

BEFORE THE HEARING COMMISSIONERS

UNDER

The Resource Management Act 1991

AND

IN THE MATTER

of the Proposed Otago Regional Policy Statement
2021

**ORC SUBMISSIONS FOR HEARING
UFD – Urban form and development**

Dated 14 February 2023

ROSS DOWLING MARQUET GRIFFIN
SOLICITORS
DUNEDIN

Telephone: (03) 477 8046
Facsimile: (03) 477 6998
PO Box 1144, DX YP80015

Solicitor: A J Logan

**ORC SUBMISSIONS FOR HEARING
UFD – Urban form and development**

May it Please the Commissioners:

Introduction

- 1 It is an ORC function to establish, implement, and review objectives, policies, and methods to ensure that there is sufficient development capacity in relation to housing and business land to meet the expected demands of the region.¹
- 2 The PORPS must give effect to² the National Policy Statement on Urban Development 2020 (“NPSUD”) and the National Policy Statement for Highly Productive Land 2022 (“NPSHPL”), among other things.

The National Policy Statement for Highly Productive Land 2022 (“NPSHPL”)

- 3 As the NPSHPL was only recently gazetted in September 2022, and has not reached the same level of familiarity as the NPSUD, I attach a summary of its relevant provisions as Schedule One.

Relevance to this hearing - scope

- 4 The NPSHPL came into force on 17 October 2022³ with immediate effect⁴.
- 5 Accordingly, in considering submissions and making recommendations on the PORPS the Panel must have in mind that the PORPS must give effect to the NPSHPL.
- 6 However, any matters arising from the NPSHPL outside the scope of submissions are outside the scope of this hearing and cannot be dealt with by this Panel.
- 7 Any such matters will need to be dealt with by the ORC as a variation of or change to its proposed or operative policy statement.

PORPS consistency with the NPSHPL – “...avoids, as the first priority...”

- 8 It follows from the requirement to give effect to the NPSHPL that the PORPS cannot be inconsistent with the NPSHPL.

¹ Section 30(ba) of the Resource Management Act 1991 (“the Act”).

² Section 62(3) of the Act.

³ Clause 1.2(1) of the NPSHPL.

⁴ Clause 4.1(1) of the NPSHPL

- 9 I have previously submitted that the use of the phrase “avoids, as the first priority” is intended as a qualifier to the word avoid, conveying that “avoid” is not an absolute requirement, but that the standard is higher than “avoid, remedy or mitigate”.
- 10 The phrase “avoids, as the first priority” is in the UFD chapter at O4(2) (Development in rural areas), P4(6) (Urban expansion) and P8(4) (Rural lifestyle and rural residential zones) in reference to highly productive land.
- 11 In her evidence at paragraphs 8.99 onwards⁵ Ms Mcleod opposes use of: “...avoids, as the first priority...”. As does Ms McEwan⁶.
- 12 Ms Mcleod expresses the opinion that the words used are more restrictive than the NPSHPL, because the NPSHPL does not allocate a priority to avoidance, rather it specifies when certain activities must be avoided, and the circumstances in which this is not required.
- 13 The relevant NPSHPL provisions are policies 5 to 8, and clauses 3.6 to 3.10. These provisions are very clear and directive as to what must be avoided and in what circumstances.
- 14 For example, policy 5 provides:
- The urban rezoning of highly productive land is avoided, except as provided in this National Policy Statement.*
- 15 In context of protection from inappropriate use and development under policy 8, clause 3.9 of the NPSHPL is specific and directive that inappropriate use and development must be avoided, and that all use or development is inappropriate other than a closed list of activities.
- 16 While Part 3 of the NPSHPL is described as a “non-exhaustive” list of things that local authorities must do⁷, the provisions above do not leave room for regional (or other) policies and objectives to do other than those provisions explicitly state. They are too specific and directive.
- 17 These NPSHPL provisions do not allow the possibility of some lesser standard when avoidance is required, nor the possibility that avoidance is always the first priority.

