BEFORE THE NEW PLYMOUTH DISTRICT COUNCIL
INDEPENDENT HEARINGS COMMISSIONER

IN THE MATTER	of the Resource Management Act 1991
AND	
IN THE MATTER	of an application under section 88 of the Act by B,M,R Sim to the New Plymouth District Council to undertake a boundary change and five-lot rural subdivision etc, at 6 & 42 Leith Road, Okato

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FURTHER LEGAL SUBMISSIONS OF COUNSEL FOR THE APPLICANT B, M, R SIM 17 MAY 2023

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SWG-268974-1-1000-V1:SWG-e

MAY IT PLEASE THE INDEPENDENT HEARINGS COMMISSIONER

Introduction

1. The issues in this case have generally been thoroughly traversed over a lengthy period of time.

2. On 17 October 2022 the National Policy Statement for Highly Productive Land 2022 ("NPS-HPL") came into force and applies in the circumstances of this case.

Issues

3. The key issue in the context of the NPS-HPL (and the most recent evidence, and these legal submissions) in this case is - whether the applicants' proposed subdivision of their land should be avoided in terms of clause 3.8 of the NPS-HPL, and the exemptions provided thereunder as follows:

> **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:
>
> (b) the subdivision is on specified Māori land:
>
> (c) the subdivision is for specified infrastructure, or for defence facilities operated by the New Zealand Defence Force to meet its obligations under the Defence Act 1990, and there is a functional or operational need for the subdivision.
>
> (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.

(3) In subclause (1), **subdivision** includes partitioning orders made under Te Ture Whenua Māori Act 1993.

(4) Territorial authorities must include objectives, policies, and rules in their district plans to give effect to this clause.

4. Moreover, in my respectful submission, as referred to in my earlier submissions dated 8 June 2022 ("earlier submissions") - the critical issues requiring determination in this case are, *still*, whether or not granting consent to the proposed (discretionary) activity will promote the sustainable management of natural and physical resources - the purpose of the Resource Management Act 1991 ("RMA"); and, whether or not granting consent will be consistent with the relevant provisions under the relevant statutory instruments[1].

5. It is respectfully submitted that the result of this case should be one that the Commissioner believes best achieves the purpose of the RMA: the sustainable management of natural and physical resources as defined in s. 5(2) RMA.

6. In assessing and determining that - it must be recalled that surrounding neighbours, and iwi, deemed potentially affected by the proposal, have given written approval to the application (in terms of s. 104(3)(a)(ii) RMA) – and, no submissions were

[1] Falling for consideration under s. 104(1)(b) RMA

lodged in opposition to the application following public notification.

Further Evidence

7. In response to the NPS-HPL issues (which arose after the substantive hearing of this matter on 8 June 2022) - the applicant has called further evidence from the expert witnesses below.

Expert Witnesses

(a) Allen Juffermans – Surveyor/Director, Juffermans Surveyors Limited. Mr Jufferman's evidence of 24 January 2023 confirms the accuracy of the survey drawings/plans, maps and calculations provided by his firm in this case to date.

(b) Richard Bain – Landscape Architect, Bluemarble.

Mr. Bain's further evidence of 24 January and 21 April 2023, inter alia, notes that the scaled-back revised proposal (in direct response to the NPS-HPL) self-evidently reduces overall effects on rural character and visual amenity. The mitigation recommendations he has provided (for SUB21/47781) remain relevant to the revised proposed lots – including Lot 4[2]; and, he is now largely in agreement with Ms Griffiths in this context[3].

However, he does not agree with Ms Griffiths that a height limit should apply to non-habitable buildings in a working rural

[2] Further evidence Richard Bain, 24 January 2023, para 12; 21 April 2023, paras 6-9
[3] Further evidence Richard Bain, 21 April 2023, paras 6-9

environment; and notes that the proposed consent condition was never intended to apply to farm buildings[4].

That is because it is impractical - and in my submission would be unreasonable - in that non-habitable buildings in such an environment sometimes require heights greater than 6 metres to accommodate, for example, tall machinery - such as gantrys, booms, hoppers; and materials. Such buildings are clearly appropriate in a working rural environment[5].

The latest s. 42A Officer's Hearings Report dated 17 March 2023, Ms L. Buttimore, Consultant Planner ("Officer's Report") - also concludes that the proposal ensures the maintenance of the rural character and amenity of the environment[6], and that any actual and potential adverse effects are able to be appropriately mitigated[7].

As Mr Bain noted, the Officer also considers the proposed side yard setback is appropriate, and a positive design for the subdivision to ensure that future built form on Lot 5 is appropriate[8].

