

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

**Decision No. [2024] NZEnvC 83**

IN THE MATTER of the Resource Management Act 1991

AND appeals under clause 14 of the First Schedule of the Act in relation to the proposed Second Generation Dunedin City District Plan

BETWEEN BLUE GRASS LIMITED and OTHERS

(ENV-2018-CHC-293)

(continued in the Schedule)

Appellants

AND DUNEDIN CITY COUNCIL

Respondent

Court: Environment Judge P A Steven  
Sitting alone under s279 of the Act

Hearing: at Dunedin on 11 December 2023

Appearances: P Page and A Griffin for Blue Grass & Ors,  
Johnston – Karitane and Gladstone Family Trust  
M Garbett and J Hardman for the respondent  
S Anderson for Otago Regional Council  
S Scott for Highland Property Enterprises Ltd

Last case event: 8 March 2024

Date of Decision: 18 April 2024

Date of Issue: 18 April 2024



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## SECOND DECISION OF THE ENVIRONMENT COURT

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- A: The court finds that the further question posed for consideration is “no”.
- B: The parties have 15 working days to confer and file a joint memorandum of counsel outlining the future progress of the appeals.

### REASONS

[1] The court has previously determined that the National Policy Statement for Highly Productive Land 2022 (NPS-HPL) does 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.<sup>1</sup>

[2] This decision concerns a second preliminary legal issue to do with interpretation of the NPS-HPL, namely:<sup>2</sup>

- (a) can more detailed mapping undertaken since 17 October 2022 using the Land Use Capability (LUC) classification prevail over the identification of land as Land Use Capability Class 1, 2, or 3, as mapped by the New Zealand Land Resource Inventory (NZLRI) and determine for the purposes of cl 3.5(7) of the NPS-HPL whether land is highly productive land (HPL)?

[3] The court received submissions and held a hearing on this matter on 11 December 2023.

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<sup>1</sup> *Balmoral Developments (Outram) Ltd v Dunedin City Council* [2023] NZEnvC 59 (*Balmoral*).

<sup>2</sup> DCC submissions dated 3 October 2023 at [2].

[4] Due to the nature of the appellants' arguments, at the conclusion of the hearing, and following discussion with the parties, the court determined that it would be helpful to hear from Manaaki Whenua Landcare Research (MWLR) who is the Crown Research Institute responsible for New Zealand's land environment as to how the NZLRI is maintained. That was facilitated by counsel for Dunedin City Council (DCC) and Otago Regional Council (ORC). An affidavit from Dr Andrew Manderson, who is the Science Team Leader and Senior Researcher at MWLR was duly filed. Mr Manderson's affidavit addressed questions from the court, arising from presentation of the appellants' case. Following lodgement of that affidavit, parties lodged further submissions although none of the parties stated that a reconvened hearing was required.

### **The NPS-HPL**

[5] The NPS-HPL was approved by the Governor-General under s52(2) RMA on 12 September 2022, and as per cl 1.2(1) of the NPS-HPL came into force on 17 October 2022.

[6] The overarching objective of the NPS-HPL is:

Highly productive land is protected for use in land-based primary production, both now and for future generations

[7] The policies require that HPL is mapped in regional policy statements and district plans and that HPL is protected from inappropriate use and development. Policies prioritise the use of HPL for land based primary production.

[8] 'Highly Productive Land' is defined in cl 1.3(1) of the NPS-HPL and is:<sup>3</sup>

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<sup>3</sup> Clause 4.1 of the NPS-HPL (timing) also notes that "until an operative regional policy statement contains the maps of highly productive land required by clause 3.5(1), highly productive land in the region must be taken to have the meaning in clause 3.5(7)".

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).

[9] 'LUC 1, 2 or 3 land' is also defined in cl 1.3(1):

**LUC 1, 2, or 3 land** means land identified as Land Use Capability Class 1, 2, or 3, as mapped by the New Zealand Land Resource Inventory or by any more detailed mapping that uses the Land Use Capability classification

[10] 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 HPL.

