

**IN THE ENVIRONMENT COURT
AT CHRISTCHURCH
I TE KŌTI TAIAO O AOTEAROA
KI ŌTAUTAHĪ**

Decision No. [2025] NZEnvC 144

IN THE MATTER of the Resource Management Act 1991

AND an appeal under clause 14(1) of the
First Schedule of the Act

BETWEEN S G JOHNSTON

(ENV-2018-CHC-296)

Appellant

AND DUNEDIN CITY COUNCIL

Respondent

Court: Environment Judge K G Reid
Environment Commissioner A P Gysberts

Hearing: at Dunedin on 11 December 2024

Appearances: P Page and G Griffin for S G Johnston
M Garbett and R Kindiak for Dunedin City Council

Last case event: 11 December 2024

Date of Decision: 5 May 2025

Date of Issue: 5 May 2025

INTERIM DECISION OF THE ENVIRONMENT COURT

A: We adopt option 3 of the options identified by the appellant. We assess the rezoning of the subject land as Rural Lifestyle to be the most appropriate outcome and more appropriate than the existing provisions.



B: By Friday 23 May 2025 the parties are to file a joint memorandum with proposed plan provisions for the court to consider, or alternatively advise the court that they cannot agree. If the parties cannot agree, the court will make timetabling orders for the provision of submissions.

C: Costs are reserved.

REASONS

Introduction

[1] Mr Stephen Johnston appealed Dunedin City Council's decision to reject his submission on the second-generation Dunedin District Plan (2GP) that sought rezoning of 78 and 90 Stornoway Street and 89 Grimness Street, Karitane (sites) from Coastal Rural zone to Township and Settlement zone.

[2] The sites are registered to the Estate of Margaret (Maggie) Karetai, also known as Maggie Taiaroa, who died intestate in 1945. Mr Johnston represents Maggie's descendants.¹

[3] A mediation agreement signed by the parties at court-assisted mediation on 28 March 2022 provided for the rezoning of the site from the Coastal Rural zone to the Township and Settlement zone as sought in Mr Johnston's submission.

[4] The National Policy Statement for Highly Productive Land 2022 (NPS-HPL) came into effect on 17 October 2022, several months after the mediation agreement was signed.

[5] No party to the appeal opposes giving effect to the mediation agreement, if there is a legally available way for that to happen. The issue for this court to determine is whether the mediation agreement can still be implemented now that

¹ Evidence-in-chief of Haines Peter John Ellison dated 6 September 2024 at [29].

the NPS-HPL is in effect.

[6] The appellant has put forward various options for achieving the mediated outcome without contravening the requirements of the NPS-HPL. The Council supports the outcome agreed between the parties at mediation, however it considers the introduction of the NPS-HPL made this outcome unachievable. The Council is of the view that the various options put forward for achieving the mediated outcome are not possible as they either contravene provisions of the NPS-HPL or are not agreed as being consistent with the 2GP. The Council's position is the site is best to remain zoned Coastal Rural.

The sites

[7] The sites are two unconnected parts that together total 0.607ha in area.

[8] The sites are zoned Coastal Rural and adjoin Township and Settlement zoning. Part of the sites are located within a Hazard 2 (flood) Overlay zone and/or Hazard 3 (coastal) Overlay zone. The sites sit within the Pūrākaunui to Hikaroroa to Huriawa wāhi tūpuna mapped area. In addition, the Waikouaiti Estuary Natural Coastal Character Overlay zone covers all of 90 Stornoway Street and approximately half of 89 Grimness Street. Other sites within Karitane zoned Township and Settlement are also subject to these overlays.

[9] It was unclear to us how the sites came to historically have a rural zoning. They are part of the Karitane settlement. They are of a similar size and layout to the residential zone to the north and west, which are zoned Township and Settlement.

[10] It was common ground that all of the land within the sites is Land Use Classification 3 (LUC 3).

The mediated outcome

[11] The mediated outcome was summarised to us in the following way:²

16. The Agreement was signed on 28 March 2022 and provided that, if certain works were undertaken (they were) the parties agreed in principle that if a rezoning was agreed then the following matters were to be included as a covenant on the relevant records of title:

- *Two dwellings only: one dwelling on 78 Stornoway Street, and one dwelling on 89 Grimness Street and 90 Stornoway Street (to be amalgamated);*
- *Both dwellings to be located above the 4m contour;*
- *Warning to future buyers that the landowner is to be liable for coastal erosion (along same lines as that applied to Holt site at 96 Stornoway Street);*
- *Biodiversity planting on the lower portion of the properties;*
- *Upper portion of the properties subject to height and reflectivity controls and planting plan, to manage effects on natural character; and*
- *Access must be along the back of the properties (i.e. on higher land).*

17. The Mediation Agreement further stated that if the parties agreed to the rezoning of the properties, the parties agreed in principle to a provision included in a structure plan for a duplex development within a single building on 78 Stornoway, subject to agreement between the parties on the size of the building.

Background

[12] Mr Haines Ellison gave evidence on the history of land acquisition in Karitane in general and the history of the sites in particular. Mr Ellison is currently

² Evidence of Ben Farrell dated 9 September 2024 at [16]-[17].

the Manager of the South Team of the Māori Agribusiness Directorate at the Ministry for Primary Industries. Between 2009 and 2020 Mr Ellison worked as a lawyer at the Ngāi Tahu Māori Law Centre. In this role he carried out research into historical land ownership in the Ngāi Tahu area. He also worked with several Ngāi Tahu Kaumatua who shared some of their storable knowledge about Ngāi Tahu lands with him. Many of these Kaumatua are no longer alive today.

[13] During his time at the Ngāi Tahu Māori Law Centre Mr Ellison dealt with the estate of Maggie Karetai. In 2014 he advised one of Maggie's grandsons and Mr Johnston in relation to the sites. Mr Ellison drew on the Waitangi Tribunal's report on the Ngāi Tahu claim as background.³

[14] Mr Ellison's evidence was uncontested. We found his evidence compelling. His evidence formed the basis of the appellant's submissions that this case engages s6(e) of the RMA in that the sites are ancestral Māori land. We set out the relevant parts of his evidence in the following paragraphs:⁴

History of land acquisition in Karitane and these Sites

10. I record the following understandings drawn from the Waitangi Tribunal's report on the Ngāi Tahu claim.
11. Like much of the South Island, the Sites were acquired through the Kemp Purchase in 1848. The purchase made up almost a third of the country's land area. It must also be one of the country's most controversial. To acquire 13,551,400 acres (from Kaiapoi to Ōtākou), at the time the Crown paid just 2000 pounds.
12. Ngāi Tahu agreed to sell much of their land to the Crown on their understanding that their villages and homes, their gardens and their natural food resources would be retained by them, as well as substantial

³ The Ngāi Tahu Report 1991. WAI 27. Waitangi Tribunal Report 1991 at 2.4.

⁴ Evidence-in-chief of Haines Peter John Ellison dated 6 September 2024 at [10]-[29].

additional lands.

13. In 1991, the Waitangi Tribunal upheld the claimants' grievances that:

the Crown to the detriment of Ngai Tahu failed to fulfil the terms of the agreement between Kemp and Ngai Tahu in respect of Kemp's purchase, in particular –

- (i) ample reserves for their present and future benefit were not provided and
- (ii) their numerous mahinga kai were not reserved and protected for their use.

