

IN THE MATTER

of the Resource Management Act 1991
("RMA" or "the Act")

AND

IN THE MATTER

of a hearing of submissions and further
submissions on the Proposed Central
Hawke's Bay Council District Plan Review
(Stream 6 Mapping and Rezoning Requests)

**OUTLINE OF LEGAL SUBMISSIONS FOR
LIVINGSTON PROPERTIES LIMITED**

Dated 10 November 2022

Introduction and Summary

1. The submission by Livingston Properties Limited (**Livingston**) seeks to rezone approximately 58 hectares¹ of land within its 174 hectare property from General Rural to Rural Residential/Residential, in order to realise Livingston's vision for a sustainable, 21st century exemplar development, contributing substantial amenity benefits to Waipukurau communities.
2. To allow the rezoning requested in the submission made by Livingston would provide additional capacity to meet future housing demand in the District, with a more compact and better connected urban form, than to reject that request.
3. The land concerned is ideally placed to accommodate future growth; identified for that purpose under the Council's Integrated Spatial Plan (**ISP**), of low productive land value, and without any natural or physical resource constraints to its potential being realised in this way.
4. Conversely, to reject the rezoning request would be an "own goal" scored against the District across all relevant dimensions of sustainable management, and lead to perverse outcomes.

The Subject Property and Zoning Requested

5. Livingston owns a 174 hectare property accessed from 94-96 Mount Herbert Road, Waipukurau.²
6. The property is located approximately 1.3 km to the east of the Waipukurau town centre.³
7. The area sought to be rezoned within the property is within a 15-25 minute walk from the Waipukurau CBD.⁴
8. The property is largely devoid of native vegetation⁵ albeit that Livingston has recently planted over 20,000 native trees, shrubs and water filtration plants on the property.⁶

¹ Noting that this area has been reduced to 45 ha (including reserves) in the Structure Plan appended to Mr Taylor's evidence.

² Paragraph 4 of Mr Livingston's evidence, paragraphs 9-13 of Mr Taylor's evidence. At the time Livingston's submission was lodged, the property was (circa) 143 ha.

³ Section 2.1, Appendix A to Mr Campion's evidence (Intersection Performance Assessment, August 2020).

⁴ Sheet 8 of Appendix B to Mr Bray's evidence.

⁵ Paragraphs 26-27 of Mr Bray's evidence.

⁶ Paragraph 12(a) of Mr Livingston's evidence.

9. The property is currently zoned General Rural under the Central Hawke's Bay Proposed District Plan (**PDP**), ⁷ but identified within the ISP as a "*Potential growth area for focussed investigation – Medium Term*" (western third of the property) and otherwise as a "*Proposed Rural Residential Growth Area*."⁸
10. The property is currently accessed through Ennisclare Place, with the proposed access upon subdivision directly to Mt Herbert Road, as now available following acquisition of the site at 94 Mount Herbert Road.⁹
11. Appendix A to Livingston's submission comprises a **Concept Plan** revealing the specific relief sought in that submission, and whereby some 18.7 hectares would be rezoned General Residential, 39.1 hectares Rural Lifestyle, and 0.49 hectares Commercial, leaving the 84.5 hectare balance area¹⁰ as General Rural zone.
12. The soils on the property range from LUC class 3 to 6.¹¹ The area of land sought to be rezoned General Residential under the Concept Plan falls within the area of LUC 3 soil,¹² but with significant constraints on productive capacity, as addressed later in these submissions.
13. Finally, an important factor to consideration of Livingston's submission, is that resource consent approval has been obtained to subdivide the property to create 86 lifestyle sites along with two residential sites, and one large rural balance lot¹³ (the **Existing Consent**).
14. The consented development area approved under the Existing Consent extends over some 47 hectares of rural land, whereas the development areas under the Concept Plan extends only over 35 hectares of the property¹⁴ (i.e. excluding reserve areas).
15. Against that background, the following submissions are made in support of Livingston's submission; firstly with reference to the relevant statutory tests against which the submission falls to be assessed, and then addressing the evidence produced by Livingston in that statutory context.

