Before the District Plan Hearings Panel appointed by Central Hawke's Bay District Council

In the matter of	the Resource Management Act 1991 (RMA)
And	
In the matter of	the hearing of submissions on the Proposed Central Hawke's Bay District Plan

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Reply Submissions for Central Hawke's Bay District Council

Hearing Stream 6 - Rezoning

Dated 9 December 2022

May it please the Panel

Introduction

1. These submissions respond to legal submissions presented for Livingston Properties Ltd and James Bridge at the hearing on 17 November 2022. The general content of the submissions were addressed ahead of counsel presenting their submissions, so they could address anything new arising. For the mostpart, the submissions to follow are a written version of what was presented orally at the hearing.

2. These submissions are restricted to responding to legal arguments put forward for these submitters, while the reporting officers will deal with their merits.

Submissions for Livingston Properties Ltd

Does the National Policy Statement on Highly Productive Land 2022 (NPS-HPL) apply?

3. While Livingston accepts that the subject site is zoned Rural and includes an area of LUC 3, several arguments were put forward for the submitter to the effect that the land is not 'HPL'.

4. The first reason is because it is "identified for future urban development". My submissions on the NPS-HPL[1] addressed this exclusion, but I expand on those comments here.

5. In order to be 'identified for future urban development' and therefore be excluded from being HPL under cl 3.5(7), the following terms need to be considered, namely the land must be:

   (a) Identified in a 'strategic planning document';

   (b) As 'suitable';

   (c) For 'urban' development;

   (d) Commencing in the next 10 years; and

   (e) At a level of detail that makes the boundaries of the area identifiable.

6. It is common ground that the Integrated Spatial Plan (ISP) is a 'strategic planning document'. I also agree that the boundaries of the areas identified as 'Potential growth area for focused investigation – Medium Term', and 'Proposed Rural Residential Growth Area', both of which apply to the Livingston land, are sufficiently clear in the ISP as to make the boundaries of the area so identifiable.

7. However, in my view, the ISP does not identify the subject land as "suitable" for development. References to a "Potential growth area" for "investigation" are not, in my view, what the drafters of the NPS-HPL would have intended as having the required level of certainty to qualify as "suitable" for development. The investigation process may well have resulted in the area being deemed unsuitable for development.

8. That interpretation is consistent with how the ISP was interpreted in the Household Growth Report, which was a report prepared specifically to review the approach to accommodating growth in the Proposed District Plan, following consultation on the Draft District Plan. There, the authors (Sage Planning) considered whether it was

[1] Legal Submissions for Central Hawke's Bay District Council in relation to National Policy Statement on Highly Productive Land 2022, 9 November 2022, available on the CHB Hearings Portal under Hearing Stream 6.

appropriate to identify potential areas of urban growth identified by the ISP in the PDP, but concluded:[2]

> … given the high-level, desktop nature of the ISP and the ISP's reference to the need for further detailed investigations to determine whether some or all of the land within each potential area is suitable for development, it would be more appropriate to only identify the general indicative direction of potential urban growth on the periphery of each town, rather than identify specific property boundaries (as done in the ISP), to reflect this uncertainty and lack of supporting detailed assessment. This approach is also important in order to manage the expectations of landowners in these areas.

9. I further do not consider that the land is identified as suitable for development in the next 10 years. At best, it is identified for investigation in the medium term (3-10 years) but that cannot be read as a statement that development is to commence within that period. The suggestion that there is an adopted intention for this land to be developed within the next 10 years is belied by the fact that it was not included as such in the PDP. Had it really been the case that the Council had adopted a strategy that identified this land as being suitable for urban development in the life of the Plan, then one would expect it to have been so identified. That the ISP was prepared immediately before the PDP, with the stated intention of informing the PDP, is a strong indicator that the ISP does not have the meaning the submitter seeks to ascribe to it.

10. The third requirement is that the land must be identified for "urban" development. The ISP identifies part of the Livingston land as suitable for 'Rural Residential Growth'. The NPS-HPL differentiates between "urban" rezoning which is enabled in some limited circumstances, and rezoning for "rural lifestyle" which can occur only in much more limited circumstances. The interim definition of HPL at cl 3.5(7) itself differentiates between land identified for future urban development at (b)(i) and land that is subject to a plan change from rural to "urban or rural lifestyle" at (b)(ii). There is an intentional exclusion of land identified for future rural lifestyle development from land excluded from being HPL in the interim period. In my view, 'Rural Residential Growth' anticipates development akin to rural lifestyle, and does not qualify as identifying the land as appropriate for 'urban' usage.

