BEFORE A HEARINGS PANEL
APPOINTED BY MANAWATŪ DISTRICT COUNCIL

UNDER	schedule 1 of the Resource Management Act 1991
IN THE MATTER	of Private Plan Change 1, a request to make changes the Manawatū District Plan
BY	**TE KAPITI TRUST** Applicant

LEGAL MEMORANDUM ON QUESTIONS POSED BY THE COMMISSSIONERS

Dated: 21 April 2023

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MAY IT PLEASE THE COMMISSIONERS:

[1] This memorandum provides legal submission on the interpretation of the National Policy Statement on Highly Productive Land 2022 ("**NPS:HPL**"), in response to Minute 2 of the Hearing Panel dated 28 March 2023. Specifically, these submissions address the matters identified at paragraph 2(c)(i) – (iii).

[2] The three matters on which advice has been sought, and our response, is set out below:

(a) Question 1: What is the equivalent zone in the National Planning Standards to the Rural 2 Zone and the Rural Lifestyle Nodal Overlay in the Manawatū District Plan that apply to the Private Plan Change 1 site? In other words is it equivalent to a "general rural or rural production" zone for the purpose of cl 3.5(7)(a) (i) of the NPS:HPL?

The nearest equivalent zoning for the land proposed to be rezoned under Private Plan Change 1 ("**PPC1**") is general rural or rural production for the purpose of cl 3.5 (7)(a)(i) of the NPS:HPL.

(b) Question 2: Does the Council's Draft District Plan constitute a strategic planning document that would fall within the defined exemption for "identified for future urban development" in cl 3.5(7)(b)(i) the NPS:HPL?

The Council's Draft District Plan is not a strategic planning document that would fall within the defined exemption in cl 3.5 (7)(a)(ii) of the NPS:HPL.

(c) Question 3: Does the Versatile Land Assessment contained in Appendix H of the Private Plan Change 1 request, which identifies the Private Plan Change 1 site as being LUC 4 or LUC 6, satisfy the requirement for "more detailed mapping that uses the Land Use Capability classification" so as to exclude it from the definition of LUC 1, 2 or 3 land referenced in cl 3.5(7)(a) (ii) of the NPS:HPL. If it does not, why does it not?

The versatile land assessment contained in Appendix H of PPC1 is not "*more detailed mapping*" such as to disqualify the land from the definition of LUC 1, 2 or 3.

[3] The Council recognises the potential significance that these matters have on determination of the Requestor's PPC1. Despite this, determination of these issues involves legal interpretation of the NPS:HPL in a way that has potentially broader implications in terms of how the Council should interpret and apply it in other Resource Management Act 1991 ("**RMA**") processes. We are aware of at least one Environment Court proceeding that will soon be heard that (in part) relates to the interpretation and application of the NPS:HPL with relevance to issues before this Hearing Panel. There are likely others.

[4] In this context, the Council notes the Requestor's Memorandum[1] identifies that notwithstanding the legal position on the above matters, the requestor is intending (as a "back-up position"[2]) to call evidence to satisfy the Hearing Panel that the requirements of cl 3.6(4) and (5) are met by PPC1. The Council officers have not seen evidence addressing these matters, and it will not be provided until after this legal advice is circulated and after the Council's s 42A planning report.

[5] Having not yet seen the evidence in support of the Applicant's 'back-up position', the Council has a level of discomfort as to the elevated significance of legal arguments seeking to provide for the exclusion of the application from the NPS:HPL.

[6] For that reason, the Council's preference is that the Applicant's plan change proposal is considered in relation to complete evidence as to the cl 3.6(4) and (5) matters. Rather than to have it treated as a 'back-up', it is preferable, if possible, for consideration of PPC1 in terms of these provisions be regarded as the primary matter, with the legal matters addressed by this advice (relating to the disqualification of this land from the NPS:HPL), to be considered only if they are not 'moot' by that stage.

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1 In response to the Minute of the Hearing Panel.
2 Applicant's 24 March 2023 Memorandum, at [8].

[7] Notwithstanding the above, the following legal advice is provided as to the three matters, addressing relevant legal principles first.

Legal Principles

[8] The questions in this advice require legal interpretation of provisions in the NPS:HPL and the National Planning Standards.

[9] Pursuant to ss 53 and 58E of the RMA, National Policy Statements and National Planning Standards are "*secondary legislation*" within the meaning of the Legislation Act 2019.

[10] As "*legislation*" defined by the Legislation Act 2019 includes "*secondary legislation*",[3] the general legislative interpretation principles as set out in the Legislation Act apply. Sections 10–12 in particular, read as follows:

> **10 How to ascertain meaning of legislation**
>
> (1) The meaning of legislation must be ascertained from its text and in the light of its purpose and context.
> (2) Subsection (1) applies whether or not the legislation's purpose is stated in the legislation.
> (3) The text of legislation includes the indications provided in the legislation.
> (4) Examples of those indications are preambles, a table of contents, headings, diagrams, graphics, examples and explanatory material, and the organisation and format of the legislation.
>
> **11 Legislation applies to circumstances as they arise**
>
> Legislation applies to circumstances as they arise.
>
> **12 Legislation does not have retrospective effect**
>
> Legislation does not have retrospective effect.

