Before an Independent Hearings Commissioner appointed by
the Selwyn District Council

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under: the Resource Management Act 1991

in the matter of: an application by KeaX Limited for resource consent to establish a solar farm at 115 and 150 Buckleys Road and 821 and 823 Hanmer Road, Brookside, Leeston (RC225180)

between: **KeaX Limited**
Applicant

and: **Selwyn District Council**
Consent Authority

Legal submissions on behalf of KeaX Limited

Dated: 23 February 2023

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MAY IT PLEASE THE COMMISSIONER

INTRODUCTION

1 These legal submissions are presented on behalf of the Applicant, KeaX Limited (the *Applicant*).

2 There is no doubt that New Zealand faces a significant and urgent challenge in reducing greenhouse gas emissions and adapting to the effects of climate change. A key part of our climate change response is the Government's target of 100% renewable electricity generation by 2030.

3 The application before the Commissioner is a proposal for a 258ha solar farm in the Selwyn District. Once fully operational, it would generate enough renewable electricity to power, on average, 22,000 homes annually. This is a significant contribution and an exciting prospect for the energy sector and the wider community.

4 The Applicant acknowledges that the benefits of the proposal alone are not sufficient to obtain the necessary planning approvals. To that end, the Applicant has engaged an experienced team of consultants to thoroughly assess all aspects of what is proposed. The Applicant and its experts have carefully addressed all relevant effects, planning documents and matters raised by Council staff/consultants and submitters.

5 On this basis, the Commissioner can be satisfied that the proposal meets the relevant statutory tests and is deserving of consent.

6 These submissions will address the proposal, the planning framework, and the legal framework.

7 Evidence will be presented for the Applicant by:

7.1 **Mr Campbell McMath** – owner/operations;

7.2 **Mr Aaron Williams** – glint and glare;

7.3 **Mr Martin Gledhill** – electromagnetic fields;

7.4 **Mr William Reeve** – acoustics;

7.5 **Ms Amanda Anthony** – landscape planning; and

7.6 **Ms Claire Kelly** – planning.

8 The Applicant's experts have reviewed the evidence filed by the Joint Submitters and will respond as necessary during the presentation of their evidence.

THE PROPOSAL

9 The Applicant proposes to establish a solar farm (the *Proposal*) on a 258ha site in the Brookside area, approximately 10km north of Leeston in mid-Canterbury (the *Site*).

10 The Site comprises several parcels of land owned by the Price and Ward families, who will lease the land to the Applicant for the purposes of the Proposal. The Site is currently characterised by rural land use, including shelter belts and other plantings surrounding much of the Site.

11 The Proposal is described in detail in the Application and Assessment of Environmental Effects (the *AEE*), Mr Aimer's Section 42A Report and Mr McMath's and Ms Kelly's evidence.

12 In brief, the Proposal is for a solar array, comprising 5,844 tables of fixed solar panels and 26 inverters, and associated infrastructure. It is proposed to be constructed in three stages and, on completion, will have a generating capacity of 160MW.

13 The electricity generated will be fed into the network via Orion's Brookside Substation (the *Substation*), which is located adjacent to the north-western corner of the Site. The capacity of the Substation and its proximity are key factors relevant to the assessment of the Proposal, as Mr McMath will explain.

14 As outlined in the AEE, the current dairy farming activity on the Site will cease as each stage is completed and will be replaced with sheep farming around and underneath the panels. This dual land-use is known as "agri-voltaics". As Mr McMath's evidence explains, it is an increasingly common land use approach to achieve both decarbonisation goals and the diversification of farming activities.

15 The Proposal also comprises site preparation and construction works and exotic and indigenous planting for landscape mitigation. The surrounding area is currently used for dairy farming, other agricultural activities, and some semi-rural lifestyle blocks. The Proposal has been carefully designed to fit into the rural setting. This includes, in particular, landscape mitigation measures and amendments made since the AEE was lodged to address Selwyn District Council's and submitters' concerns.

16 The Proposal also requires consents under the Canterbury Land and Water Regional Plan for earthworks and operational phase stormwater. These consents have been granted.

PLANNING FRAMEWORK

17 The Proposal is subject to the "dual" planning regime currently applying in the Selwyn District under the Operative Selwyn District Plan (*Operative Plan*) and the Proposed Selwyn District Plan (*Proposed Plan*).

