

**IN THE ENVIRONMENT COURT
AT CHRISTCHURCH
I TE KŌTI TAIAO O AOTEAROA
KI ŌTAUTAHI**

Decision No. [2023] NZEnvC 180

IN THE MATTER of the Resource Management Act 1991

AND an appeal under clause 14 of the First
Schedule of the Act

BETWEEN G M & J DRINNAN

(ENV-2022-CHC-25)

Appellants

AND SELWYN DISTRICT COUNCIL

Respondent

Court: Environment Judge J E Borthwick
Environment Commissioner K A Edmonds
Environment Commissioner D J Bunting

Hearing: at Christchurch on 19, 20, 21 and 23 June 2023

Appearances: A J Schulte for the appellants
K Rogers and P Rogers for the respondent
K E Forward for the Trices Road Rezoning Group

Last case event: 23 June 2023

Date of Decision: 25 August 2023

Date of Issue: 25 August 2023

DECISION OF THE ENVIRONMENT COURT

A. Appeal declined (in part).

B. Costs are reserved.

DRINNAN v SELWYN DISTRICT COUNCIL – DECISION



REASONS

Introduction

[1] Grant and Jeanette Drinnan have appealed a decision of the Selwyn District Council that excluded them from a plan change to rezone land for residential development on the outskirts of Prebbleton.

[2] A second ground of appeal, concerning the stormwater solution for the plan change, was resolved by the parties and the court has granted consent orders sought in relation to the same.

Background

[3] Having retired from farming, the Drinnans purchased a small landholding (10 ha) on the outskirts of Prebbleton. The land afforded them the opportunity to continue a rural lifestyle, grazing cattle on 2.2 ha of land located adjacent to Hamptons Road.

[4] Subsequent to purchase, the District Council developed a recreational park adjacent to their southern boundary, while across Hamptons Road and to the north, a group of neighbouring landowners applied for a plan change (PC72) to rezone 28 ha of land for residential development.

[5] With the rural character of the area set to change, the Drinnans made a submission on the plan change seeking to include the 2.2 ha. If rezoned, this land has the potential yield for 26 to 30 allotments.

[6] But for the National Policy Statement – Highly Productive Land 2022 ('NPS-HPL'), the District Council accepts that the urban zoning of the 2.2 ha parcel would be appropriate and there is no technical reason constraining its development.

[7] At issue is the presence of LUC-1 soils on the Drinnan land which – given its rural zoning – the District Council submits precludes the land’s development under the NPS-HPL (at least in the short term).

Issues for determination

[8] Two issues arise as follows:

- (a) does the land come within the exceptions for urban rezoning in cl 3.6 of the NPS-HPL?; and
- (b) if it does not, is the Drinnan land located in a rural lifestyle zone as defined by the National Planning Standards?

[9] There was a third issue as to whether the Drinnan land was within the scope of PC72. The Hearing Commissioner who decided the plan change did not consider its rezoning incidental or consequential to the proposed plan change.¹ The parties to the appeal have since agreed the plan change is within the scope of PC72.² Because the appellants are unsuccessful on the remaining ground of appeal, we do not need to make a decision on scope.

Issue: does the land come within the exceptions for urban rezoning in cl 3.6 of the National Policy Statement – Highly Productive Land 2022?

[10] By way of introduction, it seems possible, if not probable, given its size and location that the Drinnan land will be zoned for urban use after the Canterbury Regional Council amends its Regional Policy Statement (‘RPS’) by including maps of the highly productive land (NPS-HPL, cl 3.5).

[11] Meantime, the urban rezoning of highly productive land is to be avoided, except as provided by the provisions of the NPS-HPL (Policy 5). The parties agree

¹ Statement of Facts and Issues dated 26 August 2022 at [15].

² Joint memorandum of counsel dated 30 September 2022.

that the only pathway for rezoning of the Drinnan land is cl 3.6 of the NPS-HPL. A directive provision, the District Council may allow the rezoning of highly productive land ‘only if’ each of the requirements in sub-clauses (1)(a)-(c) are met:

- (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.

[12] The Drinnans submit rezoning their land satisfies the requirements of cl 3.6(1)(a)-(c).³ Before giving our findings on cl 3.6(1) we briefly address a sub-issue concerning whether the Drinnan land is to be evaluated as part of, or separately from, PC72.⁴

Sub-issue: is the Drinnan land to be evaluated as part of, or separately from, PC72?

[13] Whereas land approved for urban development in PC72 was identified for future urban development, the Drinnan land was not.⁵ The Drinnans submitted on the plan change following its notification seeking to extend the area to be rezoned for urban development to include their land. They say the merits of the appeal should be assessed as part of PC72. They are concerned that the number

³ Schulte, opening summary submissions dated 19 June 2023 at [36], [43] and elsewhere. See also, Schulte, opening submission dated 28 February 2023 at [95]. And Schulte, closing submissions dated 23 June 2023 at [12].

⁴ Schulte, opening summary submissions dated 19 June 2023 at [17], [25], [35], [38], [41]-[42]. See also, Schulte, opening submission dated 28 February 2023 at [98].

⁵ Cleese, EiC dated 31 March 2023 at [37.3]-[37.4]. Forward, opening submissions dated 19 June 2023 at [18]-[20].

of dwellings their site could yield is unlikely to “justify a plan change application under the [National Policy Statement – Urban Development ‘NPS-UD’]”.⁶ They say the urban rezoning of the site’s highly productive land satisfies the requirements of cl 3.6(1) of the NPS-HPL.

