Before an Independent Hearings Commissioner appointed by
the Selwyn District Council

*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*

# Reply legal submissions on behalf of KeaX Limited

Dated: 15 March 2024

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**MAY IT PLEASE THE COMMISSIONER**

## INTRODUCTION

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

2 The position for the Applicant 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 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.

2.2 For the purposes of the Commissioner's substantive decision-making under sections 104 and 104B of the Resource Management Act 1991 (*RMA*):

(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 cover the following matters, as indicated at the end of the second hearing day:

3.1 Amendments to the Proposal/conditions of consent;

3.2 Scope of application for proposed change to construction and operational hours;

3.3 Interpretation and application of the National Policy Statement for Highly Productive Land 2022 (*NPS-HPL*);

3.4 Amenity values;

3.5 Relevance of Partially Operative Selwyn District Plan (*POSDP*) provisions;

3.6 Section 104(3)(d); and

3.7 The Applicant's position on Mr Henderson's "Attachment 1".

4 For ease of reference, the following attachments are included with these submissions:

4.1 **Appendix 1** – amended proposed conditions of consent;

4.2 **Appendix 2** – amended Landscape Graphic Supplement;

4.3 **Appendix 3** – Rangiriri solar farm decision;

4.4 **Appendix 4** – Waerenga solar farm decision;

4.5 **Appendix 5** – Edgecumbe solar farm decision;

4.6 **Appendix 6** – Jeremy Brabant legal advice; and

4.7 **Appendix 7** – Ministry for the Environment letter.

## AMENDMENTS TO PROPOSAL/CONDITIONS OF CONSENT

5 Through the course of the hearing, the Applicant team heard more specific details from the Brookside Submitters Group (the *Submitters*) as to their concerns about the Proposal, and from Council witnesses on certain matters. As a result, the Applicant proposes several amendments to the proposed conditions of consent. These are explained in this section of the reply submissions and are captured either in the amended consent conditions attached as **Appendix 1** or in the amended Landscape Graphic Supplement attached as **Appendix 2**.

### Monitoring and maintenance of the solar panels and other infrastructure

6 At the hearing, the Submitters raised concerns around contamination in the event of damage to the solar panels and discussion followed regarding monitoring and maintenance of the panels.

7 As MrMcMath explained, it is standard practice for solar farms to be subject to ongoing monitoring as part of operations. This involves a continuous online monitoring system because energy generation is constantly recorded. If a performance irregularity is highlighted (i.e. there is a reduction in expected energy generation), this automatically signals a "fault" of some sort with a particular panel or piece of infrastructure. This triggers follow up online monitoring or, if necessary, a physical inspection. In addition, physical inspections of the infrastructure generally take place at least every six months.

8 In the unlikely event that any panels or other infrastructure become faulty, these are generally replaced within two weeks, to ensure that they are continuing to generate the most possible energy in the climatic conditions. In the very unlikely event of damage to a panel or other piece of infrastructure, these are also generally replaced within two weeks, for the same reason.

9 By way of example, Mr Nick Keeler of Ethical Power has advised that at its Marshwood solar farm in Somerset in the United Kingdom, since operations commenced in May 2015, only 25 of the 6,900 panels have been faulty or damaged. This is a failure rate of only 0.3% over nine years. Further, these are an older generation of solar panels, with the technology having advanced significantly since 2015.

10 The upshot is that broken/cracked panels are highly unlikely and, in any case, the Proposal will be subject to continuous monitoring and maintenance from a commercial, operational perspective. However, to give comfort to the Submitters in response to concerns raised, the Applicant proposes the following new Condition 40 requiring regular monitoring and replacement of any damaged panels:

> *The Consent holder shall ensure that the solar farm infrastructure is maintained to a high standard by undertaking (at least) the following:*
>
> *a. continuously on-line monitoring, enabling faults such as broken panels to be identified in a prompt manner; and*
>
> *b. undertaking a physical inspection of the solar farm infrastructure every 6 months; and*
>
> *c. replacing any broken panels within two weeks of these being identified (subject to product availability).*

**Construction noise on Saturdays and general piling activity**

11 At the hearing, the Submitters raised concerns in relation to the impacts of construction noise on Saturdays. Their concerns focused on the impacts of piling activity on Saturdays, particularly if multiple piling rigs are used.

12 After hearing these concerns and the importance of respite on the weekends for the Submitters, the Applicant proposes that there will be no piling of any form (percussive or otherwise) on Saturdays.

13 In addition, the Applicant is willing to restrict weekday piling hours to between 8:00am and 5:00pm, noting that the construction hours are 7:30am to 6:00pm.

14 The proposed amendment to Condition 24 to record these changes is as follows:

> *Construction work on the site must take place between the hours of 7.30 a.m. and 6.00 p.m, Monday to Saturday (inclusive), except that piling of any type shall not be undertaken outside the hours of 8:00am and 5:00pm on weekdays or at any time on a Saturday. Noisy works must not be undertaken on Sundays or public holidays.*

15 The question of the scope of the application as it relates to Saturday construction activity is addressed in the "Scope of Application" section below, at paragraphs 38-43.

