

BEFORE THE INDEPENDENT HEARINGS COMMISSIONER

IN THE MATTER OF: An application for subdivision consent, pursuant to section 11 RMA for a 11-lot subdivision (8 rural residential allotments, 2 balance lots and a boundary adjustment (amalgamation)

AND

IN THE MATTER OF: A hearing by Central Hawke's Bay District Council

OPENING STATEMENT OF RYAN O'LEARY – PLANNING

Dated 27 June 2024

Determination of Activity Status under the Proposed District Plan (PDP)

1. The subdivision is assessed as a Discretionary Activity under SUB-R5(10) of the PDP. This rule applies to any lifestyle subdivision in the Coastal Environment (CE).
2. The activity status has not changed and s88A is therefore not necessary to consider further. The proposal is a Discretionary Activity under the Operative District Plan (ODP) and PDP.

Appeals on the PDP

3. As requested, I have sought information on the status of the appeals on the PDP. I attach and email and attached document provided by Council's Planning Manager, Ms Kim Anstey, which details the matters subject to appeal and a summary of the current status relevant to the General Rural Zone (GRUZ) and Coastal Environment (CE). I understand that the scope of the appeals relevant to this subdivision will soon be beyond challenge, subject to the Environment Court issuing a Consent Order accordingly.

RM 220210

4. RM220210 involves a two-lot subdivision of the application site. Both lots are in excess of 50ha and each have an identified a building platform corresponding with that on proposed Lots 7 and 9 for RM230016. Those building platforms are more readily accessible from Williams Road. Mr McKay has outlined that RM220210 forms part of the existing environment. I agree. I do note however, that RM220210 is subject to a consent notice condition restricting any dwelling to only those identified building platform areas. Those locations are also different to Mr Bray's 'pick', being Lot 8, for a building platform which might otherwise be permitted on the lot.

Minimisation of Fragmentation of the Rural Land Resource under the PDP

5. I have comprehensively set out in paragraphs 4.16 to 4.36 of the s42A Report a cascade of provisions which collectively seek to 'limit' rural lifestyle subdivision in the GRUZ and *minimise* fragmentation of the rural land resource. The Strategic Direction

for the Rural Land Resource applies to all rural zones. It contains some provisions which are directed to ensuring highly productive land is specifically protected for further fragmentation (RLR-03). However, it also contains provisions which apply to 'rural land' more generally. RLR-04 for example, seeks that *"Residential and other activities that are unrelated to primary production are directed to locations zoned for those purposes and that are not situated on highly productive land"*. It then follows that RLR-P3 seeks *"To minimise fragmentation of the District's rural land resource through directing lifestyle subdivision to the Rural Lifestyle Zone and limiting lifestyle subdivision in the General Rural Zone..."*

6. Although the Issue RLR I1 relates to the *Incremental Loss of Highly Productive Land*, the policy response is not limited to this issue. In my view, the s32 Report and s42A Report on the plan change clearly indicate that the PDP is to give primacy to primary production activities throughout the zone (not just on highly productive land). This is clear in RLR-02 which states: *"The primary production role and associated amenity of the District's rural land resource is retained, and is protected from inappropriate subdivision, use and development"*.
7. It is not my evidence, as Mr Lawson asserts, that the PDP acts as a prohibition to rural lifestyle subdivision. As stated in my rebuttal evidence, RLR-P3 and GRUZ-P8 seeks to *limit* rural lifestyle subdivision and not avoid or prevent, and, it is not an absolute bar. Rather, I consider that the cascade of provisions from the *Strategic Direction, Rules and Assessment Matters* seeks to limit the scale, density and frequency of rural lifestyle subdivision.
8. I note that there has been some discussion around the policy outcome that the "1 in 3" rule is aiming to achieve. While it may not be perfect, this rule does act to "limit" the scale, density and frequency of rural lifestyle lots in the GRUZ (outside the Coastal Environment), and gives some indication of what type of lifestyle development is considered to be appropriate in the GRUZ.
9. This is in contrast with the ODP approach which was very permissive with no 'brakes' applied to the rate of change in the rural zone. Commissioner Littlejohn commented

on the potential reasons for this as a planning technique. Helpfully, the hearings Panel's decision on the PDP recorded the following (emphasis added)¹:

*9.3.8 The reporting planner also did not support removal of the condition limiting lifestyle subdivision in the General Rural Zone (outside of the Coastal Environment Area) to a site once every 3 years, as sought by Hort NZ and IA & PD Waldrom. Without this 'limitation', she considered there would be no differentiation from what can occur currently under the ODP rules, and therefore there would be little control over the **quantity and speed** at which land fragmentation could occur within the General Rural Zone into the future.*

...

9.6.9. The Panel agrees with the reporting planner that the proposed rules limiting lifestyle lots to 1 lot per 3-year cycle would allow landowners in the General Rural Zone to have some ability to create new titles whilst ensuring the General Rural Zone retains its focus, providing for and supporting primary production in the District.

10. I accept that the plan does enable rural lifestyle subdivision in compliance with SUB R5(1)(b) as a Controlled Activity, signalling that this activity is appropriate. However, when compliance with these conditions is not achieved the proposal must be assessed as a Discretionary Activity. AM-13 contains specific Assessment Matters which I set out below for convenience (emphasis added).

SUB-AM13

5. *That the subdivision **does not result in any more than one lifestyle site** being created from the title subject to the subdivision application.*
6. *Whether the proposed lifestyle site in the General Rural Zone is being created within 3 years of any prior lifestyle sites being created from the subject title, or any previous title that has become part of the subject title. If more than one lifestyle site is created within the 3-year period, **the application may be declined on this basis.***
7. *Where multiple sites greater than 20 hectares are being created in one subdivision or over successive applications, site configuration, shape and timing will be given particular consideration with regard to appropriateness for primary production activities. Such subdivisions should not be undertaken with the intention of 'setting up' future lifestyle site subdivisions. If this is found to be the case, the application may be declined on this basis.*

¹ Topic 3B: Rural Environment: Rural Zones, Rural Noise, Rural Subdivision

11. I consider RLR-P3 seeks to minimise land fragmentation *through directing lifestyle subdivision to the Rural Lifestyle Zone and*, relevant to this application *limiting lifestyle subdivision in the General Rural Zone*. The PDP has not taken an approach to ‘manage’ lifestyle in the GRUZ. Rather, it intends to ‘minimise’ fragmentation. The limits set are particularly important given the PDP aims to ‘prevent large numbers of small holdings’ and limit the rate of change. For example, a Controlled Activity subdivision under SUB-R5(1) could only realistically complete 2 to 3 rural lifestyle subdivisions over the 10-year life of the plan when such provisions may be subject to further review.
12. Here, the proposed subdivision seeks to cluster a greater number of lifestyle sites together at a number and rate than would not be envisaged in the GRUZ (outside of the Coastal Environment) and contrasts with this policy direction which seeks to limit rural lifestyle subdivision.

Subdivision in the Coastal Environment under the PDP

13. In my opinion, the PDP makes a deliberate distinction for subdivision in the GRUZ that is located *inside* and *outside* the CE. The Section 32 Report² for the Coastal Environment provisions signals that this distinction is intentional:

*In addition, the subdivision rules continue to make **all subdivision in the coastal environment a Discretionary Activity** (as is currently the case in the Operative District Plan), in recognition that the coastal environment is sensitive to inappropriate subdivision. A Discretionary Activity status enables due consideration of adverse effects on the coastal environment and natural character on a case-by-case basis. Proposed policies CE-P1 to CE-P8 will improve and strengthen guidance for plan users in this respect.*

14. Lifestyle subdivision in the CE is not considered in the same way as within the broader GRUZ (outside of the CE), as recognised by both its rules, assessment matters and policy settings. Subdivision within the CE is subject to a number of more rigorous provisions, requiring consideration of the provisions of the Coastal Environment and including SUB-AM16 (quoted below with emphasis added). While the activity status has not changed between the ODP and PDP, I do note that the policies that sit behind that activity status has changed substantially.