⁷ Paragraph 53 of Mr McKay's evidence, paragraphs 30-33 of Mr Bray's evidence.

⁸ Appendix B and Appendix C to Mr Taylor's evidence, paragraph 38 of Mr Bray's evidence, s 42A report at paragraph 5.3.4.

⁹ Paragraph 9 of Mr Taylor's evidence.

¹⁰ That is, of the total land area referred to in the submission and noting that an additional 30 hectares was acquired by Livingston in June 2022, paragraph 13 of Mr Taylor's evidence. Refer also paragraph 1 to Mr McKay's evidence, Appendix A to submission s 127.001.

¹¹ Appendix 1 to Mr Morice's evidence.

¹² Appendix B to Mr Taylor's evidence.

¹³ Paragraph 10 of Mr Taylor's evidence along with Appendix A.

¹⁴ Paragraph 17 of Mr Taylor's evidence.

Relevant Statutory Framework

16. A helpful recent summary of the relevant statutory tests for consideration of a rezoning request¹⁵ was recorded by the Environment Court in *Middle Hill Ltd v Auckland Council*,¹⁶ as follows:

[27] It was agreed that the mandatory requirements for plan preparation are as summarised in *Long Bay-Okura Great Park Society Inc v North Shore City Council*¹⁷ with the updates made in *Colonial Vineyard Ltd v Marlborough District Council*.¹⁸

[28] The matters at issue relate to the most appropriate zoning for the land. No new objectives or policies are proposed, and most of the Plan Change 25 precinct provisions have been settled through consent orders.

[29] In summary, therefore, the relevant statutory requirements for the plan change provisions include:

- (e) whether they are designed to accord with and assist the Council to carry out its functions for the purpose of giving effect to the Resource Management Act 1991 (**RMA or Act**);
- (f) **whether they accord with Part 2 of the RMA;**
- (g) **whether they give effect to the regional policy statement;**
- (h) **whether they give effect to a national policy statement;**
- (i) **whether they have regard to the Auckland Plan and the Structure Plan (being strategies prepared under another Act); and**
- (j) whether the rules have regard to the actual or potential effects on the environment including, in particular, any adverse effect.

[30] Under s 32 of the Act we must also consider whether the provisions are the most appropriate way to achieve the purpose of the plan change and the objectives of the Auckland Unitary Plan by:

¹⁵ In this (Livingston) instance by way of submission to a full District Plan review, but set out in by the Court the context of a private plan change to the Auckland Unitary Plan.

¹⁶ [2022] NZEnvC 162, at [27]-[30].

¹⁷ NZEnvC Auckland A78/08, 16 July 2008 at [34].

¹⁸ [2014] NZEnvC 55 at [17].

- (a) identifying other reasonably practicable options for achieving the objectives; and
- (b) assessing the efficiency and effectiveness of the provisions in achieving the objectives, including by:
 - i. identifying and assessing the benefits and costs of the environmental, economic, social, and cultural effects that are anticipated from the implementation of the provisions, including the opportunities for:
 - economic growth that are anticipated to be provided or reduced; and
 - employment that are anticipated to be provided or reduced; and
 - ii. if practicable, quantifying the benefits and costs; and
 - iii. assessing the risk of acting or not acting if there is uncertain or insufficient information about the subject matter of the provisions.

(emphasis added)

17. While all of these statutory tests are (strictly speaking) relevant, the following submissions principally address those aspects of the statutory tests given emphasis above.¹⁹

Regional Policy Statement

18. The principal relevant objectives of the Hawke’s Bay Regional Policy Statement (**RPS**) are objectives UD1 and UD5.²⁰ These provisions aim to establish a compact and strongly connected urban form throughout the region, along with integration of development with the provision of infrastructure.
19. The rezoning request would demonstrably promote a compact and connected urban form, involving built development over a lesser area of rural land than under the Existing Consent²¹, and with “*better*”²²

¹⁹ Noting that as to paragraph [29](i) of the Environment Court’s decision, the relevant non-statutory instrument in this case is the ISP rather than the Auckland (Spatial) Plan.

