BEFORE THE CENTRAL HAWKE'S BAY DISTRICT COUNCIL

220003

IN THE MATTER OF	the Resource Management Act 1991
AND	An application by James Bridge for a resource consent to subdivide land at Pourērere (being Part of Lot 1 DP 27067 and contained in Record of Title HBW3/400)

LEGAL SUBMISSIONS OF COUNSEL FOR THE APPLICANT

12 July 2023

MAY IT PLEASE THE COMMISSIONERS

Introduction

1. I acknowledge the history and culture detailed in the Cultural Impact Assessment produced by the Kairakau Lands Trust. I acknowledge the history of loss, both of the land itself as well as the change brought about by farming on the land which has removed wetlands and prevented the gathering of mahinga kai.

2. Typically, people who operate under the Resource Management Act talk about avoiding, remedying or mitigating adverse effects on the environment. This application attempts to improve the state of the environment. Consequently, the applicant proposes to:

   (a) accept the archaeological recommendations contained in the Cultural Impact Assessment;

   (b) improve stream water quality by continuing the riparian planting and the appropriate management of water quality;

   (c) appropriately manage stormwater through a system of swales and a retention pond, planted in native plants where practicable;

   (d) Provide for further planting of indigenous species in shared open spaces;

   (e) undertake predator control in and around the dotterel breeding area on the beach in addition to maintaining the existing fences;

   (f) All while maintaining (if not enhancing) the productive capacity of the farming operation of the subject land.

3. The Council has raised the issue of subdividing Class 3 productive soils. While we are of the view that the effects on productive soils on the site were minor and consequently effects are avoided, it is possible to increase the productivity of the remaining land through the installation of drainage to constructed wetlands.

4. A network of paths will be created to reduce vehicle movement and to improve pedestrian access.

5. The Applicant has already offered access to the farm for tangata whenua.

6. Issues raised in the Cultural Impact Assessment are matters for us to face as a society. The Applicant is proposing to make a tangible improvement to Pourērere.[1]

Submissions

7. This application was publicly notified and six submissions were made in opposition. The submitters have been responded to in the evidence of the witnesses called by the applicant.

The Application

8. The application as lodged sought consent 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.

9. I agree with Mr O'Leary the activity for which consent is sought is a discretionary activity.

10. The reason a discretionary resource consent is needed is because:

    (a) The proposal is for lots smaller than the minimum lot size standard in the rural zone of 4,000m² (operative plan);

    (b) As 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) (operative plan); and

    (c) To the extent that recreational activities will occur on the shared open space lots, that activity now also requires a resource consent (proposed plan, rule has immediate legal effect).

11. An application for a subdivision consent is not merely an application to draw lines on a map.[2] What is proposed a place where people will live ("residential development") and recreate ("shared open space"): some of that open space

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[1] Although not official, we defer to the Cultural Impact Assessment where a macron is used in the name Pourērere.
[2] *Pukenamu Estates Ltd v Kapiti Environmental Action Inc* HC Wellington AP106/02, 1 July 2003.

will also be used for farming purposes and to restore indigenous ecosystems (the streams, the retention pond and parts of the shared open space).

12. Ordinarily a resource consent application would identify the relevant rules and would be framed as a consent to do something that would 'breach' those rules. However, as I outlined in a letter referred to in the Section 42A Report,[3] in the context of this case, it matters whether an application is conceptualised as for an activity or for a breach of the rule. This is because the relevant rule framework has changed since the application was lodged. (I will address the weight to be given to each plan below).

13. A resource consent is "a consent to do something".[4] It is a consent to undertake an activity. It is not a consent to merely breach a rule.[5] The fact that new rules have been introduced into the proposed plan does not change the activity. As the Environment Court held in *Arapata Trust* "a holder of a resource consent for a specified use or activity is not required to obtain a further resource consent for the same use or activity when a new or changed rule comes into effect."[6]

14. It is obvious from the application that the open space lots are going to be recreated on. That activity now requires a consent. While the rules have changed, there is no change to the activity. Consequently, there is no issue of scope.

15. The rules relating to setbacks (GRUZ-S5) are under appeal and so are not operative. Nor do those rules have immediate legal effect. The set back rules do not relate to a matter listed in s 86B(3).

16. In any event the proposal is for this subdivision consent seeks to reflect the setbacks contained in the operative plan.

Highly Productive Land

17. The National Policy Statement for Highly Productive Land ("**NPS-HPL**") came into force on 17 October 2022. Policy 7 of that National Policy Statement is that "the subdivision of Highly Productive Land is avoided, except as provided in this National Policy Statement". That policy is supported by a policy

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[3] Section 42A Report, a [2.15].
[4] Section 87.
[5] See the Environment Court decision in *Arapata Trust Ltd v Auckland Council* [2016] NZEnvC 236 and the High Court decisions in *Duggan v Auckland Council* [2017] NZHC 1540 and *Marlborough District Council v Zindia Ltd* [2019] NZHC 2765.
[6] *Arapata Trust Ltd v Auckland Council* [2016] NZEnvC 236 at [44], *Zindia* at [37]

protecting Highly Productive Land from inappropriate use and development[7] and prioritising the use of Highly Productive Land for land-based primary production.[8]

18. There is no question that the NPS-HPL sets up a directive set of policies which are intended to have a significant impact on the form of subdivision in New Zealand. There is no question that the area sought to be subdivided comprises Highly Productive Land as that expression is defined in the NPS. It is controversial that the NPS-HPL applies to LUC 3 land;[9] however, as the Regional Council has not yet completed its HPL mapping exercise, the NPS is clear that all such land is deemed to be Highly Productive Land for the purpose of the NPS.[10] That is not something which can be debated here.