18 Under the Operative Plan, the Site is zoned Rural (Outer Plains) and it is agreed that, overall, the Proposal is a **discretionary activity**. The reasons for consent are set out in the Section 42A Report and Ms Kelly's evidence.

19 Under the Proposed Plan, the Site is zoned General Rural. There are no rules with immediate legal effect that apply to the Proposal under the Proposed Plan and therefore no consenting requirements under the Proposed Plan.

LEGAL FRAMEWORK

20 As a discretionary activity, the Proposal is required to be considered under sections 104 and 104B of the Resource Management Act 1991 (*RMA*). This section of our submissions addresses the relevant matters under sections 104 and 104B, with particular focus on the key legal issues.

21 We note that section 104(1) does not give primacy to any of the matters to which a decision-maker is required to have regard.[1] The weighting of the relevant considerations is a matter for the Commissioner.

Section 104(1)(a) – effects on the environment

22 The evidence for the Applicant is that the Proposal will result in a range of positive effects and the adverse effects will be for the most part less than minor (with some minor effects).

23 The assessment of effects is largely agreed as between the Applicant's experts and Council staff/experts, except in relation to highly productive land, where the Section 42A Report writer has asked for more information from the Applicant. This information has been provided in the evidence for the Applicant and the matter is addressed in detail below.

24 We note that written approvals have been received from various owners/occupiers, as listed in the Section 42A Report.[2] Effects on these owners/occupiers must be disregarded.[3]

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[1] *Stirling v Christchurch City Council* HC Christchurch CIV-2010-409-2892, 19 September 2011.

[2] Section 42A report, page 3.

[3] Resource Management Act 1991, section 104(3)(a)(ii).

Positive effects

25 As signalled above, the positive effects of the Proposal are clear and many. At a high level, the Proposal will:

25.1 enable renewable electricity generation which is anticipated to be sufficient to supply, on average, 22,000 homes in Canterbury annually;

25.2 assist in meeting national targets to increase electricity generation from renewable sources and reduce New Zealand's reliance on fossil fuels; and

25.3 build resilience into the electricity generation network, with other electricity sources (for example, hydro-electricity) under increasing pressure due to changes in weather patterns.

26 More specifically, the Proposal will:

26.1 provide a locally generated electricity supply, reducing the need for long transmission distances and the associated inefficiencies and costs;

26.2 be able to feed in to existing network infrastructure (namely the Substation), resulting in more cost-effective electricity production for end-users;

26.3 enable diversification of the agricultural use of the Site;

26.4 have lower environmental impacts than the existing dairy farm operations, both with respect to greenhouse gas emissions and nutrient discharges/losses, with a likely enhancement of water quality in the surrounding environment; and

26.5 result in economic and social benefits.

Adverse effects

27 The adverse effects of the Proposal are addressed in detail in the evidence for the Applicant. In terms of the main effects areas raised by submitters:

28 *Glare and reflectivity* – the evidence of Mr Williams confirms that the effects of glint and glare on residential amenity, road safety, or aviation activity associated with Christchurch Airport will be less than minor.

29 *Visual amenity, rural amenity/character and landscape* – the evidence of Ms Anthony confirms that the visual amenity, rural amenity/character and landscape effects of the Proposal will be minor initially, reducing to less than minor within a reasonable period based on the mitigation planting.

30 We note that rural amenity is a composite notion addressing the expectations of amenity in a rural setting. It is generally made up of more tangible elements including noise, visual/landscape, traffic and other matters. It requires a degree of subjective assessment but is not necessarily decisive, rather it is one factor to be weighed in the decision-making process.[4] Most cases where adverse effects on rural amenity values have led to a decline of consent have involved significant adverse effects. This is particularly because it is not a requirement of the RMA or planning documents to freeze an area at a point in time, rural settings can adapt to change and still maintain rural character.[5]

31 Ms Anthony will respond to Mr Smith's landscape evidence for the submitters. Some matters of legal clarification may assist the Commissioner:

31.1 It is well-established that there is no right to a view.[6] Even though a decision-maker must have regard to the maintenance and enhancement of amenity values and the quality of the environment, this is not the same thing as a right to a view.[7]

31.2 The assessment of effects on visual amenity and landscape should necessarily take account of both expert and local opinions, but must be undertaken in the context of the relevant planning provisions, as this is the framework against which local expectations about amenity are to be measured.[8]

31.3 Care should be taken with descriptions of a "change in character" in the context of the planning documents. Mr Smith's conclusion (paragraph 84) that the character of the Site will change to a "predominantly rural utility / semi-industrial character" is not consistent with the meaning of "industrial activity" in the Operative and Proposed Plans, which is an "*activity involving the manufacturing, production, processing, assembly, disassembly, packaging, servicing, testing, repair and/or warehousing of any materials, goods, products, machinery or vehicles*". The Proposal contains no elements of industrial activity.