²⁰ Paragraphs 18-21 of Mr McKay’s evidence, paragraph 5.3.23 of the s 42A report.

²¹ Paragraph 17 of Mr Taylor’s evidence.

²² The provenance of the term ‘better’ in a section 32 context is addressed below.

provision for transportation connections to the Waipukurau town centre.²³

20. Similarly as to integration with infrastructure more generally, and whereby:
- (a) The rezoning area has access to existing reticulated wastewater and water mains along its frontages with Mt Herbert Road and Ennisclare Place, as well as access to the transportation network,²⁴ and
 - (b) While, as with all potential future growth areas identified in the ISP, development would be subject to the capacity of Council infrastructure to service that development,²⁵ some \$6.9 million of development contributions could be levied upon subdivision of the land in accordance with the Concept Plan,²⁶ to address additional demand placed on the Council services involved.
21. As further explained by Mr McKay, a Structure Plan document has now been prepared to provide certainty as to the extent of roads, reserves, walkways and stormwater infrastructure to be vested or otherwise provided for public benefit.²⁷
22. With reference to that Structure Plan and the detailed assessment included within Tables 1-3 of Livingston's submission, the rezoning request also demonstrably complies with the controlling policies of the RPS (UD10.3, UD10.4, UD11 and UD12).²⁸

Central Hawke's Bay PDP

23. The most relevant objectives and policies of the PDP to the Livingston rezoning request are those set out in the Urban Form and Development (UFD) chapter,²⁹ the objectives of which seek to:
- Provide for a sustainable supply of land to meet current and future urban development demands.³⁰

²³Paragraphs 18-19 of Mr McKay's evidence, paragraph 54 of Mr Bray's evidence.

²⁴ Paragraph 21 of Mr McKay's evidence.

²⁵ Wastewater and water services in particular.

²⁶ Paragraph 21 of Mr Taylor's evidence.

²⁷ Paragraphs 24 of Mr McKay's evidence.

²⁸ Paragraphs 17 and 24 of Mr McKay's evidence, paragraph 5.3.24 of the s 42A report.

²⁹ Paragraph 33 of Mr McKay's evidence.

³⁰ Objective UFD01.

- Retain and protect valuable highly productive land in the district from urban development.³¹
 - Ensure that new urban development is planned for and undertaken in a manner that is consistent with the matters outlined in the RPS.³²
24. As Mr McKay advises, all three of these key objectives are served through the rezoning request, as follows:
- The land in question has been identified in the ISP through a Smart Growth process, involving a comparative assessment of potentially suitable land to meet future development demand.
 - While part of the property is classified as LUC 3, its agricultural potential is significantly constrained (and as such, I submit is not “highly productive”).
 - The rezoning request is consistent with the relevant objectives and policies of the RPS.³³
25. The UFD section of the PDP also expressly references the ISP, which identifies the subject land for a combination of Residential/Rural Residential purposes (in terms of future growth options), and with the subject property also identified on Figure 3 of the UDF chapter of the PDP.
26. The significance of this reference in the ISP and UDF chapter is addressed further presently, in the context of the National Policy Statement – Highly Productive Land 2022 (**NPS-HPL**).
27. For completeness, Mr McKay also assesses the rezoning request against the relevant objectives and policies of the PDP General Residential zone and Rural Lifestyle zones (as sought to be applied through the rezoning request in Livingston’s submission) and determines that the request would be consistent with those provisions as well.³⁴

Rezoning is the “Better” option

28. With respect, the central test in s 32 of the RMA of relevance in this case, is to assess whether the rezoning request is “*the most*”

³¹ Objective UDF02.