I also note that the Officer is of the view that the proposal does not result in adverse traffic amenity or character effects (and results in no unacceptable adverse effects on the roading network, traffic safety and efficiency (including the State Highway))[9]; no adverse cumulative effects[10]; no adverse loss of open space effects and rural character and amenity

4 Further evidence Richard Bain, 21 April 2023, para 7
5 Ibid
6 Officer's Report, para 43
7 Officer's Report, para 59
8 Further evidence Richard Bain, 24 January 2023, para 7; Officer's Report para 46
9 Officer's Report, paras 48-51

effects[11]; and, results in no adverse cultural, archaeological or heritage effects.[12]

(b) James Allen, AgFirst Taranaki. Mr Allen is a highly qualified agricultural consultant of nearly 30 years' experience[13].

Mr Allen's evidence was called by the applicant in response to the NPS-HPL - and addresses relevant issues in respect of same from a land use capability, and productivity, perspective[14].

His assessment focusses on the applicant's land classed as highly productive under the NPS-HPL – and, importantly, provides a detailed analysis of the existing productive capacity of the applicants' land - so that an overall comparison between the existing and the proposed can be made - in terms of loss of productivity of highly productive land over the long term[15].

In assessing such productivity - Mr Allen notes that the class of land and soil suitability is merely one factor in determining productivity; other factors include climate suitability, profitability, access to labour, infrastructure requirements, access to market and post-harvest facilities[16].

Given the size of the subject land, in Mr Allen's expert opinion, the most likely future land use options are similar to the existing uses – being a mixture of maize and rye grass silage,

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[10] Officer's Report, para 57
[11] Officer's Report, para 59
[12] Officer's Report, paras 67-70
[13] Evidence James Allen 24 January 2023, paras 2.1-2.8
[14] Evidence James Allen 24 January 2023, para 5.1-5.12; Evidence James Allen 21 April 2023, paras 5-22
[15] Evidence James Allen 24 January 2023, paras 3.2-6.3; 21 April 2023, paras 10-23
[16] Evidence James Allen 24 January 2023, para 5.4

and grazing (predominantly on the less productive areas of the property)[17].

Moreover, in my submission, in his experience smaller block sizes – such as those proposed – reduce the total capital investment required for potential diversification into alternative land uses; and consequently, provides people with potential future opportunity for diversification into alternative production options[18]; which, as he observes from Ms Hooper's evidence, is being promoted in the Taranaki region[19]. In my respectful submission this is consistent with, and promotes, the purpose and principles of Part 2 RMA.

Mr Allen's detailed analysis of the productivity of the applicant's land, both pre and post subdivision - based on the applicant's revised proposal, (which responsibly and appropriately responded to the NPS-HPL and concerns in respect of same discussed in Mr Allen's and Ms Hooper's evidence of 24 January 2023) – leads him to safely conclude that there is a small loss of [HPL] productive capacity as a result of the subdivision – but only due to the possible impact of provision of a dwelling and curtilage on Lot 1 (and possibly Lot 6)[20].

However, in that context, he also agrees with Ms Hooper that the potential establishment of dwellings on productive land is to be expected – and is consistent with primary land-based enterprises throughout the country, where there are significant efficiencies and supportive benefits from living on the land in a

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[17] Evidence James Allen 24 January 2023, para 5.8; 21 April 2023, para 7
[18] Evidence James Allen 21 April 2023, paras 7-8
[19] Ibid

working rural environment for all of the reasons he comprehensively provides[21].

Like Ms Hooper, he does not think that the intent of the NPS-HPL is to stop primary producers living, or building dwellings, on their productive land; and in fact, in his experience, the ability for workers and owners to live on highly productive land,

"... *is a crucial part of our rural infrastructure – and such activities are reasonably necessary to support land-based primary production on rural land.*" [22]

In my respectful submission, that approach must logically be correct - or it would lead to an absurd, illogical, result which cannot be the intention of the NPS-HPL – because, in my submission, such a result would be inconsistent with, and would not promote, the purpose and principles of Part 2 RMA; and would also potentially be inconsistent with many permitted activity rules in this context contained in district plans throughout New Zealand.

Mr Allen does, however, agree with Ms Hooper's suggested condition restricting the position of any future dwelling (if any) on proposed Lot 1 to avoid and mitigate potential impacts on the efficient productive use of this lot[23].