[11] An overriding principle of the interpretation of secondary legislation is that it should be construed in a way that is consistent with its purpose, and the

[3] Legislation Act 2019, s 5.

purpose and substantive provisions of the primary legislation,[4] being the RMA.

[12] Further, the Environment Court has summarised[5] principles for interpretation of provisions in District Plans, and while the documents in issue here are not District Plans (which are not secondary legislation), we consider they are nevertheless of some assistance here:

(a) The well-established test is to ask what the plain and ordinary meaning of the words used in the District Plan are, and what an ordinary, reasonable member of the public examining the district plan would take from the rule.[6]

(b) It is now settled that district plan interpretation also involves a contextual and purposive approach. The Court of Appeal has held that "*while it is appropriate to seek the plain meaning of a rule from the words themselves, it is not appropriate to undertake that exercise in a vacuum*".[7]

(c) This purposive approach is particularly important where there is ambiguity or uncertainty in the wording of the provisions. Interpreting a rule by rigid adherence to the wording itself would not be consistent with the requirements of the Interpretation Act 1999.[8]

(d) Relevant factors to consider when undertaking a contextual interpretation include the purpose of the provision, the context and scheme of the plan, the history of the plan, the purpose and scheme of the RMA and any other permissible guides to meaning (including common law principles of statutory interpretation).[9]

(e) Interpretation should also avoid creating injustice, absurdity, anomaly or contradiction.[10]

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4 Grant Thornton *Laws of New Zealand – Statutes* (online looseleaf ed, LexisNexis) at 205.
5 *Saville v Queenstown Lakes District Council* [2019] NZEnvC 90 at [16].
6 *Powell v Dunedin City Council* [2005] NZRMA 174 (CA).
7 *Powell v Dunedin City Council*, above n 6, at [35].
8 *Powell v Dunedin City Council*, above n 6.
9 *Brownlee v Christchurch City Council* [2001] NZRMA 539 at para [25].
10 *Waimairi County Council v Hogan* [1978] 2 NZLR 587 at 590 (CA).

Question 1: What is the equivalent zone in the National Planning Standards to the Rural 2 Zone and the Rural Lifestyle Nodal Overlay in the Manawatū District Plan that apply to the Private Plan Change 1 site? In other words is it equivalent to a "general rural or rural production" zone for the purpose of cl 3.5(7)(a)(i) of the NPS:HPL?

Approach

[13] The premise of this question is that the National Planning Standards ("**Planning Standards**") have not yet been implemented in the Manawatū District Plan ("**District Plan**").

[14] As a result, the references to "*general rural or rural production*" zones at cl 3.5(7)(a)(i) of the NPS:HPL requires consideration of the nearest equivalent zone in the District Plan.[11] Specifically, the NPS:HPL provides that:

> (4) A reference in this National Policy Statement to a zone is:
>
> (a) a reference to a zone as described in Standard 8 (Zone Framework Standard) of the National Planning Standards; or
>
> (b) for local authorities that have not yet implemented the Zone Framework Standard of the National Planning Standards, a reference to the nearest equivalent zone.

[15] If the nearest equivalent zoning under the Planning Standards for the PPC1 site is neither "*general rural*" nor "*rural production*", then the site should not be regarded as Highly Productive Land under the NPS:HPL.

[16] As the reference in cl 3.5(7)(a)(i) are to the rural and rural production zones as described by the Planning Standards, the starting point for this issue ought to be consideration of the descriptions of those zones as set out in Section 8 of the Planning Standards. Under this approach, the Planning Standards descriptions are taken as a starting point, with the applicable

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[11] NPS:HPL, cl 1.3(4)(b).

zone construct in the District Plan evaluated against it, to find the nearest equivalent.

[17] The zone framework set out at Section 8 of the Planning Standards identifies a total of 31 zones and descriptions that cover a wide range of zoning possibilities, many of which will not currently be found in operative and proposed zones across New Zealand.

[18] With such a wide range of zones accounting for many possibilities, there is no certainty in a comparison exercise that there will be only one nearest equivalent zone identified. Accordingly, it would be open under an equivalency exercise for there to be more than one 'zone' construct within a District Plan having the same nearest equivalent zone under the Planning Standards.

[19] It is important to also recognise that the reference to a 'nearest equivalent' is specifically to a 'nearest equivalent "*zone*". In New Zealand (and beyond), zoning is an accepted primary method in land use planning for grouping planning provisions together control the use and development of land with similar characteristics.

[20] As recognised by the Planning Standards, a 'zone' is a planning method that incorporates a spatial layer with the following function:[12]

> A zone spatially identifies and manages an area with common environmental characteristics or where environmental outcomes are sought, by bundling compatible activities or effects together, and controlling those that are incompatible.

[21] The NPS also recognise that District Plans utilise various other spatial layers that serve different and complementary functions to 'zones'. These spatial layers include other commonly accepted planning methods such as "*overlays*", "*precincts*", and "*specific controls*", and are recognised in the Planning Standards for their functional differences and relationships to zones. For example, the function of a "*Precinct*" spatial layer is as follows:

> A precinct spatially identifies and manages an area where additional place-based provisions apply to modify or refine

[12] Planning Standards, Chapter 12, Page 50.

aspects of the policy approach or outcomes anticipated in the underlying zone(s).

