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: applications by KeaX Limited for resource consent to establish a solar array at 150 and 115 Buckleys Road, Brookside, Selwyn (RC235464)

between: **KeaX Limited**
KeaX

and: **Selwyn District Council**
Consent Authority

Opening legal submissions on behalf of KeaX Limited

Dated: 1 March 2024

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MAY IT PLEASE THE COMMISSIONER

INTRODUCTION

1 These legal submissions are presented on behalf of KeaX Limited (*KeaX*). KeaX seeks the necessary resource consents to construct and operate a 111 ha solar array in Brookside in the Selwyn District (the *Proposal*). The Proposal would generate enough renewable electricity to power, on average, 11,200 homes annually.

2 The Proposal is precisely what is needed to assist the significant and urgent challenge Aotearoa / New Zealand faces in reducing greenhouse gas emissions and adapting to the effects of climate change. It is an exciting prospect.

3 The significant benefits of the Proposal alone are of course not sufficient to obtain the necessary planning approvals. To that end, KeaX has engaged an experienced team of experts to thoroughly assess all aspects of what is proposed. Their assessment, together with responses to Council and community feedback, has resulted in the development of the Proposal now before the Commissioner.

4 KeaX and its experts have carefully addressed all relevant effects, planning documents and matters raised by Council staff and submitters. In addition, Mr Bigsby's thorough and well-reasoned Section 42A Report recommends the grant of consent.

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

STRUCTURE OF SUBMISSIONS

6 These legal submissions:

6.1 Briefly introduce the Proposal and KeaX's evidence;

6.2 Address four key legal matters:

(a) The previous application;

(b) The two district plans;

(c) Amenity effects; and

(d) The National Policy Statement for Highly Productive Land 2022 (*NPS-HPL*) and National Policy Statement for Renewable Energy Generation 2011 (*NPS-REG*).

6.3 Address the submission and evidence of Mr Raymond Henderson.

THE PROPOSAL

7 KeaX seeks to establish the Proposal at a 111 ha site in the Selwyn District. The site is currently used for dairy farming and is characterised by rural land use, including many linear features such as shelter belts, irrigators and fencing.

8 The Proposal is for a solar array, comprising approximately 140,000 solar panels set within single axis tracking tables, 13 inverters and associated infrastructure. The expected energy generation will be 100GWh per year.

9 The electricity generated will be fed via 33kv lines into Orion New Zealand Limited's Brookside Substation (the *Substation*), which adjoins the north-western corner of the site. Proximity to the Substation and the capacity of the sub-transmission lines were critical factors in selecting this site, as Mr McMath explains.

10 The site will contain the solar array and also maintain a form of productive use around and underneath the panels. This dual land-use is known as agrivoltaics. Mr Ford's and Mr McMath's evidence explains that this is an increasingly common land use approach to achieve both decarbonisation goals and the diversification of farming activities, and is highly consistent with the NPS-HPL requirements.

11 The Proposal also comprises planting for landscape mitigation. As explained by Ms Anthony, the Proposal has been carefully designed to fit into the rural setting and respond to community concerns.

12 KeaX has already obtained the necessary consents under the Canterbury Land and Water Regional Plan for earthworks and operational phase stormwater discharge. Those consents remain applicable for the Proposal, which remains generally the same in nature albeit of a smaller scale.

EVIDENCE

13 Evidence has been provided for KeaX by:

13.1 **Mr Campbell McMath** – company/operations;

13.2 **Ms Amanda Anthony** – landscape planning;

13.3 **Mr William Reeve** – acoustics;

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

13.5 **Mr Stuart Ford** – highly productive land;

13.6 **Dr Zac Beechey-Gradwell** – land contamination; and

13.7 **Ms Claire Kelly** – planning.

14 KeaX's witnesses have prepared summary statements which they will present at the hearing. The witnesses have also reviewed the evidence filed for the Brookside Submitters Group and will respond as necessary when presenting their summary statements.