14. The original grant of titles by the Crown for the Sites were issued between 1877 and 1879. It is unclear who asserted ownership over the Site between 1848 and 1877. I recall these may have been considered waste lands.

15. The Site is situated just 20 metres from the Waikouaiti Native Reserves Mapped Area, scheduled under the 2GP. The piece of land across the road from 89 Grimness Street comprised within Waikouaiti Block XII Section No 80 is Māori Freehold Land, the majority of which is owned by Maggie's descendants.

16. For many Māori, land is a taonga tuku iho, a treasure passed down from the ancestors to be looked after and passed onto the next generation. When viewed through this lens, whenua isn't just an economic asset that can be used as security and sold but rather turanga wae wae where one can stand and say they belong.

17. Māori lost significant land through the process of colonisation. Subsequent laws resulted in further land loss. Some of these laws were in place until 1993 and the enactment of Te Ture Whenua Māori Act 1993 which places much stronger emphasise on the retention of lands. For some Māori, if they no longer own land in an area they whakapapa to, there can be a feeling of loss of ahi ka (their fires have gone cold).

Maggie's Estate

18. Despite passing nearly 80 years ago, two sections of general title land at Karitane remain in various iterations of Maggie's name. Maggie was a child of Tame and Peti Parata (nee Brown). Tame was born in around 1837 at Ruapuke Island. He moved to Waikouaiti (Karitane) in the 1850s. I was told by whānau that Tame moved to Waikouaiti (Karitane) to stay with his uncle, Haereroa. Tame quickly became prominent within the Hapu and his photograph still hangs prominently at the Puketeraki Marae today.
19. Maggie died intestate and Letters of Administration were never granted for her estate. Her interests in Māori freehold land were succeeded to in the years after her death. Those entitled were her children living at her at the time of succession with substitution of issue for those children that had died. At least four of her children had died leaving issue when succession to her Māori land interests took place.
20. In 2014, Maggie's descendants wanted to transfer the two sections of general land at Karitane out of Maggie's name and into living descendants. My recollection is that we provided advice on transfer of general land, the need to appoint an administrator and an initial indication of who might become an owner in these sections once transfer had taken place. Due the number of people involved and that my client was quite elderly, progress was slow and eventually the file was closed.
21. Section 177 of the Native Land Act 1931 sets out who is entitled to Maggie Karetai's estate in as much as it consists of general title land. Maggie's second husband survived her but because she died without a will, her estate was to be treated as though her husband died before her. My understanding in October 2014 was that 31 people were entitled to her estate in proportions ranging from 1/12 to 1/264th. It is likely that those numbers and proportions have changed in the intervening decade. In 2014 only one of these people – John Richard Taiaroa – was still living. Even then it was hard to say with any certainty who the heirs to the estate were.

22. Before transferring the sections, the current heirs/owners need to be identified. To do this, the families of each of Maggie's heirs as identified in 1945 need to be approached.
23. The process to transfer the shares from Maggie to the heirs is complicated and could be very costly. Before transferring the shares, Letters of Administration for Maggie Karetai's estate need to be taken out and this is done through the High Court.
24. Under the Te Ture Whenua Māori Act 1993, the sites are general land owned by Māori. Although the legal system of ownership reflects western pakeha legal norms, it is important to recognise that does not make it any less important to the owners as ancestral land owned by Māori.

Whānau relationship to the site and the area

25. I recall documents that confirmed Maggie received these lands from her father, Tame Parata (Tame). Tame received a significant portion of land in the Waikouaiti Blk XII Native Reserve which he farmed. In his will, various land parcels were left to whānau members.
26. Section 6(e) of the Resource Management Act 1991 notes that:

6 Matters of national importance

In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall recognise and provide for the following matters of national importance: ...

(e) the relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga:

27. As noted by the Waitangi Tribunal, six Ngai Tahu Rangatira signed the Treaty: Tuhawaiki, Kaikoura, Tikao, Karetai, Iwikau and Taiaroa. All of Maggie's descendants whakapapa to Taiaroa and several also whakapapa

to Karetai.

28. Lands in Karitane were acquired by the New Zealand Company through the Kemp Purchase. Notably, despite being involved in these discussions, the Waitangi Tribunal records that Karetai did not sign this deed.

29. In my opinion, for the descendants of Maggie, the sites are ancestral land of Māori. Although there is a relatively short period (1848 to 1877/1879) in which the sites were likely to have been considered land owned by the Crown, Maggie descends from the original Māori owners prior to the Kemp purchase.

[footnotes omitted]

[15] Based on Mr Ellison’s evidence, we find that the sites are ancestral land of Māori to which s6(e) applies. All parties accepted as much.

[16] Planning evidence before us from Mr Farrell (for the appellant) traversed the legal status of the land. On the basis of Mr Ellison’s evidence Mr Farrell categorised the land as general land owned by Māori under the Te Ture Whenua Māori Land Act 1993. However, the land is not “specified Māori land” for the purposes of the NPS-HPL and NPS-IB.

[17] The proposed Otago Regional Policy Statement (pRPS) adopts the term “Māori land”. And sets out a structured pathway (i.e. tikanga, TRoNT governance and systems) whereby general land owned by Māori is to be treated in a similar way to Customary Māori Land and Māori Freehold Land.

[18] There was no evidence before us as to whether the subject land had been through this process so as to be classified as Māori Land under the pRPS.

Appellant’s position

[19] The appellant’s planner Mr Farrell put forward four potential avenues of relief to give effect to the mediation agreement:

- (a) *Option 1*: the sites are rezoned Settlement and Township zone, with a structure plan or bespoke site-specific provisions that effectively restrict the residential development opportunities to a maximum of two units on locations outside the natural hazard and landscape overlay locations;

The land is ancestral land under s6 which provides a gateway through the restrictive direction in the NPS-HPL, applying the exception clauses enabled by clause 3.9(2)(c) “*is for a purpose associated with a matter of national importance under s 6 RMA*”,⁵ or clause 3.9(2)(d) for specific Māori land;⁶

- (b) *Option 2*: continue to zone the sites Rural Coastal zone, but use the NPS-HPL clause 3.9 exception framework to approve a structure plan or bespoke site-specific provisions that effectively restrict the residential development opportunities to a maximum of two units on locations outside the natural hazard and landscape overlay locations;
- (c) *Option 3*: rezone the sites to a Rural Lifestyle Zone, with bespoke site-specific provisions that enable residential development opportunities to occur in locations outside the natural hazard and landscape overlay locations.

Mr Farrell states such relief would be appropriate assuming the direction in clauses 3.7 and 3.10 of the NPS-HPL are satisfied. He is satisfied it would.⁷

Mr Simon Glennie addresses the exceptions in clause 3.10. He considers the land meets the exemption in clause 3.10 of the NPS-HPL. Mr Glennie states the productive capacity of the land is low. There is no economically viable primary production that can be undertaken on the land. The productive capacity is negligible, so its

⁵ Consistent with the approach taken by the court in *Beresford, Bunker & Rouse v Queenstown Lakes District Council* [2024] NZEnvC 182 (Sticky Forest).

⁶ Evidence-in-chief of Ben Farrell dated 9 September 2024 at [96].

