

# **RM 220003**

## **Paoanui Point Limited Application**

### **Decision of the Panel of Hearing Commissioners**

**Hearing held in the Central Hawke's Bay District Council Chambers  
on 12 and 13 July 2023**

#### **INTRODUCTION**

1. This is the report and decision of the Hearing Panel, Eileen von Dadelszen (Chair), Liz Lambert, and Grey Wilson. We were appointed by the Central Hawke's Bay District Council (CHBDC or 'the Council') pursuant to section 34A (1) of the Resource Management Act 1991 ("the Act" or "the RMA") to hear the Application (Subdivision consent RM 220003) lodged by Mr James Bridge on behalf of Paoanui Point Ltd ("the Applicant") and all submissions relating to it, and to make decisions, under section 357A of the Act.
2. This decision contains the findings from our deliberations on resource consent Application and has been prepared in accordance with section 113 of the Act.

#### **ATTENDANCES**

Applicant: Mr James Bridge, Landowner and  
Director of Paoanui Point Limited

Mr Quentin Davies, Legal Counsel

Mr Josh Marshall, Legal Counsel

Ms Christine Foster, Planning Consultant

Mr John Hudson, Landscape Architect

Ms Chantal Whitby, Landscape Architect

Dr Andrew Hicks, Ecologist

Mr Mateus Boaretto, Transport Engineer

Mr Son Tat Que Nguyen, Civil and Environmental Engineer

Mr Stephen Goodman, Farm Advisor

Mr David Dravitzki, Geotechnical Engineer

Submitters:

**Mr G.C. and Ms M.L. Harris,**

Mr Martin Williams, Legal Counsel

Mr Roger Wiffen (Planner)

Mr Phillip Tither (Agricultural Advisor)

**Pourerere Community and Character Preservation Society**

Ms Tracy Gay (Business owner and permanent resident of Pourerere Beach)

Ms Jan Harty

**Ivan, Jennifer, and Warren Bennet**

Reporting Officers:

Ms Laura Bielby, Legal Counsel

Mr Ryan O'Leary, Planning Consultant and Author of s 42A Report

Mr Lachlan Grant, Agricultural Scientist

Ms Rebecca Ryder, Landscape Architect

Mr Chris Rossiter, Transportation Engineer

Mr Wayne Hodson, Civil Engineer

Mr Lee Paterson, Geotechnical Engineer

### **Others in Attendance**

Hearing Facilitators: Ms Connie Mills, Hearings Manager

Ms Bianca Lord, Consents Support Officer

Ms Nelson-Smith, Chairperson of Waipukurau Marae, gave the opening Karakia

## **SUMMARY**

### **SUBDIVISION AND LANDUSE CONSENT**

3. Under delegated authority of Central Hawke's Bay District Council and pursuant to sections 9, 104, 104A 108, and 220 of the RMA 1991:
4. We refuse consent to the Application for the reasons given in this decision.

## PROCEDURAL MATTERS

5. Before the hearing, the Panel circulated and published three Minutes relating to procedural matters:

- Minute No 1 (9 June 2023), provided information relating to the hearing, and advice that the Panel had received a request from Kairakau Lands Trust, the authors of the Cultural Impact and Assessment, for the report dated 10 December 2022 not be distributed without prior consent because it contained sensitive information. The Panel advised its intention to issue an order pursuant to s42(2)(b) of the RMA prohibiting circulation and publication of the Cultural Impact and Assessment, with the exception of the section entitled “Conclusion and Recommendations”. The Minute also invited the Applicant (who had commissioned the Report) to confirm that this order would be acceptable to the authors of the Report.
- Minute No.2 dated 26 June 2023, resulted from the Applicant’s response. The Panel’s order under s 42(2)(b) of the Act prohibited circulation and publication of the Cultural Impact and Assessment, with the exception of the sections entitled “Further Considerations” and “Conclusion and Recommendations” on pages 61 to 64 of the document. We consider those pages include information which is useful to all parties involved in the hearing of this Application and circulation of them would not cause serious offence to tikanga Maori or disclose waahi tapu.)<sup>1</sup>
- Minute No 3 dated 3 July 2023, relates to the issue of land use consent. The Panel directed the Applicant to confirm whether or not a land use consent was being sought currently, and the Reporting Officer to advise whether, if a land use consent was being sought, all relevant matters had been considered and assessed. We also requested a specific recommendation from the Reporting Officer about the land use consent. At that time, and within Minute 3, we addressed the matter of section 91 RMA and our finding that no issue arose in this respect (i.e. we did not need to defer the hearing) as a result of the matter of land use consent.

We consider that the matter of what land use consent is required for the Application, and why, was addressed in an overly complicated and convoluted way at the hearing by way of evidence and submissions. However, that resource consent (land use and subdivision) is required for the proposal as a discretionary activity is not in dispute by any of the parties. Although subsequent (i.e. the 12 January 2024) submissions appear to potentially contradict this statement, we accept Counsel for the Applicant’s statement at para 10 of Opening Submissions as to what resource consent is required and why.

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<sup>1</sup> Minutes No1 (9 June 2023) and No 2 (26 June 2023) from Hearing Panel.

6. Before the hearing, a report was produced under section 42A (“section 42A Report”) on behalf of the Council by Mr Ryan O’Leary, Consultant planner. Details about this Report are set out below.
7. The s42A Report and the Applicant’s technical evidence were circulated before the hearing in accordance with section 103B of the Act to enable those documents to be read before the hearing.
8. A minor preliminary issue arose prior to the hearing being the need to confirm the name of the Applicant as it appeared in different forms in various documents. The Applicant’s Counsel, in the Memorandum of Applicant in response to Minute No.1 dated 13 June 2023 listed the Applicant as ‘Paoanui Point Limited’ and confirmed this verbally at the Hearing.
9. (a) The hearing of the Application was held at the Central Hawke’s Bay District Council Chambers, 28-32 Ruataniwha Street Waipawa. After a karakia led by Ms Nelson-Smith, the hearing began at 9am on Wednesday 12 July 2023.
10. In order to invite any comments or concerns from any parties, and in the interest of transparency, the Commissioners stated the following potential conflicts of interest. No party voiced any concern:
  - Commissioner Wilson: Mr Boaretto,
  - Commissioner Lambert: Dr Hicks and Mr Williams,
  - Commissioner von Dadelszen: Mr Tither and Mr Hudson
11. On 13 July 2023 after all submissions and evidence had been heard, the hearing was adjourned to enable information requested during the hearing (relating to possible conditions of consent) and a written right of reply to be provided by the Applicant’s counsel.
12. We visited the site on Wednesday 23 August 2023. This assisted us to gain an understanding of the context for the Application, and to gain a better understanding of the effects of the proposal and the issues that were discussed at the hearing. On the site visit we did not meet with, nor discuss any matters associated with the hearing with, any of the parties.
13. After the hearing was adjourned, we circulated, and arranged to be published, five Minutes:
  - Minute No.4 (23 August 2023) clarified details about the proposed caucusing of Ms Foster and Mr O’Leary about possible conditions, and the Timetable for a Reply (4 September 2023) provided by the Applicant.

- Minute No.5 (6 September 2023), related to the request from the Applicant’s Counsel to extend the date for the Reply. We directed that the Reply be provided by 11 September 2023.
  - Minute No.6 (15 September 2023), following a request from the Applicant’s counsel, and consultation with all parties, we directed that the Reply be provided by 30 October 2023.
  - Minute No.7 (22 November 2023) related to a request from the Applicant’s counsel to suspend the processing of the Application pursuant to section 91A(3)(c) of the Act. The Panel determined that the requested extension pathway of this section of the Act was not available to the Applicant due to the time the Application had already been on hold. We shared the Applicant Counsel’s memorandum explaining the request and invited all parties to provide submissions/comments about this request.
  - Minute No.8 (5 December 2023) following consideration of the Applicant’s counsel’s submission, and submissions from other parties, we directed that the Reply be provided by 12 January 2024. We also requested that the Reply include comment on some specific matters discussed at the hearing.
14. On 12 January 2024 we received, and arranged to be circulated and published to all parties:
- Closing submissions from the Applicant’s counsel; and
  - A suite of Draft Conditions of Consent, provided by the Applicant’s counsel, based on those originally suggested by the s 42A author, should the Application be consented, and amended following discussions between the planners for the Applicant and the Council.
15. At paragraph 72 of the closing submissions, the following statement was made: *“The Applicant’s position is that this Application is lawfully on hold under the RMA. Its position is that the Panels latest minute purporting to require the filing of these closing submissions is invalid as it was issued while the Application is on hold. These submissions are filed without prejudice to the Applicant’s position.”*<sup>2</sup>
16. Our position regarding the Applicant’s ability to place the Application on hold after the hearing is set out in Minute 7. We have treated the submissions from the Applicant received 12 January 2024 as a right of reply, and we have determined that the hearing is closed as per Minute 9.

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<sup>2</sup> *Legal Submissions of Counsel for the Applicant 2 January 2024 Q Davies and J Marshall para 72, pages 15-16.*

17. Mr Williams, Counsel for Havelock Bluff Trust submitted a memorandum dated 22 January 2024 in response to the 12 January 2024 submissions from the Applicant's legal Counsel. There is no ability for any party to respond to a right of reply from an Applicant, and accordingly we have not considered Mr William's memorandum any further in our determination of the Application.
18. The hearing was formally closed by Minute No 9 on 24 January 2024.
19. Minute No.10 (12 February 2024) directed, pursuant to s 37(1)(a) of the Act, that the final date for the Panel's written decision would be Friday 23 February 2024.

## **SECTION 113 OF THE RESOURCE MANAGEMENT ACT 1991**

20. Section 113(3) of the Act states:

*A decision prepared under subsection (1) may, -*

*(a) instead of repeating material, cross-refer to all or a part of -*

*(i) the assessment of environmental effects provided by the applicant concerned:*

*(ii) any report prepared under section 41C, 42A, or 92; or*

*(b) adopt all or a part of the assessment or report and cross-refer to the material accordingly.*

21. In the interests of brevity, we make use of section 113 of the Act and focus our assessment of the Application on the principal matters in contention.

## **BACKGROUND**

22. The Application, made in accordance with section 88 of the Act, was lodged with the Council on 23 December 2021. Requests by the Council for further information under section 92 of the Act, between 17 March 2022 and 9 August 2022, were followed by a request pursuant to section 95A (2)(a) of the Act by the Applicant for the Application to be publicly notified, acknowledging that a response to a further information request for a Cultural Impact Assessment was still to be provided. Following acceptance of a Notification Report, dated 21 September 2022, the Application was publicly notified on 22 September 2022, in accordance with section 95B of the Act and with clause 10 of the Resource Management (Forms, Fees, and Procedure) Regulations 2003.

## **PROPOSED ACTIVITIES**

23. A full description of the proposal is contained within the Application documents provided by the Applicant and described in the section 42A report.

24. The resource consent applied for is a Subdivision and Land Use Consent RM 220003.
25. “The Applicant proposes;  
to subdivide 25 Punawaitai Road, Pourērere Beach into:
- (a) *48 allotments suitable for residential development plus the balance lot;*
  - (b) *Three lots of shared open space*
  - (c) *One lot for stormwater retention and treatment; and*
  - (d) *Two lots for shared access.”*<sup>3</sup>
26. “This is intended to provide a comprehensive rural-lifestyle development (subdivision) involving 48 rural-residential sections, an allotment for stormwater disposal and 3 lots shared open spaces. A large (358.77ha) balance allotment will continue to be used for agricultural purposes. The proposed subdivision was intended to be implemented over a series of stages.....”
27. “...The proposal would provide a logical extension to a previous 20-lot rural lifestyle subdivision, referred to as Stages 1 and 2, which obtained resource consent on 9 March 2020 (RM180160 and RM180160A) and has since been completed. The proposal provides a continuation of the rural-lifestyle pattern generated by this subdivision, including a regularised road layout and is well-contained within its localised landform and dominant hillside.”<sup>4</sup>
28. The Application and associated Assessment of Effects on the Environment(“AEE”) were prepared on behalf of the Applicant by Ms Christine Foster of CF Consulting Services Ltd. The AEE was supported by technical reports:
- Transport Impact assessment: Urban Connection Limited
  - Infrastructure Report including Geotechnical Report: Fraser Thomas Limited
  - Hazard Report: HB Emergency Management
29. Additional information was provided separately by an Archaeological Assessment of Effects by Heritage Services Hawke’s Bay, by a Cultural Impact Assessment by Kairakau Lands Trust, and a Report on the effect the subdivision would have on the productive capacity of the land, by Goodman Rural. (It should be noted that at the request of the Applicants, and after conferring with other

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<sup>3</sup> *Legal Submissions of Counsel for the Applicant, 12 July 2023, Q Davies and J Marshall.*

<sup>4</sup> *Section 42A Officer’s Report and Technical Evidence 21 June 2023 para 3 page 2.*

parties, we issued an order pursuant to section 42(2)(b) of the RMA, prohibiting the circulation and publication of the Cultural Impact Assessment by the Kairakau Lands Trust dated 10 December 2022, with the exception of the section entitled: “Conclusion and Recommendations” on pages 61 to 64 of the document.)

