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ODERINGS BROOKVALE ROAD, HAVELOCK NORTH SITE: NPS-HPL ISSUES

Introduction

1. HDC has stated the following in its s92 Request:

> The application is supported by a desktop soil and Land Use Capability classification assessment of the site by Dr Reece Hill of Landsystems (dated 21 April 2023) that concludes the land is most appropriately classified as non-productive land and that, as such, the NPS-HPL does not apply.
>
> However, this is not considered sufficient to address the application of the NPS-HPL to the land in question.
>
> As indicated in the assessment of effects accompanying the application, the land is shown as being LUC 3, as mapped by the New Zealand Land Resource Inventory.
>
> Clause 3.5(7) of the NPS-HPL requires that until a regional policy statement containing maps of highly productive land in the region is operative, land classified as LUC 1-3 and not identified for future urban development must be treated as 'highly productive land'.
>
> Under the NPS-HPL, LUC 1, 2, or 3 land means 'land identified as Land Use Capability Class 1, 2, or 3, as mapped by the New Zealand Land Resource Inventory or by any more detailed mapping that uses the Land Use Capability classification' [underline added].
>
> The land meets this interim definition and must therefore be treated as 'highly productive land' under the NPS-HPL.

2. We agreed at a follow-up meeting that we would come back to you explaining our reasoning in more detail as to why the Landsystems site specific assessment does qualify as "more detailed mapping" using the "Land Use Capability classification". I also note that, although the s92 Request refers at the second to last paragraph of the above extract to underlining being added, no underlining actually appeared in the s92 Request (although it is unlikely that anything will turn on this).

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Oderings' approach

3. Oderings has approached the applicability of the NPS-HPL in the same way that Queenstown Lakes District Council ("**QLDC**") itself has recently taken, in the context of part of its proposed district plan review.[1]

4. In that process, a submitter relied on the evidence of Dr Reece Hill (of Landsystems) which provided a desktop analysis of available LUC map information and interpretation of aerial photography and detailed contour map information. Dr Hill's conclusion was:

> … the property scale assessment using aerial photography and detailed slope class map information, indicates that the subject site land would more accurately be class as LUC class 4 or greater, based on slope alone, and as such would not be classed as NPS highly productive land.

5. QLDC engaged Mr Ian Lynn to complete a peer review of Dr Hill's evidence. Mr Lynn agreed with Dr Hill's findings that the site is not LUC 3 land, stating:

> **Based on the more detailed mapping undertaken**, and the findings of Dr Hill and Mr Lynn, **Council accepts that the NPS-HPL does not apply to the submitter's proposal**, and consequently, the NPS-HPL is not a reason to reject the rezoning request.

6. This position was challenged, particularly the approach of accepting "more detailed mapping" on a site specific rather than on a district or region-wide basis. QLDC's reply submissions set this out, together with its response, as follows (original emphasis):

> "LUC 1, 2, or 3 land" is defined in the NPS-HPL as follows:
>
> > **LUC 1, 2, or 3 land** means land identified as Land Use Capability Class 1, 2, or 3, as mapped by the New Zealand Land Resource Inventory **or by any more detailed mapping that uses the Land Use Capability classification**
>
> Ms Limmer's submissions for APONLS draw attention to the Ministry for the Environment's 'Guide to Implementation' of the NPS-HPL. An extract is quoted in respect of the definition of LUC 1, 2 and 3 which, in summary, suggests that any more detailed mapping needs to have happened at a region or district level (rather than site by site), before it can be used by a council to identify Highly Productive Land (HPL) under the transitional definition of LUC 1, 2 or 3 land.
>
> The Guidelines also say:
>
> > More detailed mapping could be tools such as S-Map, **however it is not intended to include site-specific soil assessments prepared by landowners**. If a local authority intends to use more detailed mapping information, it must be based on the LUC classification parameters (completing the assessment according to the methodology in the Land Use Capability Survey Handbook (2009)), and not consider other factors such as water availability. **Part 2 of the guide will provide further**

[1] As part of the hearing, before commissioners, of Stage 1 submissions: Gertrude's Saddlery Limited and Larchmont Developments Limited, at Arthurs Point.

guidance on best practice for undertaking more detailed assessment of LUC.

As submitted orally at the hearing, MfE's guidance document inserts words into the NPS-HPL that are simply not there. They would require the definition of LUC 1, 2 or 3 land to be read as follows (ie. with the addition of the additional underlined words):

> **LUC 1, 2, or 3 land** means land identified as Land Use Capability Class 1, 2, or 3, as mapped by the New Zealand Land Resource Inventory or by any more detailed mapping completed at a region or district level, that uses the Land Use Capability classification completing the assessment according to the methodology in the Land Use Capability Survey Handbook (2009).