³² Objective UDF03.

³³ Paragraphs 34-35 of Mr McKay’s evidence.

³⁴ Paragraphs 36-41 of Mr McKay’s evidence.

appropriate way to achieve the objectives” of the PDP, having regard to various factors.³⁵

29. A line of cases under the RMA confirms that application of this central test amounts to determining which of the available planning options is “better” or “best”.³⁶
30. Livingston submits that to allow the rezoning request would demonstrably “better” serve the objectives of the PDP, and “better” give effect to the RPS, than to reject the relief sought in the submission.
31. In that regard, the “counterfactual” or principal “alternative” would, in the ordinary course, be to retain the notified General Rural zoning of the property, with demand for housing then falling to be accommodated through Rural Lifestyle sites in a less efficient way, including under the provisions of the Operative District Plan which remain in force.³⁷
32. In this case however, and as a matter of law, the counterfactual necessarily includes the subject site as developed in accordance with the Existing Consent, and whereby 88 rural/residential lots would be established:
 - Over 12 hectares’ more of rural land (47 versus 35 hectares),
 - Without any provision for reserve areas (whereas 9.3 hectares are proposed under the Concept Plan), and
 - Without any provision for walkways, to better integrate with active transport connections to the Waipukurau town centre.³⁸
33. In that regard, reference is made to the following ruling of the Court of Appeal in *Queenstown Lakes District Council v Hawthorn Estate Ltd*:³⁹

In our view, the word “environment” embraces the future state of the environment as it might be modified by the utilisation of rights to carry out permitted activity under a District Plan. It also includes the environment as it might be modified by the implementation of resource consents which have been granted at the time a particular application is considered, where it appears likely that those resource consents will be implemented.

³⁵ As set out above, citing *Middle Hill Ltd*, at [30].

³⁶ *Abrahams Holdings v North Shore City Council*, A69/2007, *Royal Forest and Bird Protection Society v Whakatane District Council*, W009/2008, *Suburban Estates v Christchurch City Council*, C217/2001.

³⁷ Paragraphs 79-80 of Mr McKay’s evidence.

³⁸ Paragraph 17 of Mr Taylor’s evidence.

³⁹ [2006] NZRMA 424, at [84].

34. There can be no doubt that if this rezoning request is refused, Livingston would have recourse to the Existing Consent, and utilise the development opportunity it represents.
35. I submit that to refuse this rezoning request in the face of that reality would comprise an effective “own goal” for the District with a lost opportunity (or opportunity cost), including:
- A less compact, less well connected urban form.⁴⁰
 - Inferior infrastructure provision (including as to stormwater,⁴¹ and with no capacity to take development contributions), and no walkways or reserve areas providing for active and passive recreation.
36. On top of that, and as further noted by Mr Bray:
- I understand that the granted subdivision scheme was prepared solely based on achieving compliance with the planning provisions of the operative District Plan and survey requirements. *It was not developed through a landscape or urban responsive approach and is not a scheme I am supportive of.*⁴²
37. By contrast, the Concept Plan inherent to the rezoning request was developed through a thorough and informed assessment by Mr Bray’s firm (Wayfinder) of the:
- Urban context,⁴³ whereby relative to surrounding urban form, there is potential scope for higher density, smaller lot residential development closer to the Waipukurau town, expanding to larger lots towards the town boundaries; and
 - Natural context,⁴⁴ whereby the landscape within and in the immediate surrounds of the site has been highly modified.
 - District Plan context,⁴⁵ whereby the property is zoned General Rural rather than Rural Production (as such, more suitable to a range of land uses than just primary production).

⁴⁰ RPS objective UD1.

⁴¹ Noting Mr McKay’s evidence at paragraph 26 in this regard, and in response to paragraph 5.3.27 of the s 42A report as to the capacity of the site to accommodate stormwater management needs associated with such development.