[2] Central Hawke's Bay District council – District Plan Review – Household Growth Response, November 2020, Sage Planning, p46.

11. Mr Williams took the view that 'Rural Residential' could refer to a Large Lot zone, which is classified as urban.[3] In my submission, that is unlikely when the Operative District Plan has no such 'Large Lot' zoning, and it would not have been anticipated at the time of preparing the ISP.

12. I acknowledge that all of these terms are open to interpretation, and there is as yet no case law to guide how they are to be applied in practice. However, applying the NPSHPL in light of its objective of protecting highly productive land, I consider the stricter interpretation is appropriate. The implications of the land not being classified as HPL by virtue of giving a generous interpretation to the ISP is that the NPSHPL can never apply to this land, not only in the interim period before the Regional Council mapping but also after that, as cl 3.4(2) prevents land identified for future urban development as being mapped as HPL.

13. By contrast, if the Panel agrees that the ISP does not identify the land as identified for urban development, options for its development are not foreclosed because:

    (a) Prior to the Regional Council mapping, options for urban rezoning still exist under cl 3.6, and rezoning for rural lifestyle under cl 3.10, in appropriate circumstances; and

    (b) The appropriateness of identifying the land as HPL can be fully considered through the Regional Council mapping process required under cl 3.4.

14. In my view, the ISP cannot be said to identify the Livingston land as suitable for urban development., and the Panel should be mindful of applying a strained meaning to the ISP in order to avoid the application of the NPSHPL.

15. In my submission, the LUC 3 portion of the land is to be considered HPL, and the provisions of the NPS-HPL in terms of the limitations on rezoning applied.

[3] NPSHPL, cl1.3, definition of 'urban'.

Relevance of productive capacity and constraints

16. The evidence from Mr Morice, and the legal submissions, appear to invite the Panel to conclude that the site is not, in fact, highly productive land.[4] The NPS-HPL differentiates between the following matters:

    (a) 'Highly productive land' which is determined by regional council mapping, or until then, the transitional definition in cl 3.5(7) as discussed above;

    (b) 'Productive capacity' which means the ability to support and-based primary production over the long term, based on an assessment of physical characteristics (such as soil type etc), legal constraints and the size and shape of parcels; and

    (c) Constraints on land.

17. For the reasons set out above, I consider the land is currently HPL for the purposes of the NPS. It may not ultimately be mapped as HPL through the HBRC plan change, however that cannot be prejudged at this stage and, as noted in relation to the Bridge submission, the Panel should be conscious of compromising that mapping process by removing LUC 3 land from the pool of land available for consideration.

18. The evidence of Mr Morice goes to the productive capacity and constraints applicable to the land. In my submission, those matters may be relevant:

    (a) When considering the proposed rezoning from General Rural to General Residential in terms of its environmental, social, cultural and economic costs associated with the loss of HPL for LBPP under cl3.6(4)(c);

    (b) When considering the proposed rezoning from General Rural to Rural Lifestyle in terms of cl 3.10 – this is the only path available under the NPS-HPL for rezoning land to Rural Lifestyle (per cl 3.7). The land's low (but not absent) productive capacity and constraints such as limited drainage are relevant here, but to be satisfied that the requirements of the clause are met, information is required as to whether they render the land incapable of economically viable use for LBPP for at least 30 years, including a full

[4] Evidence of Gregory Morice, para 23. Legal Submissions for Livingston, para 24, second bullet.

consideration of reasonably practicable options such as alternate forms of LBPP, improved land-management strategies, water efficiency measures and so on. Productive potential must not be limited by its past or present use and the size of the landholding is not determinative of a long-term constraint (although it presumably may be one factor).

19. In my submission, the Panel would need more information than that provided by Mr Morice to be satisfied as to the above matters, particularly for cl 3.10, which is clearly intended to be a narrow window for exceptions to the general rule that lifestyle residential is not an appropriate use of HPL.

20. The productive capacity of the land may also be relevant when making a s 32 assessment, including an assessment against the objectives and policies of the PDP, but in my submission, when considering the proposal against the NPS-HPL, the assessment must be limited to the factors set out above.

The Part 2 Argument

21. Mr Williams argued that if the NPSHPL did apply to the rezoning sought in this case, then the instrument had "incomplete coverage" in terms of *King Salmon* because the NPS does not contemplate a situation where rezoning would result in a better outcome than proposed rezoning. He said that because the existing subdivision consent would entirely undermine the productive capacity of the land, then the Panel should – despite the directive in the NPSHPL to avoid rezoning of the HPL – have regard to Part 2 and consider whether the rezoning would give better effect to the sustainable management purpose of the RMA.