⁵ Ainsley McLeod (Transpower) in relation to UFD-O4 and UFD-P4, paras 8.99-8.100 and 8.108

⁶ Emily McEwan (Dunedin City Council) paras 17 and 19(a)

⁷ Clause 3.1(1) of the NPSHPL

- 18 The phrase “avoids, as the first priority” at O4(2), P4(6) and P8(4) is therefore inconsistent with the NPSHPL provisions outlined above. If this phrase remains, then the PORPS will not give effect to the NPSHPL.
- 19 The supplementary evidence of Ms White and Ms Boyd on this issue approached the issue from the perspective that if the word “avoid” remains in the provisions without any qualification, then that would be contrary to the NPSHPL, because it does not allow for the circumstances under the NPSHPL where avoidance is not required. That is correct.
- 20 Ms White will address how the provisions might be re-worded.
- 21 Because the NPSHPL provisions outlined above are so prescriptive this may be an instance where a simple cross referencing of the NPSHPL is appropriate. But that is a policy writing matter for Ms White.

Highly productive land which is specified Maori land

- 22 Ms McIntyre gives evidence on this topic⁸.
- 23 She states:
35. The relevant direction in the NPSHPL is as follows:
- (a) Clause 3.8 requires territorial authorities to avoid subdivision of highly productive land except in specified circumstances. There is an exception for specified Māori land,³⁰ which is a defined term similar to, but narrower than, the definition of Maori land developed for the PORPS and discussed above;
- (b) Clause 3.9 requires territorial authorities to avoid the inappropriate use or development of highly productive land. Exceptions provided for in this clause include specified Māori land,³¹ as well as use for a purpose associated with a matter of national importance under section 6 of the RMA.³²
36. As discussed above, I consider that provision for use and development of ancestral land is a matter that needs to be addressed in the PORPS to give effect to section 6(e) of the RMA. Accordingly, I consider that reference to section 6 matters in Clause 3.9 would include use associated with providing for the relationship of mana whenua with their ancestral lands. I discuss my recommendations as to how this should be provided for in areas of highly productive land in my evidence on the LF and UFD chapters.
- 24 The NPSHPL defines specified Maori land.
- 25 As Ms McIntyre notes, that definition is narrower than the definition developed for the PORPS.
- 26 It is also correct that:

⁸ Sandra McIntyre (Kāi Tahu ki Otago) in relation to UFD-O4(2), UFD-P4(6) and UFD-P7(3), paras 34-36 and 157

- 26.1 Subdivision on specified Maori land is one of the exceptions to the clause 3.8 NPSHPL requirement that subdivision of highly productive land be avoided; and
- 26.2 Use or development of specified Maori land is one of the exceptions to the clause 3.9 NPSHPL requirement to avoid the inappropriate use or development of highly productive land, as is use or development for, or for a purpose associated with, a matter of national importance under section 6 of the Act.
- 27 So far as section 6(e) of the Act is concerned, a use or development to recognise and provide for: “the relationship of Maori and their culture and traditions with their ancestral lands” would be within scope of the exception in clause 3.9(2) of the NPSHPL whether or not it is on specified Maori land.
- 28 These exceptions cannot though extend beyond the scope of:
- 28.1 the definition of specified Maori land in the NPSHPL (for clauses 3.8 and 3.9); and
- 28.2 section 6(e) of the Act (for clause 3.9).
- 29 The exceptions do not apply to clauses 3.6 or 3.7 of the NPSHPL.
- 30 Ms McIntyre proposes amendment to Objective 4(2) and Policies 4(6) and 7(3) to add “except as provided for in MW-P4”.
- 31 These amendments are problematic in terms of the NPSHPL.
- 32 The three proposed exceptions relate directly to highly productive land.
- 33 The scope of MW-P4 and the proposed exceptions seems potentially at least to be:
- 33.1 broader than the NPSHPL definition of specified Maori land;
- 33.2 beyond the scope of section 6(e); and
- 33.3 applicable to clauses 3.8 and 3.9 of the NPSHPL.
- 34 If that is the case, then the exceptions cannot be added because the PORPS must give effect to, and cannot be contrary to, the NPSHPL.

35 If that is not the case, then the exceptions add nothing, because the NPSHPL exceptions will apply regardless of whether the proposed exceptions are included or not.

The National Policy Statement on Urban Development 2020 (“NPSUD”)

36 The evidence as to how the PORPS ought to give effect to the NPSUD presents a number of different views.

37 In her opening statement Ms White after review of the evidence summarises the key outstanding issues. Largely these are matters for the expert witnesses.

38 As with the NPSHPL, the Panel’s recommendations as to resolution of these issues must result in the PORPS giving effect to, and not being inconsistent with, the NPSUD.

