IN THE ENVIRONMENT COURT
AT CHRISTCHURCH

I TE KŌTI TAIAO O AOTEAROA
KI ŌTAUTAHI

Decision No. [2024] NZEnvC 155

IN THE MATTER	of the Resource Management Act 1991
AND	an appeal under clause 14 of the First Schedule of the Act and Private Plan Change 28 to the Nelson Resource Management Plan
BETWEEN	SAVE THE MAITAI INCORPORATED
	(ENV-2022-CHC-65)
	Appellant
AND	NELSON CITY COUNCIL
	Respondent
AND	CCKV MAITAI DEV CO LP and BAYVIEW NELSON LIMITED
	Applicant

Court:	Environment Judge J J M Hassan Environment Judge K G Reid Environment Commissioner K A Edmonds
Hearing:	at Nelson on 14, 15 and 16 February 2024
Appearances:	S Gepp and S Galbreath for the appellant K Rogers for the respondent J Maassen for the applicant R English in person – a s274 party
Last case event:	29 April 2024

Date of Decision: 3 July 2024
Date of Issue: 3 July 2024

INTERIM DECISION OF THE ENVIRONMENT COURT

A: The appellant has been partly successful. The following changes to PPC28 are required:

(a) the Walters Bluff area should be retained as Rural (the current zone) on the structure plan; and
(b) further amendments to the provisions package are required to address various matters we have identified.

B: Before the court can reach the conclusion that PPC28 should be approved, the drafting issues we have referred to need to be resolved.

C: We envisage the next procedural steps towards our final decision as follows:

(i) the applicant will file a revised structure plan that identifies the Walters Bluff area as Rural, as a first step;
(ii) the planning witnesses will undertake further witness conferencing to provide, by joint witness statement, a tracked change update to the applicant's closing submission version of provisions, revised and updated to reflect the findings in this decision and stating brief reasons for any differences between the planners on those matters;
(iii) by memorandum of counsel, parties may offer comments on that further joint witness statement, including offering any proposed changes to the planners' recommended updated provisions;

(iv) if any party requests or the court considers it appropriate to reconvene the hearing to consider matters arising from the joint witness statement and memoranda, directions for that will follow, anticipating that any hearing would be on a roundtable or "sleeves rolled up" format;

(v) directions for closing submissions for the purposes of the court's final decision will be made in due course.

D: To those ends, parties are to confer and the respondent is to file a memorandum, preferably a joint memorandum, proposing associated timetable directions, within 15 working days of the date of this decision. Leave is reserved for any party to seek further (or amended) timetabling directions, after first conferring with other parties, within 15 working days of the date of this decision. If need be, the court will convene a judicial telephone conference to resolve any differences on timetabling directions. Such directions will issue by Minute.

E: The question of costs (if any) will be settled following the court's final decision.

REASONS

Introduction

[1] Save the Maitai Incorporated ('STM'/'appellant') has appealed against the approval by the Nelson City Council ('NCC'/'Council') of Private Plan Change 28 ('PPC28').[1]

[2] The PPC28 site is outlined on Figure 1 ('the site'). The site is located to the northeast of Nelson City. It is a short distance by road, approximately

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1 PPC28 is formally known as *Private Plan Change 28: Maitahi – Bayview to the Nelson Resource Management Plan*.

2.6km from the city centre. Most of the site is within Kākā Valley, which forms part of the wider Maitahi/Mahitahi Valley. Kākā Hill is located to the east of the site; the Malvern Hills and the Botanical Hills are to the north and northwest. To the northwest the site extends over the ridge and adjoins the existing residential areas of Nelson City; Atawhai and Bayview.

Figure 1. The PPC28 site to the northeast of Nelson City

[3] The site is a mix of Rural and Rural Higher Density Small Holdings under the Nelson City Resource Management Plan ('NRMP'). In approving PPC28 NCC accepted the recommendation of an independent hearing panel ('IHP').[2] As approved PPC28 would:

(a) rezone identified parts of the site as Residential, Open Space – Recreation and Suburban Commercial, retaining the remainder as (including Kākā Hill) Rural;

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2 The commissioners who heard the application and made the recommendation were Mr Greg Hill (Chairperson), Ms Sheena Tepania (now Environment Judge Tepania), Ms Gillian Wratt, and Mr Nigel Mark-Brown.

(b) introduce a new Schedule X to the NRMP containing bespoke planning provisions including a site structure plan; and

(c) make associated changes to existing NRMP provisions.

[4] The applicant, CCKV Maitai Development Limited ('CCKV'/'applicant'), is a limited partnership. The partnership includes a group of experienced land developers and Ngāti Koata as to a 35% share. Ngāti Koata are an iwi with manawhenua in Whakatū (Nelson) and are tangata whenua. As discussed below, PPC28 affords Ngāti Koata an opportunity to exercise kaitiakitanga and would help secure access to land for long term housing for whānau within their rohe. One aspect of the arrangements amongst the consortium members is that Kākā Hill is to be gifted to Ngāti Koata.[3]

[5] The appellant is a not-for-profit organisation established specifically to oppose PPC28. The appellant's original submission sought that PPC28 be declined, or alternatively residential development be limited to the Bayview side of the PPC28 site.

[6] The notice of appeal filed by STM raised a wide range of issues, including adverse effects on the visual amenity and landscape values of Kākā Valley, the effect of climate change and traffic effects. The notice of appeal also alleged that there had been a failure to give effect to a number of national policy statements.

[7] By the time of the hearing the scope of the appeal had been significantly narrowed. The matters addressed by the appellant in evidence and submissions were focused on two issues:

(a) *erosion and sediment control*: the appellant submits that there is a lack of information concerning potential erosion and sediment from

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3 Applicant's opening submissions at [5].

earthworks during establishment, and a consequent lack of understanding of sediment generation risk. The appellant submits that PPC28 cannot be approved by the court unless and until this information is supplied.[4] The appellant also submits that a better understanding of sediment generation risk would inform planning provisions;[5]

(b) *National Policy Statement for Highly Productive Land* ('NPS-HPL'): two areas of the PPC28 land are identified in the National Land Use Capability Inventory[6] as LUC3. The appellant submits that the NPS-HPL precludes the rezoning of these areas as residential.[7]

[8] In addition, the appellant indicated a concern with flood risks on the PPC28 site and downstream, particularly considering the August 2022 flood event. The appellant requested that the court considers the evidence on flood risks, but did not otherwise seek to pursue the issue.[8]

[9] Richard English is a s274 party. He has raised the issue of the potential roading connection between the PPC28 site and Walters Bluff ('the Walters Bluff Connection'). The structure plan approved as part of PPC28 provides for this connection. Mr English submits that this provision is outside the scope of PPC28 as notified.

Position of NCC

[10] NCC supports PPC28 on the terms set out in the IHP recommendations report, together with amendments subsequently agreed in the Joint Witness Statement (Planning) ('JWS Planning').

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4 Appellant's opening submissions at [39].
5 Appellant's opening submissions at [12].
6 Appellant's opening submissions at [50].
7 Appellant's opening submissions at [40].
8 Appellant's opening submissions at [4(c)].

Legal framework

[11] Our jurisdiction on appeal is *de novo*. As such, we have the same powers, duties and discretions as NCC. It is mandatory for us to have regard to the decision appealed against under s290A. In formal terms the "decision appealed against" in this case is the decision of NCC to adopt the recommendations of the IHP. The IHP recommendations report was the foundation for that decision. The recommendations report sets out the reasoning and findings forming the basis of the Council's decision. We have therefore had regard to the recommendations report as part of our obligation under s290A.

[12] The IHP report was extensive and comprehensive. Many of the findings of the commissioners have not been challenged on appeal in the refined and focused case put forward to us by the appellant. We are also able to have confidence in the findings of the commissioners because we were provided with the evidence that was in front of the IHP and upon which they relied. We refer to findings of the commissioners where necessary in this decision.

[13] The legal issues raised before us were confined to raising a limited number of discrete points. We deal with these issues as appropriate in this decision. Because of the focused way submissions have been presented we need only outline the legal principles in a relatively brief way.

[14] The court has comprehensively summarised the principles applicable to plan changes in a number of cases including *Colonial Vineyard Ltd v Marlborough District Council,*[9] *Cabra Rural Developments Ltd v Auckland Council*,[10] and more recently *Edens v Thames Coromandel District Council*.[11] The applicable general

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9 *Colonial Vineyard Ltd v Marlborough District Council* [2014] NZEnvC 55 at [17].

10 *Cabra Rural Developments Ltd v Auckland Council* [2018] NZEnvC 90 at [279].

11 *Edens v Thames Coromandel District Council* [2020] NZEnvC 13 at [11].

principles are:

(a) proposed objectives are to be evaluated as to whether they are the most appropriate way to achieve the purpose of the RMA.[12] Policies are to implement objectives. The proposed rules are to implement the policies;

(b) each proposed policy, rule and method is to be examined as to whether it is the most appropriate method of achieving the objective, having regard to efficiency and effectiveness;[13]

(c) in undertaking the assessment of the efficiency and effectiveness of provisions, the court must identify and assess the benefits and costs anticipated from the implementation of the provisions and assess the risk of acting or not acting if there is uncertain or insufficient information about the subject matter of the provisions;[14]

(d) new rules must be evaluated with regard to the actual or potential effect on the environment of the activities that they would enable, in particular any adverse effects.[15]

[15] We apply these general principles in light of the issues raised in submissions and evidence in this case in the following way:

Erosion and sediment control

(a) PPC28 proposes a new objective (RE6 Maitahi/Mahitahi Bayview Area) specific to the site. We evaluate this objective as to whether it is the most appropriate way of achieving the purpose of the RMA;

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12 RMA, s32(1)(a).
13 RMA, s32(1)(b).
14 RMA, s32(2).
15 RMA, s6(3).

(b) PPC28 introduces six new policies. One policy specifically deals with erosion and sediment control (policy RE6.5), four other policies are also relevant (RE6.1 to RE6.4).[16] These policies are to be the most appropriate way to implement objective RE6;

(c) PPC28 proposes a structure plan identifying zonings (with overlays) for the site. A package of rules is also proposed. These measures are to implement plan policies.

NPS-HPL

(d) under s67(3) regional plans must give effect to national policy statements. The same requirement applies to district plans under s75(3). Both sections apply in this case because the NRMP is a combined district and regional plan. Therefore, the court must satisfy itself that approving PPC28 will give effect to the NPS-HPL.

[16] In addition to the NPS-HPL, the National Policy Statement on Urban Development ('NPS-UD') features in our consideration.

[17] For the applicant, Mr Maassen urged us to adopt a *structured analysis* approach to the interpretation of the interaction between the NPS-UD and the NPS-HPL, so that where they conflict, the NPS-UD should prevail. We understand the reference to a structured analysis to refer to the approach discussed by the Supreme Court in *Port Otago Ltd v Environmental Defence Society Inc.*[17] For the reasons set out below we do not view the present case as bringing the NPS-UD and the NPS-HPL into conflict, so it is not necessary for us to conduct the structured analysis referred to in *Port Otago*.

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16 Policy RE6.6 deals with Heritage Structures and is not relevant to the issues raised in this appeal.

17 *Port Otago Ltd v Environmental Defence Society Inc* [2023] NZSC 112.

Overview of PPC28

[18] The NRMP manages specific areas identified for urban intensification through a series of structure plans and schedules. PPC28 would introduce a new structure plan and provisions package (Schedule X) for the PPC28 site into the plan.

Structure Plan

[19] The structure plan as approved by the IHP (the most up to date version) is shown in Appendix 3. The structure plan identifies:

(a) new areas of *Residential* zoning at four densities;[18]
(b) an area of *Higher Density Small Holdings* and larger *Rural* zoning on Kākā Hill;
(c) a small area identified for *Suburban Commercial* located in a central area;
(d) an area as *Open Space Recreation* or *Neighbourhood Reserve* along the valley floor on either site of the Kākā Stream, on vegetated areas on the south of the site as it adjoins the Maitai River, and to the west as the site slopes towards Nelson City;
(e) a number of other small areas of *Kanuka Vegetation and Kahikatea* and *wetland* are identified for protection;
(f) overlays identify areas as *Residential Green* and *Revegetation* (in the rural zone);
(g) an *Indicative Road*.

[20] The approach of identifying areas for zoning in a structure plan incorporated in a schedule is consistent with how other site specific rezonings

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18 Residential, Residential Higher Density Area, Residential Lower Density Area, and Residential Backdrop Area.

are dealt with in the NRMP.[19] We comment that the proposed structure plan for PPC28 is in considerably more detail than the other examples in the NRMP.

[21] The applicant proposes to work out the details of proposed development work, including the exact location of allotments and roads (if PPC28 is approved) as part of the design phase of development. The location and volume of the required earthworks would be identified as part of this detailed design process. Resource consents for the required earthworks would then be sought to authorise development in accordance with the detailed designs.

[22] The applicant's approach puts the emphasis on the policy and rule framework within which future resource consents are considered. Mr Parsonson, an expert in sediment and erosion control who gave evidence for the applicant described the applicant's approach in the following way:

> Early in my involvement in the proposal, I formed the opinion that the critical mechanism to ensure that sediment discharges during development were acceptably minimised was to impose planning provisions that enforce, at the consenting phase, the appropriate assessment of all relevant factors, and require the appropriate design and management responses.[20]

Proposed objective and policies

[23] The NRMP contains general provisions dealing with earthworks, erosion, and sediment control. These provisions apply to the site.[21] PPC28 proposes to introduce earthworks, erosion, and sediment control provisions that are bespoke to the site. Proposed objective RE6, and a number of related policies in proposed NRMP Schedule X reflect the intentions of the applicant

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19 See Schedule E, I, U, and V of the NRMP Volume 2: Zones.

20 Parsonson statement of evidence dated April 2023 at 8.

21 NRMP, Ch 5 DO13 Soil erosion and sedimentation.

concerning these matters. Our discussion is with reference to the latest proposed versions of these provisions contained in the JWS Planning dated 24 November 2023.[22]

Objective RE6

[24] A single new objective RE6 is proposed. Given its central importance, we set it out in full together with the explanation and reasons accompanying it.

> Objective RE6
>
> The Maitahi/Mahitahi Bayview Area (Schedule X) contributes positively to the social, economic, cultural and environmental well-being of the Nelson Whakatū community including:
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> - a new mixed density residential neighbourhood amongst areas dedicated to public open space and revegetated rural land; and
> - a sense of place that is responsive to, and respectful of, natural character, landscape and Whakatū Tangata Whenua values; and
> - development that is fully serviced with three waters infrastructure, and coordinated with transport infrastructure upgrades; and
> - improved freshwater quality, freshwater and terrestrial ecosystem health and biodiversity.
>
> Explanation and Reasons
>
> RE6.i The Plan Change and the Nelson Tasman Future Development Strategy have identified the Maitahi/Mahitahi Bayview Area as being suitable

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22 The 24 November 2023 witness conferencing was the only conference which took place as part of this appeal. We were also referred to the statements produced following two previous witness conferences in 2022 as part of the IHP process.

> for accommodating future development as an expansion of Nelson's urban area to provide for population growth and meet consequential housing demand. Schedule X and the associated Maitahi/Mahitahi Bayview Structure Plan are to ensure that residential and commercial development and open space can meet a range of needs. The Schedule's provisions will ensure development is appropriate, culturally sensitive, and provides for enhanced community recreational opportunities and ecological values. The Structure Plan also provides for road, cycle and pedestrian linkages which will benefit the areas within and outside of the Maitahi Bayview Area. Landscape values are recognised through green and revegetation overlays, building control rules and overall design guidance around landscaping and use of recessive colours for buildings.

Policies RE6.1, RE6.5 and RE6.3

[25] There are three policies under which applications for resource consent for earthworks would be considered.