The reduction of the size of proposed Lot 4 to an area that already contains an existing dwelling and is already unproductive (i.e., the existing dwelling and curtilage) – and

[20] Evidence James Allen 21 April 2023, paras 10-12
[21] Evidence James Allen 21 April 2023, paras 13-14
[22] Ibid
[23] Evidence James Allen 21 April 2023, para 15

returning additional land to the balance lot (6) is also consistent with the NPS-HPL[24].

Lot 5, it must be recalled, already contains existing dwellings (platform), buildings, curtilage, and driveway – and, due to its proposed size, retains its long-term productive capacity[25].

Mr Allen disagrees with the Officer's view that some land would be lost to "lifestyle" purposes for the reasons he sets out[26].

Overall, Mr Allen finds that the applicant's (responsibly) revised proposal retains the overall long-term productive capacity of the land and, accordingly, is consistent with the NPS-HPL[27].

It must be noted that Mr Allen's expert evidence is the only expert evidence available in this context in this case and is uncontested (by any other experts within his discipline).

For those reasons, in my submission, Mr Allen's expert evidence should be given considerable weight in this case in this context.

Further, in my respectful submission, the Officer appears to ignore or does not accept Mr Allen's expert evidence - for no apparent good reason in my submission; and which, in my submission, is also at odds with Ms Buttimore' s expert witness duties under the Code of Conduct for Expert Witnesses – such

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[24] Evidence James Allen 24 January 2023, para 5.11; 21 April 2023, para 19.
[25] Evidence James Allen 24 January 2023, para 5.9; 21 April 2023, para 19.
[26] Evidence James Allen 21 April 2023, para 21
[27] Evidence James Allen 24 January 2023, para 6.3; 21 April 2023, para 23.

duties which Mr Allen and Ms Hopper have properly complied with in this case.

For those reasons (and all the other reasons canvassed in all of the evidence and submissions for the applicant) the applicant's evidence ought to be preferred in this case – particularly that of Mr Allen's and Ms Hooper's, in contrast to Ms Buttimore's.

(c) Kathryn Hooper – Independent Planning Consultant, Director, Landpro Limited.

Ms. Hooper[28] provides, in my respectful submission, comprehensive and compelling further expert planning evidence for the applicant; with a particular focus on the NPS-HPL issues now relevant in this case.

Drawing from Mr Allen's evidence, Ms Hooper discusses the rationale of that evidence which she closely scrutinizes in the context of the NPS-HPL.

In doing so, she importantly applies the proper tests required by the NPS-HPL in analysing the overall potential long-term productive capacity of the proposed lots[29] (as does Mr Allen), and correctly observes:

[28] Who previously employed Ms.Gerente (who moved to alternative employment before the NPS-HPL issues had to be addressed in this case)
[29] Evidence Kathryn Hooper 24 January 2023, paras 27-48; Evidence Kathryn Hooper 21 April 2023, paras 8-62

"... Mr Allen correctly considers the existing productive capacity... - so that an overall comparison between the existing and the proposed capacity can be made - while also considering the relevant factors contributing to the existing productive capacity as recommended by way of examples in the guide."[30]

"... Ms Buttimore pre-empts what is a 'rural lifestyle' allotment on the basis of size, despite the MfE guidance being very clear that no size is specified and the reasons for this. She dismisses the demonstration of productive capacity in Mr Allen's expert evidence... She has provided no evidence to the contrary... (particularly expert evidence such as Mr Allen's)."[31]

"What is important is that productive land uses <u>are able to</u> occur, and that the productive capacity is not compromised, should an owner either now or in the future choose to exploit the productive capacity of the land."[32]

"I agree that 'must avoid' is a strong directive, however, the exception provided under clause 3.8 moderates this. The exception for subdivision where proposed lots can retain the overall productive capacity of the land over the long term makes it clear that the retention of productive capacity is the goal, not merely the restriction on subdivision."[33]

"The availability of HPL will in fact be increased by this subdivision as it will provide the opportunity for people to

[30] Evidence Kathryn Hooper 21 April 2023, para 11
[31] Evidence Kathryn Hooper 21 April 2023, para 13
[32] Evidence Kathryn Hooper 21 April 2023, para 14
[33] Evidence Kathryn Hooper 21 April 2023, para 44

access productive land affordably and use it productively innovatively and more diversely, also in line with Part 2 RMA."[34]

"Clause 3.8 of the NPS-HPL must be applied in a way that is consistent with Part 2 RMA and an overzealous application leaning towards 'absolute protection' would not be consistent, as it would not achieve the balance necessary to promote sustainable management as defined in Section 5."[35]