⁷ Evidence-in-chief of Ben Farrell dated 9 September 2024 at [95].

loss is not significant; or

- (d) *Option 4*: the court concludes the 2GP framework renders the land incapable of reasonable use (s85 RMA) and directs alternative relief on that basis.

Appellant's submissions

Option 1

[20] The appellant considers the relief is available because the 2GP Rural Coastal zone, in which the sites sit, is not a rural production or general rural zone in terms of the National Planning Standards. Therefore, this rezoning does not relate to highly productive land and is not captured by clause 3.6 of the NPS-HPL.

[21] Based on the analysis in *Wakatipu Equities Ltd v Queenstown Lakes District Council*,⁸ the appellant submits that whether the sites are to be treated as highly productive land to which clause 3.6 of the NPS-HPL applies rests on whether the Coastal Rural zone, including its overlays and precincts, is “used predominantly for (i.e., mainly serves) primary production purposes” as described in PS8 of the National Planning Standards.

[22] The appellant submits the main purpose of the 2GP’s Coastal Rural zone is not for primary production purpose, and instead about protecting the natural character of the coastal environment.

[23] The appellant submits the nearest equivalent zone to the Coastal Rural zone for the purposes of the National Planning Standards is the Natural Open Space zone. Mr Farrell concludes that this is the nearest equivalent zone because:⁹

- (a) The Coastal Rural Zone is generally consistent with [the description of the Natural Open Space Zone in PS8] given the clear importance of the natural

⁸ *Wakatipu Equities Ltd v Queenstown Lakes District Council (Wakatipu)* [2023] NZEnvC 188.

⁹ Rebuttal evidence of Ben Farrell dated 14 November 2024 at [23].

environment, whilst simultaneously supporting sites and settlements of various sizes ranging from residential density through to very rural. All while the buildings and structures remain compatible with that environment.

- (b) The Natural Open Space Zone is the nearest equivalent zone because it is the zone within the Planning Standards that best reflects the values of the Coastal Rural Zone.
- (c) The Coastal Rural Zone and the Natural Open Space Zone also share the following intuitive similarities:
 - (i) Both have a principal focus surrounding the protection of the natural environment.
 - (ii) Both zones can be found in the Rural chapters of District Plans: The District Plan Structure Standards, proscribed within the Planning Standards, provide a direction that the Natural Open Space Zone must be placed in either the Rural Zones or the Open Space and Recreation Zones Chapters.
- (d) Neither the Planning Standards nor 2GP contain a more obvious equivalent to either the Coastal Rural Zone or the Natural Open Space Zone.

[24] The appellant submits the introduction of Chapter 20 – Recreation Zone of the 2GP shows that the rural zones are used to hold land for activities (or lack of activities) that have nothing to do with primary production, but rather activities such as conservation, protection, biodiversity and landscapes, walking and biking tracks.

[25] If the court is minded to accept that the Rural Coastal zone's nearest equivalent zone for the site is not the rural general or rural production zones, the appellant submits the site would not be considered highly productive land for the purposes of clause 3.5(7) of the NPS-HPL and would not therefore be captured by clause 3.6. Clause 3.6 only imposes restrictions on 'urban rezoning' which is defined, for the purposes of the NPS-HPL, as changing from a general rural or rural production zone to an urban zone. The appellant accepts that the proposed rezoning would convert the sites to an urban zone, however, for the reasons above, submit the sites are not within a general rural or rural production zone.

[26] Accordingly, the appellant's position is that the proposed rezoning is not captured by clause 3.6 of the NPS-HPL. This being the last barrier to rezoning, the appellant submits that it is legally available to implement the mediation agreement.

Part 2 RMA

[27] The appellant submits that the directive nature of the NPS-HPL does not trump the s6(e) considerations in this case. Mr Farrell's evidence is that the 2GP does not give effect to the Council's obligations so the court may go back to Part 2 of the RMA and assess for itself whether the obligation "to recognise and provide for" the relationship of Māori with their ancestral land outweighs the NPS-HPL considerations in the context of the sites.

[28] The appellant also submits that s7(b) of the RMA is also relevant. The appellant submits, in reliance on the evidence of Mr Glennie, that given that the sites cannot be used to provide "any viable land-based production", that the use of the land by two houses, one being a duplex, is a more efficient use and development of natural and physical resources, in accordance with s7(b).

Options 2 and 3 – structure plan provisions in the Rural Coastal or Rural Residential 1 zones

[29] The appellant submits that if the court determines that the closest equivalent zone to the 2GP's Rural Coastal Zone is the general rural or rural production zone under the Standards, then in the alternative, the mediation agreement can still be given effect to by way of a structure plan in either a Rural Residential 1 or the existing Coastal Rural zone under the 2GP.

Option 4 – section 85 RMA

[30] Alternatively, if the relief outlined above (options 1 – 3) is barred through application of clause 3.6 of the NPS-HPL, the appellant submits that there are

grounds for a s85 RMA direction to be made by the court. The outcome provided for in the mediation agreement is a reasonable use of the land and is the only use available to the landowners. The provisions of the 2GP make the site incapable of reasonable use in not providing for that outcome. Those same provisions place an unfair and unreasonable burden on the landowners of the site, particularly given their ancestral relationship to the land.

[31] The appellant submits Part 3 does not provide a barrier to amending the zoning boundary of the 2GP to provide for the site to be in Township and Settlement zoning.

Council position

[32] The Council remains content with the agreement reached at mediation to re-zone the site Township and Settlement zone. However, it is the Council's position that the rezoning of the sites and the agreement reached at mediation cannot now be achieved due to the requirements that were brought in by the NPS-HPL, in particular the directive policy to avoid urban rezoning of highly productive land currently in clause 3.6 of the NPS-HPL.

[33] Mr Peter Rawson gives evidence that the most appropriate zone is the Rural Coastal zone because the rezoning does not meet the requirements of clause 3.6 of the NPS-HPL. This is because:¹⁰

- (a) the Township and Settlement zone is consistent with the definition of 'urban' and 'urban rezoning' in the NPS-HPL;
- (b) the rezoning fails to meet the requirements of clause 3.6(1)(a) because the rezoning is not required to provide sufficient development capacity, and supply compared to demand is predicted to increase in the medium to long-term. There is sufficient housing capacity in the short, medium and long term to meet demand; and

¹⁰ Evidence of Peter Rawson dated 27 September 2024 at [31].

- (c) the rezoning fails to meet the requirements of clause 3.6(1)(b) because there are several Township and Settlement zoned sites, or parts of sites, within the vicinity of the sites, which have the potential to provide additional capacity.

[34] However, Mr Rawson’s s32AA RMA assessment conclusion is that the requested rezoning is otherwise appropriate. The proposed rezoning would achieve Objective 2.6.2 and Policy 2.6.2.1 subject to structure plan rules in the residential section of the 2GP which reflect the mediated agreement.

[35] The Council addressed each of the options put forward by the appellant.

Option 1: Rezone the sites to Township Settlement zone

[36] The Council’s position on option 1 is that the exception in clause 3.9 does not provide for re-zoning of land to urban. That remains precluded by clause 3.6.