[14] Giving planning evidence on behalf of the appellants, in Mr S Fletcher’s opinion the Drinnan land is to be holistically assessed together with PC72 when determining whether the requirements of cl 3.6(1) are met.⁷ We find the Ministry for the Environment guide to implementation, which Mr Fletcher quotes, does not support this opinion. The guidance concerns land use activities on a land parcel within an allotment that has both highly productive land and non-highly productive land. It is in these circumstances that a holistic assessment is recommended. The guidance does not pertain when rezoning highly productive land.

[15] The parties agree, and we accept, the NPS-HPL does not apply to PC72 land as the plan change land was approved for future urban development.⁸ We also accept the submissions of counsel for the District Council, Ms K Rogers, that had the plan change been notified inclusive of the Drinnan land, cl 3.6(1) of the NPS-HPL would have applied but its application would have been restricted to the Drinnan site.⁹

[16] The application of the NPS-HPL to the rezoning of highly productive land (only) is the only interpretation of its provisions that is reasonably available. Policy 5 of the NPS-HPL applies to highly productive land and not to other land – ‘[t]he urban rezoning of highly productive land is avoided, except as provided in this National Policy Statement’.¹⁰ Clause 3.6 restricts the zoning of highly productive land to the circumstances set out in sub-clauses (1)(a)-(c) by providing

⁶ Schulte, opening summary submissions dated 19 June 2023 at [25].

⁷ Fletcher, rebuttal dated 28 April 2023 at [12]-[21].

⁸ Transcript (Schulte) at 17. Forward, opening submissions dated 19 June 2023 at [18]-[20].

⁹ Rogers, closing submissions dated 23 June 2023 at [27]-[30].

¹⁰ NPS-HPL, Pt 2: Objective and Policies, Policy 5.

‘territorial authorities may allow urban rezoning of highly productive land only if ...’. A transitional provision, cl 3.5(7), deems land zoned general rural or rural production and LUC 1, 2 or 3 land to be ‘highly productive land’ until the RPS contains maps of highly productive land.

[17] Concluding, we find the relevance of PC72 to the determination of this appeal is:

- (a) the notification of the plan change motivated the appellants to seek partial rezoning of their land; and
- (b) that the rezoning of the Drinnan land will contribute to a well-functioning urban environment that includes PC72 (NPS-UD, Objective 1 and Policy 8 – out of sequence development).

[18] Finally, while we address cl 3.6(1) of the NPS-HPL requirements in detail below, as it arises out of this sub-issue, we record our findings on an inference drawn by Mr Fletcher from PC72’s compliance with the sub-clause (1)(a) requirements. It was asserted that the site is “inextricably linked” with PC72 land. If PC72 is required for demand for residential housing at Prebbleton, then the site is required to meet demand. If the site is required to meet demand, sub-clause(1)(a) is satisfied.¹¹ There is no evidence before us capable of supporting a finding that the site is inextricably linked with PC72, nor is the site required to achieve a well-functioning environment.¹² This opinion appears to arise from a misunderstanding that land that is not highly productive land (i.e. PC72) is also subject to the NPS-HPL.

[19] We turn next to the evidence concerning development capacity to meet housing demand for land.

¹¹ Fletcher, EiC dated 28 February 2023 at [76]-[77].

¹² We accept the opinion of Mr Cleese, EiC dated 31 March 2023 at [16.5] that if the appeal is declined, the resultant urban form outcome is acceptable.

Development capacity to meet housing demand for land

The experts

[20] Expert evidence on housing capacity/demand forecasts for Prebbleton was provided by Ms N Hampson for the Drinnans and Mr R Yeoman for Selwyn District Council.

The national policy statements

[21] We start by summarising the directly relevant provisions of the two national policy statements – NPS-UD and NPS-HPL – with respect to housing capacity and demand.

[22] Under Policy 2 of the NPS-UD, councils are required to provide sufficient housing capacity to meet the short term (within the next three years), medium term (3 to 10 years) and long term (10 to 30 years) needs of the community within the urban environment.¹³ This requires projections of the likely demands for each of these terms which are to include what is described as an appropriate competitiveness margin of 20%.¹⁴

[23] Plan-enabled capacities for each of the three time periods are defined in the NPS-UD as follows:¹⁵

- Short term relates to land which is zoned for housing or business use in an operative district plan;
- Medium term is either land which is zoned for housing or business use in an operative district plan or in a proposed plan;
- Long term is either land which is zoned for housing or business

¹³ NPS-UD, Policy 2 and Yeoman, EiC at [35].

¹⁴ The competitiveness margin is defined in the NPS-UD as being a margin over development capacity, for the short term 20%, for the medium term 20%, and for the long term 10%.

¹⁵ NPS-UD, cl 3.4(1).

use in an operative district plan or in a proposed plan or on land identified by a local authority for future urban use or urban intensification in an FDS,¹⁶ or if a local authority is not required to have an FDS, any other relevant plan or strategy.

[24] Directly related to the NPS-UD housing capacity assessments is cl 3.6(1)(a) of the NPS-HPL as follows:

- (1) Tier 1 and Tier 2 territorial authorities may allow urban rezoning of highly productive land only if:
 - (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 ...
[our emphasis]

[25] Whereas Policy 2 of the NPS-UD cited above is that there is ‘...**at least** sufficient development capacity to meet expected demand for housing ... over the short term, medium term, and long term’, under NPS-HPL, Policy 3.6(5), any urban zoning of highly productive land will be the ‘**minimum necessary** to provide the required development capacity...’ [our emphasis].