**Setback of shelterbelt from Kewish property**

16 Mrs Kewish noted at paragraph 7 of her statement of evidence that the most northern aspect of her home is approximately 13 metres from the northern boundary fence and that, on the proposed Landscape Plan, the on-site shelterbelt creating visual screening for her property will be situated 10 metres north of the boundary fence, resulting in a total separation distance of 23 metres.

17 It was always the Applicant's intention that there be a > 30m separation between the Kewish dwelling and this shelterbelt. This was already recorded in proposed Condition 33, which reads:

> *An additional visually impermeable shelterbelt hedge shall be planted and maintained at a minimum height of 3.5m approximately 20m from the boundary with 324 Branch Drain Road (and 33m from the existing residential unit on this site).*

18 However, the Applicant acknowledges the error in the location of the shelterbelt (being 10m rather than 20m from the relevant site boundary) and an updated Landscape Plan with this issue rectified is attached as **Appendix 2** to these submissions.

**Site set-up/development plan for farming component**

19 At the hearing, there was much discussion about how to ensure that sub-clause 3.9(3)(a) of the NPS-HPL would be able to be achieved.

20 This ties into the section 104(3)(d) question of whether the adverse effects of the Proposal on the highly productive land resource will be minor or less (i.e. below the public notification threshold), and consideration of these effects in a section 104/104B sense.

21 The requirements of sub-clause 3.9(3)(a) are discussed in detail below. As discussed below, it is important to ensure that any conditions imposed in this respect do actually address effects, and do not go further than addressing the "availability and productive capacity" of highly productive land. That is, they should not stray into some form of "productivity" requirement or a requirement for a specific use of the land.

22 However, the Applicant found the Commissioner's discussion with Mr Gordon for the Council a very useful basis for developing a set of "Farm Development" conditions, which are considered to address the issues raised. In essence, the conditions set out a framework for the development of the site so that methods and systems are put in place to ensure that the adverse effects of the solar component on the overall availability and productive capacity of the highly productive land are minimised and mitigated.

23 There was some confusion at the hearing as to whether the site will continue to be irrigated after the solar farm has been established. The Applicant clarifies that the site will continue to be irrigated, albeit this is likely to be in a reduced capacity (volume and area) as set out in Section 4.1 of the Application, which reads:

> *It is proposed to retain some of the water infrastructure, including existing water tanks, to provide water for livestock grazing on site, and reduced irrigation.*

24 This was also confirmed in the Applicant's section 92 response dated 4 October 2023, which stated:

> *The layout of the solar farm may require…. various/alternate forms of irrigation to be placed under the panels.*

25 The proposed conditions address irrigation of the overall site as part of the Farm Development Plan. It is noted that this is not, and cannot be, a requirement for irrigation of the overall site at all times. This would go well beyond the requirements of the NPS-HPL and there is no expert evidence saying it is required. Both Mr Ford (for the Applicant) and Mr Hainsworth (for the submitters) confirmed this position in their evidence due to the characteristics of the subject land. Such a condition would be highly unusual and could lead to perverse environmental outcomes.

26 The set of conditions are proposed Conditions 41 and 42 and they read:

> *41. The Consent Holder shall, at least 30 working days prior to the commencement of construction, submit to the SDC for certification a Farm Development Plan. The plan shall include, but not be limited to:*
>
> *a. Methods and systems including those required for irrigation to ensure that the Site can continue to be used for primary production, as defined in Condition 42 below.*
>
> *b. A simple plan identifying the location of tracks, turning areas for machinery, and the initial locations of any proposed fencing, water troughs and irrigation equipment (as known at the time of constructing the solar farm).*
>
> *c. Methods for successfully restoring pasture within three months of commissioning being completed.*
>
> *42. Where the land is returned to pasture, the pasture shall be:*
>
> *a. Maintained so that vegetation or grass is in a healthy and uniform state with the exception of seasonal browning off;*

b. *Replanted where erosion or die-off has resulted in bare or patchy soil cover;*

c. *Maintained so that no visible pugging is observed.*

*For the purposes of this resource consent, "primary production" means production from agricultural, pastoral, or horticultural, activities that is reliant on the soil resource of the land.*

27 On an ongoing basis, the management of the farm will be governed by the underlying landowners' Farm Environment Plan, as required by Environment Canterbury.

**Consent duration**

28 The issue of the duration of the consent was not a matter that received significant focus at the hearing, although it was raised in submissions. However, the Applicant had and has given the matter significant thought both before and after the hearing.

29 The appropriateness or otherwise of a limited consent duration is obviously related to the highly productive land issue. Essentially, the question is whether the consent, if granted, needs to be for a limited term to ensure the reversibility of the use of the *entire* site for land-based primary production.

30 Based on the NPS-HPL interpretation set out from paragraph 44 below, and the evidence of the experts (Mr Ford, Mr Hainsworth and Mr Gordon) as to the effects of the Proposal on the highly productive land, in our submission, a consent duration condition is not required.