Policy RE6.1 – subdivision and development consistent with the Structure Plan

[26] Policy RE6.1 is to provide for subdivision and development which is consistent with the Maitahi/Mahitahi Bayview Structure Plan in Schedule X and where a number of matters are to be demonstrated. The policy provides the overall context for the structure plan and the framework within which all resource consents (including earthworks) within the site would be considered. It provides:

> **Policy RE6.1 Maitahi/Mahitahi Bayview Area**
>
> Provide for subdivision and development which is consistent with the Maitahi/Mahitahi Bayview Structure Plan in Schedule X and where it is demonstrated that:
>
> a. It will contribute to a well-functioning urban environment;
> b. It accommodates a range of housing densities and forms to meet the

diverse needs of Whakatu-Nelson's community;

c. It achieves high quality urban design outcomes;
d. Any comprehensive housing development is consistent with the requirements of Appendix 22;
e. It is consistent with the requirements of Appendix 9 (where appropriate) and Appendix 14;
f. The recreational opportunities to meet the needs of current and future residents are implemented and available to the wider community, including the creation of the identified reserves and walkway linkages;
g. The multi – modal transport connections in the Structure Plan, in the form of roads, cycleways and pedestrian linkages, are implemented; and
h. The urban environment is safe from flooding risks and is resilient from the effects of climate change.

Policy RE6.5 – earthworks

[27] Proposed policy RE6.5 is the principal policy dealing with earthworks. This policy provides:

Policy RE6.5 Earthworks, and Erosion and Sediment Control

Require that development within Schedule X does not accelerate soil erosion or mobilisation, through:

a. Implementing and maintaining best-practice erosion and sediment control measures from the outset and throughout the duration of all earthworks, ensuring that these measures are in alignment with freshwater and recreational values, with particular emphasis on minimising any adverse effects on the Kākā Stream, Maitahi/Mahitahi River and its swimming holes;
b. Discouraging earthworks on steeper slopes unless supported by site specific assessment;
c. Requiring staging and progressive stabilisation of all earthworks to minimise the area of earthworks left exposed at any one time and the adverse effects of erosion;
d. Minimising the overall extent of earthworks to that necessary to enable the proposed development or activity;
e. Incorporating a comprehensive site management and monitoring system to ensure all implemented erosion and sediment control

measures remain fully operational throughout their intended duration; and

f. Developing and implementing an adaptive management strategy that includes procedures to monitor the effectiveness of the required erosion and sediment control measures, and establishes contingency plans if actual or potential adverse effects are identified during the consenting of earthworks.

RE6.3 – integrated management

[28] Proposed policy RE6.3 provides:

Policy RE6.3 Integrated Management

…

A. Ensuring integrated stormwater management, erosion and sediment control and flood hazard mitigation by:

a. Implementing best-practice erosion and sediment control measures for the duration of all earthworks (as addressed in Policy RE6.5 Earthworks, and Erosion and Sediment Control);

…

Policies on related outcomes

[29] There are several other more general proposed policies that are also relevant. These include policy RE6.2 Whakatū Tangata Whenua Values, and policy RE6.4 Indigenous Biodiversity.

Policy RE6.2

[30] Proposed policy RE6.2 most relevantly provides:

RE6.2 Whakatū Tangata Whenua Values

Ensure subdivision, use and development of the Maitahi/Mahitahi Bayview area recognises and provides for cultural values and mātauranga Māori through:

…

c. Ensuring that subdivision and development reflects Whakatū Tangata Whenua values, and enables the exercise of kaitiakitanga; and

d. Ensuring that Whakatū Tangata Whenua are involved throughout the subdivision and development process.

…

Methods

6.2ii The specific provision for Iwi involvement following the principle of Mana Whakahaere through the requirement of a cultural impact assessment for any resource consent application involving earthworks, freshwater, discharges, subdivision or comprehensive housing.

6.2.iii Consultation with Iwi on issues relating to the relationship of Māori with their ancestral lands, water, sites, waahi tapu and other taonga.

Policy RE6.4

[31] Proposed policy RE6.4 is directed at restoring, protecting and enhancing indigenous terrestrial and freshwater biodiversity. The policy is proposed to be directively worded. It provides:

RE 6.4 Indigenous Biodiversity

Ensure that indigenous terrestrial and freshwater biodiversity is restored, protected and enhanced as an integral part of subdivision and development, including by:

a. Restoring and enhancing the degraded lower portion of the Kākā Stream where this provides for improved ecological outcomes, and may include the provision of off-set stream enhancement to ensure a net gain of in-stream values within the Structure Plan area;

b. Identifying, protecting and enhancing existing natural wetlands, their margins and connections to streams;

c. Providing for ecological linkages between ecological areas (freshwater and terrestrial) inside and neighbouring Schedule X;

d. Protecting and enhancing threatened species habitats within Kākā Stream; and

e. Providing significant areas of "Residential Green Overlay" and "Revegetation Overlay" requiring indigenous plantings.

Associated rules for the purposes of resource consent processes

Activity classification – discretionary and non-complying

[32] The evidence was that the majority of earthworks required for PPC28 at establishment would be discretionary or non-complying.[23] Any earthworks within the Residential Green Overlay is a discretionary activity.

Supplementary matters for control – rr REr.61, OSr.49 and RUr.27

[33] Applications for resource consent for earthworks within the PPC28 area would be considered under the generic rule framework in the NRMP. However, some additional matters of control and or/discretion are introduced in rules REr.61, OSr.49 and RUr.27. These additional matters are the extent to which the requirements listed in policy RE6.5 have been considered and achieved and the ESCP.

Information requirements for applications and role of the first consent application

[34] Applications for resource consent must adopt the general procedures and standards outlined within NCC's technical documents as a minimum, but higher standards may be required.

[35] Applications for resource consent for subdivision, earthworks and earthworks related discharges within the PPC28 area are subject to special information requirements in rules X.11 to X.16. Our understanding is that some information is required to be provided at the time of the *first* application

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23 Ridley evidence-in-chief at [29].

for resource consent for earthworks anywhere on the PPC28 site.[24]

[36] These include requirements for a consent application to include a proposed *Erosion and Sediment Control Plan* ('ESCP').[25]

[37] The ESCP may be "informed by" a *sediment yield analysis* of the kind argued for by Mr Ridley and discussed below. The report and management plans are to detail adaptive management procedures that will be applied with triggers and responses when effects are greater than anticipated. Reference to the Nelson-Tasman Erosion and Sediment Control Guidelines July 2019 or any subsequent updates will inform best practice erosion and sediment control.

[38] The application must include an *Ecological Impact Assessment* ('EIA') identifying and describing the significance and value of freshwater and terrestrial habitat and features, and the potential effects on ecology from the proposed activities (including earthworks). The EIA is to cover the whole of the PPC28 site. The EIA is to describe methods to achieve the outcomes in policy RE6.4, the first such report to address "all of the land and freshwater environment" contained within the structure plan and account for effects downstream (including in the Maitahi and Nelson Haven) (X.15).

[39] Associated expert reports are required to demonstrate relevant policies have been addressed in the design, including as to:

(a) "water sensitive" design (X.12);
(b) earthworks design (X.16); and

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24 PPC28 Schedule X V4 29 July 2022. X.13 Stormwater Management Plan refers to the first SMP submitted for subdivision and development of this site (which must be comprehensive and catchment wide). X.15 Ecological Impact Assessment/Environmental Management Plan refers to the first EIA submitted for subdivision and development (which must address all of the land and freshwater environment contained within Schedule X and account for potential effects on downstream receiving environments (Maitahi/Mahitahi River Nelson Haven)).

25 PPC28 Schedule X V4 29 July 2022, X.16.

(c) a stormwater management plan ('SMP') (X.13).

[40] Any resource consent application for (*inter alia*) earthworks must be accompanied by a *Cultural Impact Assessment* demonstrating compliance with policy RE6.2. This is to be prepared by or on behalf of the relevant "iwi authority", for applications involving earthworks, discharges, freshwater and terrestrial ecology, comprehensive housing or subdivision (or a statement of the reasons of the iwi authority for not providing this) (X.11).

Discussion of the evidential issues concerning PPC28

[41] In the next part of this decision, we discuss and make findings on the key issues arising from the evidence heard concerning PPC28. As we discuss, that evidence was primarily as to erosion and sediment control and related risks and issues.

Environmental context and site visit

[42] PPC28 proposes to rezone significant parts of the Kākā Valley. The valley is the catchment for the Kākā Stream. The stream flows intermittently through the valley floor, into the Mahitahi/Maitai River and on through Nelson City into the shallow estuary of Nelson Haven. The Mahitahi/Maitai River and the wider Mahitahi/Maitai valley have considerable value to Nelson residents for recreation. There are walking and picnicking areas, playing fields and significantly, a number of highly valued swimming holes.

[43] We undertook a site visit on the first day of the hearing. The itinerary was agreed between the parties and included driving over the site and visiting local features and swimming holes. Dennes Hole is one such swimming hole. It is located where the Kākā Stream joins the Maitai River in close proximity to the site.

[44] We viewed the site from a number of vantage points in the area,

including from Nelson Port and the Bayview subdivision. We made the following general observations from what we saw:

(a) we noted that Kākā Valley is a small and confined catchment. The sides of the valley are mostly steep, particularly as the valley slopes down towards Kākā stream. The steepest areas have been excluded from proposed development in the structure plan. However, some steeper areas are proposed for residential development. Some, but not all, of the steeper areas identified for residential development are subject to a vegetation overlay requiring planting of native vegetation;

(b) we viewed the two areas identified as LUC3 and observed:[26]

(i) LUC3 Area 1 ('the Kākā valley area') – this area is on the Kākā valley floor. It is comparatively small (10ha) in the context of the PPC28 site however, it is central to the entire proposed structure plan. It is also the only significant flat area within the PPC28 site. It has been identified in the structure plan for higher density residential development and an associated commercial area;

(ii) LUC3 Area 2 ('the Walters Bluff area') – this area adjoins the existing suburb of Atawhai. It is a narrow piece of land extending across the applicant's boundary for a short distance. There are no features visible on the ground to distinguish this area from the adjoining areas of the applicant's land which are not LUC3.

(c) the significance of the swimming holes, including Dennes Hole, in the Maitai was apparent. They are close to, and easily accessible from Nelson, including by cycle and on foot, and were being used for swimming when we visited.

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26 See the map of these areas at Attachment 3 to the applicant's opening submissions.

Issues concerning earthworks, erosion and sediment control

[45] Before the court, earthworks, erosion and sediment control were addressed by the following experts:

(a) for the applicant –
    (i) Mr Parsonson – an expert in resource management matters including erosion and sediment control;
    (ii) Mr Foley – geotechnical engineering;
    (iii) Mr Lile – planning.
(b) for STM –
    (i) Mr Kinnoch – planning.
(c) for NCC –
    (i) Mr Jones – planning.
(d) Mr Ridley – who appeared under a witness summons to assist the court. His evidence was relied upon by STM.

[46] The applicant and the appellant agree that erosion and sediment control are issues that need to be addressed if PPC28 is to be granted. The parties disagree on the adequacy of the risk assessment undertaken as part of the application. Central to this disagreement is the evidence of Mr Ridley.

[47] Mr Ridley is an expert in erosion and sediment control. He had been instructed by NCC to review the erosion and sediment control aspects of the PPC28 application and had provided a technical assessment which had formed part of the s42A reporting officers' report.[27] At the appellant's request, the court issued a witness summons to Mr Ridley.

[48] Mr Ridley is critical of the PPC28 provisions package in Schedule X, including the structure plan. He says that the PPC28 provisions cannot be

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27 Section 42A report of Graeme Ridley – Erosion and Sediment Control dated 20 May 2022, together with two further commenting reports.

granted until sediment yield modelling to estimate the likely sediment that development on the PPC28 site will generate, is carried out. That is the position adopted by the appellant.

[49] Ms Gepp submitted that the evidence demonstrated that the site has challenges in terms of sediment generation risk management.[28] Further these challenges should be seen in the context of:

(a) sediment disposal to sensitive receiving environments is a resource management issue for the region;[29]
(b) sediment from subdivision and building construction is the key activity of concern in terms of sediment generation in Nelson.[30]

[50] Ms Gepp submitted that in making a rule a territorial authority (and the Environment Court on appeal) must have regard to the actual and potential effect on the environment of activities including, in particular, any adverse effect (s76(3) RMA).[31] Ms Gepp accepted that the manner in which activities would be managed by rules and other proposed plan provisions was relevant in assessing the activities' effects on the environment. However, Ms Gepp submitted that it would be a breach of the requirement in s76(3) to simply defer the assessment of sediment effects to the resource consent stage.[32]

[51] Ms Gepp submitted that the applicant had not undertaken any specific sediment generation risk assessment. In reliance on Mr Ridley's opinion, Ms Gepp submitted that without this basic information and risk assessment it was "guesswork" to assess the effects of PPC28 earthworks.[33] Ms Gepp was critical of the evidence of Mr Foley and Mr Parsonson and pointed to

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28 Appellant's closing submissions at [11].
29 NRMP issue RI17.ii.
30 Nelson-Tasman Erosion and Sediment Control Guidelines 2019.
31 Appellant's closing submissions at [13].
32 Appellant's closing submissions at [13]-[18].
33 Appellant's closing submissions at [15] and [16].

inconsistencies in their evidence.

[52] Ms Gepp contrasted the information provided in the present case with the comprehensive assessment of earthworks effects undertaken in *Li v Auckland Council*[34] *('Li').*

[53] Ms Gepp referenced the National Policy Statement for Freshwater Management 2020 ('NPS-FM') concept of Te Mana o Te Wai which includes the concept of restoring and preserving the balance between water, the wider environment, and the community.[35] Given the very high value that the community places on the Maitai River, Ms Gepp submitted that preserving the balance involves (includes) having a high degree of confidence that land use changes will not result in loss of freshwater values. At present, Ms Gepp submitted that there is a lack of information on which that confidence could be based.

[54] Mr Maassen for the applicant submits that the sediment yield modelling proposed by Mr Ridley would be expensive, highly uncertain and would not add to a better understanding of the site at plan change stage.[36] Sediment yield modelling would require a detailed understanding of the design of development works such as the location of allotments and road. This detailed design work has not yet been carried out. Sediment yield modelling if required, can be carried out at the resource consent stage.[37]

[55] The issues in contention concerning erosion and sediment control were first raised by Mr Ridley. It is therefore convenient for us to set out Mr Ridley's concerns first and then deal with the applicant's response before setting out our findings.

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34 *Li v Auckland Council* [2018] NZEnvC 87.

35 Appellant's closing submissions at [30] and the NPS-FM, cl 1.3(1).

36 Applicant's opening submissions at [78](a)-[78](c).

37 Applicant's opening submissions at [81].

Mr Ridley's evidence

[56] Mr Ridley is a director of Ridley Dunphy Environmental Ltd. He has qualifications in agricultural science, and over 30 years' experience in erosion and sediment control. His experience has included detailed involvement in work for councils and the development community. Mr Ridley was the primary author of the Auckland Regional Council's Technical Publication Number 90 *Erosion and Sediment Control Guidelines for Land Disturbance Activities*, and a contributor to a number of other technical guideline documents. He peer reviewed the Nelson-Tasman Erosion and Sediment Control Guidelines which have been adopted by the Tasman and Nelson District Councils and apply locally.[38] We find that Mr Ridley is well qualified and experienced in providing advice on the management of erosion and sediment control issues relating to land development.

[57] Pursuant to the court's summons, Mr Ridley prepared a statement of evidence annexing his evidence and the reports provided to the IHP. This included his primary report dated 20 May 2022 and an addendum dated 23 June 2022. He confirmed that his views had not changed since these documents were prepared.

[58] In his primary report, Mr Ridley first assessed the rule framework proposed for erosion and sediment control as part of PPC28. He said:

(a) the PPC28 location has many challenges for erosion and sediment control associated with clay soils, steep contour in some locations and sensitive receiving environments;[39]

(b) the PPC28 bespoke rules offer no specific framework for addressing erosion and sediment control and full reliance is placed

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38 Ridley evidence-in-chief at [3].

