

**BEFORE A COMMISSIONER APPOINTED BY THE SELWYN DISTRICT COUNCIL
AT SELWYN DISTRICT COUNCIL**

Under The Resource Management Act 1991 ('**RMA**')

In the matter of an application by KeaX Limited to construct and operate a 111ha
solar array at 115 & 187 Buckleys Road, Leeston.

**LEGAL SUBMISSIONS
FOR THE BROOKSIDE SUBMITTERS GROUP**

1 March 2024

Duncan Cotterill

Solicitor acting: Ewan Chapman / Jessica Ottawa
PO Box 5, Christchurch 8140

Phone +64 3 372 6405

ewan.chapman@duncancotterill.com

jessica.ottowa@duncancotterill.com

MAY IT PLEASE THE COMMISSIONER

- 1 These legal submission are provided on behalf of Clark and Elizabeth Casey, Dave and Donna Kewish, Michael and Anneka Dalley, Corey Krygsman, Anne and Donald Green, and Simon Robinson and Donna Irons (the **Brookside Submitters Group**), who were all part of the limited notified group and lodged submissions in oppositions to the KeaX Limited proposal RC235464 to construct and operate a 111ha solar array at 115 & 187 Buckleys Road, Leeston (the **Application/ Proposal**).

BACKGROUND

- 2 This is not the first time a solar farm proposal has been considered for this site. In March 2023, resource consent to establish a 250ha solar array was declined by the Commissioner on the basis that the indefinite term sought and the Proposal's impact on highly productive land (**HPL**) established a more than minor effect on the environment that required public notification¹ (the **Original Application**). All of the members of the Brookside Submitters Group submitted on the earlier application, and some participated at that hearing.
- 3 On 10 August 2023, the amended Application was filed (with key changes comprising a reduction in the proposal size from 250ha to 111ha, and a change in the proposed site design/ panel direction). Other amendments to the Original Application include a change to the amenity planting proposal to screen the site. Despite the earlier panel of Commissioners' finding that public notification was required, the outcome of the notification decision was again to limited notify nine parties of the Proposal, but to reduce the notification group from that of the Original Application (understood to be assessed simply on a boundary abutting basis and no wider and therefore a smaller group given the reduction in Application Site area).
- 4 Whilst the Application was limited notified, surprisingly meaningful engagement with the Brookside Submitters Group was not undertaken. It is accepted that a generic factsheet was circulated to the limited notified group, however it is submitted that the nature and scale, and long-term impacts of the Proposal warrant a greater level of community engagement. The Brookside Submitters Group is disappointed that despite known concerns (due to the earlier process), a targeted approach and early consultation was not advanced by the Applicant. Early engagement would have reduced submitter input/ costs and would have enabled the Application preparation phase to capture and collaboratively work through any concerns raised. This would have resulted in efficiencies and been of benefit to all parties.

¹ per s104(3)(d) of the Resource Management Act 1991 (the **RMA**).

- 5 Whilst there are only a limited number of submitters involved in this process, this proposal has garnered significant interest from the community in a negative way. The views presented by the submitters today are not isolated, and the submitters here today are delivering their own views, but these are shared by many.

EVIDENCE

- 6 In support of their submissions, the Brookside Submitters Group have filed expert briefs of evidence by:

6.1 Mr Stewart Fletcher, Planner;

6.2 Mr Sharn Hainsworth, Land Use Capability;

6.3 Ms Haddee Thompson-Morrison, Soil Expert; and

6.4 Mr Ray Henderson, Ecologist, and a person with considerable experience in handling and dealing with contaminants.

- 7 In addition, the Brookside Submitters Group will provide evidence of fact themselves.

KEY SUBMISSIONS

- 8 Although there has been significant evidence put before you by the Applicant in respect of the positive effects of the Application, it is respectfully submitted that this issue is not simply one of positive environmental, and renewable energy generation outcomes. The key issues are the impacts this Application will have on the long-term loss of highly productive land, including on the integrity of the National Policy Statement for Highly Productive Land 2022 (**NPS-HPL**), and the amenity values of the surrounding properties and small close knit rural community of Brookside.