[22] Importantly, where such additional spatial layers are present within or across identified District Plan zones, they do not replace the broader underlying 'zone' construct that guides the use and development of the land. These spatial layers are, as demonstrated by reference to the Planning Standards, intended to be regarded as additional or supplemental to an underlying zone in such a way that refines or adds to the core zone construct, but does not fundamentally change it.

[23] As above, the identification of a 'nearest equivalent' requires the identification of a "zone" in Section 8 of the Planning Standards which is the nearest equivalent of a "zone" in the District Plan, according to how the District Plan describes its zones. Specifically, the land in question must either be "zoned"[13] as general rural or rural production, or else the reference to zone[14] must be deemed to be a reference to the nearest equivalent zone[15] in the Planning Standards.

[24] In our opinion, the task does not require or invite consideration of the additional spatial layers, which can be disregarded. This approach is consistent with a plain interpretation of 1.3(4) and 3.5(7). It is also a sensible approach that avoids a highly complex and imprecise nationwide task of having to determine the significance of every additional spatial layer or variance in rules, to determine how that might affect the underlying zoning.

[25] Consistent with this view, the primary focus of the comparative assessment in this advice relates to the relevant District Plan Zone, that is, the Rural Zones. We address the Nodal Area specifically at paragraphs [41] to [49].

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13 Clause 3.6(7)(a)(i).
14 Clause 1.3(4).
15 Ibid.

The National Standard Zone Descriptions

[26] There are three relevant zone descriptions in Section 8, Table 13 of the Planning Standards, being:

(a) **General Rural Zone:** Areas used predominantly for primary production activities, including intensive indoor primary production. The zone may also be used for a range of activities that support primary production activities, including associated rural industry, and other activities that require a rural location.

(b) **Rural Production Zone:** Areas used predominantly for primary production activities that rely on the productive nature of the land and intensive indoor primary production. The zone may also be used for a range of activities that support primary production activities, including associated rural industry, and other activities that require a rural location.

(c) **Rural Lifestyle:** Areas used predominantly for a residential lifestyle within a rural environment on lots smaller than those of the General Rural and Rural Production Zones, while still enabling primary production to occur.

[27] While all three zones are zones that exist in rural environments, the primary difference between these different Zones is that the General Rural Zone and the Rural Production Zones are described as being "predominantly for primary production activities" whereas the Rural Lifestyle Zone is "predominantly for a residential lifestyle." In these descriptions, the word 'predominance' can be taken as being synonymous with that feature (rural production or residential lifestyle) being the primary characteristic of the area.

[28] Notably, the Rural Lifestyle Zone is also described as having smaller lots than in the other two zones, indicating that the feature of the one is to be determined by reference to the relative difference in lot sizes between this zone and the other two zones. However, we consider that the key to a Rural Lifestyle zone is the predominance of residential lifestyle, necessitating consideration of facets beyond mere lot size.

The Relevant MDC District Plan Zone

[29] By description in the District Plan, the rural environment in the Manawatū District includes two rural zones, identified as "Rural 1" and "Rural 2". The site of PPC 1 is zoned as Rural 2.

[30] The distinction between the two rural zones depends only on differences in soil versatility, as explained in the following (lengthy) explanation in the District Plan: (emphasised words signal terms defined in the District Plan)

> It is important to keep open a wide range of options for the future use of land, so that it can continue to meet the reasonably foreseeable needs of future generations and can be sustainably managed to preserve its life-supporting capacity in terms of the **Act**. Subdivision can compromise the potential land use options by fragmenting ownership. It may cause blocks to become too small for certain types of rural activity. It may then be difficult to collect them together again for production, particularly if the land has become over-capitalised with **buildings**. Farmers' price for land is related to potential farm income, but rural-residential users' price is influenced more by off-farm income. Below a certain size, blocks may become too small for practical rural use at all.
>
> This Plan uses an average lot size philosophy. It does not prevent the creation of small blocks within the rural **zone**, but effectively requires that people creating a small lot must also create a larger one to achieve the average. There is also a requirement that at least 50% (or at least 20 hectares, whichever is smaller) of the block being subdivided be left in one piece. This aims to discourage subdivision into uniform blocks all at the average size. These controls will help to retain an overall subdivision pattern within the District which allows a wide range of land uses to be able to secure land holdings appropriate to their needs.
>
> Retaining options for use of the District's "versatile land" (ie Class I and II soils apart from Class IIs2) is particularly vital. An explanation of the land use capability classes and why versatile land is a special resource can be found in the

