Before a Hearings Panel appointed by Manawatū District Council

In the matter of	the Resource Management Act 1991 (**RMA**)
And	
In the matter of	a request by Te Kapitī Trust to change the Manawatū District Plan under clause 21 of Schedule 1 of the RMA (Private Plan Change 1)

Outline of Legal Submissions for Requestor

Dated 25 May 2023
Hearing Date 30 May 2023

May it please the Hearings Panel

INTRODUCTION

1. These submissions, and the evidence to follow, are in support of the request by Te Kapitī Trust (**Trust**) for private plan change 1 (**PC1**) to the Manawatū District Plan (**MDP**). PC1 essentially seeks to extend the Village Zone at Rongotea to provide additional capacity for up to 160 new dwellings as well as provision for a new public reserve. The proposal is to rezone 21.88 ha of land currently zoned Rural 2 with a nodal overlay, while an adjoining 10.48 ha will retain its Rural 2 zoning but be subject to a structure plan identifying the location of public open space (together, the **PC1 area**).

2. Somewhat unusually for rezoning proposals, there is a high level of support for PC1, both from the Council and the community. There is no disagreement as between relevant experts as to the appropriateness of PC1 in terms of urban design, ecology, transportation, geotechnical issues or servicing for water, wastewater and stormwater. While submitters have understandably expressed concern over some of these matters, the expert advice is that the plan change proposal satisfactorily addresses all technical matters, and no competing expert evidence has been called. Even at a policy level, there is no dispute that PC1 gives effect to, and is consistent with, the higher order statutory documents, including the National Policy Statement on Urban Development (**NPS-UD**).

3. Until receipt of the Council's supplementary evidence, there was one outstanding issue as between the Trust and the Council, namely how PC1 sits against the National Policy Statement on Highly Productive Land (**NPS-HPL**). Mr Batley's addendum statement of 24 May 2023 confirmed his view on behalf of the Council that the threshold for rezoning highly productive land (**HPL**) to an urban zoning is met by PC1. Nevertheless, given the recent introduction of the NPS-HPL, it is anticipated that the Panel will wish to fully understand that position, and that is a primary focus of these submissions.

4. In that regard, my memorandum of 24 March 2023 outlined the Trust's position that the NPS-HPL does not apply to the land affected by PC1 because it is not HPL as that term is defined in the NPS-HPL. In line with the preference expressed in the Council's legal memorandum, [1] the Trust has prepared its evidence on the basis that the NPS-HPL applies. However, in the event that the Panel has any reservations about that position, the Trust requests the opportunity to address the jurisdictional issue at the hearing or by way of reply. The Trust will be guided by the Panel on that matter.

5. Given that relatively narrow issue that remained live following receipt of the Section 42A report, and is now essentially resolved, the evidence for the Trust is succinct, although of course the Commissioners have access to all technical reports in the plan change request, Mr Batley's report and the joint witness statements. The Trust will call evidence from:

   (a) **Duncan and Susan Cheetham** – The Cheethams are the trustees of the Trust which is the proponent of PC1. Their evidence addresses their dealings with the Council and the background to PC1, as well as their vision for the rezoned area. Having had significant experience with farming themselves, their evidence also addresses the practical difficulties associated with making productive use of the plan change land, which is relevant to the question of the 'costs' if this land is removed from the pool of HPL available for productive purposes;

   (b) **Mr Sharn Hainsworth** – a senior pedologist with 24 years of professional experience, Mr Hainsworth's evidence addresses the nature of the soils

[1] Legal Memorandum on Questions Posed by the Commissioners, 21 April 2023.

underlying the site. His evidence similarly goes to the question of the 'costs' of allowing the rezoning to proceed;

(c) **Ms Ruth Allen** – Ms Allen's evidence directly addresses the first limb of the criteria for rezoning, by considering whether there is sufficient development capacity to meet demand for housing in the Manawatu district;

(d) **Ms Kim Anstey** – as lead planner on PC1, Ms Anstey addresses the statutory tests for plan changes, and includes an analysis of the full suite of criteria for rezoning HPL.

6. These submissions address:

(a) A brief outline of what PC1 seeks and its background;

(b) A brief outline of the approach to assessment of plan changes;

(c) Consideration of the relevant national policy statements.

OUTLINE OF PC1

7. The background to PC1 is set out in the evidence of Duncan and Susie Cheetham. They explain that they bought 14 Banks Road in February 2020, with the intention of undertaking lifestyle subdivision in reliance on the Nodal area provisions. This would be a continuation of the similar subdivision they had successfully carried out on the neighbouring property.