- 9 Evidence presented by the Brookside Submitters Group will demonstrate that the Application will impose more than minor effects on the environment, it will confirm that the effects of the Proposal have not been given the appropriate level of consideration by the Applicant, the Applicants experts, the processing planner, or the Council appointed experts. I address these matters in turn throughout these submissions.

- 10 My principal submissions are:

10.1 The NPS-HPL prevents this Application being approved. In having regard to the higher order policy document, it is simply not open to the Commissioner to allow the development of new specified infrastructure (a solar array in this instance) on highly

productive land. The strong, unequivocal language in the NPS-HPL² requires that the application be declined.

- 10.2 If the Commissioner finds that there is a pathway available to grant the Application, it is submitted that the scale and nature of the effects that this long-term Proposal will have on HPL and the wider receiving environment, mean that it should not have been assessed without public notification – imposing a jurisdictional bar to the granting of consent per s104(3)(d) of the Resource Management Act 1991 (the RMA).
- 11 The above submissions, if accepted, leave the Application in the difficult position of both contrary to the NPS-HPL, and falling short in terms on an effects on the environment assessment.

EFFECTS OF PROPOSAL

- 12 Drawing from the evidence presented by the Brookside Submitters Group the key environmental effects associated with the Application are as follows:
- 12.1 A reduction in amenity for both neighbouring residents and the general public;
 - 12.2 A significant change in the landscape character of the site from rural to industrial;
 - 12.3 Adverse effects resulting from contamination and related surface water runoff;
 - 12.4 Adverse effects on the productive capacity of HPL; and
 - 12.5 An unjustified and inappropriate use of HPL.
- 13 The mitigation methods proposed by the Applicant and addressed in the Application material do not adequately avoid, remedy or mitigate the adverse effects generated by the Proposal. The submitter group has considered whether there may be conditions available that would manage the effects of the Proposal to an appropriate level but consider there are none.

THE APPLICATION

- 14 It is undisputed by the planning experts that the activity status of the Proposal is discretionary. Accordingly you will have regard to (relevantly):

² Clause 3.9 of the NPS-HPL

- (i) Any actual and potential effects on the environment of allowing the activity³;
- (ii) Any measure proposed or agreed to by the Applicant to ensure positive environmental effects to offset any adverse effects⁴ ;
- (iii) The relevant provisions of the Statutory documents⁵;
- (iv) Any “*other matter*” you consider to be relevant and reasonably necessary to determine the application.⁶

RELEVANT STATUTORY DOCUMENTATION

National Policy Statement for Highly Productive Land 2022

- 15 As a preliminary matter, I address the issue of consistency the relevant statutory documentation – namely the higher order policy documentation.
- 16 Clause 3.9 of the NPS-HPL requires a consent authority to avoid the inappropriate use and development of HPL unless one of the exceptions in clause 3.9(2)(a)-(j) can be made out.

3.9 Protecting highly productive land from inappropriate use and development

- (1) *Territorial authorities must avoid the inappropriate use or development of highly productive land that is not land-based primary production.*
- (2) *A use or development of highly productive land is inappropriate except where at least one of the following applies to the use or development, and the measures in subclause (3) are applied:*
 - a) *it provides for supporting activities on the land:*
 - b) *it addresses a high risk to public health and safety:*
 - c) *it is, or is for a purpose associated with, a matter of national importance under section 6 of the Act:*
 - d) *it is on specified Māori land:*