"... *what is important is that the long-term productive capacity of this land is retained for future generations should someone, at some stage, make that choice to use it.*" [36]

In order to achieve consistency with the NPS-HPL, Ms Hooper has responsibly made a number of recommendations (as instructed by the applicants) in respect of the application contained in her evidence (and Mr Allen's) as follows:

- Removing proposed Lots 2 and 3 from the "scaled back" application[37];
- Reducing the size of Lot 4, leaving additional highly productive land within the balance lot (6)[38];
- Volunteered no complaints covenant (in respect of reverse sensitivity issues under clause 3.8 (2) NPS-HPL) [39];
- Appropriate minimum setback requirements in respect of Lot 5 (also remedying existing title deficiencies in

[34] Evidence Kathryn Hooper 21 April 2023, para 62
[35] Evidence Kathryn Hooper 21 April 2023, para 74
[36] Evidence Kathryn Hooper 21 April 2023, para 100; see also para 59
[37] Evidence Kathryn Hooper 24 January 2023, paras 32-39 and Appendix B
[38] Evidence Kathryn Hooper 24 January 2023, paras 34, 38

respect of that lot) and Lot 4 - also assisting with mitigation of potential reverse sensitivity effects[40];

- Restricting the future dwelling and associated curtilage location to a small portion of the site on proposed Lot 1 - to avoid potential interference with future operational productive capacity potential[41];
- Restricting the number of potential permitted future dwellings (*if* any are required in the future) on proposed Lot 6 to one dwelling only[42].

The proposed lots in the revised "scaled back" proposal are, in Ms Hooper's view (supported by Mr Alen's evidence), not too small to be productive as is erroneously contended by Ms Buttimore (who is not an expert in these matters like Mr Allen is).

To the contrary – Ms Hooper notes a number of compelling reasons why such lot sizes might create new diverse productive opportunities for people and communities – potentially promoting innovation and improvements in the resilience of our country's primary sector – and potentially promoting the affordability and availability of suitable primary production land for people and communities.[43]

In this context Ms Hooper further relevantly notes that:

"Therefore, in place of one productive rural enterprise will potentially be three. This is consistent with the diversification

[39] Evidence Kathryn Hooper 24 January 2023, para 42
[40] Evidence Kathryn Hooper 24 January 2023, paras 43-45
[41] Evidence Kathryn Hooper 21 April 2023, para 29 and Appendices A and B
[42] Evidence Kathryn Hooper 21 April 2023, para 50 and Appendix B
[43] Evidence Kathryn Hooper 21 April 2023, paras 16-25, 62, 79, 87

encouragement from central government, it is consistent with the NPS-HPL, and ultimately, while the NPS HPL does not consider economic resilience or sustainability, if we return to the purpose of the RMA (which Ms. Buttimore agrees we should[44]), the natural soil resources will provide for sustainable rural communities for future generations."[45]

Ms Hooper also shares Mr Allen's views regarding the intent of the NPS-HPL in the context of dwellings (and other buildings) on HPL, and opines:

"*A dwelling on a productive block is not contrary to primary land-based production or productive capacity. In fact, it is normal and expected. I do not believe the intent of the NPS-HPL was to stop our primary producers living on their land – however, taken to its logical conclusion, this is where Ms. Buttimores opinion leaves us; which is also at odds with Part 2 RMA in my opinion."*[46]

"If Ms. Buttimore's stance on dwellings on HPL is accepted no block would be able to be subdivided anywhere in New Zealand, regardless of the size of it, if the land area beneath any future dwelling was not considered part of the productive enterprise."[47]

She goes on to note[48] that the same arguments apply to any buildings or structures that might be established on HPL to

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[44] At paragraph 130, Officer's Report
[45] Evidence Kathryn Hooper 21 April 2023, para 87
[46] Evidence Kathryn Hooper 21 April 2023, para 30
[47] Evidence Kathryn Hooper 21 April 2023, para 31
[48] Evidence Kathryn Hooper 21 April 2023, para 32

support rural production, which is clearly not the intent of the NPS-HPL.

People living and working on highly productive land is part of this country's culture (and has been for well over one hundred years in my submission) and,

"... *is consistent with maximising the productive capacity of the land and is therefore consistent with the NPS-HPL*"[49],

In my submission, Ms Hooper and Mr Allen are correct that the relevant guidance noted supports their position that dwellings are anticipated as part of, and are often critical to, and supportive of, a productive rural enterprise; Ms Hooper also importantly notes that, in this case, the dwellings on the subject land are part of the existing environment - or are permitted activities under the relevant plans.[50]

Overall Ms. Hooper's view is that granting consent is consistent with the relevant objectives and policies of the District Plan, Proposed District Plan, Iwi Environmental Management Plan, Taranaki Regional Policy Statement and NPS-HPL and, moreover, will promote the purpose and principles of the RMA.