## **WRITTEN APPROVALS**

30. The s42A Report states that written approvals were received by the Council with the Application from Jillian Munro (the Trust Chairperson) and Mr James Kenrick on behalf of the Pourerere Hapu Trust. There was some lack of clarity in the evidence as to whether Mr Kenrick’s approval was provided as tangata whenua or as landowner or something else.
31. We queried this at the hearing and understand from the Applicant’s Counsel that Mr Kenrick’s written approval was provided as a potentially affected party as one of the owners, and as speaking on behalf of some of the owners of, the Pourerere B Block. We received no further evidence regarding what the potential effects of the proposal on this land block are, nor why written approval was sought from this party other than Mr Bridge’s statement that Mr Kenrick is a local kaumatua.
32. We have made no further consideration of the potential effects of the proposal on these parties.
33. In their opening legal submissions Counsel for the Applicant contends that the effects on owners and occupiers of the first subdivision stage must be disregarded as they are bound by a land covenant against their title to join the Incorporated Society. Among the rules of the Society is a requirement that each member agrees to support any resource consent Application made by the Developer to subdivide any development on Lot 2 DP 564721 (being the Staged Development), Counsel then cites two cases that a generic agreement to give written approval to certain classes of resource consent Applications is itself approval for the purpose of section 104(3). We have accepted this legal argument.

## **SECTION 42A RMA REPORT**

34. The Council’s section 42A RMA Report (s42A Report) summarised the Application, describing the consent sought and the Application site, summarised the submissions received, and analysed the matters requiring consideration under the Act. The Report also included the following technical reviews:
  - Three waters consideration: Stantec
  - Traffic effects: Stantec
  - Geotechnical effects: Stantec

- Landscape effects: Boffa Miskell
- Productive capacity of the land and its soils: LandVision Limited

35. The Report also included recommendations to assist the Panel. The main recommendation was that the Application be refused. A suite of 62 draft conditions was also included as Appendix 1 to this Report to assist the Panel should it decide to grant consent to the Application. These Conditions were modified by the Applicant during the hearing and finally presented as 61 conditions with the Applicant's Reply on 12 January 2024. We understand the final "Draft Conditions" were a result of joint conferencing (informal) after the Hearing was adjourned between Ms Foster and Mr O'Leary.

## DESCRIPTION OF SITE

36. The site of the Application is described in the s42A Report<sup>5</sup>:

"2.13 The Application site is known as 25 Punawaitai Road, Omakere (formerly known as 62 Punawaitai Road). It is located off Punawaitai Road. It is legally described as Lot 2 DP 564721 (1037998) and Lot 22 571974 (1037998) ('the Site').

2.14 The Site is intersected by Makurapata Stream and adjoins the coast along the eastern boundary. The site and the surrounding environment are located within the Rural Zone of the Central Hawke's Bay District Plan and General Rural Zone under the Proposed District Plan. Part of the site is also located within the Coastal Margin Area of the ODP, and the Coastal Environment under the Proposed District Plan."

## RELEVANT RULES AND ACTIVITY STATUS

37. The s42A Report outlined the relevant rules and status of the activity under the Central Hawke's Bay Operative Plan which became operative on 27 July 2000 and the Proposed Plan which was publicly notified on 23 May 2023.<sup>6</sup>

Consent is required primarily because the subdivision proposes lots that are smaller than the minimum lot size standard of 4,000 m<sup>2</sup> set out in the Operative District Plan for the Rural Zone and because the proposal contains a private road, more than 10 residential lots will not have vehicle access directly onto a road and consequently the proposal does not meet rule 9.10(g) of the Operative Plan. The proposal also falls to be considered as a discretionary activity under the Proposed District Plan for the use of the open shared space lots under Rule GRUZ-R10(1)(a).

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<sup>5</sup> Section 42A RMA Report, Ryan O'Leary, pages 14-15.

<sup>6</sup> S 42A Report paras 2.5-2.15.

## SUBMISSIONS

38. The Application was publicly notified on 22 September 2022 following a request by the Applicant (under section 95A(3)(a)) and acceptance of a Notification Report on 21 September 2022.

## RELEVANT STATUTORY PROVISIONS

39. We have had regard to the relevant statutory provisions including the relevant sections of Part 2 and sections 104, and 104B, of the Act.
40. Under section 104(1), and subject to Part 2 of the Act, which contains the Act's purpose and principles, when considering an Application for resource consent and any submissions received, we must have regard to-
- (a) *any actual and potential effects on the environment of allowing the activity; and*
  - (b) *Any measure proposed or agreed to by the Applicant for the purpose of ensuring positive effects on the environment to offset or compensate for any adverse effects on the environment that will result from allowing the activity;*
  - (c) *Any relevant provisions of a national environmental standard, other regulations, a national policy statement, a New Zealand coastal policy statement, a regional policy statement or a proposed regional policy statement, a plan or proposed plan; and*
  - (d) *Any other matter the consent authority considers relevant and reasonably necessary to determine the application.*

41. As discussed above (para 32) we assess the subdivision activity as a Discretionary Activity under s 104 B:

*After considering an application for a resource consent for a discretionary activity.... a consent authority –*

- (a) *may grant or refuse the application; and*
- (b) *if it grants the application, may impose conditions under section 108.*

## RELEVANT DOCUMENTS

42. In accordance with section 104(1)(b)(i)-(vi) of the RMA, we have had regard to the relevant statutory provisions of the following documents:
- National Policy Statement for Highly Productive Land 2022 (NPS-HPL)

- National Policy Statement for Freshwater Management 2020
  - NZ Coastal Policy Statement 2010 (NZCPS)
  - National Environmental Standards for Freshwater 2020
  - Hawke's Bay Regional Resource Management Plan 2006 (HBRRMP)
  - Hawke's Bay Regional Coastal Environment Plan 2014
  - Central Hawke's Bay Operative District Plan (ODP)
  - Central Hawke's Bay Proposed District Plan (PDP)
43. Each of these documents is considered and discussed to the extent relevant in subsequent sections of this decision.

### **SUMMARY OF EVIDENCE HEARD**

44. Copies of all the written material submitted during the consent process are held by the Council and the questions and responses during the hearing were recorded and are held on the Council records. These recordings are available on request from the Central Hawke's Bay District Council.
45. In addition, we took our own notes of the verbal statements and verbal evidence presented and any answers to questions. We do, however, summarise and refer to relevant elements of the submissions, statements, and evidence in this decision, particularly in our discussion about the principal issues raised.
46. The Panel has carefully considered the positive effects that may arise should consent be granted and the reasons why the Applicant sought to establish this subdivision as an extension to the existing 20-lot development. We also appreciate the careful consideration given by the Applicant to providing an extensive suite of conditions designed to reduce or mitigate the main issues raised in the s42A Report and by submitters.
47. However, we find that the National Policy Statement for Highly Productive Land and the provisions in the proposed District Plan are clear about the need for land of this quality to be protected for use in land-based primary production, both now and for future generations. We find that we cannot grant consent to the Application because it does not meet the test of 3.8(1)(a) because the subdivision would enable approximately 17 hectares of highly productive land to be utilised for residential purposes and therefore the proposed lots do not retain the overall productive capacity of the subject land. This is in addition to our finding that the size of the proposed lots results in a pattern and density of development that we consider to be contrary to the objectives and policies of the Proposed District Plan, and that the reverse sensitivity effects associated with the proposal are not able to be avoided, remedied or mitigated by condition of consent.

## **ISSUES FOR CONSIDERATION**

48. In assessing the Application, we have considered the Application documents, all the submissions received, the evidence provided during the hearing, including the s42A Report and technical reports, the site visit and the conditions amended<sup>7</sup> as a result of discussion between the planners after the hearing was adjourned. In making our assessment, we are required to consider the actual and potential effects of the Applications on the existing environment, including lawful existing activities, permitted activities, and any activities authorised by existing resource consents. In dealing with the issues raised, however, we are aware that this subdivision is a Discretionary Activity and therefore may be granted, or may be refused, and if granted, conditions may be imposed.

### **Principal Issues**

49. Based on the evidence, we consider the principal issues in contention relating to the Application are:

- NPS-HSL and effects of the loss of highly productive land
- Natural Character, Landscape Character (including Rural Character and Amenity Effects)
- Reverse sensitivity effects

### **Other Relevant Issues**

50. We consider that the following are other relevant issues for our decision:

- Land transport network effects
- Geotechnical and natural hazards effects
- Ecological Effects

### **Other Issues**

51. Additional issues we considered include:

- Cultural effects and Effects on Tangata Whenua Values
- Archaeological effects
- Servicing and infrastructure effects

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<sup>7</sup> Attached to Reply dated 12 January 2024.

## PRINCIPAL ISSUES

### National Policy Statement for Highly Productive Land

52. There is agreement amongst all parties that the National Policy Statement for Highly Productive Land (NPS-HPL) is relevant to the consideration of the Application. All parties agree that the site where the subdivision is proposed, i.e. where the new allotments for residential purposes would be located, is classified as LUC 3 and specifically 3W1 meaning “soil wetness resulting from poor drainage or high water table, or from frequent overflow from streams or coastal waters first limits production”<sup>8</sup>. There are two other areas of Highly Productive Land (HPL, as defined in the NPS) with the same classification elsewhere in the Applicant’s subject site, being in the Balance Lot – proposed Lot 60. The remainder of the Balance Lot has an LUC 6 and 7 classification. The two other areas that are HPL within the balance lot are shown in the annexure of Mr Goodman’s evidence<sup>9</sup> (being the areas he has demarcated as Area 1 and Area 2 for drainage), noting that Mr Grant<sup>10</sup> provided clarification that the boundary of the extent of HPL is as in his more refined scale version. We accept that, and find that it has no further material impact on our assessment and determination of the matter.
53. In Opening Submissions<sup>11</sup> at para 3, Mr Marshall and Mr Davies, express the view that effects on class 3 soils as a result of the proposed subdivision will be minor. Although they do not consider any mitigation or offsetting of the loss of HPL that would result from the subdivision to be required in order to meet that test, they confirm that the Applicant nonetheless offers drainage conditions. These conditions would require that subsoil drainage, with discharge to constructed wetlands, be installed within the HPL in the balance lot such that the (they say minor) loss of productive capacity resulting from the subdivision would be offset.
54. The Applicant’s case is that either the loss of productive capacity resulting from the subdivision is so minor that it doesn’t trigger the avoidance requirement in clause 3.8(1), or that with the drainage offsetting activity, the overall productive capacity retention requirement of clause 3.8(1)(a) is able to be met (as asserted in para 29 of Opening Submissions).

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<sup>8</sup> As referred in *Legal Submissions of Counsel for the Applicant dated 12 January 2024 footnote 5 P F J Newsome, R H Wilde and E J Willoughby Land Resource Information System Spatial Data Layers: Data Dictionary (Landcare Research New Zealand, 2008)*.

<sup>9</sup> *Statement of Evidence Stephen Peter Goodman 28 June 2023*.

<sup>10</sup> *Technical memorandum for an Application for subdivision consent under the Resource Management Act 1991 in respect of 25 Punawaitai Road, Pourerere Beach para 9.7*.