39 Ridley s42A report, at [25].

on the general NRMP framework;[40]

(c) the majority of earthwork activities required for PPC28 would be discretionary or non-complying under rule REr.61. Under this rule discretion is restricted to a range of matters including, amongst other matters, loss of topsoil, slope failure, soil and vegetation entering rivers and coastal water, the area to be cleared at any one time, the method and timing of activity;

(d) Mr Ridley assessed the approach in rule REr.61 as typical of erosion and sediment control approaches but says it does not address any specific considerations that may be required in the PPC28 area.[41] Additional matters should be addressed, including requiring staging and open area limits and the use of chemical treatments.[42]

[59] Mr Ridley's conclusion on the proposed PPC28 rule framework was as follows:[43]

> 34. Overall, I conclude that the current NRMP provisions and the identified PPC 28 Schedule X.9 principles that apply provides negligible certain[t]y of achieving an appropriate outcome in managing erosion and sediment control for the PPC 28 area. This conclusion is reached due to the current NRMP provisions having no direct linkage to the PPC 28 specific circumstances that exist and the principles themselves providing no mention of earthworks or erosion and sediment control and hence no future consenting guidance.

[60] While we agree that the erosion and sediment control provisions of PPC28 need improvement, we do not agree that the specific circumstances of PPC28 have not been addressed as suggested by Mr Ridley. As set out below,

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40 At [26].
41 At [31].
42 At [36].
43 At [34].

we find that specific provision has been made for the circumstances of PPC28 and that the intention is that specific guidance is provided for future consenting (albeit that these provisions need to be improved). As set out below this is also the conclusion reached by Mr Kinnoch, the planning witness for STM.

[61] Mr Ridley goes on to make observations about the lack of information accompanying the application. He says:[44]

> 37. I further assess that it is currently very difficult, if not impossible, to understand from the current request what the potential sediment yields from the PPC 28 earthworks will be and therefore what is considered appropriate staging and earthwork open area limits. This is due to an absence in the request of indicative earthwork locations and extent of earthworks within these locations, and consequently an absence of a sediment yield estimate. This sediment yield estimate (normally in the form of a sediment yield model) if undertaken, would allow for a comparative analysis of sediment yields from the current land use to that during earthworks with various erosion and sediment controls in place and open area limitations applied. This information will allow for an informed assessment and provide certain[t]y of outcomes dependent upon the analysis of such an exercise, which can then be reflected through appropriate PPC 28 provisions.
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> 38. Without such sediment yield model outputs, the assessment of downstream environment effects during construction is also very difficult to determine. This consequently makes it very difficult to confirm if the extent of proposed earthworks, which would occur if the site be rezoned, is suitable or not.

[62] Mr Ridley gives evidence that it would not be appropriate for the sediment yield analysis to be undertaken later in the planning process at resource consent stage.[45] His recommendation is that any assessment occurs

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44 At [37]-[38].

45 At [39].

prior to assessing the proposed rule framework. These comments are at the core of Mr Ridley's criticism of PPC28 and STM's case before us.

[63] Mr Ridley did not claim any expertise in geotechnical assessment. He was careful to emphasise that in larger projects he would always work with an expert with geotechnical expertise.[46] The input would have been incorporated into any assessment he would carry out. Mr Ridley immediately accepted that Mr Foley was such a geotechnical expert.[47]

[64] Mr Ridley based his evidence on his experience in other earthworks projects.[48] His evidence was that the most successful projects are the ones where sediment yield estimations have been done up front and not left to the consenting process.[49] However, in questions from the court Mr Ridley was not able to point to any completed projects where his suggested approach had been adopted.[50]

Applicant's evidence

Mr Foley

[65] Mr Foley is a geotechnical engineer with 35 years' experience in geotechnical risk assessment in Nelson/Tasman and throughout New Zealand.[51] He was the supervising author of the geology and geotechnical hazards assessment undertaken by Tonkin + Taylor as part of the development of the PPC28 structure plan.[52] He was also the author of a subsequent report

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46 NOE, at 100 lines 21-30, and 101 lines 3-13.
47 NOE, at 101 line 16.
48 Ridley s42A report, at [40]-[41].
49 NOE, at 117 line 4.
50 NOE, at 117 line 17 to 120 line 11.
51 Foley Council Hearing Statement of Evidence at 3.
52 NOE, at 24 line 32.

assessing the sediment yield for the PPC28 area.[53]

[66] Mr Foley's evidence was that in the context of Tonkin + Taylor's technical work, he had undertaken a thorough investigation. He had assessed the nature of the geology and soils and a range of geotechnical hazards, including but not limited to soil erosion and slope instability, and he had assessed the risks associated with residential land development.[54] Mr Foley had undertaken both desktop and field investigation as part of this work. In summary, before us Mr Foley gave the following evidence on key matters:

(a) he rejected the suggestion by STM that an appropriate assessment of sediment generation risk has not been carried out. He said that the assessment he had undertaken that lead to the Tonkin + Taylor report had been extremely thorough and was multifaceted;[55]

(b) in his assessment the PPC28 site has fewer challenges for erosion and sediment control than many other sites, including other sites in the North Island.[56] Sediment generation risk is also lower within the site than general Nelson soils;[57]

(c) clay soils are a driver of erosion and sediment risk. Clay soils are extremely rare on the site. Mr Foley's evidence was that:

> The soil cover in the PPC28 area is comparatively thin and … sits onto of this unerodable rock, and the soil layer itself includes a lot of coarse particles so that the actual percentage of clay in them or silt in them will be less than probably 2 to 3 per cent in many cases.[58]

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53 10 June 2022 report PPC28 "Impact of geology on sediment yield" Common Bundle tab 155.

54 Foley Council Hearing Statement of Evidence at 3-4.

55 NOE, at 26 line 22 to 27 line 30.

56 Evidence-in-chief at [15].

57 NOE, at 28 line 20.

58 NOE, at 35 line 29.

(d) the geology of the PPC28 site is dominantly a very hard rock with a very thin layer of soil;[59]

(e) rock erodibility factors for the rock within the PPC28 area are 30 to 12,000 times lower than rock types present in areas such as Drury and Okura (which was subject of the court's consideration in *Li*);[60]

(f) his assessment had identified areas of low, moderate and high geotechnical risk within the PPC28 area. This assessment included but was not limited to erosion and slope stability risks;[61]

(g) he did not agree with Mr Ridley's opinion that minimal, if any, consideration of erosion and sediment risk had gone into the development of PPC28.[62] He said that he had provided significant input into the structure plan. Sensitive areas for slope stability and erosion susceptibility had been excluded from proposed development or were subject to vegetation enhancement;[63]

(h) following the input of Tonkin + Taylor, the structure plan included areas that were potentially suitable for residential development and had been zoned as such;[64]

(i) more detailed geotechnical assessments would be required as part of all future consent applications. These requirements would ensure that geotechnical risks were managed as part of detailed design and construction of the subdivision and development.[65]

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59 NOE, at 25 line 18 to 26 line 6.

60 Evidence-in-chief at [22].

61 Evidence-in-chief at [25].

62 Evidence-in-chief at [26]-[28].

63 Tonkin + Taylor Geology and Geotechnical Hazards Report March 2021 at 3.

64 Geology and Geotechnical Hazards Report at 8.

65 Geology and Geotechnical Hazards Report at 6-7.

Mr Parsonson

[67] Mr Parsonson is an environmental consultant with extensive experience in assessing applications under the RMA. He has held positions with the Auckland Regional Council as a soil conservator, land and water specialist and consent and compliance manager.

[68] In his prepared statement of primary evidence to the IHP Mr Parsonson commented on:

(a) the applicant's approach to the plan change, specifically the approach of deferring the quantification and assessment of earthworks until resource consenting;
(b) whether the effects of earthworks could be managed through the existing NRMP provisions, the proposed PPC28 provisions and the Nelson-Tasman Erosion and Sediment Control Guidelines.[66]

[69] Before us Mr Parsonson was focused on assessing and responding to the evidence of Mr Ridley from a planning perspective.

[70] Mr Parsonson considered the minimisation of potential sediment-related effects could be appropriately managed through future consenting processes under the NRMP, incorporating the existing and proposed provisions. In his view, no greater level of certainty would be achieved by undertaking indicative estimates and modelling of sediment yield at this time, and this was not necessary to inform plan change processes.[67]

[71] Mr Parsonson stated that it would be *possible* to carry out an assessment of effects of sediment generated from earthworks as part of the current plan change process. However, in his view such an exercise would involve a

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66 Parsonson statement of evidence before the IHP at 6.
67 Parsonson evidence-in-chief at 11.

"speculative assessment". The outputs from any sediment modelling at this stage would change depending on the outcome design process.

[72] Consistent with Mr Foley's evidence, Mr Parsonson rejected Mr Ridley's criticism of the applicant's approach to the development of the structure plan and provisions package. Mr Parsonson had been involved in the refinement of the structure plan and had conferred with Mr Foley on the areas to exclude from development and zoning and associated controls.[68]

Planning evidence

[73] Three planners gave evidence before the court – Mr Jones (for NCC), Mr Kinnoch (for STM) and Mr Lile (for the applicant). They all attended a joint witness conference prior to the hearing and agreed a JWS. The planners agreed to changes to the provisions of PPC28 which resulted in them reaching the follow conclusions:[69]

> 3.1 Regarding the need for further high-level sediment yield assessment to support the plan change, the experts agree that this should not be required. [Mr Kinnoch] notes that while this information may be useful for large scale earthworks proposals, he accepts that it is likely less influential with regard to specific plan provisions. [Mr Kinnoch] considers that inclusion of specific reference to sediment yield analysis, where appropriate, in the information requirement under X.16 would be sufficient. [Mr Lile] and [Mr Jones] agree with this amendment.
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> …
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> 3.5 All experts agree that the provisions as now set out in relation to earthworks are sufficiently robust. There are no areas of disagreement remaining between the experts in relation to the management of

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68 Parsonson reply evidence before the IHP at 7.

69 JWS – Planning dated 24 November 2023 at [3.1]-[3.5].

earthworks, erosion and sedimentation.

[74] All three planners (including Mr Kinnoch for STM) supported the JWS when they appeared before the court. Mr Kinnoch confirmed in questioning from Mr Maassen that sediment yield modelling at plan change stage would be high level and would be *academic* in terms of supporting any particular provisions of PPC28.[70] Any such modelling could be useful at resource consent stage.[71] In these respects Mr Kinnoch disagreed with Mr Ridley. More broadly, Mr Ridley's views do not coincide with the conclusions recorded in the JWS.

[75] It appears to us that Mr Ridley has had limited engagement with the other witnesses giving evidence and he was not asked to attend witness conferencing as part of this appeal process, although there were some discussions between Mr Parsonson and Mr Ridley.[72]

Submissions on evidential matters

[76] Ms Gepp submitted that there was an inconsistency between Mr Foley's oral evidence on the extent of clay soils on the site and the Tonkin + Taylor report. She submitted that the reference in the report to "geologically young, Holocene, alluvial deposits, consisting of clayey silts and gravels" was inconsistent with Mr Foley's description of clay soils being extremely rare on the site.[73] The alleged inconsistency was not put to Mr Foley but in any event, as we read the Tonkin + Taylor report, the reference to "clayey soils" relates to a discussion of liquefaction and lateral spreading on the Maitai River floodplain rather than an issue of soil erosion on the PPC28 site.

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70 NOE, at 187 lines 12-18.

71 NOE, at 186 lines 28-30.

72 Although Mr Ridley did have several discussions with Mr Parsonson by phone. It is also noted that Mr Ridley and Mr Parsonson attended expert conferencing on 5 May 2022 prior to the IHP hearing – Parsonson evidence-in-chief at 3.

73 Appellant's closing submissions at [10(c)].

[77] Ms Gepp referred to a letter titled "Impact of Geology on Sediment yield"[74] from Tonkin + Taylor to the applicant. The letter is dated 10 June 2022 and gives advice to the applicant on the assessment of sediment yield from the PPC28 site. The letter considers whether it would be useful to use a Universal Soil Loss Equation to estimate sediment yield on the site. The letter describes fill to be sourced from the cut area excavations as constituting "less than 20%" silt and clay. Ms Gepp states that this was a much higher figure than the 2 to 3% stated by Mr Foley.[75]

[78] It is unclear to us whether the reference in the report concerns the same issue Mr Foley was addressing in his oral evidence. The reference in the letter is part of a discussion about the composition of fill sourced from cut areas on adjoining sites. Given Mr Foley's very clear statements in oral evidence to us, we are not prepared to infer inconsistency between this evidence and his written advice of June 2022.

[79] Ms Gepp refers to a purported "disagreement" between Mr Foley and the erosion and sediment control specialists on the relative importance of slope and geology.[76] Mr Foley said geology was the "fundamental underlying cause for sediment generation" whereas Mr Parsonson identified "slope length and slope grading" as "particularly key factors" and geology as "quite a fundamental factor". Mr Ridley identified slope as the "primary factor".

[80] Having read the evidence of Mr Parsonson and Mr Foley and heard them give evidence, we do not understand there to be a disagreement. Mr Parsonson and Mr Foley were both involved in, and worked together on, the development of the structure plan. We conclude that the differences in wording between them are not material to the fundamental issue of the extent

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74 Letter titled "Private Plan Change 28 Impact of Geology on Sediment yield", Common Bundle tab 155.

75 Appellant's closing submissions at [10].

76 Appellant's closing submissions at [7].

of sediment generation risk. If there is a difference between the applicant's witnesses and Mr Ridley on this issue, we prefer the applicant's witnesses for the reasons we have set out below.

Findings

Sediment yield modelling

[81] We make the following findings about the need for sediment yield modelling as part of the PPC28 process as suggested by Mr Ridley:

(a) the difference of opinion between the experts on the value that might be gained from modelling at plan change stage is a reasonable divergence of views between such experts;

(b) the principal benefit Mr Ridley sees in the modelling is that it would enable an understanding of areas of the PPC28 site where sediment yields might be high, so that extensive earthworks could be excluded from those areas. However, we find that the structure plan has been developed with the input of a multi-disciplinary team which included Tonkin + Taylor and Mr Foley. Tonkin + Taylor and Mr Foley had undertaken significant site-specific investigations as part of this process. We find that the process adopted to develop the PPC28 structure plan has resulted in an appropriate level of certainty for the purposes of the plan change, as to those areas where erosion risk was higher, and which should therefore be excluded from development altogether. We do not agree with Mr Ridley's view that there is no evidence that proposed zonings took into account erosion risk and sediment generation capacity;

(c) we find that there would be limited value in requiring the modelling at this stage. We agree with Mr Parsonson and Mr Kinnoch that the exercise would be speculative at this stage but

that there may well be value at the resource consenting stage;

(d) Mr Ridley's views about the desirability of having sediment yield modelling undertaken at plan change stage rather than later during resource consenting for earthworks, do not appear to have regard to the detail of the policies and rules which would govern the consenting process. His concerns are at a high level of generality. In this respect, we prefer the evidence of the planners contained in the JWS, which included the views of Mr Kinnoch for STM;

(e) we have already noted Mr Ridley's extensive experience in erosion and sediment control matters. However, the specific matter Mr Ridley has put at issue is whether the applicant should be required to supply more information on erosion and sediment at plan change stage rather than, if necessary, at resource consenting. On that issue we come to a different conclusion to Mr Ridley.[77]

Lack of information – Li v Auckland Council

[82] The appellant relied upon the decision of the Environment Court in *Li* where this court gave in depth consideration to the potential adverse effects of sedimentation arising from a proposed residential plan change in a sensitive marine environment. The applicant in that case had carried out sediment yield modelling using the "GLEAMS" sediment model. Ms Gepp says that the information available to the court in *Li* was significantly greater than in the present case.[78]

[83] *Li* contains a detailed discussion of the use to which the output from the model could be put in assessing these potential adverse effects. Modelling output included expected mean daily and mean annual sediment generation, by sub-catchment area. Using this information, the court analysed the potential effects on stream morphology and channel erosion. The output from

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77 NOE, at 100 lines 21-30, and 101 lines 3-13.

78 Appellant's closing submissions at [22].

the GLEAMS model was also used to undertake further modelling to examine estuarine sedimentation and associated marine effects.[79]

[84] Counsel for STM accepted that the sufficiency of information is context specific. *Li* does not set an overarching principle that the modelling of potential earthworks is required for all plan changes.