[37] The Council submits the general exemption in clause 3.9 is not an “exception” to clause 3.6. Clause 3.6 applies expressly and directly to “rezoning” for urban uses. Clause 3.9 applies to “use and development” of land. It is considered that clause 3.9 applies more relevantly to a consent than an urban rezoning. Clause 3.6 is contained and sets out where rezoning can occur “only if” the test in clause 3.6 are met.¹¹

[38] The land at issue in this case, which is general land owned by Māori, is not land provided by the Crown for redress under a Treaty settlement to provide for the owners’ economic wellbeing.¹² That was a key part of the reasoning in the Sticky Forest decision, that does not appear to apply here.

[39] Mr Rawson notes that there is no reference to s6 RMA or specified Māori

¹¹ Evidence of Peter Rawson dated 27 September 2024 at [34].

¹² Referring to evidence-in-chief of Ben Farrell dated 9 September 2024 at [26].

land in clause 3.6 of the NPS-HPL. Mr Rawson recognises the importance of these sites as ancestral land for descendants of Margaret Taiaroa/Karetai and agrees that the sites may meet the requirements in clause 3.9(2)(c) or 3.9(2)(d). However, he considers the requirement of clause 3.6 needs to be met.¹³

Option 2: Continue to zone the sites Rural Coastal and apply a structure plan

[40] Council's position in relation to this option is that applying a structure plan that achieves the mediated outcome would be contrary to the density standard (Rule 16.5.2) and the objectives and policies for the rural zones (particularly Objective 16.2.1 and Policy 16.2.1.7) that require the avoidance of residential activity in the rural zones on sites that do not comply with the density standards for the zone.¹⁴ This essentially embeds Township and Settlement like provisions (and a site-specific outcome) into the Rural zone. This is not supported by the Council.

Option 3: Rezone the sites to a Rural Lifestyle Zone, with bespoke site-specific provisions

[41] Council considers that even if the test for an exemption under clause 3.10 of the NPS-HPL to rezone these sites to a Rural Lifestyle (in the case of the 2GP a Rural Residential) zone could be met, this would not achieve the mediated outcome – which was to rezone to Township and Settlement zoning.

[42] Clause 3.10 does not provide for urban rezoning of rural land. The exemption in clause 3.10 can only be used as a pathway to rezone the sites to a Rural Lifestyle zoning, which in the context of the 2GP, would be one of the Rural Residential zones described in section 17. The parties have not agreed to a Rural

¹³ Evidence of Peter Rawson dated 27 September 2024 at [34]-[35].

¹⁴ Evidence of Peter Rawson dated 27 September 2024 at [42]-[43].

Residential zoning for the sites.

[43] Further, the mediated outcome with its housing density on small sites would be inconsistent with the objectives and policies (particularly Objective 17.2.1 and Policy 17.2.1.2) and site size for the Rural Residential zone (in Rule 17.5.2).¹⁵

[44] Mr Rawson did not offer evidence on the productive value of the sites as he has no expertise in this field. He did however note that clause 3.6 of the NPS-HPL sets a strict test for urban rezoning of highly productive land, and does not provide an exemption for land that is subject to permanent or long-term constraints.¹⁶

Option 4: Direction under s85

[45] The Council opposes any application made under s85 for the following reasons:

- (a) the starting point is that s85 identifies an interest in land is deemed not to be taken or injuriously affected by a plan provision, unless s85 identifies that it is:
- (b) the gateway to s85 is not open in this case because Mr Johnston did not raise an issue that the land was “incapable of reasonable use” in his original submission; and
- (c) despite this, the current zoning of Rural Coastal is considered most appropriate to implement the current national direction in the NPS-HPL and is considered to be appropriate and not render the land incapable of reasonable use.

¹⁵ Evidence of Peter Rawson dated 27 September 2024 at [45].

¹⁶ Evidence of Peter Rawson dated 27 September 2024 at [36].

Is the Coastal Rural zone a rural zone?

[46] The appellant’s rebuttal planning evidence also sets out an argument that clause 3.6 of the NPS-HPL does not apply to the rezoning of the sites from Coastal Rural to Township and Settlement zoning because the Coastal Rural zone is not a rural zone under the National Planning Standards.

[47] The Council’s position is that the Coastal Rural zone is clearly identified in the 2GP as a rural zone and therefore clause 3.6 is engaged.

[48] The Council submits the structure and content of the 2GP make it clear that the objectives and policies of the Rural zone apply to all seven subparts of the Rural zones.¹⁷

[49] The Council considers the Township and Settlement zone is “urban”, and the current Coastal Rural zone is a general rural or rural production zone as described in the National Planning Standards.

[50] In *Balmoral Developments (Outram) Ltd v Dunedin City Council (Balmoral)*,¹⁸ the Environment Court considered whether land that fell within the definition of highly productive land in clause 3.5(7) of the NPS-HPL could be mapped by the appellants in the interim period between the commencement of the NPS-HPL and the completion of mapping by the regional council. Mr Johnston’s appeal in relation to the Karitane sites was one of the appeals considered in the decision.

[51] In *Balmoral*, the court referred to the requirement in clause 1.3(4) that where local authorities have not applied the Zone Framework Standards of the National Planning Standards, then a reference to a zone is a reference to the nearest

¹⁷ Coastal Rural zone, High Country Rural zone, Hill Country Rural zone, Hill Slopes Rural zone, Middlemarch Basin Rural zone, Peninsula Coast Rural Zone, Taieri Plain Rural zone.

¹⁸ *Balmoral Developments (Outram) Ltd v Dunedin City Council (Balmoral)* [2023] NZEnvC 59.

equivalent zone. The decision states:¹⁹

I am told by counsel for ORC that each of the seven rural zones used in the 2GP is the equivalent to either the rural general or rural production zones referred to in the Zone Framework Standard. No party contested that explanation, which is accepted by the court.

[52] As the Council points out, this is the same issue where Mr Farrell has now reached a different conclusion.

[53] In *Balmoral* the court found:²⁰

... the NPS-HPL will apply to its consideration of the appeals filed by the appellants because in each case, the land that is the subject of the appeals does not come within the exemption under cl 3.5(7)(b) of the NPS-HPL.

NPS-HPL

[54] The objective of the NPS-HPL is that “highly productive land is protected for use in land-based primary production, both now and for future generations.”

[55] Nine policies give effect to the objective. The policies prioritise the use of highly productive land for land based primary production, particularly Policy 5 which provides that:

The urban rezoning of highly productive land is avoided, except as provided in this National Policy Statement.

Definitions

[56] “Highly productive land” is defined in clause 1.3(1) as:

¹⁹ *Balmoral* at [51].

²⁰ *Balmoral* at A.

Land that has been mapped in accordance with clause 3.4 and is included in an operative regional policy statement as required by clause 3.5 (but see clause 3.5(7) for what is treated as highly productive land before the maps are included in an operative regional policy statement and clause 3.5(6) for when land is rezoned and therefore ceases to be highly productive land).

[57] “Urban rezoning” is defined as “... changing from a general rural or rural production zone to an urban zone”.

[58] “Urban” is defined as a description of a zone:

means any of the following zones:

- (a) low density residential, general residential, medium density residential, large lot residential, and high density residential:
- (b) settlement, neighbourhood centre, local centre, town centre, metropolitan centre, and city centre:
- (c) commercial, large format retail, and mixed use:
- (d) light industrial, heavy industrial, and general industrial:
- (e) any special purpose zone, other than a Māori purpose zone:
- (f) any open space zone, other than a Natural Open Space zone:
- (g) sport and active recreation.

