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

Reply legal submissions on behalf of KeaX Limited

Dated: 6 March 2023

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MAY IT PLEASE THE COMMISSIONER

INTRODUCTION

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

2 The Applicant's position remains, as set out in our opening submissions, that:

2.1 Section 104(3)(d) does not provide a jurisdictional bar to the grant of consent because:

(a) there are no adverse effects of the Proposal on the environment that are more than minor, such that the Proposal should have been publicly notified; and

(b) there are no adverse effects on any persons who were not limited notified that are minor, such that the Proposal should have been limited notified to them.

2.2 For the purposes of the Commissioner's substantive decision-making under sections 104 and 104B:

(a) the adverse effects of the Proposal will be acceptable and there are significant positive effects;

(b) the Proposal is consistent with the various relevant planning documents; and

(c) the Proposal is accordingly deserving of consent, subject to the amended proposed conditions of consent attached as **Appendix 1** to these submissions.

3 These submissions address matters that arose during the hearing.

THE NOTIFICATION QUESTION

4 Section 104(3)(d) of the Resource Management Act 1991 (*RMA*) was a focus of the hearing and a key part of the Joint Submitters' case. The legal points needing resolution are:

Does section 104(3)(d) address public or limited notification, or both?

4.1 Section 104(3)(d) refers to "notification" and does not specify whether public or limited notification is required. There is case law either way (*Ngāti Awa*[1] and *Maungaharuru*[2]) and the

[1] *Te Rūnanga o Ngāti Awa v Bay of Plenty Regional Council* [2019] NZEnvC 196, (2019) 21 ELRNZ 539 (104(3)(d) met by either public or limited notification).

[2] *Maungaharuru-Tangitu Trust v Hawke's Bay Regional Council* [2017] NZRMA 147 (NZEnvC) (104(3)(d) not met if only limited notification undertaken).

most recent decision (*Goodwin*[3]) does not resolve the inconsistency.

4.2 In our submission, based on the use of "*or*" in the definition of "notification" in the RMA,[4] *Ngāti Awa* should be preferred, which held that the requirement in section 104(3)(d) is met by either public *or* limited notification.

4.3 However, even if the Commissioner prefers to follow *Maungaharuru*, which held that the requirement in section 104(3)(d) is not met if only limited notification is undertaken, the Applicant's position is that public notification was not required, for the reasons set out below.

How should section 104(3)(d) be approached?

5 The recent *Goodwin* decision provides useful guidance as to how to approach section 104(3)(d).[5] It confirms:

5.1 The Commissioner need not and should not revisit the Council's initial notification decision because that "*clearly intrudes into a judicial review function on notification which is the province of the High Court*".[6]

5.2 Instead, the determination as to whether or not there should have been notification arises as part of the Commissioner's decision-making on the application itself pursuant to section 104.[7]

5.3 The Commissioner should make the determination on the basis of all of the evidence before him at the section 104 stage. It would be "*artificial and illogical if, in making a determination as to whether or not notification should have been undertaken, a consent authority and/or the Court could not have regard to all of the information before them but were limited to consideration of information available to consent authority officers at the time the notification decision was made*".[8]

6 The Commissioner should therefore follow the steps in section 95A of the RMA and decide, based on all of the evidence now before him, whether public notification was required. In terms of section 95A:

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[3] *Goodwin & Others v Wellington City Council* [2021] NZEnvC 9 (*Goodwin*).

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

[5] *Goodwin* at [94]-[124].

[6] *Goodwin* at [99] and [104].

[7] *Goodwin* at [99].

[8] *Goodwin* at [104].

6.1 *Step 1*: mandatory public notification was not required;

6.2 *Step 2*: public notification was not precluded;

6.3 *Step 3*:

(a) *subclause 8(a)*: there was no rule or national environmental standard that required public notification;

(b) *subclause 8(b)*: the Proposal will not or is not likely to have adverse effects on the environment that are more than minor (as discussed at paragraphs 9-34 below); and

6.4 *Step 4*: there are no special circumstances that exist in relation to the application that warrant the application being publicly notified (as discussed at paragraphs 35-36 below).

7 In terms of adverse effects, as the Commissioner will be aware, section 95D provides that a consent authority that is deciding whether an activity will have or is likely to have adverse effects on the environment that are more than minor:

7.1 must disregard any effects on persons who own or occupy the subject land and any land adjacent to that land;[9]

7.2 may disregard an adverse effect of the activity if a rule or national environmental standard permits an activity with that effect;[10] and

7.3 must disregard any effect on a person who has given written approval to the relevant application.[11]

8 The Commissioner must therefore consider whether there are any adverse effects on the environment (excluding effects on the landowners, adjacent landowners and those persons who have given written approval) that would trigger a requirement for public notification.

Adverse effects on the environment

9 The evidence for the Applicant is that the Proposal will not or is not likely to have adverse effects on the environment that are more than minor.

10 The relevant effects areas that have been raised by the Joint Submitters are visual and landscape effects (effects on views from

[9] Resource Management Act 1991, section 95D(a).

[10] Resource Management Act 1991, section 95D(b).

[11] Resource Management Act 1991, section 95D(e).

public roads and landscape character) and effects on highly productive land.

Visual and landscape effects

11 The Applicant proposes a comprehensive landscape mitigation strategy to screen the Proposal from views from adjacent and nearby public roads and neighbouring and nearby properties. The landscape mitigation strategy has been developed by Boffa Miskell and is based on feedback received from the Council officers/experts and neighbours.

12 As explained by Ms Anthony, the landscape mitigation strategy includes a combination of:

12.1 in some locations, reliance on existing, full height and dense shelterbelts;

12.2 in some locations, filling in the gaps of existing, full height but less dense shelterbelts with additional exotic planting;

12.3 in some locations, planting new 3m wide exotic shelterbelts;

12.4 in some locations, filling in the gaps of existing native planting areas; and

12.5 in some locations, planting new 3m wide native buffer planting.

13 The latest landscape mitigation strategy was provided with Ms Anthony's hearing statement. An updated version of the landscape mitigation strategy is attached as **Appendix 2** to these submissions. This is the final version upon which the Applicant seeks consent. This version incorporates changes to address matters raised by submitters at the hearing. The changes are described at paragraphs 58, 63 and 68 below as they relate to the relevant submitters' properties.

14 Counsel for the Joint Submitters suggested that the Proposal relies on vegetation that is not on-site to provide screening of the Proposal. This is incorrect. To be clear, as acknowledged by Mr Smith at the hearing, there is no reliance on off-site vegetation to provide screening of the visual effects of the Proposal, all vegetation (existing and proposed) is on-site.

15 In response to Council and submitter feedback, the Applicant has agreed that:

15.1 *all* planting around the perimeter of the Site will be undertaken prior to the commencement of construction of Stage 1; and

15.2 planting will be required to reach 2m in height and 3m in width along the relevant public road and private property boundaries prior to the commencement of each relevant stage of construction.