31 It is therefore with some hesitation that the Applicant volunteers a consent duration condition. To be clear, the Applicant does not consider such a condition necessary. However, based on the Submitters' position, and if the Commissioner were minded only to grant consent on the basis of reversibility being secured, the Applicant would be willing to offer it. It would be proposed Condition 2 and would read as follows:

*The duration of this consent shall be limited to 40 years from the commencement of construction works on-site.*

**Hours of operation**

32 There was discussion at the hearing about the hours of operation of the Proposal. The morning hours did not appear to be of concern, with the Submitters indicating that rural activity (and associated noise) starts early in the morning. The Applicant has given careful consideration to a potential restriction in the evening hours of operation and its position is set out in the following paragraphs.

33 Fundamentally, the expert noise evidence of both Mr Reeve for the Applicant and Mr Farren for the Council is that operational noise

levels will be low. Even at the closest residential receiver (the Kewishes), the noise will not interfere with typical domestic activities and the noise effects will be minimal.

34 As illustrated at page 9 of Mr Reeve's acoustics report accompanying the application, there are eight properties that (conservatively) will receive operational noise levels greater than 40 dB $L_{Aeq\ (15\ min)}$, which is the night-time noise limit. Of those eight properties, five will receive noise levels of 42 dB $L_{Aeq\ (15\ min)}$ or less, the other three between 44 and 47 dB $L_{Aeq\ (15\ min)}$.

35 These levels are well within the Operative Selwyn District Plan (*OSDP*) and POSDP noise limits and are closer to the night-time noise limit in any case. This is naturally due to the passive nature of solar farms and the purposeful layout of the Proposal with the noise generating aspects located in the middle of the site. There is, accordingly, no effects basis for a restriction in the evening hours of operation.

36 On this basis, the Applicant does not consider it necessary to offer a restriction on operational hours in the evening. This decision also aligns with peak electricity hours and being able to provide the necessary support to the grid, which contributes to Aotearoa New Zealand's overall climate change and decarbonisation goals.

37 The question of the scope of the application as it relates to operational hours is addressed in the "Scope of Application" section below, at paragraphs 38-43.

**SCOPE OF APPLICATION FOR OPERATIONAL AND CONSTRUCTION HOURS**

38 As outlined in Mr Reeve's evidence and our opening submissions, there is a difference between the OSDP and POSDP daytime hours for the purposes of the noise rules. Under the OSDP, it is 7:30am to 8:00pm. Under the POSDP, it is 7:00am to 10:00pm. The Applicant seeks that the POSDP hours apply for the Proposal.

39 There is also a difference between the OSDP and POSDP construction noise hours, with the POSDP allowing for construction noise on Saturdays between 7:30am and 6:00pm. The Applicant seeks that construction be allowed on Saturdays, noting there will be no piling of any form on Saturdays as per paragraph 12 above.

40 This raises the question of whether there is any scope issue associated with these changes. The relevant legal principles regarding the permissible scope of changes to an application are:

40.1 An applicant can amend its application before or at a hearing, but not to the extent that it becomes in substance a different application;[1]

40.2 The scope question depends on the facts of the particular case;[2]

40.3 Relevant factors are whether the activity for which resource consent is sought, as ultimately proposed, is significantly different in its scope or ambit from what was originally applied for, in terms of:[3]

(a) the scale or intensity of the proposed activity; and

(b) the altered character of effects/impacts of the proposal.

40.4 A means of testing those factors is to consider whether there might have been other submitters, had the activity as ultimately proposed to the consent authority been that applied for and notified.[4]

41 Applying the above principles in this case, the proposed changes will not result in an activity that is significantly different in scope or ambit from what was originally applied for. The Proposal is fundamentally the same, this is simply an adjustment to create alignment with what is now the Selwyn District planning regime. More specifically:

41.1 The scale or intensity of the Proposal has not changed;

41.2 Mr Reeve has confirmed that the proposed alignment with the POSDP hours will not lead to any notable change in noise effects, meaning there is no material alteration to the character of the noise effects of impacts of the Proposal; and

41.3 The change does not result in any additional parties being impacted that might have been notified of the application.

42 In our submission, the proposed change is clearly both within scope and acceptable from a noise effects perspective. Ultimately, the

[1] *Waitakere City Council v Estate Homes Limited* [2007] 2 NZLR 149, at para [29].

[2] *Shell New Zealand v Porirua City Council* (CA57/05, 16 May 2005, Anderson P for the Court) at para [7].

[3] *Atkins v Napier City Council* [2009] NZRMA 429, at paras [20]-[21].

[4] *Atkins v Napier City Council* [2009] NZRMA 429, at paras [20]-[21].

Proposal is well within the OSDP and POSDP noise limits for construction and operational noise.

43 At the hearing, Mr Bigsby for the Council queried whether the written approvals given for the Proposal remain valid with the proposed change in hours. In our submission, given that the scope test has been met, as set out above, the written approvals remain valid. We also advise that it was only the owners of the site that provided their written approval and that they are obviously in full support of the Proposal.

## INTERPRETATION AND APPLICATION OF NPS-HPL

### Introduction and questions to be answered

44 The NPS-HPL was obviously a focus of the hearing and was well-traversed by all parties and witnesses. It is not in dispute that the NPS-HPL applies to the Proposal.