Relevant clauses

[59] Part 3 of the NPS-HPL sets out the steps to be taken by local authorities to give effect to the objectives and policies. This includes the criteria for identifying and mapping highly productive land. Part 3 also sets out the circumstances in which rezoning, subdivision, and use and development of highly productive land may be appropriate by listing a number of exemptions.

[60] The clauses which have been raised by the parties are set out below.

[61] Clause 3.5(7) sets out the position to be taken by territorial authorities and consent authorities until the mapping in the regional policy statement has been undertaken. Clause 3.5(7) provides that:

Until a regional policy statement containing maps of highly productive land in the region is operative, each relevant territorial authority and consent authority must apply this National Policy Statement as if references to highly productive land were references to land that, at the commencement date:

- (a) is:
 - (i) zoned general rural or rural production; and
 - (ii) LUC 1, 2, or 3 land; but
- (b) is not:
 - (i) identified for future urban development; or
 - (ii) subject to a Council initiated, or an adopted, notified plan change to rezone it from general rural or rural production to urban or rural lifestyle.

[62] Clause 3.6 provides:

3.6 Restricting urban rezoning of highly productive land

- (1) Tier 1 and 2 territorial authorities may allow urban rezoning of highly productive land only if:
 - (a) the urban rezoning is required to provide sufficient development capacity to meet demand for housing or business land to give effect to the National Policy Statement on Urban Development 2020; and
 - (b) there are no other reasonably practicable and feasible options for providing at least sufficient development capacity within the same locality and market while achieving a well-functioning urban environment; and
 - (c) the environmental, social, cultural and economic benefits of rezoning outweigh the long-term environmental, social, cultural and economic costs associated with the loss of highly productive land for land-based primary production, taking into account both tangible and intangible values.
- (2) In order to meet the requirements of subclause (1)(b), the territorial authority must consider a range of reasonably practicable options for providing the required development capacity, including:
 - (a) greater intensification in existing urban areas; and
 - (b) rezoning of land that is not highly productive land as urban; and
 - (c) rezoning different highly productive land that has a relatively lower

productive capacity.

- (3) In subclause (1)(b), development capacity is **within the same locality and market** if it:
 - (a) is in or close to a location where a demand for additional development capacity has been identified through a Housing and Business Assessment (or some equivalent document) in accordance with the National Policy Statement on Urban Development 2020; and
 - (b) is for a market for the types of dwelling or business land that is in demand (as determined by a Housing and Business Assessment in accordance with the National Policy Statement on Urban Development 2020).
- (4) Territorial authorities that are not Tier 1 or 2 may allow urban rezoning of highly productive land only if:
 - (a) the urban zoning is required to provide sufficient development capacity to meet expected demand for housing or business land in the district; and
 - (b) there are no other reasonably practicable and feasible options for providing the required development capacity; and
 - (c) the environmental, social, cultural and economic benefits of rezoning outweigh the environmental, social, cultural and economic costs associated with the loss of highly productive land for land-based primary production, taking into account both tangible and intangible values.
- (5) Territorial authorities must take measures to ensure that the spatial extent of any urban zone covering highly productive land is the minimum necessary to provide the required development capacity while achieving a well-functioning urban environment.

[63] Clause 3.7 provides that “territorial authorities must avoid rezoning of highly productive land as rural lifestyle, except as provided in clause 3.10.”

[64] Clause 3.9(2) provides:

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:

...

- (c) it is, or is for a purpose associated with, a matter of national importance under section 6 of the Act:
- (d) it is on specified Māori land:

[65] Clause 3.10 provides:

3.10 Exemption for highly productive land subject to permanent or long-term constraints

- (1) Territorial authorities may only allow highly productive land to be subdivided, used, or developed for activities not otherwise enabled under clauses 3.7, 3.8 or 3.9 if satisfied that:
 - (a) there are permanent or long-term constraints on the land that mean the use of the highly productive land for land-based primary production is not able to be economically viable for at least 30 years; and
 - (b) the subdivision, use, or development:
 - (i) avoids any significant loss (either individually or cumulatively) of productive capacity of highly productive land in the district; and
 - (ii) avoids the fragmentation of large and geographically cohesive areas of highly productive land; and
 - (iii) avoids if possible, or otherwise mitigates, any potential reverse sensitivity effects on surrounding land-based primary production from the subdivision, use, or development; and
 - (c) the environmental, social, cultural and economic benefits of the subdivision, use, or development outweigh the long-term environmental, social, cultural and economic costs associated with the loss of highly productive land for land-based primary production, taking into account both tangible and intangible values.
- (2) In order to satisfy a territorial authority as required by subclause (1)(a), an applicant must demonstrate that the permanent or long-term constraints on economic viability cannot be addressed through any reasonably practicable options that would retain the productive capacity of the highly productive land, by evaluating options such as (without limitation):

- (a) alternative forms of land-based primary production:
 - (b) improved land-management strategies:
 - (c) alternative production strategies:
 - (d) water efficiency or storage methods:
 - (e) reallocation or transfer of water and nutrient allocations:
 - (f) boundary adjustments (including amalgamations):
 - (g) lease arrangements.
- (3) Any evaluation under subclause (2) of reasonably practicable options:
- (a) must not take into account the potential economic benefit of using the highly productive land for purposes other than land-based primary production; and
 - (b) must consider the impact that the loss of the highly productive land would have on the landholding in which the highly productive land occurs; and
 - (c) must consider the future productive potential of land-based primary production on the highly productive land, not limited by its past or present uses.
- (4) The size of a landholding in which the highly productive land occurs is not of itself a determinant of a permanent or long-term constraint.
- (5) In this clause:
- landholding** has the meaning in the Resource Management (National Environmental Standards for Freshwater) Regulations 2020.
- long-term constraint** means a constraint that is likely to last for at least 30 years.

National Planning Standards

[66] The National Planning Standards are relevant to this appeal because:

- (a) clause 1.3(4) of the NPS-HPL states that a reference to a zone is a reference to a zone described in Standard 8 (Zone Framework Standard) of the National Planning Standards, or in cases where local authorities have not yet implemented the Zone Framework Standard of the National Planning Standards, the nearest equivalent zone; and
- (b) clause 3.5(7) of the NPS-HPL requires that until a regional policy statement containing maps of highly productive land for that region

is operative, the NPS-HPL must be applied as if references to highly productive land were references to land that at the commencement date is zoned general rural or rural production.

[67] The Zone Framework Standard provides the following descriptions:

General rural zone Areas predominantly for primary production activities, including intensive indoor primary production. The zone may also be used for a range of activities that support primary production activities, including associated rural industry, and other activities that require a rural location.

Rural production zone Areas used predominantly for primary production activities that rely on the productive nature of the land and intensive indoor primary production. The zone may also be used for a range of activities that support primary production activities, including associated rural industry, and other activities that require a rural location.

