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

Under	the Resource Management Act 1991
In the matter of	an application for subdivision consent by Paoanui Point Limited to subdivide a 380 ha rurally zoned property to create 48 residential allotments
Between	**Paoanui Point Limited** Applicant
And	**Central Hawke's Bay District Council** Consent Authority

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

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May it please the Commissioners:

1. Introduction

1.1 This memorandum relates to Paoanui Point Limited's (**Paoanui** or **Applicant**) application for subdivision consent for a rural-residential development at 25 Punawaitai Road, Pourerere Beach (**Site**) (**Application**), and addresses legal issues that have arisen in the s 42A report, reply evidence and during the hearing.

1.2 The Site is a 382.048 ha parcel of rurally zoned land and, importantly, is highly productive land (**HPL**) as defined in the National Policy Statement for Highly Productive Land 2022 (**NPS-HPL**). As the Panel has heard during the hearing, the Site abuts the Applicant's earlier consented development and requires consent as a discretionary activity under the Central Hawke's Bay Operative District Plan (**OPD**).

1.3 The Council's consenting planner, Mr Ryan O'Leary, has prepared the s 42A report in respect of the Application. Following consideration of all material filed in respect of the Application, Mr O'Leary has recommended that consent be declined. This is on the basis that the Application:

a. is not consistent with the NPS-HPL;

b. does not sufficiently mitigate the effects of the development on the rural landscape; and

c. is not consistent with the objectives and policies in the PDP for the General Rural Zone, which represent a significant policy shift to those contained in the ODP.

1.4 The purpose of this memorandum of counsel is to respond to following specific legal issues that have arisen through the processing and hearing of the Application:

a. The NPS-HPL.

b. Highly productive land under the PDP.

c. Weighting of the ODP and PDP.

d. Covenants and written approvals.

2. Council witnesses

2.1 The experts who have provided technical advice and made recommendations on behalf of the Council are:

a. Chris Rossiter – transport.

b. Rebecca Ryder – landscape.

c. Lachlan Grant – soil and productive capacity.

d. Wayne Hodson – three waters.

e. Lee Paterson – geotechnical and natural hazards.

f. Ryan O'Leary – planning / s 42A author.

2.2 Mr Rossiter, Ms Ryder, Mr Grant Mr O'Leary[1] are in attendance at the hearing today to provide a summary of their recommendations and to answer any questions from the Panel.

2.3 Messrs Hodson and Paterson are not in attendance today, but have prepared technical memoranda that supported the s 42A report and can be available to attend via Teams at short notice to answer any questions that the Panel may have for them.

[1] Messrs Grant and O'Leary are here today in person, and Ms Ryder will be attending by Teams.

3. Legal framework

3.1 When considering an application and submissions on it, a consent authority must have regard to the matters set out in s 104 of the Resource Management Act 1991 (**RMA** or **Act**).

3.2 The following s 104 matters are particularly relevant to the consideration of this Application:

a. any actual and potential effects on the environment of allowing the activity;[2] and

b. any relevant provisions of a national policy statement,[3] and a plan or proposed plan.[4]

3.3 The Application is for a discretionary activity and, as such, the consent authority may grant or refuse it.[5] If it grants the Application, the consent authority may impose conditions under s 108 of the RMA.[6]

4. Section 104(b)(iii): National Policy Statement on Highly Productive Land

Overview (definition of HPL, and objective and policy framework)

4.1 The NPS-HPL came into force on 17 October 2022, and aims to safeguard the future availability of New Zealand's most favourable soils for food and fibre production. This is achieved through the provision of strategic direction in the NPS that seeks to improve the way that the subdivision, use and development of HPL is managed under the RMA.[7]

Transitional definition of HPL

4.2 The NPS-HPL requires regional and territorial authorities to map HPL within specified time periods.[8] Importantly to this Application though, despite the fact that Hawke's Bay Regional Council is yet to map HPL in the region, the NPS still

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2 RMA, s 104(ab).
3 RMA, s 104(b)(iii).
4 RMA, s 104(b)(vi).
5 RMA, s 104B.
6 RMA, s 104B.
7 *Balmoral Developments (Outram) Ltd v Dunedin City Council* [2023] NZEnvC 59 at [31].
8 NPS-HPL, Clauses 3.4 and 3.5.

applies as it includes a transitional definition of HPL that must be applied in the period before regional authorities undertake the required mapping exercise.[9] The transitional definition of HPL includes any land that:

(a) is:

(i) zoned general rural or rural production; and

(ii) land use capability class (**LUC**) 1, 2 or 3 land, but

(b) is not:

(i) identified for future urban development; or

(ii) subject to a Council initiated, or an adopted, notified plan change to rezone it from general rural or rural production to urban or rural lifestyle.