45 As a starting point, we note the statutory framework applying to the NPS-HPL. Under section 104(1)(b)(iii), when considering the Proposal and submissions, the Commissioner must "have regard to" any relevant provisions of the NPS-HPL. This is not a requirement to give effect to the NPS-HPL, that requirement applies to the development of regional and district plans. The NPS-HPL is therefore a key document for the Commissioner's decision-making, but not one that will necessarily override any other section 104 considerations.

46 Nonetheless, in our submission, based on the evidence and a correct interpretation and application of the NPS-HPL, the Proposal *is* an *appropriate* use and development of highly productive land. It is therefore consistent with the NPS-HPL.

47 As set out in our opening submissions, there are a series of steps to work through to establish whether the Proposal can be considered an appropriate use and development of highly productive land and therefore consistent with the NPS-HPL.

48 The first two steps were considered in detail at the hearing:

48.1 The Proposal is "specified infrastructure" (clause 3.9(2)(j)(i)); and

48.2 There is a functional or operational need for the Proposal to be on the highly productive land (clause 3.9(2)(j)).

49 In particular, in our submission, the Commissioner can be comfortable with Mr McMath's evidence and responses to questioning as to the operational need for the Proposal to establish in this location.

50 These reply submissions accordingly focus on the two remaining NPS-HPL questions:

50.1 Does the "construction" or "development" or specified infrastructure come within clause 3.9(2)(j)(i)?

50.2 What is required under clause 3.9(3) and have these measures been applied in this case?

51 Attached to these reply submissions are copies of three other decisions to approve solar farms on highly productive land. See the Waerenga decision at **Appendix 3**, the Rangiriri decision at **Appendix 4** and the Edgecumbe decision at **Appendix 5**.

52 Our opening submissions (see paragraph 48) summarised the relevant parts of these decisions and that discussion is not repeated here. The decision-makers in those cases were dealing with the same issues and, while not binding, their consideration and findings may be of assistance to the Commissioner.

53 Also attached to these reply submissions as **Appendix 6** is the legal advice received from Jeremy Brabant about the interpretation of the NPS-HPL.

**Construction/development of new specified infrastructure**

***Legal principles***

54 The legal principles for interpretation of clause 3.9(2)(j)(i) of the NPS-HPL are:

54.1 National policy statements are secondary legislation and, as such, are to be interpreted in accordance with the Legislation Act 2019 (*Legislation Act*).[5]

54.2 The Legislation Act provides that the meaning of legislation must be ascertained from its text and in light of its purpose and its context.[6] This is commonly known as the purposive approach to interpretation.

***Interpretation and discussion***

55 For ease of reference, the text of clause 3.9(2)(j)(i) reads:

*(i) the maintenance, operation, upgrade, or expansion of specified infrastructure;*

56 On its face, the text of this clause of the NPS-HPL does not refer to "new" specified infrastructure, or the "construction" or "development" of specified infrastructure. However, that is not the end of the interpretation exercise.

[5] RMA, section 52(4).

[6] Legislation Act 2019, section 10(1).

57 The purpose and context of the NPS-HPL must be considered. Reading the NPS-HPL as a whole, including the objective and key relevant policies (namely, Policies 1, 4 and 8), it is clear that the purpose of the NPS-HPL is to protect and prioritise highly productive land for use in land-based primary production, now and in the future. However, the NPS-HPL does not contain an absolute protection requirement. It would be a significantly shorter document if it did. Instead, it contains express policy recognition that certain "use and development" of highly productive land is appropriately able to occur.

58 The legislative background supports this position. Without traversing the entirety of the background documents, some useful extracts from the Ministry for the Environment's section 32 report include:[7]

> Page 6: *The NPS-HPL does not seek to provide absolute protection of HPL, nor does it specify that there should be no loss of HPL within a region or district. The NPS-HPL recognises the need for certain (non-productive) uses and developments to occur on HPL and provides for these in specified circumstances, either through rezoning or resource consents.*
>
> Page 102: *As the NPS-HPL objective is to protect HPL for land-based primary production, allowing other (non-productive) uses on HPL is potentially contrary to that objective. However, it is also necessary to allow for other (non-productive) uses on HPL in certain circumstances, otherwise there is risk the NPS-HPL will prevent appropriate and necessary uses of HPL that deliver wider environmental, economic, social and cultural benefits. Clause 3.9(2) (supported by clause 3.9(3)) seeks to strike a balance between ensuring alternative uses are provided for on HPL while still achieving the overarching NPS-HPL objective to protect HPL for land-based primary production.*
>
> Page 102: *… the criteria guiding appropriate use of HPL specifically provide for activities that have a national or regional benefit and a functional or operational need to be located on HPL (eg, infrastructure, defence, and quarrying and mining), uses that deliver wider benefits (eg, environmental enhancements), and supporting activities that support land-based primary production on that land (eg, storage sheds, packing houses, on-site processing). This is an effective way to protect HPL for land-based primary production without precluding appropriate uses of HPL.*

59 The recognition in the scheme of the NPS-HPL that some non-productive use and development of highly productive land is appropriate necessarily applies to all "use and development", be that *new* use and development, or maintenance, upgrade or

[7] See https://environment.govt.nz/publications/nps-highly-productive-land-evaluation-under-section-32-of-the-resource-management-act/.

expansion of *existing* use and development. There is no suggestion in the overall text or background documentation that this can only relate to an existing use or development, where the highly productive land resource is already "compromised". That would be too narrow a reading of the overall scheme of the NPS-HPL.

