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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RIGHT OF REPLY FOR THE APPLICANT
B, M, R, SIM

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MAY IT PLEASE THE INDEPENDENT HEARINGS COMMISSIONER

Right of Reply

Comments on Reporting Officer's responses to questions by Commissioner at Hearing

1. Despite the expert evidence of Mr Allen, the Reporting Officer was still of the view that the proposed subdivision would result in the long term productive capacity of the land not being retained – for reasons that were not clearly provided.

2. However, Mr Allen's evidence is that the long term productive capacity of the land will in fact be retained, with the exception of areas for house and curtilage. And, as Ms Hooper's evidence noted – what matters under clause 3.8 of the NPS-HPL is that the land's long-term productive capacity is retained. In my respectful submission, the proposed subdivision achieves that.

Key matters to be addressed in reply

3. There appeared to be some uncertainty as to the ability for a consent authority to access Part 2 RMA when considering an application for consent – particularly where there is an NPS such as the NPS-HPL providing what on its face could be considered "strong direction" against a proposal. At least, the approach taken by the Reporting Officer is, in essence, that the proposal cannot proceed because it is contrary to the NPS-HPL (even if the adverse effects are only minor).

4. While some of these issues have been covered, to assist the Commissioner, these submissions in reply seek to explain fully

how, and why, the Commissioner can have regard to Part 2 and is not "bound" by the NPS-HPL to decline consent. This follows a careful understanding of ***King Salmon***,[1] ***RJ Davidson***,[2] and other recent authorities.

NZ King Salmon

5. As the Commissioner will be well aware, ***King Salmon*** concerned the lawfulness of a decision by a Board of Inquiry to approve certain site-specific plan changes to the Marlborough Sounds Resource Management Plan. However, context is everything,[3] and it is appropriate to provide a little more background about the case. Significantly, as it involved a plan change, the statutory directive under s67(3) of the RMA was to "*give effect to*" (as relevant) the New Zealand Coastal Policy Statement (NZCPS) which contained objectives and policies, some of which were worded in strong terms (i.e., to "*avoid*" or "*not allow*"[4] certain outcomes). The Supreme Court found that "*give effect to*" means "*implement*" (at [77]).

6. On the facts of the case, and in light of the particular wording of the NZCPS, the Supreme Court held that the Board of Inquiry had erred in applying an "*overall judgement*" approach to assessing the consistency of the plan change with the NZCPS.[5] It then went on to hold that since the NZCPS had been intended to "*give substance to*" the principles in Part 2 of

1 *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2014] 1 NZLR 593.
2 *R J Davidson Family Trust v Marlborough District Council* [2018] 3 NZLR 283.
3 *McQuire v Hastings District Council* [2002] 2 NZLR 577 (PC), at [9].
4 *King Salmon* at [93].
5 *King Salmon* at [135]-[140].

the RMA, there could be no question of the plan change being in accordance with Part 2. The Court said that:[6]

> In principle, by giving effect to the NZCPS, a regional council is necessarily acting "in accordance with" Part 2 and there is no need to refer back to the part when determining a plan change.

7. The Supreme Court subjected that statement to three caveats, however, which would have allowed resort to Part 2 in the case of invalidity, incomplete coverage or uncertainty of meaning.[7] The latter caveat is entirely consistent with (if not required under) the orthodox approach to interpretation of a statute or regulation, which is to be ascertained from its text and in the light of its purpose and its context (s10 of the Legislation Act 2019).

8. So, in *King Salmon*, not only did the Council have to "*implement*" the NZCPS, the NZCPS contained relevant policies that were worded strongly; the two factors reinforced one another.