> explanation to Objective LU 7). It is in very limited supply and is under the greatest demand for small-lot subdivision, especially near Feilding and Palmerston North. If widespread fragmentation into uniform small lots was permitted it would not take long for subdivision to make significant inroads into the supply of versatile land and of larger blocks in these locations. The Plan's Rural 1 **zone** identifies the District's main areas of versatile land, and recognises the potential **effects** on its productive options by requiring an 8ha minimum average lot size in that zone.
>
> The average lot size for the Rural 2 **zone** (less-versatile land) has been set at 4ha. This is because the finite demand for small rural blocks is unlikely ever to have a major impact on the availability of the District's large areas of non-elite soils for productive uses. The subdivision controls for these areas are therefore primarily based instead on landscape and rural character considerations. (Refer: Objective S 3).
>
> Freeing up rural-residential subdivision of non-versatile land close to Palmerston North and Feilding may bring overall small-block prices down. This would allow productive users to compete for high quality land on a more equal basis.
>
> Policy b. above notes that the Plan requires that land quality be taken into account in decisions to **zone** extra land for urban expansion. This is because any high quality land which is put under urban development is irretrievably lost.

[31] Accordingly, while Rural 1 and Rural 2 zones are "rural zones" by description and objective, the difference between them is that Rural 2 is treated by the Council in its District Plan as having a lesser quality of soil. Apart from this, there is little to distinguish the areas in terms of their characteristics, and there is little indication that the difference is designed to create a predominance of a primary residential lifestyle character, within either zone.

[32] This is borne out in multiple aspects of the planning regime for MDC's rural zones. The key difference between the planning outcomes for these zones is that there is a relatively greater tolerance for subdivision into a higher

number of resultant lots on Rural 2 land via the District Plan's subdivision 'entitlement' rules. This is despite there being no difference between the zones in terms of minimum lot sizes (0.8 ha), or separation distances. Further, the District Plan's "*average lot size philosophy*" does not include an actual average lot size standard to differentiate the zones, although higher average lot sizes in the Rural 1 zone are a likely product of the subdivision entitlement formula.

[33] Besides the difference in subdivision entitlements, the rural zones are indistinguishable in terms of land use controls. The same land use activities are permitted and controlled for the Rural Zones together, and both play host to primarily to what a lay-person would call rural activities. For example, Rule B3.1 lists permitted activities in the "*rural zones*", including the following activities that are well understood to be consistent with a productive rural environment, (and inconsistent with a "predominantly residential lifestyle"):

(a) Piggeries;

(b) Farming;

(c) Sale yards;

(d) Farm contractor depots;

(e) Milking sheds;

(f) Forestry;

(g) Mineral exploration;

(h) Effluent ponds.

[34] As can be seen, other than the difference in subdivision entitlements, the District Plan makes few deliberate concessions to Rural Lifestyle developments in the Rural 2 zone.

[35] While the Rural 2 zone has some greater allowance for subdivision than Rural 1 land, we consider that both Rural 1 and 2 zones are the nearest equivalents to the Planning Standards General Rural Zone, as both Rural Zones provide for a predominance of primary production activities zone.

[36] We note that a reality of the zoning construct under MDC's District Plan is that the subdivision development rights for both Rural 1 and Rural 2 land enable the creation of rural lifestyle developments (and considering that such entitlements can arise as controlled activities, the scheme could fairly be described as permissive). However, it does not necessarily follow that the best equivalent zone for Rural 2 (or indeed, either rural zone) should be classified as Rural Lifestyle Zone or that the Council has expressed in its District Plan a deliberate objective for either rural zone to become predominantly residential as the desired outcome.

[37] Despite the allowance for such development, the MDC's rural zones are best described as providing a predominance of productive activities, with the potential for rural lifestyle development. Based on this description, the nearest equivalent zones to the General Rural Zone in the Planning Standards would be the Rural 1 and Rural 2 Zones.

[38] Further, a finding that the closest equivalent of the Rural 2 Zone is Rural Lifestyle would result in an absurd outcome. While we do not have an exact percentage, by perusing the Council's Planning Maps, one can see that the biggest portion of the Manawatu District's rural land by far is classified as Rural 2 land. It would be absurd outcome if the equivalence exercise (as well as being inconsistent with the objective of the NPS:HPL) resulted in the plurality of the Council's rural land to be deemed a Rural Lifestyle Zone and, as such, not being subject to the NPS:HPL. This is particularly the case, considering that the planning differences between Rural 1 and Rural 2 land is to protect the District's versatile soils, rather than to create a Residential Lifestyle area.

[39] Such a finding would also have implications beyond the 'interim' response necessitate under cl 3.5(7) and would impact the subsequent Regional Council mapping process. This is because the Regional Council's mapping exercise under cl 3.4(1) requires it to map as highly productive land only land in a General Rural Zone or Rural Production Zone, notwithstanding that MDC's Rural Zone undoubtedly would include large geographically cohesive areas of predominantly LUC Class 1, 2, or 3 land.

[40] Ultimately, it is our opinion that the District Plan does not include a zone that is equivalent to a Rural Lifestyle zone in the Planning Standards (nor

does it need to, particularly given the permissiveness of its rural zones). The closest equivalent in the National Planning Standards to the Council's Rural 2 zone is the General Rural Zone, which recognises the predominance of primary production activities. For completion, we consider that the closest equivalent zoning to the Council's Rural 1 zone would also be the General Rural Zone.