Growth Modelling

[26] Ms Hampson provided two briefs of evidence, a primary brief dated 28 February 2023 and a rebuttal brief dated 28 April 2023. Attached as an appendix to her evidence is a copy of evidence from Mr F Colegrave dated 26 January 2023, which he had prepared in support of a submission to the proposed Selwyn District Plan.¹⁷ Ms Hampson said that Mr Colegrave’s evidence included a robust assessment of Prebbleton’s housing needs based on the Selwyn District component of the *Greater Christchurch Housing and Business Capacity*

¹⁶ FDS is defined as the Future Development Strategy required by subpart 4 of Part 3 of the NPS-UD.

¹⁷ This was unrelated to PC72.

Assessment (HBA) 2021 ('HBA 2021') and that she had relied on this when preparing her primary evidence.

[27] In her rebuttal evidence she responded to Mr Yeoman's evidence and in particular that Mr Yeoman had relied on the latest update of the *Selwyn Capacity for Growth Model (SCGM 2022) for Selwyn District Council* ('SCGM 2022') which superseded the modelling which had underpinned the Selwyn District component of HBA 2021. SCGM 2022 was prepared by Mr Yeoman's firm, Formative Limited 2021.

[28] Mr Yeoman also co-authored a report¹⁸ which described the assumptions and findings which had been made in the preparation of SCGM 2022. The report included district-level growth projections for the long term period from 2022-2052 sourced from the 2022 Statistics New Zealand population projections which had then been converted into household and dwelling projections for the district.¹⁹

[29] Ms Hampson advised that SCGM 2022 included a capacity assessment which took into account the Selwyn District Proposed District Plan ('PDP') zoning and rules, MDRS/variation 1, proposed additions to the Urban Growth Overlays, SHAs²⁰ and approved Fast Track consents and operative (or treated as operative) private plan changes. It also identified plan enabled, commercially feasible, infrastructure served and reasonably expected to be realised capacity in accordance with the NPS-UD 2020, as well as updated dwelling demand forecasts.²¹

[30] Ms Hampson said that it was her understanding that SCGM 2022 had been

¹⁸ The full title of this report is the *Selwyn Residential Capacity and Demand Model – IPI 2023 Economic Assessment* dated 13 April 2023. A copy of this report is included at Tab 7 of the Joint Common Bundle. Its scope is described as providing a summary of the SCGM 2022 which addresses the overall Selwyn District.

¹⁹ We note that in their evidence both Ms Hampson and Mr Yeoman have for the most part used the term "dwelling" whereas the two national policy statements adopt the term "housing". We take these two terms to mean the same thing.

²⁰ We understand this to be an acronym for Special Housing Areas.

²¹ Hampson, rebuttal evidence at [14].

adopted by the Council as its current position for residential sufficiency.

[31] In this context, attached to Ms Hampson's rebuttal evidence was a copy of further evidence from Mr Colegrave dated 17 April 2023 which he had prepared for another plan change (PC79) and which she said she had reviewed and considered in preparing her rebuttal evidence.

[32] While agreeing that SCGM 2022 included the most up-to-date information, Ms Hampson noted that in submissions to the Council, two economists, Mr Akehurst on Variation 1 to the PDP and Mr Colegrave, had both completed preliminary reviews of the model and both had raised concerns as to its reliability to inform the sufficiency of residential capacity over the medium and long term.

[33] Ms Hampson was also critical that SCGM 2022 had not been peer reviewed, which Mr Yeoman responded to by pointing out that his company had modelled district plan projections for housing growth for a number of other councils in New Zealand and that none of these had been peer reviewed.

[34] Notwithstanding this criticism about the lack of a peer review, Ms Hampson told us that she accepted Mr Yeoman's district level dwelling projections "as a given" for the purpose of her evidence.²²

[35] Mr Yeoman told us that his understanding was that there was no disagreement between the parties about whether there was enough short term capacity, with the disagreement between them being about the medium term.²³

[36] This is consistent with the evidence presented by both experts which addressed capacity and demand over the next 10 year period from 2023 to 2032, which covers both the short and medium terms identified in the NPS-UD.

²² Hampson, rebuttal at [20].

²³ Yeoman transcript at 119.

[37] In the remainder of this section on capacity and demand, therefore, we have referred to the next 10 year period as the “short-medium term”.

Development capacity

[38] In the following table, we summarise the results of Mr Yeoman’s modelling of the short-medium term feasible housing capacity, as well as assessments which he said had been provided by developers:²⁴

Location	Feasible capacity	Developers’ assessments
PC68	770	820
PC72	304	330
Summerset	217	290
Bupa	76	115
Blade Mews	41	41
Tosswill Road	30	30
Infill	circa 10%	
Total	circa 1,500+	1,526

[39] Ms Hampson’s capacity forecasts are identified in her evidence as being Reasonably Expected to be Realised (‘RER’) capacities.²⁵ We understand that the terms “feasible” used by Mr Yeoman and RER used by Ms Hampson can and have been used interchangeably.²⁶

[40] Ms Hampson’s forecasts were:

²⁴ Yeoman transcript at 101,102. In the NPS-UD definitions, *feasible* means for the short and medium term, commercially viable to a developer based on the current relationship between costs and revenues.

²⁵ Hampson, rebuttal evidence Table 1 at [64].

²⁶ Hampson, rebuttal evidence at [44].