9. Importantly, even in the context of the requirement to "*give effect to*" (or "*implement*"), the Supreme Court did not consider that the "*avoid*" requirement under the relevant policies of the NZCPS required all effects on ONFs and ONLs to be "*not allowed*". It explicitly contemplated that activities with minor (or transient) effects could be allowed, stating at [145]:

> … 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 coastal environment, even where that natural character is outstanding. …

10. In these proceedings, the case (and evidence) for the applicant is that the adverse effects of their proposal are minor only. In

6 *King Salmon* at [85].
7 *King Salmon* at [88] and [90].

other words, they are not prohibited, even under a strict application *King Salmon* approach. In resolving whether or not to allow the proposal (i.e., with minor effects), even under the *King Salmon* approach, it is entirely appropriate to carefully consider it against Part 2. Even more flexibility is allowed in accessing Part 2 in the context of a resource consent following the Court of Appeal's decision in *RJ Davidson*, which I turn to address next.

RJ Davidson

11. *RJ Davidson* concerned an application under the RMA for a resource consent for a mussel farm in Marlborough. The Court of Appeal was required to consider the scope of s 104(1) of the RMA, which requires decision-makers to "*have regard to*" relevant provisions of various planning documents, as well as other matters, "*subject to Part 2 of the RMA*".

12. The main question before the Court of Appeal in *R J Davidson* was whether the words "*subject to Part 2 of the RMA*" had any residual meaning in the light of the decision of the Supreme Court in *King Salmon*.

13. The Court of Appeal confirmed the application of Part 2 in the resource consent context, acknowledging its pre-eminence in resource consent decision-making - and confirming the ability to consult it directly in those decisions. The Court of Appeal specifically held that the analysis applied in *King Salmon* did not transfer over to the provisions of the RMA governing the granting of resource consents, specifically s 104(1), either in respect of the approach to be applied when taking into account the provisions of relevant planning documents under s 104(1)(b), or

when considering the significance of taking into account the range of factors in s 104(1)(a)-(c) "*subject to Part 2 of the RMA*".[8]

14. The Court of Appeal held that s 104(1) "*plainly contemplate[d]*" decision-makers having direct regard to Part 2 of the RMA in appropriate cases. The Court observed:[9]

> The Act's general provisions dealing with resource consents do not respond to the same or similar reasoning to that which led the Supreme Court to reject the "overall judgment" approach in *King Salmon*. There is no equivalent in the resource consent setting to the range of provisions that the Supreme Court was able to refer in the context of the NZCPS, designed to ensure its provisions were implemented: the various matters of obligation discussed above. Nor can there be the same assurance outside the NZCPS setting that plans made by local authorities will inevitably reflect the provisions of pt 2 of the Act. That is of course the outcome desired and anticipated, but it will not necessarily be achieved.

15. The Court of Appeal held that if, when considering an application for resource consent, an activity engaged the NZCPS in a manner where "*it was unclear from the NZCPS itself whether consent should be granted or refused*", for example because there was "*no clear breach of a prescriptive policy in the NZCPS*", then the consent authority would need to exercise a judgement - and could have regard to Part 2.[10]

16. Importantly, the Court held that a similar approach should be taken for activities engaging other types of plans (such as District Plans). After summarising the "*fair appraisal*" approach to considering relevant plan provisions, the Court went on to say:[11]

> It may be … that a fair appraisal of the policies means the appropriate response to an application is obvious, it effectively presents itself. Other cases will be more difficult. If it is clear that a plan has been prepared having regard to pt 2 and with a coherent set of policies designed to achieve clear environmental outcomes, the result of a genuine process that has regard to those policies in accordance with s

8 *R J Davidson* at [47] and [73].
9 *R J Davidson* at [70].
10 *R J Davidson* at [72].
11 *R J Davidson* at [74]-[75].

> 104(1) should be to implement those policies in evaluating a resource consent application. Reference to pt 2 in such a case would likely not add anything. It could not justify an outcome contrary to the thrust of the policies. Equally, if it appears the plan has not been prepared in a manner that appropriately reflects the provisions of pt 2, that will be a case where the consent authority will be required to give emphasis to pt 2.
> If a plan that has been competently prepared under the Act it may be that in many cases the consent authority will feel assured in taking the view that there is no need to refer to pt 2 because doing so would not add anything to the evaluative exercise. Absent such assurance, or if in doubt, it will be appropriate and necessary to do so. That is the implication of the words "subject to Part 2" in s 104(1), the statement of the Act's purpose in s 5, and the mandatory, albeit general, language of ss 6, 7 and 8.