15 These submissions do not repeat the content of the AEE, reports and evidence for KeaX. Instead, they concentrate on matters that are anticipated to be a focus of the hearing.

THE PREVIOUS APPLICATION

16 As the Commissioner will be aware, KeaX previously sought resource consents to construct and operate a solar array at the site and on neighbouring land (RC225180). This application was declined via a Commissioner's decision issued on 27 March 2023.

17 The previous application has been mentioned by submitters and it may be of assistance to the Commissioner to clarify that:

17.1 The previous application was lodged prior to the NPS-HPL coming into effect.[1] The NPS-HPL came into effect before the hearing.[2] Accordingly, at the time of the hearing there was a different (i.e. significantly more stringent) policy framework for considering effects on highly productive land.

17.2 At the previous hearing, there was no expert evidence addressing highly productive land. The Commissioner found that he could not be certain that the effects on highly productive land would be minor or less than minor (i.e. below the public notification threshold). This triggered section 104(3)(d) of the Resource Management Act 1991 (*RMA*).

17.3 Section 104(3)(d) provides that a consent authority must not grant a resource consent if the application should have been notified and was not. Section 104(3)(d) does not require the notification decision to be revisited (that is the function of the High Court on judicial review). Rather, it requires the decision-maker to make a determination, as at the time of substantive decision-making, whether the notification threshold is met.[3] If it is, section 104(3)(d) creates a "jurisdictional" bar to the grant of consent.

17.4 The Commissioner found that the effects on highly productive land were, as at the time of his substantive decision-making, potentially more than minor. This met the public notification threshold and meant that the application should, at that point in time, have been publicly notified. This was an unfortunate

[1] The previous application was made in March 2022.

[2] NPS-HPL took effect 17 October 2022, hearing took place on 23/28 February 2023.

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

consequence of the timing of the application (pre-NPS-HPL) versus the timing of the hearing (post-NPS-HPL) and one which was largely out of KeaX's hands.

17.5 There is no such complicating factor for the current application because the NPS-HPL has applied to the Proposal the whole way along, and because KeaX (and the Council) has engaged a highly productive land expert, Mr Ford, who has assessed that the effects of the Proposal on highly productive land will be less than minor. The section 104(3)(d) issue has accordingly been "cured".

18 It was entirely open to KeaX to make this new application. While the nature of the activity remains the same, what is now proposed is of a smaller scale, thereby naturally generating less effects on the environment and nearby landowners and occupiers. Crucially, the missing part of the puzzle (expert evidence on highly productive land) has been provided in support of this Proposal.

19 It goes without saying that the Proposal must be considered on its own merits, separately to the previous application. However, it is not an "elephant in the room" or anything that might lead to the decline of consent.

20 Some submitters have suggested that the Proposal, being smaller, does not represent KeaX's full development plans. It is an applicant's choice as to the scope of the activity for which they seek resource consent and KeaX has made a commercial decision to pursue this Proposal. Again, it is what is before the Commissioner that is required to be determined. If the commercial position is such that additional solar is sought to be built in future, this would need to be applied for in the usual way and assessed in light of any overall cumulative effects.

21 Finally on section 104(3)(d), Mr Fletcher, for the Brookside Submitters Group, has again raised an apparent notification issue with this Proposal. This time section 104(3)(d) is being raised in relation to amenity effects. The evidence for KeaX and the Council is that adverse amenity effects will be minor at most. There is no suggestion of effects that are more than minor, over the public notification threshold. On this basis, in my submission the Commissioner can be comfortable that section 104(3)(d) is not triggered in this case. Public notification was not required at the time of the Council's notification decision, nor is it required now.

OPERATIVE AND PARTIALLY OPERATIVE DISTRICT PLANS

22 The Proposal is subject to a "dual" planning regime under the Operative Selwyn District Plan (*OSDP*) and the new Partially Operative Selwyn District Plan (*POSDP*).

23 The application was lodged on 10 August 2023, at which point the Proposal only engaged rules under the OSDP.[4] The Council released the Appeals Version of the POSDP on 27 November 2023. At that point, the Proposal engaged one POSDP rule.[5] That rule is not subject to appeal and therefore must be treated as operative in terms of section 86F of the RMA, and the previous applicable OSDP rules must be treated as inoperative.