4.3 In the NPS-HPL "identified for future urban development" means land that is: [10]

a. identified in a published Future Development Strategy[11] as suitable for commencing urban development over the next 10 years; or

b. identified:

i. in a strategic planning document as an area suitable for commencing urban development over the next 10 years; and

ii. at a level of detail that makes the boundaries of the area identifiable in practice.

4.4 The Applicant's experts and Mr O'Leary are in agreement that the Site meets this transitional definition as it is rurally-zoned LUC 3 land, and is neither "identified for future development" nor subject to a Council-initiated or consented plan change to rezone the land. In other words, there appears to be no dispute between the parties that the NPS-HPL applies to this Application.

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9 NPS-HPL, Clause 3.5(7)

10 NPS-HPL, Clause 1.3(1).

11 Future development strategies are spatial planning instruments prepared pursuant to the National Policy Statement on Urban Development 2020. A future development strategy for Napier has not yet been prepared.

Objective and policy framework

4.5 The single objective of the NPS-HPL is to protect HPL for use now and into the future:[12]

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

4.6 Supporting the single objective of the NPS-HPL are nine policies, including the following which are relevant to this Application:[13]

a. Policy 1: Highly productive land is recognised as a resource with finite characteristics and long-term values for land-based primary production.

b. Policy 4: The use of highly productive land for land-based primary production is prioritised and supported.

c. Policy 6: The rezoning and development of highly productive land as rural lifestyle is avoided, except as provided in this National Policy Statement.

d. Policy 7: The subdivision of highly productive land is avoided, except as provided in this National Policy Statement.

e. Policy 8: Highly productive land is protected from inappropriate use and development.

f. Policy 9: Reverse sensitivity effects are managed so as not to constrain land-based primary production activities on highly productive land.

The MfE Guide

4.7 The Ministry for the Environment has published a Guide to Implementation of the NPS-HPL (**MfE Guide**).[14] The MfE Guide, while potentially a helpful resource to assist with interpretation, has no legal status and the consent authority must therefore exercise caution in placing sole reliance on it. This was recently

12 NPS-HPL, Clause 2.1.

13 NPS-HPL, Clause 2.2.

14 Ministry for the Environment. 2023. *National Policy Statement for Highly Productive Land: Guide to implementation.* Wellington: Ministry for the Environment.

confirmed by the Environment Court in *Gray v Dunedin City Council*[15] in the context of the NPS-HPL and the MfE Guide*:*

> [206] However, we are not prepared to give any weight to the discussion of the NPS-HPL in the MfE guidelines. We refer to the High Court's observation on the relevance of the Guidance Notes published by MfE for the NZCPS 2010 which we respectfully agree with and are in any event bound by:
>
> > The first question is what status should be given to the Department of Conservation's Guidance Notes. It is clear that they have no statutory basis, and that whilst helpful, they are not legally binding on the Court as necessarily properly interpreting the provisions of either the Act or the NZCPS. Whilst the Supreme Court may have referred to the Guidance Notes, not surprisingly it did not determine that the Guidance Notes are determinative, and indeed the Guidance Notes themselves include a disclaimer that they are not a substitute for legal advice, neither are they official government policy.

Clauses 3.8, 3.9 and 3.10

4.8 The clauses of the NPS-HPL that are of particular relevance to the Application, and which impose current duties on the Council,[16] are clauses 3.8, 3.9 and 3.10.

4.9 Against the objectives and policies, these clauses provide for development of HPL in very limited circumstances, outside of which subdivision, use and development of HPL is to be avoided.

Clause 3.8

4.10 Clause 3.8 relates specifically to subdivision and sets a high bar.

4.11 It requires that subdivision of HPL be avoided except where it is on specified Māori land; for specified infrastructure purposes; or where an applicant has demonstrated that the proposed lots will retain the overall productive capacity of the subject land over the long-term:

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15 *Gray v Dunedin City Council* [2023] NZEnvC 45.