16 Proposed Condition 21 secures this requirement, which reads:

> *The Consent Holder shall ensure that all landscape mitigation planting is 2m in height and 3m in width:*
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> (a) *along Buckleys Road, along the boundaries with Lot 2 DP 54392, Lot 1 DP 7545, RS 8955 and Lots 1 and 2 DP81783 and Lot 2 DP 387576)), and within 10m of Branch Drain Road prior to Stage 1 construction works commencing; and*
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> (b) *along the boundaries with Lot 1 DP387576, Lot 1 DP53447, RS5849, RS5723, RS3658, Part RS9500 and Lot 2 DP78273 prior to Stage 2 construction works commencing; and*
>
> (c) *along Hanmer Road and Caldwells Road and the boundaries with RS 9933, RS 5723, Lot 1 DP 21302, Lot 1 DP37121 prior to Stage 3 construction works commencing.*

17 This will ensure that appropriate screening is achieved prior to construction of the solar infrastructure commencing.

18 From the 2m starting point, the planting will then be required to reach 4m in height to provide full screening of the Proposal. Ms Anthony's conservative estimate is that this will take approximately five years' growth, although noting that the visual effects above the initial 2m screening are limited. A Landscape Management Plan condition (Conditions 14-16) is included in the proposed conditions of consent to secure this requirement. The appropriateness of a management plan condition approach is discussed at paragraphs 126-127 below.

19 Prior to the hearing, the Applicant had proposed to irrigate the landscape mitigation planting for 2-3 years to enable it to establish. In response to Mr Smith's evidence for the Joint Submitters, the Applicant now proposes that the planting will be irrigated as required during the operational life of the solar farm. This is proposed Condition 17. The condition does not go as far as requiring irrigation at all times due to the wet season, as described by the submitter Mr Green (Glenmore Farming Company Ltd) and others at the hearing, when irrigation is unlikely to be required or beneficial.

20 Ms Anthony assessed the effects on views from public roads to be in the low-moderate (i.e. minor) range initially (with the planting at

2m), reducing to very low (i.e. less than minor) (with the planting at 4m). Ms Anthony assessed the effects on landscape character to be low-moderate (i.e. minor) initially (with the planting at 2m), reducing to very low (i.e. less than minor) (with the planting at 4m). Mr Densem's peer review agreed with Ms Anthony's assessment.

21 Counsel for the Joint Submitters referred to *Trilane Industries Limited v Queenstown Lakes District Council*.[12] In that case, the Queenstown Lakes District Council's (*QLDC*) landscape expert assessed the visual effects of a new dwelling when viewed from Lake Wanaka and a nearby public walking track, for a 5-7 year period before the proposed planting established, as moderate. The QLDC planner then relied on that assessment but concluded that the visual effects would be no more than minor on the basis that they were temporary. The High Court held that, for the purposes of the RMA notification tests, it was wrong to characterise effects as minor because they were temporary.[13]

22 Here, the Applicant has purposefully taken into account the temporary adverse visual and landscape effects of the Proposal. Both Ms Anthony for the Applicant and Mr Densem for the Council have assessed the landscape and visual effects of the Proposal firstly without the proposed planting having fully established (low-moderate = minor) (i.e. the temporary effect) and with the planting having fully established (very low = less than minor) (i.e. the permanent effect). Nowhere in the Applicant's or Council's assessment have effects been considered "minor" because they are temporary. In other words, the experts have not gone on and taken the next, incorrect, step as in *Trilane* to reach a "minor" effects conclusion because the effects were temporary.

23 Mr Smith's pre-filed evidence suggested that the Proposal would have moderate adverse visual effects from three public roads and moderate adverse landscape character effects. Mr Smith did not address these "public" effects at the hearing and appeared to indicate that, aside from the matters he raised at the hearing, he was generally comfortable.

24 Nonetheless, Mr Smith's conclusions in his pre-filed evidence were based on uncertainty around irrigation (now addressed), reliance on the proposed vegetation maturing (now addressed with the 2m starting point requirement), and native vegetation not being in-keeping with the rural character of the area (now addressed, with most native planting now replaced with exotic planting, especially along the Casey property boundary, as explained below).

[12] *Trilane Industries Limited v Queenstown Lakes District Council* [2020] NZHC 1647 (*Trilane*).

[13] *Trilane* at [59].

25 On this basis, for the purposes of the public notification determination, the adverse visual and landscape effects of the Proposal on the environment will be no more than minor.

Highly productive land

26 The National Policy Statement for Highly Productive Land (*NPS-HPL*) was a focus of the hearing and one we will turn to later in these submissions.

27 However, at the hearing the Commissioner sought guidance on whether the impact of the Proposal on the highly productive land was a relevant matter in assessing the potential adverse effects of the Proposal. As a discretionary activity, all effects may be considered, so this may be a relevant effects area.

28 The assessment of effects is a separate exercise to the application of the "implementation" provisions of the NPS-HPL to the Proposal. The effects assessment should not be undertaken in a vacuum and the planning documents necessarily inform the effects assessment. However, the exercise is determining the adverse effects on the highly productive land, rather than applying the NPS-HPL.

29 To that end, the RMA and the NPS-HPL provides the following guidance:

29.1 the purpose of the RMA includes sustaining the life-supporting capacity of soil;[14]

29.2 highly productive land is a natural resource with finite characteristics and long-term values for land-based primary production;[15] and

29.3 adverse effects on highly productive land will impact its "*productive capacity*", which:

in relation to land, means the ability of the land to support land-based primary production over the long term, based on an assessment of:

(a) *physical characteristics (such as soil type, properties, and versatility); and*

(b) *legal constraints (such as consent notices, local authority covenants, and easements); and*

(c) *the size and shape of existing and proposed land parcels.*

[14] Resource Management Act 1991, section 5(2)(b).

[15] National Policy Statement for Highly Productive Land, Policy 1.

30 As outlined by Mr McMath and Ms Kelly, the Proposal will have minimal impacts on the productive capacity of the land because:

30.1 the installation of the solar infrastructure requires minimal site works beyond pile driving and small areas of hard stand for the inverters;

30.2 no legal constraints will be imposed on the land; and

30.3 the size and shape of the existing large parcels will remain as is, with no subdivision or other fragmentation proposed.

31 In other words, there will be minimal impacts on the underlying soil resource, which will be protected in the long-term. This is in contrast to, for example, a proposal for subdivision, a residential/rural lifestyle development, or other such use which permanently destroys the soil resource.

32 While the current levels of primary production on the Site will reduce, in our submission, this is not relevant to the assessment of effects *on the highly productive land* (i.e. the soil resource). Instead, that is an assessment of productivity in an economics/viability sense (i.e. the use of the land for dairy farming vs the use of the land for a solar farm/agrivoltaics).

33 The use of land in that sense is largely at the owner's or applicant's prerogative.[16] There is nothing in the RMA or NPS-HPL that *requires* a landowner to *use* highly productive land for primary production. In this scenario, the owners of the Site could cease their dairy farming operations tomorrow, thereby reducing the economic productivity of the land, with no consequences. The point is the impact on the soil resource. We return to this point in the NPS-HPL section from paragraph 85 onwards below.

34 On this basis, the adverse effects on the soil resource of the highly productive land will be no more than minor.

Special circumstances

35 The Commissioner must also consider whether there are any special circumstances that exist in relation to the application that warrant the application being publicly notified. There has been no suggestion from the Joint Submitters that any such special circumstances exist.

36 As the Commissioner will be aware, special circumstances are those that are unusual or exceptional and that make notification desirable despite the general provisions excluding the need for notification.[17]

[16] *NZ Rail Ltd v Marlborough District Council* [1994] NZRMA 70 (HC) (financial viability of a proposed activity not a relevant effect).

