

**BEFORE THE SELWYN DISTRICT COUNCIL
HEARINGS PANEL**

IN THE MATTER Proposed Selwyn District Plan

AND

IN THE MATTER of Adderley Head Legal
Opinion on NPS-HPL

**MEMORANDUM OF PLANNING ADVISOR (IVAN THOMSON)
ON BEHALF OF SAUNDERS FAMILY TRUST (DPR 166)**

15 June 2023

INTRODUCTION

1. This memorandum is filed in response to the Adderley Head legal opinion on the status of the Proposed District Plan (PSDP) General Rural (Inner Plains Overlay) Zone (GRUZ) under the National Policy Statement – Highly Productive Land 2022 (NPS-HPL). This was issued after filing of the Saunders Family Trust (SFT) rebuttal evidence in response to the s42A report on the NPS-HPL.
2. The SFT filed submissions on the PSDP requesting a realignment of the boundary between the Inner Plains Specific Control Area-Rural Density 1 (SDA 1) overlay (Inner Plains), and the East Plains Specific Control Area-Rural Density Overlay (East Plains) at West Melton/Halkett to include the land the subject of their submission within the Inner Plains rather than the East Plains Overlay (as notified). The evidence and hearing preceded the gazetting of the National Policy Statement – Highly Productive Land 2022 (NPS-HPL) and soil productivity was only addressed in terms of the policy framework that existed at the time. There is an acceptance by the submitters that most of their land is HPL as defined in the NPS-HPL.
3. Evidence was also lodged on behalf of SFT on 10 February 2023 in response to the Section 42A Report on the NPS-HPL prepared in accordance with the directions of the

Commissioners in Minute 30. However, this evidence was filed prior to the Council's legal advice (from Adderley Head) on application of NPS-HPL dated 14 February 23 regarding whether or not the Inner Plains SCD 1 overlay is equivalent to a Rural Lifestyle (RL) Zone.

4. In Minute 39 the Commissioners advised *'the Panel will advise in due course if we consider a hearing is necessary for the NPS-HPL matter, or alternatively, if we find the submitted briefs of evidence to be clear on their face such that no hearing is necessary'*. We understand that the Panel has elected not to hear evidence relating to those submissions.
5. The NPS-HPL legal opinion ('the legal opinion') has been discussed at several rezoning hearings on Variation 1 and privately requested plan changes through both planning evidence and legal submissions. However, as far as we are aware, the SFT has not had the same opportunity to present planning evidence or legal submissions in response to the Adderley Head advice.

THE LEGAL OPINION

6. In essence the legal opinion considers land identified as GRUZ: SCA 1 Inner Plains in the PSDP is the equivalent of the General Rural Zone in the NPS-HPL, not the Rural Lifestyle Zone, so the NPS-HPL applies. The opinion goes on to say:

However, the National Planning Standard (NPS) zone descriptions refer to 'use'. We have not been provided evidence of on the ground use, so have completed our assessment on the basis of the planning provisions. Evidence of on the ground use of the relevant land could alter the assessment.¹

APPLICATION OF THE NPS-HPL TO THE SFT SUBMISSION

Relevant NPS-HPL Provisions

7. Responses to the legal opinion put to the Panel and Hearings Commissioners at the rezoning hearings (subsequent to receipt of the legal opinion) are important to the SFT because how Clauses 3.7-3.10 are applied, and whether SCA 1 is equivalent to a Rural Lifestyle Zone, is likely to impact on the outcome of the SFT submission.
8. The context within which those urban rezoning submissions/evidence has been presented differs markedly from that which applies to the SFT land. The SFT land is situated entirely in a rural setting separated completely from an urban settlement, and the submission is not seeking an urban outcome. Submitters seeking an urban outcome are arguing that the land to be rezoned urban comprises rural lifestyle lots (and are therefore exempt from the interim definition of HPL²), whereas the SFT is also saying its land is RL but is seeking confirmation of that (i.e. that it be included as part of the adjoining General Rural Zone – Inner Plains or be zoned RL) rather than retaining it as General Rural (GRUZ – East Plains Overlay). I consider that the assessments will be different.

¹ At [4.6].

² NPS-HPL 3.5(7)

9. Clause 3.6 of the NPS-HPL is likely to be more applicable to the urban rezoning proposals but our concern is that the Panel may still make rulings on 3.7 and 3.10 in this context. The key NPS-HPL clauses potentially relevant to the SFT submission appear to be 3.7 and 3.10. Clause 3.7 is

3.7 Avoiding rezoning of highly productive land for rural lifestyle.

- (1) Territorial authorities must avoid rezoning of highly productive land as rural lifestyle, except as provided in clause 3.10.