60 On that basis, an interpretation of clause 3.9(2)(j)(i) that it only enables existing renewable energy generation activities on HPL to be maintained, operated, upgraded or expanded is not consistent with the scheme of the NPS-HPL.

***Alternative interpretation – expansion of specified infrastructure***

61 As explained at the hearing, there is a plausible argument that the development of a new solar farm can be considered "expansion" of specified infrastructure and therefore covered in the text of clause 3.9(2)(j)(i). This interpretation is addressed in the Jeremy Brabant legal advice attached as **Appendix 6**, which supports both our argument outlined above and the "expansion" argument.

62 The upshot of this is that there are two plausible approaches to determining that new specified infrastructure comes within clause 3.9(2)(j)(i) of the NPS-HPL.

***Specific vs general rule of interpretation***

63 There was some discussion at the hearing between the Commissioner and counsel for the Submitters about the rule of interpretation, the specific prevails over the general. In our submission, this is not a case of the specific prevailing over the general because clause 3.9(2)(j)(i) can comfortably be read with the remainder of the NPS-HPL as enabling the development or construction of new specified infrastructure.

64 However, if that rule of interpretation is to be applied, it must be done so correctly. The Courts have consistently emphasised that the textual conclusion of the specific vs the general is not the end of the Court's inquiry. In light of the purposive approach required by the Legislation Act (as outlined above), the interpretation of a legislative provision can only be settled once the Court or decision-maker has ensured that the interpretation aligns with the purpose of the legislation, as evidenced by the preceding case law, the legislative scheme and the legislative history. Thus, while these historical rules of statutory interpretation may continue to be applied, this will only be when they accord with the purposive approach to interpretation.[8]

***Ministry for the Environment Consultation Document***

65 There was much discussion at the hearing, particularly between the Commissioner and Mr Fletcher, about the status and implications of

[8] *Jennings Roadfreight Ltd (in liq) v Commissioner of Inland Revenue* [2014] NZSC 160, [2015] 1 NZLR 573.

the Ministry for the Environment's Consultation Document (September 2023) on the proposed insertion of the word "construction" into clause 3.9(2)(j)(i) of the NPS-HPL.

66 These reply submissions do not repeat the discussion at the hearing which generally established that the Consultation Document does not, when read as a whole, state that there is *no* pathway to obtain resource consent for new specified infrastructure on highly productive land. Rather, the Consultation Document responds to a concern raised by developers (including in the renewable electricity generation sector) that the NPS-HPL should *more clearly* provide policy support for new specified infrastructure.

67 Counsel noted at the hearing that another solar farm developer had been in contact with the Ministry for the Environment to clarify this position. The response received from the Ministry confirming this position is part of the public record of decision-making on the Rangiriri solar farm. A copy is therefore included as **Appendix 7** to these submissions, if it is of assistance to the Commissioner.

**Measures in clause 3.9(3)**

68 For ease of reference, clause 3.9(3) requires territorial authorities to 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.*

69 Careful consideration is needed of what exactly sub-clause (a) requires. As stated in our opening submissions, by using the words "minimises or mitigates", the clause recognises that most land use or development that has a pathway under clause 3.9(2) will inevitably lead to some loss of the availability and productive capacity of highly productive land. In other words, sub-clause (a) does not impose an absolute requirement for the non-productive activity to have no effects on the highly productive land resource.

70 "Availability" is not defined in the NPS-HPL but generally refers to "the quality of being able to be used or obtained". "Productive capacity" is defined in the NPS-HPL to mean:

*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*

71 A solar farm, by its nature, has minimal impact on the availability and productive capacity of the underlying soil resource. This is because construction can be progressed in a non-invasive manner, e.g. piling and minimal areas of hardstand. The site layout can be organised and operations managed in such a way that productive activities can continue under and around the panels. In our submission, the evidence for the Applicant outlining these matters (particularly from Mr Ford and Mr McMath) sufficiently demonstrates that the Proposal meets the requirements of clause 3.9(3)(a).

72 In particular, Mr Ford's position was that "productive capacity" means the ability to maintain the soil in a condition capable of supporting primary production, rather than a prescribed plan of how primary production will in fact occur. His clear evidence was that the soil would remain in good condition and that the range of uses currently applicable to the site would remain available. There did not appear to be significant dispute in the end between Mr Ford, Mr Gordon and Mr Hainsworth on this point.

73 However, there was discussion at the hearing about how to, in effect, "secure" the availability and productive capacity of the highly productive land resource through the lifetime of the solar farm.

74 In our submission, care in interpreting and applying sub-clause (a) needs to be taken here. Sub-clause (a) refers to "availability" and "productive capacity" and does not go further and relate to the "productivity" of highly productive land, in an economics/viability sense or in the sense of the highest and best productive use of the land.

75 Some of the Submitters' presentations focused on the viability of the land for productive use in conjunction with the solar farm. With respect, that is not the question that sub-clause (a) addresses. The use of the land in that sense is largely at the owner's or applicant's prerogative.[9] 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 focus is the impact on the soil resource.