19. Mr Wiffen argues that the district plan is subservient to the NPS-HPL.[11] That is not an accurate reading of s104(1)(b). Both the plans and the NPS must be had regard to. In addition, Mr Wiffen describes the process that Councils must follow to give effect to the NPS as creating "urgency".[12]

20. The process is rather more measured:

    (a) Regional Councils must identify highly productive land and (as soon as possible but no later than) 3 years after the commencement of the NPS, must notify a variation to their RPS.[13] Notification of this variation must occur before October 2025. The schedule 1 process will take up to 2 years, and there may be appeals to the Environment Court.

    (b) Territorial Authorities must then include those mapped areas in their district plans without using a schedule 1 process within 6 months of the regional variation becoming operative (and again soon as possible).[14]

    (c) From that point, the NPS-HPL mapping would apply to that mapped land.

    (d) Separately, every territorial authority must notify changes to objectives, policies, and rules in its district plan to give effect to this NPS (using a

[7] NPS-HPL, cl 2.2, Policy 8.
[8] Policy 4.
[9] Land Use Capability Class 3.
[10] NPS-HPL, cl 3.5(7).
[11] At [14] and [78]
[12] At [64]
[13] NPS-HPL, cl 3.5(1)
[14] NPS-HPL, cl 3.5(3)

process in Schedule 1 of the Act) as soon as practicable, but no later than 2 years after maps of highly productive land in the relevant regional policy statement become operative.[15] That would include giving effect to Clauses 3.8 and 3.9, and would most likely occur in 2028 or 2030.

(e) In the meantime, the NPS defines HPL as all LUC 1, 2 and 3 land. This is a safety net to ensure that no inappropriate subdivision, use or development in the (potentially long) interim period.

21. There is nothing particularly urgent about this.

22. Nor is one instrument subservient to the other. The NPS-HPL does not override s104. It provides a consenting pathway in the interim, and directs a planning pathway in the medium term.

23. The consenting pathway in the context of this case is clause 3.8. The applicant's evidence is directed towards demonstrating that clause 3.8(1)(a) and clause 3.8(2) are met, and consequently consent can be granted. Clause 3.9(2) is relevant to the extent that certain land-uses are exceptions to restrictions.

24. Clause 3.8(1) and (2) relevantly provide:

> (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.
>
> …
>
> (2) Territorial authorities must take measures to ensure that any subdivision of highly productive land:
>
> > (a) avoids if possible, or otherwise mitigates, any potential cumulative loss of the availability and productive capacity of highly productive land in their district; and
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> > (b) avoids if possible, or otherwise mitigates, any actual or potential reverse sensitivity effects on surrounding land-based primary production activities.

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[15] NPS-HPL 4.1(2)

…

25. Arising out of these provisions are three issues:

    (a) The meaning of ‘avoid’;

    (b) The meaning of ‘the subject land’;

    (c) The meaning of ‘productive capacity’.

Avoid

26. There is no caselaw on the meaning of ‘avoid’ in the context of the NPS-HPL. However, it ought to be assumed that the Minister for the Environment had in mind recent Supreme Court authority on the meaning of ‘avoid’.[16] The *NZ King Salmon* decision concerned the word ‘avoid’ in the context of the New Zealand Coastal Policy Statement (“**NZCPS**”). The NZCPS requires the avoidance of adverse effects in circumstances set out in policy 11 (Indigenous Biological Diversity), 13 (Natural Character), 15 (Natural Features and Natural Landscapes) and 16 (Surf Breaks). In that context the Supreme Court has stated (emphasis added):

    [144] Third, it is suggested that this approach to policies 13(1)(a) and 15(a) will make their reach over-broad. The argument is that, because the word “effect” is widely defined in s 3 of the RMA and that definition carries over to the NZCPS, any activity which has an adverse effect, no matter how minor or transitory, will have to be avoided in an outstanding area falling within policies 13 or 15. This, it is said, would be unworkable. We do not accept this.

    [145] The definition of “effect” in s 3 is broad. It applies “unless the context otherwise requires”. So the question becomes, what is meant by the words “avoid adverse effects” in policies 13(1)(a) and 15(a)? This must be assessed against the opening words of each policy. Taking policy 13 by way of example, its opening words are: “To preserve the natural character of the coastal environment and to protect it from inappropriate subdivision, use, and development”. Policy 13(1)(a) (“avoid adverse effects of activities on natural character in areas of the coastal environment with outstanding natural character”) relates back to the overall policy stated in the opening words. *It is improbable that it would be necessary to prohibit an activity that has a minor or transitory adverse effect in order to preserve the natural character of the*

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[16] *Environment Defence Society Inc v New Zealand King Salmon Co. Ltd* [2014] NZSC 38 [2014] 1 NZLR 593. Any day, the Supreme Court will issue decisions in the *Port Otago* and the ‘East West Link’ cases, which may add to the relevant case law.

coastal environment, even where that natural character is outstanding. Moreover, some uses or developments may enhance the natural character of an area.

27. While avoid means to prevent the occurrence of something, the Supreme Court found that minor effects would not be contrary to the avoid policy. To paraphrase, if a policy directs that certain adverse effects be 'avoided', that policy can be met despite the presence of those effects if those effects are "minor or transitory".

28. The report of Steve Goodman was directed at meeting the no more than minor effects test. I apprehend that the Council's reporting officer and Lachlan Grant take a more stringent approach. I will return to that below. However, if Mr Goodman's evidence is accepted, the avoid policy 7 in the NPS-HPL will be met by the proposal.