Nodal Area

[41] We now turn to consider, specifically, the issue of the "Nodal Area". The Panel's direction asks what the equivalent zone is to the "Rural Lifestyle Nodal Overlay" in the MDC District Plan. It is useful as a preliminary point to clarify the language used here, because the District Plan does not use the language "Rural Lifestyle Nodal Overlay".

[42] It is understood that the intention is to refer to what is defined as "Nodal Area" in Chapter 2 of the District Plan. This definition of Nodal Area spatially identifies these areas as being"…within 1km of any of the following places…" then listing several settlements/villages within the district, and includes the "Rongotea Village Zone Boundary". The PPC 1 site is within this spatially identified area and is accordingly within the Nodal Area.

[43] Further (and not to be unduly pedantic), but the words "rural lifestyle" and "overlay" also do not appear to exist in the District Plan in reference to the Nodal Areas.

[44] Ultimately, however, whatever description may be assigned to the Nodal Areas, they are not 'zones' for the purposes of the NPS:HPL and Planning Standards. As it is not a zone for the land, it is unnecessary to consider its nearest equivalent zone under the Planning Standards, for reasons given earlier in this advice.

[45] There are two key reasons why we say that the Nodal Areas are not zones. First, "Zone" is defined term in the District Plan which means "… an area identified on the District Planning Maps, for which the District Plan specifies rules and standards for development." The Nodal Areas are not zones in accordance with this definition, as they are not identified on the district planning maps. Nodal Areas in this District Plan are un-mapped

spatial layers which are identified by definition, with these areas being secondary to the underlying zonings identified on the Planning Maps. The PPC1 site has only one zone applying to it, and that is the Rural 2 zone.

[46] Second, the planning features and characteristics of the Nodal Area are better described as a 'precinct' spatial layer, which is complementary to a zone but does not create a distinct zone. Pursuant to Chapter 12, Table 18 of the Planning Standards, a "precinct" is identified as a spatial layer with the following functions:

> A precinct spatially identifies and manages an area where additional place-based provisions apply to modify or refine aspects of the policy approach or outcomes anticipated in the underlying zone(s).

[47] This describes the functionality of the Nodal Areas, which include additional place-based provisions that modify the outcomes anticipated in the underlying Rural 2 Zone, but not in such a way that it creates an altogether new zone. Notable Planning features of the Nodal Area are:

(a) They are not described or defined as zones;

(b) They are subject to the same Rural Zone objectives and policies as Rural Zones, subject to there being some policy support for "*some small-lot subdivision… in identified rural and peri-urban localities*" which can be taken as a reference to Nodal Areas, (despite not being referred to by name);

(c) There are some provisions in the District Plan that relate only to the Nodal Area. In terms of land use, Rules B3.5.1 and B3.5.2 differently categorise some uses of land in the Nodal Area that would otherwise be permitted rural type uses the Rural 2 Zone, such as some rural industries, pig farming, silage pits and saleyards (which would be non-complying activities under Rule A2.1);

(d) In terms of subdivision, the only difference between Rural 2 zone standards and Rural 2 within the Nodal Area is that subdivisions assessed as discretionary activities for failure to comply with Rural

2 subdivision standards are subject to a discretionary activity "assessment criteria" that indicates that lot sizes cannot be less than 4,000m^2 in Nodal Areas.[16]

[48] While the application of the Nodal Area does provide for some changes to the underlying Rural 2 zoning provisions, these changes are properly described as 'modifications or refinements' to the Rural 2 zone. In our opinion, the Rural 2 zone with the addition of the Nodal Area precinct (or overlay) is clearly not a discrete 'zone' requiring the identification of a nearest equivalent.

[49] Even if the Rural 2 zone together with the Nodal Area was to be regarded as one discrete "zone", the modifications provided by the Nodal Area would not, in our opinion, mean that that the nearest equivalent zone is Rural Lifestyle. The addition of: slightly different land use rules; additional limited additional policy support for smaller subdivision; and an assessment criteria establishing a lot size bottom line – would not alter the function of the zone so much as to mean the nearest equivalent is Rural Lifestyle. It would still be General Rural.

Question 2:

Does the Council's Draft District Plan constitute a strategic planning document that would fall within the defined exemption for "identified for future urban development" in cl 3.5(7)(b)(i) the NPS:HPL?

[50] This issue relates to the Applicant's argument that the PPC1 land is identified for future development in a strategic planning document as suitable for commencing urban development over the next 10 years.

[51] The premise of this argument is that the Council has adopted a "Draft District Plan" which identifies areas for urban growth through proposed rezoning. A feature of the Council's "Draft District Plan" is that it identifies the PPC1 land as a mixture of "settlement zone" and "rural residential." It is argued that the Draft District Plan is a "strategic planning document", and that the identification of the PPC1 land as "settlement zone" in the

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16 A1.3.4 (xxiv) … The need to provide a degree of separation between future dwellings by maintaining a minimum allotment size of around 4000m2.

Draft District Plan constitutes the identification of the land as being suitable for commencing urban development. If correct, the significance is that the PPC1 site would be "identified for future urban development" and would not be regarded as highly productive land under cl 3.5(7)(b)(i).