8. However at the same time, the Council was advancing a change to the MDP by which it proposed to explore "*some real growth opportunities"* at Rongotea which had not yet been realised.[2] The Council actively engaged with the Cheethams in relation to the imminent plan change process which would affect the zoning of the property. A draft Plan Change was notified in March 2021, with an indication the final proposed Plan Change would be notified 'towards the end of 2021'.[3] This showed the PC1 area being zoned part Settlement or Village Zone and part Rural Lifestyle.

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2 Email Rachelle Johnston, "*Re: Banks road Rongotea*", 8 May 2020, included in Appendix A to Evidence by Duncan and Susan Cheetham.

3 Email Matthew Mackay, "*MDC Draft Plan Change A&B: Residential, Rural and Village"*, 3 March 2021, included in Appendix A to Evidence by Duncan and Susan Cheetham.

9. However after submissions were received on the draft Plan Change, things came to something of a halt. As Mr Mackay's memorandum puts it, "*The Village component of Draft PC-A has not progressed*".[4] The Cheethams describe how they needed to make a decision as to wait for the Council or to seek a private plan change, and opted for the latter. While Mr Mackay's evidence states the reasons for the Council-led plan change having stalled were "*the lack of a strategic growth plan for the Villages and concern around misalignment of infrastructure planning (and funding) with landuse planning*", however there was much greater certainty in relation to Rongotea, and the PC1 area in particular. The Council had already given written assurances about the availability of wastewater servicing and advised that "*Council is not aware of any infrastructure upgrades that would be required*, and connections would be available to any rezoned land.

10. The main components of PC1 in terms of the changes proposed to the MDP are:

    (a) A new chapter is included titled 'Rongotea South Development Area' which includes a number of objectives, policies, rules and performance standards to apply to development within the area. Development must occur in accordance with the Structure Plan and a Comprehensive Development Plan, which is required for any proposal. There is also a requirement for a Stormwater Management Plan for any application for subdivision;

    (b) The Village Zone is extended over Parcel 1. A new objective and several policies are added to apply to development within the Rongotea South Development Area, specifically in relation to stormwater and flooding issues. Several performance standards are amended to provide specific lot sizes, density and permeable areas for the area;

    (c) The Rongotea South Structure Plan is added as Appendix 17A; and

    (d) The Transport section is amended to provide road cross sections specifically for the PC1 area.

11. The features of PC1 are set out in more detail in the request, the evidence of Ms Anstey and the section 42A report. The reporting officer recommended one change to the notified provisions, so that Objective DEV-O2 refers to the

[4] Appendix I to Council s 42A report.

development integrating with "*the existing environment*" as well as the village character, and the addition of a requirement that the Comprehensive Development Plan demonstrate how the proposal:[5]

> vii. Has given consideration to suitable boundary treatments, including but not limited to planting and fencing, to assist in softening the transition from the residential lots within the Rongotea South Development Area and the adjoining lots along Florin Lane.

12. Ms Anstey confirms in her evidence that she supports this amendment and recommends on further minor amendment in response to the submission by Waka Kotahi to include reference to subdivision creating a sustainable neighbourhood where "*the recreational and multi-modal opportunities of the community are enhanced through the provision of public open space and pedestrian and cycle linkages"*.[6] The reporting planner has not commented on that suggestion, but it is thought to be unlikely to be controversial.

THE STATUTORY ASSESSMENT

13. I do not intend to take the Panel through the various steps of the statutory test as it applies to PC1 in detail. As already noted, the material comprising the plan change request, the s 32 report, the officer's report and Ms Anstey's evidence all address the statutory framework.

14. It may be useful though for the Commissioners to have a recent statement of the approach to assessment of private plan changes, and this was helpfully set out by the Environment Court in *Middle Hill Ltd v Auckland Council* [2022] NZEnvC 162. While in an Auckland context, the approach to the statutory framework remains relevant (although subject to some provisos discussed below). The Court described the relevant statutory framework as follows:[7]

> [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*, with the updates made in *Colonial Vineyard Ltd v Marlborough District Council*.
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> [28] The matters at issue relate to the most appropriate zoning for the land. No new objectives or policies are proposed, ...

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5 Section 42A Report, p40.

6 Evidence of Kim Anstey, para 102.

7 Internal footnotes omitted.

[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:

"(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."