16 At [197].

3.8 Avoiding subdivision of 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:

…

(2) Territorial authorities must take measures to ensure that any subdivision of highly productive land:

(a) avoids if possible, or otherwise mitigates, any potential cumulative loss of the availability and productive capacity of highly productive land in their district; and

(b) avoids if possible, or otherwise mitigates, any actual or potential reverse sensitivity effects on surrounding land-based primary production activities.

…

4.12 The MfE Guide further explains the rationale for Clause 3.8 as follows:

> The direction that subdivision of HPL be "avoided", apart from the specific exceptions in the NPS-HPL, is intended to provide a stringent approach for any subdivision proposal on HPL to avoid further fragmentation of this finite resource.

4.13 The present Application does not involve the subdivision of Māori land and is not for a specified infrastructure purpose. As such, to fall within any of the exemptions in Clause 3.8(1), the Applicant must demonstrate that the proposed lots will retain the overall productive capacity of the subject land over the long-term.

Productive capacity

4.14 In the NPS-HPL, "productive capacity" is defined as:

> …the ability of the land to support land-based primary production over the long term, based on an assessment of:

(a) physical characteristics (such as soil type, properties, and versatility); and

(b) legal constraints (such as consent notices, local authority covenants, and easements); and

(c) the size and shape of existing and proposed land parcels.

4.15 On this, the MfE Guide explains:

> Retaining the overall productive capacity of the land over the long term means there is no loss in the potential of the subject land being used for land-based primary production, when viewed over a 30-year timeframe based on reasonably foreseeable conditions. This should include consideration of effects of the proposed subdivision and/or subsequent proposed land use on the potential land-based primary production use of the subject land, including loss of land from production through access, curtilage development, any setbacks and any changes to the size and shape of property boundaries to mitigate reverse sensitivity effects.
>
> [Our emphasis added].

And:

> [The test in Clause 3.8(a)(a)] envisages enabling:
>
> i) subdivisions such as boundary adjustments where HPL is amalgamated to form a larger productive landholding.
>
> ii) subdividing a large farm into smaller lots that are still capable of being used for a particular type or range of land-based primary production (for example, the separation of a 120-ha farm into two 60-ha farms).
>
> It is unlikely that subdivision into rural lifestyle lots would meet the productive capacity test in this clause.

4.16 While not losing sight of the status of the MfE Guide, the interpretation in that document appears to be consistent with:

a. The wording of the provision, which requires an assessment of, not just to the current capacity and use of land, but of that which could feasibly occur in the long-term (including as a result of improvements or enhancements).

b. Clause 3.10(2) of the NPS-HPL, which sets out a non-exhaustive list of reasonably practicable options that would retain the productive capacity of land. These include options such as alternate forms of land-based primary production, improved land management strategies, water efficiency or storage mechanisms, and alternative production strategies. This suggests that the productive capacity of land includes its productive potential over the long-term which may be unlocked by a range of actions, improvements or interventions.

4.17 In his s 42A report, Mr O'Leary concludes, in reliance on Mr Grant's expert view, that the information supplied by the Applicant in support of the Application was insufficient to demonstrate that the overall productive capacity of the Site would be retained as required by Clause 3.8(1)(a), and that further information would be needed to meet this requirement. In his reply evidence and during the hearing, the Applicant's expert, Mr Goodman, appears to accept that there would a loss of the current productive capacity – in the region of 4.5%. He is of the view, however, that the overall productive capacity can be retained (and therefore compliance with Clause 3.8(1)(a) achieved) if subsoil drainage improvements are undertaken on other HPL contained within the balance lot.

4.18 However, as set out above, Clause 3.8(1)(a) requires that, in assessing whether the overall productive capacity is retained in the long-term, the consent authority needs to consider the land's potential for land-based primary production over a 30-year period. In other words, it is not sufficient to look only at current capacity or use, but rather the consent authority needs to look at future potential capacity. Methods to unlock that capacity may occur in a range of ways, including those set out in Clause 3.10(2). For the Site, the drainage improvements proposed by Mr Goodman are one of the ways to simply unlock the future productive potential of the land, rather than increasing its capacity.

4.19 It follows then that, on the information currently before the consent authority, it has not been demonstrated that the overall productive capacity of the Site will be retained – but rather that:

a. there are improvements that can be undertaken to the Site as a whole to improve its productive capacity in the long-term; and

b. the subdivision will result in a loss of approximately 18ha of that land.