Location	RER capacity	RER adjustment	Adjusted RER capacity
PC68	770	75%	578
PC72	304	90%	274
Summerset	217	75%	163
Infill/Redevelopment	270		270
Total	1579		1,284²⁷

[41] With respect to these forecasts, Ms Hampson said that:

- for PC68 and PC72, she had adopted Mr Yeoman’s capacities and based on the evidence of Mr Colegrave, adjusted these down, to 75% for PC68 and 90% for PC72 as being more reasonable shares of the capacities for these two plan change areas being realised by 2032;²⁸
- for Summerset, 75% of the 217 housing units might be a more reasonable assumption based on the medium term (although she said that she had not spoken to Summerset about this);²⁹
- for infill/development, she had reduced Mr Yeoman’s infill/redevelopment total of 555 houses by about 50% to account for non-developable areas as well as land for roads, reserves and other infrastructure with a further reduction of another 18 houses to accommodate vested reserves, to give an overall RER of 270.

[42] As well as making these downward adjustments to Mr Yeoman’s housing capacity assessments, Ms Hampson said that she considered that Mr Yeoman’s assessments should be further reduced because of:³⁰

²⁷ We note that this column should total 1,285.

²⁸ Hampson, rebuttal at [58].

²⁹ Hampson, rebuttal at [59].

³⁰ Hampson, rebuttal at [65].

- reduced feasible capacity associated with the use of higher (recommended) profit margins;
- uncertainty about a fifth parcel of larger scale capacity in Prebbleton which she said could not be located or verified from the data provided; and
- the potential for lower yields on the five larger redevelopment parcels –

although she did not provide any quantification of what these further downward adjustments might be.

[43] To summarise, Mr Yeoman has identified a feasible capacity of around 1,500 houses in the short-medium term whereas, relying on Mr Colegrave's evidence, Ms Hampson has discounted some of this capacity to reach a total of just under 1,300 houses.

[44] Mr Yeoman told us also that he considered that the difference between the two assessments of around 200 dwellings (1,500–1,300) was immaterial to the overall decision about whether there would be sufficient plan enabled housing capacity or not.³¹

Demand for housing land

[45] Mr Yeoman based his allocation of the Prebbleton share of the overall district dwelling demand on the average of the district residential building consents issued over the last five years which he said was a share of 3% for Prebbleton, or an average of 46 dwellings per annum. He had then assigned this 3% to the short-medium term and long term growth for the district which he said equated to a total of 420 additional dwellings for Prebbleton (including the NPS-UD competitive margin of 20%) for the short-medium term and 1,100 additional dwellings

³¹ Yeoman transcript at 102.

(including the margin) for the long term.

[46] Ms Hampson responded that without the NPS-UD competitive margin of 20%, Mr Yeoman's short-medium term dwelling growth would only be 350, or 35 dwellings per annum, which was considerably less than the last five year average of 46.

[47] Ms Hampson provided a one page graph titled *Prebbleton SA2 Share of Total District Building Consents (Annual Dwelling Growth)* which she said was an extension of the graph she had included in her rebuttal evidence as Figure 1. This graph was admitted by consent as Exhibit Drinnan 1. The differences between Figure 1 and Exhibit Drinnan 1 are that the exhibit includes the additional information of a horizontal line marking the average share of housing growth in Prebbleton for the last five years (3%) and a line showing the average share for the overall time period shown on the exhibit (i.e. since 2000) which was 8%.

[48] Ms Hampson also included on Exhibit Drinnan 1, information from the Council's dwelling projections in its 2021 long term plan which she said showed that Prebbleton's share would be between 11% and 12% of the district's housing growth in each of the years up until about 2028, before dropping to about 7% in subsequent years which would give a long run average of about 8%.

[49] She said that she was at a loss to understand how Mr Yeoman had forecast a growth of only a 3% share of the district total, relying on the most recent five year period when there had been very little supply of sections in Prebbleton. Overall, she considered that a reasonable share of the district's growth for Prebbleton would be 10%,³² although she added that, as Prebbleton has 7% of dwellings at the moment, one would expect that it would continue to capture its share of housing growth at least at this level.³³

³² Hampson transcript at 57.

³³ Hampson transcript at 57.

[50] After the evidence had been heard, counsel for the Drinnans produced (by consent) an updated version of Exhibit Drinnan 1 which had been prepared by Ms Hampson, titled *Prebbleton SA2 Count of Total District Building Consents (Annual) – Historical and Projected*. This was uncontested and admitted as Exhibit 3.

[51] While Exhibit Drinnan 1 listed the Prebbleton *share* of the total district building consents issued for each year from 2000, Exhibit Drinnan 3 listed the actual *number* of consents issued in each year from 2000. In addition, three horizontal lines had been added to Exhibit Drinnan 3 showing the average annual dwelling consents issued for the most recent 5 years (46 consents), the 10 years from 2013 to 2022 (88 consents) and the period from 2000 to 2022 (68 consents).

[52] Exhibit Drinnan 3 also recorded projected dwelling demands for Prebbleton as percentage shares of the district total for the short-medium term, which were for Mr Yeoman a 3% share and for herself a 10% share. The equivalent numbers of dwellings per annum from these percentages were 35 dwellings (Mr Yeoman) and 105 dwellings (Ms Hampson) which for the short-medium term totalled 350 and 1,050 dwellings respectively. These numbers were based on an overall district demand for the short-medium term of 12,547 dwellings (including the NPS-UD competitive margin) or 10,500 dwellings (excluding this margin).³⁴

[53] When questioned about his projected growth of only 3%, Mr Yeoman said that he had relied on NPS-UD guidance material which was for growth to be based on *recent development patterns* and that while he had not found any explanation as to what *recent development patterns* meant in practice, he had taken this to be the last five years.³⁵ Accordingly, he considered that it would be reasonable to expect the short-medium term demand for new housing in Prebbleton to be within the range from 300 to 500 dwellings with his modelled number of 420 (including the NPS-UD

³⁴ *Formative Report* at Fig 4.1.