15. As mentioned, there are a few differences between *Middle Hill* and the assessment required of PC1.

16. First, there is a slight difference in that whereas in *Middle Hill* it was a simple case of substituting one zone for another zone within the Auckland Unitary Plan, here a new chapter is proposed to be introduced to the MDP and therefore there are new objectives and policies in play. The statutory test therefore requires that each proposed objective is to be evaluated by the extent to which it is the most appropriate way to achieve the purpose of the Act.[8] Otherwise, generally speaking the same consideration as applies to rules applies equally to policies.

17. The second matter is that as of 30 November 2022 there are some additions to s 74 RMA, which relate to matters to be considered when changing the district plan, specifically:[9]

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[8] Section 32(1)(a).

[9] Cl 2 Resource Management Amendment Act 2020 Commencement Order 2021

(d) any emissions reduction plan made in accordance with section 5ZI of the Climate Change Response Act 2002; and
(e) any national adaptation plan made in accordance with section 5ZS of the Climate Change Response Act 2002.

18. Chapter 7 of the Emissions Reduction Plan[10] relates to Planning and Infrastructure, and promotes well-functioning urban environments, higher density development, strategic planning and protection of areas of cultural significance. The '*actions to reduce emissions through improvements to the planning and infrastructure system*' are focused on amending environmental legislation; applying direction to urban developments to provide for intensification and housing close to workplaces; addressing infrastructure financing issues; promoting Crown-led and private sector urban regeneration projects; and improving the evidence base for decisions. These have limited application to PC1 which involves the expansion of a Village environment which is not itself an urban area, however PC1 is generally consistent with the outcomes being sought, particularly in terms of expanding an existing residential community and making efficient use of infrastructure.

19. The National Adaptation Plan[11] at chapter 4 provides:

> The effects of climate change are being felt now. During the transition to the new system, councils need to avoid locking in inappropriate land use or closing off adaptation pathways before the new resource management system takes full effect. Councils have existing functions and powers that can be used to avoid, mitigate or manage the impacts of natural hazards. These functions can support climate-resilient development in the right locations. In particular, councils must recognise and provide for the management of significant risks from natural hazards as a matter of national importance in exercising their functions and powers under the Resource Management Act 1991 (RMA). Both regional and territorial authorities have functions under the RMA that relate to avoiding or mitigating natural hazards.

20. Ms Anstey's evidence addresses this by noting that unlike other areas within the Manawatū District, the plan change area is not subject to coastal hazards or land instability. There are no natural hazard matters that have been identified as particularly affecting this land.

21. A final comment on the *Middle Hill* decision is that it followed the position that the relevant parts of the National Policy Statement on Urban Development 2020 (**NPS-UD**) were those relating to 'planning decisions', being Objectives 2, 5 and 7 and

10 Aotearoa New Zealand's first emissions reduction plan (environment.govt.nz)
11 Urutau, ka taurikura: Kia tū pakari a Aotearoa i ngā huringa āhuarangi | Adapt and thrive: Building a climate-resilient New Zealand (environment.govt.nz)

Policies 1 and 6. That position has recently been overturned by the High Court in *Southern Cross Healthcare Ltd v Eden Epsom Residential Protection Soc Inc* [2023] NZHC 948, and I discuss this decision in some detail below.

NATIONAL POLICY STATEMENTS

22. Given the particular focus on the NPS-HPL in this case, it is useful to consider the role of national direction, and all such documents that are in play in terms of PC1.

Implementing National Policy Statements

23. Various provisions of the RMA are relevant to how NPSs are to be applied. A useful starting point is the purpose of NPSs, which is to "*state objectives and policies for matters of national significance that are relevant to achieving the purpose of this Act*". Also relevant is s 53(3) which provides "*A local authority must also take any other action that is directed by the national policy statement*".

24. As noted above, the Council must prepare and change its district plan "in accordance with" (s 74(1)(ea)) and must "give effect to" a NPS (s 75(3)(a) RMA).

25. In terms of how NPSs are interpreted and applied in practice, the leading case is *Environmental Defence Society Inc v New Zealand King Salmon Co Ltd,*[12] in which the Supreme Court held that where a planning instrument uses directive language it is to be strictly interpreted. It specifically held that "*'avoid' in policies 13(1)(a) and 15(a) [of the New Zealand Coastal Policy Statement] is a strong word, meaning "not allow" or "prevent the occurrence of"*".[13] In the recent *Southern Cross* decision, the High Court emphasised that directive language could also be framed positively, directing Councils to 'require' or 'enable' certain outcomes, and that care should be taken not to give more weight to a 'negative direction' than to a positive one.[14] I discuss this further below in relation to the positive directions in the NPS-UD.

