

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

Under the Resource Management Act 1991

In the matter of The hearing of an application by **PAOANUI POINT LIMITED** to subdivide part of a 380 hectare rurally zoned property to create 48 residential allotments

**MEMORANDUM OF COUNSEL
FOR HAVELOCK BLUFF TRUST REGARDING APPLICANT'S REPLY**

Dated 22 January 2024



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MAY IT PLEASE THE COMMISSIONERS

1. Counsel has reviewed the closing reply submissions for the applicant.
2. Accepting no leave to file a response to that reply has been granted (and presumably would only be given in exceptional circumstances), there are aspects of the reply which are factually incorrect and prejudicial (one point being so at the fundamental level, as noted below).
3. To the extent the Commissioners are minded to consider the following content of this memorandum in the (submitted to be exceptional) circumstances outlined below, this degree of prejudice would be cured.
4. The substantive point is that the applicant's reply on the NPS-HPL essentially undermines a key plank of its case in evidence and legal submissions, being the case which the submitter I represent (the Havelock Bluff Trust) moved to address and respond to at the hearing.
5. The applicant's case at hearing was that, to the extent there was any impact on productive capacity from the loss of the 18ha being subdivided (which was denied by the applicant), this could be offset by drainage improvements elsewhere which would change the "properties and versatility of the soil", and as such retain productive capacity of the farm overall.¹
6. Mr Wiffin responded to this in evidence,² and counsel did so in submissions,³ including as the argument was developed by counsel at the hearing.
7. In reply, counsel for the applicant now submits the opposite, namely that productive capacity is defined by the status quo, not any possible future physical characteristics (defined to include soil type, properties and versatility) following intervention in the land such as drainage, as otherwise absurd results would follow.⁴
8. Remarkably, the applicant's own case (at the hearing) is presented as the *submitter's* argument in this part of the reply, which is simply incorrect.

¹ See paragraph 48 of counsel for the applicant's opening submissions.

² Most notably, at paragraph 38 of his evidence.

³ Paragraphs 37 to 59 of counsels submissions for the Havelock Bluff Trust, noting paragraphs 51 to 53 in particular.

⁴ Paragraphs 4 to 15 of counsel's reply.

9. Counsel also notes the following submission in reply; namely that “*Drainage, because it is a long term change to the physical characteristics, has not been included as part of the present position*”⁵ and that “*It is not correct to merely say that land could be drained and therefore its productive capacity assumes its drainage*”.⁶ These submissions also directly contradict the applicant’s case at hearing.
10. The Applicant cannot have it both ways.
11. If the reply point is accepted, with respect, the offsetting argument and proposed drainage conditions go with it.⁷
12. On the factual points asserted (without evidence, or through evidence from the bar or assumption) in reply, I am instructed that:
 - (a) Mr Harris has made drainage improvements to his land, and could demonstrate that through evidence (he would have done so more definitively, if this point had been made as part of the applicant’s case at hearing, rather than in reply);⁸
 - (b) Similarly, Mr Harris was named in the *Synlait* decision as a director of the Havelock Bluff Trust (original defendant in the proceedings).⁹
13. These latter two points may not be material.
14. In that category, and for completeness, counsel denies any conflict of interest relevant to this hearing.¹⁰ Counsel has no decision making role in this case, and nor does the Regional Council itself. The Regional Council is not a party. The Regional Council has a future planning function to identify and map HPL, but that has no current bearing on the case. The site is HPL under the NPS as it stands.
15. Finally, counsel has cited the recent *Gibbston* case¹¹ which was not available when the hearing was held back in July, and in the ordinary course the hearing would have been concluded well before its release.
16. I submit the case simply confirms that local authorities (not the Court) have the principal planning role under the NPS,¹² and note that there

⁵ Paragraph 15 of counsels reply.

⁶ Paragraph 15 (b) of counsel's reply.

⁷ Proposed conditions 51-53 (reply version).

⁸ Refer paragraph 15 a) of counsel's reply.

⁹ Refer paragraph 44 of counsel's reply

¹⁰ Paragraph 71 of counsel's reply.

¹¹ Paragraph 30 of counsel's reply.

¹² Paragraphs [37] to [42].

was no development on the two subdivided sites proposed to be approved under the modified application before the Court in that case.¹³

17. That is not the situation here where the applicant argues (to counsel's recollection) its application for 48 lots covers both subdivision and land use.



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Martin Williams
Counsel for the Havelock Bluff Trust

Date: 22 January 2024

¹³ Paragraphs [6].