I note that the Officer's Report also concludes that the proposal is consistent with the relevant objectives and policies of the Taranaki Regional Policy Statement[51], Operative District Plan[52], Proposed District Plan[53] (except, in her view, in relation

[49] Evidence Kathryn Hooper 21 April 2023, para 33
[50] Evidence Kathryn Hooper 21 April 2023, para 35
[51] Officer's Report para 114
[52] Officer's Report para 120

to protection of versatile soils and production orientated activities[54], which is not accepted) and the Iwi Environmental Management Plan Taiao, Taiora[55]. Notwithstanding all that, Ms Buttimore is of the view that the proposal will result in a loss of productive capacity in conflict with the NPS-HPL[56], and will not achieve the purpose of the RMA.[57]

In my submission that is largely because Ms. Buttimore does not accept, and appears to ignore, the expert evidence of Mr Allen (which she should accept) and has not properly applied, or given appropriate weight to, that evidence in the context of the relevant considerations under the NPS-HPL and Part 2 RMA - for all of the reasons provided in the evidence for the applicant and these submissions.

Further in my respectful submission, Ms Buttimore asserts an arbitrary and narrow view[58] that people and communities cannot build dwellings (and other buildings and structures) and live on highly productive land – in total contrast to what people and communities have been doing for many years, and are still doing, and will continue to do, throughout this country - which clearly is at odds with Part 2 RMA (and Ms Hooper's and Mr Allen's evidence discussed above).

For all of those reasons, Ms Hooper's (and Mr Allen's) evidence must be preferred based on the facts and circumstances of this case in my respectful submission.

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[53] Officer's Report paras 121-125
[54] Officer's Report paras 126
[55] Officer's Report para 127
[56] Officer's Report paras 111-112
[57] Officer's Report para 144
[58] Officer's Report paras 82-112

Law/Legal Principles

Section 104(1) and Part 2 RMA

8. As set out in my earlier submissions, section 104 (1) identifies the matters to which the consent authority must have regard, subject to Part 2;

> **[104 Consideration of applications**
> (1) When considering an application for a resource consent and any submissions received, the consent authority must, subject to Part 2, have regard to -
> (a) any actual and potential effects on the environment of allowing the activity; and
> [[(b) any relevant provisions of-
> (i) a national environmental standard:
> (ii) other regulations:
> (iii) a national policy statement:
> (iv) a New Zealand coastal policy statement:
> (v) a regional policy statement or proposed regional policy statement:
> (vii) a plan or proposed plan; and]]
> (c) any other matter the consent authority considers relevant and reasonably necessary to determine the application.

Must have regard to – subsection 104 (1) RMA

9. In Donnithorne v Christchurch City Council[59], "*have regard to*" was held to indicate matters that are required to be considered as part of the weighing-up process contemplated by s 104, as opposed to requirements or standards that have to be fully met. A consent authority still has a discretion that is not limited by sub-section (1) – the matters being given such weight as the

[59] [1994] NZRMA 97 (PT)

deciding body deems appropriate in the overall mix of relevant considerations.

10. The scope of the mandatory directive was also considered by the High Court in Foodstuffs (South Island) Ltd *v* Christchurch City Council[60]. The directive "*must have regard to*" is not to be elevated to mean "*must give effect to*". Rather, as His Honour Justice Hansen stated, "*The requirement for the decision maker is to give genuine attention and thought to the matters set out in s. 104, but they must not necessarily be accepted.*[61]" [62]

11. Section 104 does not give any of the matters to which a consent authority is required to have regard primacy over any other matter. All the matters are to be given such weight as the consent authority sees fit in all the circumstances: Kennett v Dunedin City Council.[63]

12. Section 104(1), therefore, adopts an open-ended approach to the weight that is to be attached to the relevant matters.

13. However, where a superior policy document such as a national policy statement contains a clear directive that is relevant to the proposal in question, such a directive may have a constraining effect: Environmental Defence Society Incorporated v The New Zealand King Salmon Co Ltd[64] (where the Supreme Court considered the directive effect of NZCPS provisions in a plan change context).