⁴² Paragraphs 50 of Mr Bray’s evidence.

⁴³ Paragraphs 17 to 24 of Mr Bray’s evidence.

⁴⁴ Paragraphs 26 to 29 of Mr Bray’s evidence.

⁴⁵ Paragraph 30-33 of Mr Bray’s evidence.

- The ISP,⁴⁶ whereby the land has been identified for future growth having regard to the key strategic goals of the ISP.
- Land use capacity,⁴⁷ whereby the property scores relatively low in terms of productive potential, compared to other more productive parts of the District and indeed Region.
- Walking and cycling,⁴⁸ whereby Mr Bray concludes that of all the potential growth areas identified in the ISP, the site provides the easiest (distance and grade) connection to existing public locations including the CBD.
- Vehicle access.

38. In summary, having assessed the rezoning request in this context, Mr Bray concludes as follows:

58. Though building up layers of information and considering urban design outcomes such as context, character, choice and connectivity, Wayfinder was able to start considering opportunities for creating a landscape and urban responsive development for the Golden Hills Site. As identified, the key conclusions reached through this analysis included:

- (a) It is highly modified land with few (if any) natural qualities other than landform and restoration planting that has been undertaken by the owners;
- (b) It is identified within the Waipukurau Spatial Plan as suitable for medium term residential growth at its western extent and suitable for rural lifestyle development further to the east.
- (c) It is the most centrally connected land identified as a growth area within the Waipukurau Spatial Plan;
- (d) Only a relatively small proportion of the site is located within LUC 3, this being the area at the base of the site closest to existing urban development.
- (e) The site already has resource consent for subdivision into 88 lifestyle lots, which significantly diminishes its ability for sustaining long term productive land use;

⁴⁶ Paragraph 34 - 40 of Mr Bray's evidence.

⁴⁷ Paragraphs 41- 46 of Mr Bray's evidence.

⁴⁸ Paragraphs 51-54 of Mr Bray's evidence.

- (f) The site provides for close, connected walking and cycling opportunities with already formed footpaths from the site entrance to the CBD, community buildings and recreational land;
- (g) It is located in close proximity to the College, and with some planning with neighbouring sites, could be directly connected; and
- (h) It is well serviced with two vehicle entrances to a well formed Secondary Collector road.

39. As Mr McKay advises, to reject the rezoning request would:

- Lead to perverse outcomes in relation to the sustainable management of the District's highly productive land resource.⁴⁹
- Result in a greater area of land being lost from the balance farm than would occur under the rezoning request, and involve a significantly less efficient use of the LUC 3 land component of the property for housing supply.⁵⁰
- Result in a form of development which, as well as consuming more rural land, would be more motor vehicle dependant, subject to onsite servicing, and generally displaced from urban services and amenities.⁵¹
- Not represent sustainable management more generally.⁵²

40. A further point made by both Mr McKay and Mr Bray is that all of the growth areas in the ISP for Waipukurau involve LUC 3 land, such that the implications of the NPS-HPL (as addressed below) are the same across those options.⁵³

41. That is, were the Panel to determine that it should or must refuse this rezoning request as a result of the NPS-HPL, the same would apply to those other growth areas, significantly undermining the ability to accommodate future demand for housing within Waipukurau in the manner intended by the ISP.

⁴⁹ Paragraph 94 of Mr McKay's evidence.

⁵⁰ Paragraph 93 of Mr McKay's evidence.

⁵¹ Paragraph 80 of Mr McKay's evidence.

⁵² Paragraph 83 of Mr McKay's evidence.

⁵³ Paragraph 42 of Mr Bray's evidence, paragraph 55 of Mr McKay's evidence.