4.20 If the consent authority agrees with Mr O'Leary's view on the interpretation of Clause 3.8(1), and that the Applicant has failed to demonstrate that the proposal falls within any of the exceptions in Clause 3.8(1), it is not necessary to go on to consider the mitigation measures in Clause 3.8(2) of the NPS-HPL. These apply only where an exception in Clause 3.8(1) is satisfied.

Clause 3.9

4.21 Clause 3.9 is concerned with use and development of land (as distinct from subdivision) and tightly prescribes the activities that are considered an appropriate use and development of HPL. All activities not provided for in that exhaustive list are defined as inappropriate.

4.22 The Applicants' evidence does not address Clause 3.9 of the NPS-HPL but, on counsel's reading, the development that would be enabled by the Application does not fall within any of the categories of appropriate use.

Clause 3.10

4.23 If the exemptions in Clauses 3.8 and 3.9 of the NPS-HPL do not apply, Clause 3.10 provides further exemptions to the restrictions in those clauses where the HPL is subject to long term constraints:

> (1) Territorial authorities may only allow highly productive land to be subdivided, used, or developed for activities not otherwise enabled under clauses 3.7, 3.8, or 3.9 if satisfied that:
>
> > (a) there are permanent or long-term constraints on the land that mean the use of the highly productive land for land-based primary production is not able to be economically viable for at least 30 years; and
> >
> > (b) the subdivision, use, or development:
> >
> > > (i) avoids any significant loss (either individually or cumulatively) of productive capacity of highly productive land in the district; and
> > >
> > > (ii) avoids the fragmentation of large and geographically cohesive areas of highly productive land; and
> > >
> > > (iii) avoids if possible, or otherwise mitigates, any potential reverse sensitivity effects on surrounding land-based primary production from the subdivision, use, or development; and

(c) the environmental, social, cultural and economic benefits of the subdivision, use, or development outweigh the long-term environmental, social, cultural and economic costs associated with the loss of highly productive land for land-based primary production, taking into account both tangible and intangible values.

(2) In order to satisfy a territorial authority as required by subclause (1)(a), an applicant must demonstrate that the permanent or long-term constraints on economic viability cannot be addressed through any reasonably practicable options that would retain the productive capacity of the highly productive land, by evaluating options such as (without limitation):

(a) alternate forms of land-based primary production:

(b) improved land-management strategies:

(c) alternative production strategies:

(d) water efficiency or storage methods:

(e) reallocation or transfer of water and nutrient allocations:

(f) boundary adjustments (including amalgamations):

(g) lease arrangements.

(3) Any evaluation under subclause (2) of reasonably practicable options:

(a) must not take into account the potential economic benefit of using the highly productive land for purposes other than land-based primary production; and

(b) must consider the impact that the loss of the highly productive land would have on the landholding in which the highly productive land occurs; and

(c) must consider the future productive potential of land-based primary production on the highly productive land, not limited by its past or present uses.

(4) The size of a landholding in which the highly productive land occurs is not of itself a determinant of a permanent or long-term constraint.

(5) In this clause:

landholding has the meaning in the Resource Management (National Environmental Standards for Freshwater) Regulations 2020

long-term constraint means a constraint that is likely to last for at least 30 years.

4.24 Although the Applicant did not provide any detailed evidence in support of Clause 3.10 (presumably in light of its view that the Application falls within the exemption in Clause 3.8(1)(a)), Mr O'Leary has turned his mind to this in his s 42A report, and has formed the view that the conjunctive requirements in Clause 3.10(a), (b) and (c) have not been satisfied.

Avoiding subdivision of HPL

4.25 The NPS-HPL is clear. If none of the exceptions in Clauses 3.8 or 3.10 apply to a proposed subdivision of HPL, the activity must be avoided.

Avoid

4.26 The Supreme Court in *King Salmon* was clear that avoid is to be interpreted as "not allow" or prevent the occurrence of."[17]

4.27 Accordingly, if the Panel finds that the Application is inconsistent with Policy 7 of the NPS-HPL (as it does not fall within any of the very exceptions in Clauses 3.8 and 3.10), it has no option but to decline the Application.

5. Section 104(b)(vi): Strategic direction of the PDP on HPL

5.1 In her reply evidence, Ms Foster, for the Applicant, states that:

a. "highly productive land" as referred to in the PDP should be distinguished from HPL as defined in the NPL-HPL; and

b. the use of the phrase "highly productive land" in the PDP is a synonym for land within the Rural Production Zone in that plan (**RPROZ**).[18]

5.2 As a result, Ms Foster appears to suggest that those provisions in the PDP that relate to "highly productive land" (including the objectives and policies in the Strategic Direction – Rural Land Resource chapter) do not apply to the Application.