10. Clause 3.10 sets out the circumstances under which HPL can be rezoned for rural lifestyle purposes.

11. If the Panel reaches the view that the 'nearest equivalent zone' to the PDP Inner Plains Overlay is a General Rural Zone not RLZ, then Clause 3.7 is not relevant to the assessment of the SFT submission.. Clauses 3.8-3.9 apply to the subdivision and use of land once zoned, not rezoning proposals. They appear not to be a 'barrier' to future subdivision of the SFT land into 4 ha blocks because under the Operative and Proposed District Plans, subdivision which meets the relevant density standard (and other applicable standards) is a controlled activity and establishing a dwelling (meeting the density standard) is permitted. Consistent with the NPS-HPL Guidance³ (page 11), the NPS-HPL does not come into play because the matters of control do not include soil quality/land use capability.

12. I have concluded that if the Panel considers the Inner Plains is the equivalent of the General Rural Zone, then the NPS-HPL is not relevant to the assessment of the SFT submission. The SFT land is more akin to the Inner Plains environment than the East Plains and should be included within the Inner Plains Overlay.

13. The legal opinion considers that the Inner Plains Overlay is the equivalent of the General Rural Zone, not RLZ, but with an important 'rider' i.e. that evidence of on the ground use may change this assessment. If the Panel considers that the Inner Plains Overlay is the equivalent of the Rural Lifestyle Zone, not General Rural Zone, then this, in my opinion, is also the case for the SFT land.

14. One of the issues the NPS-HPL seeks to address is the cumulative loss of rural land for rural lifestyle purposes as it causes *"fragmentation of productive land, resulting in irreversible land use change"*. For this Site this has already occurred and a finding that the NPS-HPL does not apply would not be contrary to the purpose of the NPS-HPL. It is simply acknowledgement of the existing situation. The NPS-HPL is not relevant to the assessment of the SFT submission.

³ NPS-HPL Guide to Implementation December 2022

15. Based on landscape evidence presented by Mr Craig at the PDP hearing, the land was in my planning evidence incorrectly identified as East Plains in the notified PDP and should be zoned General Zone Inner Plains Overlay (which is the equivalent of the NPS RLZ); or be zoned RLZ. The NPS-HPL Clause 3.10 matters are met in this case i.e. the land can be zoned General Rural Zone Inner Plains Overlay/RLZ.
16. The evidence that has been submitted for SFT is essentially that:
 - a) The SFT submission blocks are all rural lifestyle blocks that contain substantial houses. They are not irrigated and there is no potential for future irrigation because they are within a 'red zone' where water is already overallocated.
 - b) The current land use for the blocks is low intensity farming comprising low intensive grazing and baleage/hay production and horse training at 12 Painters Road.
 - c) It is unlikely, if not fanciful, that these properties will ever be reconfigured in a manner that will form a viable productive unit over the next thirty years.
 - d) If subdivided to create 4 ha blocks, there will still be some remaining productive potential (but they continue to be uneconomic units for primary production).
17. The NPS describes a Rural Lifestyle Zone as 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. This is precisely the description of the SFT submission land.
18. There is a specific signal in the PSDP that although residential activities are part of the General Rule Zone, they should not compromise the ability of the Zone to be used for primary production. The definition of primary production (an NPS definition) makes no reference to activities reliant on soil productivity or the soil resource, and there appear to be no proposed amendments to either the GRUZ or Definitions following their respective hearings to change this. The thrust of the GRUZ and Inner Plains overlay is directed towards protecting *primary production* activities from reverse sensitivity effects of residential development and maintaining the rural character and amenity. There seems to be a disconnect between the National Planning Standards and the NPS-HPL. This is recognised in the legal opinion:

[43] Assessment: It is not clear to us that the activities anticipated in these areas [Rural Production Zones] 'rely' on the productive nature of the land.

19. Given all of the above, for the SFT submission blocks in my opinion the nearest equivalent zone under the National Planning Standards (NPS) is Rural Lifestyle not General Rural because the existing and potential use is rural lifestyle not general rural production ie. they fit within the NPS description of the RLZ as "*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.*"

20. Subdivision of the SFT submission land to 4 hectares will not (once dwellings are established) create reverse sensitivity effects, and the resultant lots can be used for primary production activities, and they are more appropriately recognised as Inner Plains.
21. Because the new Inner/East Plains boundary will abut a complying 20 ha lot and existing 4ha lots, the risk of 'environmental creep' is minimised. In any case, this concept only applies to resource consents, not rezonings. The policy framework is firm that undersize subdivision is to be avoided:

GRUZ-P2

Avoid the development of residential units on sites that are smaller than the required minimum site size, except where:

- a) the development has been provided for through a grandfather clause;
- b) the minimum residential density requirement is achieved through balance land that adjoins the proposed undersized allotment in a coherent form to maintain a predominance of open space immediately surrounding the undersized allotment; or
- c) the development is for a temporary activity, or temporary accommodation.