76 However, having listed to the Submitters' concerns, the Commissioner's questions and discussion with Mr Gordon for the Council, the Applicant is willing to offer a set of "Farm Development

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

Plan" conditions. These have been set out and described at paragraphs 19-26 above. In our submission, with these conditions in place, there can be no doubt that the requirements of clause 3.9(3)(a) are met.

***Landowner comments***

77 It may also be of assistance to the Commissioner to note that the underlying landowners, Paul and Matthew Ward attended the hearing and offered the following comments (on behalf of the entire Ward family) about the way they intend to continue farming the land in conjunction with the solar array:[10]

> *The Ward family have been farming this land for many years and across the road for 50 years. They will be responsible for farming management under and around the panels. The 110ha is at present used for milking on 48ha with the remainder being used for silage and hay with some winter grazing.*
>
> *It is intended, at this stage, to harvest the grass in the spring for balage between the rows with a round baler. The driver for the operation of the tilting panels runs lengthwise along the rows, so there is no issue with getting from one end to the other. The image in Mr Gordon's evidence was of an old system with the driver in between the panels, this is no longer the case. There is room at the end of the rows to turn a tractor with machinery from one row to the next.*
>
> *The area will then be grazed with either young cattle or sheep over the summer, with very few stock grazed over the winter. Another option we are looking at is growing lucerne, which is a higher value crop for balage. It will also grow for a longer period without irrigation.*
>
> *Fertiliser can still be spread between the rows and by using minimum tillage, which is a recognised way of planting, new pasture and crops can be sown.*
>
> *With proper management, we feel that the risk of fire can be minimised to a very low level. With irrigation being applied around the boundary to encourage tree growth this will also have the effect of giving a green buffer around the panels, which will also reduce the risk of fire getting into the solar area as well as out of it.*
>
> *With the change of cow numbers and the class of stock to either sheep, beef or crop being farmed under a solar array, this will trigger a need for a new Farm Environment Plan with Environment Canterbury for our farming operation.*

[10] If the Commissioner considers this "new material", the Applicant understands if it must be disregarded.

78 As to clause 3.9(3)(b), the evidence for the Applicant (particularly from Mr McMath and Mr Ford) confirms that due to the nature of the proposed activity and the proposed landscape screening, there will be no reverse sensitivity effects on the land-based primary production activities from the Proposal.

**AMENITY VALUES**

79 At the hearing and in their submissions, the Submitters raised concerns about adverse effects of the Proposal on their rural amenity values. The position of the Submitters and Ms Anthony for the Applicant and Mr Craig for the Council in response was well-traversed at the hearing and is not repeated here.

80 This section of the reply submissions addresses the case law on amenity values. At paragraphs 29 and 30 of our opening submissions, we set out the general principles relating to amenity effects.

81 There are numerous cases dealing with amenity effects. They generally tend to turn on their own facts and the relevant planning frameworks and are accordingly difficult to apply to subsequent situations. In particular, there do not appear to be any Environment Court or higher cases dealing with effects of solar farms.

82 In this case, the amenity effects raised by Submitters must be considered in the context of the relevant planning framework. Importantly, this includes the provisions of the POSDP Energy and Infrastructure Chapter that address the impacts of renewable energy generation activities. For example, EI-P2 refers to "*minimising the effects on, the amenity values of the surrounding environment*".

83 Notwithstanding that general caution, some further general discussion and cases that may assist include:

83.1 In *Shell New Zealand Ltd v Auckland City Council*,[11] the Court of Appeal upheld a High Court ruling that section 7(c) of the RMA does not necessarily require a proposal to maintain and or enhance amenity values. Shell had applied to establish a service station and Auckland City Council declined the application. On appeal, the High Court held that section 7(c) of the RMA does not require a proposal for a resource consent to enhance amenity. A provision in the RMA must be interpreted against the section in which it is found, the Part in which it is placed and the scheme of the RMA as a whole. The RMA contemplates applications for consent that not only do not enhance amenity, but also do not even maintain it.[12]

[11] *Shell New Zealand Ltd v Auckland City Council* [1996] NZRMA 189 (CA).

[12] At page 14.

This finding was upheld by the Court of Appeal and has been applied in many cases to follow.[13]

83.2 In *Canyon Vineyard Ltd v Central Otago District Council*,[14] Central Otago District Council (*CODC*) had granted consent to Bendigo Station Ltd (*Bendigo*) for a 12-lot subdivision and residential building platforms on eight of the lots. Canyon Vineyard Ltd (*Canyon*), owned an adjoining property on which there was a working vineyard, cellar door, restaurant, and conference and function venue. The views from Canyon's property were regarded as spectacular, and Canyon appealed CODC's decision on the grounds that aspects of the proposal would have unacceptable visual effects when viewed from Canyon's property. One of Canyon's grounds was that the Environment Court had erred in finding that the proposal was not contrary to the objectives and policies of the Central Otago Operative District Plan for the purposes of section 104D(1)(b) of the RMA 1991. Canyon argued that:

(a) Firstly, that objective in the Plan "*[t]o maintain and where practicable enhance rural amenity values*" meant that an existing unspoilt rural environment could not be changed to a rural residential environment. However, the Court agreed with the submissions of Bendigo that maintaining and/or enhancing landscape character and amenity values does not require retention of an open landscape. The policy framework in that case anticipated landscapes absorbing certain adverse effects of proposals while maintaining rural amenities. A number of authorities were cited to support this conclusion including:

(i) *Meridian Energy v Wellington City Council*:[15] concerned various resource consent applications for the construction and operation of a wind farm at Mill Creek, near Wellington. The Environment Court held that, although the wind farm would not maintain the existing landscape and the site's particular form of rural character, that inquiry alone was not determinative of the issue, observing that "*[t]here is no requirement in the RMA or the planning documents to freeze the landscape at a point in time*".