5.3 However, the lack of a definition of the phrase "highly productive land" in the PDP appears to have been a deliberate decision on the part of the authors of the PDP to avoid any potential inconsistency with the definition in the NPS-HPL.

5.4 The NPS-HPL was released after conclusion of the hearings on the PDP and, as Ms Foster has identified, "[t]he Panel observed that the use of LUC 1 to 3 class soils aligned generally with the approach of the PDP and therefore reliance could be

17 *Environmental Defence Society Inc v New Zealand King Salmon Company Limited* [2014] NZSC 38 at [77].

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made on the definitions in the NPS-HPL rather than introducing a separate definition to the PDP".[19]

5.5 Of note, the Introduction to the PDP's Strategic Direction – Rural Land Resource chapter explicitly references the NPS-HPL, stating that "it is anticipated that the approach in this District Plan will go a long way towards already giving effect to the likely future requirements of the NPS-HPL". The Panel's report on the PDP also states that, although the majority of the HPL in the district identified by LandVision would be within the RPROZ, it is not the only zone that would contain such land. In particular, the Panel observed that:

> 2.1.3 The highly productive land identified in the LandVision Report ultimately underpinned the creation of RPROZ in the PDP and that that zone encompasses the major concentration of the District's highly productive/versatile land.
>
> …
>
> 2.1.4 The Rural Production Zone in the PDP encompasses the majority of the District's concentration of highly productive land.
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> …
>
> 3.6.13 The Panel agrees with the reporting planner and does not recommend that a definition of 'Highly Productive Land' be included in the PDP. The Panel considers that the important thing is the identification, rather than the definition, of 'Highly Productive Land' and notes that the productive soils are mapped in the PDP in that it is largely contained within its own purpose-built spatial layer, being the RPROZ – Rural Production Zone.
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> [Our emphasis added].

5.6 On counsel's reading:

a. the intention of the PDP's drafters was to endeavour to give effect to the (then) anticipated NPS-HPL, and that, in the absence of a definition of highly productive land in the PDP, the phrase should be interpreted consistent with the NPS-HPL definition; and

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[19] As cited in the Statement of Evidence of Christine Anne Foster for the Applicant dated 28 June 2023 at [83].

b. the objectives and policies contained in the Strategic Direction – Rural Land Resource chapter relating to highly productive land are relevant to this Application and must be had regard to under s 104 of the RMA.

6. Weighting of the ODP, PDP and NPS-HPL

ODP and PDP

6.1 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.[20]

6.2 In this case, while the zoning of the Site in the PDP has legal effect, it cannot be treated as operative under s 86F of the RMA as it is subject to an appeal by the Applicant. As such, the consent authority must undertake a weighting exercise between the ODP and the PDP, and there is no statutory guidance on how such an exercise should be carried out.

6.3 The key principles are, however, established in case law, with the leading decision being *Keystone Ridge Limited v Auckland City Council,*[21] in which the High Court accepted the summary of the weighting principles that had been set out by the Environment Court in that case, being:[22]

a. The RMA does not accord proposed plans equal importance with operative plans, rather the importance of the proposed plan will depend on the extent to which it has proceeded through the objection and appeal process.

b. The extent to which the provisions of a proposed plan are relevant should be considered on a case-by-case basis and might include:

i. the extent (if any) to which the proposed measure might have been exposed to testing and independent decision-making;

ii. circumstances of injustice;

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20 *Kennett v Dunedin CC* (1992) 2 NZRMA 22 (PT).

21 *Keystone Ridge Limited v Auckland City Council* HC Auckland AP24/01, 3 April 2001.

22 At [16] and [36].

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

c. In assessing the weight to be accorded to the provisions of a proposed plan each case should be considered on its merits. Where there had been a significant shift in Council policy and the new provisions are in accord with Part II, the Court may give more weight to the proposed plan.

6.4 The closer the proposed plan comes to its final content, the more regard is had to it.[23] Where an outcome of a consent application would be the same under both plans, the existence of two plans makes little difference. However, in this case, Mr O'Leary has assessed that the proposal is generally consistent with the ODP, but that it is contrary to the PDP – in particular, the objectives contained in the Strategic Direction – Rural Land Resource chapter that are concerned with protection of the rural land resource from fragmentation.