[85] We have not found it helpful to compare the current case with the approach taken in *Li*. The factual context appears to have been different in material respects. The geological setting is very different to *Li* as explained by Mr Foley and Mr Parsonson.[80] Here the context is a site significantly less prone to erosion and sediment risk.

[86] Mr Parsonson said that the approach taken by the applicant in proposing to implement best practice erosion and sediment control measures including staging and area limitations, was also different.[81] We take these comments to refer to differences between the provisions package proposed in *Li* and the present.

[87] In the current context we have found that erosion and sediment control modelling such as that carried out in *Li* should not be required at plan change stage. That is not to say that it might not be helpful in assessing applications for resource consent.

[88] We comment that there are risks for the applicant in its approach. We were told that applications for consent for earthworks will most likely be discretionary or non-complying. The provision package as framed, has detailed and complex information requirements including the potential provision of sediment yield modelling. There is therefore uncertainty for the

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79 *Li* at [38]-[75].

80 Foley Summary Statement before IHP at [9]. Foley evidence-in-chief, at [15], [18] and [23], Parsonson NOE at 83 lines 15-29.

81 NOE, at 83 lines 7-28.

applicant as to the final form of any conditions that would be imposed on any earthworks' consents. Conditions could potentially be onerous.

Earthworks, erosion, and sediment control provisions of PPC28

[89] We make the following findings on the technical evidence and submissions before us concerning erosion and sediment control:

(a) the Mahitahi/Maitai River and the Kākā Stream are important and sensitive receiving environments. The Mahitahi is highly valued as a recreational resource close to Nelson City. It has significant value from a cultural perspective;

(b) we accept the evidence of Mr Foley that the PPC28 site is significantly geologically different from many other areas in New Zealand. Clay content is one of the main drivers of sediment risk. Clay makes up a relatively small proportion of the PPC28 soil. We accept the applicant's evidence that the PPC28 site is relatively low risk from an erosion and sediment control perspective;

(c) the PPC28 structure plan has been developed by the applicant's consultants incorporating a risk-based approach to the determination of appropriate zoning and overlays. We find that a high level sediment risk analysis has been undertaken by Tonkin + Taylor and Mr Foley, and that this has been reflected in elements of the structure plan;

(d) there may be benefit in undertaking a sediment risk modelling analysis. However, we accept that undertaking the exercise now as part of PPC28 would involve a significant element of speculation. The exercise might ultimately have to be re-done once the more detailed planning is undertaken in the context of resource consenting. In terms of our assessment under s32 we find that such an approach would be neither efficient nor effective, and there would be costs of proceeding in this way but

little or no benefit;

(e) the intended direction of the policy package as we understand it is the most appropriate way to manage the erosion and sediment control risks of the development of the PPC28 site. The provisions place the onus of managing the detail of erosion and sediment control risks on the resource consenting process. Given the relatively lesser erosion and sediment risk associated with the PPC28 site, and the approach already taken by the applicant to developing the structure plan, it is appropriate to manage residual risk in this way;

(f) we do not accept Ms Gepp's submission that adopting PPC28 rules (and other plan provisions) would be a breach of s76(3) of the RMA. It is not correct, in our assessment, to view the proposed PPC28 rules as "deferring" the assessment of erosion and sediment effects to the resource consenting stage.[82] We have found that the PPC28 structure plan has been developed incorporating a risk-based approach to the determination of appropriate zoning and overlays;

(g) we accept that there remains erosion and sediment risk associated with development on the site. However, we assess the magnitude of this risk as small. This residual risk is appropriate to be managed by way of plan provisions which, amongst other matters, govern future resource consenting. Section 76(3) is an obligation to "have regard to" actual and potential effects on the environment of activities including, in particular, any adverse effect. We have extensive regard to the potential adverse effects of erosion and sediment generation in this decision. Section 76(3) does not impose any threshold that must be met before a rule can be adopted;

(h) we accept Ms Gepp's submission that NPS-FM cl 1.3(1) – Te

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82 Appellant's closing submissions at [13].

> Mana o Te Wai – requires a high degree of confidence that land use changes will not result in the loss of freshwater values. We are satisfied that the combination of the process that has adopted by the applicant in developing PPC28 and the proposed plan provisions (*provided* these provisions can be modified as we indicate in this decision) will achieve this high degree of confidence.

[90] For clarity, these conclusions are subject to achieving appropriate amendments to PPC28 provisions in line with the drafting matters raised in this decision.

Issues as to kaitiakitanga

[91] Part 2, s7(a) RMA, directs that particular regard be given to kaitiakitanga. 'Kaitiakitanga' is defined for those purposes as:[83]

> kaitiakitanga means the exercise of guardianship by the tangata whenua of an area in accordance with tikanga Maori in relation to natural and physical resources; and includes the ethic of stewardship.

[92] As we have noted, PPC28 is in part designed to enable the exercise of kaitiakitanga, including by reflecting Whakatū Tangata Whenua values and ensuring Whakatū Tangata Whenua involvement through subdivision and development processes.

[93] We received only limited evidence on these matters, namely from Mr Hemi Toia, Kaiwhakahaere matua (Chief Executive) of Ngāti Koata's commercial and economic arm, Koata Ltd. We did not receive evidence on behalf of any of the other iwi who are manawhenua. We understand those who affiliate to Whakatū Marae, in addition to Ngāti Koata, are Ngāti Tama,

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83 RMA, s2(1).

Te Ātiawa, Ngāti Kuia, Ngāti Rārua and Ngāti Toa Rangatira.

[94] Mr Toia informed us that one kaitiakitanga purpose of Ngāti Koata's involvement in the applicant's consortium is to help secure access to land to enable provision of secure long-term housing for Ngāti Koata whanau within their rohe. That is in a context in which the Crown, in its Te Tiriti o Waitangi Deed of Settlement, included in its apology "to Ngāti Koata for its failure to ensure Ngāti Koata retained sufficient land for their future needs".[84]

[95] Related to that, as we have noted, Kākā Hill, a maunga of great significance to local iwi and a prominent landscape feature overlooking the Kākā Valley part of the Site, is to be gifted to Ngāti Koata. We were not informed whether affiliation to this maunga extends to any of the other iwi. Furthermore, we were not informed of the affiliations held with respect to the Maitai and Kākā catchment, although we observe that the website for Whakatū marae includes the specification:[85]

> Ko Mahitahi te Awa.

[96] As such, we make no findings on those matters other than that we accept Mr Toia's relevant explanations. On matters concerning environmental kaitiakitanga in the development, he informed us that Ngāti Koata is working alongside other iwi (who will continue to take different roles) in order to meet the expectations of "all tangata whenua in Nelson/Whakatū".[86] On matters concerning erosion and sedimentation management, he expressed confidence that these are "designed to reduce inputs into the Maitai awa" by "identifying the constraints in the form of land that is steep or close to waterways and allocating it for re-vegetation as an obligation of development".[87] That

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84 Toia evidence-in-chief at 2.
85 Whakatumarae.co.nz.
86 Toia evidence-in-chief at 3.
87 Toia evidence-in-chief at 4.

confidence is backed by our related evidential findings.

[97] However, we find there is a need to refine the drafting of some of the related provisions proposed in the JWS Planning so as to ensure effective delivery on these intentions (and also on related matters as to the protection of the values associated with the Maitai and the Kākā Stream tributary).

Issues as to flood risks

[98] Concern with flood risks on the PPC28 site and downstream was mentioned by the appellant in opening submissions. The appellant requested that the court consider the IHP evidence on flood risks but did not otherwise seek to pursue the issue.

[99] All of the technical briefs of evidence to the IHP from each party has been produced to us. However, none of the witnesses covering flooding issues gave evidence before us. The relevant witnesses before the IHP were: Mr Velluppillai (for the applicant on flooding issues); Mr Mills (for the applicant on stormwater management) and Mr Farrant (for the applicant on water sensitive design); as well as Ms Purton (who completed a s42A report for the Council on flooding issues). We have had regard to the briefs of evidence of these witnesses and to the findings of the IHP on this issue.[88]

[100] Mr Velluppillai gave evidence before the IHP that if post-development peak flows could be limited to no more than pre-development flows then flood hazard in the Maitahi/Mahitahi River and floodplain would not be increased as a result of PPC28 and development of the site.

[101] The IHP accepted the evidence of Mr Velluppillai that sufficient modelling and assessment had been carried out to demonstrate that there are feasible options available to address potential effects of the proposed

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88 IHP recommendations report at [641]-[648].

development on flooding.

[102] The IHP amended PPC28 provisions to require the provision of a stormwater management plan. Additionally, policy RE6.3 – Integrated Management was amended by the IHP to include a number of clauses that will need to be assessed at resource consent stage for achieving appropriate flood mitigation.

[103] Given the way the matter has been pursued before us and our review of the relevant evidence, we see no reason to depart from the findings of the IHP on the issue of flooding.

Conclusion as to the evidential issues

[104] Those findings lead us to be satisfied that none of the noted matters of dispute in the evidence are themselves impediments to our consideration of PPC28 on its merits. As we later discuss, however, there are several matters of drafting refinement requiring further input from the parties before the court will be in a position to determine the most appropriate zoning outcome and, in particular, on what basis if any should PPC28 be approved.

Higher order issues pertaining to consideration of PPC28

[105] Some higher order issues were raised in submissions as bearing on our consideration of those provisions:

(a) one set of issues concerns the proper interpretation of NPS-HPL;
(b) another set of issues concern a dispute between STM and Mr English as a s274 party and concern the so-termed Walter Bluff roading connection. In essence, Mr English challenges whether there is jurisdictional scope for the connection whereas STM challenge whether Mr English has capacity as a s274 party to address this connection at all:

(c) a third set of issues raised concerns the Fast-Track Approvals Bill 2024 ('the Bill').

[106] We address those issues in Appendix 1. For the reasons we set out in that Appendix, we conclude as follows:

(a) PPC28 must give effect to the NPS-HPL. That affects a small part of the site at Walters Bluff. However, that part of the site can remain part of PPC28, but zoned rural (the current zone). That is appropriate so as to allow for any integrated management aspects to be better addressed;
(b) Mr English has capacity to raise issues concerning the Walters Bluff Connection but he is wrong on the matter of jurisdictional scope, which we find is available. We also find that PPC28 should make provision for the Walters Bluff Connection, contrary to Mr English's submissions on the merits;
(c) the Bill has no bearing on the determination of the appeal.

Findings on proposed PPC28 provisions

[107] On the basis of our evidential findings, we next discuss various matters concerning the proposed PPC28 provisions as pursued in closing submissions. Our findings are with reference to the provisions recommended in the JWS Planning.

[108] We acknowledge that the expert evidence underpinning PPC28 is extensive and only a component of it was tested before us (the remainder not being challenged by the appellant). Understandably, this underpins the confidence expressed by Mr Toia concerning the proper enablement of environmental kaitiakitanga.

[109] However, the issues before us concern the efficacy of the planning framework.

[110] Important in those terms is the hierarchy intended by the RMA whereby rules serve to achieve related objectives and achieving and implementing related policies.[89] That is of course within an overall design that intends plans to, inter alia, give effect to NPS (relevantly for the matters discussed, including the NPS-FM).

[111] In those terms, we identify a number of matters requiring further refinement in order for the court to be in a position to determine whether or not PPC28, on a modified basis, is appropriate and can be confirmed. In several cases, we are not in a position to reach determinative findings at this time on the substance of various proposed provisions. Hence, in many cases, we pose questions for consideration and these will need to be addressed by a further decision that follows steps we set out in the directions we give later in this decision.

Objective RE6 and Policy RE6.1

[112] Objective RE6 and related policies are designed to be central to the consideration of resource consent applications relating to earthworks, erosion and sediment control. That is in the sense of giving direction to the exercise of discretion, in consenting processes, in conjunction with the rules and other provisions, including as to information requirements in Schedule X as part of the structure plan approach provided for in PPC28.

[113] However, we find that there are several matters concerning objective RE6 and related policies that need to be addressed if PPC28 is to be approved. The issues primarily concern a lack of proper direction being given for the purposes of the exercise of discretion in the grant of resource consents to develop the site according to the intentions of PPC28.

[114] One failing is as to a lack of reference in objective RE6 and related

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89 RMA, ss 67, 68, 75, 76.

proposed policy RE6.1 to the risks associated with erosion and sediment from earthworks. Added to that, policy RE6.1 is highly directive, subdivision and development is to be *provided for* consistent with the structure plan.

[115] A possible improvement to objective RE6 and policy RE6.1 could be to add a specific outcome along the lines of:

> *An environment where the adverse effects of accelerated soil erosion are avoided, remedied, or mitigated*

[116] That is similarly the case for policy RE6.5 on earthworks, erosion and sediment control. This policy is also important to the design of PPC28 in these matters.

Policies RE6.2, RE6.3 and RE6.4

[117] In addition, we find issues with the expression of policies RE6.2 on "Whakatū Tangata Whenua Values", policy RE6.3 on "Integrated Management" and policy RE6.4 on "Indigenous Biodiversity". This group of policies is unhelpfully vague in what they express by way the ecological and cultural health of the Maitahi and Kākā Stream and their associated recreational and cultural values.

Policy RE6.3

[118] The explanatory text for policy RE6.3 on "integrated management" indicates that the so termed "best practice principles" are intended to be aligned with the NPS-FM' and the National Environmental Standards for Freshwater 2020. However, in substance, the policy is more narrowly focussed. There is no overarching expression of an intention that reflects the concept and principles of Te Mana o te Wai (including in regard to kaitiakitanga and protection of the mauri) as is set out at NPS-FM cl 1.3.

Policy RE6.4

[119] Similarly, policy RE6.4 on indigenous biodiversity is narrower in focus than protection of the values of the relevant water bodies. Rather, its direction for restoration protection and enhancement is largely with respect to its five specified priorities. This narrowness extends to what is called for by way of an expert EIA report under X.15.

Policy RE6.5

[120] Turning to policy RE6.5, we note its importance as one of the restricted discretionary additional matters of control or discretion for earthworks in rule X.10.

[121] The JWS Planning proposes amendments. One is to revise the stem of the policy and to substantively amend subclauses (a) – (f) and the associated explanatory text. We identify the following issues arising from those proposed amendments:

(a) would the amended policy adequately signal and allow for consideration of the sediment yield (informing effects and risks and their treatment) in a holistic design of the subdivision or development?
(b) would the proposed revision to subclause (b) weaken the effectiveness of the policy (in particular the replacement of the direction "avoiding, to the greatest extent practicable, and otherwise minimising earthworks on steeper slopes" with the direction "discouraging earthworks on steeper slopes unless supported by site specific assessment")?
(c) what does "site specific assessment" as contemplated in the revised wording involve? How does it relate to other policy considerations?
(d) does the revised explanatory text accurately reflect what the policy

requires?

(e) is there too great a presumption in these recommended amendments that development (with and without subdivision) has a priority?

(f) do the proposed revisions to the method statement in RE6.5.ii fail to properly record that standards and guidelines are to be applied to achieve the necessary outcomes in a more directive manner with procedures detailed in management plans to implement them?

[122] Policy RE6.5 primarily directs that the acceleration of "soil erosion or mobilisation" is to be prevented through specified means. Those means include the implementation and maintenance of "best-practice erosion and sediment control measures". The only explicit reference to water quality outcomes is the statement "ensuring that these measures are in alignment with freshwater and recreational values with particular emphasis on minimising any adverse effects on the Kākā Stream, Maitahi/Mahitahi River and its swimming holes".

[123] In essence, rather than being designed according to the NPS-FM concept of Te Mana o te Wai, policy RE6.5 leaves the position on outcomes (including as to mauri) vague. Indeed, in its language of minimising adverse effects, it would appear to contemplate potential risk to the mauri of the receiving waters, for instance as arising from unanticipated but significant contamination from sediment discharges. That issue is one of proper risk management. The associated explanatory text emphasises a "risk-based" approach but is silent on whether it is acceptable for that risk to be effectively transferred to the downstream waters and their values.