THE LEGAL OPINION – OTHER MATTERS.

22. The legal opinion includes an assessment of the Operative and Proposed District Plan provisions which are within the area of expertise of RMA planners. It explains (paragraph 24) that this approach is based guidance in the NPS-HPL and caselaw – *"it is clear that what is required is an assessment of the text of the ODP and PDP respectively, to understand how the controls on the land are described 'in the round', followed by a comparison with the NPS rural zoning descriptions"*.

There are a number of matters of relevance to the SFT and where some further planning comment may also be of assistance to the Panel, as set out below.

[31] For a Rural Lifestyle zone, we would expect to see objectives, policies and rules which are supportive of rural lifestyle activities, and which seek to limit rural activities which effect such rural lifestyle activities development. This is not the case in the Operative District Plan.

23. The Operative District Plan Inner Plains /'Rural Lifestyle Zone' has a minimum lot size of 4 ha for subdivision and erecting a dwelling, compared to 20 ha minimum in the Outer Plains (and PDP East Plains Overlay). The basis for the minimum lot sizes is set out in Objective B4.1.2 and the explanation and is heavily orientated towards maintaining 'character' and 'amenity'.

Objective B4.1.2

Residential density is low enough to maintain the character of the rural area and to avoid adverse effects on natural and physical resources or reverse sensitivity effects.

Objective B4.1.2 relates to the level of residential density in the Rural Zone. It must be low enough to:

Avoid effects on natural or physical resources such as groundwater and roads.

Maintain the character of the area, particularly the ratio of land to buildings, which affects how built up an area looks.

Avoid reverse sensitivity effects which can occur when houses locate too close to other activities in the Rural Zone

24. The Inner Plains density standard of 4 ha minimum achieves all of the above. Whilst farming is not economic on 4 ha lots, this size is too big for purely residential living. Although some form of farming activity (e.g. part time) is still usually carried out. Reverse sensitivity effects with intensive farming activities and boarding animals are managed by specifying performance standards for these activities and in most case requiring resource consents for new or expanded activities (Rules 9.8-9.11) and a restricted discretionary consent for subdivision to create lots within 300m of an existing facility (Rule 10.1.1.4). The same rules apply in the Inner and Outer Plains.

25. This makes 'planning sense' and does not mean that these activities are 'favoured' over rural lifestyle activity in the Inner Plains. They often only require small sites, and proximity to markets so may be more suited to Inner Plains rather than Outer Plains locations (in my experience poultry farms, for example, in Selwyn are generally in the Inner Plains). In all cases, the intent of the rules is to avoid reverse sensitivity effects.

26. A different approach applies to rural industrial activity, which is not provided for in the Inner Plains other than very small scale (it is non complying) but discretionary in the Outer Plains (Rule 9.5). The Explanation notes "*The smaller allotment size and higher population density of the Rural (Inner Plains) Zone means that medium to large scale industrial activities may not be able to locate in this area without generating significant adverse amenity effects.*"

In the PDP, there is a smaller limit of the size of permitted primary industry in the Inner Plains compared to the East and West Plains (maximum 200m² compared to 500m² maximum land area – Rule GRUZ-R11) and industry is non complying in all rural zones.

27. [35], we consider that our assessment above is appropriate as it takes into account the way the relevant land is described in the ODP as a whole, and that the 4ha minimum zoning must be considered in the context of the zone. It is also clear from the above discussion that a 4ha lot size does not preclude valuable productive capacity. Accordingly, our conclusion remains that the land identified as Rural: Inner Plains is the equivalent of the General Rural or Rural Production zone, not the Rural Lifestyle Zone.

28. The Council's own agricultural economic advice is that 4 ha blocks are not likely to be economic and are lifestyle blocks⁴.

[47]....The NPS-HPL provides a more stringent 'avoid' approach for rural lifestyle zoning on HPL given this is an inefficient (and generally inappropriate) use of this finite resource....The NPS-HPL contains strong direction through Policy 6 and Clause 3.7 that rural lifestyle zoning of HPL should be avoided. The rationale is that it is inappropriate to:

- *use Aotearoa New Zealand's most productive land for low-density housing and*
- *prevent future productive use of this land through allowing fragmented ownership and*

the construction of dwellings and hardstand areas that have the potential to cause reverse sensitivity effects on land-based primary production activities.

None of the above criteria apply with respect to the SFT land – it is already fragmented to the extent that it is unable to be used for highly productive primary production. It is on the boundary of the Rural Inner Plains where the surrounding land use and subdivision pattern is also fragmented rural lifestyle blocks.

⁴ https://www.selwyn.govt.nz/_data/assets/pdf_file/0007/353347/Rural-Zone-Density-and-Minimum-Lot-Size-Farm-Advisory-Review-of-Options.pdf - see Section 2.2 Inner Plains