6.5 In the s 42A report, Mr O'Leary has given greater weight to the PDP, which he notes represents a significant policy shift to that contained in the ODP. He considers that the PDP reflects the community aspirations for the rural land resource, and has been the subject of submissions and hearings. It also goes a long way to giving effect to the higher order documents which have been promulgated since the first generation ODP was adopted, including the NPS-HPL.[24]

6.6 Mr O'Leary's s 42A report was prepared before the appeal period for the decisions on the PDP closed on 7 July 2023. Since then, Mr Bridge has filed an appeal against the decision to reject his submission seeking that Site be re-zoned from the General Rural Zone to the Large Lot Residential.[25] The zoning of the Site is therefore subject to appeal and cannot be treated as operative. It does, however, still have legal effect under s 86B of the Act.

6.7 In her reply evidence, Ms Foster suggests that the orthodoxy is to give very little weight to a PDP when the zoning remains unsettled because of an appeal. Ms Foster's evidence is that Mr O'Leary's conclusions about the force of the PDP

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23 *Queenstown Central Ltd v Queenstown Lakes District Council* [2013] NZHC 815, [2013] NZRMA 239.

24 Section 42A Report of Ryan O'Leary – Planning, 21 June 2023 at [4.109]-[4.113].

25 Appeals | Central Hawke's Bay District Council (chbdc.govt.nz).

objectives and policies should be treated with caution, and that less weight should be given to the PDP provisions because the zoning of the subject site is subject to appeal and may change. [26]

6.8 The fact that there is an appeal against the zoning of the Site is just one factor in a case-specific assessment and it is open to this Panel to decide that greater weight should be given to the provisions of the PDP, despite the existence of the appeal. We refer to the comments of the Environment Court in *Peat v Waitakere City Council,* in which the Court:[27]

> [157] We do not accept that. The Variation was based on professional reports. Having been notified and submissions and cross-submissions on it heard, and having a report on structure planning by review consultants and a report by the peer reviewer, … Council gave decisions on the submissions making modifications to the variation but confirming it. The City Council chose not to adopt the review consultants' recommendation that it withdraw the variation. In those circumstances the variation (as so modified) is incorporated in the proposed district plan and represents the current planning intentions of the planning authority.
>
> [158] Of course the position might change when the reference appeals have been decided. But the deferral of the hearing of them (at the City Council's request) leaves the Swanson Structure Plan as the only expression of its current planning intentions, and one which has (with modifications) survived the participatory process of making, hearing and deciding submissions. In the meantime, it should be given substantial respect and weight…
>
> [Our emphasis added].

6.9 As noted above, the consent authority must undertake a case-by-case assessment in determining the weight to be given to the PDP. In this case, although the appeal is one factor in favour of limited approach being afforded to be PDP, there are several factors suggesting that more substantial weight should be placed on that instrument:

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26 Statement of Evidence of Christine Anne Foster for the Applicant, 28 June 2023 at [62]-[63].

27 *Peat v Waitakere City Council*, ENC Auckland A082/2004, 14 June 2004 at [156].

a. The PDP Panel has heard detailed submissions from the community on the district's rural resource, including submissions on the zoning of the Site, and provisions of the PDP reflect the outcome of that process.

b. While the consent authority is not in a position to decide the fate of the Applicant's appeal, the Court in *Knowles v Queenstown Lakes District Council*[28] found that the likelihood of success of an appeal can be a relevant consideration in the weighting exercise. In this case, although there is nothing to suggest that the Applicant does not have legal standing to bring the appeal (unlike was ultimately the case in *Knowles),* the appeal against the zoning of the Site will be assessed against the NPS-HPL, in particular Clause 3.6 which requires territorial authorities to avoid urban rezoning of HPL, except as provided for in very limited circumstances.[29] The relief sought on appeal will therefore need to overcome the directive and restrictive framework in the NPS-HPL and the Panel may find this relevant to the weighting exercise.

c. The NPS-HPL provides clear directives to territorial authorities in respect to HPL, and the objective of that higher order instrument is clear: HPL is protected for use in land-based primary production, both now and for future generations.

The ODP does not give effect to the NPS-HPL but, by contrast, the PDP does go a long way to achieving this. Affording greater weight to the ODP would be inconsistent with the NPS-HPL, and risk the permanent loss of a finite resource.