Policy RE6.2

[124] In regard to the matter of kaitiakitanga, policy RE6.2 expresses certain

priorities whose importance was emphasised in Mr Toia's evidence. Those are, in summary, to:

(a) ensure subdivision, use and development on the site recognises and provides "for cultural values and mātauranga Māori";
(b) recognise the customary interests, values, rights and responsibilities exercised by Whakatū Tangata Whenua in a manner consistent with the sustainable management of natural and physical resources; and
(c) ensure that subdivision and development reflects Whakatū Tangata Whenua values, and enables the exercise of kaitiakitanga.

[125] The related method statements emphasise associated process dimensions of enabling kaitiakitanga according to the applicable tikanga, namely:

(a) iwi involvement according to the principle of Mana Whakahaere (i.e. governance, authority and mandate); and
(b) consultation with iwi on issues relating to the relationship of Māori with their ancestral lands, water, sites, wāhi tapu and other taonga.

[126] Given their important directive purposes, we find that the noted policies need to be refined so as to clearly express and reflect each of those outcome and process dimensions.

[127] In addition, given that the protection of the mauri of the noted water bodies is plainly central to the purposes of kaitiakitanga, we find it important that the noted policies plainly express bottom line protective intentions for the water bodies, according to Te Mana o Te Wai. Our present view is that this should be made explicit in each policy, rather than being simply by cross-referencing.

The rule framework

[128] We have a related concern as to whether the activity classification rules as proposed under PPC28 would allow for the proper implementation of the noted policies for the achievement of objective RE6. In particular, we are mindful that those policies call for a comprehensive and integrated management approach to their implementation. The first consent application for earthworks anywhere on the PPC28 site has particular importance in those terms.

[129] We note that the planning witnesses, in their JWS, record their opinion that permitted activity earthworks (under REr.61, OSr.49 and RUr.27), in combination with other relevant permitted activity standards (for example those addressed in Mr Lile's June 2022 evidence at [175]) sufficiently manage erosion and sedimentation effects from small scale earthworks. REr.61 is specified as a regional and district rule.

[130] In his evidence at the first instance hearing, Mr Lile referred to a number of variables determining activity status of earthworks activities and provided a table (including Earthworks (REr.61), Riparian Overlay (REr.71), Flood Path/Flood Overlays (REr.82) and for freshwater general discharges to land where it may enter water (FWr.25) and point source stormwater discharges to water FWr.22) in the Residential Zone). For example, the Riparian Overlay only relates to the esplanade widths identified in Table 6.2 (Appendix 6, NRMP), of the banks of the watercourses (Maitahi/Mahitahi River and Kākā Stream), and the Flood Overlay only relates to the lower flood plain.

[131] Importantly, Mr Lile also stated that the activity status is typically restricted discretionary (under REr.61.3) with *essentially* no limitation of the scope of discretion, and with an expectation (and requirement) from Council that a very high level of information will be provided, including use of best

practice principles in all respects.[90]

[132] Under restricted discretionary rule REr.61.3, discretion is restricted to a long list of matters (with some of these the same or similar to the reserved matters for a controlled activity). For example, these pertain to topsoil, slope failure, erosion, duration of bare soils, entry of soil and vegetation to waterbodies, catchment flows, instream and coastal habitats, control and management structures and mitigation methods (including revegetation and long-term management) and emergencies. There is also reference to values set out in Appendix 6, Table 6.1 for any river.

[133] PPC28 would add new restricted discretionary activity matters to three rules.[91] The methods attached to policy RE6.5 include:

> RE6.5.iii Comprehensive Housing Development in the Residential Zone – Higher Density Area and Subdivision – General (Residential Zone) are managed as restricted discretionary activities with Special Information Requirements for earthworks set out within Rule X.16 of Schedule X.
>
> RE6.5.v Earthworks activities are required to adhere to the general NRMP rules set out at rules REr.61, Osr.49 and Rur.27, including standards on excavation or filling depths, proximity to river banks, soil placement, and the stabilisation and rehabilitation of bare soil areas.
>
> RE6.5.iv Applications for earthworks resource consent are accompanied by a report from a suitably qualified and experienced erosion and sediment control expert demonstrating how the earthworks will meet Policy RE6.5. Adaptive management procedures are detailed, including triggers and responses when effects may exceed anticipated levels.

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90 Lile evidence before IHP June 2022 at 48.

91 The matters added are "the extent to which the requirements listed in Policy RE6.5 have been considered and achieved" and "the matters that are relevant to the Erosion and Sediment Control Plan provided in accordance with X.16 of Schedule X". These matters are added to rules REr.61, OSr.49 and RUr.27.

[134] While that would add reference to policy RE6.5, none of the other noted policies is directly referenced as relevant in the consideration of a restricted discretionary consent application.

[135] We were informed that all earthworks applications were likely to be assessed as a discretionary or non-complying activities. However, it is not clear how that aligns with the rule framework and its extensive provision for restricted discretionary activities.

[136] We are also unclear as to whether and how the rules would require or secure a comprehensive and integrated management approach to achieving the PPC28 policies at the time of the *first* application for resource consent involving earthworks anywhere on the PPC28 site.

Other drafting refinement matters

[137] We have noted some drafting inconsistency matters, but there may be others.

[138] Policy RE6.5 refers only to "development". We understand it should also refer to "subdivision" given earthworks related to both activities have erosion and sediment control implications.[92] We note that the JWS Planning adds reference to "subdivision" and "earthworks related discharges" in X.16. Mr Lile's evidence at the first instance hearing pointed out that the NRMP requires consents for earthworks as well as for the discharge of sediment and flocculant associated with temporary earthworks activity which is probably why the latter item was added.[93]

[139] Under X.1 Application of the Schedule there appears to be no specific mention of sediment and erosion control issues and their treatment. That

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92 NOE at 79.

93 Lile evidence before IHP June 2022 at 48-52.

would also appear to be an omission.

Conclusion and next steps

[140] The appellant has been partly successful. The following changes to PPC28 are required:

(a) the Walters Bluff area should be retained as Rural (the current zone) on the structure plan; and
(b) further amendments to the provisions package are required to address various matters we have identified.

[141] Before the court can reach the conclusion that PPC28 should be approved, the drafting issues we have referred to need to be resolved.

[142] We envisage the next procedural steps towards our final decision will be as follows:

(i) the applicant will file a revised structure plan that identifies the Walters Bluff area as Rural, as a first step;
(ii) the planning witnesses will undertake further planning witness conferencing to provide, by joint witness statement, a tracked change update to the applicant's closing submission version of provisions, revised and updated to reflect the findings in this decision and stating brief reasons for any differences between the planners on those matters;
(iii) by memorandum of counsel, parties may offer comments on that further joint witness statement, including offering any proposed changes to the planners' recommended updated provisions;
(iv) if any party requests or the court considers it appropriate to reconvene the hearing to consider matters arising from the joint witness statement and memoranda, directions for that will follow, anticipating that any hearing would be on a roundtable or "sleeves

rolled up" format;

(v) directions for closing submissions for the purposes of the court's final decision will be made in due course.

[143] To those ends, parties are to confer and the respondent is to file a memorandum, preferably a joint memorandum, proposing associated timetable directions, within 15 working days of the date of this decision. Leave is reserved for any party to seek further (or amended) timetabling directions, after first conferring with other parties, within 15 working days of the date of this decision. If need be, the court will convene a judicial telephone conference to resolve any differences on timetabling directions. Such directions will issue by Minute.

[144] The question of costs (if any) will be settled following the court's final decision.

For the court:

K G Reid
Environment Judge

Appendix 1

Findings on higher order issues pertaining to consideration of PPC28

NPS-HPL

[1] There are two pieces of land within the PPC28 site which may be caught by the NPS-HPL. A 10ha area on the Kaka Valley floor (the Kaka Valley area) and a 2ha area on Walters Bluff (Walters Bluff area).

[2] The IHP hearings on PPC28 took place in July 2022. The IHP report with recommendations is dated 9 September 2022. The Council decision to approve PPC28 is dated 27 September 2022.

[3] The NPS-HPL was notified on 12 September 2022 and its provisions came into effect on 17 October 2022 ("the commencement date"). This was after PPC28 had been approved by the NCC. The NPS-HPL therefore did not form part of the IHP's consideration.

NPS-HPL policy provisions

[4] There are several matters in contention between the parties as to the application of the NPS-HPL to PPC28. Before turning to these we set out the relevant provisions:

[5] Under cl 3.4 every regional council must map as highly productive land ('HPL') within its region land that:

(a) is in a general rural zone or rural production zone; and
(b) is predominantly LUC1, 2 or 3 land; and
(c) forms a large and geographically cohesive area.

[6] 'LUC1, 2, or 3 land' is defined to mean:

> 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.

[7] Under cl 3.5 the mapping of HPL must be incorporated into regional policy statements within three years using a Schedule 1 RMA process. Once a regional policy statement containing maps of HPL is operative, territorial authorities are required to amend their district plans so that they contain exactly equivalent maps. This process is to occur under s55(2) of the RMA without using the process in Schedule 1.

[8] 'Highly productive land' is defined in cl 1.3(1) as follows:

> 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 see clause 3.5(7) for what is treated as highly productive land before the maps are included in an operative regional policy statement and clause 3.5(6) for when land is rezoned and therefore ceases to be a highly productive land)

[9] Clause 3.5(7) specifies how HPL is to be treated in the period between the commencement date and when a regional policy statement containing maps of HPL becomes operative. It sets up a holding position where certain land is deemed to be HPL during this period.[94] The clause provides:

> (7) 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 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) LUC1, 2 or 3 land; but

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94 *Balmoral Developments (Outram) Ltd v Dunedin City Council (Balmoral)* [2023] NZEnvC 59 at [97].

(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.

[10] HPL that is proposed to be rezoned as urban or otherwise developed – whether during the transition period or after mapping is operative – must be assessed in in terms of the criteria for rezoning and development in cls 3.6 to 3.9, unless the exemption in cl 3.10 applies. The NPS-HPL operates as a moratorium on the rezoning and development of HPL until the assessment under cl 3.6 and following has taken place.

Matters in issue

[11] The following matters are in issue between the parties:

(a) is the NPS-HPL relevant to the court's consideration on appeal, given that it came into effect after PPC28 had been approved by the NCC?

(b) are the two areas in question caught by the transitional definition of HPL in cl 3.5(7)? In particular are the areas:

(i) LUC1, 2 or 3 land? and

(ii) zoned general rural or rural production?

If yes:

(iii) is the land *identified for future urban development* (and caught by the exception in cl 3.5(7)(b)(i))?

(c) if the two areas are HPL and are not exempt, how should they then be dealt in terms of the provisions of the NPS-HPL restricting rezoning as urban, and subdivision and inappropriate use and development (cls 3.6 to 3.10)?

[12] We deal with each question in turn.

Application of NPS-HPL on appeal

[13] Our jurisdiction on appeal is *de novo* under s290 of the RMA.

[14] The applicant's argument is that under s290 the court does not have the 'power or duty' to implement the NPS-HPL as that duty did not apply to the local authority when making its decision on PPC28.[95] Conversely, STM and the Council maintain that it is mandatory for this court to give effect to the NPS-HPL.

Applicant's submissions

[15] The applicant argues (in summary):[96]

(a) introducing new statutory functions or duties such as those set out in the NPS-HPL of potentially significant scope through an appellate process is inconsistent with the purpose of commencement provisions and the direction in the Legislation Act ss12 and 26;

(b) s12 of the Legislation Act provides that legislation does not have retrospective effect. Section 26 provides:

> (1) Secondary legislation or a part of any secondary legislation comes into force on the date stated or provided for in the legislation.

(c) the Council was not obliged to implement the NPS-HPL when deciding on PPC28 as the NPS-HPL had not commenced, and the provisions of the NPS were not addressed in the IHP's recommendations report;

(d) s290(1) has as its purpose ensuring the court supervises and reviews the validity and appropriateness of the decision made by

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95 Applicant's opening submissions at [101]-[109].

96 Applicant's opening submissions at [101]-[109].

the local authority as a planning authority. The court does not have an independent planning function;

(e) directions about rezoning in cls 3.7 and 3.10 of the NPS-HPL apply to local authorities not to the court.[97] Further it would defeat the Schedule 1 process for the court to have an original jurisdiction to address matters that could not have been addressed in submissions and that are in substance new;

(f) a notice of appeal must, under the Resource Management (Forms, Fees, and Procedure) Regulations 2003, give reasons for the appeal. It cannot be rational to accept a valid challenge to a local authority decision because the local authority did not consider a matter that by law, was irrelevant to the local authority;

(g) to the extent that the Environment Court in *Balmoral* took a contrary view the appellant submits that the decision was wrongly decided;

(h) the appellant's argument that the NPS-HPL precludes the rezoning of the Kākā Valley area as urban, is a "tick-box approach" which ignores overall context. This includes that the Kākā Valley area is at the heart of tangata whenua aspirations for housing for tangata whenua in that location.[98]

Appellant's submissions

[16] The appellant argues that the NPS-HPL is not being applied retrospectively, rather it is being applied to the decision the court is yet to make.

[17] The Environment Court addressed the issue of the application of the NPS-HPL to plan changes that are part way through the Schedule 1 process in

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97 The applicant's opening submissions at [109(c)] refer to cls 3.7 and 3.10 of the NPS-HPL. However, we apprehend that the applicant is mainly referring to cl 3.6.

98 Applicant's opening submissions at [110].

Balmoral. In that case the court held the application of newly operative national policy statements to appeal processes is to be determined by the transitional provisions of the NPS in question.

[18] The position under the NPS-HPL is clearly set out in cl 3.5(7). The transitional provisions set up a holding position which is intended to take effect on "commencement" in the interim period while the regional councils complete and make operative the required mapping exercise.

Council submissions

[19] NCC submits that the NPS-HPL is a relevant matter for the court to consider. The case law states that at each stage of the RMA process – the Council decision and any Environment Court consideration of an appeal – the relevant instruments and policy documents to consider are those which exist at the time of the decision (subject to the express terms of the RMA). The NPS-HPL is now in force and district and regional plans must give effect to it.[99]

Discussion

[20] The starting point is that under s290 the Environment Court is under a general duty to determine an appeal in the light of the circumstances prevailing at the date an appeal is heard.[100]

[21] This general principle means that the Environment Court has an obligation to address changes that occur to the planning framework between the Council decision at first instance and the hearing of the appeal where it has

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99 Council's opening submissions at [25].

100 *Te Rūnanga o Ngāti Whātua v Auckland Council* [2023] NZEnvC 277 at [162] and *Ireland v Auckland City Council* (1981) 8 NZTPA 96.

jurisdiction.[101]

[22] In *Balmoral* the Environment Court considered how it should apply the NPS-HPL to appeals from decisions on a proposed plan change determined before the NPS-HPL came into effect – a materially similar situation to that currently before us.

[23] The court in *Balmoral* referred to the High Court decision of *Horticulture New Zealand v Manawatu-Wanganui Regional Council*[102] as well as other decisions where national policy statements had been gazetted part way through the Schedule 1 plan making and appeal process.

[24] The Environment Court held in *Balmoral*:

> [91] The transitional position under the NPS – HPL is clear; by cl 4.1 until the NPS-HPL has been given effect to in the relevant regional policy statement, each territorial authority and all consent authorities, including the court, must apply the NPS – HPL to land within the scope of cl 3.5(7)(a) where it is not excluded by the exemptions in cl 3.5(7)(b).

[25] We concur with these comments.

[26] Under cl 4.1(2) territorial authorities must, by using the process in Schedule 1, notify objectives, policies and rules to give effect to the NPS-HPL within two years of regional policy statements that map HPL becoming operative. Elements of the assessment of HPL contemplated in cls 3.6 to 3.10 of the NPS-HPL involve a strategic assessment and are to be undertaken by the Council.

[27] As the appellant submits, the Environment Court does not have an

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101 *Federated Farmers of New Zealand v Northland Regional Council* [2022] NZEnvC 16 at [32].