<sup>11</sup> *Legal Submissions of Counsel for the Applicant 12 July 2023 Q Davies and J Marshall*.

55. The Applicant's planning and soil experts, Ms Foster and Mr Goodman respectively, are of the view that the relevant tests of the NPS-HPL are able to be met by the proposal and accordingly there is no impediment in that instrument to us granting consent to the Application.
56. The planning and soils experts for the Council, Mr O'Leary and Mr Grant respectively, are of the contrary view as are Mr Wiffen and Mr Tither, the planning and soil experts for the Havelock Bluff Trust as a submitter. They are all of the view that the proposed subdivision cannot meet the avoidance test of clause 3.8(1) because the overall productive capacity of the subject land over the long term will not be retained by the proposed lots. We heard submissions from Ms Beilby on behalf of the Council, and Mr Williams on behalf of the Havelock Bluff Trust supporting the positions of these experts. Whilst these parties do not consider that we can allow the subdivision under clause 3.8(1) and therefore there is no need to assess the proposal against the other provisions of the NPS-HPL, they have all, helpfully, and to varying degrees, provided us with evidence and submissions relating to those other provisions.
57. We find that indeed clause 3.8(1), and specifically clause 3.8(1)(a) [there is no contention from any party that clauses 3.8(1)(b) or 3.8(1)(c) are relevant], is the principal clause to be considered in our decision making. We set out our findings in relation to clause 3.8(1)(a) below.

#### **NPS-HPL Clause 3.8(1)(a)**

58. For clarity and as referenced by several experts, clause 3.8(1) of the NPS-HPL states:

##### *3.8 Avoiding subdivision on highly productive land*

*(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 long term*

#### **Meaning of Subject Land in the Application of Clause 3.8(1)(a)**

59. We have, prior to making our determination regarding the Application against clause 3.8(1)(a), considered the question of whether this clause applies to the whole of the Applicant's landholding or to only the HPL land within that landholding or something else. We consider the correct application of this clause to be to the land on which a land use change would be enabled if we were to grant consent to the proposed subdivision.

60. Counsel for the Applicant in the legal submissions dated 12 January 2024, addresses this matter, and sets out a contrary position to that of Mr Wiffen. We generally agree with Mr Wiffen's line of reasoning and do not agree with Messrs Marshall and Davies on this point.
61. At para 32 of the 12 January 2024 legal submissions, Messrs Marshall and Davies state that there is nothing in the NPS-HPL to support Mr Wiffen's view that the 'subject land' referred to in Clause 3.8(1)(a) (and therefore the land that we need to consider in terms of the requirement to retain productive capacity set out in that clause) only relates to land which is defined as HPL under the NPS.
62. Whilst we understand the point made by Messrs Marshall and Davies that productive capacity, as defined in the NPS-HPL, is not limited to LUC 1, 2 and 3 land, we do not agree with their position regarding the Application of 'subject land'.
63. The chapeau of clause 3.8(1) applies specifically to highly productive land and we read subclause (a) as simply replacing 'highly productive land' with 'subject land' for drafting purposes. Clause 3.8 does not refer to subdivisions that include highly productive land, but rather it specifically refers to the subdivision **of** highly productive land [our emphasis added] and we consider it is therefore clear that clause 3.8(1)(a) applies only to HPL. We think this is supported by the fact that there is no offsetting contemplated in the NPS, nor is an avoid, remedy or mitigate hierarchy in place with regard to the subdivision of HPL. We return to these matters later.
64. We note that the NPS-HPL in other provisions uses the term 'landholding', and relies on the meaning of that term set out in another national level instrument, being the Resource Management (National Environmental Standards for Freshwater) Regulations 2020. Clause 3.8(1)(a) does not use the term 'landholding'.
65. We also do not agree with Messrs Marshall and Davies that "*the prevailing purpose of the NPS is to protect loss of productive capacity*". There is nothing in the NPS to support this. As pointed out by Mr O'Leary and others, the NPS-HPL has a singular objective which is that "*highly productive land is protected for use in land-based primary production, both now and for future generations*". None of the policies 1 through 9 refers to productive capacity.
66. We note that we have accepted the advice of Messrs Marshall and Davies and given no weight to the Ministry for the Environment Guide to Implementation for the NPS-HPL which others have referenced in their evidence and submissions, and which in fact they also present to us in submissions.
67. Our finding is based on our reading of the words and terms used in the NPS-HPL and the evidence and submissions before us. Our finding is that the Application of clause 3.8(1)(a) is limited to the HPL that is proposed to be subdivided.

68. If we have, however, erred in this finding, and we can and should in fact consider the whole of the Applicant's landholding in our assessment of productive capacity and whether or not the proposed subdivision meets the requirement of clause 3.8(1)(a), we still find that the proposal cannot be said to retain the productive capacity of the subject land for the reasons we have set out below.

### **Productive Capacity**

69. In order for us to determine the standing of the proposal against clause 3.8(1) we must be clear what the productive capacity of the subject land is, and so we have considered the expert soils evidence with particular regard for the definition of productive capacity as set out in the NPS-HPL<sup>12</sup>.
70. We have three expert witness statements relating to assessment of productive capacity and all of those focus primarily on assessing productive capacity in relation to subclause (a) of the definition above. All experts are in general agreement that the highly productive land that is proposed to be subdivided for residential purposes has limitations due to lack of drainage, heaviness and high moisture levels during winter, as reflected by its classification of LUC 3W1.
71. The experts, in order to apply modelling to calculate the loss of productive capacity that would result from the proposed subdivision, have all undertaken an exercise to determine the best productive land use of the subject land under current conditions and all agree that this is for livestock grazing (sheep and beef). They have then all used an 'all of farm' approach to calculate the loss on that basis.
72. We return to the 'all of farm' approach in our consideration of the question of offsetting later.
73. It is not in contention that the best current productive use of the subject land is for livestock. Nor is it in contention that the proposed subdivision will enable residential development to occur that would make approximately 17 hectares of highly productive land unable to be used for productive purposes.
74. The Applicant's case places significant emphasis on the limitations of the area to be subdivided due to wetness and heavy soils, in making an overall case that the existing productive capacity is less than purported by other experts. Counsel for the Applicant takes issue with suggestions from other parties that our consideration of productive capacity should take into account other potential

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<sup>12</sup> "Productive capacity" is defined in the NPS-HPL as follows:

*"in relation to land, means the ability of the land to support land-based primary production over the long term, based on assessment of:*

*Physical characteristics (such as soil type, properties and versatility); and*

*Legal constraints (such as consent notices, local authority covenants, and easements); and the size and shape of existing and proposed land parcels".*

productive uses, including those that could be realised if improvements such as drainage of the site were to be installed.

75. We find the position of Messrs Marshall and Davies on this matter, as set out in the submissions dated 12 January 2024, to be problematic. They seem to be saying on the one hand that we should consider drainage improvements as a way of ‘counting’ positively towards a retention of productive capacity (albeit elsewhere on the landholding) but we should not ‘count’ such improvements towards the measure of productive capacity of the 17 hectares that is to be subdivided. We do not accept this.
76. The definition of ‘productive capacity’ requires us to take a long term view and there is agreement from parties that 30 years would be appropriate in this regard. We therefore consider that it is entirely valid, and in fact necessary, to assess productive capacity as more than the current best use and agree with Ms Bielby at her para 4.18<sup>13</sup> in this regard.
77. We do not consider suggestions that ‘unlocking’ the productive capacity of the subject land may require some actions to be undertaken to be fanciful nor outside the realm of what we should consider under the NPS. Nor do we agree with the Applicant’s Counsel<sup>14</sup> that drainage alters the soils to the extent that it renders them something other than LUC3W1. That classification recognises those limitations but also recognises that there are finite characteristics of that soil such that it is warranted to be considered as having a productive capacity, and the NPS protects this.
78. In the same way that the proposed residential purposes will require drainage infrastructure and stormwater management, some future productive uses such as horticultural may require similar management measures. The difference is that residential purposes do not rely on the finite characteristics of the soils of the site to support them, whilst production does, and this is what the NPS seeks to protect.
79. There will be a loss of productive capacity of 17 hectares of highly productive land as a result of the subdivision irrespective of whether future improvements on the site were to occur. Our view though is that the loss of productive capacity that would occur includes both the loss of current best use (i.e. with no improvements) AND the future potential if improvements or other measures were to be taken.

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<sup>13</sup> *Memorandum on behalf of Central Hawke’s Bay District Council (as consent authority) regarding legal issues arising in the s42A report and hearing, RiceSpeir, J Magrath and L Bielby, 13 July 2023 as presented by Laura Bielby.*

<sup>14</sup> *Legal Submissions of Counsel for the Applicant 12 January 2024, Q Marshall and J Davies para 8.*

80. We therefore consider it likely that both Mr Grant and Mr Goodman have in fact underestimated the productive capacity of the subject site. We agree with Mr Wiffen's view that there are potentially problems with the approaches of both Mr Goodman and Mr Grant in terms of capturing the potential of the subject site, and we prefer the approach of Mr Tither's assessment in that it is more comprehensive.
81. In any case, we accept the position of all soils experts that there will be a loss of productive capacity as a result of the proposed subdivision, be that 4.5%, 5.5% or 7.6% or something else depending on the modelling approach and baseline for assessment.
82. Again, if we are wrong about the application of 'subject land' and clause 3.8(1)(a) should in fact be applied to the whole of the Applicant's landholding, we agree with Mr Williams<sup>15</sup> at his para 13 that a subdivision that would enable approximately 20% of the highly productive land within that landholding to be used for residential purposes does not retain the overall productive capacity of the subject land. We also do not agree with the Applicant's position that this would be a minor loss nor that this loss would have minor effects on overall productivity capacity, whether that be only for the land that is to be subdivided for residential purposes or for the whole of the Applicant's landholding.
83. We therefore accept the position of the Reporting Officer, and others, that a loss cannot be said to be a retention in the context of clause 3.8(1)(a) and the requirement of that clause is not met by the proposal.
84. The Applicant's position is that this loss can either be mitigated or 'offset' elsewhere on the landholding, or that the loss is minor. It is therefore necessary for us to consider those particular matters.

### **Offsetting as a Means of Retaining Productive Capacity**

85. have considered the matter of whether offsetting is available under the NPS as a means of retaining productive capacity where it would be lost as a result of the subdivision of HPL.
86. In short, we consider that if the NPS-HPL intended to provide for the ability to offset a loss of productive capacity in one location by an increase in productive capacity in another location, it would say so. That is, if it were intended that the term 'overall productive capacity' in Clause 3.8(1)(a) were to encompass an offsetting approach, there would be a prescriptive methodology for applying this tool, similar to the National Policy Statement for Freshwater Management and the National Policy Statement for Indigenous Biodiversity. Those statutes utilise the 'no net loss' principle. The NPS-HPL does not utilise this principle. We suspect this is because high quality soil is in a fixed location and has finite characteristics (unlike wetlands or tracts of indigenous vegetation which are able

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<sup>15</sup> *Outline of Legal Submissions on Behalf of the Havelock Bluff Trust 12 July 2023 Martin Williams.*

to be established in various locations in situations where the loss in another location is unavoidable).