22. In my submission, there is no incomplete coverage here. The NPSHPL is quite clear that it is to apply from the commencement date (cl 4.1(1)) and that there is to be essentially a 'freeze' on development of land meeting the interim definition of HPL until the Regional Council mapping exercise has been completed. The drafters would have been aware that some planning processes were part way through, but deliberately chose not to include transitional provisions to allow those to be completed without regard to the NPSHPL.

23. In any event, I note the reporting officers have considered the proposal to rezone the land under Part 2 and have concluded that there are reasons to decline the request notwithstanding the application of the NPSHPL.

Relevance of the Existing Consent to consideration under the NPS-HPL

24. A complicating factor in this case is the fact that the submitter has obtained consent for rural lifestyle subdivision which its experts say is not an appropriate Resource Management outcome. As Mr Livingston says "*the consented subdivision is a poor use of the Property, but an easier option for us as the developers".*[5]

25. The submitter relies on the existing consent essentially to argue that concerns about the appropriateness of the rezoning need to be viewed in light of the alternative, which is that the submitter will implement the subdivision consent and lock in a worse environmental outcome.

26. The Proposed District Plan as a whole looks to address a number of issues with the Operative District Plan, including a very permissive rural subdivision regime. The NPSHPL similarly seeks to prevent this type of subdivision being repeated on HPL. The fact that applicants have been able to secure consent for development they openly state to be a poor environmental outcome is unfortunate and will be much more difficult to replicate in future.

27. The extent to which the Panel should let those poor planning outcomes of the past influence its current decision-making processes is for the Panel to determine. On the one hand, the submitter is open about the fact that it deliberately applied for consent under the permissive provisions of the Operative District Plan without offering any landscape or urban design outcomes which would have allowed its own experts to support it.[6] On the other hand, the submitter asks the Panel to accept its real intention is to deliver a 'modern, top-quality subdivision' if only the Panel grants the relief it now seeks.[7]. In my submission, the Panel is entitled to treat this 'offer' with some cynicism.

5 Evidence of William Livingston, para 10.
6 Evidence of Shannon Bray, para 50.
7 Evidence of William Livingston, para 8.

28. In my submission, the Panel should not be overly swayed by what are essentially threats by the submitter that he will deliver a poor planning outcome if the Panel does not grant the relief sought. It remains open for the submitter to await the outcome of the Regional Council mapping in the next few years, noting that Mr Williams stated with confidence that the land would not be mapped as HPL, and pursue the development then. It also remains open for the submitter to deliver the best quality rural lifestyle development it can, noting that these will be much harder to approve in the future.

29. A point I noted at the hearing is that rezoning the property as sought does not remove the ability for the existing subdivision consent to be given effect to. Mr McKay at the hearing said he expected the submitter would surrender the existing consent if the rezoning is approved, and suggested a rule might be proposed to require that. No such rule has been put forward and it is unclear whether a rule could legally require a separate legal right to be surrendered. Certainly it could not do so without being triggered by an application to develop the land. Mr Livingston offered no assurance or undertaking to the Panel that if the rezoning was approved, the subdivision consent would not be implemented.

30. In the event that the land was rezoned to General Residential, the new rules would apply to the new lots, allowing, for instance, multiple houses to be established on one site as a permitted activity, and allowing outcomes not anticipated by the Concept Plan without any real ability to enforce the promised 'better' outcome. Given the rezoning is being put forward as a 'better' outcome than the existing situation, it would be useful for the submitter to address how this hybrid situation would be avoided.

New provisions put forward in reply

31. On 25 November 2022, Mr McKay submitted further information as to how he considered the Concept Plan being promoted by the submitter would actually be required to be delivered through the PDP provisions (noting no such method was initially proposed).

32. Mr McKay acknowledges that if the NPSHPL applies, the Panel mut avoid rezoning of HPL for rural lifestyle (cl 3.7). Because an area proposed for rural lifestyle is within a LUC3 portion of land, Mr McKay's solution is essentially to rename the

Rural Lifestyle Zone as it applies to that portion of the land "General Residential Zone" but apply rules which seek to replicate some, but not all, of the rules applicable to the Rural Lifestyle Zone (for instance the minimum lot size would be 2,500m^2, which is the recommended size for the Rural Lifestyle Zone, rather than 350m^2 which is recommended for the General Residential Zone).[8]

33. With respect, this would be a clear manipulation of the naming of zones with the express purpose of bypassing the clear directives of the NPSHPL. The NPSHPL recognises development at a rural lifestyle scale as being generally adverse in terms of effects on productive land. Simply calling the area by a different zone name does not alleviate that exact effect.