26. The Supreme Court in *King Salmon* also considered how competing principles within NPSs should be reconciled, holding:

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12 [2014] NZSC 38, [2014] 1 NZLR 593 (*King Salmon*)

13 *Environmental Defence Society Inc v New Zealand King Salmon Company Ltd*, [2014] NZSC 38, [2014] 1 NZLR 593, at [126].

14 *Southern Cross Healthcare Ltd v Eden-Epsom Residential Protection Soc Inc*, supra, at [119] – [121], [128]. I note this was in the context of the Regional Policy Statement and not directly in relation to the NPS-UD, however the principle still applies.

> [129] When dealing with a plan change application, the decision-maker must first identify those policies that are relevant, paying careful attention to the way in which they are expressed. Those expressed in more directive terms will carry greater weight than those expressed in less directive terms. Moreover, it may be that a policy is stated in such directive terms that the decision-maker has no option but to implement it. So, 'avoid' is a stronger direction than 'take account of'. That said however, we accept that there may be instances where particular policies in the NZCPS 'pull in different directions'. But we consider that this is likely to occur infrequently, given the way that the various policies are expressed and the conclusions that can be drawn from those differences in wording. It may be that an apparent conflict between particular policies will dissolve if close attention is paid to the way in which the policies are expressed.
>
> [130] Only if the conflict remains after this analysis has been undertaken is there any justification for reaching a determination which has one policy prevailing over another. The area of conflict should be kept as narrow as possible. The necessary analysis should be undertaken on the basis of the NZCPS, albeit informed by s 5. As we have said, s 5 should not be treated as the primary operative decision-making provision.
>
> [131] A danger of the 'overall judgment' approach is that decision-makers may conclude too readily that there is a conflict between particular policies and prefer one over another, rather than making a thoroughgoing attempt to find a way to reconcile them …

27. While *King Salmon* was considering policies within the NZCPS itself that were said to be in conflict, the High Court in *Tauranga Environmental Protection Society Inc v Tauranga City Council*,[15] considered a tension between policies in NZCPS and the National Policy Statement on Electricity Transmission. In a proposal that involved the realignment of transmission lines affecting the coastal environment, the Court considered the approach that should be applied when trying to reconcile competing provisions as follows (at [79]):

> The Supreme Court's decision in *EDS v King Salmon*, … requires decision-makers to focus on the text and purpose of the legal instruments made under the RMA. A decision-maker considering a plan change application must identify the relevant policies and pay careful attention to the way they are expressed. As with any legal instrument, the text of the instrument may dictate the result. Where policies pull in different directions, their interpretation should be subjected to "close attention" to their expression. Where there is doubt after that, recourse to pt 2 is required.

28. In other words a decision on a plan change must give effect to all relevant NPSs, with any competing provisions reconciled if possible, before having regard to Part 2 if they cannot be. For the reasons to follow, in this case there is no conflict, as PC1 gives effect to all three relevant NPSs.

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15 [2021] 3 NZLR 882

National Policy Statement on Urban Development 2020 (NPS-UD)

29. Manawatū District Council is a tier 3 local authority and therefore consideration must be given to the NPS-UD. While tier 3 authorities are not subject to all requirements, many do apply, and tier 3 authorities are "strongly encouraged" to implement those that do not.[16]

30. The High Court's decision in *Southern Cross* emphasises the importance of having full and proper regard to all aspects of the NPS-UD. As noted above, the Environment Court had previously held that only those provisions of the NPS-UD applying to 'planning decisions' needed to be considered for private plan changes. The High Court held that was wrong, referring to cl 4.1 which provides that every tier 1, 2 and 3 local authority must amend its district plan to give effect to the NPS-UD "as soon as practicable". The Court held:[17]

> It follows that the Council was required to amend its district plan to give effect to the NPS-UD as soon as practicable. The Environment Court, on appeal, had the same duty. The Court had to make a decision on the request for PPC21. This meant it was, in terms of cl 4.1(1), practicable for the Court to amend the district plan to give effect to the NPS-UD when making its decision (assuming, of course, PPC 21's proposed changes gave effect to the NPS-UD).

31. The planners for the Trust and the Council have both correctly considered the relevant obligations of the NPS-UD, without limiting themselves to those provisions referring to 'planning decisions'. Both particularly recognise the relevance of Policy 8 which requires local authorities to be responsive to plan changes that would add significantly to development capacity and contribute to well-functioning urban environments. The reporting officer concludes that:[18]

> I consider that the proposal would provide significant development capacity that is not otherwise enabled, and similarly that it would contribute to a well-functioning urban environment…In particular, I consider the locational benefits of the Site in terms of the adjacency to the existing village expanse of Rongotea, to contribute to the significance of the capacity. The plan change is also well-connected along transport corridors.