² Section 32 Report on the Proposed District Plan, Coastal Environment, Page 33

SUB-AM16

Subdivision of land, including Lifestyle Sites within Outstanding Natural Landscapes and Features, Significant Amenity Features, and the Coastal Environment (including identified areas of High Natural Character)

1. *The design of the subdivision and the development it will accommodate, to ensure that it will not have adverse visual or landscape effects on the values of the feature, landscape or area (identified in ECO-SCHED5, NFL-SCHED6, and CE-SCHED7 of the District Plan) and will not detract from the natural character of the coastal environment. Reference will be made to the proposed nature and location of building platforms, roads and accessways, earthworks, landscaping, and planting. In particular, the subdivision will be assessed in terms of its ability to achieve the following:*
 - a. *Be of a scale, design and location that is sympathetic to the visual form of the coastal environment or the natural character area, landscape, or feature, and will not dominate the landscape.*
 - b. *Avoid large scale earthworks on rural ridgelines, hill faces and spurs.*
 - c. *Be sympathetic to the local character, to the underlying landform and to surrounding visual landscape patterns.*
 - d. *Be designed to minimise cuttings across hill faces and through spurs, and to locate boundaries so the fencing is kept away from visually exposed faces and ridges.*
 - e. *Where planting is proposed, its scale, pattern and location is sympathetic to the underlying landform and the visual and landscape patterns of surrounding activities.*
 - f. *Where necessary, for the avoidance or mitigation of adverse effects, any proposals to ensure the successful establishment of plantings.*
 - g. *Be sympathetic to the natural science, perceptual and associational values (including for tangata whenua) associated with the natural character area, landscape, or feature.*

15. There has been some discussion about when SUB-R5(10) applies. Mr Lawson suggests that the lifestyle site must be within the Coastal Environment. My interpretation of SUB-R5 is that it applies to “*subdivision to create a Lifestyle Site(s)*”. It is not the location of that lifestyle site that engages this rule. It is subdivision for that purpose, irrespective of where that lifestyle lot is to be located. This is consistent with the previous approach in the ODP where the subdivision of land in the coastal margin would be a Discretionary Activity.

Potential Subdivision of neighbouring lots

16. Mr Yule has referred to the potential to subdivide other lifestyle sites on adjoining lots 'as of right'. In response, I note that:
- a. Mr McKay and I agree that no subdivision is provided for as a permitted activity.
 - b. In my view, subdivision of land for any lifestyle site within the CE overlay would be a Discretionary Activity under SUB-R5(10).
 - c. Outside the CE, a controlled activity subdivision is provided for where SUB-R5(1)(b) is complied with (e.g. more than one rural lifestyle site no sooner than 3 years after the title is created; and with a 20ha+ balance lot). However,
 - d. If the land contains a Significant Natural Area (SNA), Historic Heritage (HH) item, Schedule of Areas of High Natural Character (CE-SHED7), or a Site or Area of Significance to Maori (SASM) the subdivision would be a Restricted Discretionary Activity under SUB-R5(2). Similarly, if it is affected by a Natural Hazard identified on the Planning Maps it would be a Restricted Discretionary Activity under SUB-R5(3).
17. Mr Yule and Mr McKay have referred to the Land Covenant restriction to apply to several of the adjoining lots (Condition #62). Mr McKay clarified in his s92 response that, for the avoidance of doubt, this was not intended to exclude any subdivision related to the creation of Conservation Lots under SUB R6 and SUB R7. In other words, the applicant's proposed covenant still provides for the creation of rural lifestyle lots during the 9 year stand-down period in the land covenant in accordance with those rules.