24 This means that the Proposal only requires consent under the one POSDP discretionary activity rule. However, because it is a discretionary activity rule, all relevant objectives and policies remain to be considered. This includes both the POSDP and OSDP objectives and policies, the latter remaining in effect until all appeals are resolved and the Council makes the POSDP operative under clause 20 of Schedule 1, RMA.

25 The AEE and expert evidence for KeaX, in particular the evidence of Ms Kelly, assesses the Proposal against all relevant OSDP and POSDP provisions and confirms it is consistent with them.

26 Mr Stewart's planning evidence for the Brookside Submitters Group alludes to issues with Mr Bigsby's approach to the OSDP. It is unclear what these are. However, it is hoped that the above, the fulsome assessment of the OSDP in the AEE and evidence for KeaX, and Ms Kelly's summary, answers any questions from the Commissioner in this respect.

27 It is noted that for the purposes of the noise rules, the OSDP and POSDP "daytime" hours differ. The OSDP daytime hours are 0730 to 2000, whereas the POSDP daytime hours are 0700 to 2200. The application assessed the Proposal against the OSDP daytime hours. Given the updated status of the POSDP, the evidence for KeaX (from Mr Reeve) assesses the Proposal against the POSDP daytime hours and it is these hours that are proposed to apply. Mr Reeve's evidence confirms that the proposed alignment with the POSDP hours is not expected to lead to any notable change in noise effects, therefore the "change" does not lead to any scope issues.

AMENITY RELATED EFFECTS

28 Mr Stewart's evidence raises amenity related effects, including that the Proposal may change the existing character of the area.

29 Both Ms Anthony (from an expert landscape perspective) and Mr Reeve (from an expert acoustics perspective) have considered the impacts of the Proposal on the existing landscape and rural character of the area and the underlying noise environment. Their conclusions, together with those of the Council experts, are that while the Proposal will result in an appreciable change, this is not

[4] Namely, Rules 1.7.1.2, 3.15.4 and 5.1.3.

[5] Namely, EI-R31.

"significant" (as assessed by Mr Fletcher) and indeed is appropriate given the characteristics of this particular environment and in light of what is anticipated by the planning framework. Furthermore:

29.1 Mr Fletcher references "paddock based length" shelterbelts with "open views across paddocks and the wider area… readily available".[6] As Ms Anthony will confirm, a large amount of the site boundary has existing shelterbelts, meaning open views are already constrained. Further, her viewpoints show that for many submitters and road users, open views across open paddocks towards the distant on-site shelterbelts will be maintained.

29.2 Mr Fletcher suggests there is a "higher sensitivity" to persons being impacted by a significant change in the nature and character of the site with reference to the character of the local area. The experts for KeaX and the Council have identified the underlying characteristics of the local area, being a typical rural environment. It is unclear why this would result in a "higher sensitivity" to the impacts of the Proposal, but nonetheless these experts have assessed the degree of change in this character as being appreciable but not significant, and therefore appropriate.

29.3 The assessment of effects on amenity should necessarily take account of both expert and local opinions, but must be undertaken in the context of the relevant planning provisions, as this is the framework against which local expectations about amenity are to be measured.[7]

29.4 For completeness, it is well-established that there is no right to a view.[8] Even though a decision-maker must have regard to the maintenance and enhancement of amenity values and the quality of the environment, this is not the same thing as a right to a view.[9]

30 Ultimately, the assessment of amenity related effects is one factor to be weighed in the decision-making process.[10] Most cases where adverse effects on rural amenity values have led to a decline of consent have involved significant adverse effects,[11] which is not the case here. This is particularly because it is not a requirement of the

[6] Paragraph 17.

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

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

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

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

[11] Counsel is happy to provide a summary of relevant case law, if that would assist the Commissioner.