[13] For example, *Careys Bay Association v Dunedin City Council* ENC Christchurch C150/2003, 7 November 2003; *Paremata Residents Association Inc v Porirua City Council* ENC Wellington W41/2003, 24 June 2003;

[14] *Canyon Vineyard Ltd v Central Otago District Council* [2022] NZHC 2458.

[15] *Meridian Energy v Wellington City Council* [2011] NZEnvC 232.

(ii) *Todd v Queenstown Lakes District Council*:[16] concerned an appeal against the grant of a resource consent for a subdivision (with associated activities) of an approximately 8.45ha block of land into two parcels of similar size in the Wakatipu Basin of the Queenstown Lakes District. The proposed district plan stipulated the purpose of the subject zone was to "*maintain and enhance the character and amenity of the Wakatipu Basin*", which was reflected in the proposed objectives. One of the landscape and rural amenity values at issue was the site's sense of openness. In considering competing evidence on this point, the Court held:[17]

*[87] At that near view scale, we find that the proposal would change the present view across open pastoral land to a limited but acceptable extent. We do not entirely accept Mr Skelton's opinion that, despite the additional dwellings, the site would retain its sense of openness. Rather, Mr Brown fairly observes that the proposed dwellings would sit 'in the middle of' the site. To that extent, the proposal would render the site less open tha[n] it currently is, as a matter of fact. However, several factors combine to satisfy us that the proposal sufficiently maintains openness in a way that is sympathetic to landform and effectively ensures absorption of this land use change.*

(b) Secondly, that the Environment Court had incorrectly read down the words "contrary to" in section 104D as being synonymous with "not being repugnant or antagonistic to", which it said was the wrong standard. Related to the Court's findings on the meaning of "maintain", the Court rejected this argument on the basis that the objective to "maintain" rural amenity values encompassed some changes to the landscape. Canyon was not entitled to an unchanged rural landscape with no visible buildings.

83.3 As to energy infrastructure, in *Re Meridian Energy Ltd*,[18] it was noted that amenity effects are a common issue in windfarm proposals. In these cases, decisions often come

[16] *Todd v Queenstown Lakes District Council* [2020] NZEnvC 205.

[17] This conclusion was upheld on appeal to the High Court in *Brial v Queenstown Lakes District Council* [2021] NZHC 3609 and considered by the Court of Appeal (*Brial v Queenstown Lakes District Council* [2022] NZCA 206) as a reason for refusing leave for a second appeal.

[18] *Re Meridian Energy Ltd* [2013] NZEnvC 59.

down to the weighing up of national level benefits and the adverse effects at a local level (as is signalled in the NPS-REG). This was a successful application for resource consent for a 33-turbine wind farm. In this case, the Court considered that all potentially adverse effects, apart from those relating to visual amenity effects on certain landowners, could be mitigated effectively by the conditions of consent. There remained significant visual adverse visual and amenity effects which could not be mitigated. However, against this, the Court balanced the positive effects of the proposal. In addition to the economic benefits, the overwhelming benefit was the generation of renewable electricity from a reliable source. As in other wind farm cases, the Court stated that the decision came down to weighing the national benefits against the adverse local effects. The Court concluded that the former outweighed the latter in this case and so granted the applications for resource consent subject to conditions.

**POSDP PROVISIONS**

84 There was some discussion between the Commissioner and the respective planners as to the framework of the POSDP. For completeness, this section briefly records the legal/planning position for the Applicant on two questions about the POSDP. This is the same position taken by Mr Bigsby for the Council.

**Is the NPS-HPL codified in the POSDP?**

85 Yes. The Rural Chapter includes a requirement to protect highly productive land as per the NPS-HPL and GRUZ-P1A provides: '*Avoid the inappropriate use and development of highly productive land, except as provided for by the National Policy Statement for Highly Productive Land 2022*.' This implements clause 3.9(1) of the NPS-HPL.

86 The Energy and Infrastructure Chapter includes Policy EI-P2, which seeks to minimise the adverse effects of important infrastructure, and renewable electricity generation on the physical and natural environment by:

> 6. *providing for the maintenance, operation, upgrade or expansion of important infrastructure on highly productive land where there is a functional or operational requirement to locate the infrastructure on that land whilst:*
>
> (a) *minimising or mitigating any actual or potential cumulative loss of highly productive land; and*
>
> (b) *avoiding if possible, or otherwise mitigating, any actual or potential reverse sensitivity effects on land-based primary production activities.*

87 This implements clauses 3.9(2)(j) and 3.9(3) of the NPS-HPL.

88 This codification aligns with the following relevant timing: the NPS-HPL came into force on 17 October 2022 and decisions on the POSDP were publicly notified on 19 August 2023, meaning there was time in the hearing process for the provisions of the NPS-HPL to be incorporated.