The Subject Land

29. The Legislation Act 2019 provides that "the meaning of legislation must be ascertained from its text and in the light of its purpose and its context.[17]

30. In my submission, the meaning of "subject land" in the context of clause 3.8(1)(a), and in the context of this site means the full 376.7ha lot which the applicant seeks to subdivide. Indications of this are found in the context of the NPS which requires that "The Applicant demonstrates that the [subdivision of] the proposed lots will retain the overall productive capacity of the subject land over the long term."[18]

31. The word "overall" suggests a broad judgment. If "the subject land" was interpreted as just being the 17 ha (approximately) being used for something other than indigenous vegetation restoration, access or being retained in some sort of rural use, such as horse paddocks, then most forms of subdivision would need to be avoided. There will be a much more straight forward way of writing such a policy.

32. Mr Wiffin contends that the "subject land" includes only land which is defined as HPL in the NPS. There is nothing in the NPS which supports this. The prevailing purpose of the NPS is to protect loss of productive capacity. Such a narrow interpretation would present an artificial picture of the actual loss of productive capacity which the subdivision activity would cause. The class 3

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[17] Legislation Act 2019, s 10.
[18] Clause 3.8(1)(a)

soils of the farm are not farmed separately from the remaining parts of the farm. 'Productive capacity' is not limited to LUC 1, 2 or 3 land.

33. Mr Wiffin also contends that the "Guide to Implementation" prepared by the Ministry for the Environment is of assistance. The Courts have been clear that it is inappropriate for such documents to be referred to as an interpretation aid for interpreting RMA legislation such as national policy statements. Such documentation is often prepared after the fact of the legislation and only reflects the subjective interpretation of Ministry officials. To use such documentation as aids to interpretation is to give them legislative weight.

34. The Environment Court has recently ruled (in the concept of the National Policy Statement for Freshwater Management (NPS-FM)):[19]

> Firstly, we note that NPS-FM is a statutory instrument established under Part 5 (ss 45-55) RMA, changes to which must be effected in accordance with s 53. The proposition that a definition contained in such a statutory instrument might be altered in some way or its application affected by operation of non-statutory instruments such as the Guidance document and hydrology tool is one with which we have extreme difficulty as a legal proposition. The Guidance document appears to be just that, "guidance", the application of which is tempered by caveats in the document itself which we will refer to shortly but one of which makes it clear that the Guidance document does not purport to alter laws, official guidelines or requirements, a category which the definition contained in NPS-FM must surely fall into.

35. Mr Wiffin also misquotes s 104(1)(c) of the RMA as that "regard can be had to 'any other relevant matter'".[20] That section in fact reads (emphasis added) "When considering an application for a resource consent and any submission received, the consent authority must, … have regard to … any other matter the consent authority considers relevant *and reasonably necessary to determine the application*."

36. The Guide produced by the Ministry is not relevant (applying the decision in *Adams*). It is not necessary for the consent authority to refer to the Guide. The NPS-HPL in its context indicates that the subject land means the land proposed to be subdivided.

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[19] *Greater Wellington Regional Council v Adams* [2022] NZEnvC 25 at [136].
[20] Evidence of Roger Wiffin at [13].

37. Nevertheless the guidance documents does not say what Mr Wiffen says it says. It states[21]

> In some situations, a landuse activity may span both HPL and non-HPL land under the transitional definition of HPL. In these circumstances, a holistic assessment should be undertaken with the NPS-HPL provisions applying to the overall land-use activity.[22]
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> To assess whether the "overall productive capacity" will be retained in the context of a subdivision application (under Clause 3.8(1)(a)), or a small scale or temporary activity (Clause 3.9(2)(g)), the emphasis is on the 'overall' productive capacity and not just the productive capacity of the balance lot. This assessment will require the existing productive capacity of the subject land to be assessed so that an overall comparison between the existing and proposed can be made.[23]

Productive Capacity

38. The NPS-HPL defines productive capacity as:[24]

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

39. Both Lachlan Grant, Steve Goodman and Mr Tither identify the tendency of the soil to become waterlogged and pugged in this location as a key constraining factor. The particular soil type, coupled with the presence of water inhibits grass growth. This results in damaged pasture caused by excessive trampling which inhibits grass growth in the medium term. On an overall basis, this reduces the existing productive capacity of the land.

40. There is a distinction to be drawn between how one uses the land, and its productive capacity. When Mr Wiffen refers to "ramping up" production[25] he is talking about the former. Altering the drainage properties is altering a

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[21] Ministry for the Environment. 2023. National Policy Statement for Highly Productive Land: Guide to implementation. Wellington: Ministry for the Environment.
[22] Page 19
[23] Page 22
[24] Clause 1.3.
[25] At [42]

physical characteristic, and consequently the latter. Drainage properties are inherent.

Mr Tither's evidence

41. Mr Tither's evidence equates an 18ha loss of productive land over what he says is a 325ha farmable area with a 65% loss of economic surplus over the entire farm.

42. This seems to have been achieved by

(a) Using a different basemap of the property. Mr Goodman has supplemented Property Guru/Core Logic data with a ground truthing exercise (which I note Mr Tither has not undertaken). Mr Goodman took out pine trees and ponds etc to arrive at his figure.

(b) Assuming that 18ha of Class 3 soils proposed to be subdivided are capable of producing high quality feed. Mr Bridge will say this is not the farming model that either Mr Bridge or his neighbour has used over the past 6 years. Mr Tither states that 85ha of the farm is flats.[26] It is not apparent why Mr Tither has applied a special forage to only 18ha of the property.[27]

(c) Increased the fixed costs of the farming enterprise by incorporating a $80,000 management salary irrespective of farmable area, and making other adjustments to expenses.

43. The result of Mr Tither's model is that the farm as he would have it now operate, makes a profit of $8,048 per annum in an average year. No margin of error is stated but a small change in assumptions will presumably render the modelled farm unprofitable.