³⁵ Yeoman transcript at 91, 92.

20% competitive margin) being within this range.³⁶

[54] For illustrative purposes, in the following table we have listed what the demand for new housing for Prebbleton would be for shares of the district total over the range from 3% to 10%:³⁷

Prebbleton percentage of district share for short-medium term over next 10 years	Demand (excluding NPS-UD margin)	Demand (including NPS-UD margin)
3	315	376
7	735	878
8	840	1,003
10	1,050	1,255

Discussion on demand

[55] Mr Yeoman’s evidence was that the average number of dwellings consented over the most recent five years of 3% of the district total (which included the “Covid years”) represented a sufficient period on which to base the Prebbleton share of the district’s short-medium term dwelling demand.

[56] When questioned further on this percentage share, he said that when translated to the actual number of dwellings consented, 3% was a small percentage of what was a “bigger pie”.³⁸ In fact, as we have noted, the number of dwellings consented during this most recent five years was an average of only 46 dwellings

³⁶ Yeoman transcript at 98-99.

³⁷ We note that the district demand total of 12,547 dwellings is the number which would derive from Ms Hampson’s 105 dwellings per annum in Exhibit 3, whereas for Mr Yeoman’s 3%, the annual number on Exhibit Drinnan 3 would need to either reduce from 35 to 31 dwellings per annum for a 3% share or increase to 3.33% for 35 dwellings per annum to match the 12,547 dwellings. We note that this small mathematical difference is immaterial in the context of our overall finding on demand. There is no particular significance for the percentage shares shown in this table.

³⁸ Yeoman transcript at 94.

per annum. By comparison, in the five years before this, the average number of dwellings consented per annum was 130 (or about three times as many as for the most recent five years).

[57] Given the above, we find it difficult to agree with Mr Yeoman that the short-medium term share of the district demand would be as low as 3%.

[58] While Ms Hampson has proposed a 10% share of the district total, we note that, based on the Council's 2012 long term plan, she had also assessed that the average share of the short-medium term demand (to 2032) would be about 8%.

[59] Taken together, we have concerns about the validity of the shares of the district total proposed by either Mr Yeoman or Ms Hampson. Instead, in our view, the short-medium term demand should be based on the average annual number of dwellings consented over the last 10 years with the NPS-UD competitive margin added on.

[60] Exhibit Drinnan 3 shows that the number of consents issued over this 10 year period has been an average of 88 dwellings per annum giving a 10 year total of 880. With the NPS-UD competitive margin of 20% added on, this would give a Prebbleton demand of 1,050 short-medium term dwellings which would be an 8.4% share of the district total of 12,547 dwellings.

Discussion of demand/ capacity equation

[61] Next, we turn to consider the demand/capacity equation for Prebbleton's short-medium term housing needs.

[62] Mr Yeoman's evidence was that the demand should be in the range from 300 to 500 houses (including the NPS-UD competitive margin) and for Ms Hampson, based on a 10% share of the district total, the demand would be 1,050 houses (without the NPS-UD margin) or 1,260 (including the margin).

[63] We have found that Prebbleton's short-medium term share of the district's housing total demand should be based on an 8.4% share or 1,050 houses which includes the NPS-UD competitive margin.

[64] For capacity we agree with Mr Yeoman that the difference between his assessment and that of Ms Hampson of around 200 houses (1,500–1,300) is neither here nor there in the context of the decision we need to make about whether there is sufficient plan enabled development capacity to meet demand for housing land.³⁹

[65] On the basis of a forecast capacity of 1,300 houses, there would be a substantial buffer of some 250 houses between this capacity and our finding on demand for 1,050 houses.

Finding – cl 3.6(1)(a)

[66] Our overall finding on the capacity/demand equation with respect to cl 3.6(1)(a) of the NPS-HPL is that there is already adequate feasible plan enabled development capacity to meet Prebbleton's short-medium term housing demand by some margin. There is, therefore, no requirement under this clause of the NPS-HPL to include the Drinnan land to PC72. Having failed at the first hurdle, we have not assessed sub-clauses (1)(b) and (c) as the requirements of cl 3.6(1) are conjunctive.

[67] However, as it was a concern of the appellants, we provide our assessment of the feasibility of providing for development capacity within the Prebbleton market.⁴⁰ Relevant to cl 3.6(1)(b), the zoning of highly productive land may be allowed only if there are no other reasonably practicable and feasible options for providing for capacity.

³⁹ Yeoman transcript at 102.

⁴⁰ Schulte, closing submissions at [33]-[36] and elsewhere.

Cl 3.6(1)(b): feasibility (infrastructure)

[68] During the course of the hearing, the question was raised as to whether there was adequate infrastructure to service the feasible short-medium term housing capacity identified in the evidence of the two economists.⁴¹

[69] In response, Mr J Clease, the planning expert for the Council, provided us with advice on infrastructure both from his personal knowledge as well as referring us to evidence from an infrastructure expert, who provided input to the s 42A report which Mr Clease had prepared for the Council for the recent PC79 rezoning application.⁴²

[70] Mr Clease told us that Prebbleton's wastewater is pumped a distance of some 10 km to the Pines Wastewater Treatment Station which is located on the western side of Rolleston. He said that this treatment plant has more than adequate capacity for treating all of Prebbleton's wastewater.⁴³

[71] At Prebbleton, there is an existing pump station which has the capacity (with a small surplus) to pump all of the wastewater from the PC68 and PC72 areas to Rolleston if these areas were to be developed at a density of 12 houses per hectare.⁴⁴

[72] While the installation of a new pump station at Prebbleton might be a short term hurdle which would constrain the rezoning of further land beyond PC68 and PC72, Mr Clease said that this would not be a "dealbreaker" when considered in the time context of the next 10 years.⁴⁵ Likewise, if it was found to be necessary to increase the capacity of the pipeline from Prebbleton to Rolleston, this would

⁴¹ Clease transcript at 211.