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[60] (1999) 5 ELRNZ 308: [1999] NZRMA 481 (HC)
[61] Foodstuffs (supra), at page 9
[62] In Unison Networks Ltd v Hastings District Council [2011] NZRMA 394 (HC), the High Court confirmed the position in Foodstuffs (supra)
[63] (1992) 2 NZRMA 22 (PT), at page 16
[64] [2014] NZSC 38, [2014] 1 NZLR 593

14. In the context of a resource consent application, however, the Court of Appeal's decision in RJ Davidson Family Trust v Marlborough District Council[65] confirms the approach to be taken following King Salmon[66] - which is discussed further below (and is the same approach as was noted in my above mentioned earlier submissions at paragraphs 16-17 thereof).

National Policy Statement – Highly Productive Land (NPS-HPL)

15. The NPS-HPL states in Part 4, at clause 4.1(1):

> Every local authority must give effect to this National Policy Statement on and from the commencement date[67] (noting that, until an operative regional policy statement contains the maps of highly productive land required by clause 3.5(1), highly productive land in the region must be taken to have the meaning in clause 3.5(7)).

16. Clause 3.5(7) is in a sense "transitional", as it provides for an interim position whereby the NPS-HPL is to apply to land that is zoned general rural or rural production and is LUC 1, 2, or 3 land (as mapped by the New Zealand Land Resource Inventory) until the regional mapping exercise is complete, unless one of the two exemptions (in sub-clause 3.5(7)(b)) applies.

17. All parties agree that the above mentioned exemptions (in sub-clause 3.5(7)(b)) do not apply to the applicant's land – and that the NPS-HPL does apply to the applicant's land being considered under this consent application - as set out in the most recent Officer's Report and evidence regarding same. As

[65] [2018] NZCA 316
[66] Supra
[67] Commencement date means the date on which this National Policy Statement comes into force, as identified in clause 1.2(1), which is 17 October 2022

noted, the key issue, therefore, is should the proposed subdivision be avoided in terms of clause 3.8 of the NPS-HPL, and the exemptions provided thereunder.

18. Section 104(1)(b)(iii) RMA applies to the NPS-HPL - to which the consent authority must have regard; subject to Part 2 RMA. I have noted above how the Court applies "*have regard to*" in this context; subject to Part 2 RMA.

Part 2 RMA

19. "Subject to Part 2" – was discussed in my earlier submissions particularly following the Court of Appeal's decision in RJ Davidson Family Trust[68]; and I generally agree with the Officer's comments about, and approach to, Part 2 set out in paragraphs 128-130 of the Officer's Report.

20. Section 5 RMA is paramount; particularly given the approach in RJ Davidson Family Trust[69] - in the context of the NZS-HPL not yet having been factored into the District Plan (operative and proposed):

> **5 Purpose**
>
> (1) The purpose of this Act is to promote the sustainable management of natural and physical resources.
>
> (2) In this Act, **sustainable management** means managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural wellbeing and for their health and safety while –

[68] Supra
[69] Ibid

(a) Sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and

(b) Safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and

(c) Avoiding, remedying, or mitigating any adverse effects of activities on the environment.

21. The method of applying s. 5 – and its application in this case – was covered in my above mentioned earlier submissions (at paragraphs 20-22).

22. Ms Hooper finds that the application does not conflict with Part 2 RMA – and, as noted earlier, that the NPS-HPL must be applied in a way that is consistent with Part 2 RMA.[70] In my submission her approach correctly aligns with that set out in RJ Davidson Family Trust[71].

23. The proposal, inter alia, provides for people and communities in terms of new housing in an attractive place to live and diversification and new, potentially more affordable and available, opportunities for agricultural and horticultural activities, for example, for future generations - while meeting all the caveats in s. 5 (2)(a)-(c).

24. In my submission Ms Buttimore takes a narrow view that the application does not achieve Part 2 of the RMA. She has failed, for example, to properly take into account people and communities - and in my submission gives very little weight (if any) , for no apparent reason, to the positive aspects of the proposal to achieve those matters enshrined in section 5 RMA –

[70] Evidence Kathryn Hooper 21 April 2023, paras 73-75
[71] Ibid

and gives no weight at all to the evidence of Mr Allen, who is an experienced and well respected expert in his field.

25. The relevant ss. 6 - 8 considerations in this case, which inform the purpose of the RMA, were covered in my above mentioned earlier submissions (at paragraphs 23-26).

26. It is respectfully submitted that the proposal recognises and provides for the matters of national importance in ss 6(a), 6(e) and 6(f).