No Barriers

42. Building on the point just made, this rezoning request represents a rare even unique opportunity for development of a property holding in single ownership,⁵⁴ which raises no resource management or environmental effect issues of significance, including in relation to all section 6 RMA matters of national importance, ie as to:
- Landscape/natural character.
 - Heritage/cultural values.
 - Significant indigenous vegetation or habitats for indigenous fauna.
 - Natural hazards.
43. To reject such an opportunity would simply place greater consequent development pressure both at District and Regional scale, including on the very resources sought to be protected under the RPS⁵⁵ and RMA.
44. Beyond that, development of the Livingston property can readily be accommodated within the transportation network,⁵⁶ including with potential to support public transport connections in the future.
45. In terms of the geotechnical properties of the site, Mr Wylie's evidence confirms the whole Concept Plan area is suitable for residential development.⁵⁷
46. In terms of the productive potential or capacity of the land sought to be rezoned, as Mr Morice confirms in his evidence, the majority of the property is LUC 4 or LUC 6 land.⁵⁸
47. The area sought to be rezoned General Residential falls within the LUC classifications of 3s1 and 3e2.
48. Mr Morice explains that these descriptors address both the drainage limitations of the land involved, including severe summer soil moisture deficits,⁵⁹ and effects of erosion limiting production.
49. Mr Morice advises that the land is very hard to classify as "highly productive", and that the Matapiro soils (underlying the LUC 3e2

⁵⁴ Paragraph 23 of Mr Taylor's evidence.

⁵⁵ Refer objective UD1, footnote 5 to Mr McKay's evidence (paragraph 20).

⁵⁶ Mr Champion's evidence, Mr McKay's at paragraph 44.

⁵⁷ Paragraphs 18 and 19 of Mr Wylie's evidence.

⁵⁸ Paragraphs 14 and 19 of Mr Morice's evidence.

⁵⁹ Paragraphs 15 and 18 of Mr Morice's evidence.

area)⁶⁰ comprise a compacted sandy clay loam (pan) having a significant impact on the productivity of this class of land.⁶¹

50. Mr Morice concludes as follows:

Due to the broad brush approach that has been used in applying LUC mapping to the Site, I consider this is a poor guide to the actually LUC based on the soil profiles. The Site is not highly productive land and is likely that it only falls in this category because of its near flat contour, and nothing else. I therefore conclude that there is minimal loss of productivity by converting this land to “general residential” zone and “rural lifestyle” zone.⁶²

51. This evidence is highly relevant in the context of the NPS-HPL as addressed further presently.

52. Finally, in terms of stormwater management, Mr McKay advises that the available land holdings for stormwater attenuation (as illustrated on the Structure Plan produced through Mr Taylor), along with access to the Eastern Interceptor drain, natural water courses and the fall of the land towards Mt Herbert Road, collectively provide certainty that stormwater quality and quantity can be appropriately managed within the rezoning area.⁶³

53. In summary therefore, as to all resource management implications and effects,⁶⁴ there is no reason why the rezoning request should not be allowed, and conversely every reason why it should be.

54. The one potential caveat to that submission involves the implications of the recently released NPS-HPL, as now addressed in more detail, in the factual context just explained.

NPS-HPL

55. The NPS-HPL came into force on 17 October 2022, and it is accepted that the Panel would need to consider whether the PDP would “give effect to” this NPS, in the event that the submission were allowed.⁶⁵

56. That said, as the High Court has confirmed, a new national policy statement emerging during a plan process falls to be implemented in

⁶⁰ Refer Mr Morice’s Appendix 1 and Appendix 2.

⁶¹ Paragraphs 23 and 24 of Mr Morice’s evidence.

⁶² Paragraph 27 of Mr Morice’s evidence.

⁶³ Paragraph 26 of Mr McKay’s evidence.

⁶⁴ As relevant under the statutory tests set out above.