⁴² Exhibit 4 summary of s 42A report of Jonathan Clease (Planning).

⁴³ Clease transcript at 211.

⁴⁴ Clease transcript at 211.

⁴⁵ Clease transcript at 211.

also be manageable.

[73] In addition, in his s 42A report for PC79, Mr Clease noted that if the PC79 land was to be rezoned there would be no barriers to this from the perspectives of stormwater management and water supply.

[74] On the basis of the evidence that there would be an adequate water supply to service PC79 (if this was to be approved), we conclude that there would also be an adequate supply of water to service all of the land which has been identified by the two economists as contributing to the short-medium term housing capacity for Prebbleton.

[75] For completeness, with respect to the Drinnan appeal, Mr Clease agreed with Mr Schulte that, on the basis that the Drinnan land would accommodate as few as 25 to 30 houses, the provision of infrastructure for this size of development would not be a constraint if this land was to be rezoned as an extension to PC72.

Issue: is the Drinnan land located in a rural lifestyle zone?

[76] The second and final issue was to be decided if the appellants were unable to satisfy the requirements of cl 3.6(1) of the NPS-HPL. If the Drinnan site is in a rural lifestyle zone, they argue the land is not highly productive land and therefore not subject to cl 3.6(1) of the NPS-HPL.

[77] It is no small challenge to reconcile the later-in-time NPS-HPL and the National Planning Standards with the provisions in an operative District Plan. The challenge presented by this case is around the terminology used in the three planning instruments.

[78] The Drinnans contend that the nearest equivalent zone in the National Planning Standards to the zoning of their site under the District Plan, is the 'rural lifestyle zone'. If correct, cl 3.6 of the NPS-HPL does not apply and presents no impediment to rezoning of their land for urban development.

Discussion and findings

[79] Clause 3.5(7) of the NPS-HPL states that until a regional policy statement containing maps of highly productive land in the region is operative, the NPS-HPL is to be applied as if references to highly productive land were references to land that is:

- (a) zoned general rural or rural production; and
- (b) LUC 1, 2, or 3 land.

[80] Furthermore, a reference to ‘zone’ in the NPS-HPL is:⁴⁶

- (a) a reference to a zone as described in Standard 8 (Zone Framework Standard) of the National Planning Standards; or
- (b) for local authorities that have not yet implemented the Zone Framework Standard of the National Planning Standards, a reference to the nearest equivalent zone.

[81] As the District Council has not yet implemented the Zone Framework Standard, the nearest equivalent zone applies.

Interpretation of District Plans

[82] Deciding which of the zones is the ‘nearest equivalent zone’ does not involve an evaluation of the extent of rural land use activities taking place within the relevant zone. This approach risks the court inadvertently making new policy rather than interpreting the same. We are reinforced in this view by the MfE guidance on interpreting cl 3.5(7) that notes the assessment is undertaken by referring to the zone description, objectives, policies, activity table and subdivision

⁴⁶ NPS-HPL, cl 1.3 Interpretation at [4].

provisions (in the round).⁴⁷

[83] First principles apply with the meaning of legislation to be ascertained from its text and in the light of its purpose and its context (Legislation Act 2019, s 10(1)). The text of legislation includes the indications provided in the legislation, examples of those indications are preambles, a table of contents, headings, diagrams, graphics, examples and explanatory material, and the organisation and format of the legislation (Legislation Act 2019, s 10(3) and (4)).

[84] Under the Legislation Act, legislation means the whole or a part of an Act or any secondary legislation. Secondary legislation includes an instrument that is made under an Act, if the Act states that the instrument is secondary legislation. The rules in a district plan are secondary legislation (RMA, s 76(2)). Where examination of the immediate context of the plan leaves some uncertainty, it is permissible to consider provisions in light of the purpose they fulfil in the authorising legislation (in this case, the RMA). The fact that a district plan is to give effect to a RPS can make the latter of some relevance to the interpretation of the former.⁴⁸

[85] Section 10 of the Legislation Act requires a purposive approach to interpretation. This approach may require consideration of other permissible guides to meaning. These guides are in addition to the usual considerations of the text of the relevant provision in its immediate context; the purpose of the provision; the context and scheme of the plan and any other indications in it; the history of the plan, and the purpose and scheme of the Act.⁴⁹

[86] We do not, however, consider reliance on reports prepared under ss 32

⁴⁷ Ministry for the Environment, 2022. *National Policy Statement for Highly Productive Land: Guide to Implementation*. Wellington. MfE 1726, ISBN: 978-1-991077-2 (online).

⁴⁸ *Auckland Council v Budden* [2017] NZEnvC 209 at [37] cited with approval by the High Court in *Simons Pass Station Ltd v Mackenzie District Council* [2020] NZHC 3265 at [25]-[27].