34. The suggestion is also highly problematic from the perspective of implementation, internal consistency of the PDP and in terms of the zoning as a method giving effect to relevant objectives and policies of the PDP. In particular I note:

    (a) If land was zoned General Residential but the size of sites and the number of dwellings were controlled to a Rural Residential level, the rules and standards applicable to development on the sites would be those in the General Residential zone, and not the Rural Lifestyle Zone. The effects of that have not been assessed in s 32 terms, and represent a departure from the relief sought;

    (b) The zoning and special rules proposed would fail to give effect to the policies of the General Residential Zone, such as promoting medium density development (GRZ-P4), confining the General Residential Zone in Waipukurau to areas likely to be provided with infrastructure such as reticulated water, stormwater and wastewater (GRZ-P5); enabling higher density development for senior citizen housing (GRZ-P2) and prioritising the character and amenity of the residential environment over an allowance for limited primary production (GRZ-P6).

35. Applying a General Residential Zone to an area sought by the submission to be zoned Rural Lifestyle raises scope issues which are not removed simply by limiting

[8] For recommended provisions see Council Reply – Hearing Stream 5, Appendix 2. Note that the reduction of the lot size for Rural Residential was as a result of a submission by Livingston Properties Ltd.

the number of houses and sites that can be created. As signalled above, there are wider implications that simply were not signalled by the submission and which, in my submission, cannot properly be addressed by importing rules from another zone and applying them to the General Residential Zone.

36. While an understandable reaction to the application of the NPSHPL, the solution offered by Mr McKay is unworkable and inappropriate in resource management terms and should be rejected.

Submissions for James Bridge

37. The submitter essentially seeks a 'spot zone' over an existing subdivision comprising 20 lots from between 1,967m^2 and 2676m^2 in size,[9] plus a communally owned lot of just under 5000m^2. The reporting officer recommends against the rezoning, having regard to the full suite of statutory tests. I comment only on the following aspects.

Application of the NPS-HPL

38. The submissions in support of the rezoning accept that the land is 'technically "highly productive land" under the NPS' but says that it has no productive capacity and therefore appears to argue the NPS-HPL does not apply.

39. I disagree with that analysis. Policy 5 of the NPS is clear that the urban rezoning of HPL is avoided, except as provided in the NPS. The NPS then provides for urban rezoning in non-Tier 1 and 2 areas in clause 3.6(4), as addressed in my opening submissions from para 12. The relevant tests that must be met before urban rezoning can be allowed summarised below along with my comments on the application of each point to the subject land:

    (a) The rezoning is required to provide sufficient demand capacity to meet expected demand for housing.

        The submissions assert that because the land is already subdivided, its residential capacity is required. I disagree and say rather that any demand

[9] Note, not 5,000m2 as per para 4 of the Legal Submissions.

has already been supplied by the subdivision, and rezoning will do nothing to meet demand. The Integrated Spatial Plan identifies no additional demand.

(b) There are no other reasonably practicable and feasible options for providing the development capacity.

Again, any development capacity has already been provided and will not be met by rezoning. This criteria is not met.

(c) The benefits of rezoning outweigh the costs associated with the loss of HPL for LBPP, taking into account both tangible and intangible values.

The benefits of rezoning appear to be:

- *A philosophical view that zoning should match development; and*
- *Neighbours' approvals would not be needed and landowners would not need to seek resource consent to breach the General Rural Zone setback rules.*[10]

The costs of loss of HPL associated with the subject site will be minimal, given it has already been approved for residential subdivision. However, the submitter's planning witness states that resource consent is still required to infringe the 30 m setback under the current zoning. That consent process would give the consent authority the ability to consider reverse sensitivity effects on surrounding HPL, and the loss of the ability to do that is a 'cost' to the productive potential of the wider area.

I also consider that spot-zoning this area of land will potentially compromise the efficient mapping of HPL yet to be carried out by HBRC. Councils cannot map urban zoned land as HPL and can only map land that forms a 'large and geographically cohesive area'. Removing part of the land from that able to be mapped may in fact prevent the HPL on this land from meeting the 'cohesive' requirement and therefore actually have a much more significant effect on the availability of HPL than has been assessed. In my submission, the cautious and arguably hardline approach

10 McFlynn evidence, para 3.

applied by cl 3.5(7) is intended to prevent that type of compromise from occurring before the Schedule 1 process has had the chance to run its course.