87. It is not possible, in our view, to offset the loss of the highly productive soil in a different location and we reiterate here that we do not accept the position of Messrs Marshall and Davies that the overall purpose of the NPS-HPL is to protect productive capacity. Its singular objective is to protect highly productive land, which by definition is comprised of specific soils in fixed locations. This is supported by Policy 1 of the NPS-HPL which is that "*highly productive land is recognised as a resource with finite characteristics and long-term values for land-based primary production*".
88. We agree with Messrs Williams and Wiffen<sup>16</sup> that there is clearly no offsetting ability under the NPS-HPL. Further, we think that the fact that the NPS-HPL does not contemplate offsetting, supports our interpretation of clause 3.8(1)(a), that it relates only to the HPL that is proposed to be subdivided.
89. For the avoidance of doubt, if the term 'overall' in Clause 3.8(1)(a) enables the use of offsetting to meet the requirement to retain productive capacity, we find that the Applicant has not advanced its case that the loss of productive capacity can be 'made up for' on the other HPL in sufficient detail for it to be relied upon to ensure that productive capacity of the entire landholding would be retained.
90. Although our view is that it is not determinative in our decision making, we specially directed in Minute 8 that the Applicant confirm the location of the proposed constructed wetlands to which the subsoil drains required by conditions would discharge. The Applicant's ecological expert, Dr Hicks, provided us with indicative locations for the constructed wetlands during the hearing and we sought to have these confirmed for several reasons. Partially, this was to ascertain whether these were to be located within the HPL in Lot 60 or outside it, because it seems there would potentially be some loss of productive capacity within that land if its use is to be changed to a wetland. It was also so that we could assess whether we consider the proffered conditions relating to drainage works (51-53) to be appropriate and sufficient. Unfortunately, we did not receive that information in the Legal Submissions dated 12 January 2024.
91. We note that the Applicant has not proposed covenants or other legal instruments that would require the HPL within balance lot 60 to remain in productive use. Even if the requirement of clause 3.8(1)(a) were considered to be met by way of offsetting, we do not consider that measures have been taken such that the potential for cumulative loss of the availability and productive capacity have been avoided or mitigated as required by clause 3.8(2)(a). We think this would require that the proposal 'hold the line' with no further change of use to occur on the HPL. Otherwise, the productive capacity loss that was offset would simply be potentially lost again, albeit at a later date.

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<sup>16</sup> *Statement of Planning Evidence of Roger Douglas Wiffen 05 July 2023 para 42 pages 9-10.*

92. We understand that the Applicant has likely not presented a more detailed case regarding offsetting, because their position is that it is not necessary. Rather, as stated in various places by Applicant’s Counsel and experts, the case being promulgated is that the loss of what they say to be 4.5% of productive capacity is so minor that it cannot be said to have an effect on the overall productive capacity of the subject land and therefore the NPS-HPL presents no impediment to the granting of consent. We set out our consideration of this matter below.

### **Minor Effects and the Application of the NPS-HPL**

93. Counsel for the Applicant in the submissions dated 12 January 2024 makes the case that an “*avoid policy does not require the avoidance of effects which can be considered to be minor or transitory*” as confirmed in *Port Otago Limited*<sup>17</sup>, and that Mr Goodman’s evidence demonstrates that the “*subdivision will have such a small effect on productive capacity it must be considered minor or transitory under the NZ King Salmon/Port Otago tests*”.
94. Counsel then refers us to the recent *Gibbston Vines Limited*<sup>18</sup> decision, which specifically references the *Port Otago* decision. Counsel directs us to the findings of that case but provides no further submissions regarding its applicability to the proposal before us, other than to remind us<sup>19</sup> that if the Applicant is wrong regarding minor effects, drainage improvements have been proffered to offset these.
95. We have considered the *Gibbston* case in order to understand its potential relevance to our interpretation and Application of the NPS-HPL to the proposed subdivision.
96. As we understand it, the Court found that the effects of a proposed subdivision that would create two new allotments within LUC 3 soils on productive capacity would be minor and therefore not inconsistent the policies of the NPS-HPL.
97. By comparison, we have not come to the conclusion that the effects of the proposed lots on productive capacity will be minor as we have already set out. We note that the facts of *Gibbston* appear to be substantially and materially different to those of the proposal we are considering and we find that nothing in the Court’s finding regarding minor effects has an effect on our findings in this regard. We note in particular paras 79 and 86:

*“[79] That is in part because we find the Site has no Melanic Soils and, in view of that and its relatively small size, has relatively limited long-term value for landbased primary production. That is the case whether or not the Site is subdivided in accordance with the Modified Proposal. Furthermore, we find that*

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<sup>17</sup> *Port Otago Limited v Env Defence Society* [2023] SC 112.

<sup>18</sup> *Gibbston Vines Ltd v Queenstown Lakes DC NZEnvC* [2023] 265.

<sup>19</sup> *Legal Submissions of Counsel for the Applicant 12 January 2024*, Q Marshall and J Davies para 29.

*the Modified Proposal does not have any identifiable impact on recognition of other highly productive land as a resource with finite characteristics and long-term values for land-based primary production. In particular, that is because it does not involve any associated development aspects that could give rise to such effects.*

*[86] The Modified Proposal would, to the extent we have discussed, reduce the extent to which land of the Site is likely to be able to be used in future for landbased primary production. However, as noted, that is in a context in which it has not been so used for a number of years and the evidence reveals it does not include Melanic Soils. In essence, the Modified Proposal renders unlikely any future arrangement whereby the Site may become part of such production. Therefore, we find that the Modified Proposal would not offend the objective in cl 2.1.”*

98. As such, it is not necessary for us to traverse in detail or make a finding in relation to the matter of whether or not minor effects are allowable under the provisions of the NPS-HPL, and Policy 7 and clause 3.8(1)(a) in particular.
99. We do however note, in considering the *Port Otago* decision, that it appears to us that the NPS-HPL avoidance policies, and specifically Policy 7, is not a policy about avoiding effects. It is directed at avoiding a specific activity, being subdivision. Likewise, clause 3.8(1)(a) does not direct the avoidance of effects on productive capacity. Rather, it says that subdivision must be avoided so that productive capacity is retained. By contrast, Policies 11, 13, and 15 of the New Zealand Coastal Policy Statement, which is the subject of the *Port Otago* decision, all include the phrase “*avoid adverse effects of activities on...*”.
100. In the vein of the *Port Otago* decision findings that an avoidance policy cannot be interpreted to mean to avoid all effects no matter the scale, we note that, as pointed out to us by the Reporting Officer<sup>20</sup>, the Proposed District Plan does contemplate some subdivision of HPL via provision for a conservation lot. Our view is that it may be the case that some subdivision of the HPL which is proposed to be turned into residential allotments via this proposal would be able to meet the test of clause 3.8(1)(a) and of the PDP. This could for example include a lesser number and density of lots than that proposed, and the implementation of legal instruments restricting further subdivision such that the productive capacity of the LUC3 within the subject site were able to be retained.
101. We note this to provide an assurance that we have not applied any test that we consider to be contrary to the findings of the *Port Otago* case, nor the *Gibbston Vines* case.

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<sup>20</sup> Section 42A RMA Report, Ryan O’Leary, para 4.27 page 37.

102. We find that the matter of minor effects in the context of applying the NPS-HPL is not one that our decision hinges upon, because we do not consider the effects of enabling approximately 17 hectares of HPL to be used for residential purposes, thereby removing them from productive use, to be minor.
103. Based on our finding that the requirement of clause 3.8(1)(a) cannot be met and therefore consent must be refused, it is not necessary for us to consider the additional clauses of the NPS. However, we provide the following evaluation and determination for completeness.

### **Clause 3.8(2) NPSHPL**

104. We note there appears to be a referencing error in the s42A Report at page 65 where it includes the text of clause 3.8 which may have led to subsequent erroneous referencing in evidence. In the s42A Report, the subclauses under clause 3.8(2) of the NPSHPL are referenced as (d) and (e), whereas we understand these to in fact be (a) and (b) as per the version of the NPSHPL available on the Ministry for the Environment's website as at the date of the decision. In any case, the meaningful text of those subclauses is quoted correctly in the s42A Report.
105. With regard to clause 3.8(2)(a) Mr Grant<sup>21</sup> considers that the loss of approximately 18(17) hectares. is a negligible amount of the district's HPL and he therefore considers that clause 3.8(2)(d) can be met. Again, we consider this provision is clear that potential cumulative loss should be avoided and we accept Mr Wiffen's position as stated at para 50 of his evidence that the subdivision must be refused in order to avoid this potential cumulative loss.
106. With regard to clause 3.8(2)(b), we generally agree with Mr Wiffen's reasoning regarding the potential for the proposed subdivision to result in issues for surrounding land-based primary production activities. And we also accept the Applicant's position that this can be managed, to some extent, via the use of no-complaints covenants being imposed on the new lots. However, Clause 2(b) requires in the first instance, that the actual or potential reverse sensitivity effects are avoided if possible. It is possible to avoid the potential for reverse sensitivity effects by not allowing the subdivision.

### **Clauses 3.9 and 3.10 NPSHPL**

107. We generally accept Mr O'Leary's position as set out in para 4.124 pages 67-68 of the s42A Report that clause 3.9 of the NPS-HPL is potentially relevant to the consideration of the Application given that it includes a requirement for land use consent for the recreational spaces and the stormwater lots.

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<sup>21</sup> *Technical memorandum for an Application for subdivision consent under the Resource Management Act 1991 in respect of 25 Punawaitai Road, Pourerere Beach, Iain Grant, para 11.10.*

108. However, the primary activity we are considering is a residential subdivision and residential activities are clearly not provided for under clause 3.9. We have already addressed the matters in clause 3.9(a) and (b) insofar as they are covered in 3.8(2)(a) and (b). Clause 3.9(4) is not a matter for our consideration in determining the Application.
109. There is clearly no relevant exemption in clause 3.10, and as we understand it, no party is making the case that this clause provides a relevant pathway for consent to this Application.

### **Concluding Statement Regarding the NPS-HPL**

110. We find that we cannot grant consent to the Application because it does not meet the test of clause 3.8(1)(a) because the subdivision would enable approximately 17 hectares of highly productive land to be utilised for residential purposes and therefore the proposed lots do not retain the overall productive capacity of the subject land.

### **Consideration of the Proposed District Plan Provision in Relation to Productive Land**

111. As set out at para 4 of Mr O’Leary’s supplementary evidence, there is disagreement between himself and Ms Foster, for the Applicant, about how the provisions of the Proposed District Plan should be interpreted and applied to this Application.
112. Ms Foster’s position is that there is a “deliberate distinction” in the PDP policy framework between the Rural Production Zone and the General Rural Zone, and that since the site does not fall into the former, the provisions in the PDP relating to protecting highly productive land and the land resource of the district do not have the same implications for this Application as Mr O’Leary, and Mr Wiffen, consider they do.
113. We find Ms Foster’s evidence in this regard paras 81-94 evidence in chief on this matter to contain a partially speculative analysis of the reasons for the relevant provisions in the PDP and does not provide a clear, objective analysis of the proposal with regard to the relevant objectives and policies.
114. We find Mr O’Leary’s evidence more helpful in this regard, particularly the provision of the *Legal Submissions for Central Hawke’s Bay District Council in relation to the National Policy Statement on Highly Productive Land 2022, Asher Davidson, dated 9 November* via his Supplementary Evidence and his detailed analysis set out in paras 4.19 to 4.34 of the s42 Report.
115. That analysis, we find, is consistent with the approach taken within the NPS-HPL. We have heard from a number of parties that the NPS-HPL is a ‘blunt instrument’ and that its prescriptive provisions are intended to apply as a safeguard for HPL in the interim whilst regional councils undertake their detailed mapping exercises.