32. The conclusion that PC1 will give effect to the NPS-UD is an important one and should not be overlooked in favour of the arguments surrounding the NPS-HPL.

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16 NPS-UD, cl 1.5.

17 *Southern Cross Healthcare Ltd v Eden-Epsom Residential Protection Soc Inc*, supra, at [83].

18 Section 42A report, para 193.

33. I mentioned above that the Court in *Southern Cross* emphasised that care should be taken not to give more weight to a 'negative direction' (such as the NPS-HPL's obligation to 'avoid' certain outcomes) than to a positive one. The Court in that case found the Environment Court had erred when it considered certain policies using words such as "require" and "enable" were not directive, saying they were in fact strongly directive.[19] That is important when assessing applicable NPS-UD policies such as:

(a) Policy 1 – which requires that planning decisions contribute to well-functioning urban environments, which at a minimum requires the environment "*have or enable a variety of homes that…meets the needs, in terms of type, price, and location, of different households"*;

(b) Policy 2 – which requires authorities to "*provide at least sufficient development capacity to meet expected demand for housing"* at all times;

(c) (Slightly less strongly directive) Policy 6(c) and (d) – which directs decision-makers to have particular regard to the benefits of developments consistent with well-functioning urban environments, and any relevant contribution that will be made to meeting the requirements of the NPS to provide or realise development capacity.

34. The NPS-UD also provides directives such as that in cl 3.2(1) which provides:

> Every tier…3 local authority must provide at least sufficient development capacity in its …district to meet expected demand for housing.

And the clause referred to by the High Court, cl 4.1 (emphasis added):

> Every tier…3 local authority must amend its ….district plan to give effect to the provisions of this National Policy Statement as soon as practicable.

35. The evidence of Ms Allen is that there is expected demand for housing in the Manawatū District for around 1600 houses over the next 10 years,[20] with that demand being split 60:40 between Feilding and more rural areas.[21] Given the

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19 *Southern Cross Healthcare Ltd v Eden-Epsom Residential Protection Soc Inc*, supra, at [119] – [121], [128]. I note this was in the context of the Regional Policy Statement and not directly in relation to the NPS-UD, however the principle still applies.

20 Evidence of Ruth Allen, para 10.

21 Evidence of Ruth Allen, paras 12 – 17; Manawatū District Council Long Term Plan, 2021-2031, p79.

restrictions on rural subdivision, under both the MDP and now the NPS-HPL, the 40% growth will predominantly need to be accommodated in the Villages. While there appears to be capacity at Feilding, there is no evidence of anywhere near sufficient capacity within the Villages.

36. The Panel are required to give effect to the NPS-UD's positive direction that sufficient capacity 'must' be provided, just as much as they are obliged to meet the NPS-'HPL's 'avoid' directions.

37. Secondly, it is important that the Panel be prepared to act on the information available to it, rather than, for instance, indicating a preference to wait for a district-wide growth strategy or a wider plan change than what is currently before it. The High Court in *Southern Cross* found the Environment Court had erred when it considered parts of the NPS-UD did not apply because the Council had not yet promulgated a plan change to give effect to the intensification obligations on tier 1 authorities. The fact that the Council was still engaged in a process under the NPS-UD did not, the High Court held, "*limit the Court's obligation to give effect to the objectives and policies of the NPS-UD*".[22] In other words, the fact that the Council might be looking to provide for growth in other ways in the future does not mean the Panel can fail to provide for that growth in line with the expectations of the NPS-UD now.

38. There is no doubt that approving PC1 would give effect to the Council's obligations imposed in clear and directive terms by the NPS-UD.

National Policy Statement on Highly Productive Land 2022

39. The NPS applies to 'highly productive land' (**HPL**) defined as (<u>emphasis</u> added):

> … land that has been mapped in accordance with clause 3.4 and is included in an operative regional policy statement as required by clause 3.5 (but <u>see clause 3.5(7) for what is treated as highly productive land before the maps are included in an operative regional policy statement</u> and clause 3.5(6) for when land is rezoned and therefore ceases to be highly productive land).

40. As Horizons Regional Council has not yet completed its mapping, clause 3.5(7) applies, which provides:

> Until a regional policy statement containing maps of highly productive land in the region is operative, each relevant territorial authority and consent authority must apply this

[22] Ibid at [85].