[52] To answer this question, it appropriate to consider the cl 3.5(7)(b)(i) 'strategic planning document' exception ("**Strategic Planning Exception**") in its broader context, including its companion exception under cl 3.5(7)(b)(ii) ("**Rezoning Exception**"). This clause provides a second means by which land can be excluded from being highly productive land, where the land is "*subject to a Council initiated, or an adopted, notified plan change to rezone if from general rural or rural production to urban or rural lifestyle*".

[53] Here, what the Applicant describes as a 'strategic document' was certainly intended by MDC to become a fully-fledged 'plan change' and was being prepared as such under the RMA's Schedule 1 process. Specifically, the Draft Plan Change referred to by the Applicant was subject to the following resolution of Council on 4 February 2021 which refers to the intended Schedule 1 processes:

> Council Resolution on Draft Plan Change.
>
> Meeting date 4 February 2021. Resolution:
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> MDC 20/630 DRAFT PLAN CHANGE A (RURAL ZONE) AND B (RESIDENTIAL ZONE) APPROVAL FOR NOTIFICATION Report of the General Manager – Community and Strategy dated 12 January 2021 seeking approval to publicly consult on Draft Plan Change A and B: Review of the Rural, Residential and Village Zones, noting that consultation would be completed in accordance with Clause 3, of Schedule 1 of the Resource Management Act (1991). Principal Policy Planner, Matthew Mackay, Policy Planner Kirk Lightbody, and Contracted Policy Planner Andrea Harris gave a presentation outlining a summary of key components of the proposed Plan Changes, the proposed consultation and engagement approach, and the timeline being followed for the Plan Change.

[54] Subsequently, the Council's review of its Rural Zone (as referred to in the resolution), has not progressed to notification despite the passing of over two years. While work programmes are underway on the Council's rural zone review plan change, no draft plan changes for the rural zones have progressed to the point where it could be said that there is a Council initiated, or an adopted, notified plan change such as to meet the Rezoning Exception.

[55] Noting this context, the Rezoning Exception recognises a scenario where land has been evaluated in accordance with s 32 by a Council, with a decision then made to initiate and notify a plan change including a zone change on that basis. A s 32 report is an integral part of this process, as it must be prepared by notification time, pursuant to cl 5 of Schedule 1.

[56] By contrast, a district plan which is at the 'consultation' stage of plan change development does not require a section 32 assessment, recognising that consultation is a step that is carried out "during the preparation of a proposed policy statement or plan".[17] This recognises that consultation on the preparation of a District Plan is regarded by Schedule 1 as a pre-notification requirement in such a way that it may inform the development of the Plan Change.

[57] By law and pursuant to common sense, a version of a plan change that is approved to be circulated for the purposes of consultation under Schedule 1 should not be regarded as an adopted or Council initiated and notified plan change such as to engage the Rezoning Exception. The Environment Court has recently confirmed this in a different context in *Balmoral Developments (Outram) Ltd v Dunedin City Council,* where it held that:[18]

> to come within this exception, it is implicit that the rezoning… has to be reflected in the plan change initiated by the Council when it is initiated, that is, at the notification stage.

[58] To be fair to the applicant, it is not arguing otherwise. However, in our opinion it is relevant that the Minister has deliberately provide a specific exception for circumstances where a rezoning is reflected in a Plan

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17 RMA, sch 1, cl 3.
18 [2023] NZEnvC 59 at [63].

Change has been initiated to the point of notification, and the Draft District Plan does not meet this requirement. In this context it would completely circumvent the limits on this exception if a nascent plan change that had not progressed beyond consultation could nevertheless be regarded as a "strategic planning document" and fall into the other exception.

[59] Our opinion is that the meaning of "strategic planning document" here must be interpreted as being mutually exclusive of plan changes, including plan changes that cannot otherwise meet the requirements of the District Plan Exception.

[60] Equally, the Draft District Plan cannot be a "strategic planning document" within the meaning of the Strategic Planning Exception. This is because "strategic planning document" is defined in the NPS:HPL as being "any non-statutory growth plan or strategy adopted by local authority resolution". The reference to 'non-statutory growth plan or strategy' means a growth plan or strategy other than those required by (or as a consequence of) statute. Notwithstanding its early stage of development, the Draft District Plan is certainly under preparation as a statutory document.

[61] While it is accurate that the Council does not have a Future Development Strategy or other adopted growth plans or strategy that clearly signal the Council's resolved intentions for growth in the Rural Zone, this does not mean that one must be 'found' or pieced together for the purpose of disqualifying land from the NPS:HPL. The absence of an adopted strategic document showing suitability for future urban development is just that the Strategic Planning exception is not available under cl 3.5(7)(b)(i).

Question 3:

Does the Versatile Land Assessment contained in Appendix H of the Private Plan Change 1 request, which identifies the Private Plan Change 1 site as being LUC 4 or LUC 6, satisfy the requirement for "more detailed mapping that uses the Land Use Capability classification" so as to exclude it from the definition of LUC 1, 2 or 3 land referenced in cl 3.5(7)(a)(ii) of the NPS:HPL. If it does not, why does it not?