[11] Clause 3.4 provides:

**3.4 Mapping highly productive land**

- (1) Every regional council must map as highly productive land any land in its region that:
  - (a) is in a general rural zone or rural production zone; and
  - (b) is predominantly LUC 1, 2, or 3 land; and
  - (c) forms a large and geographically cohesive area.
- ...
- (5) For the purpose of identifying land referred to in subclause (1):
  - (a) mapping based on the New Zealand Land Resource Inventory is conclusive of LUC status, unless a regional council accepts any more detailed mapping that uses the Land Use Capability classification in the New Zealand Land Resource Inventory; and
  - (b) where possible, the boundaries of large and geographically cohesive areas must be identified by reference to natural boundaries (such as the margins of waterbodies), or legal or non-natural boundaries (such as roads, property boundaries, and fence-lines); and
  - (c) small, discrete areas of land that are not LUC 1, 2, or 3 land, but are within a large and geographically cohesive area of LUC 1, 2, or 3 land, may be included; and

- (d) small, discrete areas of LUC 1, 2, or 3 land need not be included if they are separated from any large and geographically cohesive area of LUC 1, 2, or 3 land.

[12] Clause 3.5(1) provides:

**3.5 Identifying highly productive land in regional policy statements and district plans**

- (1) As soon as practicable, and no later than 3 years after the commencement date, every regional council must, using a process in Schedule 1 of the Act, notify in a proposed regional policy statement, by way of maps, all the land in its region that is required by clause 3.4 to be mapped as highly productive land.

[13] Before the mapping of HPL is notified, the NPS-HPL places immediate restrictions on land captured by the definition of HPL, under cl 3.5(7) of the NPS-HPL (relevantly):

**3.5 Identifying highly productive land in regional policy statements and district plans**

...

- (7) 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.

**The Councils' position**

[14] DCC submits that the answer to the question posed in paragraph [2] above

is “no”. It submits that the NPS-HPL creates a “holding position” for protection of highly productive land that is mapped as LUC 1, 2 or 3 by the NZLRI at the commencement date, until the ORC completes its mapping.<sup>4</sup>

[15] In DCC’s submission, the plain meaning of the transitional provisions is clear: until a regional policy statement containing maps of highly productive land in the region is operative, cl 3.5(7) defines HPL. DCC submits that “the commencement date” applies to subparagraph (a)(ii). HPL is therefore land that is mapped LUC 1, 2 or 3 at the commencement date.<sup>5</sup> The “commencement date” referred to in cl 3.5.7 is critical to the interpretation of this clause. It applies to the criteria set out in sub-paragraphs (a) and (b).

[16] DCC submits that this interpretation is consistent with the court’s decision in *Balmoral*, which concluded that the commencement date is the relevant point in time to assess the relevant zoning of a property.<sup>6</sup>

[17] DCC also says that amendments to the NZLRI maps since the commencement of the NPS-HPL have not included any relevant change to the LUC status.<sup>7</sup>

[18] DCC submits that the plain meaning of the transitional provisions is conclusive of the correct interpretation, but, for completeness, also submits that the interpretation is supported by the policy intent of the NPS-HPL.<sup>8</sup> It submits:<sup>9</sup>

... that it would be inappropriate and inconsistent with the policy intent of the NPS-HPL for mapping of land on a smaller scale (such as site-specific, as is the

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<sup>4</sup> DCC submissions dated 3 October 2023 at [4].

<sup>5</sup> DCC submissions dated 3 October 2023 at [12].

<sup>6</sup> DCC submissions dated 3 October 2023 at [13].

<sup>7</sup> DCC submissions dated 16 November 2023 at [13]. Appellants accept that Dr Manderson’s evidence shows that the core data in the NZLRI and Classification has not changed since the commencement date of the NPS-HPL (see Blue Grass parties submissions dated 9 February 2024 at [9]).

<sup>8</sup> DCC submissions dated 3 October 2023 at [17].

<sup>9</sup> DCC submissions dated 3 October 2023 at [23].

case in the appeals to which this issue relates) to be determinative of whether that land is HPL or not. The NPS-HPL has tasked the ORC to do so.

[19] DCC says an interpretation that allows site-specific soil testing and mapping to change the HPL status in the interim may affect the integrity of the mapping to be undertaken by ORC.<sup>10</sup> Referring to the cl 3.4(3), DCC notes that regional councils must map land as HPL that is “predominantly” LUC 1, 2 or 3, and forms a “large and geographically cohesive area”. In other words, land that is not LUC 1, 2 or 3 may be mapped as HPL.