³ Section 104(1)(a) RMA

⁴ Section 104(1)(ab) RMA

⁵ Section 104(1)(b) RMA

⁶ Section 104(1)(c) RMA

- e) *it is for the purpose of protecting, maintaining, restoring, or enhancing indigenous biodiversity:*
 - f) *it provides for the retirement of land from land-based primary production for the purpose of improving water quality:*
 - g) *it is a small-scale or temporary land-use activity that has no impact on the productive capacity of the land:*
 - h) *it is for an activity by a requiring authority in relation to a designation or notice of requirement under the Act:*
 - i) *it provides for public access:*
 - j) *it is associated with one of the following, and there is a functional or operational need for the use or development to be on the highly productive land:*
 - (i) *the maintenance, operation, upgrade, or expansion of specified infrastructure:*
 - (ii) *the maintenance, operation, upgrade, or expansion of defence facilities operated by the New Zealand Defence Force to meet its obligations under the Defence Act 1990:*
 - (iii) *mineral extraction that provides significant national public benefit that could not otherwise be achieved using resources within New Zealand:*
 - (iv) *aggregate extraction that provides significant national or regional public benefit that could not otherwise be achieved using resources within New Zealand.*
- (3) *Territorial authorities must take measures to ensure that any use or development on highly productive land:*
- a) *minimises or mitigates any actual loss or potential cumulative loss of the availability and productive capacity of highly productive land in their district; and*
 - 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.*

(4) Territorial authorities must include objectives, policies, and rules in their district plans to give effect to this clause.

- 17 The NPS-HPL was introduced to ensure the availability of New Zealand's most favourable soils for food and fibre production, now and for future generations. The NPS-HPL provides direction to improve the way HPL is managed under the RMA and provides a strong avoid direction to preserve HPL by preventing subdivision and inappropriate land use. This means that Council must decline applications that are not in accordance with the policy unless the proposal meets one of the limited exceptions.
- 18 It is understood that the status of the Proposal site as HPL (with 92 % LUC 2 and 8% LUC 3)⁷ is not disputed, therefore, these submissions do not address this further. I turn to the applicable NPS-HPL policies.

Clause 3.9(2)(j) – Specified Infrastructure

- 19 The Applicant considers that the Proposal to establish a new solar array on HPL would meet the exception provided for under clause 3.9(2)(j)(i)
- 20 Clause 9(2)(j)(i) is set out above, and establishes an exception for “*the maintenance, operation, upgrade, or expansion*” of specified infrastructure, provided there is a functional or operational need for it.
- 21 Whilst it is not disputed that the Proposal meets the definition of “*Specified Infrastructure*”⁸, it is respectfully submitted that the Applicant and Council officer have accepted an incorrect and overly broad interpretation of the clause.
- 22 Clause 3.9(2)(j) specifically refers to the maintenance, operation, upgrade, or expansion of specified infrastructure, so to interpret this clause to also apply to the establishment of new specified infrastructure would be incorrect.
- 23 It is submitted that the specific wording of the NPS-HPL was intended to enable the maintenance, further extension, and development of Specified Infrastructure (provided they meet the functional and operational need test) on highly productive land, so as not to render these already established activities completely defunct and unable to keep up with required upgrades⁹. The NPS-HPL is however, specifically worded to avoid the establishment of new specific infrastructure on HPL unless there is an operational or functional need can be established. It is submitted that this is a reflection of the position that other sites (specifically

⁷ Refer to para 133 of the section 42A report.

⁸ As defined in clause 1.3(1) - Interpretation section of the NPS-HPL

⁹ To do so would be contrary to the sustainable management purpose of the RMA (s5)

non-HPL) are available and would be more appropriate when considering new construction of the same.

- 24 While the Government has signalled change in the renewable energy space¹⁰, for the purposes of this hearing you must apply the NPS-HPL in its present form. It will be a publicly notified process to change the NPS-HPL – and it is “a bridge too far” to second guess any outcome of that process.
- 25 Following *Love v Porirua City*¹¹, you must rely on the wording of the plans before you. It is submitted that this approach should apply to the wording of National Policy Statements all the same.
- 26 The purpose of this hearing is not a review of the NPS-HPL amendment process – and in any case, the discussion document neither drills down to a particular site, and nor does it indicate how the NPS-HPL may change – other than that any amendment will follow a formal process if progressed.

Clause 3.9(2)(g) – small scale and temporary activities that do not have an impact on productive capacity

- 27 For completeness, we also address the exception at 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.

- 28 Given the scale of the Proposal, and indefinite term being applied for, it is not considered that the Application would constitute a ‘small scale’ or ‘temporary’ land use. However, for completeness, we refer to the evidence of Mr Hainsworth where it is established that the Application will have an impact on the productive capacity of the site when considered against the versatility of use.
- 29 Versatility of land use is at the heart of the definition of productive capacity, and 3.9(2)(g) does not consider any impact on the productive capacity to be appropriate.