116. Within the context of the overall planning framework that applies to our decision making, and the provisions of the NPS-HPL in particular, we accept Mr O’Leary’s conclusion as set out in para 5.2(c) of the s42A Report that it is appropriate to afford the provisions of PDP as they relate to the rural land resource and highly productive land greater weight than the provisions of the ODP.
117. We do not agree with Ms Foster that the proposal can be reconciled with the strategic direction (of the PDP) for the rural land resource, irrespective of zoning.
118. We accept Mr O’Leary’s assessment that the proposal would be contrary to Objectives RLR-01, RLR-03, SUB-01 and Policy RLR-P3.
119. For these reasons, we find that granting consent to the Application would be contrary to the Rural Land Resource and Subdivision provisions of the Proposed District Plan.
120. As an additional although, as we find it, non-material consideration, we note that there appears to be an inconsistency, or at least lack of clarity, between the Applicant’s Counsel and the Applicant’s Planner with regard to the relevance, or otherwise, of the Applicant’s appeal on the zoning of his land under the Proposed District Plan.
121. In her evidence regarding the provisions of the PDP as they relate to highly productive land, Ms Foster makes the following statements (within para 90 and 94):
- “Interestingly, that is also the outcome that remains in dispute in Mr Bridge’s submission and appeal: that the land he has identified as suitable for large-lot subdivision be rezoned as ‘Large Lot Residential’. I reiterate my point that the zoning of the land as General Rural remains in dispute for the purposes of determining this application”.*
- “...consider it is open to the Hearing Panel to conclude that the proposal can be reconciled with the strategic direction for the rural land resource, noting again that the underlying challenge to the legitimacy of the General Rural zoning remains unresolved”.*
122. In the submissions dated 12 January 2024, Mr Marshall and Mr Davies state at para 63:
- “The applicant reiterates its submission that it is inappropriate for this panel to pre-judge the merits of Mr Bridges appeal on the zone. The Case quoted by Ms Bielby (Knowles v Queenstown Lakes District Council) does not support the proposition that Councils may prejudge the merits of an appeal or the prospects of its success. Rather, the case concerned an appeal that was lodged outside its jurisdiction. As such, it was an invalid appeal. There is no suggestion that Mr Bridge’s appeal was invalidly filed. The merits of Mr Bridge’s appeal is for the Environment Court to determine.”*

123. We do not consider that whether or not the Applicant considers the existing zoning of the site to be legitimate to be a relevant consideration for us in making a determination on this Application.
124. We queried any stated (via decision reports) reasons about the proposed zoning of the Applicant's land because the Landscape experts for the Applicant made a case in their evidence that Purerere is the only place where coastal subdivision at this scale would be able to occur within the District. We sought to understand this line of reasoning more fully through our questions of those experts at the hearing. However, it does not appear this is an argument the Applicant is progressing as such and we have not considered it any further on the basis of statements made at the hearing. We understand the totality of the case Ms Beilby makes in her para 6.9 regarding the weighting of the PDP in relation to HPL. We have already set out our findings in relation to the PDP above, and we have not made any pre-judgement as to the merits of Mr Bridge's appeal regarding zoning in the PDP.

## **Natural Character, Landscape Character (Including Rural Character and Amenity Effects)**

### **Discussion**

125. The subject site is described in detail in various sections of this decision, so this is not repeated in full here. However, in relation to landscape and natural character effects the site is largely flat. It lies within the coastal environment as shown in the Hawke's Bay Regional Coastal Environment Plan, but is over 600m from the active beach and separated from it by a 110m high hill. The Makurapata Stream, a small tributary of the Purerere Stream, runs along the eastern boundary of the site. The stream is currently degraded and grazed, and riparian planting is planned for the banks of the stream<sup>22</sup>.
126. In the Application documentation the Applicant provided a report prepared by Hudson Associates<sup>23</sup> that concludes that the proposed subdivision is appropriate in its landscape setting.
127. Ms Foster, for the Applicant, summarised the Hudson Report findings as<sup>24</sup>:
- "Landscape Character: The existing landscape character of the broader context (including Purerere settlement) has moderate-high values and the proposed subdivision will have low effects on broader landscape character. The existing character of the immediate locality has moderate values and the proposed subdivision will have low-moderate adverse effects on these localised landscape character values.*

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<sup>22</sup> Hudson Associates, *Purerere Subdivision Landscape Assessment: September 2021* para 8.

<sup>23</sup> Hudson Associates, *Purerere Subdivision Landscape Assessment: September 2021*.

<sup>24</sup> *Christine Foster, Assessment of Effects on the Environment: September 2021* pp 10-11.

*Natural Character: The existing broader context has moderate-high natural character values and the proposed subdivision will have very low effects on broader natural character. The immediate vicinity of the proposed subdivision has low-moderate natural character values and the proposal will have very low effects on localised natural character values.*

*Visual Amenity Values: The existing environment, including Pourerere and nearby properties, has low or low-moderate visual amenity values and the proposed subdivision will have low-moderate adverse effects on visual amenity values and low cumulative effects for visual amenity.*

*...The Hudson Associates assessment is that the proposal will have no more than minor adverse effects on landscape character and on visual amenity values and will have less than minor effects on natural character”.*

128. The Hudson Report evaluates the effects of development of the site based on three factors: landscape character, natural character and visual amenity. After establishing a baseline for each factor the assessment applies ratings to the changes to them using the NZILA (New Zealand Institute of Landscape Architects) seven point rating scale. The conclusions of the report are summarised above in Ms Foster’s evidence.
129. The key factors in the report described as contributing to reducing potential adverse effects of the proposal on the landscape character and natural character, and visual amenity are:
  - a. The presence of an existing township and subdivision
  - b. Containment of the site provided by the local landform and dominate hills
  - c. A lot layout which places larger lots (typically over 4000m<sup>2</sup>) and open spaces on the perimeter of the proposal, at the interface with remaining farming activity
  - d. The proposed subdivision includes a Residential Zone performance standard for building height limits
  - e. A colour and reflectivity scheme which will be incorporated as a covenant on the lot titles
  - f. Limited earthworks due to the flatness of the site
  - g. Riparian planting along the Pourerere Stream tributary, east of the site.
130. At the Hearing Ms Chantal Whitby, a Registered Member of the NZILA, provided a statement for the Panel, on behalf of the Applicant, addressing specifically the effects of the development on landscape character.

131. Ms Whitby's evidence presents an assessment of the landscape character of the proposal at two scales – a broader scale and a localised scale. Effects on landscape character are assessed as low-very low for natural character for the broad scale and as low-moderate and very low for the localised scale.
132. The principal reasons for this assessment are, *inter alia*:
- a. The large scale of the broader context topography;
  - b. The surrounding hills creating an intimate scale in which smaller lots will be appropriate;
  - c. Limited visibility of the subdivision due to its location at the back of the valley;
  - d. Screening of the development from Porerere township by the existing consented subdivision;
  - e. No direct connection between the subdivision and the coast due to distance and topography;
  - f. The positive effects of riparian planting of the Porerere Stream tributary on the north-eastern and south-eastern boundaries of the subdivision;
  - g. Height, colour and reflectivity conditions for buildings will ensure they will be sympathetic with their surroundings.
133. Ms Whitby concludes that the proposal will not dominate characteristics of the rural landscape and the amenity of the area will be maintained. In her view this means that no further mitigation measures would be necessary.
134. For Council, landscape evidence was presented by Ms Rebecca Ryder. Ms Ryder is a Registered Landscape Architect and a Fellow of the NZILA. Ms Ryder's technical memorandum addressing the landscape effects of the Application was presented as part of the Central Hawke's Bay District Council's (Council) reporting planner's report under s 42A of the RMA and covers:
- a. Natural character effects, and;
  - b. Landscape character effects, inclusive of rural character and visual amenity effects.
135. Paras 4.1 – 4.3 of Ms Ryder's technical memorandum summarises her findings:
- The proposed subdivision will introduce 48 residential lots into the rural landscape, which have been assessed in the Hudson Associates Landscape Assessment report (2021).*

***Overall, in my opinion the landscape assessment does not comprehensively evaluate the landscape character, including visual amenity, effects and in turn provide reasoning for the appropriateness of the development in a rural zone, particularly related to the sprawl and dominance of the subdivision within the pastoral rural landscape. (Panel emphasis).***

*Reliance on the remaining open rural landscape and spatial layout of the subdivision, without a landscape mitigation plan, does not provide suitable certainty of the management of potential adverse landscape effects. In my view the unique characteristics of the site and design responses to appropriately integrate a land use change are not apparent in the assessment.*

*It is my opinion that there remains potential for moderate adverse landscape effects to be generated on the rural character. Further detail is required to evaluate the reasoning for the site's ability to integrate the loss of the open rural landscape. The mitigation measures recommended by the Applicant do not suitably respond to the rural character and require, in my view, a more robust response. I have provided further recommendations on what these could comprise further within this report.*

136. Ms Ryder's further recommendations relate to the development and implementation of a planting plan, colour controls and restrictions to building height. She also proffers that, when considering land use change in rural landscapes, further conditions that manage building placement in the landscape, fencing controls and management of domestication of lots and the varying degrees of domestication should be addressed under conditions of consent. These are measures that are relevant in addressing some of the subdivision designs response to the landscape values of rural and natural environment it sits within.
137. With respect to the Applicant's assessment she notes that while the method statements are clearly laid out and reflective of the time at which they were applied, they do not attempt to further integrate and assess the cultural values of the site. This is clear in the method of assessment, and paragraph 81 of the Hudson Assessment provides statement with no further descriptions. Applying Te Tangi a te Manu's approach to landscape assessment in a bi-cultural approach would suggest that the assessment would benefit with further engagement in understanding the cultural values of the site to inform its conclusions. We note that this assessment by Ms Ryder preceded the submission of the Cultural Impact Assessment provided by Kairakau Lands Trust.
138. In the s42A Report the Reporting Officer, Mr O'Leary, notes that Mr. Hudson's assessment was prepared before the notification of the Proposed District Plan and does not take into account the relevant provisions of the PDP. We comment on that under the Evaluation section on this issue.

139. In her Supplementary Statement to the Hearing (13 July 2023) Ms Ryder concludes that she retains her opinion that there remains potential for moderate adverse landscape effects of the proposal on the environment. She remains of the view that the landscape evidence has not provided further detail to understand the landscape response to the unique characteristics of the site, that differentiate the site from its immediate adjoining valley floor. Reliance on the hillsides to provide open space is not, in her opinion, suitable to mitigate the loss of rural open space and dominance of built form in this rural landscape.

140. The Applicant's closing legal submissions in relation to landscape state that:<sup>25</sup>

*Mr O'Leary, in his supplementary, states that the subdivision will "dominate the rural valley floor". This is not supported by the evidence. The proposal is consistent with the scale of development as currently consented on the valley floor.*

*Mr O'Leary and Ms Foster have been working on a set of conditions relating to landscape for this development. Ultimately, they have been unable to reach an agreement. We have included with this submission the conditions the applicant submits are appropriate. It is for the panel to decide what is appropriate based on the evidence before it.*

*Ms Ryder admitted at the hearing that the conditions she has sought to be imposed on this subdivision have been based on conditions imposed on a development in the outskirts of Hamilton. The context is quite different and inappropriate in the context of Pourēre.*

141. In the Panel's opinion, this matter has not been adequately resolved through the Hearing Process.

142. The submission from Pourerere Community and Character Preservation Society outlines their concerns that the proposal diminishes the character of the rural landscape and that increased vehicles and people will adversely affect the coastal character. The character they feel defines Pourerere is that of an isolated rural/landscape coastal characterised by a large sandy beach.

143. On behalf of the Society Ms Gay presented their submission at the Hearing and states that they disagreed with the findings of the Hudson Report that there will be little effect on the character of the community from the proposal. Instead, they feel that the landscape assessment by Boffa Miskell (Ms Ryder) more correctly aligns with their view of the community.

144. The submission from the Havelock Bluff Trust expresses concerns about the adverse effects of the proposal on the rural character and amenity values of the area. They state that the development would not maintain clear distinctions between the urban and rural areas of the locality and that this will impact the

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<sup>25</sup> Paras 50-52.

character and quality of the surrounding rural areas and its landscape values and riparian management.

## Evaluation

145. Evidence was presented on behalf of both the Applicant and Council on the Application of the objectives and policies of the Operative District Plan and the Proposed District Plan, and other relevant statutory documents, in relation to landscape and natural character and visual amenity.

146. Firstly, we briefly reference the Hawke's Bay Regional Policy Statement which includes Objective 4:

*"Promotion of the preservation of the natural character of the coastal environment and its protection from inappropriate subdivision, use and development."*

147. In her assessment of effects for the Applicant Ms Foster notes that in relation to Objective 4<sup>26</sup>:

*The landscape assessment contained in Appendix 5 has considered the potential for adverse effects on the natural character of the coastal environment and concludes that, given the hill that separates the site from the coastline, any effects on coastal natural character will be less than minor.*

148. We agree with her assessment that the effects on the natural character of the coast will be less than minor given the site's location in relation to the coast. For this reason, we also find that the proposal meets Objectives CE-01 and CE-02 of the Proposed District Plan.

149. In dispute is the Application of the objectives and policies of the Proposed District Plan. In particular those of the General Rural Zone.