[20] DCC submits that:

24. In our submission such an interpretation that allows site specific soil testing and mapping to change the HPL status in the interim period does:
  - (a) have the potential to risk excluding smaller areas of land that may not be LUC 1, 2, or 3, but that may form part of a large area of land that may otherwise be assessed as HPL;
  - (b) raise uncertainty as to the status of those smaller areas of land when the ORC undertakes its mapping; namely, whether or not the mapping undertaken by ORC supersedes that undertaken and relied on by individuals for planning permission in the transitional period;
  - (c) risks a gold-rush effect resulting in fragmentation of large and geographically cohesive areas of land that may be mapped by the ORC as highly productive; and
  - (d) ultimately may affect the integrity of mapping to be undertaken by the ORC, the strong policies against urban use of HPL, and the overall objective of the NPS-HPL to protect HPL.

[21] DCC refers to the appellants’ reference to “more detailed mapping” and submits that this wording in the definition of LUC 1, 2 or 3 does not overcome

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<sup>10</sup> DCC submissions dated 3 October 2023 at [24].

the need to have that mapping in place at the commencement date.<sup>11</sup>

[22] In the context of cl 3.5(7), in the interim the purpose of the phrase “more detail mapping” in the definition of “LUC, 1, 2, or 3” is only intended to accommodate use of more detailed LUC mapping other than in the NZLRI that was available prior to 17 October 2022. DCC observes that some councils rely on the S-Map which is another mapping resource in addition to the NZLRI.

[23] In closing submissions, DCC accepts Mr Page’s argument that cl 1.4 of the NPS-HPL means that the NZLRI maps incorporated by reference can be updated by Landcare Research. That interpretation is reasonable and is accepted as correct. This allows the NZLRI maps to be updated and provide conclusive evidence of the LUC status.<sup>12</sup> However, this does not affect DCC’s interpretation of the NPS-HPL that cl 3.5(7) does preserve the interim position as at the commencement date.

[24] DCC says that it is clear that the version of the maps publicly available at the commencement date remains available to provide conclusive evidence to the public of the land classification as at the commencement date.<sup>13</sup> There are currently not “multiple operative inventories” as argued by Mr Page and Mr Griffin. In any case, this concern is overcome by the DCC interpretation that during the transitional period it is the version at the “commencement date” that is authoritative for the purposes of cl 3.5(7).<sup>14</sup>

[25] DCC submits that the consistent use of the past tense in cl 3.5(7)(a) and (b) combined with the reference to “land that, at the commencement date” means that these states of affairs had to be known at the time.<sup>15</sup>

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<sup>11</sup> DCC submissions dated 3 October 2023 at [26].

<sup>12</sup> DCC submissions dated 8 March 2024 at [7]-[8].

<sup>13</sup> DCC submissions dated 8 March 2024 at [9].

<sup>14</sup> DCC submissions dated 8 March 2024 at [10].

<sup>15</sup> DCC submissions dated 8 March 2024 at [14]-[15].



[26] ORC concurs with the outcome reached by DCC and generally with the reasons contained in its submissions.<sup>16</sup>

[27] ORC submits that the function of cl 3.5(7) is to hold the line pending the preparation and finalisation of the regional maps.<sup>17</sup> Until the mapping exercise is undertaken, the transitional definition fixes the status of the land as LUC 1, 2 or 3, as classified at 17 October 2022. Any other interpretation potentially undermines the mandatory mapping exercise.<sup>18</sup>

[28] ORC submits that the relevant context for the NPS-HPL includes documents such as s32 evaluations. The s32 evaluation for the NPS-HPL shows that the “mischief” at which the NPS-HPL is directed is the loss of highly productive land through changes in land use.<sup>19</sup> The interpretation advanced by DCC and ORC accords with the underlying goal of the NPS-HPL.<sup>20</sup>

[29] ORC’s further submissions argue that an LUC change in the NZLRI during the transitional period does not change the status for the purposes of cl 3.5(7). It argues that the status is fixed for the transitional period by the land’s classification at the commencement date.<sup>21</sup> If an LUC change occurs during the transitional period, the land classification at the commencement date still applies.<sup>22</sup> It is clear from Dr Manderson’s evidence that the LUC 1, 2 or 3 classification of land at the commencement date can be established.<sup>23</sup>

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<sup>16</sup> ORC submissions dated 2 November 2023 at [12].