Productive capacity, 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*

¹⁰ Ministry for the Environment. 2023. *Managing the use and development of highly productive land: Potential amendments to the NPS-HPL – Discussion Document*. Wellington: Ministry for the Environment.

¹¹ *Love v Porirua City Council* [1984] 2 NZLR 308.

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

c) *the size and shape of existing and proposed land parcel*¹²

30 Mr Ray Henderson has also provided detailed evidence exploring potential impacts on land and water, should the existence of solar panels result in the 'leaking' of toxic chemicals, as well as failure of solar panels resulting in the same. If that is established, then the impacts on productive capacity and of contaminant runoff will impose far greater restrictions on versatility and therefore productive capacity of the Application site and surrounding HPL.

3.9(2)(f) - *the retirement of land from land-based primary production for the purpose of improving water quality*

31 Lastly, we also address the exception at 3.9(2)(f) -

it provides for the retirement of land from land-based primary production for the purpose of improving water quality:

32 It is clear from the proposal that there is no intention to retire the land from land based primary production. Whilst later in my submissions I do address the lack of commitment to what primary production activities that will be undertaken on the site, it is clear from the application that there is no intention to retire the site from land based primary production for the purpose of improving water quality. The primary purpose of the Proposal is retire the land use to establish a solar farm.

33 It is submitted that in addition to the three matters addressed above, none of the exceptions set out in Clause 3.9(2) apply here, given the nature of the Application, and scale and impacts on the productive capacity of the land. The exceptions that we have not addressed bear no relevance to the Proposal, so in the interests of efficiency, we did not address them.

34 The NPS-HPL directive is clear – *avoid the inappropriate use or development of HPL that is not land-based primary production*. Despite the Applicant's suggestion that the site will support a form of primary production, this is not the site's primary purpose (that being a solar array) and the long-term removal of the site from a productive land use, including its integration with surrounding rural land, means that this Application simply cannot be granted.

35 Sub-clauses (3) and (4) of Clause 3.9 are also relevant. The removal of the site from the wider rural land base exacerbates actual cumulative loss of the availability and productive capacity of HPL in the Selwyn District and also gives rise to reverse sensitivity effects on surrounding rural land uses.

¹² Definition of Productive Capacity – NPS-HPL.

- 36 The evidence presented by Mr Casey, Mr Robinson, and Mr Dalley address these matters and establishes their concerns around reverse sensitivity and cumulative loss of HPL when continuing to operate their farming operations that abut the proposal site.
- 37 The submitters justifiably want to be able to continue to productively farm their land without being confronted with reverse sensitivity issues. Typical spray and harvest activities will be at odds with the existence of panels on the neighbouring site, and the submitters are concerned that the existence of a solar array in the neighbouring paddock will introduce reverse sensitivity and may impose a cumulative loss of the availability and productive capacity of HPL due to mitigation measures required to attend to the newly established reverse sensitivity effects.
- 38 The submitters also raise concerns around increased stormwater runoff produced by the proposal and potential contamination from the same which would in turn introduce additional cumulative loss of the availability and productive capacity of their properties.

National Policy Statement for Renewable Energy Generation 2011

- 39 The National Policy Statement for Renewable Energy Generation 2011 (**NPS-REG**) came into force in April 2011. The primary objective 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.

- 40 Whilst on the face of it, there may appear to be some crossover between the NPS-HPL and the NPS-REG, it is submitted that in this instance, they are not in conflict. The NPS-HPL took effect on 17 October 2022 - some 11 years after the NPS-REG took effect and it can therefore be expected that it was prepared with the NPS-REG front of mind.
- 41 Renewable energy generation activities are considered and provided for under the NPS-HPL through the specified infrastructure exceptions¹³, but this was specifically drafted to only provide the exception for maintenance, operation, upgrade, or expansion of the same – refer back to paragraph 23 above, where this position is explained further.
- 42 The Applicant and council officer address this policy statement in depth, however it is submitted that given the wording of the NPS-HPL provides no scope for this new specified

¹³ Clause 3.9(2)(j) of the NPS-HPL

infrastructure activity to establish on the site, the restrictions imposed by the NPS-HPL are not altered by the application of the NPS-REG.