27. In this regard the Officer's Report is contradictory and consequently, in my respectful submission, flawed. At paragraph 140 of that report Ms Buttimore states that there are no such relevant maters in this case. However, that contradicts paragraph 65 of that report in the context of s 6(a) – and contradicts paragraphs 66-67 of that report in the context of s 6(e) RMA in my submission. Paragraphs 68-71 of the Officer's Report cover s. 6(f) matters.

28. Similarly, the Officer's Report has no particular regard to s 7(a) (or 7(d)) RMA – and in my submission does not address s 8 RMA.

29. As noted in my earlier submissions[72] - in terms of ss. 6(e), 7(a) and 8 - the applicant has undertaken appropriate consultation with tangata whenua, whose participation in the proceeding has been properly enabled, and whose views have been (and will be) appropriately taken account of.

[72] At paragraphs 24, 25

30. The Officer's Report in my submission affords little, if any, proper consideration or weight to those matters. Rather, Ms Buttimore appears to take a narrow view and exaggerates matters in s. 7 RMA that support her position (regarding ss 7(b) and (g) – which is not accepted on the facts and circumstances of this case – particularly in respect of (but not necessarily limited to) proposed Lots 4 and 5) in my submission, and in that regard her report is flawed and should not be given significant weight in this context. I do, however, agree with paragraphs 137-138 of the Officer's Report in respect of ss. 7(c) and (f).

Sections 104(1)(a), 104(1)(b), 104(2) & 104(3) RMA

31. The above provisions – including effects (including positive) – have been previously addressed in my earlier submissions[73], and in earlier and further recent evidence, and in the interests of brevity I will not analyse those matters again.

32. However, I will briefly reiterate that - in those earlier submissions - I noted that Ms Buttimore did not properly assess and weigh the positive effects in this case[74] - and applied a narrow view in considering s. 104(1)(b) matters and reaching her conclusions[75] - and also failed to properly take into account the mandatory provisions of s. 104(3)(a)(ii) RMA (as did Ms Griffiths)[76]. Those earlier submissions still stand – and are further reasons why the expert evidence for the applicant (which does properly consider those matters) must be preferred, and given more weight, in this case.

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[73] At paras 27-55
[74] At paras 32-34
[75] At para 41
[76] At paras 53-54

Other Legal Issues

Precedent Effects

33. It is trite law that precedent in the strict sense does not arise from the grant of a resource consent, following the Court of Appeal's decision in Dye v Auckland Regional Council[77]. A consent authority is not bound by a previous decision of the same or another authority; the facts and circumstances of each case are never likely to be the same (due to the many variables in each case); - as also noted by Ms Hooper, this case has many distinguishing facts, circumstances, and variables - some of which cannot be replicated[78].

34. It is submitted that the facts and circumstances of this case are highly unlikely, and in fact impossible in my submission, to be readily replicated elsewhere in New Plymouth. The uniqueness of the site and surrounding environment, and facts and circumstances of this case, also means that the integrity of the District Plan (and Proposed District Plan) is not threatened.

No Complaints Covenants

35. I briefly note the Environment Court's observations in Avatar Glen Limited v New Plymouth District Council[79] - where His Honour Judge Thompson stated:

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[77][2001] NZRMA 513 (CA), at paragraphs 32-36.
[78] Evidence Kathryn Hooper, 21 April 2023, paras 81-85
[79] [2016] NZEnvC 78, at para 70; see also subsequent decision Avatar Glen Limited v New Plymouth District Council [2016] NZEnvC 180 allowing the appeal and approving conditions of consent including condition wording re no complaints covenant and form of no complains covenant attached as Appendix B thereto

"[70] We accept that no complaints covenants are not a universal panacea, but they do provide a level of reassurance to a person or organisation who or which may be at risk of complaint about some relatively low-level adverse effect. We certainly see no harm in them."

Submissions and Conclusions

36. Each case must be considered and determined on its merits in light of the particular facts and circumstances.

37. In my submission the proposal will provide for the applicants' and their families (including their aged mother who is currently living in a care facility) - in terms of providing for the social and economic wellbeing of the applicants – through assisting in the ongoing sustainability of the farming operation.

38. The proposal will also provide new housing for people in an attractive and healthy, positive (for well-being) environment. It also promotes diversity for people and communities regarding agricultural and horticultural options - and is good for the country's diversification and resilience and depth of food supply, for example – particularly given recent climatic weather events in, for example, Hawkes Bay.

39. In my respectful submission, the provision of further housing within the rural environment in the district is also a very positive thing for the local community and future generations - in terms of, for example, more people living in that community - and becoming part of that community - and potentially engaging in,

and assisting with, for example, community activities in the future.