44. Mr Tither does refer to drainage[28]. He acknowledges that "The subject land already has drainage ditches and a degree of fall which I expect would enable well-designed drainage to be implemented."[29] On a projected profit per year of $8,048 it is difficult to see where the necessary debt servicing ability will come from, unless the subdivision is granted.

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[26] At [32]
[27] At [70] ("I have modelled an option of enhancing the pastoral productivity of 18 ha of flat land with specialist forage")
[28] Beginning at [82]
[29] At [83]

45. It is important to note that 'productive capacity' is not 'productive area'. Consequently the addition of drainage will add to productive capacity even as the area reduces.

46. One final point: some of the 18ha proposed to be subdivided will be used for indigenous vegetation restoration. Some will be used for access. Some will be retained in pasture. These activities are exempt pursuant to NPS-HPL Clause 3.9(2). This explains the 17ha figure which has been used in some of the calculations.

Drainage to improve Productive Capacity of the balance land

47. As noted above, the evidence of Mr Goodman is that the adverse effects of the proposal will have no more than a minor effect on the productive capacity of the land. However, in the event that that evidence and argument is not accepted by the Council, the applicant is proposing a condition to undertake drainage works to ensure the overall productive capacity of the subject land is not lost – indeed will be improved.

48. Drainage of this nature[30] which increase the productive capacity of the balance lot to an extent that, overall, there is no loss in production. Productive capacity is increased by changing the properties and versatility of the soil.

49. Mr Goodman will say that, if a series of conservative assumptions are made, the production of the land with the subdivision but without drainage will result in a 4.5% reduction in economic farm surplus, when compared with the present situation. The subdivision and drainage combination will increase the economic farm surplus by 1.6% If more optimistic assumptions are made (such as those suggested by Mr Grant) then there is a greater net improvement in economic farm surplus as a result of the subdivision and drainage.

50. The land which is proposed to be drained is itself Class 3 soils, so would fall within Mr Wiffen's definition of subject land.

51. On that basis the applicant is of the view that "the proposed lots will retain the overall productive capacity of the subject land over the long term". Strictly speaking the policy test is met without reference to s104(1`)(ab): "the consent authority must … have regard to … any measure proposed or agreed to by the applicant for the purpose of ensuring positive effects on the environment to

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[30] Which is a permitted activity under the Hawke's Bay Regional Resource Management Plan: 6.6.2 Rule 32 (page 157)

offset or compensate for any adverse effects on the environment that will or may result from allowing the activity".

Highly Productive Land is defined differently in the District Plan

52. In Mr O'Leary's 42A report, he makes a number of points about the proposed plan provisions.[31] In response to those points, we say:

(a) Ms Foster has pointed out in her evidence that the term "Highly Productive Land" is used in the proposed plan in a different sense to the technical definition in the NPS-HPL. For the purpose of the objectives and policies in the proposed plan, the land cannot be said to be highly productive.[32] Under the applicant's proposal, the productive capacity of Highly Productive Land (as that term is used in the proposed District Plan) will be maintained[33] (see RLR-O1);

(b) While the subdivision is undoubtedly fragmentation, when considered at a district scale and even at a 'subject land' scale, the district's Highly Productive Land is protected;[34] and

(c) Use of this land in this location compliments the resources of the rural area. Please see my comments on reverse sensitivity below (OLR-P4).

Large Lot Residential vs Rural Lifestyle

53. This proposal is not rural lifestyle subdivision but rather large lot residential. Throughout the Section 42A Report, Mr O'Leary has referred to the creation of 48 rural lifestyle lots. These lots are not rural lifestyle lots, but rather large lot residential. The difference between large lot residential and rural lifestyle zone is that the former is an urban zone and the latter is not an urban zone.

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[31] Beginning at Section 42A Report 4.24.

[32] Although it is undeniably Highly Productive Land for the purpose of the policies and provisions in the NPS-HPL.

[33] Noting Ms Foster's point that this land is not Highly Productive Land as defined in the proposed District Plan. Her analysis demonstrates that that Highly Productive Land is centered around Ruataniwha, Takapau Plains, Waipukurau, Waipawa and Ōtāne in the land zoned Rural Production Zone (RPROZ).

[34] Again, making the point that, in the context of the proposed plan, this land is not Highly Productive Land.

54. In the National Planning Standards[35], the rural lifestyle zone is defined as:[36]

> Areas used predominantly for a residential lifestyle within a rural environment on lots smaller than those on general rural and rural production zones, while still enabling primary production to occur.

55. The lots proposed do not fall within that definition. They are intended to be residential lots. Once space for the house and wastewater treatment system has been provided. There is no realistic area for further primary production.

56. Large lot residential zone by contrast is defined as:

> Areas used predominantly for residential activities and buildings such as detached houses on lots larger than those of the low density residential and general residential zones, and where there are particular landscape characteristics, physical limitations or other constraints to more intensive development.

57. Here the physical constraint is that each piece of land needs to provide for its own wase water system, while smaller than the Controlled Activity Standard.

58. This distinction matters because there are specific policies in the NPS-HPL and in the proposed District Plan[37] which are not relevant in this case, but would be relevant if lifestyle lots were proposed.

59. The issue which those provisions are attempting to address is to prevent hobby farmers who each will occupy a few hectares (in order of magnitude larger than the lots proposed here) which, cumulatively, would remove large amounts of productive land out of production.

60. The short point is that these lots will not be rural lifestyle lots and consequently the policies seeking to discourage rural lifestyle subdivisions are not applicable.