102 *Horticulture New Zealand v Manawatu-Wanganui Regional Council* [2013] NZHC 2492.

executive planning function. It is not the court's role to initiate the implementation of the NPS-HPL under cl 4.1. However, in the appeal before us there are no practical nor jurisdictional limitations impacting our ability to ensure the granting of PPC28 does not compromise the NRMP giving effect to the NPS-HPL, while the strategic assessment under cls 3.6 to 3.10 and plan development process takes place.

[28] In conclusion, we find that the NPS-HPL is relevant to our consideration in this case. We do not accept the submissions of the applicant to the contrary.

LUC1, 2 or 3 land

[29] Both areas in question are identified in the New Zealand Land Resource Inventory ('NZLRI') as LUC3.

[30] At the hearing before us, Mr Bennison gave evidence for the applicant. He is a registered farm management consultant. He had undertaken a productivity assessment of the whole PPC28 site. Mr Bennison gave evidence before the IHP on the productive values of the PPC28 site. In short, his evidence was that the whole site was of low productivity. He said:

> the grazing of the land is not economically sustainable and there is no grazing rental being paid by the grazier. The primary objective being to use livestock to prevent and control the regrowth of the gorse and broom for pest management purposes and as a means of reducing the fire risk.[103]

[31] In considering the Kākā Valley area he said:

> The only area of the total land holding under consideration that could be considered to be highly productive and which would meet the definition above, is the flat to gently sloping area adjacent to the Kaka Stream and the Maitai

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103 Productivity report, at 6.

> Valley end of the parcel. That area is however zoned Rural Small Holdings where the baseline minimum area for subdivision is 5000 m² with an average of 1 ha. That baseline permitted activity largely precludes the land from being used for any productive purpose.

[32] Mr Bennison's productivity report did not consider the NPS-HPL which had yet to come into effect at the time it was produced. In evidence before us Mr Bennison used the findings in his productivity report to address the definition of highly productive land in the NPS-HPL. His evidence was:

> The [Kākā Valley area] fails to meet the definitions in Section 3.4 of the NPS – HPL due to the current *Rural – Higher Density Small Holdings* zoning.
>
> The [Walters Bluff area] fails due to the lack of a large and geographically cohesive area. However, as per my assessment of productive values, that land is steep and does not meet the criteria for LUC3, being:
>
> > Arable. Moderate limitations, restricting crop types and intensity of cultivation, suitable for cropping, viticulture, berry fruit, pastoralism, tree crops and forestry.
>
> My understanding of the LUC 3 land category is that it is land that, due to the characteristics of the land as it is located, is capable of intensive agricultural or horticultural uses producing at the upper limits of yield and quality. The [Walters Bluff area] does not have the characteristics required to enable any productive uses at the required level.[104]

[33] In making these comments, Mr Bennison did not attempt to assess the two areas in question under the criteria in the Land Use Capability Survey Handbook ('the Handbook') to determine its categorisation. Ms Gepp's cross-examination of Mr Bennison made this fact quite clear.[105]

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104 Bennison evidence-in-chief at 3.

105 NOE, at 8-11.

NPS-HPL evidence – process following the hearing

[34] At the conclusion of the hearing, we offered tentative thinking on these matters in view of opening submissions and evidence (including that of Mr Bennison) as well as our site visit. We indicated that subject to closing submissions, the court's understanding of the definition of LUC1, 2 and 3 in the NPS-HPL was that it availed the court of the capacity to find, on the basis of more detailed mapping, that the interim treatment of land as HPL does not apply in a particular plan appeal context.

[35] Prior to the close of the hearing the court made directions providing an opportunity for the applicant to provide an affidavit from a suitably qualified expert assessing the site following the criteria in the Handbook and mapping the area as to land use capability.

[36] This exercise has now been completed. An affidavit was filed on 8 March 2024 by Mr Grant, an agricultural consultant with expertise in soil, land resources and LUC mapping.

[37] Mr Grant's affidavit attaches a report entitled Land Resources and Land Use Capability Classification Assessment. The purpose of the report was to determine the land use capability classification of land within PPC28. The report maps land within PPC28 as to class and subclass.

[38] The result of Mr Grant's mapping exercise was that about 8.66ha of land in the approximate location of the Kākā Valley area has been assessed as LUC3. The mapped area coincides in part with the LUC3 area identified in the NZLRI but is not co-extensive with it.

[39] The Walters Bluff area has not been identified as LUC1, 2 or 3 in Mr Grant's assessment.

[40] Neither the appellant nor the Council contested the assessment

undertaken by Mr Grant.

[41] In summary we have before us uncontested evidence by way of a site-specific assessment using the Handbook methodology showing that 8.66ha of the flat and moderately sloping area on the Kākā Valley floor is LUC3 (with different boundaries to the NZLRI area). The evidence is that the Walters Bluff area is not LUC1, 2 or 3.

[42] Following the conclusion of the hearing Judge Steven's division of the Environment Court has issued its decision in *Blue Grass Ltd v Dunedin City Council.*[106] This decision addresses the issue of whether a site-specific survey is sufficient as a "more detailed mapping" for the purposes of the interim definition of HPL in cl 3.5(7) in the NPS-HPL.

[43] In summary the court finds that a site-specific assessment is insufficient for the purposes of assessing LUC1, 2 and 3 in the interim definition because any such assessment occurs after the "commencement date" in cl 3.5(7). This is a different conclusion to that signalled in our preliminary observations.

[44] With the benefit of the court's detailed consideration of the issue, which is the first time the issue had been considered by the Environment Court, we concur with the court's determination in *Blue Grass*. It is not necessary for us to re-traverse the issue and in any event given Mr Grant's assessment, the issue is now moot with regard to the Kākā Valley area (the most significant of the two areas in question).

[45] We therefore treat the Kākā Valley area and the Walters Bluff area as both LUC3, as mapped in in the NZLRI, for the purposes of the NPS-HPL.

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106 *Blue Grass Ltd v Dunedin City Council* [2024] NZEnvC 83.

Zoned general rural or rural production

[46] Under the transitional definition, HPL is land that is both LUC1, 2 or 3 and "zoned general rural or rural production".

[47] "General rural" and "Rural production" are not defined in the NPS-HPL. By cl 1.3(4)(a) a reference to a "zone" in the NPS-HPL is a reference to a zone as described in Standard 8 (the Zone Framework Standard) of the National Planning Standards 2019 ('PS').

[48] The PS is intended to bring national consistency to all plans as to (inter alia), structure, format, and definitions. However, NCC has not yet amended the NRMP to implement the PS.

[49] The current zoning for the two areas in question under the NRMP is:

(a) Kākā Valley area – Rural High-Density Small Holdings Area ('HDSHA'); and
(b) Walters Bluff area – Rural zone.

[50] The HDSHA is not identified as an independent zone under the NRMP, rather it is an "area" dealt with within the wider Rural zone provisions.

[51] Under cl 1.3(4)(b) of the NPS-HPL where a local authority has not implemented the PS a reference to a "zone" is a reference to the "nearest equivalent zone" under the PS.

[52] For the Walters Bluff area, it is common ground that the nearest equivalent zone in the PS to the Rural zone in the NRMP is General rural. For the Kākā Valley area the parties do not agree on:

(a) whether the HDSHA should be considered as part of the rural zone, or a separate zone for the purposes of cl 1.3(4)(b);

(b) if the HDSHA is a separate zone, which of the zones set out in the PS is the nearest equivalent.

[53] These issues are not straightforward. As with many other plans, the structure and terminology of the NRMP is inconsistent with the requirements of the PS. The analysis on both issues requires examining the NRMP against the spatial layers and zone classes specified in the PS.

National Planning Standard – structure and zone classes

[54] National Planning Standard 12 seeks to standardise the naming of spatial layers, their function and location within plans. The standard contains Table 18, which relevantly provides:

Spatial layer name	**Function**	**Location of spatial layer provisions**
Zones	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.	Zone chapters or sections
Precincts	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).	If apply to only one zone, in the associated zone chapter or section If apply to multiple zones, in the multi-zone precincts chapters
Specific controls	A specific control spatially identifies where a site or area has provisions that are different from other spatial layers or district-wide provisions that apply to that site or area (for example where verandah requirements apply, or where a different maximum height on a particular site applies).	Relevant chapters or sections

[55] Standards 4 and 5 set out how district and combined plans are required to deal with zones and the other spatial layers set out in the standard. The General rural zone, Rural production zone, Rural lifestyle zone and Settlement zones are identified as *sections* within the wider "rural zones" *chapter*.

[56] Standard 8 (the Zone Framework Standard) sets out descriptions of the various zones. The Rural chapter zones are the following:

Zone name	Description
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.
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.
Rural lifestyle zone	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.
Settlement zone	Areas used predominantly for a cluster of residential, commercial, light industrial and/or community activities that are located in rural areas or coastal environments.

Meaning of "Areas used predominantly for"

[57] The meaning of the expression "areas used predominantly for" as used in the zone classes set out above is not dealt with in the PS. In *Wakatipu Equities Ltd v Queenstown Lakes District Council ('Wakatipu')* the court adopted the plain and ordinary meaning of the expression and said: [107]

> We find that phrase has its plain ordinary meaning. "Areas" refers to the spatial dimensions of the zone as depicted on the PDP planning maps. "Used" refers to the purpose served by the zone. "Predominantly" means "mainly". The phrase as a whole refers to what the main purpose of the zone in question is.
>
> [footnotes omitted]

[58] Overall, the court held that the transitional definition (cl 3.5(7) and cl 1.3(4)) calls for an examination of what the *main purpose* of the relevant existing

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107 *Wakatipu Equities Ltd v Queenstown Lakes District Council* [2023] NZEnvC 188 at [18].

district plan zone is to best enable the protective aims of the NPS-HPL to be realised.[108]

Parties' positions

[59] The applicant argues:

(a) the HDSHA is a separate zone which is most closely equivalent to the Rural lifestyle zone in the PS;
(b) the PS definition of the Rural lifestyle zone refers to areas that are for rural lifestyle "within a rural environment", so that the zone can have rural character features including some rural production. The key distinguishing factor between rural and residential lifestyle zones is lot size i.e. density;
(c) the purpose of the NPS-HPL cl 1.3(4)(b) is to avoid capturing land in the definition of HPL that is managed under existing plans by spatial controls and provisions (assessed in the round) that would not correspond most closely to general and rural production zones and hence not credibly support the predominant use of soils as a rural production resource;
(d) the high density provisions of the HDSHA, in combination with a relatively low productivity means that land in the area is to be used predominantly for rural lifestyle activity. The existing land use patterns around Ralphine Way and the Rural zone HDSHA demonstrate that fact. The NRMP explicitly anticipates similar development in Kākā Valley to that already at Ralphine Way;
(e) the difference between the minimum lot area for the rural zone of 15ha and the HDSHA of 5000m² is a major difference.

[60] The Council relies on its planning expert Mr Jones. Mr Jones

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108 *Wakatipu* at [19].

completed an assessment of the relevant zone provisions and gave evidence that the nearest equivalent zone to the HDSHA is rural lifestyle.

[61] The appellant submits that the HDSHA is not a separate zone but part of the wider rural general zone.[109] In cross-examination, Mr Jones accepted that the HDSHA is not a separate zone. The appellant points to provisions and the rural zone rules indicating that Small Holdings areas are predominantly rural rather than residential in character.[110]

Discussion

Is the HDSHA a separate zone?

[62] The rural zone provisions of the NRMP reference "Small Holdings" under two categories; the lower density small holdings area and the HDSHA. The lower density small holdings areas have a minimum lot size of 3ha whereas the HDSHA has a minimum lot size of 5000m^2 and an average of 1ha. References in the plan are sometimes specific as to one or other part of the small holdings area and sometimes generic without differentiating between lower and higher density categories. Relevant parts of the rural zone provisions dealing with small holdings are set out in Appendix 2.

[63] We see the main purpose of the rural zone in the NRMP as primary production. Small holdings areas are included within the zone in locations where they do not compromise the long-term ability of the land to be used for productive purposes and in locations where conflict with large-scale rural activities is minimised.[111]

[64] The description of the rural zone in RUd.6 states that the small holdings

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109 Appellant's closing submissions on NPS-HPL at [15]-[17].

110 Appellant's opening submissions at [60].

111 DO16.1.1.ix.

areas comprise mainly valley floors along with the lower and mid slopes of a number of valleys. Further, the small holdings "zoning" recognises the limited productive potential of these areas due to the topography and small size. The zoning also allows for the clustering of housing to mitigate visual amenity effects and enables a transition from residential to rural zoning.[112]

[65] We are satisfied that within the small holdings areas providing for primary production is not the main purpose of zone provisions. The focus of the small holdings areas is rural character and amenity, and to provide rural lifestyle opportunities within the rural environment on smaller lots.

[66] The NRMP objectives and policies clearly differentiate the rural zone from the small holdings areas. The clearest example of this differentiation is in the context of rural character. In explaining the reasons for objective RU2, reason RU2.ii divides the rural environment into three "distinct areas". These are the "main area of the Rural Zone", the "Small Holdings Area" and the "coastal environment".

[67] The differentiation between the small holdings areas and the wider rural zone is carried through into the rules in the following ways:

(a) for the HDSHA the subdivision rules require that any subdivision complies with the detailed design standards for residential subdivisions;[113]
(b) commercial and industrial activities within the HDSHA are subject to the residential rules. The NRMP explains that this is because lot size within the HDSHA is closer to that in the residential zone than to the rural zone;[114]
(c) the HDSHA has special rules relating to daylight and sunlight

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112 RUd.6.
113 RUr. 78.2.e.iii, Appendix 14.
114 RUr 20.5.

> amenity controlling the effect of shading from plantation forests, shelter belts, crops and buildings on adjoining sites.

[68] We are satisfied that the purpose of the HDSHA area within the NRMP is fundamentally different to the purpose of the wider rural zone. The HDSHA rules, taken together, represent a quite different package of provisions which is not readily aligned with the rural zone provisions. The rules are much more closely aligned with residential zone rules.

[69] For these reasons we are satisfied that the HDSHA area is best regarded as a separate zone rather than one of the other spatial layers identified in Table 18 of the PS.

[70] The facts of the present case are different to *Drinnan v Selwyn District Council*,[115] *('Drinnan')* where the court held that the "Inner Plains" area of the Selwyn District Plan was used predominantly for primary production activities in common with the rest of the rural zone. The Inner Plains area was a method to manage residential demand for lots of less than 4ha within 30km of Christchurch City.[116] Other than density the zone rules for Inner Plains were identical to the remainder of the rural zone. The rules provided for a wide range of rural production and farming activities subject to meeting effects-based standards.[117]

[71] The facts of the present case are also different to *Wakatipu*,[118] where the Environment Court considered whether the Lifestyle Precinct sub-zone ('LP') should be treated as part of the wider Wakatipu Basin Rural Amenity Zone ('WBRAZ') or as a separate zone. Neither the NPS-HPL nor the PS expressly recognise a "subzone".

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115 *Drinnan v Selwyn District Council* [2023] NZEnvC 180.
116 At [101].
117 *Drinnan* at [103].
118 *Wakatipu* at [23]-[73].

[72] In *Wakatipu* the purpose of both the WBRAZ and the LP was to provide for landscape character and visual amenity. The rules relevant to the LP serve this overarching purpose.

Nearest equivalent zone

[73] We hold that the HDSHA comfortably fits within the definition of Rural lifestyle zone in Table 13 of the PS. It is an area 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.

[74] Mr Jones gave evidence that the HDSHA is most closely aligned with the Rural lifestyle zone in the PS rather than the other zone options that would engage the NPS-HPL (General rural or Rural production).[119] It will be apparent from the foregoing discussion that we agree with Mr Jones.

[75] The consequence of our conclusion under this part of the NPS-HPL is that the Kākā Valley area falls outside the transitional definition of HPL. However, the much smaller Walters Bluff area is HPL, and is subject to the NPS-HPL.

Identified for future urban development

[76] Under cl 3.5(7)(b)(i) of the NPS-HPL land that is identified for future urban expansion is exempted from the transitional definition of HPL.