[17] *Peninsula Watchdog Group Inc v Minister of Energy* [1996] 2 NZLR 529.

Public opinion will not be determinative.[18] In our submission, nothing in this case gives rise to special circumstances that would warrant public notification.

Limited notification

37 Finally on section 104(3)(d), the Joint Submitters have alleged that there were additional persons who should have been limited notified. There was no consideration in *Goodwin* if there were other persons who should have been limited notified. In our submission, asking the Commissioner to revisit the Council's limited notification decision would intrude into the judicial review function of the High Court and is therefore not appropriate.

38 However, even if the Commissioner considered he was obliged to do so, the Applicant does not consider there to be any additional persons upon which the Proposal would have minor effects such that they should have been given limited notification.

39 The evidence of Mr Smith and Mr Fletcher for the Joint Submitters has not actually identified any additional persons who they say should have been limited notified.

40 Ms Anthony and Mr Densem did not consider there were any other persons who should have been notified. Ms Anthony has shown the extent of the submitters' landholdings on the plan attached as **Appendix 2** (areas shaded in pink), which illustrates that the majority of land surrounding the Site is owned by the Submitters, hence why they were the only affected parties.

Conclusion on section 104(3)(d)

41 Overall, it is clear that section 104(3)(d) does not apply in this case and the Commissioner may proceed to make a substantive decision on the Proposal pursuant to sections 104 and 104B of the RMA.

42 The Commissioner raised the *Fullers* case[19] and asked counsel to consider whether it was relevant. Counsel confirm that it was a judicial review of a non-notification decision, therefore is not relevant to the limited notification circumstances of this case.

THE EFFECTS ASSESSMENT

43 The witnesses for the Applicant have carefully assessed the effects of the Proposal on the environment and on the submitters. That evidence is not repeated, except to reiterate their conclusions that the adverse effects of the Proposal will be acceptable. This is based on the amendments to the Proposal made since lodgement of the

[18] *Murray v Whakatane District Council* [1997] NZRMA 433.

[19] *Fullers Group Ltd v Auckland Regional Council* [1999] NZRMA 439 (CA).

application and the mitigation measures to be secured by way of the amended proposed conditions.[20]

44 As to two preliminary matters relating to effects:

44.1 Firstly, counsel for the Joint Submitters asserted, without reference to evidence, that the adverse of effects of a Proposal of this nature must be more than minor.[21] Counsel suggested that the Applicant's and Council's planners had conflated the positive effects of the Proposal with their adverse effects assessment in their "appropriate enthusiasm" for a Proposal of this nature.[22]

44.2 A thorough reading of both Mr Aimer's Section 42A Report[23] and Ms Kelly's evidence[24] (and the AEE[25]) demonstrates that they separately considered the adverse effects of the Proposal. They identified the positive effects and considered them in their overall assessment of the Proposal, as is appropriate, but there is no suggestion that the positive effects outweigh any other relevant considerations. The weighting as between all relevant considerations is, in any event, a matter for the Commissioner.

44.3 Secondly, the legal submissions and landscape evidence for the Joint Submitters characterise the Proposal as an "industrial" activity or "industrial and trade premises".[26] As outlined in the AEE[27] and our opening legal submissions, a solar farm is defined as a "utility" in the Operative Selwyn District Plan (*Operative Plan*).[28] Under the RMA, a solar farm is defined as "infrastructure".[29] The operation of the Proposal

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[20] Evidence of Ms Kelly, paragraph 5.17.

[21] Submissions of counsel for the Joint Submitters, paragraph 9.

[22] Submissions of counsel for the Joint Submitters, paragraph 13.

[23] Section 42A Report, paragraphs 72 - 186.

[24] Evidence of Ms Kelly, paragraphs 5.4 - 5.17.

[25] AEE, section 6.

[26] Submissions of counsel for the Joint Submitters, paragraphs 2, 10, 21, 22 and 51 and evidence of Mr Smith, paragraph 67.

[27] AEE, section 5.2.

[28] ***Utility****: includes the use of any structure, building or land for any of the following purposes;*

(a) The generation, transformation and/or transmission of energy;

[29] ***infrastructure*** *means—*

…

(d) facilities for the generation of electricity, lines used or intended to be used to convey electricity, and support structures for lines used or intended to be used to convey electricity, excluding facilities, lines, and support structures if a person—

(i) uses them in connection with the generation of electricity for the person's use; and

requires consent under the "utility" provisions of the Operative Plan and is "specified infrastructure" under the NPS-HPL.

44.4 It is therefore incorrect to characterise the Proposal as an industrial (and trade) activity. In our submission, this incorrect characterisation has influenced the Joint Submitters' position on the Proposal, in particular its appropriateness in a rural environment.[30]

Noise

45 It is not in dispute that the Proposal achieves the noise limits applying in the Rural Zone and, in fact, the Applicant has committed to a noise limit that is 5 dB L_{Aeq} lower than the applicable noise limit. This is secured via Condition 42. As Mr Reeve and Mr Farren pointed out, this means that the level of operational noise will be very quiet and appropriate in a rural area.

46 Importantly, there will be no noise at night because the Proposal obviously will not be able to operate in darkness. On non-sunny days, there is likely to be reduced noise due to the variable fan speed (as Mr Reeve described) as cooling takes place but at a lower level as less power is generated.

47 However, at the hearing, the character of the noise was a focus. The submitters considered that the Proposal would impact their rural amenity because it might result in a change (albeit not a loud one) in the sound environment.

48 Mr Reeve, Mr Farren and Mr Lewthwaite addressed this matter at the hearing. Mr Reeve and Mr Farren confirmed that the noise would not have special audible characteristics. Mr Reeve added that it would *not* be in the nature of a mechanical hum, which appeared to be a concern of the submitters. Mr Farren considered that, while audible, the noise would be acceptable in this context.

49 While the Commissioner is not limited to considering compliance with the District Plan noise limits, these are a useful and objective measure of a baseline of appropriate noise that is anticipated in the Rural Zone, set through a process of public participation. It is common planning practice throughout New Zealand to rely on noise limits for the assessment of noise effects. Of some significance, as Mr Reeve noted, 50 dB L_{Aeq} is a relatively high standard of residential amenity that is not typically provided for in a rural area.

50 Further, an evaluation of effects must ascertain whether the relevant district plan identifies any valued attributes or

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(ii) does not use them to generate any electricity for supply to any other person:

[30] This also addresses the need (or lack thereof) for a discharge permit to discharge contaminants from an industrial or trade premises, as alleged by counsel for the Joint Submitters.

characteristics for the relevant zone, or more broadly the receiving environment, and effects must be assessed in light of the outcomes for the relevant resources and values under the district plan. The planning instruments provide a yardstick against which the subjective views of submitters can be measured.

51 Under the Operative Plan:

51.1 Quality of the Environment, Objective B3.4.1 seeks to ensure that 'the District's rural area is a pleasant place to live and work'. The Explanation and Reasons states: *It is achieved by policies and rules to manage effects such as noise, vibration, outdoor signage; glare and odour. The policies and rules allow for day to day farming and other activities which have effects typical of a rural area, but manage activities that have potentially stronger effects. The policies and rules are not as stringent as those for Living zones. The Rural zone is recognised principally as a business area rather than a residential area, in the Plan*.