Reverse Sensitivity Effects

61. Mr O'Leary agrees that the proposal adequately addresses reverse sensitivity effects. One of the advantages of smaller lot size is that it avoids any suggestion that the lots will be used for a non-urban/rural purpose. In any event, the combination of no complaints covenants, appropriate consent

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[35] A territorial authority must prepare and change its district plan in accordance with a National Planning Standard: s74(1)(ea). See also s 58B(4)(c) and s58I

[36] Zone Framework Standard, Table 13.

[37] For example, RLR-P3 and in terms of the NPS Policy 6 and clause 3.7.

notices, creation of the shared lots and buffer area, and the other features of the subdivision means that reverse sensitivity is not an issue.

Natural Character, Landscape Character including Rural Character and Visual Effects

62. I observed that there is a tension between the Cultural Impact Assessment, the Landscape Peer Review by Ms Ryder and the incentive to minimise the effects on Highly Productive Soils.

63. As the Cultural Impact Assessment observes, this area has previously been drained with streams being moved and straightened with a loss of mahinga kai. The proposition that Ms Ryder seeks to have us accept is that, despite the upheaval and loss of the values described in the Cultural Impact Assessment, we should nevertheless prefer primary production.

64. Policy GRUZ-P2 in the proposed district plan recognises that residential activities can be located within the rural zone. The policy relevantly provides:

> "To provide for non-primary production related activities … that support the function and wellbeing of rural communities and/or the enjoyment of the rural environment, and contribute to the vitality and resilience of the district's economy, and where they are managed to ensure that:
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> 1. Their scale, intensity and built form are in keeping with the rural character of general rural zone;
> 2. They maintain a level of amenity in keeping with the rural character of the general rural zone;
> 3. They minimise reversed sensitivity effects on activities otherwise anticipated within the general rural zone; and
> 4. Adverse effects are avoided, remedied or mitigated."

65. As observed, the Council does not disagree that reverse sensitivity effects are adequately avoided by the proposal. Equally this application will have no overall effect on primary production.

66. Ms Ryder, when she describes "the loss of open rural landscape"[38] and "open rural character",[39] seems not to have taken into account the existing subdivision. When Ms Ryder went to the site in March 2022 it is plain that Ms Ryder saw the location of the stages 1 and 2development but her assessment

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[38] At 4.3 and 8.16.
[39] At 8.5 and 8.15.

of this application, in accordance with *Hawthorn*,[40] needs to assume that stages 1 and 2 will be fully developed. In those circumstances this application ought to be reviewed as an extension to the pre-existing large lot residential development.

67. Ms Ryder has referred to the proposal being inconsistent with CE-P3[41] which is to avoid “sprawling or sporadic subdivision and development in the coastal environment area”,

68. CE-P3 needs to be viewed in light of objective CE-O1 which provides:

“Preservation of the natural character of the coastal environment of Central Hawke’s Bay, comprising the following distinctive landform of:

(a) Rugged, eroding, grey mudstone cliffs;

(b) Steep limestone outcrops;

(c) Remnant dune lands and associated inter-dunal wetlands, small lakes and associated vegetation;

(d) Wide sweeping beaches; and

(e) Small settlements, recessed into bays, adjoining a number of sheltered beaches.

69. Both landscape architects have agreed that natural character of the coastal environment is not an issue in this case. Indeed this application would be part of a small settlement, recessed into the land upstream of the estuary and set back (recessed) from the coastal foreshore, and near (adjoining) a beach. Whether one would consider the beach sheltered perhaps depends on the weather.

70. Consequently the wording of sprawling or sporadic must take its meaning from the objective which includes small settlements as part of the natural character of the Central Hawke’s Bay coastal environment.

71. Given that this development is anticipated by the objective, it cannot be sporadic. Sprawling means development without an edge.[42] Were this application not recessed into the land surrounding and upstream of the

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[40] *Queenstown-Lakes District Council v Hawthorn Estate Ltd* (2006) 12 ELRNZ 299, [2006] NZRMA 424 (CA).
[41] At 8.7.
[42] *Wakatipu Environmental Society Inc v Queenstown Lakes District Council* [2000] NZRMA 59 (EnvC) at [155].

estuary, confined by the steeper land and the stream and associated with the existing development in stages 1 and 2, there may have been an issue in terms of CE-P3.

72. As I read Ms Ryder's report, she is suggesting that, should a suite of landscape mitigation measures be adopted, the effects of the activity might be reduced to an acceptable level. The Applicant team have reviewed the matters listed at paragraph 8.14. It would appear that many of the items on this list were suggested by Ms Ryder in an earlier application on the outskirts of Hamilton.[43] There are certainly differences between Dinsdale and Pourērere. Many of the matters which Ms Ryder had suggested are already part of the Applicant's thinking and had been imposed on the owners of stages 1 and 2. Where appropriate, they can be and have been proposed as conditions of consent in respect of this application.

73. It is perhaps unfortunate that, despite the invitation being made some time ago, there was not an earlier discussion between Ms Ryder and Mr Hudson or Ms Whitby. I observe that some of the suggestions made by Ms Ryder were not adopted by Mr O'Leary in his proposed consent conditions.

Planning Matters

The weight to be given to the proposed plan

74. The provisions of the proposed District Plan which affect this subdivision are subject to a specific appeal by James Bridge. A copy of his notice of appeal is **attached**. Doubtless other appeals will have been made on the plan.