[77] The phrase "identified for future urban development" is defined in cl 1.3 as follows:

> (a) identified in a published Future Development Strategy as land suitable

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119 Jones evidence-in-chief at [56].

for commencing urban development over the next 10 years; or

(b) identified:

(i) in a strategic planning document as an area suitable for commencing urban development over the next 10 years; and

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

[78] "Strategic planning document" is further defined to mean any non-statutory growth plan or strategy adopted by local authority resolution.[120]

[79] The PPC28 site[121] was identified in the NCC's Future Development Strategy ('FDS') as a suitable greenfield expansion area with an estimated development yield of 900 houses. The FDS was adopted by the NCC on 29 August 2022 and was published on 19 September 2022.

[80] The FDS does not however provide a timeframe within which development is suitable to occur. Instead, the FDS directs the user to an implementation plan for "the staging and rollout of greenfield growth areas".[122]

[81] On 14 November 2023 the Council approved the Nelson Tasman FDS Implementation Plan 2023 ('implementation plan'). The implementation plan sets out an indicative staging for all FDS sites. The PPC28 site is identified as being for medium term development, specifically in the next one to 10 years, between 2024 and 2034.

[82] The implementation plan does not provide any mapping but instead refers back to the descriptions in the FDS (N-106 – Maitahi/Bayview).

[83] The difficulty for the applicant is that the implementation plan did not

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120 NPS-HPL, cl 1.3(1).

121 Referred to in the FDS as "N – 106 – Maitai/Bayview".

122 FDS at 48.

exist as at "the commencement date" referred to in the transitional definition in cl 3.5(7). As at the commencement date the FDS did not identify the PPC28 site as suitable for commencing urban development over the next 10 years.

[84] As previously indicated the transitional definition and cl 3.5(7) are intended to operate as a qualified moratorium on the rezoning of certain land as urban. This qualified moratorium takes effect on the commencement date.

[85] The text of cl 3.5(7) and the definition of "identified for future urban development" are quite clear. We see no room to take a purposive approach to interpretation whereby we would read into the FDS the timeframe in the implementation plan as suggested might be possible by counsel for the NCC.[123]

[86] Further, as noted by Ms Gepp, the FDS and implementation plan are documents that are required to be produced by councils under the NPS-UD.[124] Clause 3.18 of the NPS-UD states that an implementation plan or part of an implementation plan is "not part of the FDS to which it relates".

[87] In reality, as at the commencement date the NCC had simply not identified the timeframe within which the PPC28 site was suitable for development. It was therefore not possible, as at the commencement date, to determine any timeframe for implementation.

[88] For these reasons the PPC28 site falls outside the exception in cl 3.5(7)(b)(i).

Clause 3.6 – restricting urban zoning of highly productive land

[89] We have determined that only the Walters Bluff area is caught by the

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123 NCC closing submissions on NPS-HPL at [23].

124 Appellant's closing submissions on NPS-HPL at [23].

transitional definition of HPL. We now consider the consequence of that determination for the rezoning of this piece of land.

[90] Rezoning as urban HPL that is caught by the NPS-HPL is restricted by cl 3.6. Clause 3.6 provides that Tier 1 and 2 territorial authorities may only allow urban rezoning of HPL if the requirements set out in sub-cl (1)(a)-(c) are met. These provide:

> (a) the urban rezoning is required to provide sufficient development capacity to meet demand for housing or business land to give effect to the National Policy Statement on Urban Development 2020; and
> (b) there are no other reasonably practicable and feasible options for providing at least sufficient development capacity within the same locality and market while achieving a well-functioning urban environment; and
> (c) the environmental, social, cultural and economic benefits of rezoning outweigh the long-term 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.

[91] The evidence before the court has not made an assessment of these matters in the way set out in cl 3.6. Likewise, the evidence before the IHP did not directly address cl 3.6 because at the time of the IHP hearing the NPS-HPL was not in effect.

Parties' positions

[92] In closing submissions, we were invited by the applicant to use the FDS 2022, the technical report accompanying it and housing and business assessments ('HBA') as "tools to reconcile the NPS HPL and NPS UD". The applicant submits that these documents provide a body of work sufficient to conclude that the NPS-HPL cl 3.2 (which relates to integrated management)

and cl 3.6 are met by rezoning the PPC28 site to urban.[125] The applicant further describes the FDS 2022 technical report and HBA as a credible documented resource for concluding that the NPS-HPL cls 3.2, 3.4 and 3.6 are met.[126]

[93] The appellant submits that the relevant assessment under cl 3.6 is of the particular area of land that is identified as HPL (the Walters Bluff area), rather than the PPC28 site as a whole. The appellant submits that this would be consistent with the approach taken in *Drinnan*.

[94] According to the appellant, such documentary information as is available as to whether PPC28 would implement the NPS-UD considers the PPC28 site as a whole. The appellant submits that there has been no specific consideration of cl 3.6 in terms of rezoning the particular areas of land identified as HPL.

[95] Clause 3.6 has not been addressed in submissions for the Council, nor is it covered in the evidence of Mr Jones the Council planning witness.

Discussion

[96] We find that the correct approach to the issue is that suggested by the appellant. The focus of our consideration under cl 3.6 is the area of HPL rather than the wider PPC28 site.

[97] Further, we are not attracted to the proposal from the applicant that we should interpret the FDS 2022, technical report and HBA as meeting the requirements of (inter alia) cl 3.6. None of these documents carry out the assessment required by cl 3.6. The three limbs of cl 3.6(1) are conjunctive. This means that the NCC may allow urban rezoning of HPL only if the

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125 Closing submissions for the applicant at [61].

126 Closing submissions for the applicant at [69].

rezoning is required to provide sufficient development capacity for housing to give effect to the NPS-UD and sub-cl (1)(b) and (c) are both also met.

[98] Sub-clauses (1)(b) and (c) are additional requirements for land that is HPL over and above the requirements of the NPS-UD. The FDS 2022 technical report and HBA are all documents prepared under the NPS-UD and have not assessed these additional requirements.

[99] The assessment required under cl 3.6, and for that matter cls 3.8 and 3.9 involve the assessment of strategic matters on a district wide basis. For example under cl 3.6(1)(b) the council may allow urban rezoning of HPL where there are no other reasonably practicable and feasible options for providing at least sufficient development capacity within the same locality and market while achieving a well-functioning urban environment. In order to meet this requirement, the council must inter-alia consider the following options:

(a) greater intensification and existing urban areas; and
(b) rezoning of land that is not HPL as urban; and
(c) rezoning different HPL that has a relatively lower productive capacity.

[100] In our view these are strategic matters that should be assessed by the Council, likely (although not necessarily) as part of a Schedule 1 process as signalled in cl 4.1(2) of the NPS-HPL.

[101] We have already noted that the NRMP must "give effect to" the NPS-HPL. The relevant provisions in the NPS-HPL are highly directive. Objective 2.1 provides:

> Highly productive land is protected for use in land-based primary production, both now and for future generations [our emphasis]

[102] Policy 5 which deals specifically with rezoning provides:

> The urban rezoning of highly productive land is avoided except as provided for in this National Policy Statement. [our emphasis]

[103] These provisions set a very high bar to meet the statutory obligation in ss 75(3) and 67(3) for the NRMP to give effect to the NPS-HPL.[127]

[104] PPC28 must treat the Walters Bluff area in a way that gives effect to the NPS-HPL. We find that the most appropriate way to deal with the Walters Bluff area is for it to retain its current Rural zoning. However, the Walters Bluff area can remain part of PPC28. This may allow for any integrated management aspects to be better addressed. Roading and infrastructure connections through Walters Bluff would still need to meet the requirements in cl 3.9 of the NPS HPL, which relate to the protection of HPL from inappropriate use and development.

Walters Bluff roading connection

Scope to include a connection to Walters Bluff in the Council's decision

[105] Mr English says there was no scope to include the Walters Bluff Road connection in the IHP's recommendations report on PPC28. The applicant acknowledged that, as notified, PPC28 did not include a connection to Walters Bluff. However, the applicant noted that several submissions sought a connection to Walters Bluff.[128] The Council also noted the connection was added following expert conferencing, which recommended the connection be included.[129]

[106] The IHP's recommendations report said:[130]

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127 *Royal Forest and Bird Protection Society of New Zealand Inc v New Zealand Transport Agency* [2024] NZSC 26.

128 Applicant's opening submissions at [126]-[129].

129 Council's opening submissions at [55].

130 IHP recommendations report at [781]-[782].

781. Issues were raised by submitters (and in particular Mr English) about the scope for adding an indicative road at Walters Bluff. That Indicative Road was added following expert conferencing between the Applicant and Council experts on urban design and transport.

782. Mr English contended that the amendment to the Structure Plan showing an Indicative Road to Walters Bluff was beyond the scope of the PPC 28. We disagree. A number of submitters, as outlined in Mr Maassen's Reply submissions, sought this road connection. These included, in particular:

- David Jackson, under the heading "Decisions Sought" and stated at 1(b) provide on the Structure Plan Indicative Road connection and position that connect to Walters Bluff and to Frenchay Drive.

- Lincoln and Christine McKenzie filed a submission stating an exit down Walters Bluff Road may be useful. That was a recommended response to their proposal to reduce large traffic volumes on the downstream roading network.

- Mr Olorenshaw filed a submission that talked about a connection at Walters Bluff (clause 2.2) that would reduce traffic demand.

- The Waka Kotahi submission noted in various places that the Applicant's TIA referred to a potential connection to Walters Bluff, but that was not shown in the Structure Plan. Waka Kotahi's general request for relief sought analysis and amendments, as discussed in this submission.

[107] There appear to be two aspects to arguments on this issue. Firstly, were there submissions seeking a road connection to Walters Bluff (that were "on" the plan change)? If a submission is not "on" a plan change, there was no jurisdiction for relief (by way of a Council amendment to PPC28) to be granted. If the submissions were "on" the plan change, was the Council's decision within the range of permissible ("in scope") decisions it could make?

[108] The Council submits that for a submission to be "on" a plan change, a two-limbed test must be satisfied:[131]

(a) firstly, the submission must address the proposed plan change itself. That is, it must address the extent of the alteration to the status quo which the change entails; and

(b) secondly, the Council must consider whether there is a real risk that any person who may be directly affected by the decision sought in the submission has been denied an effective opportunity to respond to what the submission seeks.

[109] The Council submits that the second limb guards against the concern that a plan change could be so morphed by additional requests in submissions that people who were not affected by the plan change as notified became affected through a submission which had not been directly notified to them.

[110] The nature of PPC28 was described in the request as to "rezone approximate 287-hectares of land located within Kaka Valley, along Botanical Hill and Malvern Hill … along with a number of integrated changes to associated provisions of [the NRMP]". The Council submits that PPC28 is sufficiently wide that integrating traffic connectivity to the rezoned land could have been anticipated as being within scope.[132]

[111] We accept that submission. The addition of a potential roading connection is not a widening of the PPC28 area, and is a foreseeable response to the PPC28 rezoning proposal. When a plan change proposes a change to the zone of land that would intensify its use, matters such as roading connections are clearly in issue. We note that the PPC28 request included a structure plan, which showed potential roading connections (but, admittedly,

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131 Council's opening submissions, at [51], citing *Palmerston North City Council v Motor Machinists Ltd* [2013] NZHC 1290, [2014] NZRMA 519.

132 Council's opening submissions at [58].

not to Walters Bluff Road).[133]

[112] The changes made to PPC28 included (in summary):[134]

- Addition of two secondary roads. The first indicates a potential connection with Walters Bluff and the second indicates a road connection into Kākā Valley
- The completion of certain transport upgrades (eg intersection of Nile Street and Maitai Road, Ralphine Way and Maitai Valley Road, link road from Bay View Road to Walters Bluff and/or Ralphine Way, and active mode connections from PPC 28 land to the city centre) before subdivision or development occurs

[113] The Council submits that for an amendment to be within scope, typically there would be a relationship between a submission and an amendment, such that the amendments "can fairly be said to be foreseeable consequences of any changes directly proposed in the reference".[135]

[114] The Council says Mr Jackson's submission is very clear on its face – it seeks an additional connection to Walters Bluff.[136] The Council notes that this submission was set out in the summary of submissions, which was notified on 8 February 2022. Any person who may have been directly affected by the change therefore had an opportunity to respond to that submission.[137]

[115] Mr English argued that the IHP's recommendations report mischaracterises the submissions on PPC28.[138] He considers the IHP does

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133 Private Plan Change Request to the Nelson Resource Management Plan at 144 and Attachment B1-1.

134 IHP recommendations report at 9-10.

135 Council's opening submissions at [60], citing *Albany North Landowners v Auckland Council* [2017] NZHC 138 at [115] and *Countdown Properties (Northlands) Ltd v Dunedin City Council* [1994] NZRMA 145 (HC).

136 Council's opening submissions at [63]-[64].

137 Council's opening submissions at [64]-[65].

138 English opening submissions at [27]-[30].

not (in his view, in error) refer to the prime relief sought in any of these submissions.[139] He ultimately submits that these submissions are irrelevant.[140]

[116] We have considered the relevant submissions ourselves, and find that the decision the Council made on PPC28 is within the scope of the submissions. We note that the assessment of whether any amendment made by a council decision is reasonably and fairly raised in the course of submissions should be approached in a realistic workable fashion rather than from the perspective of legal nicety.[141] An approach that focuses on the primary relief sought would be inappropriately narrow.

Whether Mr English's s274 notice was within scope of the appeal, and/ or whether the subsequent narrowing of the appeal affects his right to advance his case

[117] The applicant argues that the subject matter of the appeal was not about the amendment to the structure plan within the Bayview catchment to accommodate a connection to Walters Bluff, and it is not within the scope of the appeal and inquiry. This is because:[142]

(a) the transportation matters in the notice of appeal do not address that issue, but others;
(b) the appellant's then planner, Ms McCabe, agreed to the connection in the IHP conferencing in the JWS – Transport dated 4 May 2022;
(c) the appellant has made it plain in its memoranda that it is not concerned with the Bayview component of PPC28, but only the Kākā Valley;
(d) the appellant does not call evidence on transportation, and Mr

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139 English opening submissions at [28].
140 English opening submissions at [28].
141 *Albany North Landowners v Auckland Council* [2017] NZHC 138 at [115].
142 Applicant's opening submissions at [138].

Kinnoch did not propose or recommend changes to the structure plan;

(e) the appellant says in the joint memorandum that it is not an issue it pursues.

[118] Alternatively, the applicant submits that the issue was abandoned by the appellant in this appeal.[143]

[119] The applicant submits that s274 RMA only authorises a submitter to participate in an appeal if the submission is "about the subject matter of the proceedings".[144] Section 274(4B) provides:

> (4B) However, in the case of a person described in subsection (1)(e) or (f), evidence may be called only if it is both—
>
> (a) within the scope of the appeal, inquiry, or other proceeding; and
>
> (b) on matters arising from that person's submissions in the previous related proceedings or on any matter on which that person could have appealed.

[120] The applicant submits that restrictions in s274 have two purposes:[145]

(a) to ensure that the s274 party is only participating on their topic of interest to the extent it is a "live" matter in the proceedings; and

(b) ensuring that a s274 notice does not become an originating source of jurisdiction as if, in practical terms, the submitter were an appellant but did not file a notice of appeal.

[121] The applicant submits that Mr English is trying to "piggyback" on the appeal without filing an appeal himself on a topic in which the appellant has

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143 Applicant's opening submissions at [139].