51.2 There are two policies that directly address noise: Policy B3.4.13 which recognises 'temporary noise associated with short-term, seasonal activities as part of the rural environment, but ensure continuous or regular noise is at a level which does not disturb people indoors on adjoining properties', and Policy B3.4.14 which relates to bird scaring devices.

51.3 It is noted that Policy B3.4.13 refers to not disturbing people *indoors* on adjoining properties, not simply within their property boundary. However, the Proposal imposes a noise standard lower than that required in the Rural Zone at the *notional boundary* (which is 20m from residential dwellings) on adjoining properties. This is significantly more stringent than what is required and illustrates that the noise from the Proposal will be very quiet.

52 Under the Proposed Selwyn District Plan (*Proposed Plan*):

52.1 The objectives and policies seek that people, and the environment are protected from significant levels of noise. The provisions seek to do this by setting maximum noise limits to reflect the character and amenity of each zone and limits on the location, frequency, and duration of specific activities that generate noise.

52.2 The Proposal will likely generate noise during the construction phases; however, these effects will generally be managed in accordance with NZS 6803: Construction Noise, ensuring construction only happens during daylight hours during the week. Piling works within 50m of the north elevation of the dwelling at 324 Branch Drain Road will likely exceed the

Proposed Plan noise limits.[31] This will be addressed in the Noise Management Plan (Condition 41), which will include measures such as discussing and agreeing the scheduling of piling works with the owner/occupier.

52.3 It is likely that the Proposal will generate very little noise once operational. The Site will operate within the Proposed District Plan noise limits due to the passive nature of, and lack of moving machinery associated with a solar array.

53 The High Court decision in *Gabler & Others v Queenstown Lakes District Council*[32] may provide some assistance. That case involved an unsuccessful judicial review application of a non-notification decision for a commercial recreation activity on a rurally zoned site out of Queenstown. The argument in that case focused on the adequacy of information as to compliance with the relevant district plan noise limits, but there was some discussion about the "quality" of the noise. While the High Court did not make an express finding in this respect, the end result appeared to be that a quantitative approach was appropriate and that if in the implementation of consent there was any failure to comply with the noise limits, the Council could intervene, review or if necessary cancel the consent.[33]

54 However, having listened to the submitters' presentations at the hearing, the Applicant has considered additional noise mitigation to address the submitters' concerns. As the Commissioner noted during the hearing, the fans used for the inverters are already variable speed and the changing speed will mean the noise levels could be even lower than predicted, especially during non-sunny days. Mechanically, there is limited additional mitigation that could be provided. Physical screening of the inverters could be an option. While Mr Reeve's view is that this is not necessary from a noise effects perspective, the Applicant is in any event willing to offer screening of the inverter closest to the nearest residential dwelling (that is, on the Kewish property). Mr Reeve advises that this could reduce noise levels by 5 dB. This is now secured by Condition 29, which requires physical screening of the equipment via a fence with no gaps, of a solid material and a certain height.

Visual and landscape (including glint and glare)

55 The "public" visual and landscape effects have been addressed at paragraphs 11-25 above.

56 The visual effects on the submitters are addressed as follows. As set out in our opening submissions, there is no right to a view under

[31] It is noted that the noise rules in the Proposed Plan do not have immediate legal effect therefore there is no consent requirement in this respect.

[32] *Gabler & Others v Queenstown Lakes District Council* [2017] NZHC 2086 (*Gabler*).

[33] *Gabler* at [87]-[89].

the RMA,[34] but rather visual effects are part of amenity considerations.

David and Donna Kewish – 324 Branch Drain Road

57 The Kewishs raised concerns about the visibility of the Proposal in views from their property to the north and north-east and their driveway. Mr Smith raised a scenario in which the existing shelterbelt on the Proposal Site is removed, opening up views of the Proposal. He proposed a new shelterbelt along the full northern boundary of the Kewish property, set back 10m from the existing shelterbelt, to address this scenario. Mr Smith also queried the ability of the proposed native planting along the Site boundary to the east of the Kewish property to full screen the proposal.

58 In response to the Kewish's concerns, the Applicant proposes:

58.1 To plant two rows of evergreen, exotic species 150m in length, set back 10m from the existing shelterbelt on the Site, along the northern Kewish property boundary, starting at Branch Drain Road and extending eastwards. This is intended to strengthen the existing screening and address any gaps in the existing shelterbelt for views to the north and north-east from the Kewish's dwelling. This is shown on the landscape mitigation strategy at **Appendix 2** by a yellow line to the north of the Kewish dwelling. This is secured through Condition 20.1.

58.2 It should be noted that the existing shelterbelt along the northern Kewish property boundary is tall and dense and will provide effective screening. This is illustrated well by Photo 9 on page 20 of Mr Smith's evidence. This photo is taken from the Kewish property looking east, across the Kewish landholding, with the Site behind the shelterbelts to the left and in the far distance (>500m away). The shelterbelt to the left will be retained and will screen the Proposal immediately. The shelterbelts in the distance (>500m away) have some gaps but additional exotic planting is proposed to achieve full screening of the Proposal.

58.3 To the east of the Kewish property, to replace the proposed native planting with exotic shelterbelts. This is intended to address concerns about the effectiveness of screening of the native planting, growth rates, long-term plant viability, and being in-keeping with the rural character of the area. This is shown on the landscape mitigation strategy at **Appendix 2** by a yellow dashed line and a yellow line to the east of the Kewish property (noting this is the Casey property boundary, but the Kewish's had concerns about distant view across the Casey landholding).

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

59 In terms of glint and glare, the panels that are to the north of the Kewish property will not cause any glint and glare effects as they are fixed facing to the north. The panels to the east may cause some effects but these will be limited due to the required 2m screening before they are installed, the direction they face (fixed to the north) and the small duration of effects (10-15 minutes in the morning and 10-15 minutes in the evening, as noted by Mr van der Velden at the hearing). Once the planting reaches the required 4m there will be no effects.

60 On this basis, and on the basis of Ms Anthony's and Mr Densem's evidence, the visual and landscape (including glint and glare) effects on the Kewishs will be acceptable.

Clark and Elizabeth Casey – 180 Grahams Road/198 Branch Drain Road

61 The Caseys raised concerns around the visibility of the Proposal in views from their dwelling to the north (including from their upper storey bedrooms) and in views from their landholding (including while using farm machinery). Mr Smith advised that the Caseys valued their rural outlook and views to the Southern Alps and Port Hills, questioned the ability of the proposed native planting to achieve the desired screening effect compared to exotic planting and suggested additional shelterbelt planting along the northern Casey property boundary.

62 It should be noted that the Casey's dwelling is not on the boundary with the Proposal Site. It is approximately 150m to the south and views from the upstairs bedrooms (Image 2 on page 12 of Mr Smith's evidence) look across the Casey's paddock. The Site can be viewed in the distance to the right. There are already existing shelterbelts in place along the Site boundary, with additional exotic planting proposed to achieve full screening of the Proposal. With respect, given the distance between the Casey dwelling and the Site, it is difficult to understand how views of the Proposal would result in a high degree of adverse effects, as suggested by Mr Smith. This might be the case if the dwelling were on the Site boundary, but the predominant view from the Casey's upstairs bedrooms will remain of their own paddocks. In addition, due to the location of the Casey's dwelling to the south of the Site, there will be no impact on views eastwards towards the Port Hills and only minimal peripheral impact on views westwards towards the Southern Alps.