**What Chapters of the POSDP are relevant to the Proposal?**

89 The Energy and Infrastructure Chapter of the POSDP is a stand-alone chapter as clearly set out in the 'Note for Plan Users', which reads (emphasis added in underline):

> *As required by the National Planning Standards, unless relating specifically to a Special Purpose Zone, the 'Energy, Infrastructure and Transport' heading has been created to be self-contained for all energy, transport and infrastructure works and activities.*
>
> *The Energy and Infrastructure chapter is designed to work in the following way:*
>
> *2. Regarding energy or important infrastructure activities, while most of the relevant provisions are contained within this chapter, where an activity is located within the Port Zone or the Dairy Processing Zone (both of which are Special Purpose Zones), those chapter provisions must also be considered.*
>
> *Moreover, all activities must be assessed against the Transport chapter.*
>
> *Additionally, the objectives, policies, and methods for managing reverse sensitivity effects relating to noise sensitive activities establishing in proximity to important infrastructure are managed under the Noise Chapter of this Plan. Except where there are direct cross-references, in all other circumstances this chapter sets out all other provisions for energy or infrastructure activities.*

90 As such, the relevant provisions for this Proposal can be found in the Energy and Infrastructure, Noise and Transport Chapters of the POSDP. There is no requirement to refer to or assess the Proposal against the provisions of the Rural Chapter as the Energy and Infrastructure expressly contains all relevant matters, including those related to the NPS-HPL and amenity.

91 For completeness, Ms Kelly in any case considered all POSDP provisions and assessed the Proposal to achieve or be consistent with them.

**SECTION 104(3)(D)**

92 This section briefly addresses section 104(3)(d) of the RMA, which counsel and the planner for the Submitters seek to rely on as a jurisdictional bar to the grant of consent.

93 Section 104(3)(d) is not often raised and, when it is raised, it is generally in the context of a non-notification decision where a party seeks to suggest that they should have been notified and were not. It is uncommon for it to be raised by parties who have been notified and enabled to make submissions on an application, because they have to be suggesting that despite the application being limited notified, it should have been publicly notified.

94 As set out in our opening submissions, section 104(3)(d) does not operate retrospectively. It does not enable the substantive decision-maker to revisit the Council's notification decision. Instead, it effectively requires a judgment, as at the time of the substantive decision-making (i.e. now), whether the adverse effects of an application meet the tests for notification.

95 In this instance, the Submitters are alleging that the Proposal will result in adverse effects on amenity values and highly productive land that are more than minor, such that the public notification threshold is met.

96 In terms of amenity values, in our submission, the evidence for the Applicant and Council supports the position that the adverse effects of the Proposal on the environment will be minor or less than minor. Further, while the submitters raised concerns about impacts on their amenity values, there was nothing in their evidence to suggest impacts more broadly on the wider environment that would constitute "more than minor" adverse effects. The Commissioner may find that there are adverse, localised effects on a neighbouring landowner that are minor or more than minor, but it is only where effects of that level are on the broader environment, when the public notification threshold might be met and section 104(3)(d) engaged. On this basis, in our submission section 104(3)(d) is not engaged based on amenity-related effects.

97 In terms of effects on the highly productive land, in our submission, similarly the evidence for the Applicant and Council supports the position that the adverse effects of the Proposal on the environment will be less than minor. This aspect is addressed in detail in the NPS-HPL section above. There was equally nothing said by the Submitters that was not able to be addressed by Mr Ford, Mr Gordon and, indeed, Mr Hainsworth. On this basis, the Commissioner can be comfortable that section 104(3)(d) is not engaged based on highly productive land-related effects.

98 The Commissioner can accordingly proceed to make a decision on the Proposal under sections 104 and 104B of the RMA.

**MR HENDERSON'S ATTACHMENT 1**

99 As indicated at the hearing, the Applicant sought a brief chance to review and, if necessary, respond to the new evidence presented by Mr Henderson and Mr Dalley as Attachment 1 to Mr Dalley's evidence.

100 The Applicant's soils witness, Dr Beechey-Gradwell (agricultural scientist at AgResearch Limited), has reviewed the document and made the following brief comments:

> *I agree with the statements of Isobel Stout (Council contamination witness) that because solar panels are sealed units, and the internal components are fully protected from exposure to rainwater, the possibility of contaminants leaching from them is less than minor. This fact best explains why my measurements at Wairau Valley and the Coombe solar farm showed no increase in potential contaminants below solar panels relative to control areas.*
>
> *I also agree that the use of % changes (relative to controls) in the concentration of various potential soil contaminants under panels presented by Mr Henderson is misleading, and reference to the actual values show that the levels of these compounds under the panels are within the range expected for these soils.*

**CONCLUSION**

101 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, the Applicant and its expert team have carefully and thoroughly considered all relevant planning matters in relation to the proposal.

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

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

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

103 The Proposal is accordingly deserving of consent.

**J M Appleyard and A R C Hawkins**

**Counsel for KeaX Limited**