National Policy Statement as if references to highly productive land were references to land that, at the commencement date:

(a) is
  (i) zoned general rural or rural production; and
  (ii) LUC 1, 2, or 3 land; but

(b) is not:
  (i) identified for future urban development; or
  (ii) subject to a Council initiated, or an adopted, notified plan change to rezone it from general rural or rural production to urban or rural lifestyle.

41. The PC1 area is identified on the NZLRI maps as predominantly LUC2, and is zoned Rural 2, within a Nodal Area. The Trust has proceeded on the basis that this means the land is HPL under the interim definition.[23]

42. The NPS-HPL has a single objective which is that "*Highly productive land is protected for use in land-based primary production, both now and for future generations*". There are nine policies, of which I consider two are particularly relevant for present purposes:

(a) Policy 2 - The identification and management of highly productive land is undertaken in an integrated way that considers the interactions with freshwater management and urban development; and

(b) Policy 5 – The urban rezoning of highly productive land is avoided, except as provided in this National Policy Statement.

43. For tier 3 authorities, the NPS-HPL provides for urban rezoning when the tests in cl 3.6(4) and (5) are satisfied. These provide:

(4) Territorial authorities that are not Tier 1 or 2 may allow urban rezoning of highly productive land only if:
  (a) the urban zoning is required to provide sufficient development capacity to meet expected demand for housing or business land in the district; and
  (b) there are no other reasonably practicable and feasible options for providing the required development capacity; and
  (c) the environmental, social, cultural and economic benefits of rezoning outweigh the environmental, social, cultural and economic costs associated with the loss of highly productive land for land-based primary production, taking into account both tangible and intangible values.

(5) Territorial authorities must take measures to ensure that the spatial extent of any urban zone covering highly productive land is the minimum necessary to provide the required development capacity while achieving a well-functioning urban environment.

[23] For the avoidance of doubt, the Trust reserves its ability to argue the land is not HPL, if necessary.

44. The Trust has called evidence to address each of the tests, and all are discussed in the evidence of Ms Anstey. Without wishing to repeat the witnesses' analysis, I make the following comments as to the application of each test.

Step 1 – Is the zoning required to provide sufficient development capacity?

45. The first test requires that the urban rezoning must be required to provide sufficient development capacity to meet expected demand for housing in the Manawatu District.

46. I mentioned above that there was a considerable cross-over with the NPS-UD, and this is particularly the case for this test which uses several terms defined in that document. Clause 1.3(3) NPS-HPL provides that "*Terms defined in the National Policy Statement on Urban Development 2020 and used in this National Policy Statement have the meanings in the National Policy Statement on Urban Development 2020, unless otherwise specified*".

47. "Development capacity" is defined to mean:

> …the capacity of land to be developed for housing or for business use, based on:
>
> (a) the zoning, objectives, policies, rules, and overlays that apply in the relevant proposed and operative RMA planning documents; and
>
> (b) the provisions of adequate development infrastructure to support the development of land for housing or business use.

48. What it means for that development capacity to be "sufficient" is then explained in cl 3.2 to mean that expected demand for housing must be met by development capacity that is plan-enabled, infrastructure ready, and feasible and reasonably expected to be realised. Those terms are then further expanded on in clause 3.4 and 3.26.

49. The Trust engaged Ms Ruth Allen to undertake an assessment of "expected demand" and whether there is currently "sufficient development capacity" to meet that demand. Her evidence lists a wide range of sources she has considered to reach her views on each component of the assessment above. Her analysis is that the expected demand for the Manwatū District is for up to 1,645 new houses over the next 10 years and 5,716 within 30 years (the long-term demand, required to be assessed by the NPS-UD).

50. Importantly, her analysis is not limited to demand for houses as a total number, but addresses demand for homes in different locations. Consistent with the Council's prediction,[24] she assesses the expected demand as being split approximately 60:40 between Fielding and the rural areas / Villages. Assessing demand for different locations is consistent with the requirements of the NPS-UD which refers to assessing demand additional housing "in different locations" and "in terms of dwelling types".[25] It is also consistent with the overarching requirement that planning decisions must enable a variety of homes that meet the needs of different households "*in terms of type, price and location*" (Policy 1(a)(i)).

51. Mr Batley's Addendum Statement records that he accepts "*that the District is projected to grow over the next 10 years with this growth split between the main settlement of Feilding and the wider village areas"* (at para 14).

52. Ms Allen's evidence is that there is likely sufficient development capacity to meet demand for housing in Feilding, but a shortfall in meeting the expected demand of for between 640 and 658 houses in the Villages. In enabling approximately 160 new dwellings, PC1 would make a meaningful contribution to meeting expected demand for housing within a Village environment. Put another way, without PC1, the Council will be significantly further away from meeting its NPS-UD obligations to provide the required capacity.