[4] *Southern Alps Air Ltd v Queenstown Lakes District Council and Wilkin River Jet Ltd* [2010] NZEnvC 132.

[5] *Meridian Energy Ltd v Wellington City Council* [2011] NZEnvC 232 at [229]-[231].

[6] *Anderson v East Coast Bays City Council* (1981) 8 NZPTA 35, page 37 (HC).

[7] Resource Management Act 1991, sections 7(c) and (f), as enshrined in the planning documents.

[8] *Meridian Energy Ltd v Wellington City Council* [2011] NZEnvC 232; *Harewood Gravels Company Ltd v Christchurch City Council* [2018] NZHC 3118.

32 *Noise* – the evidence of Mr Reeve confirms that the noise effects of the Proposal will be for the most part less than minor (with construction noise potentially minor at one property).

33 *Highly productive land* – the evidence of Mr McMath addresses the impact of the construction and operation of the Proposal on the soil resource. During construction, there will be a less than minor impact on the soil resource. In the operational stage, the pasture will be maintained and the Site will continue to be able to be used for land-based primary production, although at a lesser intensity, which is a positive outcome for the soil resource. On this basis the effects during the operational stage will be less than minor. At the end of the operational life of the solar farm, a condition of consent requires the land to be returned to a state that enables it to be used for land-based primary production. This means there will be no long-term effects on the soil resource.

34 *Electromagnetic fields* – the evidence of Mr Gledhill confirms that electromagnetic fields from the Proposal would have no effect on the health of people around it, and it is highly unlikely that the electromagnetic fields would affect bees or birds in the area. The effects in this respect are accordingly less than minor.

35 The evidence of Mr Henderson for the submitters raises contamination and water quality effects. These are largely regional matters that were addressed during the regional consenting process and the respective functions of regional and territorial authorities in sections 30 and 31 of the RMA should be kept in mind. Nonetheless, these areas have been addressed by the Applicant and in the Section 42A Report, which confirms that they can be managed with appropriate conditions.

Section 104(1)(b) – statutory and planning assessment

36 The statutory and planning documents relevant to the Proposal are:

36.1 National Policy Statement for Renewable Electricity Generation 2011 (*NPS-REG*);

36.2 National Policy Statement for Highly Productive Land 2022 (*NPS-HPL*);

36.3 National Policy Statement for Freshwater Management 2020 (amended 2022) (*NPS-FM*);

36.4 Canterbury Regional Policy Statement (*CRPS*); and

36.5 Operative and Proposed Plans.

37 These documents are addressed in turn below.

NPS-REG

38 The NPS-REG came into force in April 2011. The objective of the NPS-REG is:

> *To recognise the national significance of renewable electricity generation activities by providing for the development, operation, maintenance and upgrading of new and existing renewable electricity generation activities, such that the proportion of New Zealand's electricity generated from renewable energy sources increases to a level that meets or exceeds the New Zealand Government's national target for renewable electricity generation.*

39 The NPS-REG requires decision-makers to recognise the benefits of renewable electricity generation and to acknowledge the practical implications of achieving New Zealand's target for electricity generation from renewable resources.[9]

40 As set out in Mr McMath's evidence, the current target is for 100% renewable electricity generation by 2030. More renewable energy will be needed to meet these targets, which can only be achieved through increasing renewable generation infrastructure, which the Proposal enables.

41 The NPS-REG also acknowledges the practical constraints associated with the development of new renewable electricity generation activities.[10] Amongst other things, decision-makers must have particular regard to the location of existing infrastructure, including the distribution network, and the need to connect renewable electricity generation activity to the national grid.

42 The Proposal clearly achieves the objectives and policies of the NPS-REG by providing a significant amount of new renewable electricity generation in a location where it can efficiently connect into the distribution network. That is precisely why this Site has been chosen.

43 In our submission, the high level of consistency of the Proposal with various parts of the NPS-REG should strongly factor into decision-making on the Proposal.