75. The leading case on the weight to be applied to the operative and proposed plans is *Keystone Ridge Limited v Auckland City Council*.[44] The extent to which provision of a proposed plan are relevant should be considered on a case-by-case basis, and might include:

(a) The extent to which a provision has been exposed to independent decision-making, circumstances of injustice; and

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[43] Decision following the hearing of a non-complying activity application by G & S Singleton Heritage Limited to Waikato District Council for resource consent under the Resource Management Act 1991. https://hdp-au-prod-app-waik-shape-files.s3.ap-southeast-2.amazonaws.com/9115/9590/1445/Commissioners_Decision_270720_-_G__S_Singleton_-_SUB0165_19.pdf

[44] *Keystone Ridge Limited v Auckland City Council* HC Auckland AP 24/01, 2 April 2021 at [16] and [36].

(b) The extent to which the new measure, or absence of one, might implement a coherent pattern of objectives and policies in a plan.

76. In assessing weight, each case should be considered on its merits. Where there is significant change in Council policy, and the new provisions are in accordance with Part 2, the Court might give more weight to the proposed plan.

77. In the context of this case, giving significant weight to the proposed plan will effectively prejudge the appeal. On the contrary, giving little weight to the proposed plan will nevertheless enable this application to be addressed on its merits.

78. It is a surprising element of the proposed plan that it provides not only for no expansion of the existing settlements along the coastal margin, but also even the existing settlements along the margin of the Pourērere coast and stages 1 and 2 of this subdivision is not provided for in a settlement or large lot residential zone.

79. This underlines the point that the plan must anticipate applications for subdivision in the rural zone. As noted above, that is effectively what the policies do.

Rules are not policies

80. There are suggestions in several documents that non-compliance with a rule or standard in a plan is grounds for rejecting the application. This is misconceived.

81. A rule is not a policy or objective. A rule in a plan (and by extension, a standard) operates to determine the activity status of an application. Non-compliance with a rule or standard will either trigger the need for a resource consent for an activity or classify an activity as prohibited.

82. In *Neil Construction Ltd v North Shore City Council*[45], the Planning Tribunal held:

The consultant planner for the appellant accepted the proposition that doctors should be able to operate in the Residential 5 zone but on a restricted scale. He concluded that the plan "recognises the level at which the 'doctor activity' will have a minor impact on the residential environment".

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[45] *Neil Construction Ltd v North Shore City Council* Planning Tribunal Wellington W136/95, 6 November 1995 cited in 104 Consideration of applications, Resource Management 489860595, A104.03(4)(c)

With respect this is placing the RM Act at the mercy of the rules rather than the rules at the mercy of the Act after they have been accorded due weight. We know of no authority for the proposition that a provision of the plan (i.e. its rules) can effectively define what is a minor impact on the residential environment. That is a question of fact.[46]

83. None of the rules engaged by this application are prohibited activity rules. Rather, non-compliance with the relevant standard has triggered the need for a resource consent.

84. If non-compliance with a standard is the ground for refusing a consent application, this would have the effect of making every activity either permitted or prohibited and would render the consent process a nullity.[47]

85. Mr O'Leary states in the s 42A report at [2.15] that the new performance standards in the PDP are of "particular relevance" to this proposal. For the above reasons, these new standards have no relevance. The activity status of the application was determined at the time the application was lodged. The fact that the standards for what does and does not require a resource consent if lodged today have changed do not give any guidance on whether an the application should be judged acceptable or not.

Existing Covenants as Written Approvals

86. The effects on owners and occupiers of the first subdivision stage must be disregarded. The section 42A report author challenges this proposition at [3.9] These submissions set out the legal status of the covenants with reference to relevant authorities.

87. Each of stages 1 and 2 residential lots is bound by a land covenant registered against their title. That covenant provides that:

> The Covenantor covenants for itself (and it's successors in title) with the Covenantee, that upon becoming the owner of one or more of the records of title contained in the Burdened Land, the Covenantor shall join as a member of the Society and shall remain a member while the covenantor is a owner of one or more of the records of title contained in the Burdened land and shall continue to fulfil the obligations of a member as set out in the rules of the Society including, without limitation, ensuring that any

[46] Page 13

[47] *Brial v Queenstown Lakes District Council* [2022] NZCA 206 at [24] ("… the application required discretionary activity consent. A discretionary activity is by definition one that may be granted consent.")

transferee of one or more of the records of title contained in the Burdened Land executes a deed of covenant in favour of the Covenantee agreeing to be and remain a member of the Society while a owner of one or more of the records of title contained in the Burdened Land and to continue and fulfil the obligations of a member as set out in the rules of the Society.

88. Rule 7.1 of the Society provides that "each member agrees … to support any resource consent application made by the Developer to subdivide and development Lot 2 on DP 564721 (being the Staged Development)."

Relevant law

89. Section 104(3) of the RMA states that the Council must not have regard to "any effects on a person who has given written approval to the application".

90. In *Coneburn Planning Ltd v Queenstown Lakes District Council*, the Environment Court considered the status of registered covenants.[48] The case concerned an application to subdivide a lot into 7 lots. Each lot adjacent to the lot proposed to be subdivided had a land covenant registered against its title. The covenants stated that the registered proprietors would not submit against any planning, subdivision or development proposed by the appellant and would provide any necessary further written approval for any such planning proposal.

91. Queenstown Lakes District Council argued that any approval under section 104(3) had to be specific rather than generic, that such approval had to relate to an actual application and that the Council should not have to enquire into such land covenants.

92. The Environment Court rejected that Council's arguments. The Court held that the wording of the covenant, not only obliged covenantees to give written approval, but was itself to be taken as written approval of the application for the purpose of s 104(3).