(d) Finally, cl 3.6(5) provides that territorial authorities must ensure the spatial extent of any urban zone covering HPL is the minimum necessary to provide the required development capacity while achieving a well-functioning urban environment.

In my submission, there is no required demand that this rezoning will provide. Further the 'spot zoning' requested does not achieve a well functioning urban environment.

40. As the requirements of cl 3.6(4) and (5) are mandatory and cumulative, failure to meet one of them means the rezoning would fail to give effect to the NPS-HPL and would be contrary to Policy 5. In my submission, that is the case here.

Relevance of the National Planning Standards

41. Counsel for Mr Bridge states, without authority, that "*the national direction in the National Planning Standards require the Existing Subdivision Land to be rezoned*".[11] He says that there is a substantive requirement that the zone descriptors match the existing environment (notwithstanding that he later says "*It is not sufficient for the zones to merely describe the current environment*").[12]

42. I disagree that this is required by the National Planning Standards. Their very purpose disclaims that outcome:

> The purpose of the first set of national planning standards (the planning standards) is to improve the efficiency and effectiveness of the planning system by providing nationally consistent:
> • structure
> • format
> • definitions
> • noise and vibration metrics
> • electronic functionality and accessibility for regional policy statements, regional plans, district plans and combined plans under the Resource Management Act 1991 ('RMA').
> <u>The planning standards do not alter the effect or outcomes of policy statements or plans.</u>

11 Submissions for Mr Bridge, para 11.
12 Submissions for Mr Bridge, para 27.

43. I note that while National Planning Standards may direct certain substantive outcomes (s 58C(2) RMA), the ones promulgated to date are more in line with s 58C(4) which provides that a national planning standard may specify the structure of plans and direct local authorities to use a particular structure or form.

44. The implication of the submissions for Mr Bridge being correct include:

    (a) A requirement for rezoning would follow any consent granted for discretionary or non-complying consent, given those types of approval are required for activities not expressly envisaged by the Zone;

    (b) In doing so, a Council would be prevented from carrying out the required statutory assessment, including a s 32 assessment, which is not a requirement for consents;

    (c) There would likely be a multitude of spot zones, to capture past consents, granted under a different and outdated planning regime.

45. Consent was granted for a departure from the expectations of the underlying zone, under the Operative District Plan. There is no logical Resource Management purpose served by applying a spot zoning to reflect that past consent. Existing activities can be one matter taken into account when determining appropriate zoning, but I am aware of no authority to support the submission that Council is compelled to spot zone existing activities.

46. I similarly disagree with the submission that "*it would be legally incorrect for the zoning decision to follow from the consequences in the rules*".[13] It is entirely appropriate to consider the effects of applying the Large Lot Residential rules to the subject land in lieu of those applying to the General Rural Zone. Zoning is a method, which applies a particular set of rules to an area of land. The application of those rules may give rise to environmental, economic, social, and cultural effects which are required to be considered under s 32 RMA.

47. As noted above, one example is the effect of different rules as to setback distances, those rules themselves giving effect to objectives and policies directed at retaining amenity of adjoining sites and avoiding reverse sensitivity effects. With respect, to

13 Submissions for Mr Bridge, para 10.

suggest that zoning decisions should be made without regard to the effect arising from the rules that would apply to development under either scenario simply misunderstands the Plan-making exercise required by the RMA.

Comment on evidence of Annabel Beattie

48. The Panel has queried the status of the evidence of Ms Beattie for the Lowrys. Mr Ide, of Hawke's Bay Regional Council, has provided a response to the Panel's query.

49. The Council has no issue with the observations made at Ms Beattie's site visit, and indeed Mr Kessels has indicated his likely agreement with those observations. However I wish to comment briefly on the form of Ms Beattie's evidence and, particularly the implied criticism of Council in her final paragraph. That paragraph purports to make 'recommendations', presumably as to Council's communication with affected landowners and describes the Lowrys' 'need' for more certainty that their existing use is guaranteed.

50. First, Ms Beattie has not qualified herself as an expert in her evidence and has not followed the Code of Conduct for Expert Witnesses, which while not mandatory for Council hearings, is certainly best practice and a matter to be considered by the Panel when deciding on the weight to be afforded to evidence. Further it appears that Ms Beattie's opinions on what Council should do are uninformed by having understood the extent of consultation undertaken and appear likely to be based on information provided by the Lowrys. She did not attempt to contact Council officers to ascertain whether the criticism was well-founded.

51. I invite the Panel to disregard Ms Beattie's comments in this regard and to prefer the evidence of Ms Gray as to the extensive efforts made by Council to consult and inform the community.

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Asher Davidson

9 December 2022