NPS-HPL

44 The NPS-HPL came into force on 17 October 2022, some seven months after the application was lodged. As noted in the Section 42A Report, the Applicant had not yet had a chance to address the NPS-HPL in this process and that opportunity was provided by way of evidence.

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[9] National Policy Statement for Renewable Electricity Generation 2011, Policy A and Policy B.

[10] Policy C.

45 Mr McMath's and Ms Kelly's evidence address the NPS-HPL in detail, in particular the questions raised in the Section 42A Report. We outline and address the NPS-HPL from a legal perspective.

46 Regional Councils are required to map highly productive land within their regions no later than three years after the commencement date of the NPS-HPL.[11] Clause 3.5(7) of the NPS-HPL provides an interim classification of highly productive land before this mapping exercise is complete. It is not in dispute that the interim classification applies to the Site due to its rural zoning and LUC 2 and 3 soils. The NPS-HPL is accordingly a relevant consideration.

47 The objective of the NPS-HPL is to protect highly productive land for use in land-based primary production, both now and for future generations.

48 The relevant NPS-HPL policies are identified in the Section 42A Report and Ms Kelly's evidence and contain themes of prioritising and supporting the use of highly productive land for land-based primary production and protecting highly productive land from inappropriate use and development.

49 Part 3 of the NPS-HPL contains the "Implementation" clauses. Clause 3.9(1) provides that:

> *(1) Territorial authorities must avoid the inappropriate use or development of highly productive land that is not land-based primary production.*

50 Land-based primary production is defined in the NPS-HPL as *"production, from agricultural, pastoral, horticultural, or forestry activities, that is reliant on the soil resource of the land."*

51 In our submission, clause 3.9(1) does not apply to the Proposal because the Site will at all times continue to be used for land-based primary production. As set out in the AEE and confirmed in Mr McMath's and Ms Kelly's evidence, while the existing dairy farm operations at the Site will be phased out, they will be replaced with sheep farming around and underneath the solar panels, which will continue while the solar farm is in operation. Sheep farming is a pastoral activity that comes within the definition of land-based primary production. The Site will therefore continue to be used for land-based primary production, albeit in a different manner from the current use.

52 Even if it is considered that clause 3.9(1) applies to the Proposal, clause 3.9(2) sets out a number of exceptions, several of which are relevant to the Proposal.

[11] NPS-HPL, clauses 3.4 and 3.5.

53 A use or development of highly productive land is not inappropriate where:

53.1 *Clause 3.9(2)(g)* – it is a small-scale or temporary land-use activity that has no impact on the productive capacity of the land:

(a) The NPS-HPL defines "productive capacity" as "*the ability of the land to support land-based primary production over the long term, based on an assessment of physical characteristics… legal constraints… and the size and shape of existing and proposed land parcels.*"

(b) In this case, as explained in Mr McMath's evidence, during construction and operation the Proposal will disturb only minimal areas of soil and is likely to improve the Site from a water quality/nutrient management perspective. At the end of the operational life of the solar farm, the infrastructure will be able to be removed with no impact on the productive capacity of the soil. As such, the long-term values of the Site for land-based primary production will be protected.

(c) In our submission, this means the Proposal can be characterised as a small-scale activity that has no impact on the productive capacity of the land for the purposes of the sub-clause (g) exception.

53.2 *Clause 3.9(2)(j)* – it is associated with the maintenance, operation, upgrade, or expansion of specified infrastructure, and there is a functional or operational need for the use or development to be located on the highly productive land:

(a) It is not in dispute that the Proposal meets the NPS-HPL definition of "specified infrastructure" because renewable electricity generation activity is recognised in the CRPS as regionally significant infrastructure.

(b) The National Planning Standards define "operational need" as "*the need for a proposal or activity to traverse, locate or operate in a particular environment because of technical, logistical or operational characteristics or constraints.*" As noted in the Section 42A Report, the threshold for establishing an operational need is lower than a functional need, but must be a "need" rather than a "want". Examples in recent case law include the packaging of water into bottles (operational need) associated with water take

from an aquifer (functional need);[12] the operational need for car parking areas to co-locate with a supermarket development;[13] and the operational need for a wind turbine to locate on a ridgeline.[14]

(c) Mr McMath's evidence explains that there is an operational need for the Proposal to be located at the Site. The primary reason the Site was selected is the proximity to transmission infrastructure (i.e. the Substation) with sufficient capacity to accept the electricity generated. Like in the *Woolworths* case, and as recognised by the NPS-REG, solar electricity generation must necessarily co-locate with transmission infrastructure. It is also relevant that the Site is a large area of land free of physical constraints, the favourable climatic conditions and the low population density in the surrounding area, compared to a larger rural settlement or an urban area.