<sup>17</sup> ORC submissions dated 2 November 2023 at [32].

<sup>18</sup> ORC submissions dated 2 November 2023 at [35]-[36].

<sup>19</sup> ORC submissions dated 2 November 2023 at [37]-[40], referring to [NPS Highly Productive Land: Evaluation under section 32 of the Resource Management Act | Ministry for the Environment](#)

<sup>20</sup> ORC submissions dated 2 November 2023 at [41].

<sup>21</sup> ORC submissions dated 25 February 2024 at [4].

<sup>22</sup> ORC submissions dated 25 February 2024 at [8].

<sup>23</sup> ORC submissions dated 25 February 2024 at [13].

## **Appellants' submissions**

[30] Highland Property Enterprises Ltd (HPEL) submits that the answer to the legal issue is “yes”. HPEL has obtained more detailed mapping, and a peer review by MWLR.

[31] HPEL acknowledges that the DCC’s approach is an available “plain and ordinary” interpretation of the words “at the commencement date”, but submits that approach is neither contextual or purposive.<sup>24</sup>

[32] HPEL submits that if more detailed mapping that uses the LUC classification (that is, that uses the necessary methodology but at a more detailed scale) reveals that the land is not in fact LUC 1, 2 or 3, then that more detailed mapping is determinative for the purposes of cl 3.5(7) as to whether the land is HPL.<sup>25</sup> That more detail mapping may be obtained after the commencement date.

[33] HPEL submits that there are two possible interpretations of cl 3.5(7) that allow for more detailed mapping to be relied on. HPEL submits that the words “land that, at the commencement date is ... LUC 1, 2 or 3 land” lend themselves to ambiguity that is not acknowledged by DCC.<sup>26</sup> HPEL submits that the interpretations to be preferred are:<sup>27</sup>

- (a) firstly, that the words “at the commencement date” apply directly to the NZLRI mapping. In effect, the NZLRI maps as they currently exist as at the commencement date must be applied to determine HPL status (rather than changes that may be made informally after that date). However, “any more detailed mapping” can take place at any time after the commencement date and prior to the ORC plan change

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<sup>24</sup> HPEL submissions dated 18 October 2023 at [5.5].

<sup>25</sup> HPEL submissions dated 18 October 2023 at [1.2]-[1.3].

<sup>26</sup> HPEL submissions dated 18 October 2023 at [4.2].

<sup>27</sup> HPEL submissions dated 18 October 2023 at [1.4].

becoming operative;<sup>28</sup>

- (b) secondly, that the qualifier “at the commencement date” applies to the land itself, rather than the nature of any mapping that has been undertaken, and therefore sets a final date by which the “state of land” is to be assessed in any more detailed mapping that uses the LUC classification methodology.

[34] HPEL submits that both interpretations allow a process by which more detailed analysis of the land in question can be relied on.<sup>29</sup> It prefers the first interpretation, but if that is not accepted, its second interpretation should be preferred over DCC’s approach.<sup>30</sup> In particular, HPEL submits that DCC’s approach leaves open the question of what “more detailed mapping” means.<sup>31</sup>

[35] HPEL submits that either interpretation allows for inherent inaccuracies to be overcome.<sup>32</sup> While HPEL acknowledges that the ORC will work through the Schedule 1 process and notify a mapping plan change, it submits that the process is not a short one. The interim status will apply until the change is operative.<sup>33</sup> That would mean significant costs for affected appellants.<sup>34</sup>

[36] HPEL also acknowledges that the singular objective of the NPS-HPL is that HPL is protected for use in land-based primary production. However, that single purpose does not extend to land that is not HPL.<sup>35</sup>

[37] Finally, HPEL submits that adopting either of its suggested interpretations would not result in a contradiction with *Balmoral*. The court’s focus in that decision

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<sup>28</sup> HPEL submits that this interpretation allows for a more simplified approach, as it can consider the land as it exists at the time of investigation, rather than at the commencement date. HPEL submissions dated 18 October 2023 at [1.4].

<sup>29</sup> HPEL submissions dated 18 October 2023 at [1.5].

<sup>30</sup> HPEL submissions dated 18 October 2023 at [4.3].

<sup>31</sup> HPEL submissions dated 18 October 2023 at [5.3].

<sup>32</sup> HPEL submissions dated 18 October 2023 at [1.6].