17. While these passages refer to the processes by which relevant plan(s) considered as part of a s 104(1)(b) RMA "*fair appraisal*" analysis have been adopted, it is plain from the Court's reasoning that it did not intend for this to be the sole criterion for the application of Part 2 of the RMA. Rather, as the emphasised passages suggest, another important question is whether the "*fair appraisal*" analysis was finely balanced or involved the consideration of competing provisions, in which case the consent authority may have regard to Part 2. This was the approach taken relatively recently by Justice Palmer in the High Court – in *Tauranga Environmental Protection Society Inc v Tauranga City Council & BOP Regional Council* CIV 2020-470-31, at [86]:

> … Consistent with *EDS v King Salmon* and *RJ Davidson Family Trust*, a Court will refer to pt 2 if careful purposive interpretation and application of the relevant policies requires it. That is close to, but not quite the same as, Mr Gardner-Hopkins' submission that recourse to pt 2 is required "in a difficult case". To the extent that Mr Beatson's and Ms Hill's submissions attempt to confine reference to pt 2 only to situations where a plan has been assessed as "competently prepared", I do not accept them.

Additional considerations – the NPS-HPL

18. It should also be noted that the NZCPS has a special status in respect of National Policy Statements (**NPSs**). The NZCPS is

the only mandatory NPS (required at all times under s57(1) of the RMA). Its purpose under s56 is also to, "*state objectives and policies* in order to achieve the purpose *of this Act in relation to the coastal environment of New Zealand*". In comparison, the purpose of other NPSs under s45 is to, "*state objectives and policies for matters of national significance that are relevant to achieving the purpose of this Act*", i.e., other NPSs are relevant, but not necessarily determinative (this makes sense as some NPSs themselves can pull in different directions, for example, the NPS-UD and the NPS-HPL). The NZCPS is also holistic in addressing the coastal environment as a whole, while other NPSs are directed to specific matters, and cannot internally address all matters under Part 2.

19. The particular language and context of each NPS is also critical. While *King Salmon* emphasised the importance of language, and how directive any policy was, the context of a particular NPS (the NPS on Urban Development) was very recently emphasised by the High Court in *Southern Cross Healthcare Ltd v Eden Epsom Residential Protection Society Inc* [2023] NZHC 948. So too was the need to interpret the provisions of a planning document in the context of the document as a whole (at [107][12]). Having regard to that context, objectives and policies requiring the Council to "*enable*" social facilities such as hospitals were, contrary to the Environment Court's findings, important and strongly directive.[13] The High Court also warned about taking an interpretation of the same term in a different planning context, without careful consideration, at [122]:

> Ms Hartley submitted that the Environment Court's interpretation of "enable" was consistent with Cull J's decision in *Equus Trust v*

[12] Citing: *Powell v Dunedin City Council* [2004] 3 NZLR 721 (CA) and *Equus Trust v Christchurch City Council* [2017] NZHC 224.

[13] At [117]-[121].

> *Christchurch City Council*. That decision concerned a very different planning instrument. Given the need to interpret planning documents in their own context, I do not find that decision of assistance in interpreting the policies in part B2.8.