63 However, in response to the Casey's concerns:

63.1 All planting along the boundary of the Site with the Casey landholding will no longer be native planting, it will all be exotic planting to be in-keeping with the rural character of the area. This will involve a combination of adding additional planting where there are existing shelterbelts in place that have gaps, and planting of new shelterbelts where required.

This is shown on the landscape mitigation strategy at **Appendix 2** by a yellow line along the full length of the Site boundary with the Casey property.

63.2 To plant an additional row of exotic buffer planting along the northern Casey property boundary to the north of their dwelling, as suggested by Mr Smith. This will be behind the existing shelterbelt, which is already going to be filled in, meaning there will in effect be a double row of planting along this boundary. This is intended to strengthen the existing screening for views from the Casey's dwelling. This is shown on the landscape mitigation strategy at **Appendix 2** by a yellow line behind the yellow dashed line to the north of the Casey dwelling. This is secured through Condition 20.2.

63.3 The condition (Condition 21) requiring the planting to reach 2m in height and 3m in width before each relevant construction stage commences will apply here. That is, no part of the solar infrastructure will be installed until it achieves the 2m height and 3m width requirement for screening from the Casey's landholding.

64 In terms of glint and glare, there will be no glint and glare effects on the Casey dwelling as it is located to the south of the Site and the panels are fixed facing north. On the remainder of the Casey property, the panels to the east and west may cause some effects but these will be limited due to the required 2m screening before they are installed, the direction they face (fixed to the north) and the small duration of effects (10-15 minutes in the morning and 10-15 minutes in the evening, as noted by Mr van der Velden at the hearing). Once the planting reaches the required 4m there will be no effects.

65 On this basis, and on the basis of Ms Anthony's and Mr Densem's evidence, the visual and landscape (including glint and glare) effects on the Clark Casey family will be acceptable.

Robyn Casey – 265 Branch Drain Road

66 Ms Casey raised concerns about the visibility of the Proposal in views from her dwelling.

67 As noted by Mr Smith, Ms Casey's dwelling is 395m away from the nearest Site boundary. It is noted that it is a single-storey dwelling. Mr Smith raised concerns about gaps in the existing shelterbelts on the Site boundary (in the distance) but accepted that once the landscape mitigation reached 3-3.5m and formed a thick hedge, effects would be addressed.

68 While views of the Proposal will be in the far distance of views from Ms Casey's dwelling, nonetheless, in response to her concerns:

68.1 As outlined above, the Applicant has committed to 2m high, 3m wide screening before each relevant construction stage commences. This will include planting to fill in the gaps in the existing shelterbelt along the relevant Site boundary. This will address Mr Smith's concerns about the initial visibility of the Proposal.

68.2 Also as outlined above in response to Clark Casey's concerns, all planting along the boundary of the Site with the Casey landholding will no longer be native planting, it will all be exotic planting to be in-keeping with the rural character of the area. This will involve a combination of adding additional planting where there are existing shelterbelts in place that have gaps, and planting of new shelterbelts where required. This is shown on the landscape mitigation strategy at **Appendix 2** by a yellow dashed line and a yellow line along the full length of the Site boundary with the Casey property. As all of the views from Ms Casey's dwelling and landholdings are views over Clark Casey's landholdings towards the Site, this will equally address her concerns.

69 In terms of glint and glare, the panels that are to the north of Ms Casey's property will not cause any glint and glare effects. The panels to the east and south may cause some effects but these will be limited due to the required 2m screening before they are installed, the distance between Ms Casey's property and the Site, the direction the panels face (fixed to the north) and the small duration of effects (10-15 minutes in the morning and 10-15 minutes in the evening, as noted by Mr van der Velden at the hearing).

70 On this basis, and on the basis of Ms Anthony's and Mr Densem's evidence, the visual and landscape (including glint and glare) effects on Ms Casey will be acceptable.

Contamination

71 Contamination effects were raised by the submitters through Mr Henderson's presentation. The Applicant understands the effects Mr Henderson were raising to be effects on human health and ecological effects as a result of materials escaping from the solar infrastructure (i.e. chemical leaching).

72 As noted at the hearing, Mr Henderson signed a petition in opposition to the Proposal and, in our submission, this puts his independence as an expert witness into doubt.

73 Nonetheless, the Applicant's response is as follows:

73.1 The Council requested information in relation to environmental risks/contamination and this was provided by the Applicant in a response dated 10 May 2022. A copy of the response is attached as **Appendix 4** and the specific

question and response is "7" on page 10. The crux of the response is that these risks are managed under other legislative regimes, including the Electricity Act 1992 (and associated regulations), Hazardous Substances and New Organisms Act 1996 and Health and Safety at Work Act 2015.

73.2 Publicly available information outlines that solar panels are made with encapsulating PV (solar) cells sealed in by a polyolefin material. This is encompassed in reinforced glass on the front and back. The modules are insulated with silicone sealant and aluminium frames. They are designed and manufactured to retain structural and operational integrity while being exposed to harsh environments (water, temperature and snow/wind loading) and avoid the potential for contaminant leaching. Modern solar panels contain only trace levels of heavy metals.[35]

73.3 Solar panels and their associated infrastructure (including the inverters and batteries) are not considered a "hazardous substance" under the Operative or Proposed Plans. By way of example, resource consent is not required to install a solar panel on a domestic house.

73.4 As outlined in the AEE, staff will visit the Site monthly to carry out inspections and maintenance of the solar array. As well as this, there is a 24/7 remote monitoring system, under which alarms go off in the event of any issues. Through both mechanisms, in the unlikely event of any issues with broken panels or associated infrastructure, this will be addressed promptly with minimal associated risks.

73.5 On this basis, it is not considered that contamination from the solar infrastructure is an issue. However, the Applicant is willing to formalise monitoring requirements into a condition of consent, to ensure they are continued for the life of the consent. This is proposed Condition 48, which requires an Operational Management Plan.

74 Beyond the above, the Applicant has addressed ecological effects (see the Ecological Assessment attached as Appendix 12 to the AEE) and effects on water quality as a result of the construction works, which have been confirmed as acceptable by the Council.

75 Mr Henderson also raised flooding concerns. As Mr McMath outlined, solar farms are specifically designed to be resilient to flooding effects. They are intended to provide resilience to the electricity network so that power can continue to be provided in the event of a natural disaster, such as a flood. This has been addressed by the

[35] See, for example, https://www.yinglisolar.com/en/ (the Applicant's supplier), https://www.pv-magazine.com/2021/03/20/the-weekend-read-bifacial-drives-pv-encapsulant-switch/ and https://patents.google.com/patent/CN206040663U/en.

Applicant in the AEE at section 7.6.4. It states that the panels will be between 3.2 and 0.7m above ground level, and therefore generally above the anticipated flood levels.

76 Furthermore, the inverters and batteries will sit on steel skids, which will be mounted on either piles (steel or concrete) or a concrete slab. This means that they will be 1m above the ground and consequently above the 200-year and 500-year rainfall ARI and the 500-year ARI Selwyn River flood depth.