Evaluation – summary

[68] We find that the most appropriate outcome in this case is that the sites be rezoned Rural Lifestyle subject to an accompanying structure plan that allows for density at the level provided for in the mediation agreement. It is not necessary for us to canvass each of the options proposed by the appellant. We summarise our overall conclusion is as follows:

- (a) clause 3.6(1) of the NPS-HPL applies to the proposed rezoning in the mediation agreement. The NPS-HPL therefore prohibits options 1 and 2;
- (b) we adopt option 3; and
- (c) it is necessary for us to consider option 4 (a direction under s85).

Evaluation – detailed conclusions

[69] The nearest equivalent zone to the Coastal Rural zone on our analysis is

Rural General. The Coastal Rural zone in name, form and substance is a Rural zone. Productive farming is specifically referred to and enabled in plan provisions. Dwellings are managed to reduce fragmentation and the impact on productive uses. Section 16 of the plan, the rural zones section, expressly identifies that the function of the rural environment is to “firstly provides for productive rural activities”. We agree with the Council that productive farming is the zones first, or primary purpose.

[70] It was not disputed that the Township and Settlement zone requested by Mr Johnston is consistent with the definition of “urban” and “urban zoning” in the NPS-HPL.

[71] On that basis, clause 3.6 is engaged. Clause 3.6 prevents the rezoning of highly productive land (which includes the sites as LUC3) as urban unless the very restricted circumstances in clause 3.6(1) apply.

[72] We accept Mr Rawson’s evidence that the requirement of clause 3.6(1)(a) is not met because there is sufficient housing capacity to meet demand in the short, medium and long term in Karitane. Mr Rawson also identified several options for providing additional development capacity within the Township and Settlement zone sites meaning that the requirement in clause 3.6(1)(b) is not met.²¹

[73] The appellant suggested but did not discuss in detail how the directive and mandatory nature of clause 3.6 might be put to one side on the basis that we are dealing in this case with s6(e) matters of national importance. In any event it is unnecessary for us to determine that point. As indicated, the solution we adopt is to rezone the land Rural Lifestyle – which means that there is no conflict with clause 3.6.

[74] Clause 3.7(1) provides that territorial authorities must “avoid” rezoning of highly productive land as rural lifestyle except as provided for in clause 3.10. The

²¹ Evidence of Peter Rawson dated 27 September 2024 at [31].

directive to “avoid” rural lifestyle rezoning in clause 3.7(1) might be argued to contrast with the words of clause 3.6(1) that territorial authorities “may allow” urban rezoning “only if” the requirements of the subclause are met.

[75] In any event, we are satisfied that the requirements of clause 3.10 are met in this case.

[76] Mr Glennie is a farm consultant specialising in sheep, beef and deer. He gave evidence addressing the exceptions in clause 3.10. His evidence was that farming land in any form is not likely to be economically viable within the next 30 years. The land parcels are less than .5 ha and as such are of insufficient scale to be useful for pastoral agriculture. The cost of clearing the sites of weeds and then perimeter fencing would also be relative to the potential for remuneration. The larger site is not adjacent to any neighbouring farmland so would not be easy to lease. The .2 ha parcel is adjacent to farmland, but at .2 ha would at best be capable of rank to sheep after expenditure on securing the site and establishing pasture. His evidence was that no feasible pastoral enterprises are available for these land parcels.

[77] Turning to possible horticultural use, again Mr Glennie’s evidence was that the land parcels are at the small end of the scale to justify investment in a horticulture or crop venture.

[78] Mr Glennie concluded that there were significant barriers to productive potential and that it was unlikely that any viable land-based production would be able to be undertaken on the sites. He considered that the current constraints were likely to be permanent. Because of his assessment he also concluded that the activity is small-scale and would not impact on the productive capacity of the land.²²

[79] Mr Glennie’s uncontested evidence addressing the exceptions in clause 3.10

²² Evidence of Simon Glennie dated 6 September 2024 at [18]-[21].

of the NPS-HPL was as follows:²³

[18] I have been asked to address the exceptions in clause 3.10 of the NPSHPL. To the extent that it is within my expertise, I have responded to that test:

- (a) 3.10(1)(a): farming the land in any form is not likely to be economically viable within the next 30 years. The inherent constraints on productive use are permanent.
- (b) 3.10(1)(b)(i): the development will not result in any significant loss of productive capacity of highly productive land in the district. 'Productive capacity' in the NPSHPL means the ability of the land to support land based primary production over the long term, based on an assessment of physical characteristics; legal constraints; and the size and shape of existing and proposed land parcels. After assessing these features, I have concluded that the productive capacity is negligible and so its loss is not significant.
- (c) 3.10(1)(b)(ii): the development will not fragment large and geographically cohesive areas of highly productive land.
- (d) 3.10(1)(b)(iii): there is no surrounding primary production, so the proposal will avoid reverse sensitivity effects on surrounding land based primary production.
- (e) 3.10(1)(c): There are no long-term environmental, social, cultural and economic costs associated with the loss of highly productive land for land-based primary production. The loss of potential grazing for two sheep is negligible.
- (f) 3.10(2): the permanent or long-term constraints on economic viability cannot be addressed through any reasonably practicable options that would retain the productive capacity of the highly productive land.

²³

Evidence of Simon Glennie dated 6 September 2024 at [18]-[19].

- (i) I have assessed alternate forms of land based primary production including pastoral, crop and horticulture. None of these forms of primary production would overcome the long-term constraints of the land.
- (ii) I have considered improved land management strategies and alternative production strategies for farming including the removal of vegetation on the site or shifting to a plant nursery arrangement and these options do not deal with the long-term constraints.
- (iii) Changes to water efficiency or storage methods and reallocation or transfer of water and nutrient allocations would not deal with the long-term constraints on this site.
- (iv) Boundary adjustments to amalgamate with surrounding land might be legally possible if the current owners sell their land or acquire neighbouring land, but this would not overcome the fundamental problems that inhibit economic primary production. If there was an obvious candidate for amalgamation for productive purposes, then it would have been the two large undeveloped lots across Grimness Street (unformed) to the west. Putting aside the legal problems with amalgamation with those two lots (it is Māori Freehold Land), the elevated portions of that undeveloped land have already been zoned Township and Settlement (shown in pink). Nothing would be achieved in a productivity sense by amalgamating the small rural zoned parcels of flood hazard land (shown in grey).
- (v) I note for completeness that clause 3.10(4) states that the size of a landholding in which the highly productive land occurs is not of itself a determinant of a permanent or long-term constraint. I agree that might be true if there was contiguous highly productive land that had productive potential that might be achieved through amalgamation. But in the present case the sites are isolated by land that is either residential, flood prone, or being used for informal conservation. So, the constraint is not just the size of the subject sites, but also the size and land uses of the

surrounding sites, and the likelihood that those surrounding sites will periodically inundated, meaning that investment in productivity is highly unlikely.

- (vi) As outlined above, lease arrangements would not work for this site and would not deal with the long-term constraints of the site.

[19] Based on the above, the land appears to meet the exemptions in clause 3.10 of the NPSHPL. The constraints of the site cannot be overcome.

[80] We accept Mr Glennie’s evidence. We therefore find that the court may allow the land to be rezoned rural lifestyle. The land may also be used and developed for housing as contemplated in the mediation agreement. These activities might otherwise be restricted by clauses 3.7, 3.8 and 3.9 of the NPS-HPL.