Incomplete Provision - Mandatory inclusion of housing bottom lines

39 An HBA is a Housing and Business Development Capacity Assessment which a tier 1 or tier 2 local authority must prepare for its tier 1 or tier 2 urban environments under clause 3.19(1) of the NPSUD.

40 ORC, DCC and QLDC are tier 2 local authorities, and Dunedin and Queenstown are tier 2 urban environments⁹.

41 Under clause 3.6(2) of the NPSUD for each tier 1 or tier 2 urban environment, as soon as practicable after an HBA is made publicly available the relevant regional council must insert into its regional policy statement housing bottom lines for the short-medium term and for the long term.

42 The PORPS was initially prepared before the HBAs were published.

43 APP10 (referred to in Policy 2(6) and Method 1(5)) is a placeholder for insertion of the relevant housing bottom lines.

44 The insertion of the bottom lines is not for this Panel. ORC must insert the bottom lines without using the process in Schedule 1 of the Act¹⁰, under section 55 of the Act.

Mandatory provision – criteria for adding significant development capacity

⁹ Refer appendix to the NPSUD

¹⁰ Clause 3.6(4) of the NPSUD

- 45 Clause 3.8 of the NPSUD deals with plan changes which are not enabled in a plan or not in sequence with planned land release.
- 46 Sub-clause (2) provides that the local authority must have particular regard to the development capacity provided by the plan change if the development capacity:
- 46.1 Would contribute to a well-functioning urban environment;
- 46.2 Is well-connected along transport corridors; and
- 46.3 Meets criteria set under sub-clause (3).
- 47 Sub-clause (3) requires each regional council to include in its regional policy statement the criteria to determine if a plan change adds significantly to development capacity.
- 48 The criteria required are in Policy 10 of the UFD Chapter.

Other matters

A separate rural chapter

- 49 At paragraphs 328 and 329 of her witness statement Ms Wharfe give evidence:
- 328. The National Planning Standards Regional Policy Statement Structure Standard includes Directions 9 and 10:*
- 9. Provisions (excluding provisions in Part 2) that:*
- a) Apply predominantly to only one topic must be located in the relevant chapter under the Topics heading*
- b) Apply to more than one topic must be located in the relevant chapters under the Domains heading.*
- 10. Any other matter addressed by the regional policy statement not covered by the structure in Table 2 must be included as a new chapter, inserted alphabetically under the Topics heading in Part 3. Additional chapters must not be synonyms or subsets of chapters in table 2.*
- 329. The rural matter is not addressed in the structure in Table 2 so if the RPS is to address this matter the NPS directs that it must be included as a new chapter.*
- 50 For that argument to be correct, the “urban form and development” heading in the National Planning Standards must be read such that it is strictly limiting of content and that “development” is strictly limited to development within urban areas and not extending into rural areas.
- 51 Even if this narrow view is taken, it is apparent from direction 9(a) that ‘provisions’ in this context need not relate solely to one topic. That direction refers to provisions: “...which apply predominantly to only one topic”.

- 52 “Provisions” is a term defined in the National Planning Standards¹¹ to mean: “all content in a policy statement or plan, including but not limited to background content, issues, objectives, policies, methods, rules, and anticipated environmental results”.
- 53 The provisions in the UFD Chapter relate predominantly to urban form and development, even if that chapter heading is interpreted narrowly to exclude development in rural areas.
- 54 It is not mandatory, nor necessary or desirable to identify and separate out provisions to make up a rural chapter.
- 55 Such an exercise would be pointless and detract from the integration of the chapter, which in large part deals with the interface between urban and rural areas and the extent to which urban activity can develop into rural areas. A point well illustrated by the content of the NPSHPL.

ORC expert evidence

- 56 Two subject matter experts are in attendance for the ORC:
- 56.1 Elizabeth White; and
- 56.2 Kyle Balderston.
- 57 Mr Balderston prepared the section 42A report for the UFD chapter. At the time he was an ORC employee. He has since moved to other employment.
- 58 Ms White was then engaged by the ORC as a consultant to undertake subsequent work on the UFD chapter. Ms White has prepared the supplementary evidence on the chapter.
- 59 Ms White has prepared an opening statement identifying the key matters she considers to be at issue in the UFD chapter after review of the evidence.
- 60 I will call Ms White to present that statement and answer the Panel’s questions on those issues and such other matters as the Panel wishes to explore. Ms White is the ORC’s present subject matter expert for the UFD chapter.