93. The Court stated:

> *I hold that authorising a general approval under section 104(3) RMA is consistent with the purpose of the RMA because both the procedural and substantive aspects of the efficiency theme may (and do here) outweigh the participatory theme.*

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[48] *Coneburn Planning Ltd v Queenstown Lakes District Council* [2014] NZEnvC 267. http://www.nzlii.org/cgi-bin/download.cgi/cgi-bin/download.cgi/download/nz/cases/NZEnvC/2014/267.pdf

94. The decision in *Coneburn* has been cited with approval by the Supreme Court.[49] The Court states:[50]

> *Resource Management Act 1991, s 104(3)(a)(ii). Synlait submitted the undertakings required it to give written approval to a resource consent application for a quarry. As we see it, the letter containing the undertakings is, itself, written approval: … Coneburn Planning Ltd v Queenstown Lakes District Council [2014] NZEnvC 267.*

95. This reference, although brief, show clear support of the decision. The Supreme Court held that a covenant, in that case, not only required written approval to be given, but was itself written approval.

96. The consequence of these two cases is 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): no further action is required by the person making the agreement.

97. Mr O'Leary tries to distinguish the above cases by the fact that the language in *Coneburn* refers to "written approval". There are a number of issues with that. First of all, none of the authorities above places any significance on the fact that the persons in that case had used the terms "written approval". Rather, the land covenants themselves, as documents in writing, were held to be written approval. In this case, the land covenant and the rules of the society are both written documents. Not that it is necessary, but it is notable that they are also both registered in public registers. They are clearly approvals in writing.

98. Secondly, the word "support", in fact, has a stronger connotation than mere approval. It could be interpreted as providing a positive obligation on owners to assist the developer in achieving its subdivision goals.[51]

99. Applying the *Coneburn* and *Synlait* decisions, the covenant and rules of the society constitute written approval under s 104(3).

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[49] *Synlait Milk Ltd v New Zealand Industrial Park Ltd* [2020] NZSC 157. http://www.nzlii.org/cgi-bin/download.cgi/cgi-bin/download.cgi/download/nz/cases/NZSC/2020/157.pdf
[50] At footnote 86.
[51] See *Queenstown Property Holdings Ltd v Queenstown Lakes DC* [1998] NZRMA 145 (EnvC), where a deed recording agreement not to oppose the proposed development was sufficient approval. This approach was followed in *Waiheke Island Airpark Resort Ltd v Auckland CC* EnvC A088/09, where the Court held that an agreement or approval need not be "positive", but may be couched in somewhat more negative terms and still amount to a binding approval.

100. At the end of [3.9], Mr O'Leary also makes a comment that "in any case, this covenant does not bind any occupiers or the like". This comment is made without any authority and I submit is not tenable on these facts. If a written approval by a land owner under s 104(3) is not taken as approval on behalf of other persons in relation to that land (such as occupiers or visitors) this would have the effect of rendering largely ineffective the ability to seek written approval under s 104(3).

101. The situation might be different where "a particular piece of land in terms of Part 2 that it would be inappropriate to treat the current owner or administrator of it as the sole arbiter of the effects on that piece of land. In those circumstances, if that owner or administrator consents, his or her consent would mean that the consent authority could disregard effects personal to that owner or administrator, but could not disregard the wider effects,"[52] However, the Court of Appeal stated that in the great majority of cases the consenting party 'binds' future owners of the land. This is the situation here.

102. There is also no evidence to suggest that there are any occupiers of stages 1 and 2 lots who are not also owners and thus covenantors under the covenant.

Ecology

103. One concern raised in conditions is the potential impact of the proposed subdivision on biodiversity, wildlife and ecosystems. Dr Hicks has given ecological evidence in this respect. Dr Hicks has recommended the inclusion of a condition requiring a riparian planting plan. This recommendation is accepted by the applicant.

104. Mr O'Leary has noted the presence of a Dotterel nesting area on the applicant's land. Dr Hicks gives evidence that the expected increase in foot traffic on the path to the beach is of no concern. A predator control programme is proposed as a condition.

Traffic

105. 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

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[52] *Royal Forest and Bird Protection Society of New Zealand Inc v Kapiti Coast District Council* [2009] NZCA 73 at [27]

Mr Rossiter's report in respect of additional traffic management methods being placed on the main Pourērere road are unnecessary. The applicant accepts Mr Boaretto's recommendations.

Archaeological Effects

106. The proposed conditions (**attached**) volunteer (as a result of the recommendation in the CIA) an archaeological authority pursuant to s 48 of the Heritage New Zealand Pouhere Taonga Act 2014. Because Heritage New Zealand is New Zealand's archaeological authority, it makes sense that the resource consent is subservient to whatever is determined to be appropriate under that legislation.

107. Controls under the Resource Management Act remain because of the agreement that the Applicant has reached with the Cultural Impact Assessment author that appropriate controls will be imposed to manage archaeology. Just in case that is not required by Heritage New Zealand, it will be required by the consent.

National Policy Statement for Indigenous Biodiversity.

108. The National Policy Statement for Indigenous Biodiversity 2023 ("**NPS-IB**") was published on 7 July 2023.[53] It will come into force on 4 August 2023.[54]

109. If the panel issues its decision on the application prior to 4 August 2023 then the NPS-IB will be legally irrelevant. If the panel does not issue its decision before that date, it is the applicant's position that the application is consistent with the objectives and policies in the NPS-IB.

Use of Management Plans

110. The Applicant has adopted the general approach set out in the Section 42A Report in respect of Management Plans with some amendments.

111. Conditions set out the outcomes, requirements or limits to an activity. Management Plans can detail how those outcomes are to be achieved.[55] They should be clear, certain and enforceable. Management Plans provide a way to identify what steps should be taken to ensure that outcomes, requirements or limits specified in conditions of consent are achieved.

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[53] "National Policy Statement for Indigenous Biodiversity 2023" (7 July 2023) *New Zealand Gazette* No 2023-go2999.
[54] Clause 1.2.
[55] *Summerset Villages (Lower Hutt) Limited v Hutt City Council* [2020] NZ EnvC 31 (*Summerset Villages No.1*) at [156].