[62] This question concerns the interpretation of cl 3.5(7)(a)(ii) and, by extension, the definition under the NPS:HPL of LUC 1, 2 or 3 land, being:

> 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.

[63] The PPC1 site is mapped by the New Zealand Land Resource Inventory as having LUC 1, 2, or 3 land, in accordance with this definition.

[64] Appendix H of the PPC1 is a copy of a soils report carried out by a third party engaged by the Applicant, and it is provided in support of the Plan Change to demonstrate that the land is not LUC 1, 2 or 3 land. The report is called "Site Specific Assessment of the Properties and Distribution of Versatile Land at 14 Banks Road, Rongotea", and the author describes the purpose of the report (in part) as follows:

> This assessment consists of a 1:15,000 scale soil and Land Use Capability Assessment and survey, leading to determination of the properties and distribution of Versatile and Other Land at 14 Banks Road, Rongotea (Figure 1).
>
> The report has been produced to identify and map any Versatile Land in the proposed subdivision site at 14 Banks Road, according to the definition of Versatile Land in the Manawatu District Council (MDC) District Plan, for the purposes of incorporation into a proposal for a private plan change.

[65] The report concludes that, following a 1:15,000 site-specific mapping, the land contains no versatile land or highly productive land, instead comprising LUC Class 4w or 6w. The report is a site-specific assessment, considering only the land to which PPC1 applies.

[66] In this context, the specific issue is whether this site-specific assessment provided by the Applicant, can be accepted as "… more detailed mapping that uses the land use capability classification".[19]

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[19] It is worthwhile to briefly note that an alternative interpretation of the LUC 1, 2 and 3 land definition is possible. The definition captures land "*mapped by the New Zealand Land Resource Inventory* ***or*** *by any more detailed mapping*". The "*or*" in that sentence is disjunctive, not conjunctive, meaning that if the land in question satisfies **either** criterion,

[67] What qualifies as "*more detailed mapping*" in this context is not immediately clear. The term is not defined, and is only used twice in the NPS:HPL.[20] Presumably, the mapping should be "*more detailed*" than that of the New Zealand Land Resource Inventory, but whose mapping is acceptable, to what standard, and for what purpose is not clear.

[68] As such, in carrying out this interpretation exercise, it is necessary to consider the context and purpose of cl 3.5(7), which is clause at the heart of the issue.

[69] To assist, the Ministry for the Environment's Guide to Implementation ("**NPS Guide**") can be considered.[21] While the NPS Guide sits outside of the NPS, it is nevertheless a useful guide for understanding its purpose, particularly considering its authorship by the Ministry for the Environment and the fact that its sole purpose is to "help stakeholders understand and implement" the NPS:HPL.[22]

[70] In discussion concerning the 'transitional' provisions of the NPS:HPL under cl 3.5(7), the NPS Guide addresses the intentional inclusivity of HPL areas under cl 3.5(7)(a), and how this is balanced by reasonable exceptions in cl 3.5(7)(b):

> It is important to note that the criteria for the transitional definition of HPL are different to those related to mapping HPL in Clause 3.4. In particular, the transitional definition of HPL applies to all LUC class 1, 2, and 3 land in general rural and rural production zones and there is no requirement to consider whether it forms a "large and geographically cohesive area".
>
> …
>
> The intention of the exemptions in Clause 3.5(7)(b) is to make sure the NPS:HPL does not undermine work that is well

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then it falls into the definition of 'LUC 1, 2 and 3 land'. If this interpretation is correct, the Panel does not need to consider the issue of more detailed mapping at all, as the land is mapped as LUC 3 in the NZLRI, satisfying the definition and therefore capturing the plan change area under cl 3.5(7) of the NPS.

20 The other reference is in cl 3.4(5)(a), which is discussed below.

21 Ministry for the Environment. 2023. *National Policy Statement for Highly Productive Land: Guide to implementation.* Wellington: Ministry for the Environment.

22 Ibid, page 6.

> advanced by local authorities to plan for new urban growth areas. Urban growth planning requires significant effort and resources from local authorities, along with community and tangata whenua engagement. The NPS:HPL transitional definition does not apply to land already 'identified for future urban development' through a Future Development Strategy (FDS) or 'strategic planning document', or land subject to a council initiated or adopted notified plan change to rezone the land. Land that is already zoned 'future urban' is also exempt.

[71] Thus, the NPS guide clarifies that the transitional arrangements set out in cl 3.5(7)(a) intend to include (not exclude) all potential HPL, balancing the broad ambit of the clause with exceptions which are designed to ensure that pre-existing urban growth planning by local authorities is not undermined by the transitional arrangements.

[72] The NPS Guide then specifically addresses cl 3.5(7)(a), including the definition of LUC 1, 2 or 3, saying (with our emphasis):

> LUC class 1, 2 or 3 land is defined in Clause 1.3(1) as "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". This means that if a region or district has more detailed LUC mapping than the original New Zealand Land Resource Inventory, then that can be used by the relevant local authority to identify HPL under the transitional definition of HPL and for subsequent mapping of HPL.
>
> **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 guidance on best practice for undertaking more detailed assessment of LUC.