150. In the supplementary statement of evidence Mr O'Leary states that:

*As outlined in paragraphs 68 and 69 of Ms Foster's evidence, she considers the correct 'frame of reference' in assessing effects on rural amenity is not a comparison between bare farmland and the Proposal, but rather, a comparison on the proposed lot sizes against the 4000m<sup>2</sup> (ODP) and 2500m<sup>2</sup> (PDP) zone standards, interspersed within the existing environment (e.g. subdivision Stages 1 and 2) and proposed open space areas.*

*Whilst I do not disagree with Ms Foster in relation to the ODP, I disagree with respect to the PDP.*

*I consider that the PDP involves a significant change in emphasis overlooked by Ms Foster and in Ms Whitby's evidence. When read in totality, the PDP therefore*

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<sup>26</sup> Para 9.0.1.

*contemplates quite a difference rural lifestyle subdivision to the 48-lots proposed. Objectives RLR-O2, RLR-O3, RLRO4, RLR-P3, GRUZ-O1, GRUZO2, GRUZ-O3 and GRUZ-O4; and, policies GRUZ-P4, and GRUZ-P8 signal a very different approach to the Operative District Plan. In particular, RLR-O4 directs residential and other activities unrelated to primary production to locations zoned for those purposes. GRUZ-O2 seeks that the predominant character of the General Rural Zone is maintained.*

*I consider that the proposal is contrary to RLR-02. The primary production role of the rural land resource and associated amenity is precisely the matter sought to be retained. Limits to the scale and intensity of possible subdivision achieve this objective.*

*The “Anticipated Environmental Results” for the General Rural Zone outline further that: The District Plan also provides for larger subdivision lot sizes in the rural zones, and limits on the provision for residential and rural lifestyle subdivision, to avoid further fragmentation of the District’s finite soil resource. Residential and rural lifestyle lots that are unrelated to primary production activities are better located in the General Residential Zone, Large Lot Residential Zone (Coastal), Settlement Zone, and Rural Lifestyle Zone, where amenity and servicing expectations are more likely to be met.*

*Overall, I disagree with Ms Foster that the Proposal is consistent with the provisions of the PDP. I consider that, when correctly framed against the policy direction of the PDP, the proposed subdivision is at odds with the above objectives and policies of the PDP. I generally agree that the proposal is consistent with the objectives and policies of the ODP.*

151. We find that we agree with Mr O’Leary’s conclusion that the proposal does not meet the objectives and policies of the Proposed District Plan in relation to rural character and visual amenity. We consider that the smaller than permitted lot size is a primary determinant in the impacts on both the character and amenity of the area.
152. We then turn to the legal advice provided by Ms Laura Bielby of Rice Spier (13 July 2023) as to the relevance of this conclusion in our decision making.
153. In section 6 of her supplementary evidence<sup>27</sup> Ms Bielby observes that section 104 of the RMA does not prescribe the relative weight that should attach to the relevant matters in that section. This is a matter of judgement for the consent authority.
154. In considering the weighting to be given we accept that the Proposed District Plan cannot be treated as operative for this site, due to an appeal applying to the zoning of the site, and other related matters. However, we are also mindful that

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<sup>27</sup> Rice Speir, Memorandum on behalf of Central Hawke’s Bay District Council (as consent authority) regarding legal issues arising in the s 42A report and hearing: 13 July 2023.

at the time of the Hearing the Proposed District Plan had been publicly notified, submissions had been heard and decisions released by the Central Hawke's Bay District Council. No evidence was presented to us of any other appeals on the PDP relevant to the subject site.

155. We are satisfied that sufficient weight can be placed upon the objectives and policies of the General Rural Zone in the PDP in relation to landscape, rural character and visual amenity to conclude that the proposal does not meet those objectives and policies.

## Findings

156. We find that the natural character and landscape character (including rural character and visual amenity effects) of the proposed subdivision are not able to be satisfactorily avoided, remedied or mitigated. Further because of the progress of the Proposed District Plan at the time of the hearing we are satisfied that we are able to place sufficient weight on it to conclude that the proposal is not consistent with the objectives and policies for the General Rural Zone.

## Reverse Sensitivity Effects

### Discussion

157. We have considered the definition of reverse sensitivity provided to us by Messrs Davies and Marshall in the closing legal submissions for the Applicant<sup>28</sup>:

*"Reverse sensitivity arises when (and only when) an established use is causing adverse environmental impact to nearby land. A new, benign activity is proposed in the vicinity. The 'reverse sensitivity' is this:<sup>29</sup>*

*If the new use is permitted, the established use may be required to restrict its operations or mitigate its in-effects so as not to adversely affect the new activity." Reverse sensitivity, in this context, is the sensitivity caused by the owners of any new lots being sensitive to existing activities in the environment " .*

They go on to say: "there was no evidence that there was a current issue" (relating to reverse sensitivity).

158. In the Opening Submissions, the Applicant's Counsel, in referring to Reverse Sensitivity said: *"In any event, the combination of no complaints covenants, appropriate consent notices, creation of the shared lots and buffer area, and the other features of the subdivision means that reverse sensitivity is not an issue."*<sup>30</sup>

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<sup>28</sup> *Legal Submissions of Counsel for the Applicant, 12 January 2024, Q Davies and J Marshall, para 39 page 9.*

<sup>29</sup> *Gateway Funeral Services v Whakatane District Council Env Wellington W005/08, 5 February 2008 at [26].*

<sup>30</sup> *Legal Submissions of Counsel for the Applicant (12 July 2023) para 61 page 13.*

*However he added that the Applicant would be prepared to build a hedge between the farm accessway and Mr Harris's property as a condition of the consent if that is necessary, and to accept a condition requiring consultation with Mr Harris as to the species of the hedge.*<sup>31</sup>

159. Ms Foster, for the Applicant, also commented: *"my opinion is that the potential for newcomers in the proposed subdivision to raise issues(about) activities on nearby farms is very low (given the separation distances) and is manageable through "no complaints" clauses."*<sup>32</sup>
160. Two of the submitters, Pourerere Community and Character Preservation Society, and Gareth Charles Harris and Melaney Lise Harris as trustees of Havelock Bluff Trust), cited reverse sensitivity among their reasons for opposing the Application. Concerns included the possibility that the proposal could impact on the ability of local businesses to continue with their activities.
161. Mr Wiffin<sup>33</sup> stated that although his long-held opinion was that reverse sensitivity covenants had their place as *"they communicate to purchasers and occupiers of the risk that they might be exposed to the effects of land based primary production. However, while they remove the right to complain, the covenant does not stop the effect that would otherwise cause complaint, which is the source of contention. Whilst a reverse sensitivity covenant may allow conflicting activities to co-exist alongside each other in a legal sense, they do not remove the conflict."*
162. Mr Williams<sup>34</sup> referred to clause 3.8 (2) (b) of NPS-HPL: *"Territorial authorities must take measures to ensure that any subdivision of highly productive land avoids if possible or otherwise mitigates any actual or potential reverse sensitivity effects on surrounding land-based primary production activities"*. His opinion is that a council has a responsibility to avoid reverse sensitivity effects if possible. We have addressed reverse sensitivity in the context of the NPS-HPL previously.
163. Mr O'Leary<sup>35</sup> in his s42A Report expressed his opinion that the proposed measures are appropriate and reverse sensitivity effects can be appropriately mitigated. However, in his supplementary statement, provided before the hearing was adjourned, <sup>36</sup>Mr O'Leary referred to Mr Harris *"providing a useful insight into the 'real world' experiences on reverse sensitivity. Having faced these issues with Stages 1 and 2 he is concerned they will inevitably exacerbate with additional residents from this subdivision. These effects impact his farm activities, his business; and, have a personal toll"*.

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<sup>31</sup> *Legal (Closing) Submissions of Counsel for the Applicant (12 January 2024) para 48 page 10.*

<sup>32</sup> *Ms Christine Foster Evidence para 43 page 14.*

<sup>33</sup> *Mr Wiffin Evidence 5 July 2023 para 51 pp 11-12.*

<sup>34</sup> *Mr Williams submissions 12 July 2023.*

<sup>35</sup> *Mr O'Leary s42A Report para 4.37 page 40.*

<sup>36</sup> *Mr O'Leary Supplementary Statement 13 July 2023 para 40 page 12.*

## **Evaluation**

164. We find that some aspects of reverse sensitivity effects of the proposal are able to be appropriately avoided, remedied or mitigated through resource consent conditions. However, we believe that the addition of 48 homes to the 20 already consented is likely to encourage residents and visitors to have expectations of some standards of residential ambiance, including peace and quiet during the summer, when many of the rural activities likely to cause concern usually take place. Regardless of rules and no complaints covenants, people living in properties in the development will be affected by farming noises and smells, animal pest control activities and stock crossing the public road. Although not able to express their complaints, they are likely to show dissatisfaction and might try to discourage normal farming practices (through word of mouth and social media). Therefore, we find that the reverse sensitivity effects of the proposal are not able to be adequately avoided, remedied or mitigated and that grant of consent to the Application would result in potentially significant adverse effects in this regard.

## **RELEVANT ISSUES**

### **Transport Network Effects**

#### **Discussion**

165. Transport network effects from this proposal in our opinion relate to traffic and pedestrian safety, including beach access and parking.
166. The subdivision site is Stage 3 of a larger subdivision being undertaken and for which consent has already been granted to Stages A, 1 and 2. Vehicle access to Stage 3 is proposed to be by way of a private road extending from the end of Punawaitai Road. Punawaitai Road is currently an unformed Council road that will be upgraded to sealed road standard in accordance with the conditions of resource consent RM180160 (Stages 1 and 2) prior to the proposed subdivision being completed. This includes expansion of its width to 6.2m.
167. Access to the Stage 3 lots will be by way of two new private roads that will have a vehicle carriageway formed and sealed to 6.2m within an 18.5m wide reserve. A 1.5m footpath is proposed on one side of the vehicle carriageway within both roads. Within the shared open space areas and the balance lot (lot 60) a 2.5m wide footpath is proposed around the periphery. This will connect to the recently constructed private access track on the eastern side of Makurapata Stream which provides access to the beach.
168. With regard to the wider network, Punawaitai Road intersects with Pourerere Road, the main egress and egress to the beach settlement. At the point of intersection the speed limit on Pourerere Road is 100 km/h and the speed limit

on Punawaitai Road is 30 km/h. Approximately 30m east of the intersection the speed limit reduces on Pourerere Road to 50 km/h.

169. We received technical evidence on traffic effects from Mr Boaretto of Urban Connection on behalf of the Applicant, and a technical memorandum from Mr Rossiter on behalf of the Council.

170. Mr Boaretto's evidence identifies the primary transport considerations as:

- a. The level of traffic that is likely to be generated by the proposed residential development;
- b. The likely effect traffic generation will have on the surrounding transport network; and
- c. The ability of the site and its surrounds to meet the access demands created by the development.

171. The Applicant provided an assessment of vehicle trip rates for the development as 28 vehicles per hour, based upon standard residential rates in the NZTA Research Report *'Trips and Parking related to Landuse November 2021'*. Mr. Boaretto notes that there is no evidence specifically available for trip rates for holiday/weekend homes.

172. In his evidence Mr Rossiter agrees that the average traffic generation of the houses in the subdivision will be less than 8vpd (vehicles per day) per dwelling. He considers that the traffic generation figures used by the Applicant are based on out-of-date figures and provide a conservative estimate of traffic generated.