ASSESSMENT OF THE ENVIRONMENTAL EFFECTS

- 43 Notwithstanding the prohibition against a grant of consent under the NPS-HPL, the Applicant also falls short in terms of its assessment of environmental effects. The Brookside Submitters Group consider that these are more than minor as compared to the Applicant's assessment of landscape effects, highly productive land and environmental health.
- 44 As outlined above, when assessing a fully discretionary Application you must have regard to (relevantly):
- (i) Any actual and potential effects on the environment of allowing the activity¹⁴;
 - (v) Any measure proposed or agreed to by the Applicant to ensure positive environmental effects to offset any adverse effects¹⁵ ;
 - (vi) The relevant provisions of the Statutory documents¹⁶;
 - (vii) Any “*other matter*” you consider to be relevant and reasonably necessary to determine the application.¹⁷
- 45 It is submitted that the Applicant and s42A officers have failed to give the necessary weight to the assessments under s 104(1)(a).
- 46 The evidence presented by on behalf of the submitters has established that the effects of the application are more than minor and are also inconsistent with the Operative and Partially Operative Selwyn District Plan (POSDP).

Amenity

- 47 In assessing the effects of the Proposal, amenity values and associated effects is a relevant consideration. Amenity values are defined in the Resource Management Act 1991 as follows:

amenity values means those natural or physical qualities and characteristics of an area that contribute to people's appreciation of its pleasantness, aesthetic coherence, and cultural and recreational attributes

¹⁴ Section 104(1)(a) RMA

¹⁵ Section 104(1)(ab) RMA

¹⁶ Section 104(1)(b) RMA

¹⁷ Section 104(1)(c) RMA

- 48 The planning evidence of Mr Fletcher, for the Brookside Submitters Group states that this Application will cause irreversible and detrimental effects on the amenity and character of the environment and surrounding Brookside area.
- 49 Mr Fletcher addresses the Applicants proposed mitigation measures (of extensive planting around the perimeter of the Application Site). It is acknowledged that this is a more palatable and less imposing option than the alternative of no screening of a paddock full of panels, but these proposed mitigation measures would arguably impose different impacts on the amenity of the surrounding environment and undermine the open space feel, character, and long-distance views enjoyed around the area – not just for the boundary residents, but also for the members of the community who walk, cycle and play in the surrounding environment.
- 50 This is backed up in the evidence of members of the Brookside Submitters Group who draw on the rural open scenescape and serene farming / lifestyle block characteristics of the area. A 111ha site of an enclosed ‘vault’ of panels concealed entirely by thick hedging (which would take several years to present as an effective screen) would impede on the pleasantness and quiet enjoyment of residents use of their properties and undermine the amenity and pleasantness of the surrounding rural environment. It is understood that the intention of the amenity planting is to provide a thick screen around the entire site. Whilst it is accepted that shelter belts form part of the rural environment, continuous perimeter planting is entirely different and would be out of character.
- 51 The evidence of the Brookside Submitters Group refers to the fact that many people live work and play in the local area due to the amenity they enjoy within their properties and around the local area. Mr Fletcher also refers to this in his evidence where he makes observations as to the way locals use and enjoy the surrounding environment – with many people out walking, biking and moving around so as to establish a community use that would be more attributed to a higher density area than one might assume from the zoning and rural land use activities undertaken within.
- 52 The conclusions of the Council Officer and landscape expert are that the Application will have an adverse effect on rural amenity primarily due to the predominance of the character in the local area, but that the adverse effects will be minimised by mitigation plantings. The Brookside Submitters Group disagrees. As above, the proposed plantings will take years to establish and will not mitigate against the built form infrastructure within the site, and external connections to the national grid.
- 53 The evidence before you, identifies that the adverse effects of the Proposal on amenity of the surrounding environment are more than minor, and accordingly, the application ought to have been publicly notified.