> Until HPL has been mapped in a regional policy statement and those maps have become operative, the transitional definition of HPL will apply to all land zoned general rural and rural production that is identified as LUC class 1, 2 or 3, regardless of its shape or size. This means many land parcels may only be partially identified as HPL under the transitional definition of HPL where part of the land parcel is LUC class 1, 2 or 3 and part is not.

[73] It is clear by reference to this guidance that cl 3.7(a) and by extension the words "*or more detailed mapping*" are not intended to provide an opportunity for territorial authorities to accept site-specific soil assessments to disqualify land from interim classification as Highly Productive Land. The guidance indicates that the reasons for the words "or more detailed mapping" is recognition that some local authorities (not this one) may have already undertaken detailed mapping projects within their district (likely to support of the development of growth strategies) that may be a reliable data source for the identification of HPL.

[74] Viewed in light of its purpose, it is apparent that the use of LUC 1, 2, and 3 as the threshold for inclusion in cl 3.5(7)(a)(ii) is not intended to provide a pathway by which land can be excluded from identification as HPL upon the provision of a site-specific soils assessment.

[75] Further, this interpretation is consistent with the purpose of cl 3.5(7)(a) as an 'inclusive' provision intended for the positive identification of LUC 1, 2 and 3 land in the transitional period. This interpretation providing greater assurance as to the protection of highly productive soils until the key provisions of the NPS:HPL (e.g., cl 3.4) have had the chance to be implemented.

[76] Further contextual factors support this interpretation. Specifically, it is useful to consider the distinct roles and responsibilities of regional councils and territorial authorities in respect of the mapping exercise required by cl 3.4.

[77] Relevantly, Part 2 of the NPS Guidance (released at the end of March 2023), provides commentary on the processes at pages 60-61. Here, the guidance emphasises that in carrying out the mapping exercise required

by the NPS:HPL it is the role of the Regional Council to decide on the appropriate data sources for its mapping exercise, and that it is up to the Regional Council to decide whether it needs to draw on 'more detailed mapping' where it is available. The NPS Guide emphasises that the more detailed mapping process "…includes more detailed or up-to-date data that is accepted by the regional council, **not individual, site-specific assessments undertaken by landowners**" (emphasis added).

[78] Nonetheless, the NPS Guide recognises there is a place for "site-specific assessments" in the Regional Council's HPL mapping process by acknowledging that individual landowners may attempt to use their own site-specific assessments to justify why their land should not be included as HPL.[23] Here, the NPS Guide is clear again that a Regional Council has "full discretion" as to whether it accepts site-specific assessments as a basis for excluding land parcels through its mapping process.

[79] One example as to why this discretion belongs to the regional council and not the territorial authorities is that the Regional Council's mapping process under cl 3.4(5)(c) allows it to map some areas as highly productive land even where the land might not be LUC Class 1, 2 or 3 in circumstances where such landforms part of a large and geographically cohesive area. If a territorial authority is allowed to disqualify land from being highly productive land at its own discretion (in reliance only on site-specific assessments provided by developers) the full range of considerations and mapping options which are the Regional Council's responsibility to consider could be curtailed.

[80] Accordingly, the risk of allowing district councils to disqualify land at its discretion in reliance on site-specific assessment is that it undermines the effectiveness of the transitional provisions and detracts from the ultimate responsibilities and discretions that belong to the Regional Council. As indicated by the NPS Guide and by reference to the assignment of responsibilities under the NPS:HPL and its protective purpose, this should be avoided.

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[23] Ibid, at 64.

[81] Ultimately, we consider that the proper interpretation of cl 3.7(a)(ii), and by extension the definition of LUC 1, 2 and 3 land, is that they do not allow for a District Council to accept developer provided site-specific assessments as an exception to the identification of that land as HPL during the interim period under cl 3.5(7). The words "*or more detailed mapping*" are to provide for when where a territorial authority itself may have already undertaken a suitably reliable detailed mapping exercise to the level that it may be used in the subsequent Regional Council mapping exercise.

[82] Accordingly, we consider that the document at Appendix H of PPC1, being a developer provided site-specific assessment, should not be accepted by the Panel such as to exclude it from the definition of LUC Class 1, 2 or 3.

[83] Our opinion does not mean that the Applicant's assessment is irrelevant. We stress that even though this site-specific assessment cannot be used to disqualify the land from the NPS:HPL, the information it contains in relation to the relative productive capacity of the soil can be relied upon in the substantive consideration of the proposal against the relevant policy framework in the NPS:HPL. On this point, the NPS Guide is clear that:

> Detailed site-specific assessments may be provided and considered as part of a resource consent application or rezoning process, as part of an assessment of the productive capacity of land and may involve peer review – refer to Productive capacity, in Part 1 of this guide.

[84] Site-specific assessment of the soil characteristics including its productive capacity will be relevant (and potentially very important) information for the purposes of identifying the environmental and economic costs associated with the loss of this area of HPL. Accordingly, the site-specific assessment is likely to have direct relevance to policy 3.6(4)(c), in consideration of whether this urban rezoning may be allowed.

Dated 21 April 2023

Nicholas Jessen