RMA or planning documents to freeze an area at a point in time; rural settings can adapt to change and still maintain rural character.[12]

31 In my submission, the detailed and carefully considered evidence of Ms Anthony, Mr Craig, Mr Reeve and Mr Farren should be preferred in the overall assessment of amenity related effects.

NPS-HPL AND NPS-REG

32 Under section 104(1) of the RMA, when considering the application and submissions, the Commissioner must *have regard to*, *inter alia*, any relevant provisions of a national policy statement. In this case, this includes the NPS-HPL and NPS-REG. There is no primacy given to any of the section 104(1) matters.[13] The weighting of the relevant considerations is a matter for the Commissioner.

NPS-HPL

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

34 Regional Councils are required to map highly productive land within their regions no later than three years after the commencement of the NPS-HPL.[14] Clause 3.5(7) provides an interim classification of highly productive land before this mapping exercise is complete. It is not in dispute that the interim classification applies to the site due to its rural zoning and LUC 2 and 3 soils. The NPS-HPL is accordingly a relevant consideration under section 104(1).

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

36 Part 3 of the NPS-HPL contains the "Implementation" clauses. Clause 3.9 provides that:

> *(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:*

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

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

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

…

(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:*

37 There is accordingly a series of steps to work through in determining whether the Proposal is an appropriate use of highly productive land in terms of the NPS-HPL.

Is it "specified infrastructure"?

38 It is not in dispute that the Proposal meets the NPS-HPL definition of "specified infrastructure" because renewable electricity generation activity is recognised in the Canterbury Regional Policy Statement as regionally significant infrastructure.

Is there a functional or operational need for the Proposal to be on the highly productive land?

39 There is an *operational* need for the Proposal to be on the highly productive land. The National Planning Standards define "operational need" as "*the need for a proposal or activity to traverse, locate or operate in a particular environment because of technical, logistical or operational characteristics or constraints.*"

40 The threshold for establishing an operational need is lower than a functional need, but it must be a "need" rather than a "want". Examples in case law include the packaging of water into bottles (operational need) associated with water take from an aquifer (functional need);[15] the operational need for car parking areas to co-locate with a supermarket development;[16] and the operational need for a wind turbine to locate on a ridgeline.[17]

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

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

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

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

42 In my submission, operational need is clearly established in this case. I refer below to several other examples of applications being approved for solar farms on highly productive land, where operational need was similarly established. While of course not binding, those decisions may be of assistance to the Commissioner.

Does "new" specified infrastructure come within clause 3.9(2)(j)(i)?

43 Clause 3.9(2)(j)(i) refers to the "maintenance, operation, upgrade, or expansion" of specified infrastructure.

44 While there is no specific reference to "new" specified infrastructure, it has since been confirmed by the Ministry for the Environment that the NPS-HPL was intended to contain a consent pathway for new specified infrastructure on highly productive land.[18] Although the word "new" was not included, this was due to an oversight in the section 32 process where it was anticipated that new specified infrastructure could be constructed on highly productive land via a designation or notice of requirement.[19]

45 In September 2023, the Ministry for the Environment issued a Discussion Document on Potential Amendments to the NPS-HPL (the *Discussion Document*). Mr Fletcher has referred to the Discussion Document and states: "*That guidance document confirms that there is no a pathway to consider the establishment of a new solar farm under section 3.9(2)(j)*". With respect, this is a mischaracterisation of the Discussion Document, which at no point states that there is no pathway. Rather, it confirms the lack of a clear consenting pathway.

46 The Ministry for the Environment's *Guide to implementation* of the NPS-HPL (the *Guide*), released well before the Discussion Document (i.e. based on the existing wording of clause 3.9(2)(j)), also clarifies this matter. The Guide states that the intention of sub-clause (j) is to "*recognise situations where the use or development of specified infrastructure… may occur on [highly productive land]*".[20] It states further that:[21]

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

[18] Discussion document, PDF page 9, second paragraph.

[19] Discussion document, PDF page 9, third paragraph.

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

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

production. For example, land surrounding structures used for infrastructure can often be used for animal grazing or some forms of horticulture.