Recent decisions of the Environment Court support the position that non-statutory MfE guidance cannot alter the meaning of a statutory instrument:

(a) In *Federated Farmers v Northland Regional Council* 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:

> 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*, the Court confirmed that the same guidance on the NPS-FM cannot alter the definition contained in the NPS-FM, noting:

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

Context and purpose are key factors when resolving competing interpretations in planning instruments. Council's view on the NPSHPL "more detailed mapping" question is that MfE's interpretation (in its Guidelines) is difficult to reconcile with the context and purpose of clause 3.5(7), and the NPS-HPL more generally. In effect, that interpretation would maintain LUC mapping that has been proven inaccurate until such time as a regional / district exercise has been undertaken, resulting in the protection of land that does not have high productive value. It is submitted that it would be inconsistent with the purpose of the NPS-HPL, and would also border on producing an absurd outcome, by placing policy restrictions on land which is not intended to be protected by the NPS-HPL.

7. Oderings adopts QLDC's approach and reasoning. It is one reason why it went down the path of obtaining "more detailed mapping" using the

"Land Use Capability classification". I address the detail of this mapping below.

"More detailed mapping" using the "Land Use Capability classification"

8. The Landsystems report clearly uses the Land Use Capability classification. It explains what that system is, and refers to the LUC Survey Handbook. It further explains:

> For an accurate assessment of LUC classification for a property, the assessment should be based on the current condition of the area. This is important because some land management practices (e.g. the placement of tracks, excavation for and placement of buildings, excavation of drains, soil remediation for soil contamination, and general earthworks) cause irreversible changes to the soil (i.e. changes other than those that can be remediated by management practices and return the soil to its intrinsic state). These areas are referred to as modified soil areas. In essence, these are soil areas classified as Anthropic Soils, and can no longer be assessed using the LUC classification or considered high class soil.

9. In fact, the report explicitly states: "My assessment has been carried out using the Land Use Capability classification."

10. While Landsystems did not undertake on-site soil observations itself, it did have specific on-site soil information before it from previously drilled bore logs. It used this information together with:

    (a) available NZLRI soil and LUC map information; and

    (b) Aerial photographs available on Google Earth.

11. The Landsystems report concludes, in respect of LUC classification (emphasis added):

> The bore log core data and photo observations, in combination with the aerial photographs, confirms that the site has undergone modification of the original soil, including excavation of the soil, placement of fill, establishment of buildings and curtilage. **The land in its current state cannot be assigned a LUC classification due to the degree of modification and is best considered non-productive land**.

12. Oderings is firmly of the view that this qualifies as a site specific "more detailed mapping" exercise. On-site investigations are not required (and did not occur in the QLDC example), but, in this case, the use of site specific bore logs occurred – in addition to aerials and images. Effectively, site investigations have been used as part of the more detailed mapping exercise.

13. It is hard to see how this can otherwise be the case. It would be inefficient and unreasonable for Oderings to have to have additional site-specific investigations undertaken in order to qualify the assessment as a "more detailed mapping exercise", particularly when there is no expert opinion that such is required. In other circumstances, Dr Hill has required site

specific investigations to be undertaken so as to provide an opinion as to the LUC classification. This is not the case here.

Considerations should HDC not accept that the site is not LUC1-3

14. Without prejudice to its position that the site is not LUC1-3, if HDC were to take a different position, the approach that Oderings considers should be taken is set out here.

15. In this regard, it is noted that the HDC s92 Request further says:

> On the basis that the land in question must be treated as 'highly productive land', the proposal seeks to subdivide and build housing which appears to be contrary to the following policies of the NPS-HPL, notably:
>
> > *Policy 7: The subdivision of highly productive land is avoided, except as provided in this National Policy Statement.*
> >
> > *Policy 8: Highly productive land is protected from inappropriate use and development.*
>
> Clause 3.8 of the NPS-HPL requires avoidance of subdivision, except in limited circumstances which do not appear to be applicable to the proposal.
>
> Clause 3.9 of the NPS-HPL requires avoidance of inappropriate use and development of highly productive land, where any use is inappropriate unless listed in clause 3.9(2). None of the matters listed in clause 3.9(2) appear to apply to the proposal.
>
> Clause 3.10 of the NPS-HPL provides a limited exemption to clauses 3.8 and 3.9.
>
> It is considered that there is insufficient information for Council to assess and be satisfied that the exemption provided for in clause 3.10 of the NPS-HPL is applicable to the proposal.
>
> To assist with this assessment, please provide the following information:
>
> - an assessment of the proposal against each of the matters in clause 3.10 of the NPS-HPL, with appropriate technical evidence (noting that they are cumulative); and
>
> - as part of the above assessment, it would be useful to include an economic assessment as to economic viability of the land to be used as a land-based productive site over the next 30 years (which may address clause 3.10(1)(a)).

16. The detail of the response to the specific clauses of the NPS-HPL is provided by Mr Gray in his letter response to further information request. My Gray concludes that the exemption provided in clause 3.10 of the NPS-HPL is met.