112. Management Plans are not a substitute for conditions setting the standards (including outcomes, limits and requirements) that are to be met to ensure environmental effects are to be kept within an acceptable level. The purpose (or objective) of each Management Plan should be clear and specific. The Environment Court has questioned the usefulness of Management Plans having a general purpose such as: "To provide measures to appropriately avoid, remedy or mitigate any adverse effect on [environmental feature] associated with [the activity]."[56] That is because the generality of this purpose could be interpreted to indicate the potential for a Management Plan not to have to comply with the outcome specified at conditions. The Court does not approve of certification provisions that "give a signal that certification can go beyond the parameters and requirements set out in other conditions".[57]

113. Consent conditions should provide for certification of amendments to Management Plans, as a pre-requisite to implementing those amendments.[58]

114. The Applicant here has been guided by those requirements for conditions and Management Plans in its approach to this application. Standards are set in the proposed consent conditions for all relevant effects of the proposal.

115. One difference in the approach taken by the Section 42A Officer is that the certification occurs via an independent third party and not the Council Officer. The consent conditions as drafted by Mr O'Leary might have required five or six Management Plans to be provided to the Council officer 15 working days before earthworks were to start. The expectation of the conditions as drafted would be that those applications would be processed within that 15 working day period. The preferrable approach is for the four independent parties to certify compliance with the consent conditions and refer that to Council.

116. If, despite the certification, Council is unhappy with the proposed Management Plan then the Council can then draw to the Applicant's attention that:

    (a) the person who prepared the report was not appropriately qualified and experienced; or

    (b) its contents in whatever way it did not comply with the relevant provisions of the condition.

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[56] *Summerset Villages (Lower Hutt) Limited v Hutt City Council* [2020] NZ EnvC 114 (*Summerset Villages No.2*) at [14].
[57] At [51].
[58] At [53].

117. I have also removed the ability of the certifier to refer to matters other than those contained within the conditions.

118. If the Council wants to retain and certify a condition then I suggest that it be:

    (a) Confined to the compliance with the consent conditions;

    (b) Required to be approved or rejected (with reasons) within a defined time period; and

    (c) Provide a mechanism by which differences can be resolved in a cost effective way.

Proposed conditions

119. Enclosed are a proposed set of conditions which may be included with the consent sought. These are a modified version of conditions proposed in the s 42A report.

120. Of the more significant changes:

    (a) Condition 6 requires all Management Plans to be kept on site alongside the conditions of consent. This avoids duplication in other conditions;

    (b) Erosion and sediment can only be minimised, not prevented. Condition 12 reflects this;

    (c) Where appropriate the relevant water body is referred to. Generally that is the modified tributary of the Pourērere (for example, condition 13);

    (d) The additions from Mr Paterson's report have been included in condition 17;

    (e) The agreed archaeological survey suggested in the Cultural Impact Assessment has been included as condition 21;

    (f) The suggestions of matters which might be addressed as part of the protection of archaeology have been included in condition 23;

    (g) The riparian planting plan has been combined with the Landscape Mitigation Plan;

    (h) There has been an attempt to make consistent the time when various Management Plans are to be filed. Consequently:

(i) Some plans need to be filed 15 working days prior to earthworks or construction commencing; and

(ii) Other plans (or steps) need to be undertaken prior to a 224 certificate being sought.

(i) Dr Hicks' recommendations in respect of the planting plan have been included in condition 31;

(j) Dr Hicks' predator control plan has been inserted into conditions 34 to 36;

(k) The Stormwater Management Plan may be able to be constructed in stages. This possibility has been added to condition 37;

(l) The separate requirement for a stormwater and overland flow design has been included in condition 41 rather than a separate consent condition;

(m) There has been some reordering of conditions to attempt to group similar matters together;

(n) The proposed drainage to ensure the overall productive capacity of the subject land is not reduced is contained in conditions 45 to 48;

(o) Additional monitoring requirements have been included in condition 50 to reflect the agreement with the provisions of the Cultural Impact Assessment;

(p) Additional requirements to monitor and to control pests have been imposed on the incorporated society in respect of condition 52;

(q) The requirement to place a consent notice to address reverse sensitivity has been addressed in condition 53;

(r) A refined proposal-specific set of design controls including the requirement for Australasian dark sky alliance approved lighting are contained in condition 55.

Conclusion

121. We are moving very rapidly from a resource management regime which merely requires applicants to avoid, remedy or mitigate adverse effects on the environment to a circumstance where applicants need to demonstrate that they are making an improvement to the environment. This application is to subdivide farm land at the edge of an existing subdivision. The consequence

will be that through extensive riparian planting, careful landscape management, native planting of some shared space, encouraging through good design walking access to the beach, predator control, together with improving the productive capacity of the farm as a whole while, in an understated and sensitive way, providing for additional residential development in a way contemplated by the proposed plan.

122. While certainly much of this was already on Mr Bridge's radar, the understanding that this needs to be done was outlined in the conclusions to the Cultural Impact Assessment. We hope to have faithfully adopted the recommendations contained in that document.

Witnesses

123. You will hear from the following witnesses

(a) James Bridge – Applicant

(b) Dr Andy Hicks – Ecology

(c) David Dravitzki – Geotechnical engineer (on call, available if required)

(d) Matheus Boaretto – Transport engineer

(e) Son Nguyen – Civil engineer

(f) Steve Goodman – Farm advisor

(g) Chantal Whitby – Landscape architect

(h) Christine Foster - Planner

Dated this day of July 2023

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Quentin A M Davies | Josh S Marshall