Planning assessment

2GP

[81] Mr Farrell assessed the proposal against the relevant objectives and policies in the current 2GP. His evidence was that the outcome agreed in mediation is provided for under s6(e) as a matter of national importance and there is no basis for any suggestion that the existing 2GP framework could be undermined by allowing any of the rezoning options he canvassed.

[82] Mr Farrell argued that strategic direction 2.5 coupled with Objective 2.5.1 Kaitiakitaka provide sufficient coverage to allow bespoke provisions for the management of particular “ancestral land” resources. These provisions provide:

A. Plan Overview and Strategic Directions › 2. Strategic Directions ›

2.5 Dunedin is a City that Gives Effect to the Principles of the Treaty of Waitangi, Protects Kāi Tahu Values, Culture and Traditions, and Enables Kāi Tahu to Express Kaitiakitaka

Objective 2.5.1 Kaitiakitaka

Kāi Tahu can exercise kaitiakitaka over resources within their takiwā.

[83] We note that the reference to “Kāi Tahu” rather than to “Māori” tends to suggest that the exercise of Kaitiakitaka is limited to iwi kaitiaki obligations, which is different to s6(e) of the Act. However, given the detailed background provided by Mr Ellison we interpretate the objective broadly in the current context to cover the subject land, no party suggested otherwise.

[84] Mr Farrell traced how Objective 2.5.1 is implemented through the rest of the 2GP plan. Chapter 14 of the 2GP is entitled “Manawhenua”. Manawhenua is defined as:

An iwi or hapū who exercise customary authority or rakatirataka in an identified area.

[85] Objective 14.2.1 is the sole objective:

The relationship between Manawhenua and the natural environment is maintained or enhanced, including the cultural values and traditions associated with:

- a. wāhi tūpuna;
- b. mahika kai; and
- c. occupation of original native reserve land through papakāika.

[86] Policy 14.2.1.6 then provides:

Policy 14.2.1.6 Enable Manawhenua to live in original native reserve areas where any adverse effects will be adequately managed in line with the objectives and policies of the relevant zone.

[87] It is not at all clear why the policy enabling Manawhenua to live on land is limited to original native reserve areas. Policy can be contrasted with the terms of

s6(e):

- (e) the relationship of Māori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga

[88] “Māori” as set out in the s6(e) is not restricted to iwi or hapū. Whanau and individual Māori are to be recognised and provided for. Notable also, the concept of “ancestral lands” is not limited to “original native reserves”.

[89] We accept Mr Farrell’s evidence that Policy 14.2.1.6 is not an adequate response to s6(e) in circumstances where Māori whanau wish to use their own ancestral lands. Including where they wish to have the right to live on them.

[90] Turning to Chapter 16 – Rural Zone, provisions for Māori is limited to Manawhenua living (through Papakāika) on original reserves.

[91] Papakāika is defined as:

Residential activity within the boundaries of an original native reserves mapped area where: ...

[92] Papakāika are therefore only provided for within native reserves. Outside native reserves nothing in the plan acknowledges that the Rural zones might contain Māori ancestral land and nothing that recognises and provides for the relationship of Māori with their ancestral land is a matter of national importance. In this respect we agree with Mr Farrell that the 2GP is inadequate.

[93] Under the Rural Lifestyle chapter the effects on cultural values are listed several times as a matter for discretion or guidance for assessment of consent applications. There are no other provision seeking to implement Objective 2.5.1.

Conclusions on 2GP Rural zoning

[94] We are dealing here with two small, isolated blocks of Māori ancestral land

in the rural zone that are unable to be used for primary production, but which because of their rural zoning cannot be used for other non-primary production focus purposes.

[95] We agree with Mr Farrell that the provisions of the 2GP are inadequate in failing to make *any* provision, much less any appropriate provision, for Māori ancestral land outside the limited areas where Papakāika are provided for.

[96] Given this deficiency we have recourse direct to s6(e) in determining the most appropriate plan provisions, as the court did in *Beresford v Queenstown Lakes District Council*.²⁴

Higher order instruments

Otago Regional Policy Statement 2019

[97] Mr Farrell identified Policy 2.1.2 Treaty Principles is relevant; this policy provides:

Ensure that local authorities exercise their functions and powers, by:

...

- d) **recognising and providing for the relationship of Kāi Tahu's culture and traditions with their ancestral lands, water, sites, wāhi tapu, and other taoka;**
- e) ensuring Kāi Tahu have the ability to:
 - i. **Identify their relationship with their ancestral lands, water, sites, wāhi tapu, and other taoka;**

²⁴ *Beresford, Bunker & Rouse v Queenstown Lakes District Council* [2024] NZEnvC 182 at [47].

- ii. Determine how best to express that relationship; ...
- g) Ensuring that district and regional plans:
 - i. Give effect to the Ngāi Tahu Claims Settlement Act 1998;
 - ii. Recognise and provide for statutory acknowledgement areas in Schedule 2;
 - iii. Provide for other areas in Otago that are recognised as significant to Kāi Tahu;

[98] We agree with Mr Farrell that providing site-specific relief for the current site through the 2GP would be consistent with this policy.

Proposed Otago Regional Policy Statement (Non-Freshwater)

[99] Mr Farrell’s evidence was that the pRPS seeks to implement the obligations under s6(e) and contains a number of provisions dealing with native reserves and “Māori land”. As noted earlier there was no evidence available to us on whether the structured pathway contained in the pRPS for recognition of general land owned by Māori has been, or is able to be, used in this case. Had the subject land been considered “Māori Land” under the pRPS, there are numerous objectives and policies that would have supported the proposed rezoning. These include MW-P4 Sustainable Use of Native Reserves and Māori Land, MW-M1 Collaboration with Kāi Tahu, MW-M2 Matauraka Māori, MW-M3 Kāi Tahu Relationships, MW-M4 Kāi Tahu rakatirataka, MW-M5 Regional and district plans, MW-M6 Incentives and education and MW-M7 Advocacy and facilitation.

[100] Having regard to Mr Ellison’s evidence and the acceptance by all parties that the subject land is Māori ancestral land to which s6(e) applies, we treat the proposal to rezone the subject land as consistent with the policy direction in the pRPS provisions dealing with Māori land.

[101] Mr Rawson discussed the objectives and policies of the pRPS relating to urban development in particular objective UFD-01 – Development of urban areas, Objective LF-LS-011 – Land and soil, and LF-LS-P19 – Highly productive land. In Mr Rawson’s view the proposal contained in the mediation agreement achieves the pRPS objectives and policies except for UFD-P4(6). This policy reflects the requirements of the NPS-HPL in relation to urban rezoning. His view about the consistency with this policy was reflective of his view that the proposed rezoning is inconsistent with the NPS-HPL. The option that we have chosen to give effect to the mediation agreement is not inconsistent with the NPS-HPL. We therefore see the option we intend to adopt as achieving the relevant objectives and policies of the pRPS.

[102] Both Mr Rawson and Mr Farrell agreed that the mediation agreement proposal is consistent with the NPS-UD.

Rural Lifestyle provisions

[103] A simple rezoning to Rural Lifestyle would not achieve the mediated outcome because the lots are too small to accommodate permitted dwellings under zone rules. Bespoke provision would need to be made to accommodate the mediated outcome.