40. It is further submitted that, once again, the Officer takes a narrow view in respect of such issues at paragraph 141 of the Officer's Report - where she narrowly focuses only on, "... *the applicant's family's social and economic wellbeing*". That approach ignores other people, future generations, and the community generally, which the proposal also stands to benefit.

41. All surrounding neighbours have given written approvals; as have the tangata whenua holding mana whenua - who have also encouraged the proposed riparian planting - which will assist to restore waterways on the applicant's land - being of cultural significance to the tangata whenua – and in that regard promotes Part 2 RMA in terms of ss 6 [(a) and] (e), 7(a) and 8; and assists to achieve the caveats in s. 5(2)(a) – (c) RMA.

42. The evidence of Ms Hooper and Mr Allen note that the size of the proposed lots themselves is not the determinant of whether the subdivision should be avoided in terms of the NPS-HPL, but rather whether long-term productive capacity is retained.

43. That evidence also observes that, in fact, productivity and diversity requires that there be small lots available. The size of a property or lot is only one of many factors that contribute to the efficient, effective and productive use of land in the rural environment. A diversity of lot sizes is important in this context (as is noted in Mr Allen's and Ms Hooper's evidence).

44. It is submitted that the applicants' proposal has appropriately responded to the NPS-HPL - and been responsibly redesigned

in such a way that the lots retain overall long-term productive capacity - particularly on a comparative basis as set out in Mr Allen's evidence.

45. Mr Allen's evidence is robust and provides an impartial objective assessment of the proposed subdivision in terms of assessment of its impact on long-term productive capacity – and in his view (and Ms Hooper's) - the subdivision design and reconfiguration safeguards productive capacity for future generations. The subdivision re-design avoids or mitigates potential cumulative loss of availability and productive capacity of highly productive land, and avoids or mitigates reverse sensitivity effects on surrounding land-based primary production based activities as discussed in Ms Hooper's evidence.

46. While "*must avoid*" is a strong directive – the exemptions listed in clause 3.8 of the NPS-HPL curb this directive significantly in this context in my submission. The exemption for subdivision where the proposed lots retain the overall productive capacity of the subject land over the long term – in particular – demonstrates that the primary goal is the retention of long term productive capacity, not just the restriction of subdivision. Mr Allen and Ms Hooper conclude, for all the reasons in their evidence, that the applicants' proposal falls under the exemption in sub-clause 3.8(1)(a), and also achieves the measures in sub-clauses 3.8(2)(a) and (b).

47. It is submitted that the proposal does not adversely reduce the productive capacity of the subject land over the long term for the bulk of the subject land, apart from where a new dwelling, for example, *might* be established. The proportion of that part of the land that might be used for same, however, is relatively minimal

and must be contemplated, in my submission, by Part 2 RMA in terms of people living and working on the land.

48. Furthermore, the dwellings and curtilage areas can be considered as supporting activities in this context, necessary to support land based primary production on the land - which is also typical throughout New Zealand's existing working rural environment (and has been for a long time – it is part of our culture). There are also permitted buildings and structures that can be built on properties as of right in the rural environment (that can lead to some loss of HPL).

49. The proposed lots will retain the overall productive capacity of the subject land over the long term and the proposal is, therefore, consistent with the NPS-HPL - any potential adverse effects in relation to the efficiency, effectiveness and productiveness of farming and rural based activities would be no more than minor, negligible, or nil.

50. Conversely, there are positive effects that will flow from the proposal - including increased availability of HPL - providing opportunity for people to access productive land affordably and use it productively, innovatively, and more diversely in accordance with Part 2 RMA[80].

51. This is also consistent with the diversification encouragement from central government – which is consistent with the NPS-HPL – and Part 2 RMA[81].

[80] Evidence Kathryn Hooper 21 April 2023, para 62
[81] Evidence Kathryn Hooper 21 April 2023, para 87

52. In summary, it is submitted that there are no significant potential or actual adverse effects on the environment that would result from the proposed subdivision and landuse. The adverse effects on the environment would be minor; however, there are a number of positive effects that would result from the proposed subdivision and landuse.

53. The proposed subdivision and landuse would, overall, not be contrary to the objectives and policies of the District Plan, Proposed District Plan, Regional Policy Statement, Iwi Environmental Management Plan Taiao, Taiora or NPS-HPL for all the reasons provided in the evidence called for the applicant (and these submissions).

54. It is respectfully submitted that the proposal meets the purpose of the RMA (being paramount in this case) – it promotes the sustainable management of natural and physical resources; and the necessary consents should be granted.

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SWA Grieve
Counsel for Applicant