47 Mr Fletcher seeks to discount the Guide as outdated. In my submission, the Guide remains representative of the Ministry for the Environment's interpretation of the existing wording of the NPS-HPL as including new specified infrastructure. The situation described in the Guide is precisely the situation here. There is an operational need for the Proposal to locate adjacent to the Substation and the site will continue to be able to be used for animal grazing.

48 While not binding on the Commissioner's decision-making, there are now several examples of *new* solar farms being approved on highly productive land. These include:

Rangiriri Solar Farm

48.1 Approved by a fast-track consenting panel on 22 December 2023. 95% of the 275 ha site was classified as highly productive land under the NPS-HPL.

48.2 In terms of effects on the soil resource, the panel found that due to the design of the proposal, the practical and economic viability of sheep grazing amongst the panels, the viability of pasture production under the panels and a condition requiring the site to be returned to its former state after operations ceased, the proposal would not diminish the productive potential of the soil resources of the site.[22]

48.3 In terms of the NPS-HPL, the panel obtained legal advice from a specialist environmental law barrister, Mr Jeremy Brabant, and, based on this advice, concluded that what was proposed was development associated with the expansion of specified infrastructure and the proposal fell within clause 3.9(2)(j)(i) of the NPS-HPL.[23]

Waerenga Solar Farm

48.4 Approved by a fast-track consenting panel on 22 December 2023. 90% of the 385 ha site was classified as highly productive land under the NPS-HPL.

[22] Record of decision of the Rangiriri Solar Farm of the Expert Consenting Panel under clause 37 of schedule 6 of the COVID-19 Recovery (Fast-Track Consenting) Act 2020, dated 22 December 2023 at [7.125]-[7.140].

[23] At [8.31]-[8.60].

48.5 In terms of effects on the soil resource, the application contained a soil and resource report which confirmed that the productive potential of the soil would be utilised for pasture production and would not be diminished as it would remain largely undisturbed with only the hard stand area being impacted. The panel was satisfied that the proposed land use would not diminish the productive potential of the soil resources of the site.[24]

48.6 In terms of the NPS-HPL, the panel similarly relied on legal advice and concluded that what was proposed was development associated with the expansion of specified infrastructure and the proposal fell within clause 3.9(2)(j)(i) of the NPS-HPL.[25]

Edgecumbe Solar Farm

48.7 Approved by a panel of independent commissioners on 23 November 2023. All of the 209 ha site was classified as highly productive land.

48.8 In terms of the NPS-HPL, the panel referred to the definition of "specified infrastructure" as including existing and future infrastructure. It was therefore not a strained meaning of clause 3.9(2)(j)(i) to treat expansion, whether new or existing, of specified infrastructure as coming within the exception. The Panel stated that: "*it makes no sense that an extension of an existing renewable energy facility would be treated differently than a new one. The effects on productive soils are the same*".[26]

49 Full copies of the decisions, or relevant extracts, can be made available to the Commissioner if it would assist.

50 In my submission, the Proposal clearly falls within the clause 3.9(2)(j)(i) specified infrastructure exemption. It would be nonsensical to interpret the clause as excluding a new solar farm, particularly, as recognised in the Edgecumbe decision, where the effects on highly productive land of an expanded activity would be no different to a new one.

Have the measures in subclause (3) been applied?

51 Where a use of highly productive land is considered appropriate under clause 3.9(2), clause 3.9(3) provides that:

[24] Record of decision of the Waerenga Solar Farm of the Expert Consenting Panel under clause 37 of schedule 6 of the COVID-19 Recovery (Fast-Track Consenting) Act 2020, dated 22 December 2023 at [5.36]-[5.40].

[25] At [6.26]-[6.36].

[26] Decision of the Commissioners appointed by the Whakatāne District Council, dated 23 November 2023 at [136]-[168].

(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.