77 Also related to contamination, Mr Henderson raised fire risks. A Fire Response Plan is already required to be prepared under separate legislation, the Fire and Emergency New Zealand Act 2017. However, the Applicant is willing to volunteer a proposed condition that the Fire Response Plan will be provided to the Council and neighbours. This is set out in proposed Condition 13.

Other effects

78 The above are the main effects raised at the hearing by the submitters. All other effects have been confirmed as acceptable in the evidence for the Applicant and Council.

REGIONAL CONSENTS

79 The Applicant has already obtained regional consents for the Proposal (for earthworks that will intercept groundwater and within 50m of surface waterbodies, and for the discharge of operational phase stormwater to ground). These were granted by the Canterbury Regional Council (*Regional Council*) in November 2022.

80 The submitters suggested that, firstly, the consents were insufficient (i.e. other consents were required) and, secondly, that there were "contamination"-type effects that, while they had been considered through the regional consenting process, also needed to be considered in this decision-making context.

81 As to the suggestion that the regional consents were insufficient, in our submission it is not the Commissioner's function in this context to determine whether or not the necessary regional consents are held for a Proposal. That is the function of the Regional Council or the High Court in judicial review.

82 The Applicant's position is that the necessary regional consents have been obtained. It was unclear from Mr Stewart's evidence and response to the Commissioner's questions what additional consents were required, perhaps some sort of discharge consent. Based on the information on contamination effects set out above, the Applicant does not understand what additional discharge consents could be required under the relevant regional rules. Counsel for the Joint Submitters suggested that an "industrial and trade"-related discharge consent was required, but the Proposal is not an industrial and trade activity. In any case, the Proposal will not be able to

operate without the necessary regional consents. If the Regional Council or High Court determines that additional consents are required, these will need to be obtained.

83 As to the consideration of "regional" effects, sections 30 and 31 of the RMA set out the functions of regional and district councils and there is some overlap as to natural resource (water, soil, etc) matters. It is therefore not the Applicant's position that these regional-type matters are not relevant at all, but rather the Regional Council is best placed to consider them and this has been done through the regional council consenting process. To that end:

83.1 The Operative and Proposed Plans seek to avoid and/or mitigate contamination of groundwater and surface water through land use activities, such as earthworks. By contrast, the issue of discharges, for example through chemical leachates, is governed by the Canterbury Land and Water Regional Plan and therefore relates to matters that have already been addressed by the Regional Council.

83.2 Resource consent was required from the Regional Council due to the earthworks proposed intersecting the highest groundwater level ever recorded on the Site and the discharge of stormwater from a utility onto land less than 1m above the highest groundwater level ever recorded on the Site.

83.3 The Regional Council is usually very adept at noting when additional consents are required but did not do so in this case, being comfortable that stormwater from the panels was the only discharge. The Proposal was considered by the Regional Council's in-house stormwater management specialist.

84 On this basis, no additional resource consents were required (noting that this should not form part of the Commissioner's decision-making in any case) and all related effects have been appropriately considered, to the extent they are relevant.

NPS FOR HIGHLY PRODUCTIVE LAND

85 The interpretation and application of the NPS-HPL is an important factor for the Commissioner's decision-making on the Proposal.

86 As set out in our opening submissions, it is the Applicant's position that the Proposal is not precluded due to the operation of the NPS-HPL and that it is in an appropriate use of highly productive land.

87 As a starting point, and given the need to ascertain the meaning of provisions in light of their context and the purpose of the planning document, we emphasise the relevant policies of the NPS-HPL:

***Policy 1**: Highly productive land is recognised as a resource with finite characteristics and long-term values for land-based primary production.*

***Policy 4**: The use of highly productive land for land-based primary production is prioritised and supported.*

***Policy 8**: Highly productive land is protected from inappropriate use and development.*

***Policy 9**: Reverse sensitivity effects are managed so as not to constrain land-based primary production activities on highly productive land.*

88 To ascertain what is "inappropriate", we turn to clause 3.9 of the NPS-HPL. Specifically, a use or development of highly productive land is "inappropriate" except where at least one of the exceptions in clause 3.9(2) apply and the measures in clause 3.9(3) are applied.

89 Our opening submissions focused firstly on the argument that clause 3.9(1) of the NPS-HPL does not apply to the Proposal because the Site will at all times continue to be used for land-based primary production.

90 This proposition remains unchanged. The AEE and evidence for the Applicant illustrate that the Proposal encompasses both the solar farm and sheep farming around and under the solar panels. The sheep farming operation will be undertaken by the landowners. While these landowners are currently dairy farmers, they have over 50 years' experience farming the soils in the Brookside area, including six years' sheep farming experience working for reputable and experienced sheep farmers in Canterbury. As such, they are well placed to understand how and why a sheep farming on the Site will be able to work and therefore why it was put forward as part of the Proposal.

91 On this point, as to productivity in an economics sense, it is noted that Mr Casey's presentation focused on the value of the loss of primary production, but did not account for the additional revenue from the diversification of the land use to solar and agrivoltaics.

92 Even if the Commissioner does not accept this position and prefers Mr Casey's farming evidence, that is not the end of the story.

93 Our second argument is that even if clause 3.9(1) of the NPS-HPL applies, several of the exceptions in clause 3.9(2) apply.

94 If one or more of the exceptions apply, use of the land that is *not* land-based primary production is allowed and the question of the feasibility or legitimacy of the proposed dual use falls away. In other words, there is no need to justify or confirm whether the

agrivoltaics concept works, because under the exception the land could be used solely for the solar farm anyway.

95 In this case, the non-invasive nature of the Proposal means that it can encompass the sheep grazing component. This enables the landowners to continue farming the land in some form and for the pasture around and under the solar farm infrastructure to be maintained. This goes to clause 3.9(3) of the NPS-HPL.

96 Ultimately, the exceptions in clause 3.9(2) are an express exclusion to the protection of highly productive land and could, for example in the case of a mineral extraction or quarrying activity, result in the permanent loss of the highly productive land resource.

97 The key exception here clause 3.9(2)(j), the specified infrastructure exemption. Clause 3.9(2)(j) provides that the use or development of highly productive land is not inappropriate where it is associated with "specified infrastructure" and there is "*a functional or operational need for the use or development to be on <u>the</u> highly productive land*" (our underlining).

98 The clause refers to "functional or operational" need, meaning that either is required rather than both, and in this case, it is operational need that is relevant.[36]

99 Operational need is not defined in the NPS-HPL but is defined in the National Planning Standards 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*.

100 By contrast, functional need is defined in the National Planning Standards as: *the need for a proposal or activity to traverse, locate or operate in a particular environment because the activity can only occur in that environment.* Functional need clearly has a higher threshold, that is, an activity can only locate in a particular environment.

101 Counsel for the Joint Submitters suggested that operational need in this context is only met if the characteristics or constraints of the proposed use result from the fact that the land is highly productive. The effect of this submission is that the word "the" in clause 3.9(2)(j) (underlined above) would be deleted and it simply state, "*there is a functional or operational need for the use of development to be on highly productive land*".

[36] At the hearing, the Commissioner noted three cases: *Director-General of Conservation v Taranaki Regional Council* [2021] NZEnvC 27; *Z Energy Ltd v Western Bay of Plenty Regional Council* [2016] NZEnvC 156 and *Doig v Marlborough District Council* [2018] NZEnvC 55. As noted by counsel for the Joint Submitters, these cases addressed "functional need" rather than "operational need", therefore are not relevant in this case.