20. The intent of an NPS, and the language used in its particular policies, needs to be understood from its text and context. While it may be tempting to take considerable assistance from MfE guidance (for example, its 'Guide to Implementation' of the NPS-HPL), recent decisions of the Environment Court make it clear that non-statutory MfE guidance cannot alter the meaning of a statutory instrument:

    a. In *Federated Farmers v Northland Regional Council*[14] the Environment Court expressed concerns regarding MfE guidance on the National Policy Statement for Freshwater Management 2020 (NPS-FM), and noted that it has no regulatory force. The Court stated at [29]:

        > We have put aside any implied directions in the guideline, but the entire Court is uneasy at the implications of the documents and its potential ramifications"

    b. In *Greater Wellington Regional Council v Adams*,[15] the Court again confirmed that the same guidance on the NPS-FM cannot alter the definition contained in the NPS-FM, noting at [136]:

        > 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,

14 *Federated Farmers v Northland Regional Council* [2022] NZEnvC 016.
15 *Greater Wellington Regional Council v Adams* [2022] NZEnvC 25.

> official guidelines or requirements, a category which the definition contained in NPS-FM must surely fall into.

21. The NPS-HPL itself has also recently been discussed by the Environment Court in a consent context, in *Gray v Dunedin City Council* [2023] NZEnvC 45. The Court found at [194] that the NPS-HPL does not "*of itself have the effect of altering the district plan in any manner*", and proceeded at [202] on the basis that "*the NPS-HPL provisions are among the wide range of identified matters that the consent authority must have regard to*". The Environment Court was also "*not prepared to give any weight to the discussion of the NPS-HPL in the MfE guidelines*" (at [206]).

Summary

22. In short, therefore, access to Part 2 is not restricted, given that:

    a. The decision on a consent application under s104 is explicitly "*subject to Part 2*" (*RJ Davidson*);

    b. The NPS-HPL is *relevant to* achieving sustainable management, but is *not determinative of* what will achieve sustainable management (s45, *Gray v Dunedin City Council*); and the District Plan has not yet been updated to give effect to the NPS-HPL (including with greater specificity as to content and location); and

    c. Even on the *King Salmon* approach, as the proposal's potential adverse effects are only minor, Part 2 is relevant to determining whether the proposal should proceed.

23. In respect of considering Part 2 itself, it is necessary to look at all aspects that are relevant – both in favour of granting consent as well as those that weigh against it: *Ayrburn Farms Estates Ltd v Queenstown Lakes District Council* [2013] NZRMA 126 at [87]-

[100]. Although decided in the context of a restricted discretionary consent application, the High Court there found that the Environment Court had erred in only considering Part 2 matters in favour of granting consent.[16]

24. By parity of reasoning, Part 2 cannot be looked at only to refuse consent (which seems to be the approach that the Reporting Officer is taking). The "*enabling*" aspects of section 5 and Part 2 require careful consideration in this case. Section 7(b) is of particular relevance in this case: "*the efficient use and development of natural and physical resources*", as part of the enabling aspects of section 5 in respect of enabling "*people and communities to provide for their social, economic, and cultural well-being and for their health and safety*". Provision of housing is a critical issue, in this context.

Concluding comments

25. It is respectfully submitted that all other issues raised in the hearings have been thoroughly canvassed in the application, the applicant's evidence and further evidence, legal submissions, and discussions during the course of the hearings.

26. Finally, an agreed version of the consent conditions following further conferencing by the planning experts have been filed by the relevant planning witnesses as directed.

27. On that note, after further consideration of the Commissioner's comments at the recent hearing - the applicant has offered a

16 *"It follows that in this case the Environment Court was obliged to have regard to any Part 2 matters which related to the matters over which the council had reserved its discretion. Its view that Part 2 was relevant for the sole purpose of identifying benefit was erroneous and based on a misinterpretation of Woolley."*

further consent condition - that there shall be no further subdivision of Lots 1, 4, 5 or 6 while the land remains in the Rural Production Zone or other similar rural zoning (which has been factored into the abovementioned proposed consent conditions dated 25 May 2023 (at condition 15.(e), filed with the Council on 24 May 2023 by Ms. Hooper) - providing future certainty for all parties, and achieving sustainable management, in my respectful submission.

SWA Grieve
Counsel for Applicant
2 June 2023