Step 2 – Are there reasonably practicable and feasible options?

53. The second test requires that there are no other reasonably practicable and feasible options for providing the required development capacity. Again, the NPS-UD sets out what is required for capacity to be feasible and reasonably expected to be realised, at cl 3.26.

54. On the basis of a demand for up to 658 new houses in the Villages over the next 10 years, possible options for providing that level of capacity could only include:

    (a) Meeting the demand through infill housing within the existing Villages;

    (b) Expanding Rongotea in a different location or expanding other Villages;

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24 Manawatū District Council, Long Term Plan, p79.

25 Clause 3.24. I note this is said to apply to tier 1 and 2 authorities, however tier 3 authorities are "strongly encouraged" to take steps directed at tier 1 and 2 authorities.

(c) Somehow generating a new Village (which has not been considered further, as the cost and serviceability of an entirely new area would be cost prohibitive and could not be described as practicable or feasible).

55. In order to be relevant, those options must be reasonably practicable and feasible (the latter being defined in the NPS-UD to mean "*commercially viable to a developer based on the current relationship between costs and revenue*").

56. In terms of infill, Rongotea is the largest of the Villages, with a population of approximately 700 people, followed by Sanson at approximately 680, with the others being significantly smaller. Mr Batley agrees in his addendum statement that infill development is not a common development pattern within the village context. It is relevant to recall that the demand being met within the villages is largely what would previously have been met in the rural area, and therefore is unlikely to be satisfied with a small, infill type, development. In my view, there is no way that the required level of development capacity could be met through infill.

57. In terms of expanding elsewhere, Ms Anstey's evidence at Appendix B considers growth options for Rongotea and Sanson, being the most likely areas where demand could be accommodated. Other areas around Rongotea and around Sanson as a whole, there are significant challenges, including a prevalence of Class 2 and 3 soils surrounding them. Other issues include the fact that possible areas are currently used as part of productive farming units or are in multiple ownership. The NPS-HPL would pose an equally or greater hurdle to rezoning and in my submission, there is no basis to suggest expansion of other villages is reasonably practicable or feasible.

58. While there are difficulties in 'proving a negative' as this test requires, in my submission it is self-evident that there are no available options for providing the level of demand Ms Allen has identified, much less options that are reasonably practicable and feasible. Even PC1 will only make a contribution to meeting the demand, albeit a meaningful one.

Step 3 – Do the benefits of rezoning outweigh the costs of the loss of HPL?

59. This test requires the benefits of rezoning to be assessed against the costs of the loss of HPL.

60. Ms Anstey assesses this aspect of the test in her evidence, and again, I do not wish to repeat that.

61. Importantly, no one has sought to argue that the rezoning of this land will have an adverse effect on the District, and it is common ground the 'costs' of losing this land for production are very low. There is direct evidence of this from Mr Hainsworth, Mr and Mrs Cheetham, and in the submission from the lessee of the PC1 area, Mr Dean Arnott. As Mr Hainsworth's evidence makes clear, if this is HPL for the purposes of the NPS-HPL, then it is in name only. It has no real long-term value for land-based primary production.

62. By contrast, there is strong evidence of the benefits associated with the rezoning, including from several submitters who, quite unusually in my experience, have gone to the effort of making a submission in strong support of the plan change. A thorough consideration of the benefits of the rezoning, addressing all relevant metrics, is included in the updated Section 32 Assessment, attached to Ms Anstey's evidence (see pages 16-18).

63. In my submission, there is simply no question that the benefits of the rezoning dramatically outweigh any cost associated with the loss of having this land available for productive use.

Step 4 – Is the rezoning the minimum to provide the required development capacity?

64. The final test is that the spatial extent of the area to be rezoned must be the minimum necessary to provide the required development capacity while achieving a well-functioning urban environment. As has already been discussed, the required development capacity is significantly higher than what will be provided by PC1, so to some extent the question is moot.

65. Given the demand is for Village-style living, and that all technical witnesses are agreed that appropriate urban design, stormwater and environmental outcomes are achieved by the proposal, it is submitted that the test is easily met.

66. With all of the requirements of the NPS-HPL met, PC1 is consistent with Policy 5 in that it applies an urban rezoning to land as provided for in the NPS.

National Policy Statement on Freshwater Management 2020 (NPS-FM)

67. The final NPS of relevance is the National Policy Statement on Freshwater Management (**NPS-FM**), which is relevant mainly due to the presence of a relatively small natural wetland within the PC1 area.