102 In our submission, this proposition attempts to read in or ascribe a meaning to "operational need" that is not there on the face of the words of the definition and clause 3.9(2)(j), in the wider context of the NPS-HPL, or in the way this term has been used in the case law.

103 Firstly, functional need and operational need are different terms with different meanings and different thresholds. Functional need has a higher threshold and means that an activity can *only* locate in a particular environment. An example is a hydro-electricity scheme, which depends on the water resource, or a mineral extraction activity, which depends on the mineral resource. Operational need, while still a "need", not a "want", has a lower threshold and instead requires a technical, logistical, or operational justification for the particular location.

104 The suggestion that, in this context, the operational need of an activity must relate to the fact that the land is highly productive land, renders the technical, logistical, or operational aspect irrelevant. It simply becomes a requirement that an activity must locate in a particular environment (i.e. highly productive land), which is the very meaning of functional need. If this were the correct interpretation, there would be no such thing as operational need in this context. This cannot be the intention of this clause of the NPS-HPL, which refers specifically to functional *or* operational need.

105 Instead, a broader consideration of the technical, logistical, or operational characteristics or constraints and the particular environment is required.[37] In this case, the particular environment is not characterised solely by the fact that it is highly productive land. It is highly productive land upon which is located a substation, with sufficient capacity and resilience to accommodate the Proposal. It is highly productive land free of physical constraints in that it is a large, contiguous area with favourable climatic conditions. It is also highly productive land with a low population density in the surrounding area, compared to a larger rural settlement area. All of these factors combined demonstrate an operational need for this location.

106 The following case may assist the Commissioner's consideration.

107 *Te Runanga o Ngāti Awa v Bay of Plenty Regional Council*[38] involved an application for new consents and changes of conditions to

[37] ***environment*** *includes—*
(a) ecosystems and their constituent parts, including people and communities; and
(b) all natural and physical resources; and
(c) amenity values; and
(d) the social, economic, aesthetic, and cultural conditions which affect the matters stated in paragraphs (a) to (c) or which are affected by those matters.

[38] *Te Runanga o Ngāti Awa v Bay of Plenty Regional Council* [2019] NZEnvC 196 at [216]-[227]. See also *Woolworths New Zealand Ltd v Christchurch City Council* [2021] NZEnvC 133 and *Pickering v Christchurch City Council* [2016] NZEnvC 237.

existing consents to enable the expansion of existing water extraction and bottling operation. The meaning of functional need and operational need was considered when determining whether the proposed activity was "industrial" (involving any type of material, good or product) or "rural processing" (with its starting point a product from a primary productive use, therefore relying on the productive capacity of the land or a functional need for a rural location). The Court confirmed the difference between functional need (only being able to occur in a particular environment) vs operational need (having technical or operational characteristics or constraints which require such a location). The Court held that the taking of water at this location reflects a functional rather than operational need. While it may be possible to take groundwater from many locations, the assurance of access to the resource in this location demonstrates a functional need. The Court held that the subsequent packaging of water into bottles at that location was an operational need, providing for a processing activity close to an identified resource serves an operational need for that activity.

108 In light of the legal analysis and the case law set out above, the technical, logistical, or operational characteristics or constraints of the Proposal that require it to be located at the Site are (as described by Mr McMath):

108.1 A solar farm cannot operate without a network connection (i.e. substation). This is obviously necessary so that the electricity generated can actually be transmitted to people's houses.

108.2 It is not as simple as selecting a site and establishing a substation. The broader network is designed and planned to meet demand for electricity and for resilience to internal and external problems. This planning is done on a 10 year basis, as shown on the Orion map provided with Mr McMath's evidence. The insertion of a new substation into that 10 year planning would impact load and the safe and efficient operation of the network. Even if a new substation could be safely accommodated outside of the 10 year planning, the duplication of such significant infrastructure would be inefficient duplication of infrastructure assets and, due to the capex requirements, would reduce the affordability of power for the end-user.

108.3 Within the network, there is a 66kV line and a 33kV line. The scale of the Proposal (amount of power generated) dictates that it must connect into the 66kV line.

108.4 A substation is not just a means of distribution of power. It is a substantial infrastructure asset with components such as circuit breakers and an inherent modelling ability. It is a key aspect that makes multiple contributions to the network.

108.5 Networks are planned and constructed based on resilience. If one line into or out of a substation goes down, others need to be in place to ensure power supply can continue. The more options available to ensure power can continue to be supplied, the more resilient the network is. As discussed at the hearing, this was evident in the recent Cyclone Gabrielle weather event.

108.6 It was suggested for the submitters by Mr Stewart (planner) that other land could be found and there could be a cable connection to a substation from a, for example, 3km distance. As Mr McMath explained from a technical and operational perspective, there are significant inefficiencies, costs (necessarily passed on to the end-user) and increased GHG emissions associated with that level of transmission distance. The optimal approach is to locate a solar farm adjacent or in close proximity to a network connection.

108.7 Industry objectives for renewable electricity generation include the energy trilemma (decarbonisation, affordability and resilience). This proposed location achieves those objectives.

108.8 A solar farm requires a large, contiguous, flat area with no physical or legal constraints. It is not as simple as looking at a map and selecting an area. Landowners must be willing to sell or lease the land. The size of land necessary for a Proposal of this scale is unlikely to be found in an urban area, it is likely to need to a rural environment.

109 In further response to Mr Stewart's suggestion that the proposal could locate elsewhere in the District on non-highly productive land, it should be noted that in this part of the District, much of the land is LUC 1-3 (which is highly productive land for the purposes of the NPS-HPL). Attached as **Appendix 3** to these submissions is the Orion network plan (provided by Mr Campbell) overlaid with the LUC 1-3 areas in the District (which are publicly accessible on Canterbury Maps). This plan demonstrates both that:

109.1 there is not much land in the area that is not highly productive land, in other words there are limited other options to avoid it; and

109.2 even if the whole Site is considered to be "lost" in terms of the highly productive land resource, there would be minimal effect on a District-wide basis. Of the extent of highly productive land in the Selwyn District (as shown on **Appendix 3**), this 258ha site is only a small percentage. As per our opening submissions, according to the provisions of the NPS-HPL, consideration of highly productive land is required by a decision-maker on District wide basis.

110 The operational need in this case is not simply an "advantage" or a "convenience" as suggested by counsel for the Joint Submitters. From a technical, logistical and operational perspective, the Site is currently one of few, if not the only location in the Selwyn District that meets the requirements for this Proposal.

111 Once the clause 3.9(2) exception is confirmed, consideration of clause 3.9(3) is required. As set out in our opening submissions and the evidence for the Applicant, the Proposal has been designed to minimise the loss of highly productive land (which must be considered on a District-wide basis in any case) and there will be minimal, if any, reverse sensitivity effects.

CONSENT DURATION

112 There was discussion during the hearing about the proposed consent duration.

113 For the reasons outlined in our opening submissions, should consent be granted, a finite term is not considered appropriate or necessary in this case. This is because during the construction and operational life of the solar farm, there will be minimal impacts on the soil resource and pastoral production will continue. If for some reason the solar farm is decommissioned, the Site must be cleared and made available for continued primary production (Conditions 51 and 52).