(d) As Ms Kelly's evidence acknowledges, sub-clause (j) refers to the "maintenance, operation, upgrade, or expansion" of specified infrastructure. While there is no specific reference to the "construction" of specified infrastructure, the Ministry for the Environment has recently released a *Guide to implementation* of the NPS-HPL (the *Guide*) which clarifies this matter. The Guide states that the intention of sub-clause (j) is to "*recognise situations where the use or development of specified infrastructure… may occur on [highly productive land]*".[15] It states further that:[16]

> *… this test recognises that the functional and operational needs of specified infrastructure… means that they may need to be located on [highly productive land] – such as where a new road or transmission lines may need to traverse over an area of [highly productive land]. Further, in many cases, the presence of specified infrastructure on [highly productive land] does not preclude the balance of the HPL being used by land-based primary production. For example, land surrounding structures used for infrastructure can often be used for animal grazing or some forms of horticulture.*

[12] *Te Runanga o Ngati Awa v Bay of Plenty Regional Council* [2019] NZEnvC 196.

[13] *Woolworths New Zealand Ltd v Christchurch City Council* [2021] NZEnvC 133.

[14] *Pickering v Christchurch City Council* [2016] NZEnvC 237.

[15] NPS-HPL Guide to Implementation, Ministry for the Environment, December 2022, page 29.

[16] NPS-HPL Guide to Implementation, Ministry for the Environment, December 2022, page 29.

(e) The situation described in the Guide is precisely the situation here. There is an operational need for the Proposal to locate adjacent to the Substation and the land surrounding the solar array will be able to be used for animal grazing. In our submission, the sub-clause (j) exception clearly applies in this case.

53.3 We also note c*lause 2.9(2)(f)* – it provides for the retirement of land from land-based primary production for the purpose of improving water quality. The Site is obviously not being "retired" from land-based primary production during both the operational phase and at the end of the operational life of the solar farm. However, as described in Mr McMath's evidence, it is likely that the Proposal will improve water quality for the Site and surrounding environment due to the phasing out of the existing dairy farming operations.

36 Where one or more of the exemptions in clause 3.9(2) apply, clause 3.9(3) provides that territorial authorities must take measures to ensure that any use or development on highly productive land:

36.1 *Clause 3.9(3)(a)* – minimises or mitigates any actual loss or potential cumulative loss of the availability and productive capacity of highly productive land in their district. As noted in the Guide, the wording of sub-clause (a) is intended to recognise that most land use or development that has a pathway under clause 3.9(2) will inevitably lead to some loss of the availability and productive capacity of highly productive land. However, territorial authorities should consider the location and footprint of the activity, clustering of activities and co-existing with land-based primary production.[17] In this case, as explained by Mr McMath, the Applicant has made significant efforts to keep the footprint of the activity insofar as it impacts the soil resource as small as possible, and the land around the solar array will be used for animal grazing.

36.2 *Clause 3.9(3)(b)* – avoids if possible, or otherwise mitigates, any actual or potential reverse sensitivity effects on land-based primary production activities from the use or development. The Guide outlines that many of the activities listed in clause 3.9(2) are unlikely to create reverse sensitivity effects and that often such effects can be avoided by using a barrier or screen (such as planting), and in most cases reverse sensitivity effects will be governed by the relevant district plan provisions.[18] The experts for the

[17] NPS-HPL Guide to Implementation, Ministry for the Environment, December 2022, page 30.

[18] NPS-HPL Guide to Implementation, Ministry for the Environment, December 2022, pages 31-31.

Applicant and Council are in agreement that the reverse sensitivity of the Proposal will be less than minor.

37 In our submission, the Proposal achieves the objective, policies and implementation clauses of the NPS-HPL. Regardless of the "pathway" through the NPS-HPL, ultimately, the Proposal ensures that the Site (being highly productive land) is protected for use in land-based primary production. This position applies both during the construction and operational life of the solar farm, when there will be minimal impacts on the soil resource and pastoral production will continue, and also following decommissioning, when the Site will be available for continued primary production. The change in use from dairy to sheep farming will also have benefits in terms of the longer-term productive capacity of the soil.