173. In his final statement Mr Boaretto notes that:

*"The expected traffic generation of the proposed development given by the TIA (Traffic Impact Assessment) is 394 vehicles per day (vpd) and 60 vehicles per hour (vph). The trip rates used are conservative for the predominantly recreational use of the residential lots and the environment in which the development is located. The conservative assessment of trip generation provides a more robust assessment of the potential traffic effects.*

*In reality, a likely more accurate trip generation for the proposed development would be based on trip generation rates for recreational homes. Recreational homes are usually second homes used by the owner periodically or rented on a seasonal basis.*

*Based on daily and peak-hour rates for recreational homes provided by the Trip Generation Manual 10th Edition of the Institute of Transportation Engineers, the daily trip generation on weekdays for the site is expected to typically be 167 vpd and 15 vph in the peak hour. Peak hour trips could be expected to increase during the weekend, reaching approximately 58 vph in the PM peak hour on*

*Fridays. The hourly trip generation on Friday evenings is similar to the figure used in the TIA....*

*The expected effects from the traffic to be generated by the site on the surrounding intersections are considered relatively low and assessed as no more than minor, and traffic effects beyond these intersections are assessed as negligible.”*

174. In terms of *intersection performance* Mr Boaretto provided an assessment of the existing intersection’s ability to absorb the traffic generated by the proposed development. He concludes that the relatively low volumes associated with the site will not impact adversely on the adjacent network. Mr Rossiter similarly concludes that there will be ample capacity at the intersection for drivers to depart and average delays will be below 10 seconds.
175. In relation to access to the township and Pourerere Beach Mr Boaretto provided an estimate of 144 vpd from the development, on the assumption that 25% of visits from the development to the township/beach will either be by foot, bike or all properties not occupied at once.
176. Mr Rossiter notes that no assessment has been provided of the effects on the operation of Pourerere Road or road safety of the increased volume of vulnerable road users in a location where there are no separated facilities or speed management controls.
177. In his final statement Mr Boaretto comments as follows on the potential increase in conflict between pedestrians and vehicles on Pourerere Rd:

*“The availability of the path that connects the site straight to the beach indicates that the site’s residents are unlikely to walk along Pourerere Road due to the significantly longer path to be walked. The path from the site to the beach results in a walking distance of approximately 1 km, while the walking distance along Pourerere Road is approximately 1.95 km to the beach or almost double the distance. Using a comfortable walking speed of 1.3 m/s, the path along Pourerere Road results in approximately 12 extra minutes compared to the path from the site straight to the beach (25 minutes against 13 minutes).*

*Furthermore, no key destination points that could generate walking trips from the site are provided throughout Pourerere Road, such as dairy shops, cafés or similar. Once again, this further indicates that no pedestrian trips from the site are likely to occur along Pourerere Road.”*

178. No evidence was presented from any parties on the impacts of increased car parking demand adjacent to the beach.

179. Five submitters raised traffic concerns in their submissions. Their points cover:
- a. Negative impact of increased demand of services and traffic from residential activities on existing environment.
  - b. Safety concerns due to increased traffic with no speed suppression as the current road has vehicles travelling at excessive speeds.
  - c. Increase in traffic:
    - i. Road currently in poor condition and proposal will result in heavy construction traffic and increased vehicle movements
    - ii. Safety concerns for pedestrians as there is no footpath along the road to access the beach
    - iii. Lack of parking to accommodate additional traffic at the beach and may result in increase of vehicles on the beach, impacting safety and effects on wildlife and coastal character.
  - d. Concerns surrounding increased traffic and roading demands:
    - i. Pedestrian safety
    - ii. Impact on road conditions from increased vehicle movements and weather events
    - iii. Speed limits and traffic control measures sought around proposed subdivision
    - iv. Lack of consideration of traffic during busy holiday periods
    - v. Increased demands for parking at beach
    - vi. Cost of maintenance and repair
    - vii. Issues with existing exit areas onto beach
  - e. Safety issues crossing Pourerere Rd from main homestead to farm and for existing residents reversing out of their properties; sealing of Punawaitai Road has sped traffic up along road. Additional traffic will exacerbate this safety concern.
  - f. Traffic assessment does not address pedestrian safety to the beach nor peak traffic numbers; nor parking at the beach.
180. Traffic and pedestrian safety are therefore a significant concern for submitters.

## Evaluation

181. We accept that, while there are differences in technical methods used, the estimates of traffic generation from the proposed subdivision will be able to be accommodated within the existing capacity of Punawaitai Road (following its upgrade) and of Pourerere Road.
182. In the Applicant's opening submission it states that:
- "The section 42A report includes a report from Mr Rossiter on traffic issues. Concerns raised in Mr Rossiter's reports have been addressed in the evidence of Mr Boaretto. Mr Boaretto has given evidence that the recommendation in 52 Royal Forest and Bird Protection Society of New Zealand Inc v Kapiti Coast District Council [2009] NZCA 73 at [27] 22 QAD-402694-2-1487-V7 Mr Rossiter's report in respect of additional traffic management methods being placed on the main Pourerere road are unnecessary. The applicant accepts Mr Boaretto's recommendations."*
183. Having visited the site and considered submissions we do not accept that additional traffic management methods are unnecessary. We consider that the speed limit at the intersection of Punawaitai and Pourerere Roads requires a reduction from its current level. We note that the CHBDC Land Transport Manager also supports the recommendations from Mr Rossiter for additional measures, and has suggested a series of raised platforms on Pourerere Rd.
184. We prefer the construction of a footpath within the overall development to provide safer access to the beach, and agree that there are physical limitations to the development of a footpath alongside Pourerere Road. Our preference is for a 2m wide footpath on one side of the road only to be incorporated at the engineering design stage.
185. We observed the limited amount of parking opportunities adjacent to the beach and accept that the introduction of additional residents and their parking needs close to the beach is a concern for submitters. However we were not provided with any evidence during the Hearing of the likely demand for beachside parking generated from the development and accept that the provision of additional parking areas should not fall to the responsibility of the Applicant. This is a matter for Central Hawke's Bay District Council to monitor and, if necessary, provide for. The areas are public parking spaces and increased demand may arise from a range of sources.

## Findings

186. Overall we find that the transport network effects of the proposal are able to be appropriately avoided, remedied or mitigated through resource consent conditions.

## **Geotechnical and Natural Hazard Effects**

### **Discussion**

187. Consideration of the geotechnical and natural hazard effects on the proposed development have been examined through the following reports:
- a. '*Geotechnical Investigation Report*', authored by Land Development Engineering, on behalf of the Applicant;
  - b. A Technical Memorandum from Lee Paterson assessing the geotechnical aspects of the Application, as part of the Reporting Officer's s42A Report;
  - c. A Technical Memorandum from Wayne Hodson assessing the servicing requirements for the development, including the potential for flooding, as part of the Reporting Officer's s42A Report;
  - d. Statement by David Dravitzki presented at the Hearing on behalf of the Applicant.

### **Geotechnical Matters**

188. Land Development Engineering (LDE) previously prepared a series of reports relating to the broader subdivision development at the property (2018, 2019 and 2021).
189. The report presented to this Hearing provides a detailed geotechnical investigation of Stage 3, the subject of this resource consent Application. The purpose of the investigation was to determine the geotechnical suitability of the proposed new Lots, assess the risk of any applicable hazards, and to provide engineering recommendations for foundation options to address any issues of insufficient bearing capacity.
190. The land surface of Stage 3 generally comprises a flat to gently sloping lightly grassed alluvial plain, surrounded by elevated broad hill/ridge landforms to the west, north and east.
191. The Pourerere Stream is situated to the south of Stage 3 with outlets to the coast. A tributary of the stream is located along the northeastern and southeastern edges of the adjacent sides of the Stage 3 area with lateral minor gullies/overland flow paths entering the stream on proposed Lots 11 and 15. An overland flow path is also present adjacent to the proposed Lots 20-22 area to the west.
192. No other significant geomorphic features are identified as part of the investigation.

193. The Geotechnical Report concludes that:

- a. The proposed subdivision has been assessed as stable and is generally considered to be suitable for construction in accordance with the New Zealand Building Code and relevant codes of practice, provided that recommendations contained within the report are adhered to.
- b. A 10m building setback from any significant slope crest belonging to adjacent tributaries or undeveloped encroaching gullies (Lots 11 & 15) has been specified.
- c. Foundation design specifications were also recommended for all lots.
- d. All other geotechnical hazards at the site have been assessed as either not present or of acceptable risk provided that the various mitigation measures. Relevant inspections and certification of the undercut/hardfill/ foundations excavations, and good practice recommendations made in the Geotechnical Investigation Report were adopted.

194. Mr Peterson's Technical Memorandum assessed the geotechnical effects of the Application and covers:

- a. Natural hazard under Building Act ss,71-73 which means the following:
  - i. Erosion (including coastal erosion, bank erosion, and sheet erosion)
  - ii. Falling debris (including soil, rock, snow and ice)
  - iii. Subsidence
  - iv. Inundation
  - v. Slippage
- b. Potential liquefaction/seismic amplification
- c. Coastal inundation/tsunami

195. In respect of the geotechnical issues Mr Peterson notes that:

*"The Applicant's Geotechnical Report has been undertaken in a professional manner, and the scope and extent of geotechnical investigations is sufficient to quantify the nature of ground conditions for the purpose of the Application.*

*Liquefaction - Whilst there are thin lenses of soils with a potential susceptibility to cyclical loading induced liquefaction, these are relatively thin. Soils generally contain a sufficiently proportion of plastic fine-grained soils to exclude the potential for liquefaction.*

*Slope Stability – this risk has been acknowledged by the Applicant, and conservative building setbacks are proposed by the application order to isolate the building from potential slope instability and the development of long term soil creep. Slope stability is Generally discounted as a risk due to the distance pf proposed developments from steeper slopes.*

*Foundation Strengths – the Applicant’s Geotechnical Report recognises that soils are present on site that do not generally meet the ultimate bearing capacity of 300kPa, and will therefore not meet Section 3.1.2 of NZS3604:2011 Timber Framed Buildings code for standard design. For the Applicant Mr Dravitzki concludes that:*

*I reviewed and approved the Geotechnical Investigation Report for the proposed Stage 3 Subdivision at Punawaitai Road, Pourerere, reference 14668.2 Revision.2, dated 11 August 2022.*

*I also reviewed and approved the various geotechnical investigation reports relating to the previous stages of the development.*

*I can confirm that the level of investigation carried out the site to date is appropriate to the level of the proposed subdivision and is sufficient for assessing the land hazards for Resource Consent purposes.”*

## **Natural Hazards**

196. The LDE Report provides an assessment of the natural hazards and ground deformation potential of the site.
197. The site does not appear to have any faults passing beneath the site nor are there any surface expressions that indicate the presence of an active fault line beneath or within close proximity to the site. It is located in an area of high seismicity and the return value used to assess liquefaction potential the Serviceability Limit State (SLS) of 25 year return period of a magnitude 6.0 earthquake and a peak ground acceleration of 0.17g is recommended to be used. An Ultimate Limit State (ULS) earthquake of 500 years, a magnitude of 6.3 and peak ground acceleration of 0.47g is recommended to be used.
198. Based on the assessed factors the site has a low overall susceptibility to liquefaction at the SLS and ULS levels, However, all building foundations within the 10m sloe proximity zone are recommended to incorporate a liquefaction tolerance equivalent to TC2 foundation systems unless the risk is otherwise discounted during building-specific geotechnical testing.
199. Mr Peterson’s technical assessment concludes that “we see no reasons to refuse the Application on the grounds of natural hazards or geotechnical conditions present on the site.”

200. The site is located outside the Hawke’s Bay Regional Council’s Coastal Hazard Zone but within the ‘near source’ Tsunami Inundation Zone, reflecting its proximity to the coast in a low-lying coastal area, along with the wider Pourerere coastal settlement.
201. For the Council Mr Hodson, as part of his assessment of site servicing requirements, notes that the proposed development area is well above estimated flood levels of the Makurapata Stream. The smaller adjacent gully appears to have less freeboard and therefore has the potential to result in overland flow through the site in extreme events. He recommends that a requirement for further assessment of the latter be included in the engineering design conditions.
202. The Pourerere Community and Character Preservation Society raised concerns about potential flooding based on flooding already experienced with the Makurapata Stream. Mr Hodson is satisfied that the Applicant has assessed the flood hazard and provided mitigation measures including detention storage to address the potential runoff from the development.

## Evaluation

203. We are satisfied that the technical experts who have provided evidence on geotechnical and natural hazard issues are qualified and experienced in their subject areas to provided that evidence.
204. When considering the resource consent Application, we have had to determine whether or not s.106 of the RMA is applicable.

### *106 Consent authority may refuse subdivision consent in certain circumstances*

- (1) *A consent authority may refuse to grant a subdivision consent, or may grant a subdivision consent subject to conditions, if it considers that—*
- (a) *there is a significant risk from natural hazards; or*
  - (b) *[Repealed]*
  - (c) *sufficient provision has not been made for legal and physical access to each allotment to be created by the subdivision.*
- (1A) *For the purpose of subsection (1)(a), an assessment of the risk from natural hazards requires a combined assessment of—*
- (a) *the likelihood of natural hazards occurring (whether individually or in combination); and*
  - (b) *the material damage to land in respect of which the consent is sought, other land, or structures that would result from natural hazards; and*

- (c) *any likely subsequent use of the land in respect of which the consent is sought that would accelerate, worsen, or result in material damage of the kind referred to in paragraph (b).*

205. In our view the Application does not trigger s.106 RMA. We are satisfied that the evidence provided is comprehensive and demonstrates that the site is not subject to significant risks from natural hazards. Nor would the proposed development exacerbate any damage to the subject area, other land or structures.