114 The proposed conditions also contain a review condition to ensure that no new/additional effects arise that need to be managed. Hydro-electricity generation, for example, uses a resource that is often under pressure from over allocation. There is a need to periodically check the allocation and ensure that it is necessary and appropriate (i.e. can any be surrendered). This does not apply in this case.

115 Further, as Mr McMath advised, with a robust maintenance and upgrade plan the plant would last for longer than 35 years and it would be an underutilisation and waste of material and a useful asset to cease operations at an arbitrary point in future. There is no suggestion that demand for energy will drop in future, to the contrary it is likely to increase, meaning removal of a solar farm would be the opposite of what is sought by the NPS-REG and New Zealand renewable energy demands.

116 Ultimately, with the amount of LUC 1-3 land available in the District and the small amount of land affected as a result of this Proposal, it is difficult to see what real resource management benefit a 35 year term would have in this case. There may also be a risk of a "finite term" precedent for the case of energy and other infrastructure, which would not align with the enabling provisions for such activities in the national, regional and district-level planning documents.

117 Counsel for the Joint Submitters asserted that consent should only be granted on a 15 year term to align with the regional consents. This would be an unusual approach and there is nothing in the RMA to suggest this is required.

118 Section 123 of the RMA specifically provides that land use consents may be granted for an unlimited period, whereas any other consents (i.e. regional consents) may only be granted for 35 years. In this instance, any discharge related to stormwater, and consents required for the farming activity (e.g. water take), will necessarily be subject to a defined term, so that effects can be readdressed and managed appropriately. The land use itself, once established, and conditions met, will not result in different or greater adverse effects over time, hence the availability of an indefinite term.

119 Once the regional consents expire, the Proposal will not lawfully be able to operate. Either the regional consents would need to be re-obtained or the "end of life" condition would be triggered, which requires the Site to be cleared and the land returned to a state that enables it to be used solely for land-based primary production. If operations continued without the regional consents in place, enforcement action would be available to the Regional Council.

120 There is also no correlation (as suggested by counsel for the Joint Submitters) between a land use consent and the replacement of a regional consent. Just because a land use consent exists, there is no assumption (in theory or in practice) that the necessary regional consents to allow an activity to continue will be granted. Instead, an application for replacement regional consents will necessarily be assessed and determined in accordance with the relevant plan and statutory provisions. This is not an "existing environment" type scenario.

121 In this respect, the Joint Submitters (in legal submissions and evidence) have also raised issues of site rehabilitation if the solar farm is decommissioned.

122 In terms of rehabilitation of the Site, from both an environmental and cost perspective:

122.1 While uncommon in New Zealand as yet, Mr McMath advises that there is ample example of the removal of solar panels overseas.

122.2 In this case, the piles that are driven into the ground will be galvanised steel piles (similar to pivot irrigators and drinking wells) and are relatively easy to remove.

122.3 If for whatever reason a solar farm is decommissioned, all of the steel from the panels (piles and supporting structure) is recycled. In addition, the aluminium, glass and other materials are all able to be recycled. All of this material

obtains high value for recycling and hence there is motivation to remove and recycle it, rather than leaving it on a site.

122.4 In our submission, this addresses the issues raised by the Joint Submitters as to the state of the Site at the end of the operational life of the Proposal. We note that rehabilitation is already secured by the proposed "end of life" condition and nothing further is required.

123 As regards conditions generally, in response to some of the comments made by and for the submitters, it is noted that the Commissioner does not have to assume non-compliance with conditions of consent.[39] In other words, compliance with the consent, if granted, may be assumed.

CONDITIONS OF CONSENT

124 As outline above, amended proposed conditions are contained at **Appendix 1** to these submissions. They are largely explained in the relevant sections above. It is noted that none of these additions or amendments are considered strictly necessary from an effects perspective, however are offered by the Applicant in good faith on the basis of matters raised by submitters during the hearing.

125 One legal matter arose in relation to the proposed conditions, namely the appropriateness of the use of management plans.

126 Management plans are an accepted approach in consent conditions particularly for large projects. Management plans must not delegate key *decisions* or *effects assessments* to a later date, but may leave the *certification* of matters to a council officer or other person using their skill and experience. An objective in a management plan condition is capable of being set by qualitative criteria in appropriate circumstances and not solely by quantitative criteria.[40]

127 It is usual practice to condition the preparation of, for example, a Landscape Management Plan and such conditions are common for consents of this nature. Such a condition will set out the objective that the landscaping is required to achieve and matters to be included, i.e. timing of planting, species, spacing of plants, height of plants at the time of planting, details of ongoing maintenance (fertilising, irrigation) etc. The Landscape Management Plan itself will be certified by the Council as appropriately addressing the objective all these matters. The Landscape Management Plan will be required to be complied with for the life of the consent.

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[39] *Barry v Auckland City Council* [1975] 2 NZLR 646 (CA) at 318 cited with approval in *Guardians of Paku Bay Association Inc v Waikato Regional Council* [2012] 1 NZLR 271 (HC) at [134].

[40] *Northcote Point Heritage Preservation Soc Inc* v Auckland Council [2016] NZEnvC 248, referring to *Environmental Defence Society Inc v New Zealand King Salmon Co Ltd* [2013] NZHC 1992, [2013] NZRMA 371, at [114]–[128].

128 On this basis, the proposed management plans conditions are valid and appropriate in this case.

129 Mr Fletcher's summary statement (section 4) contained a list of "potential conditions". It appears that these are his client's wishes conveyed rather than his planning opinion, and he has given no planning advice as to whether he considers the conditions to be necessary or appropriate from a resource management perspective. Many are outside the scope of the consenting regime. Where relevant, they have been incorporated into the proposed conditions.

MEMORANDUM FOR JOINT SUBMITTERS

130 On 2 March 2023, counsel for the Joint Submitters filed a memorandum of counsel questioning the impartiality of the Council officers. This is an extremely serious and, in our submission, unsubstantiated allegation.

131 Throughout the hearing, the Applicant sought to engage constructively with the submitters, their expert witnesses and the Council officers. The Applicant's understanding was that this was encouraged in order that the parties might reach common ground on some aspects of the Proposal. This is not uncommon and was indeed the case for certain noise and landscaping mitigation measures.

CONCLUSION

132 The Commissioner's first step in his decision-making is the jurisdictional matter of section 104(3)(d). It is our submission that the Commissioner can be comfortable that in this case, section 104(3)(d) does not apply, and the application need not have been publicly notified nor limited notified to any additional persons.

133 On that basis, the Commissioner may proceed to assess the Proposal under section 104 and 104B and, at that point, the positive effects and benefits of the Proposal become relevant.

134 The numerous benefits of the Proposal are clear, including pursuant to the National Policy Statement for Renewable Electricity Generation, and they are an important consideration for the Commissioner's decision-making.

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

136 The Applicant acknowledges the need to take into account matters raised by submitters. There is no intention on the Applicant's part to downplay them. However, they should appropriately be viewed in light of the expert evidence (and the Commissioner has expert evidence before him for both "sides") and the Operative and

Proposed Plan provisions which reflect the expectations of the community.

137 In our submission, the Commissioner can be comfortable in granting consent for the Proposal.

J M Appleyard / A R C Hawkins

Counsel for KeaX Limited