Relationship between NPS-REG and NPS-HPL

38 The Section 42A Report asks the Applicant to address whether there is any conflict between the NPS-REG and the NPS-HPL and, if so, whether it can be resolved.[19]

39 Ms Kelly's evidence has addressed this question from a planning perspective and concludes that there does not appear to be a conflict between the two national policy statements as they apply to the Proposal. Our legal position is the same.

40 In essence, the question is whether the enabling provisions of the NPS-REG conflict with the more restrictive provisions of the NPS-HPL and how this impacts the Commissioner's consideration of the Proposal. In our submission:

40.1 The starting point is that where there is an apparent inconsistency between two planning documents, a decision-maker must undertake a thorough attempt to find a way to reconcile the provisions considered to be in tension.[20]

40.2 Words should be given their plain and ordinary meaning, but a literal interpretation should not prevent the plan from achieving its intended purpose.[21] The interpretation of planning documents requires a purposive approach and consideration of the context surrounding a word or phrase.[22]

[19] Section 42A Report, at [14].

[20] *Environmental Defence Society v New Zealand King Salmon* [2014] NZSC 38.

[21] *Powell v Dunedin City Council* [2004] NZRMA 49 (HC), at [35]; affirmed by the Court of Appeal in *Powell v Dunedin City Council* [2004] 3 NZLR 721, at [12].

[22] As per section 10(1) of the Legislation Act 2019, "*The meaning of an enactment must be ascertained from its text in light of its purpose."* This same approach applies to the interpretation of planning documents.

40.3 Applying the above in this case:

(a) The NPS-HPL contains directive language in respect of protecting highly productive land for use in land-based primary production, now and for future generations. However, the requirements of the NPS-HPL are not absolute. There are pathways for certain use and development and there is recognition that such use and development may lead to some loss of the availability and productive capacity of highly productive land.

(b) The NPS-REG pre-dates *King Salmon* and, by its nature, is enabling rather than restrictive. However, its "end goal" is increasing New Zealand's renewable electricity generation to a level that meets or exceeds the Government's national target for renewable electricity generation.[23] It provides clear direction that renewable electricity generation activities must be provided for, including acknowledgement of the practical constraints associated with the development of new generation activities must be provided for, including activities. The NPS-REG also requires decision-makers to recognise and provide for the national significance of renewable electricity generation activities, whereas the NPS-HPL generally applies at a regional or district level.

(c) When applied to the Proposal, it is clear that the provisions of the NPS-REG and NPS-HPL can be read together and reconciled. The NPS-HPL does not require highly productive land to not be touched at all. Rather, it must not be used inappropriately, and where a use is appropriate, the loss of the availability and productive capacity of highly productive land should be minimised. This is precisely what this Proposal achieves. At the same time, the Proposal is highly consistent with the provisions of the NPS-REG.

CRPS and Operative and Proposed Plans

41 The Section 42A Report and the evidence for the Applicant demonstrates that the Proposal is generally consistent with all relevant CRPS and Operative and Proposed Plan objectives and policies. That assessment is not repeated here. Ms Kelly's evidence addresses where there are some small differences of opinion between her and Mr Aimer's assessment, and she will also address the evidence of Mr Stewart for the Joint Submitters.

[23] NPS-REG, Objective.

42 From a legal perspective, it is important to note that the relevant objectives and policies must be considered "as a whole" and it is rare for a decision to be based on a single provision.[24]

43 Importantly, there are many provisions in the CRPS and the Operative and Proposed Plans that recognise the many benefits of renewable electricity generation.

Section 104(3)(d)

44 Section 104(3)(d) of the RMA provides that a consent authority must not grant a resource consent if the application should have been notified and was not. This section has been raised in Mr Stewart's evidence for the Joint Submitters.

45 Section 104(3)(d) is usually raised in the context of judicial review of a non-notification decision. There has been limited consideration in decision-making on limited notified applications, because it essentially requires a submitter who was limited notified (and therefore had the opportunity to submit) to make the argument that there should have been public notification.

46 In our submission, the Commissioner need not delve into this issue because the evidence for the Applicant is that the effects of the Proposal in all respects are no more than minor (i.e. below the public notification threshold). Accordingly, public notification was not required at the time of the Council's notification decision, nor is it required now. We briefly address the case law below.