<sup>33</sup> HPEL submissions dated 18 October 2023 at [3.6].

<sup>34</sup> HPEL submissions dated 18 October 2023 at [5.4].

<sup>35</sup> HPEL submissions dated 18 October 2023 at [3.7].

was whether the land was “at the commencement date” subject to a Council-initiated, or an adopted, notified plan change. This required detailed consideration of the Schedule 1 process and the focus was not on whether more detailed mapping could be taken into account during the interim period.<sup>36</sup>

[38] Submissions were lodged on behalf of Mr S G Johnston, the Gladstone Family Trust and Meats of New Zealand Ltd (I will refer to these parties as the ‘Johnston parties’ for the purposes of this decision). They submit that the DCC’s reliance on the words “at the commencement date” in cl 3.5(7) is misconceived. The “commencement date” trigger applies to the state of the land at issue. In other words, “any more detailed mapping” must relate to the state of the land as it was at the commencement date, not as it may have been altered subsequently (for example, through excavation or building). In the Johnston parties’ submission the “more detailed mapping” itself need not have been completed at the commencement date.<sup>37</sup>

[39] The Johnston parties submit that the use of the word “unless” in relation to the phrase “more detailed mapping” in cl 3.4(5) supports the submission that the NPS-HPL is concerned to ensure that current and accurate information can be used to support the mapping process.<sup>38</sup> The words of cl 3.5(7) were chosen to support the NPS-HPL’s intention to protect land that is factually LUC 1, 2 or 3 land at the commencement date.<sup>39</sup> They go on to further submit that the more detailed mapping must prevail over the NZLRI mapping. To suggest otherwise would mean that land could simultaneously be HPL under the NZLRI mapping and not HPL land under the more detailed mapping of the state of the land at the commencement date, which these parties submit is nonsensical.<sup>40</sup> If so, there would be no reason for the words “more detailed mapping” in the LUC

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<sup>36</sup> HPEL submissions dated 18 October 2023 at [5.31].

<sup>37</sup> Johnston parties’ submissions dated 18 October 2023 at [27].

<sup>38</sup> Johnston parties submissions dated 18 October 2023 at [37].

<sup>39</sup> Johnston parties submissions dated 18 October 2023 at [45].

<sup>40</sup> Johnston parties submissions dated 18 October 2023 at [40].

definition.<sup>41</sup> It could be removed without any consequence.<sup>42</sup>

[40] The Johnston parties also submit that the DCC's interpretation is inconsistent with s12 of the Legislation Act 2019, which provides that legislation does not have retrospective effect.<sup>43</sup>

[41] Submissions were lodged on behalf of Nash & Ross Ltd and Ms W Campbell. These parties also submit that "at the commencement date" applies to the state of the land, not the date of the more detailed assessment.<sup>44</sup>

[42] These appellants also argue that, not only can the LUC class be updated by more detailed mapping during the transitional period, the wording "more detailed" means that the legislature has given clear guidance that the most detailed assessment of the land is to take priority under the definition of LUC 1, 2 or 3.<sup>45</sup> They also agree with other appellants that if the production of "more detailed" assessments did not take priority over historical mapping as contained within the NZLRI, then there is no need for those words in the definition.<sup>46</sup>

[43] They also submit that the NZLRI land use capability 2021 was updated on 28 August 2023. The LUC maps available on the MWLR website now adopt that data. Counsel was not aware of any way to display historical data sets as LUC maps that were operative at the time of the commencement of the NPS-HPL.<sup>47</sup> DCC has also referred to the NZLRI S-Map resource. That system may result in a change to LUC status as contained within the NZLRI land use capability 2021. The NZLRI may therefore contain contradictory LUC classifications for a single

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<sup>41</sup> Johnston parties submissions dated 18 October 2023 at [41].

<sup>42</sup> Johnston parties submissions dated 18 October 2023 at [49].

<sup>43</sup> Johnston parties submissions dated 18 October 2023 at [47].

<sup>44</sup> Nash & Ross Ltd and Campbell submissions dated 18 October 2023 at [11].

<sup>45</sup> Nash & Ross Ltd and Campbell submissions dated 18 October 2023 at [23].

<sup>46</sup> Nash & Ross Ltd and Campbell submissions dated 18 October 2023 at [24].