144 Applicant's opening submissions at [140], referring to RMA, s274(1)(f)(i).

145 Applicant's opening submissions at [143].

no interest, and it cannot be said to be fairly the subject matter of the proceedings or a live issue.[146] Therefore, Mr English is not entitled to pursue this matter and cannot give evidence on it.[147]

[122] We note that the appellant submitted that traffic effects remain within the scope of its appeal (noting Mr English's interest as a s274 party) but the appellant did not itself seek to pursue traffic effects as an issue.[148] The appellant said that as the appeal has progressed, it has narrowed the focus of its appeal, and its concerns around sedimentation of the Maitai River and coastal estuaries by construction works for PPC28 are the primary focus of the appeal.[149]

[123] On 24 February 2023, the appellant amended the scope of its appeal, but stated that the remaining scope included "traffic – limited to effects of traffic on amenity, adequacy of information regarding vehicles from State Highway 6, and other traffic matters covered in the Notice of Intention to Appear by Mr English".[150] On 17 January 2024, the appellant further reduced the scope of its appeal, but noted that "traffic effects remain within the scope of the appellant's appeal".[151] Mr English submits that the purported agreement between expert witnesses does not nullify his appeal.[152] In summary, Mr English argues that there is scope to continue under ss 276 and 293 RMA.[153]

[124] We find that there is scope for Mr English to advance his case. The appellant did raise traffic issues. Whilst it has subsequently narrowed the issues which remain of concern to it, that does not affect Mr English's right to

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146 Applicant's opening submissions at [144].
147 Applicant's opening submissions at [145].
148 Appellant's opening submissions at [4(d)].
149 Appellant's opening submissions at [4(a)].
150 English opening submissions at [14], memorandum of counsel – list of witnesses for Save the Maitai Inc dated 24 February 2023, at [3(e)].
151 English opening submissions at [15].
152 English opening submissions at [17].
153 English opening submissions at [24].

advance his case. The appeal has been the subject of a hearing, and parties have proffered evidence concerning traffic issues. There is therefore no natural justice issue arising.

Merits of Walters Bluff Connection

[125] Mr English has qualifications as a civil engineer but appeared before us as a lay witness. His primary argument, outlined above, was that the Walters Bluff Connection was outside the scope of PPC28. He advanced a subsidiary argument that the roading network to which the Walters Bluff Connection would join is inadequate for the postulated traffic volumes and would increase traffic noise to unacceptable levels in the environs of Walters Bluff generally.

[126] Mr English carried out an analysis of the current network capacity of the roading network. His conclusion was that the existing network does not have the capacity to carry additional traffic flows from the PPC28 development. Furthermore, he said that the roading network in the Walters Bluff area is constrained by existing infrastructure. He said that there was little or no scope to increase capacity through expansion of the existing roads. Mr English also said that additional traffic noise would be extremely intrusive and would impact on the whole Walters Bluff environs.

[127] Mr Clark gave evidence for the applicant. He is a professional engineer specialising in traffic engineering. He provided expert evidence on traffic matters including network constraints. His evidence was that the Walters Bluff Connection would provide an important link to the hill sections of PPC28 and reduce traffic flows into Bayview and Maitai Valley Road. It would also provide excellent cycle\pedestrian links from the city centre to Bayview hill.

[128] As to capacity, Mr Clark's evidence was that the existing Walters Bluff network had the capacity to carry a lot more traffic than currently and that there were no limitations on the use of the existing network as a connection to PPC28.

[129] Mr English did not question Mr Clark and we accept Mr Clark's evidence on traffic matters. We are satisfied that there is no reason to depart from the conclusions of the IHP that PPC28 should include provision for the Walters Bluff Connection.

[130] As to the issue of traffic noise, this was a side issue in Mr English's presentation to us and Mr English did not provide any expert evidence on the matter.

[131] In these circumstances we see no reason to depart from the findings of the IHP that the Walters Bluff Connection should be provided for as part of PPC28.

Fast-Track Approvals Bill 2024

[132] In the context of closing submissions, Ms Gepp submitted that the Fast-track Approvals Bill 2024 ('the Bill') was relevant to our consideration because it relates to the framework within which the court considers technical evidence on erosion and sediment control. She submitted that resource consents for subdivision and development of PPC28 may be within the criteria for projects that may be referred to a fast track approval process.

[133] At the time of finalising this decision the select committee had not reported back following submissions on the Bill. Ultimately it is a matter for Parliament as to the final form of any legislation resulting from this process and any transitional provisions that may apply.

[134] It would be entirely speculative of us to take into account possible future legislative changes and there is no statutory basis for us to do so. We proceed on the basis that we must assess the proposal in terms of the law as it currently is.

Appendix 2

NRMP provisions dealing with Small Holdings

District Wide Objectives

DO16.1.1.xi The Zone also provides space for small holdings. The flatter rural land within the District, which is in high demand for this sort of activity, is not generally of high quality. By comparison, much of the land in demand for smallholdings in the Tasman District is of high quality, and is of high value for horticulture in particular. In line with Nelson City Council's philosophy of achieving ~~a similar or complementary~~ an appropriate policy approach, ~~a flexible approach has been taken to the rural in the Nelson area~~ some provision is made in the rural environment in Nelson for rural small holdings, to help ease the pressure on the quality soils which benefit both areas. However, protection of productive capability in Tasman should not be at the expense of loss of rural character and unsustainable, inefficient or inappropriate development in Nelson. To this end, a plan change was notified in 2005 to make undersize rural small holdings subdivisions in Nelson North a non-complying activity, until such time as a framework is in place to allow for more structured and coordinated rural small holdings subdivisions in Nelson North.[05/01] The underlying philosophy of the management of this resource remains to protect its productive capability and to meet the other objectives of the Zone.

Rural Zone Provisions

Description

RUd.6

The Rural Zone can be defined as the area largely used for productive purposes, mainly for forestry and farming, excluding major conservation areas (mainly owned by the Council and the Department of Conservation). The zone includes a Small Holdings Area. The Small Holdings Area comprises mainly valley floors, along with the lower and mid slopes of a number of valleys including the Wakapuaka, and the Teal, Lud, and Marsden Valleys. Higher Density Small Holdings areas have been provided to the rear of the Residential Zone at Ngawhatu, Marsden and Enner Glynn Valleys, adjoining the Rural farmland on the southern boundary of the land at Ngawhatu and near the entry to Marsden Valley. This zoning recognises the limited productive potential of these areas due to their topography and small size, and in the case of the Higher Density Small Holdings area in upper Marsden Valley, the maintenance of the open character of this visible slope. The zoning also allows for clustering of housing to mitigate visual amenity effects, and/or enables a transition from Residential to Rural Zoning. The Small Holdings Area in Enner Glynn Valley will enable a level of development that is compatible with the rural amenity values of the valley, and does not impact on the important regional resources (the landfill site and quarry) in York Valley.

Objectives

RU2

Rural Character

***Maintenance* or enhancement of an *environment* dominated by open space and natural features.**

Reasons

RU2.i

The natural character on which the rural character is based relies on the maintenance of natural ecosystems such as riparian, riverine and estuarine

systems, and on the remnants of original vegetation together with significantly regenerated areas. Should these be removed from the Nelson area, the rural area would lose much of its unique qualities which differentiate it from many other parts of the country. In addition to natural features, pastoral agriculture and forestry contribute to the rural character.

RU2.ii

The rural environment can be separated into three distinct areas. These are as follows:

a. The **main area of the Rural Zone**, being the steeper hill areas, away from the coast and generally separated from the urban environment. This area tends to form the secondary backdrop to the city, and has a low level of apparent modification to the landscape. It does however contain significant areas of exotic forest development, which will remain a dynamic environment as varying age classes of forest are harvested and replanted. It also contains smaller areas of pastoral farming, and areas of land in various states of reversion to exotic, and in the longer term, indigenous vegetation. The area contains a very low level of development in terms of structures, as properties tend to be large, with a high degree of separation between clusters of buildings.

b. The **Small Holdings Area** is generally contained within valley floors or between urban development and the Rural Zone. The pattern of development is much greater in this area, with structures at more regular intervals, but still at a low level of density with significant areas of land in between. Small holdings are not rural residential areas, but are large enough to provide the opportunity for a range of rural activities. The character is predominantly rural rather than residential. Use of the land within this area is far more varied, with horticultural activities

interspersed in between areas of grazing, and occasionally areas of indigenous vegetation particularly in the Lud and Teal Valleys. Part of the Nelson South area (land accessed off Champion Road and Hill St North) has been identified as a Rural – Higher Density Small Holding Area, because of its location adjacent to the Residential Zone, its small size and its role as a buffer to adjoining Rural Zone Land. Parts of the Marsden and Enner Glynn Valley area have also been identified as a Rural Zone – Higher Density Small Holding Area, because of the limited productive potential of these areas due to their topography and small size, and in the case of upper Marsden Valley, the ability to cluster development to mitigate visual amenity effects in relation to the open rural character of the visible slopes. The Higher Density Small Holdings Area, as it relates to land within Schedule I (Marsden Valley, eastern area Rural Zone – Higher Density Small Holdings Area), Schedule V (Marsden Hills), Schedule E (Ngawhatu Residential Area) to the rear of the Residential Zone and adjoining part of the Rural Zoned farmland along the Southern boundary, and Schedule W (Enner Glynn and Upper Brook Valley) provides for allotments of an average of 1ha, but with a minimum subdivision area of 2,000m^2 subject to the provision of reticulated services. This zoning will provide a transition between Residential and Rural areas and, as it relates to the more visually prominent area just below the Barnicoat Range, with development sensitive landscape values. This significant variation in the average density, and the minimum lot size, is to encourage small enclaves/clusters of serviced development with significant open space separating these. Geotechnical constraints within this area will also restrict development to a limited number of enclaves of settlement. In Marsden Valley (Schedule I, Chapter 7 - Residential Zone) the western Rural Zone – Higher Density Small Holdings Area has

a site size requirement of 6,000m² average and 2,000m² minimum with a requirement for reticulated services. This recognises that this area is surrounded by Residential zoning and is therefore not located in a rural or rural to residential transition environment. As per other specified areas of Rural Zone – Higher Density Small Holdings Areas the provisions allow for clustering of development. Within the Maitai Valley, adjoining the existing urban area, a high density Small Holdings Area has been defined. This is an extension of similar existing development.

Since the plan was notified in 1996, there has been a trend of undersize subdivisions in the North Nelson Rural Zone and Rural Small Holdings area. A plan change was notified in 2005 to make undersize subdivisions between The Glen Road and Whangamoa Saddle non-complying activities. This is an interim measure to halt this trend and avoid further adverse effects on rural character, until such time as a more structured and coordinated framework for subdivision is in place.[05/01]

c. The **coastal environment** is that area between the coast and generally the first ridgeline to the landward side of the coast. The pattern of development in this area has generally been very low key, with a low level of development of structures and patterns of development. Two areas of close subdivision occur within this overlay, being the settlement at the Glen, and a cluster of dwellings at Cable Bay. It is seen as a matter of priority through the Act, the New Zealand Coastal Policy Statement and of this Plan that these areas remain limited in extent.

Rural Zone Policies

RU2.2
Density – Small holdings

Small land holdings should be of sufficient size to provide for:

a. *maintenance of general rural character and amenities, and*
b. *being visually unobtrusive, utilising topography to avoid visual impacts, and*
c. *servicing from existing infrastructure, especially roads, and*
d. *privacy and separation of dwellings, and*
e. *containment of the adverse effects on site, especially to provide for on site sewage disposal, and*
f. *avoidance or mitigation of natural hazards,*

and should be in close proximity to the urban area of Nelson, to promote transport efficiency.

Objective RU3 deals with amenity. The explanations states:

RU3.iii Experience has shown, in particular, that mixing small-site residential activities with rural activities creates pressure on those rural activities to cease parts of their operation which may have these impacts. For this reason this Plan seeks to exclude the continuing ingress of residential-only activities into the rural environment, and control the location of small holdings in order to minimise these conflicts. Promoters of other activities which require a rural location should locate in this area with full awareness that these effects exist.

Rules

RUr.34.1

Shelterbelts are permitted if they are set back at least:

a. 10m from any boundary unless the written consent of the neighbour is obtained and lodged with Council, and defensible space is maintained around any existing or proposed residential unit (as defined), and

b. 50m from any Residential Zone boundary, and

c. trees do not shade a public road between 10am and 2pm on the shortest day, and

d. trees do not obscure visibility at intersections on public roads.

In addition to the above requirements, within the Small Holdings Area and adjoining any site in the Small Holdings Area, the requirements of Appendix 16 - Daylight admission – small holdings areas shall apply.

RUr.20.5

Industrial and commercial activities in rural areas have the potential to have high levels of impacts on the amenity of adjacent activities and zones. This rule provides limits to the extent of any industrial or commercial activity beyond which each one is to be considered on its merits.

Lot size in the Rural High Density Small Holdings area is closer to that provided for within the Residential Zone than to that provided for within the Rural Zone. As a consequence, industrial or commercial activity is only permitted in the Rural High Density Small Holdings area where it satisfies the requirements of rule REr.21 which controls home occupations within residential zones.

Appendix 16

Daylight admission (Small Holding Areas – Rural zone)

AP16

Overview

AP16.i

This appendix aims to provide a reasonable standard of daylight and sunlight amenity on sites within the Small Holdings Areas.

AP16.1

Introduction

AP16.1.i

This recognises that sites within the Areas are smaller than elsewhere within the Rural Zone. Therefore the effect of shading from plantation forests or shelter belts on adjoining sites can be more significant. The effects include shading of neighbouring crops or pasture, and of houses and living areas. The sites that cause the shading can be other sites within the Small Holdings Areas, or rurally zoned sites with a boundary adjoining a site within the Small Holdings Areas.

AP16.1.ii

The control consists of a recession plane inclined into the site on which the trees are growing. The control applies only to boundaries on the southern side of a site as described below. This is because it is trees close to such a boundary on the northern side that will more severely limit the amount of sunlight and daylight reaching an adjoining property to the south.

AP16.2

How the controls apply

a. The recession control applies on any southern boundary (other than a road boundary) of:

   i. a site within the Small Holdings Areas, or

   ii. a site within the Rural Zone where the boundary is shared with a site within the Small Holdings Areas,

   where a notional line drawn perpendicular and inwards from that boundary falls within 45° either side of true North (see Figures 2 and 3).

Note, however, that a site within the Small Holdings Areas does **not** have to provide daylight amenity to an adjoining rurally zoned site.

b. Trees within plantation forests and shelter belts must not penetrate a recession plane originating 2.5m above ground level at a site boundary (other than a road boundary) and inclined into the site and upwards at an angle 45° (see Figure 1).

RUR.78.2

Subdivision not located in the Services, Coastal Environment, Conservation, Natural Hazard or Heritage overlays as shown on the Planning Maps is controlled, if:

e. the net area of every allotment is at least
   i. 15ha, except in the Small Holdings Areas, or
   ii. 3ha ~~average lot size with a 2ha~~ 05/01 minimum lot size in the Lower Density Small Holdings Area, or
   iii. 1ha average size with a 5,000m² minimum size except in Marsden Valley Schedule I, Chapter 7, eastern area), Marsden Hills (Schedule V, Chapter 7), the south side of Enner Glynn Valley (Schedule W) and Ngawhatu where the minimum size is 2000m², and except in Marsden Valley, (Schedule I, Chapter 7, western area) where the average size is 6,000m² and the minimum size is 2,000m² (all exceptions are subject to the provision of reticulated services) in the Higher Density Small Holdings Area provided that any allotment to be created complies in all respects with the requirements of Appendix 14 - Design standard,
   iv. no minimum in the case of allotments created solely for access or for a network utility, and

APPENDIX 3

THE PPC28 STRUCTURE PLAN

THE SEAL OF THE ENVIRONMENT COURT NEW ZEALAND

Proposed Structure Plan (Over Aerial)

Legend

- Residential Zone
- Residential Zone Higher Density Area
- Residential Zone Lower Density Area
- Residential Zone Lower Density Backdrop Area
- Open Space Recreation Zone
- Suburban Commercial Zone
- Rural Zone
- Higher Density Small Holdings Area
- Neighborhood Reserve
- Indicative Road
- Indicative Walkway/ Cycleway Link
- Indicative Lookout Locations
- Wetland
- Existing Stream
- Proposed Stream
- Site Boundary
- Internal Cadastral Boundaries
- Secondary Roads
- Network Tasman Limited Corridor - No Earthworks
- Residential Green Overlay
- Revegetation Overlay in Rural Zone
- Kanuka Vegetation and Kahikatea Tree to be Protected

Scale 1:10000@A3