⁴⁹ *North Canterbury Clay Target Assn v Waimakariri District Council* [2014] NZHC 3021, (2014) 18 ELRNZ 133 at [18].

and 42A or evidence given by the District Council employees in unrelated hearings to be a permissible guide to interpretation, and we give no weight to interpretations that sought support from the same.⁵⁰ Nor do we infer the existence of a zone from the later-in-time guidance document to the NPS-HPL published by the Ministry for the Environment.⁵¹

[87] While we have not summarised the thoughtful submissions made by the appellants' counsel, Mr Schulte, in support of his interpretation that the District Plan Inner Plains area is a rural residential zone,⁵² these submissions were considered. Ultimately, we took a different approach to plan interpretation.

Architecture of the District Plan – an overview

[88] The township volume of the District Plan has two principal zones: Living and Business, which are divided into sub-zones. Any activity may set up in any zone, provided any effects of the activity are compatible with the character of the zone.⁵³ Summarising, in the township volume of the District Plan the architecture is to use the zoning method.

[89] In the rural volume of the plan there is one zone which is split into areas to manage specific activities.⁵⁴ The Drinnan land is located in the Inner 'Plains'. The Plains is one of seven areas in the rural zone, the other areas being the High Country, Malvern Hills, Porters Ski and Recreation Area, Outer Plains, Port Hills and Existing Development Areas. The District Plan states that the different characteristics of the Plains has resulted in different land uses and intensity of subdivision and settlement. These differences are reflected in the Plain's division into 'Inner' and 'Outer' Plains for the management of subdivision and residential

⁵⁰ We refer here to Fletcher, EiC dated 28 February 2023 at [54]-[67] and elsewhere.

⁵¹ Schulte, opening submissions dated 28 February 2023 at [7]-[13].

⁵² Schulte, opening submissions dated 28 February 2023 at [26]-[92].

⁵³ Common Bundle, Tab 8, Selwyn District Plan at A4.5 – Use of Zones.

⁵⁴ Common Bundle, Tab 10, Selwyn District Plan at A4.5 – Use of Zones at 315.

density in the District Plan.⁵⁵

[90] Thus, it appears to us, the methods used in the township and rural volumes of the District Plan differ in that zoning and sub-zones are methods in the township volume and zoning and areas are methods in the rural.

[91] For completeness, we note that within the rural zone there is provision for the district's ski fields. The Plan refers interchangeably to these as 'sub-zones' and 'areas', but again does not define what is meant by 'sub-zone'. Ski fields aside, all areas in the rural zone are located on the planning map, albeit these are labelled 'zones' in the map legend.

[92] Finally, while any activity within the rural zone is permitted subject to compliance with the conditions of the rule,⁵⁶ we note the plan definition of 'rural activities' below:

Rural Activity: means the use of land or building(s) for the purpose of growing or rearing of crops or livestock, including forestry, viticulture and horticulture and intensive livestock production and may include a dwelling.

[93] Returning to the issue, we next found it helpful to compare the District Plan methods with the various spatial layers identified in the National Planning Standards (spatial layers are also methods that may be used in planning instruments).

Terminology in operative District Plan and National Planning Standards

[94] Under the National Planning Standards, a 'zone' is one of several spatial layers that may be found in a district plan.⁵⁷ The National Planning Standards

⁵⁵ Common Bundle, Tab 10, Selwyn District Plan at A4.5 – The Plains at 312.

⁵⁶ Selwyn District Plan, Rule 9.1.1.

⁵⁷ The National Planning Standards identifies several other spatial layers in addition to the zoning layer. See National Planning Standards at Chapter 12. District Spatial Layers Standard, Table 18.

describes zones this way:⁵⁸

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.

[95] In addition to zones, the National Planning Standards recognise ‘overlays’ and ‘specific controls’ as spatial layers:⁵⁹

An **overlay** spatially identifies distinctive values, risks or other factors which require management in a different manner from underlying zone provisions.

And

A **specific control** spatially identifies where a site or area has provisions that are different from other spatial layers ... that apply to that site or area (for example where verandah requirements apply, or where a different maximum height on a particular site applies).

[96] The District Plan description of zoning as a planning tool broadly aligns with the National Planning Standards term ‘zone’:⁶⁰

Zoning is a planning tool to manage large diverse areas by dividing them into smaller areas with common features. In the past, zones were based on the type of activities occurring in the area. Typically these were residential, commercial, industrial or rural.

This District Plan continues to use zones, but in a slightly different way. Zones are based on the characteristics of an area. The Plan’s objectives, policies and rules seek to maintain those characteristics.

[97] The difference between ‘overlays’ and ‘specific control’ layers lies in the

⁵⁸ National Planning Standards at Chapter 12. District Spatial Layers Standard, Table 18.

⁵⁹ National Planning Standards at Chapter 12. District Spatial Layers Standard, Table 18.

⁶⁰ Common Bundle, Tab 8, Selwyn District Plan at A4.5 – Use of Zones.

granularity of their respective management methods.

[98] Having compared the terms ‘zone’, ‘overlay’ and ‘specific control’ in the National Planning Standards and ‘zone’ and ‘area’ in the District Plan, read together with the District Plan’s objectives, policies, and methods for the rural area, it is our view that there is a single rural zone together with seven areas for which there are specific controls. Put another way, the rural zone ‘areas’ are the equivalent to the National Planning Standards’ ‘specific controls’ spatial layer.

[99] In coming to that conclusion, we note that the language of ‘area’ is used both in relation to the whole of the rural area and to the seven identified parts of the whole. The rural area and its various parts are described in the Plan and, having done this, the District Plan states there is only one zone in the rural area ‘though the zone is split into areas to manage specific activities’.⁶¹

[100] The rural area is subject to a common set of objectives and policies with more targeted provisions for the outstanding natural landscapes in the Port Hills, Malvern Hills and the High Country. There are no objectives or policies directed at the Plains *per se*. Rather, the Plains inner and outer areas are used to manage the demand for small lot residential development within proximity to Christchurch City.