17. This letter provides further context for the consideration of this assessment, including in respect of Part 2, should HDC not accept that clause 3.10 is met. This is important as, whatever the assessment

against the NPS-HPL, understanding its place in decision making when considering Part 2 is critical.

Access to Part 2

18. This requires consideration of *King Salmon*,[2] *RJ Davidson*,[3] and other recent authorities.

NZ King Salmon

19. *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,[4] 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 which contained objectives and policies, some of which were worded in strong terms (ie to "avoid" of "not allow"[5] certain outcomes). The Supreme Court found that "give effect to" means "implement" (at [77]).

20. On the facts of that case and in light of the particular wording of the NZCPS, the Supreme Court held the Board of Inquiry had erred in applying an "overall judgement" approach to assessing the consistency of the plan change with the NZCPS.[6] It then went on to hold that since the NZCPS had been intended to "give substance to" the principles in Part 2 of the RMA, there could be no question of the plan change being in accordance with Part 2. The Court said that:[7]

> 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.

21. 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.[8] 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 (s 10 of the Legislation Act 2019).

22. 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.

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2 *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2014] 1 NZLR 593.
3 *R J Davidson Family Trust v Marlborough District Council* [2018] 3 NZLR 283.
4 *McQuire v Hastings District Council* [2002] 2 NZLR 577 (PC), at [9].
5 *King Salmon* at [93].
6 King Salmon at [135]-[140].
7 *King Salmon* at [85].
8 *King Salmon* at [88] and [90].

23. 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. …

24. In the context of this application (ie the Oderings' application), the case for the Oderings is that the effects of its proposal are minor only.

25. In other words, the application is not prohibited, even if it were contrary to the objectives of the NPS-HPL under a strict application of *King Salmon* approach. In resolving whether or not to allow such a proposal (ie a proposal with minor effects), even under the *King Salmon* approach, it is entirely appropriate if not necessary to carefully consider it against Part 2.

26. Even more flexibility is allowed in accessing Part 2 in the context of a resource consent application, following the Court of Appeal's decision in *RJ Davidson*, which I turn to address next.

RJ Davidson

27. 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".

28. 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*.

29. The Court of Appeal confirmed the application of Part 2 in the resource consent context, acknowledging it's pre-eminence in resource consent decision-making and confirming the ability to consult it directly in such 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".[9]

[9] *R J Davidson* at [47] and [73].

30. 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:[10]

> 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.

31. 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.[11]

32. 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:[12]

> 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 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.

33. 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.

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10 *R J Davidson* at [70].
11 *R J Davidson* at [72].
12 *R J Davidson* at [74]-[75].

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.

34. This was the approach taken relatively recently by Palmer J in the High Court – refer *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.

Gray – specifically considering the NPS-HPL

35. As recently been discussed by the Environment Court in a consent context (such as this), in *Gray v Dunedin City Council* [2023] NZEnvC 45, the NPS-HPL is just one of the various matters requiring consideration. The clear inference was that the HNP-HPL was not to be determinative in that case.

36. In *Gray*, the application was for resource consent for a residential activity on an undersized lot comprising 2.8 ha. The application was non-complying and declined at first instance by the Council. While particular policies and mitigation measures (particularly as to ecological restoration) under the District Plan were a focus of the decision, the Environment Court on appeal had to still consider the NPS-HPL.

37. The Environment Court, in that context:

    (a) found at [194] that the NPS-HPL does not "of itself have the effect of altering the district plan in any manner"; and

    (b) 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".

38. This was following a detailed consideration of the scheme of the NPS-HPL at [195]-[201], which recognised some of the limitations of the NPS-HPL as expressed in the statutory consenting scheme.[13]

Summary – decision making:

39. The first point is that 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*);

[13] The Environment Court was also "not prepared to give any weight to the discussion of the NPS-HPL in the MfE guidelines (at [206]).

(b) the NPS-HPL is *relevant to* achieving sustainable management, but is *not determinative of* what will achieve sustainable management (s45,[14] *Gray v Dunedin City Council*); and, in this instance, 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 effects are in this context only minor, Part 2 is relevant to determining whether the Proposal should proceed.

40. 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: refer *Ayrburn Farms Estates Ltd v Queenstown Lakes District Council* [2013] NZRMA 126 at [87]-[100]. Although that case was 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.[15] By parity of reasoning, Part 2 cannot be looked at only to refuse consent.

41. Accordingly, 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". The site will not be used for productive purposes, and so if the consent is not granted will most likely be unused, or put to some low-level use, such as storage. In contrast, provision of housing is not just a more efficient use, it is also a use that will contribute significant social benefits, given the shortage of housing in the District. These factors weigh heavily in support of the application.

Forward progress

42. I would be happy to discuss further, as necessary.

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14 This differentiates the NPS-HPL from the NZCPS which was the context of *King Salmon*: 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", ie other NPSs are relevant, but not necessarily determinative (this makes sense as some NPSs themselves can pull in different directions, eg 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

15 "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*."

Yours faithfully

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