52 The natural consequence of use or development of highly productive land being considered "appropriate" under clause 3.9(2) is that it will inevitably result in some loss of the availability and productive capacity of highly productive land in the district. There is no "avoid" requirement, as there is for activities not considered "appropriate" under clause 3.9(2) or one of the other exception pathways.

53 However, the measures in clause 3.9(3) are required to be considered. The Guide suggests that territorial authorities should consider the location and footprint of the activity, clustering of activities and co-existing with land-based primary production.[27] Additional guidance can also be drawn from the other examples of approved solar farms outlined above.[28]

54 In this case, as explained by Mr McMath, KeaX has made significant efforts to keep the footprint of the activity, insofar as it impacts the soil resource as small as possible, and the land under and around the solar array will be able to be used for continued primary production. Mr Ford has assessed the impact of the Proposal on the highly productive land resource and confirms that sub-clause (3)(a) is met. Solar farms by their nature in fact have minimal, if any, impacts on the productive capacity of highly productive land, as per the NPS-HPL definition.[29]

55 It is important to note that clause 3.9(3)(a) refers to "availability" and "productive capacity". It does not take a step further and refer to "productivity". This is a logical outcome because solar farm or not, a landowner cannot be required to conduct the highest and best

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

[28] Record of decision of the Rangiriri Solar Farm of the Expert Consenting Panel under clause 37 of schedule 6 of the COVID-19 Recovery (Fast-Track Consenting) Act 2020, dated 22 December 2023 at [8.56]-[8.59]; Decision of the Commissioners appointed by the Whakatāne District Council, dated 23 November 2023 at [119]-[127].

[29] ***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

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

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

use of their highly productive land. In a free market it is up to them how they wish to use their land and the NPS-HPL does not, and cannot, compel them to engage in a particular form of primary production, good, bad or otherwise. For this reason, the proposed change of the use of the site from dairy farming to a solar array together with some form of primary production is entirely consistent with the policy framework of the NPS-HPL.

56 The Guide also outlines that many of the activities listed in clause 3.9(2) are unlikely to create reverse sensitivity effects and often such effects can be avoided by using a barrier or screen (such as planting).[30] The experts for the KeaX and Council are in agreement that the reverse sensitivity effects of the Proposal will be less than minor.

Overall comments on NPS-HPL

57 In my submission, the Proposal achieves the objective, policies and implementation clauses of the NPS-HPL. Ultimately, the Proposal ensures that the site (being highly productive land) is protected for use in land-based primary production. This position applies both during the construction and operational life of the solar farm, when there will be minimal impacts on the soil resource and primary production will continue, and also following decommissioning, when the site will be available for continued primary production, as per the proposed consent conditions.

NPS-REG

58 The objective of the NPS-REG is:

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

59 The NPS-REG requires decision-makers to recognise the benefits of renewable electricity generation and to acknowledge the practical implications of achieving New Zealand's target for electricity generation from renewable resources.[31]

60 While the NPS-REG is a comparatively old national policy statement, which was drafted pre-*King Salmon*, it remains important under the section 104(1) assessment and its provisions are required to be interpreted and applied in the current context. That context is a pressing need for more renewable electricity generation. That

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

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

context also includes the recent Supreme Court decision in *Port Otago*, which characterised provisions enabling infrastructure under the New Zealand Coastal Policy Statement as no less "directive" than environmental protection provisions.[32]

61 As set out in Mr McMath's evidence, the Government's current target is for 100% renewable electricity generation by 2030. This target can only be achieved through increasing renewable generation infrastructure, which the Proposal enables.

62 The NPS-REG also acknowledges the practical constraints associated with the development of new renewable electricity generation activities.[33] Amongst other things, decision-makers must have particular regard to the location of existing infrastructure, including the distribution network, and the need to connect renewable electricity generation activity to the national grid.

63 The Proposal clearly achieves the objectives and policies of the NPS-REG by providing for new renewable electricity generation in a location where it can efficiently connect into the distribution network. That is precisely why this site has been chosen. In my submission, the high level of consistency of the Proposal with various parts of the NPS-REG should strongly factor into decision-making on the Proposal.