6.10 In the event that the Panel does not agree with s 42A report, and considers that it is appropriate to give greater weight to the ODP in light of the Applicant's appeal, the Panel still needs to exercise its judgement in deciding the weight that should be placed on the NPS-HPL itself.

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28 *Knowles v Queenstown Lakes District Council* [2019] NZHC 3227.

29 "Urban" is defined in the NPS-HPL to include Large Lot Residential land.

NPS-HPL

6.11 Where a superior policy document, such as a national policy statement, contains a clear directive that is relevant to the proposal, such a directive may have a constraining effect.[30]

6.12 Where the relevant plan precedes the higher-level document, it is open to the consent authority to exercise its judgement to afford more weight to the higher level document than would otherwise be the case, as there can be no assurance that the plan provisions give effect to the higher order instrument.[31]

6.13 For present purposes, the NPS-HPL is the newest statement of national direction on the issue of highly productive land, and it also post-dates the ODP and the notification of the PDP. Its regime is particularly stringent and reflective of the fact that the loss of productive capacity cannot, in most cases, be reversed. In drafting the PDP, the Council had regard to the (then) draft NPS-HPL and this has resulted in a very high degree of consistency between the NPS-HPL and the PDP. However, to the extent that the PDP does not fully give effect to the NPS, counsel concurs with the submissions on behalf of The Havelock Bluff Trust that the latter must prevail.

7. Other matters arising

Written approvals and covenants

7.1 During the hearing, counsel for the Applicant submitted that the covenants constitute written approvals and, pursuant to s 104(3) of the RMA, the Panel is required to disregard the effects on them. Mr O'Leary addressed this in his s 42A report and stated that:

> The Applicant's further information response (to question 12) also submits that, in accordance with *Coneburn Planning Ltd vs Queenstown Lakes* the land covenant registered on all lots forming Stages 1 and 2 of 180160 has the effect of being a written approval under s 104(3) of the RMA. In my view, the Land covenant 12415482.12 obliges the purchaser to become a member of the Incorporated Society and be bound by its rules. These rules, as currently drafted, require that those

[30] *Environmental Defence Soc Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593.

[31] *Infinity Investment Group Holdings Ltd v Canterbury Regional Council* [2017] NZEnvC 36.

members "support" development, which I understand is different language than *Coneburn* which referred specifically to "written approval". I also note that these rules may be subject to change. I do not consider that the

7.2 In *Coneburn,*[32] the Environment Court was considering the status of a particular registered covenant, and caution should be exercised when applying its reasoning to a different covenant. The Covenant before that Court was notably different from the Residents' Society covenant that the Applicant seeks rely on in the present case. Clause 8.3 of the *Coneburn* covenant read as follows:

> The Grantor hereby gives written approval for the purposes of the Resource Management Act 1991 to any Planning Proposal referred to in clauses 8.1 and 8.2. The Grantor shall provide any necessary further written approval to any such Planning Proposal if requested by any of the persons named in clauses 8.1 and 8.2 and in the event of failing to do so those persons shall be entitled to provide a copy of this clause 8 to the relevant consent authority as evidence that such written approval is given.

7.3 When considering the wording and operation of that covenant in the context of s 104(3), the Environment Court found that the grantor (or covenantor) must be held to have consciously turned their mind to all the possible planning applications that could have been made.[33]

7.4 In counsel's view, the same cannot be said of a covenant that requires grantors to become members of a Residents' Society and to abide by its rule (one of which requires that they agree to support any resource consent application). This is not nearly as conclusive, or reflective of a conscious decision, in the same way that the covenant in *Coneburn* was.

7.5 Even if the Panel were to accept the covenant and Residents' Society as written approval, it should be cautious in extending this to disregard the effects on occupiers. Section 104(1)(a) requires the consent authority to have regard to the actual and potential effects on the environment (which of course includes people[34]), and s 104(3) provides the ability to disregard effects on those "persons" who have given written approval. In counsel's view, it is relevant that, even if the covenant does constitute written approval, the covenant instrument refers only

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32 *Coneburn Planning Ltd v Queenstown Lakes District Council* [2014] NZEnvC 267.

33 At [41].

34 RMA, s 2.

to owners or successors in title. It would be challenging to say that a covenant that references only an owner and a Residents' Society would meet the test in *Coneburn* of a conscious turning of the mind to all planning applications that might be made.

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L E Bielby / J J Magrath