⁶⁵ Section 75(3) of the RMA.

accordance with its provisions, particularly where they set “process” requirements for that implementation.⁶⁶

57. The following provisions of the NPS-HPL are directly relevant in that regard.
58. Firstly, Part 3 of the NPS-HPL (implementation) requires that the Regional Councils map highly productive land within three years of the commencement date (17 October 2022), using the First Schedule process in the Act.⁶⁷
59. That process has not yet started.
60. It is acknowledged that, in the meantime, under clause 3.5(7) of the NPS-HPL, any land classified as LUC 1, 2, or 3, under a mapping series using the Land Use Capability classification method, is deemed to be “highly productive land” for the purpose of the NPS-HPL.⁶⁸ Part of the Livingston property is LUC 3 under such a mapping series, as confirmed by Mr Morice in his evidence.⁶⁹
61. However, this “transitional” provision of the NPS-HPL contains a critically important exception, namely that it does not apply to land:

“identified for future urban development”.⁷⁰
62. Similarly, clause 3.4(2) provides that a Regional Council must not map (as highly productive land) any land which at the commencement date is *identified for future urban development*.
63. The NPS-HPL defines land “identified for future urban development” as follows:

identified for future urban development means:

- (a) identified in a published Future Development Strategy as land 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

⁶⁶ *Horticulture New Zealand v Manawatu Regional Council* (2013) 17 ELRNZ 652 at [98]-[102].

⁶⁷ Clauses 3.4 and 3.5 of the NPS-HPL.

⁶⁸ Refer s 42A report, paragraph 5.3.15.

⁶⁹ Paragraphs 14 to 15, and Appendix 1.

⁷⁰ Clause 3.5(7)(b)(i).

- (ii) at a level of detail that makes the boundaries of the area identifiable in practice

64. The term “strategic planning document” is in turn identified as meaning:

strategic planning document means any non-statutory growth plan or strategy adopted by local authority resolution

65. The s 42A reporting officer opines that the IPS is not a strategic planning document for the purpose of this exemption.⁷¹

66. With respect, that is wrong.

67. The ISP is clearly a “non-statutory growth plan or strategy” adopted by the Central Hawke’s Bay District Council as a local authority.

68. In particular, the subject property is identified as a “Potential growth area for focussed investigation - Medium Term” ie over a 3-10 year timeframe.⁷²

69. In drafting the NPS-HPL, including both the transitional exemption and the longer term preclusion from future mapping as highly productive land,⁷³ the Ministry was careful to preserve the operation of the very type of non-statutory instrument which the ISP represents.

70. As the Recommendation and Decisions Report on the NPS-HPL⁷⁴ records:

Future urban areas

We recommend that the NPS-HPL does not apply to future urban zones in district plans and that this is also extended to exclude future urban areas in regional policy statements, such as those identified in the Bay of Plenty Regional Policy Statement.

We also recommend that the NPS-HPL gives greater recognition of future urban areas that have been identified in a future development strategy prepared under the NPS-UD and in other ‘strategic planning documents’. *This recognises that councils have undertaken considerable work with developers and their communities to identify suitable future urban areas through non-statutory processes.* An analysis of future urban rezoning/development in major urban centres also indicates that requiring councils to revisit future growth areas in light of the NPS-HPL is unlikely to yield any viable alternatives or significantly redirect urban growth away from HPL in the short to

⁷¹ Paragraph 5.3.16 of the s 42A report.

⁷² ISP, Paragraph 5.3.16 of the s 42A report.

⁷³ Clause 3.4(2)

⁷⁴ September 2022, Ministry for the Environment.

medium term in most cases. *Officials propose that 'strategic planning document' is defined in the NPS-HPL as follows: "strategic planning document means any non-statutory growth plan or strategy adopted by local authority resolution".*

We therefore recommend that the definition of HPL in the NPS-HPL is refined so it does not apply to council-planned future urban growth areas in the short to medium term through two means:

- **Interim definition of HPL (commencement date)** - this definition would exclude future urban areas identified for future urban development or- subject to a council initiated, or adopted, notified plan change-to rezone it from general rural or rural production to urban or rural lifestyle.
- **Regional HPL mapping (three years after commencement date)** - allow councils to not map areas identified for future urban development (located on LUC classes 1 to 3) as HPL when mapping HPL. As discussed above, 'identified for future urban development' is proposed to be defined in the NPS-HPL.⁷⁵

....