Relationship between NPS-REG and NPS-HPL

64 On its face, there may be considered to be a tension between the NPS-REG and the NPS-HPL. In my submission, the provisions of each higher order document can appropriately be reconciled. In essence, the question is whether the enabling provisions of the NPS-REG conflict with the more restrictive provisions of the NPS-HPL and how this impacts the Commissioner's consideration of the Proposal.

65 The starting point is that where there is an apparent inconsistency between two planning documents, a decision-maker must undertake a thorough attempt to find a way to reconcile the provisions considered to be in tension.[34] Words should be given their plain and ordinary meaning, but a literal interpretation should not prevent the plan from achieving its intended purpose.[35] The interpretation of planning documents requires a purposive approach and consideration of the context surrounding a word or phrase.[36]

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[32] *Port Otago Ltd v Environmental Defence Society Inc* [2023] NZSC 112, [2023] NZRMA 422.

[33] Policy C.

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

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

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

66 Applying the above in this case:

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

66.2 As outlined above, the NPS-REG pre-dates *King Salmon* and, by its nature, is enabling rather than restrictive. However, its "end goal" is increasing New Zealand's renewable electricity generation to a level that meets or exceeds the Government's national target.[37] It provides clear direction that renewable electricity generation activities must be provided for, including acknowledgement of the practical constraints associated with the development of new generation activities. The NPS-REG also requires decision-makers to recognise and provide for the national significance of renewable electricity generation activities, whereas the NPS-HPL generally applies at a regional or district level.

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

MR HENDERSON'S SUBMISSION AND EVIDENCE

67 Prior to filing these submissions, counsel has received the Commissioner's Minute No. 4. Counsel had intended to raise these matters at the hearing and so the Minute was gratefully received.

68 In terms of Mr Henderson's submission, counsel agrees that the submission should be struck out as invalid pursuant to sections 96(3), (4) and 41D(1)(c) of the RMA, for the reasons given in the Minute.

69 As also noted in the Minute, Mr Henderson has filed a statement of evidence, which appears to have been provided on his behalf in support of his submission. The evidence does not appear to have been provided on behalf of the Brookside Submitters Group as this is not stated in his evidence. The other statements of evidence

[37] NPS-REG, Objective.

provided for the Group expressly state that the witnesses have been engaged to provide evidence on their behalf.

70 In any case, given Mr Henderson's clear personal opposition to the proposal through his submission and other previous activity,[38] and the breadth of his evidence beyond his stated area of expertise (ecology), in my submission his evidence is unlikely to comply with the Code of Conduct for Expert Witnesses contained within the Environment Court's Practice Note 2023.[39] The requirements for independence and objectivity of expert witnesses have been confirmed by the Environment Court in various cases.[40]

71 In my submission, the evidence should either not be accepted or should be given very limited weight (if any) in the Commissioner's decision-making.

CONCLUSION

72 The Proposal presents an exciting opportunity for the Selwyn District and a significant step for renewable energy generation in the South Island. The numerous benefits of the Proposal are clear and are an important consideration for the Commissioner's decision-making. Alongside those factors, KeaX and its expert team have carefully and thoroughly considered all relevant planning matters in relation to the proposal.

73 In my submission, the Commissioner can be comfortable that:

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

73.2 the Proposal is consistent with the various relevant planning documents.

74 The Proposal is accordingly deserving of consent.

A R C Hawkins

Counsel for KeaX Limited

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[38] See for example, media article: https://www.odt.co.nz/star-news/star-districts/residents-oppose-solar-farm.

[39] See in particular, ***section 9.2 Duty to the Court***:

*(a) An expert witness has an overriding duty to **impartially** assist the Court on matters within the expert's area of expertise.*

(b) *An expert witness is not and must not behave as an **advocate** for the party who engages then.*

(**emphasis added**)

[40] See, for example, *Briggs v Christchurch City Council* ENC Christchurch C045/08, 24 April 2008; and *Cammack v Kapiti Coast District Council* ENC Wellington W069/09, 3 September 2009.