Precedent and Integrity of the Plan

18. The Commissioner and Mr Lawson discussed the reference made in the s42A Report on the PDP reflecting the Community's most recent aspirations for the District. I mean this only to say that the provisions of the PDP have only recently gone through a full Schedule 1 process. This was the same language used by the Environment Court in

Stone vs Hastings District Council [2019 NZEnvC101]. This case involved an examination of how the overall provisions of the Hastings District Plan sought to 'limit' rural lifestyle subdivision³.

19. Mr Lawson submitted that he was not aware of any other rural lifestyle subdivision applications being processed by CHBDC which were lodged under the ODP. I note that Commissioners recently declined a 48-lot rural lifestyle subdivision at 25 Punawaitai Road (RM220003)⁴. This decision has been appealed to the Environment Court. I am also the processing planner on a 14-lot rural lifestyle subdivision in Kairaukau (RM220159). Both of these subdivisions are located in the GRUZ and contain some attributes listed in paragraph 83 of Mr McKay's evidence, but also notable differences. Notwithstanding this, a common thread is that the density and rate of rural lifestyle lots is a primary matter of contention and, in the case of RM22003 was a stated by the Hearing's Panel as a reason for their decision to decline the application.

20. Mr Lawson made some comment about the fact the application here is discretionary rather than non-complying, and suggests that this means that it cannot, by definition, be contrary to the objectives and policies. To clarify, I am not applying the objectives and policies as if they were a gateway, as would be the case if this was a non-complying activity. I am referring to them, and the importance of their consistent interpretation, in a s 104(1)(b) and (c) assessment context. Notwithstanding the case law referred to in Mr Lawson's submissions (from paragraph 9 onwards), my understanding is that there are also cases that allow discretionary activities to be declined because of their inconsistency with objectives and policies, notwithstanding the findings on effects⁵. There is no *anticipation* either way as to whether a proposal for discretionary activity is likely to be appropriate notwithstanding that the s104D Gateway Test does not apply.

³ I acknowledge several differences in this case compared to this subdivision

⁴ The site was also entirely LUC 3 soils and the primary reasons for decline related to the NPS-HPL. However, the panel found that the subdivision was inconsistent with the RLR and GRUZ provisions for rural lifestyle subdivision.

⁵ For example, *Rawling v Timaru District Council [2013] NZEnvC 67*

21. In terms of *Doherty v Dunedin City Council*, the Court there says that a discretionary activity is generally appropriate, but not on every site. For the reasons set out in my s 42A report and rebuttal evidence, I am of the view that this specific site is one of the sites where the proposed intensity of subdivision is not appropriate in light of the provision for both the zone and the Coastal Environment overlay. Where the PDP's strategic direction aims to 'prevent large numbers of small holdings', the application seeks 8 rural lifestyle lots clustered together, in addition to the residual development rights on Lots 11 and 12⁶. I consider that this is a large number of lots in the context. As one of the submitters characterised it yesterday, this amounts to 30 % increase in the size of the existing settlement. It also represents 21 years of development on the application site in accordance with the 1 in 3 rule. This would be a considerable level of intensity of subdivision within a single application.
22. Ultimately my concerns lie with the consistency of the proposed subdivision with the policy direction of the PDP which seeks to specifically limit this type of development in this zone and in this overlay, and my concern regarding the precedent effect flows from my view that this application is not consistent with the objectives and policies.
23. To find that this application is consistent with the PDP's objectives and policies and grant it consent, in my opinion, may negatively impact the effectiveness of the new policy direction. This is perhaps better understood as a precedent effect rather than a plan integrity one. While other applications may not share all of the features of this application, its approval may provide support for the further similar rural lifestyle applications throughout the GRUZ coming along behind it. I am concerned that granting this application as consistent with the objectives and policies may create what the Court in *Rawling* referred to as an *almost irresistible momentum* for the grant of such consents.

⁶ Albeit the scale of development is limited by condition 59 in the revised conditions circulated earlier by Mr McKay.