<sup>47</sup> Nash & Ross Ltd and Campbell submissions dated 18 October 2023 at [16.2].

piece of land.<sup>48</sup>

[44] Further submissions were also lodged on behalf of Blue Grass Ltd, Mr Johnston and Gladstone Family Trust (I will call these parties the ‘Blue Grass parties’ for the purposes of this decision). The Blue Grass parties respond to Dr Manderson’s evidence addressing the regulatory link between NZLRI and the NPS-HPL, potential changes to the NZLRI and LUC classification after the commencement date of the NPS-HPL, and the legal effect of those changes.<sup>49</sup> The Blue Grass parties acknowledge that the core data in the NZLRI and classification has not changed since the commencement date of the NPS-HPL, although this may not be clear from the online mapping.<sup>50</sup> However, Dr Manderson’s evidence shows that the mapping can be changed, for example through an external agency funding the Crown Research Institute to undertake research to update the NZLRI classification for a property. This does not use the First Schedule process of the Act.<sup>51</sup>

[45] The Blue Grass parties consider the effect of changes to the inventory (and other more detailed mapping) in the context of the provisions of the RMA that provide for incorporation of documents by reference.<sup>52</sup> They note that if materials incorporated by reference are amended or replaced (or updated) then the new version will normally have legal effect only once the Minister publishes a notice to that effect.<sup>53</sup> However, the NPS-HPL excludes the application of this provision. In these parties’ submission, that means that every new iteration of the NZLRI will have legal effect, but old iterations would retain their legal effect, such that there could be multiple operative inventories at any one time.<sup>54</sup> The Blue Grass

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<sup>48</sup> Nash & Ross Ltd and Campbell submissions dated 18 October 2023 at [16.6]-[16.8].

<sup>49</sup> Blue Grass parties’ submissions dated 9 February 2024 at [3].

<sup>50</sup> Blue Grass parties’ submissions dated 9 February 2024 at [9].

<sup>51</sup> Blue Grass parties’ submissions dated 9 February 2024 at [12].

<sup>52</sup> Blue Grass parties’ submissions dated 9 February 2024 at [14]-[25] and referring to RMA, sch 1AA.

<sup>53</sup> Blue Grass parties’ submissions dated 9 February 2024 at [18] referring to RMA, sch 1AA, cl 2.

<sup>54</sup> Blue Grass parties’ submissions dated 9 February 2024 at [23].

parties consider this is important context to be kept in mind.<sup>55</sup>

[46] The Blue Grass parties therefore ask this question: what is wrong with allowing a landowner to produce evidence to the court to assess their factual LUC status at the commencement date of the NPS-HPL, and how would that negate the NPS-HPL’s objective or the words of cl 3.5(7)?<sup>56</sup>

## Discussion

[47] In *Balmoral*, I described the background and context of the NPS-HPL. I will not repeat that discussion.<sup>57</sup> I found that the commencement date of the NPS-HPL was the relevant point in time for considering (in that case) whether the cl 3.5(7)(b) exemption applied to the outstanding appeals.<sup>58</sup> I also found that:

- (a) the transitional provisions can be assumed to take a deliberate holding position;<sup>59</sup>
- (b) the clear intention of the NPS-HPL is that HPL is not to be given any kind of planning permission for development for urban or lifestyle purposes before the mapping exercises are completed and given effect to;<sup>60</sup> and
- (c) during the transitional period the court is obliged to have regard to the NPS-HPL in considering appeals.<sup>61</sup>

[48] This second preliminary issue turns particularly on interpretation of the definition of “LUC 1, 2 or 3 land”, and of cl 3.5(7)(a)(ii). During the transitional period applying until the regional mapping has occurred, land that “at the commencement date” is LUC 1, 2 or 3 land is to be treated as HPL. LUC 1, 2 or

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<sup>55</sup> Blue Grass parties’ submissions dated 9 February 2024 at [24].

<sup>56</sup> Blue Grass parties’ submissions dated 9 February 2024 at [26].

<sup>57</sup> *Balmoral* at [30]-[47].

<sup>58</sup> *Balmoral* at [78].

<sup>59</sup> *Balmoral* at [97].

<sup>60</sup> *Balmoral* at [98].

<sup>61</sup> *Balmoral* at [91] and [99].

