that the Hearings Panel has no choice but to decline the application, in order to protect highly productive land within Central Hawke's Bay District for use in land-based primary

[49] Paragraph 4.37 of the s 42A report.

production, and deliver on the Strategic Direction for the rural land resource contained in the Proposed Plan.

121. The NPS-HPL is meant to put a stop to housing development on highly productive land. A subdivision creating 48 lots on which dwellings can be established as of right would do considerable violence to that national direction, and is contrary to its express wording.

122. The application must be refused consent accordingly.



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Martin Williams
Counsel for the Havelock Bluff Trust