68. PC1 proposes that this natural wetland will be protected and enhanced through the creation of a public open space area and planting, with Policy DEV-P4 proposing to provide:

> Ensure that subdivision and development within Rongotea South Development Area:
>
> …
>
> b. provides for biodiversity improvements through the creation of native riparian and wetland planting at appropriate locations within reserve areas and as part of the constructed wetland for stormwater treatment and attenuation.

69. The wetland area is also identified on the Structure Plan, within an Open Space/Reserve Area, and any proposal will be assessed against consistency with that Plan.

70. Provision for the protection and restoration of the wetland gives effect to the objective of the NPS-FM to ensure the natural wetland resource is managed in a way that prioritises the health and well-being of water bodies and freshwater ecosystems, and particularly to Policy 6 which provides *"There is no further loss of extent of natural inland wetlands, their values are protected, and their restoration is promoted*".

71. The reporting officer agrees with the Trust's assessment that PC1 will give effect to the NPS-FM, specifically by ensuring no further loss of the extent of the identified natural wetland identified on the structure plan.[26]

72. For completeness, I note that Mr Batley also goes on to say that Option A, being one of the options identified as feasible to manage stormwater from the rezoned area, "*is considered to not protect the values of the wetland*". PC1 does not include or specifically enable Option A, and it is important to note that, even if correct, the reporting officer's observations do not suggest the *plan change* is inconsistent with the NPS-FM. PC1 puts in place a number of mechanisms which allow for full

26 Section 42A Report, p 49.

assessment of the stormwater management option to be advanced – most obviously, the requirement for a stormwater management plan – which specifically require assessment of how the proposed stormwater management approach recognises the wetland as a sensitive receiving environment.[27] In my submission, the officer's suggestion that an option which has not yet been fully developed, and may not yet be advanced at all, is contrary to the NPS-FM is incorrect.

73. The same applies to his discussion of Options A and B in relation to the National Environmental Standards for Freshwater 2020 (NES-FM). PC1 includes neither Option A nor Option B, those options having been advanced to demonstrate the feasibility of managing stormwater appropriately. It is premature, and in any event, not a function of Council as a territorial authority, to give a view at this stage that one option may be inappropriate. The NES-FM specifically provide that the regulations do not deal with the functions of territorial authorities under s 31 RMA, so Mr Batley's view that Option A is inconsistent with those functions due, apparently, to it requiring non-complying activity consent from the Regional Council, does not follow.

74. In any event, as noted, PC1 does not provide for either option specifically, and the Panel does not need to consider the relative benefits of one option over the other. The plan change, the Regional Plan and the NES-FM, put in place appropriate mechanisms to ensure an environmentally appropriate outcome at the detail design stage.

Conclusion on application of NPSs

75. It is important not to overlook that Council's obligations to provide development capacity are just as important as the NPS-HPL's direction to preserve productive capacity. Policy 2 of the NPS-HPL itself recognises the need to manage HPL in an integrated way that considers interactions with urban development.

76. Clause 3.6(4) and (5) NPS-HPL provide a method of reconciling those competing obligations, and that should be done with a 'real world' view of what is reasonable and practicable. For the avoidance of doubt, it would be inappropriate to take such

27 PC1, DEV1-S8.

a strict view of the tests that they are essentially impossible for a private plan change requestor to meet, particularly where:

(a) A decision to decline PC1 would fail to implement the Council's obligations under the NPS-UD to provide development capacity; and

(b) The NPS-UD puts in place a specific obligation to be responsive to opportunities to provide additional capacity.

77. The evidence for the Trust provides an appropriate evidential basis for the Panel to be satisfied that the test for rezoning has been met. The Council agrees there is such an evidential basis and that the tests are satisfied. There is no evidence to the contrary.

CONCLUSION

78. In my submission, rezoning the PC1 area to Village Zone, with a Rongotea South Development Area and Structure Plan, is the most appropriate way of achieving the purpose of the RMA, noting that the NPS-FM, NPS-UD and NPS-HPL all provide direction as to how that purpose is to be achieved. Leaving the land zoned Rural 2 is not a realistic option in light of the national direction to provide capacity, the significant support for PC1 from the landowner, the community and the Council, and given the significant benefits that will arise from providing for an expansion of Rongotea Village.

79. The Trust respectfully requests that the Hearing Panel approve PC1. Its witnesses and myself are available to assist the Commissioners throughout the hearing and by way of reply.

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Asher Davidson
Counsel for Te Kapitī Trust
25 May 2023