¹¹ Foundation Standard, page 5

61 As the author of the original section 42A report Mr Balderston is also in attendance and available to answer any questions the Panel might have concerning his opinions in the original s42A report or otherwise.

62 If the Panel wishes, then I will call Mr Balderston after Ms White.

63 The ORC calls Ms White.

Dated this 14th day of February 2023



Simon Anderson
Otago Regional Council

Schedule One – Summary of NPSHPL

- 1 The NPSHPL came into force on 17 October 2022 with immediate effect.¹²
- 2 Its objective is to protect highly productive land for use in land-based primary production, both now and for future generations.

Meaning of highly productive land

- 3 Until there are maps of highly productive land in an operative regional policy statement, highly productive land is deemed to be all land which at 17 October 2022¹³:

3.1 Is:

3.1.1 zoned general rural or rural production; and

3.1.2 Land Use Capability Class (“LUC”) 1, 2, or 3 land under the Land Use Capability classification: but

3.2 Is not:

3.2.1 identified for future urban development; or

3.3 subject to a council-initiated, or adopted, notified plan change to rezone it from general rural or rural production to urban or rural lifestyle.

- 4 There is an LUC map at: https://ourevironment.scinfo.org.nz/maps-and-tools/app/Land%20Capability/Iri_luc_main

- 5 As soon as practicable, but by 16 October 2025 at the latest, regional councils must notify a proposed regional policy statement with updated planning maps of the region identifying highly productive land.¹⁴

- 6 Each regional council’s mapping of highly productive land must include any land that¹⁵:

6.1 is zoned general rural or rural production; and

¹² Clauses 1.2(1) and 4.1(1) of the NPSHPL. All footnotes in this Schedule refer to clauses in the NPSHPL.

¹³ Clause 3.5(7)

¹⁴ Clause 3.5(1)

¹⁵ Clause 3.4(1)

- 6.2 is predominantly LUC 1, 2 or 3 land; and
- 6.3 forms a large and geographically cohesive area.
- 7 In addition, regional councils may map land that is zoned general rural or rural production, but is not LUC 1, 2, or 3 land, as highly productive land if the land is, or has the potential to be, highly productive for land-based primary production in that region¹⁶.
- 8 However, land that at 17 October 2022 is already identified for future urban development is not to be mapped as highly productive land (and, as noted above, is not deemed highly productive land prior to regional mapping)¹⁷.
- 9 Land is identified is identified for future urban development if it is in a published Future Development Strategy, or in a non-statutory strategic planning document (adopted by council resolution) as being suitable for urban development over the next 10 years, at a level of detail that makes the boundaries of the area identifiable in practice¹⁸.
- 10 District councils must change district plans to incorporate the same maps as are in the relevant operative regional policy statement within six months after the regional policy statement became operative¹⁹. This must occur under section 55(2) of the Act, without a Schedule 1 process²⁰.

Protection of highly productive land

Urban rezoning

- 11 Urban rezoning of highly productive land is allowed by territorial authorities only if²¹:
- 11.1 Required to provide sufficient development capacity to meet demand for housing or business land (to give effect to the NPSUD for tier 1 and 2 territorial authorities (DCC and QLDC); otherwise expected demand in the relevant district);
- 11.2 There are no other reasonably practicable and feasible options for the required development capacity (in the case of DCC and QLDC,

¹⁶ Clause 3.4(3)

¹⁷ Clause 3.4(2)

¹⁸ Clause 1.3(1) definitions of “identified for future urban development” and “strategic planning document”

¹⁹ Clause 3.5(3)

²⁰ Clause 3.5(4)

²¹ Clause 3.6(1) and (4)

within the same locality and market while achieving a well-functioning urban environment); and

- 11.3 The environmental, social, cultural and economic benefits outweigh the environmental, social, cultural and economic costs of losing the highly productive land.
- 12 DCC and QLDC as tier 2 territorial authorities must consider other reasonably practicable options such as greater intensification in existing urban areas, rezoning other land that is not highly productive land as urban, and rezoning other highly productive land that has a lower productive capacity²².
- 13 All territorial authorities must take measures to ensure that the spatial extent of any urban zone covering highly productive land is the minimum necessary to provide the required development capacity while achieving a well-functioning urban environment²³.