[101] The District Plan states that the most significant resource management issue for the Plains is the demand for small lots less than 4 ha for residential development, with the greatest demand being within 30 kms of Christchurch City.⁶² The Inner Plains area as a method to manage residential demand is made clear in the reasons for the Inner Plains minimum allotment rule:

... The minimum allotment size in the Inner Plains is 4 hectares. Council believes that residential density in this area is sufficiently high to require each dwelling to

⁶¹ Selwyn District Plan at A4.5 – Use of Zones at 14.

⁶² Selwyn District Plan at A4.5 – The rural area and zones.

have 4 hectares. It is considered that 4 hectares allotments will avoid adverse effects of on-site effluent treatment and disposal on groundwater, and potential ‘reverse sensitivity’ effects on rural activities; and maintain a rural character that is distinct from townships (see Part B, Section 4.1).

[102] Again, the reason given for not allowing higher residential density in the Inner Plains is given:

The second option is not available in the Inner Plains area. The reason for this is because residential density in this area is higher such that each house requires an allotment of 4 hectares to avoid adverse effects on adjoining properties, and to avoid creating new villages due to the potential number of houses on small allotments which could be created at a residential density of 1 house per 4 hectares. Creating new villages is contrary to the Plan’s policies for residential growth. For this same reason Rule 3.10.3.6 limits the number of houses which can be clustered together. The numbers and conditions reflect current residential patterns in the Rural area. The Council has a pamphlet called “Building a House in the Rural Area”, which provides more information on how to use these rules.

[103] There is a rule permitting a single dwelling on a minimum land area of 4 ha to be erected in the Inner Plains.⁶³ Proposals to exceed this residential density are non-complying activities.^{64, 65} We accept, therefore, Mr Clease’s opinion that the rule framework for activities is essentially identical for the Inner and Outer Plains; namely that it provides for a wide variety of rural production and farming activities subject to meeting effects-based standards.⁶⁶ In short, the zone is used predominantly for primary production activities.

⁶³ Selwyn District Plan at Rule 3.10, Table C3.1 – Minimum lot area to erect one dwelling.

⁶⁴ Selwyn District Plan at Rule 3.10.6.

⁶⁵ For associated subdivision standards see Rule 10.1 and Table C10.1 for minimum allotment size and Rule 10.11.3 non-complying subdivision activity.

⁶⁶ Clease, EiC dated 31 March 2023 at [62].

Regional Policy Statement

[104] The operative RPS which the District Plan is to give effect to,⁶⁷ does not support the appellants' interpretation. The RPS provides residential activities on lots 4 ha or more are rural activities and conversely, residential activities on less than 4 ha are urban activities.⁶⁸

Proposed District Plan

[105] Finally, the position under the proposed District Plan is clear; there is a single rural zone overlain by specific control layers.

[106] First, and consistent with the RPS definitions of rural and urban activities, the residential density and minimum site size of the proposed District Plan remain unchanged.

[107] Second, while utilising the National Planning Standards' zone labelling, the notified plan does not include any rural lifestyle zone. The Drinnan site is zoned general rural zone and situated within the Inner Plains/Te Urumanuka ki Ana-ri area. This is one of four main *areas* noted, the primary purpose of which is to control residential density.⁶⁹ The planning maps more clearly distinguish between zones and *areas*, the 'rural density' notation in the legend is to identify specific control spatial layers.

Issue: which National Planning Standards zone applies?

[108] Having decided that the District Plan has a single rural zone with multiple specific control areas we turn next to the description of rural zones in the National

⁶⁷ RMA, s 75(3).

⁶⁸ Clease, EiC dated 31 March 2023 at [50]-[58].

⁶⁹ Proposed Selwyn District Plan, General Rural Zone – GRUZ Overview at 1 and HPW27 – Specific Area Control Descriptions.

Planning Standards. We were referred to three candidate zones:

- (a) general rural zone – areas used predominantly for primary production activities, including intensive indoor primary production. The zone may also be used for a range of activities that support primary production activities, including associated rural industry, and other activities that require a rural location;
- (b) rural 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;
- (c) 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.

[109] The above are sourced from a table of zone names and descriptions which territorial authorities are required to use in their District Plans.^{70, 71} Given the wide spatial area of this zone and the range of activities taking place, we accept Mr Cleese’s opinion that the nearest equivalent zone in the National Planning Standards is ‘general rural zone’.⁷²

Outcome – is the Drinnan land located in a rural lifestyle zone?

[110] We hold that the Drinnan site is not located in a zone equivalent to the rural lifestyle zone in the National Planning Standards. The site is zoned Rural in

⁷⁰ National Planning Standards, Table 13.

⁷¹ Clause 8(2) of the National Planning Standards provides that if an existing zone in a plan is consistent with the description of a zone in the table, then that existing zone must use the zone name in table.

⁷² Cleese, EiC dated 31 March 2023 at [11.2].

the District Plan, and the nearest equivalent zone in the National Planning Standards is the general rural zone.

[111] As the site is highly productive land, cl 3.6 of the NPS-HPL applies.

Overall outcome

[112] The appellants have been unsuccessful in this part of their appeal.

[113] Costs are reserved. Any application for costs is to be filed within **20 working days**, with replies within a further **10 working days**. An application for costs is not, however, encouraged given that the gazetting of the National Policy Statement for Highly Productive Land 2022 occurred after the notice of appeal was lodged.

For the court

Jane S.



J E Borthwick
Environment Judge