47 Section 104(3)(d) simply refers to "notification" and does not specify whether public or limited notification is required.[25]

48 The Environment Court in *Te Rūnanga o Ngāti Awa v Bay of Plenty Regional Council*[26] concluded that the requirement in section 104(3)(d) could be met by either public notification or limited notification.

49 However, in an earlier decision, *Maungaharuru-Tangitu Trust v Hawke's Bay Regional Council*,[27] the Environment Court (differently constituted) concluded that section 104(3)(d) was not met if only limited notification had been undertaken.

50 Most recently, the Environment Court in *Goodwin & Others v Wellington City Council* considered both cases but did not need to

[24] *Akaroa Civic Trust v Christchurch City Council* [2010] NZEnvC 110. See also *Brial v Queenstown Lakes District Council* [2021] NZHC 3609 and *Brial v Queenstown Lakes District Council* [2022] NZCA 206.

[25] Section 2AA of the RMA provides that notification "means public notification or limited notification of the application or matter".

[26] *Te Rūnanga o Ngāti Awa v Bay of Plenty Regional Council* [2019 NZEnvC 196, (2019) 21 ELRNZ 539.

[27] *Maungaharuru-Tangitu Trust v Hawke's Bay Regional Council* [2017] NZRMA 147 (NZEnvC).

reach a conclusion either way.[28] The Court in *Goodwin* did, however, confirm that section 104(3)(d) requires the decision-maker to make a determination as at the time of considering the application, rather than a retrospective review of the notification decision.

51 As outlined above, the Applicant's position is that the adverse effects of the Proposal will be no more than minor. This means the Commissioner can be comfortable that public notification was not, and is not, required, and that section 104(3)(d) therefore does not apply in this case.

PROPOSED CONDITIONS AND CONSENT DURATION

52 Ms Kelly's evidence addresses the proposed conditions, should consent be granted. These are largely agreed as between Ms Kelly and Mr Aimer.

53 Where there are some minor areas of disagreement, Ms Kelly has explained the Applicant's position. For example, some of the additional noise conditions suggested in the Section 42A Report are not considered necessary by Ms Kelly or Mr Reeve.

54 The Section 42A Report proposes that the consent be granted on a 35 year term. The reasoning is in relation to the NPS-HPL. In our submission, a 35 year term is neither appropriate nor necessary in this case. Our submissions above in respect of the NPS-HPL outline that during the construction and operational life of the solar farm, there will be minimal impacts on the soil resource and pastoral production will continue. Given this, the imposition of a 35 year term would have limited benefit in protecting the productive capacity of the Site. All it would do is make the land available for dairy farming again on a specified date, but the NPS-HPL does not require a specific type of land-based primary production to be employed.

55 In addition, a specified consent duration has implications for investment certainty, maintenance and upgrade of the solar array, and the achievement of decarbonisation goals. It would be unusual for a lifetime to be placed on infrastructure of such significance.

56 In any event, the consent conditions require that if the Proposal is decommissioned for any reason, the Site must be made available for continued primary production. This will address any concerns that the Site may be left "unattended" and unable to be used for land-based primary production.

57 In our submission, if granted, the consent should, like most land use consents, be for an indefinite term.

[28] *Goodwin & Others v Wellington City Council* [2021] NZEnvC 9.

CONCLUSION

58 The Proposal presents an exciting opportunity for the Selwyn District and a significant step for renewable energy generation in the South Island.

59 As stated at the outset of our submissions, the numerous benefits of the Proposal are clear and they are an important considerations for the Commissioner's decision-making.

60 Alongside those factors, the Applicant and its expert team have carefully and thoroughly considered all relevant planning matters in relation to the Proposal.

61 In our submission, the Commissioner can be comfortable that:

61.1 the adverse effects of the Proposal will be acceptable, subject to the conditions put forward in Ms Kelly's evidence;

61.2 there are no adverse effects that are more than minor, such that the Proposal should have been publicly notified;

61.3 the Proposal is consistent with the various relevant planning documents; and

61.4 the relevant provisions of the NPS-REG and NPS-HPL can be appropriately reconciled for the purposes of the Proposal.

62 The Proposal is accordingly deserving of consent.

J M Appleyard / A R C Hawkins

Counsel for KeaX Limited