Highly Productive Land

- 54 The key message that I urge you to take on board is that the impact of this Proposal on the highly productive land cannot be ignored when assessing the environmental impacts.
- 55 The Application has been sought upon highly productive land for an unlimited duration, and there is no certainty that the site will ever return to productive uses, or even provide for any form of productive use at all.
- 56 The Application endeavours to 'window-dress' the dominant industrial activity that is the basis for this Application by toying with some potential primary production activities that could be undertaken on the site but does not provide any solid commitment to the primary production activities that will be undertaken beneath the panels, or provide any assurance that such an activity will in fact be established. This appears to be symptomatic of the approach taken by the Applicant to composite fit the Application without meaningfully addressing and respecting the important considerations required for protection of HPL.
- 57 Given the indefinite term of the Application, and the impacts that this Proposal will have on the productive capacity of the land (notwithstanding the fact that no primary production activity has been confirmed within the Application), it is submitted that the Application would impose more than minor effects on HPL.

Contamination / Runoff

- 58 Mr Ray Henderson has provided detailed evidence exploring potential impacts on land and water, should the existence of solar panels result in in the 'leaking' of toxic chemicals, as well as failure of solar panels resulting in the same.
- 59 Should the soil contamination effects identified by Mr Fletcher be established, this has the potential to cause high impacts on the immediate site, and surrounding properties due to runoff¹⁸. There is simply too much doubt, and the application has made no attempt to address these matters. The Environment Canterbury discharge consent (CRC223909) does not provide for these specific discharges.
- 60 Mr Fletcher and Mr Hainsworth have also raised concerns around the reach of CRC223909 to manage the potential effects of the panels where contaminants may remain in the upper level of the soil, and to control associated stormwater. Concerns relating to these matters will also be addressed in the evidence presented by the Brookside Submitters Group.

¹⁸ Any potential effect of low probability which has a high potential impact is still to be assessed as an effect per s3 of the RMA.

- 61 It is established law that the decision maker is able to take into account the effects of activities that will flow inevitably for the grant of consent, but which are not before the decision maker¹⁹. Given the concerns raised, and the considerable potential adverse effects on the environment, it would be inappropriate to dismiss these matters.
- 62 Both the s42A officer and Ms Kelly consider that the permitted baseline is applicable here. Application of the permitted baseline is discretionary, and it is submitted that it ought not be applied here. When it comes to contamination effects, Ms Kelly's evidence is that those effects will be dealt with by the Environment Canterbury consents. Respectfully, assessment of these matters cannot be parked for another day. Notwithstanding the fact that we consider the ECan consents to potentially be insufficient to manage contaminant runoff from the panels, the Environment Canterbury consents are only granted for a 15-year term. Beyond the expiry of those consents, the receiving environment cannot be assessed as including authorised or mitigated discharges.

PARTIALLY OPERATIVE SELWYN DISTRICT PLAN

- 63 These submissions agree with the approach taken by the s42A officer to prioritise assessment against the POSDP given the stage of the plan change process.
- 64 The relevant objectives and policies relating to the GRUZ in the POSDP, are GRUZ-O1, GRUZ-P1A, GRUZ-P5 and GRUZ-P5A, and those relating to the Proposal are in EI-O4, EI-P2 and EI-P9.
- 65 GRUZ-O1 establishes the priority to support primary production over other activities, maintain or enhance rural character and amenity values of the zone, and protect highly productive land. It is accepted that this objective is under appeal, however the point of appeal is narrow and relates solely to reference to 'incompatible sensitive activities'²⁰ which poses no impact on the balance interpretation and bears no relevance here. On that basis, it is submitted that weight still needs to be given to this objective.
- 66 GRUZ-P1A, GRUZ-P5 and GRUZ-P5A are not under appeal and therefore bear no concern as to the weight they should be given.
- 67 GRUZ-P1A imposes a policy direction to:
- "Avoid the inappropriate use and development of highly productive land, except as provided for by the National Policy Statement for Highly Productive Land 2022"*

¹⁹ *Pukenamu Estates Ltd v Kapiti Environmental Action Inc* HC Wellington CIV-2002-485-22, 17 December 2003.

²⁰ Transpower New Zealand ENV-2023-CHC-109

68 And on a similar tune, GRUZ-P5A provides for the following to:

“Enable the maintenance, operation or upgrade of any existing activity on highly productive land, while minimising the loss of highly productive land.”