[104] The respondent’s bespoke provisions would not achieve the objectives and policies of the Rural Lifestyle zone. The purpose of rural residential zoning in the 2GP is to enable “lifestyle blocks [and] hobby farms” (Policy 2.6.1.4, 17.2.1) and residential activity in the zones should be enabling this (Policy 17.2.1.2.). The respondent said that proceeding in the way suggested would have implications for plan integrity.²⁵

[105] We acknowledge those considerations. However, our focus is on recognising and providing for the relationship of the owners of the sites to their

²⁵ Evidence of Peter Rawson dated 27 September 2024 at [43].

ancestral land as a matter of national importance.

[106] We consider that the obligation under s6(e) should be our primary focus. Those matters make this case exceptional. In those circumstances we do not think there will be any significant impact on plan integrity.

Section 32AA assessment

[107] Both planners carried out assessments under s32AA. Mr Rawson carried out an assessment of the proposal against Objective 2.6.2 and Policy 2.6.2.1. These are the key strategic objectives and policies relating to residential zoning and housing capacity. He considered that the proposed rezoning would achieve Objective 2.6.2 and Policy 2.6.2.1, subject to structure plan rules in the residential section of the 2GP which reflect the mediation agreement. His overall assessment was that, leaving aside the issue about the NPS-HPL, the rezoning as per the mediation agreement was appropriate.

[108] Mr Farrell considered that the relief sought by way of enabling some new residential development on a portion of existing land would merely extend, to a very minor if not negligible physical extent, an existing urban/residential area. By contrast, the relief sought would result in relatively substantial positive effects associated with allowing the landowners to utilise their land for reasonable use including new residential development opportunities consistent with s6(a). We agree with Mr Farrell's assessment.

Outcome

[109] The outcome that we adopt is option 3 of the options identified by the appellant. We assess the rezoning of the subject land as Rural Lifestyle to be the most appropriate outcome and more appropriate than the existing provisions.

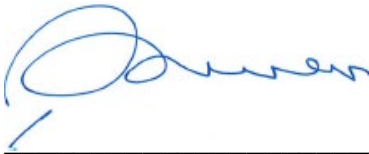
[110] Attached and marked A is a proposed draft set of Rural Lifestyle (Rezone RR1) provisions. These are taken from the schedule to Mr Farrell's evidence. If

possible, the parties are to agree a joint set of provisions to provide to the court on an agreed basis. If the provisions cannot be agreed, the court will make timetabling orders for sequential submissions and reply and will then issue a final decision.

[111] Directions are as follows:

- (a) by Friday 23 May 2025 the parties are to file a joint memorandum with proposed plan provisions for the court to consider, or alternatively advise the court that they cannot agree;
- (b) if the parties cannot agree, the court will make timetabling orders for the provision of submissions; and
- (c) costs are reserved.

For the court



K G Reid
Environment Judge



3	Rural Lifestyle (Rezone RR1)	17.5.2 <u>Density</u> 1. The maximum density of standard residential activity is as follows: <u>...e. in the Stornoway Grimness Street Structure Plan Mapped Area, a maximum of three residential activities; ...</u> <u>17.5.10 Separation distances</u> 1. New residential buildings must be located at least: a. 100m from: i. an existing, lawfully established intensive farming activity on a separate site; <u>1. except in the Stornoway Grimness Street Structure Plan Mapped area:</u> 17.6.9 Setbacks 17.6.9.1 Boundary setbacks a. new buildings, new structures, and additions and alterations, must be set back from boundaries as follows: <table border="1" data-bbox="808 1206 1982 1311"> <tr> <th data-bbox="808 1206 1386 1311">Activity</th><th data-bbox="1386 1206 1682 1311">1. Minimum setback from road boundary</th><th data-bbox="1682 1206 1982 1311">2. Minimum setback from side and rear boundaries</th></tr> </table>	Activity	1. Minimum setback from road boundary	2. Minimum setback from side and rear boundaries
Activity	1. Minimum setback from road boundary	2. Minimum setback from side and rear boundaries			

			with sites held in separate ownership
i.	Residential buildings ...	12m	10m

...c. This standard does not apply in the Stornoway Grimness Street Structure Plan Mapped Area.

17.6.5 Maximum height

1. New buildings, new structures, and additions and alterations must not exceed a maximum height above ground level as follows:

... e. in the Stornoway Grimness Street Structure Plan Mapped Area, buildings must not exceed X metres in height.

ADD NEW STRUCTURE PLAN MAPPED AREA

17.7A.7 Stornoway Grimness Street Structure Plan Mapped Area

17.7A.7 Stornoway Grimness Street Structure Plan Mapped Area Rules

17.7A.7.X

a. The performance standards, assessment guidance and special information requirements in Rule 17.7A.7 apply to all parts of the Stornoway Grimness Street structure plan mapped area.

17.7A.7.Y Land use performance standards

a. Density

i. In 'Area A' and 'Area B' of the structure plan mapped area, standard residential activities must not exceed the density limits for the Township and Settlement Zone set out in 15.5.2 (note that Rule 17.7A.7.1.a limits the maximum number of sites in the structure plan mapped area).

ii. Activities that contravene this performance standard are non-complying activities.

17.7A.7.1.Z Development performance standards

a. Location

i. In 'Area A' and 'Area B' of the **structure plan mapped area**, dwellings must not be located below the 4m contour area identified on Figure 17.7A.7A.

ii. Activities that contravene this performance standard are non complying activities.

b. Indigenous biodiversity:

i. Applications for subdivision must include a planting plan for the **structure plan mapped area**, showing how vegetation will be maintained and enhanced, unless this plan has been provided and accepted at an earlier date.

ii. The planting plan should provide for the establishment of indigenous plantings in flat areas of the site below the 4m contour.

iii. Activities that contravene this performance standard are restricted discretionary activities.

17.7A.7.1 Subdivision performance standards

X. Preliminary subdivision

i. The first subdivision of the Stornoway Grimness Street structure plan mapped area must entail a preliminary subdivision to separate amalgamate OT305/23 and OT44/173 (resulting in a single record of title for Area A).

ii. Before applying for subdivision, a covenant shall be prepared and registered in relation to OT305/23, OT44/173 and OT31/225, stating that the landowner understands and accepts the probabilities of flooding at the address and its potential costs to them, their family and visitors, both monetarily and/or personally. The covenant is to exist in perpetuity and bind future landowners.

iii. Activities that contravene this performance standard are non-complying activities.

a. Maximum number of sites

i. The maximum number of resultant residential sites within the part of the **structure plan mapped area** labelled A is one.

ii. The maximum number of resultant residential sites within the part of the **structure plan mapped area** labelled B is two. These two residential activities are to be a duplex development within a single building.

iii. Resultant sites created and used solely for the following purposes are exempt from this performance standard:

1. Scheduled ASBV or QEII covenant;

2. reserve;

3. access;

4. utility; or

5. road.

iv. Activities that contravene this performance standard are non-complying activities.

17.7A.7.2 Assessment guidance

a. In assessing contraventions of 15.8.AT.Z.b.ii, Council will consider the extent to which the indigenous plantings have maintained or enhanced the indigenous biodiversity in the **structure plan mapped area**

17.7.5 Minimum Site Size

1. The minimum site size for new resultant sites in the Rural Residential 1 Zone is 2ha.

1A. This standard does not apply in the Stornoway Grimness Street Structure Plan Mapped Area.