Avoiding subdivision of highly productive land

- 14 Territorial authorities must avoid rezoning of highly productive land as rural lifestyle²⁴.
- 15 Territorial authorities must avoid the subdivision of highly productive land unless²⁵:
- 15.1 The proposed lots will retain the overall productive capacity long term; or
- 15.2 The subdivision is on specified Maori land; or
- 15.3 The subdivision is for a lifeline utility, regionally or nationally significant infrastructure, public flood control or protection, public drainage works, or NZ Defence Force facilities, and there is a functional or operational need for the subdivision; and
- 15.4 The territorial authority takes measures to avoid, if possible, or mitigate potential cumulative loss of highly productive land and actual or potential reverse sensitivity effects on surrounding land-based primary production activities.

²² Clause 3.6(2)

²³ Clause 3.6(5)

²⁴ Clause 3.7

²⁵ Clause 1.3(1) definitions of “specified infrastructure” and “specified Maori land” and clause 3.8

Protecting highly productive land from inappropriate use and development

- 16 Territorial authorities must avoid other use or development of highly productive land except for land-based primary production unless it is one of the following:
 - 16.1 Supporting activities for land-based primary production on the land;
 - 16.2 To address a high public health and safety risk;
 - 16.3 Matters of national importance under section 6 of the Act;
 - 16.4 Activities on specified Maori land;
 - 16.5 For protecting, maintaining, restoring or enhancing indigenous biodiversity;
 - 16.6 Retiring land-based primary production to improve water quality;
 - 16.7 Small-scale or temporary with no impact on productive capacity;
 - 16.8 Activity by a requiring authority under a designation or requirement;
 - 16.9 For public access;
 - 16.10 There is a functional or operational need for the use or development to be on the highly productive land and it is:
 - 16.10.1 a lifeline utility, regionally or nationally significant infrastructure, public flood control or protection, or public drainage works;
 - 16.10.2 NZ Defence Force facilities;
 - 16.10.3 Mineral extraction that provides significant national public benefit not otherwise achievable using resources in NZ; or
 - 16.10.4 Aggregate extraction that provides significant national or regional public benefit not otherwise achievable using resources in NZ,

and in each case the territorial authority takes measures to minimise or mitigate potential cumulative loss of highly productive land and avoids, if

possible, or otherwise mitigates any actual or potential reverse sensitivity effects on surrounding land-based primary production activities²⁶.

Exemption for highly productive land subject to permanent or long-term constraints

- 17 Territorial authorities may allow subdivision, use or development of highly productive land if²⁷:
 - 17.1 Constraints mean land-based primary production will not be viable for at least 30 years and the restraints cannot be addressed by options which retain productive capacity;
 - 17.2 Significant loss of individual or cumulative productive capacity, and fragmentation of highly productive land are avoided, and reverse sensitivity effects are avoided if possible, otherwise mitigated; and
 - 17.3 The environmental, social, cultural and economic benefits outweigh the environmental, social, cultural and economic costs of losing the highly productive land.

Other provisions

- 18 Provision must be made in district plans for the continuation of existing activities on highly productive land while ensuring loss of highly productive land from those activities is minimised²⁸.
- 19 Provision must be made in district plans to prioritise the use of highly productive land for land-based primary production over other uses, and to encourage opportunities to maintain or increase productive capacity (consistent with section 6 of the Act and outcomes sought under the National Policy Statement for Freshwater management 2020)²⁹.
- 20 District plans must manage reverse sensitivity and cumulative effects, in particular³⁰:
 - 20.1 Identify typical activities and effects from land-based primary production on highly productive land that should be anticipated and tolerated in a productive rural environment;

²⁶ Clause 3.9

²⁷ Clause 3.10

²⁸ Clause 3.11

²⁹ Clause 3.12

³⁰ Clause 3.13

- 20.2 Require avoidance, if possible, otherwise mitigation of any potential reverse sensitivity effects from urban rezoning or rural lifestyle development that could affect land-based primary production; and
- 20.3 Require consideration of cumulative effects on the highly productive land.
- 21 Regional councils and territorial authorities must identify highly productive land, and manage the effects of subdivision, use, and development of highly productive land, in an integrated way³¹.
- 22 In giving effect to the NPSHPL every local authority must actively involve tangata whenua (to the extent they wish to be involved)³².

³¹ Clause 3.2

³² Clause 3.3