Further, the transitional period is relatively short - three years - *and the transitional definition of HPL does not apply to land that is already zoned for non-rural land uses (for example urban or rural lifestyle) nor land that is identified for future urban development in RMA documents, future development strategies or other strategic planning documents.* It is anticipated that once regional councils have completed the HPL mapping, district councils would need to use the HPL maps in their regional policy statements until such time as the district plan has been updated to incorporate the same maps.⁷⁶

(emphasis added)

71. In summary to this point then, and regardless of the factual reality (i.e. the evidence from Mr Morice that the land is not actually highly productive), I firmly submit that the land is not "highly productive land" for the purpose of the NPS-HPL, as it is identified for future urban development in the ISP.
72. With respect that position is abundantly clear on the face of the instrument, but also having regard to the intention of the Minister as reflected in the Recommendations and Decision Report extracts set out above.

⁷⁵ Page 20.

⁷⁶ Page 31.

73. For this reason, the NPS-HPL itself presents no barrier to this rezoning request either.

Alternative Argument – Part 2

74. The relevant statutory tests include reference to Part 2 of the RMA, as set out earlier (with reference to *Middle Hill Ltd*).
75. That said, the now well-established line of cases commencing with *King Salmon* militates against recourse to Part 2, on the assumption that higher order planning instruments “flesh out or give substance to” the Part 2 requirements, such that resort to Part 2 is not necessary or helpful, absent any “invalidity, incomplete coverage or uncertainty of meaning”.⁷⁷
76. I submit that, given the lack of express reference within the NPS-HPL to situations where implementation of existing resource consents (legally comprising part of the existing environment) would entirely undermine the productive capacity of a given area of land,⁷⁸ some recourse to Part 2 is warranted in this case (i.e. *incomplete coverage* applies).
77. That is, as Mr McKay advises, it would not represent sustainable management to decline the zoning request with the result that the Existing Consent would be implemented with worse outcomes, not only for productive soils and the efficient use of land, but for compact and connected urban form as directed by the RPS,⁷⁹ and sustainable management of natural and physical resources more generally.

Conclusion

78. A demonstrably “better” and therefore “more appropriate” outcome in terms of serving the objectives of the PDP would be achieved by granting the rezoning sought in Livingston’s submission.
79. There is no compelling reason as to why the submission should not be allowed, but conversely a number of very compelling reasons why it should be.
80. As with all areas identified in the ISP, issues of infrastructure and servicing capacity will need to be confronted at the end of the day.⁸⁰

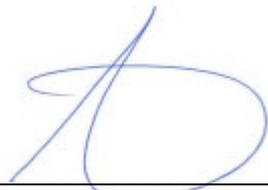
⁷⁷ *Environmental Defence Society v New Zealand King Salmon Company Limited* (2014) 17 ELRNZ 442 at [90].

⁷⁸ Paragraph 49 of Mr Bray’s evidence.

⁷⁹ Paragraphs 80, 83 and 94 of Mr McKay’s evidence for example.

⁸⁰ Paragraph 100 of Mr McKay’s evidence.

81. Rezoning the land as sought in the submission in the meantime would:
- (a) Better enable well connected and compact urban form integrated with infrastructure and service provision;
 - (b) Provide additional housing capacity to meet demand within the District as identified through the ISP;
 - (c) Provide significant amenity benefits to Waipukurau communities; and
 - (d) Avoid any significant impact on resource values of national importance under the RMA.
82. Livingston's submission should be allowed accordingly.



Martin Williams
Counsel for Livingston Properties Limited

Date: 10 November 2022