206. We concur with Mr O'Leary's s42A Report conclusion on Geotechnical and Natural Hazards issues that the effects of the proposal in this regard will be acceptable and can be sufficiently mitigated through appropriate consent conditions, and that the proposal is generally consistent with the relevant provisions under the Operative District Plan<sup>37</sup> and the Proposed District Plan<sup>38</sup> relating to natural hazard matters.

## **Findings**

207. We find that the geotechnical and natural hazards effects of the proposal are able to be appropriately avoided, remedied or mitigated through the resource consent conditions or, in the case of a tsunami, through additions to the Incorporated Society rules advising evacuation to the adjacent hill.

## **Ecological Effects**

208. Consideration of the effects the proposed development on nearby waterways and ecology have been examined through the following reports:

- Statement of evidence by Mr Son Tat Que Nguyen presented at the hearing on behalf of the Applicant regarding stormwater and wastewater discharge;
- Statement of evidence by Dr Hicks presented at the hearing on behalf of the Applicant to provide ecological advice; and
- Technical memorandum from Mr Wayne Hodson assessing the servicing requirements for the development including stormwater and wastewater, as part of the Reporting Officer's s42A Report

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<sup>37</sup> *Obj 3.4.1 and Policies 3, 4, and 5, Obj 9.5.1 and Policies 1 and 2, Subdivision Assessment Matters 14.6 (4) Natural Hazards and (11) Building Location.*

<sup>38</sup> *Obj NH-02, NH-03 and Policies NH-P1, NH-P3, NH-P5, NH-P6, NH-P8, NH-P9, NH-P10; Assessment Matters: NH -AM2, NH-AM4, NH-AM6.*

## Effects on Waterways

209. Mr Nguyen, in responding to concerns raised about the potential long-term and cumulative effects for the proposed on-site wastewater systems states<sup>39</sup> that *“the wastewater assessment is conservative, and the potential effects can be adequately mitigated (in accordance with the recommendations in a previous report)”*. He continued: *“The proposed consent notices will ensure that the registered proprietors are aware of the design, installation, operation, and maintenance requirements of these systems. The proposed maintenance contract will ensure the long-term performance of the on-site wastewater systems.”*
210. Dr Hicks expressed the opinion<sup>40</sup> that *“if on-site wastewater systems are designed and managed according to the accepted design principles, I have no reason to expect water quality effects from the subdivision to be any worse than the current land use. On the contrary in the case of the 25 Punawaitai Road subdivision, I expect the risk to water quality from suitably designed and maintained on-site wastewater systems to be substantially less than from the current land use.”*
211. The report by Mr Hodson identified the land area requirements for wastewater treatment and disposal fields allowing appropriate buffer areas and reserve areas.
212. Mr Hodson concluded<sup>41</sup>: *“There is infrastructure proposed to address most of the potential effects...Further formal arrangements and enduring requirements for on-going operation and maintenance will be important to ensure that the long-term and cumulative effects of the designed on-site wastewater systems are no more than minor.”*
213. As set out in the Infrastructure and Servicing section of this decision, we understand that the Applicant is accepting of conditions requiring in-stream and estuary water quality monitoring.

## Effects on Tūturiwhatu/Dotterels

214. Policy 4.4.2 of Operative District Plan seeks to discourage inappropriate development in sites identified as having rare, endangered, or vulnerable species of plants or animals.
215. Tūturiwhatu/Dotterel is an endangered species which is endemic to NZ.
216. A Tūturiwhatu breeding ground is near, but not on, the site of the proposed subdivision.

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<sup>39</sup> Mr Nguyen: para 5.1, page 5.

<sup>40</sup> Dr Hicks: para 16 page 4.

<sup>41</sup> Mr Hodson: para 11.5, page 9.

217. Submitters were concerned that the birds and the breeding area might suffer effects from the presence of increasing numbers of people using the nearby access track to the beach.
218. Dr Hicks<sup>42</sup> responded to these concerns by citing a survey and a study observing disturbance to nesting dotterels from people walking, running, or being accompanied by a leashed dog. His conclusion<sup>43</sup> was: *“If an adequate buffer distance (at least 50 m but ideally 100m) between the nesting area and foot traffic has been established, I see no reason to expect an increase in foot traffic to be of concern”* evidence expected increase in foot traffic on path is of no concern. Dr Hicks confirmed the importance of the existing fence, which is approximately 50 m from where the access path traverses the dunes.
219. Dr Hicks also stated that the main conservation tool for Tūturiwhatu has been the protection of breeding sites via pest control, fencing and education. Although the breeding area at Pourerere Beach is fenced off with signage, there is no pest control occurring. He believed there would be a clear benefit and a net positive outcome on bird populations if a suitably designed predator control programme was implemented that protected the dotterel nesting area.
220. We are also aware, and have read, the National Policy Statement for Indigenous Biodiversity 2023(NPS-IB), which came into force on 4 August 2023. We agree with the Applicant’s counsel<sup>44</sup> who advised that the Application is consistent with the objectives and policies of the NPS-IB.

### **Riparian Planting**

221. Dr Hicks stated that the Modified Tributary along the eastern boundary of the proposed subdivision is a small coastal creek that should provide excellent habitat opportunities for various fish species, as well as a diverse range of birds, insects, and other fauna. He believed these would benefit from an improvement in riparian habitat structure<sup>45</sup>. His recommendation was that riparian planting in addition to that already provided as part of the earlier stages of the subdivision, and that a planting plan should be prepared for the site.
222. **S42A Report:** Mr O’Leary<sup>46</sup> considered the proposal is consistent with the Operative and Proposed District Plans in regard to stormwater and wastewater management and confirmed that the Applicant has confirmed that all discharges to land will comply with Rules 23, 25 and 28 of the Regional Coastal Environment Plan. He also included relevant conditions with the draft recommended conditions relating to Riparian Planting, and recommended the Commissioners

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<sup>42</sup> Dr Hicks paras 22-26, pages 5-6.

<sup>43</sup> Dr Hicks paras 27, page 6.

<sup>44</sup> Applicant’s counsel opening submissions 12 July 2023 para 109, page 22.

<sup>45</sup> Dr Hicks paras 40-44, page 11-13.

<sup>46</sup> O’Leary paras 4.73 and 4.77 pages 50 and 52.

seek further advice on the potential impacts of increased use of the existing access track.

## **Evaluation**

223. We are satisfied that the technical experts who have provided evidence on the water are qualified and experienced in their subject areas to provide that evidence.

## **Findings**

224. Overall, we are satisfied that the possible effects of the proposal relating to Ecological Effects can be appropriately avoided, remedied or mitigated through the resource consent conditions provided by the Applicant's Counsel with his Reply.

## **OTHER ISSUES**

### **Cultural Effects and Effects on Tangata Whenua Values**

225. The matter of actual or potential cultural effects and/or effects on tangata whenua values as a result of the proposal was not traversed in significant detail at the hearing.

226. As noted earlier in this decision<sup>47</sup>, the Application included a written approval from the Pourerere Hapu Trust and we have made no further consideration of potential effects of the proposal on this party.

227. The Applicant commissioned a Cultural Impact Assessment to be undertaken by the Kairakau Lands Trust. In accordance with our Minute 2, the content of the CIA has remained confidential insofar as any publication or wider distribution is concerned, with the exception of sections entitled "Further Considerations" and "Conclusion and Recommendations" on pages 61 to 64.

228. We have considered the entirety of the CIA and accept the position set out within it that the cultural effects of the proposal subdivision on Kairakau Lands Trust will be moderate, provided recommendations and any conditions of the Archaeological Authority, should an authority be needed, are followed.

229. Mr O'Leary in the s42A Report invited the Applicant to provide comment as to whether it was accepting of the recommendations in the CIA and any offering of conditions on an *augier* basis.

230. We understand from Ms Foster's evidence in chief at para 16 that the Applicant accepts the recommendations in the CIA with the exception of undertaking a wider archaeological survey of the coastal hills around Paoanui Point.

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<sup>47</sup> Paras 27-28.

231. We have no planning evidence or legal submissions regarding whether 'moderate' equates to minor or less than minor or something else, and hence whether or not conditions on this matter would be *augier* conditions is not something we can determine.
232. However, we accept the Applicant's position that the wider archaeological survey would not likely be in the ambit of what can be required via conditions of consent, and it appears that the offered conditions of consent would implement the recommendations from the CIA. We therefore accept the Reporting Officer's position that the proposal is consistent with the objectives and policies of the ODP and PDP relating to cultural matters and Tangata Whenua Values.

### **Archaeological Effects**

233. We have an agreed set of conditions from the Applicant's Expert Planner and the Reporting Officer relating to archaeological survey and accidental discovery protocol. We therefore accept the Reporting Officer's position as stated in the s42A Report that the proposal is consistent with the PDP as adverse effects on (known) archaeological sites will be avoided and the potential for disturbance via accidental disturbance will be mitigated via the conditions of consent.

### **Servicing and Infrastructure Effects**

234. The Reporting Officer and Council's technical expert, Mr Hodson, are of the view, as set out in the s42A Report and discussed at the hearing, that the proposed servicing arrangements are in accordance with the provisions of the ODP and PDP and can be appropriately managed via conditions of consent.
235. The conditions of consent include a requirement for a Comprehensive Infrastructure Management Plan and a number of other relevant conditions, and we agree with the relevant experts that it is likely that all matters can be appropriately addressed in conditions.
236. With regard to stormwater, Mr O'Leary identified the need for a condition requiring hydraulic neutrality to account for advice from Mr Hodson that more specific site design may be required given the size of some proposed lots and where wastewater requirements mean that stormwater dispersal cannot be relied upon.
237. With regard to overland flow paths, at the hearing, we queried the Applicant's expert, Mr Nguyen about several matters including flood modelling predictions and assumptions post Cyclone Gabrielle.
238. There were a number of submissions relating to the potential effects of on-site wastewater resulting from the proposal. Mr O'Leary noted that one of the recommendations of the CIA was for in-stream and coastal water monitoring as a way to determine if water quality effects were occurring as a result of the use

of on-site wastewater systems within the proposed subdivision. It appears that this recommendation has been accepted by the Applicant.

239. It is not entirely clear to us the extent that these matters have been addressed in the Applicant's proposed conditions although we see some changes in this regard as compared to the previous version. We note that a more detailed discussion of the changes to the conditions from the Applicant, in addition to the short hand notes made in 'track changes' would have been helpful. This is particularly on the matter of servicing and infrastructure in order to understand if further refinements to the conditions were necessary, were we of a mind to grant consent to the Application.

## CONCLUSION

240. Our reasons for refusing consent are:

- a. The Application does not meet the test of 3.8(1)(a) of the NPS-HPL because the subdivision would enable approximately 17 hectares of highly productive land to be utilised for residential purposes and therefore the proposed lots do not retain the overall productive capacity of the subject land.
- b. The natural character and landscape character (including rural character and amenity effects) of the proposed subdivision are not able to be satisfactorily avoided, remedied or mitigated. Further because of the progress of the Proposed District Plan at the time of the hearing we are satisfied that we are able to place sufficient weight on it to conclude that the proposal is not consistent with the objectives and policies for the General Rural Zone.
- c. The reverse sensitivity effects of the proposal are not able to be adequately avoided, remedied or mitigated and that grant of consent to the Application would result in potentially significant adverse effects in this regard.

241. We acknowledge that we have taken into account the recommendation of Mr O'Leary to refuse consent to the Application.

242. Overall we consider that refusing consent to this Application achieves the purpose as set out in section 5 of the RMA.

Date: 22 February 2024.



Eileen von Dadelszen  
Hearing Commissioner  
(Chair)



Liz Lambert  
Hearing Commissioner



Grey Wilson  
Hearing Commissioner