69 These policies are clear and reflect the submissions made above relating to the impact of the NPS-HPL. GRUZ-P15A also specifically refers to maintenance, operation, or upgrade of activities, but goes further to confirm that this only relates to existing activities on HPL.

70 GRUZ-P5 imposes a policy direction to:

Avoid:

1. *the establishment or expansion of any industrial activity or commercial activity (other than a rural industry) where the scale of the activity is greater than that of a rural home business, or*
2. *the establishment or expansion of health centres, educational facilities and community correctional facilities,*

unless the activity has a functional need, or operational need to locate within the General Rural Zone.

71 This policy is clear and imposes a directive to avoid the establishment of any industrial or commercial activity of a scale greater than a rural home business, unless there is a functional need or operational need to locate within the General Rural Zone.

72 There is no doubt that the Proposal for a 111ha solar array would be classified as an industrial or commercial activity and that scale of it would be classified as greater than that of a rural home business. The evidence of Mr Fletcher addresses the consideration for functional and operational need, and I draw on his findings here that neither of these “needs” can be established on the face of the Application and supporting documents.

73 The policy directions in EI-P2 and EI-P9 of the POSDP are addressed in the s42A report where it is concluded that the Application is in keeping with the same. This conclusion is rejected by the Brookside Submitters Group on the following grounds.

74 Of relevance, EI-P2 (2) refers to *“locating, designing and operating development while minimising the effects on, the amenity values of the surrounding environment, public access and the health and safety of people”*.

75 It has been established through the evidence of the submitters, that the effects of the Proposal on the amenity of the environment are more than minor.

76 EI-P9(4) refers to *“The location and efficient use of existing electricity generation and distribution infrastructure”*.

- 77 It is unclear from the Application whether the Proposal site truly reflects an efficient use of existing electricity generation and distribution infrastructure. It is understood that major upgrades to the Brookside Substation will be required as a result of the Application coming “online”, but the extent of these have not been disclosed. It is understood that this work programme is going to be undertaken by Orion on the designated site (ORION-5 Brookside Zone Substation). It is submitted that the Application fails to contain adequate information and ought to be declined in accordance with s104(6) of the RMA.
- 78 It is submitted that the above assessments should inform the Commissioner when conducting an assessment under s104 of the RMA. When considering the Application for an industrial activity for an indefinite term on HPL in the General Rural Zone, it would be a strained interpretation to conclude that the application complies the objectives and policies of the POSDP.

JURISTICIONAL BAR - S104(3)(D)

- 79 The decision of the Commissioner in the Original Application determined that the effects on the amenity and HPL were such that the Proposal should have been publicly notified per s103(3)(D) of the RMA. Whilst the Application has been amended in scale and alternative mitigations are now proposed, it is considered that the Proposal does not adequately address the matters at issue in the Original Application so as to provide for a different outcome.
- 80 The effects anticipated to be generated by the Proposal are such that wider public notification ought to have been advanced. The evidence of the submitters will establish that there is significant community concern associated with this Proposal. It is submitted that those that were not limited notified are prejudiced by an inability to “have their say” on the introduction of such a significant Proposal. As per the conclusions reached above, and in the evidence supporting the same, the effects on the environment were inadequately assessed in the notification decision, and are in fact more than minor prescribing public notification.²¹

CONCLUSION

- 81 The Application site is located within an area of HPL. The NPS-HPL is clear and directive with the avoid policy at clause 3.9 which directs that territorial authorities must avoid the inappropriate use or development of highly productive land that is not land-based primary production unless one of the exceptions at 3.9(2) can be applied. Given the Application's inability to trigger one of the exceptions provided, it cannot be granted.
- 82 In addition, the submitter evidence before you establishes that the Application will have more than minor adverse environmental effects, which means that the application ought to be

²¹ s95(8)(b) of the RMA

publicly notified and was not. Again, the Application must be declined in accordance with section 104(3)(d) of the RMA.

A handwritten signature in cursive script, appearing to read "J. Ottawa", positioned above a horizontal line.

Jessica Ottawa

Legal Counsel for the Brookside Submitters Group

1 March 2024