3 land is then defined as being land identified as LUC 1, 2 or 3, “as mapped by the New Zealand Land Resource Inventory or by any more detailed mapping that uses the Land Use Capability classification”.

[49] The meaning of each provision “must be ascertained from its text and in the light of its purpose and its context”.<sup>62</sup>

[50] I accept the Councils’ submissions concerning the meaning of “at the commencement date”. I consider that “land that, at the commencement date” relates to the LUC classification of the land that existed at that time (in addition to the zoning of that land in terms of cl 3.5.7(a)(i)). I reject the appellants’ argument that “at the commencement date” applies to the state of the land at that time (such that if it was later proved to not be LUC 1, 2, or 3 land, it would then not be HPL). When read in conjunction with the definition of LUC 1, 2 or 3 it means that the LUC classification to be relied on in applying cl 4.5(7)(a)(ii) (whether that classification is in the NZLRI or any more detailed mapping) must have been in place at the commencement date.

[51] In my view, this interpretation:

- (a) accords with the intention of the NPS-HPL to protect HPL for primary production (particularly during the transitional period);
- (b) is also in accordance with the intention of the NPS-HPL that the proper process for determining what land will ultimately be mapped as HPL is the Schedule 1 RMA process, and not an ad-hoc process undertaken by private landowners as suggested by the appellants;
- (c) does not, in my opinion, introduce retrospectivity. The NPS-HPL applies from its commencement date. Whether the land is considered HPL for the purposes of the transitional period is also to be ascertained at the commencement date. There is instead an element

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<sup>62</sup> Legislation Act 2019, s10.



of retrospectivity in the appellants' arguments – if the “state of the land” is to be ascertained as at the commencement date, but by assessments occurring after that date, that means that the status as HPL would be retrospectively amended;

- (d) does not “freeze” or “sterilise” the land: it means that, during the transitional period, the relevant land will be treated as HPL. The appellants are not prevented from obtaining more detailed assessments of the land during that period. Those assessments can be fed into the mapping process that regional councils must undertake;
- (e) does not introduce “nonsensical” outcomes. The evidence presented is that the LUC classification in the NZLRI can be ascertained as at the commencement date. In contrast, if it was open to landowners to obtain more detailed LUC classifications of their land at any time (but assessed as it existed at the commencement date) then the status of the land as HPL could change and change repeatedly throughout the transitional period in an ad-hoc manner. There are no mechanics in the NPS-HPL to show how a site-specific assessment is then received and the manner in which it changes the transitional status;<sup>63</sup>
- (f) does not render the words “or by any more detailed mapping” otiose. The definition of LUC 1, 2 or 3 land in cl 1.3 of the NPS-HPL applies to all references to LUC 1, 2 or 3 land in the NPS-HPL. It does not apply only to the transitional period meaning of HPL in cl 3.5(7). “More detailed mapping” after the commencement date might reveal that the land is or is not LUC 1, 2 or 3 land. However, the purpose of the NPS-HPL and in particular the transitional period, is that any new information concerning LUC classification is to be fed into the Schedule 1 mapping process to be undertaken by regional councils. Clause 3.4(5) (for example) anticipates that a regional council might accept any more detailed mapping (that uses the LUC classification).

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<sup>63</sup> Note, see transcript at 11, l 15.

[52] I acknowledge the NZLRI mapping has limitations and is aged. I also accept that the mapping process might take some time. In the interim, there is also every possibility that land that is to be treated as HPL under cl 3.5(7) will later not be mapped as HPL. However, that does not impact the interpretation of the relevant provisions of NPS-HPL.

[53] Given the interpretation I have accepted, it is not necessary to consider the arguments concerning changes to the NZLRI and application of RMA, Schedule 1AA (incorporation of documents by reference) during the transitional period. I have not considered it necessary or helpful to consider Ministry for the Environment guidance material in this case. As noted by parties, the courts consistently attribute little weight to such guidance material.

### **Outcome**

[54] My answer to the question posed in paragraph [2] above is therefore “no”.



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**P A Steven**  
**Environment Judge**

**Schedule**

<b>ENV-2018-CHC-296</b>	Johnston - Karitane
<b>ENV-2023-CHC-017</b>	Gladstone Family Trust
<b>ENV-2023-CHC-019</b>	DDS Properties (2008) Limited
<b>ENV-2023-CHC-020</b>	Meats of New Zealand
<b>ENV-2023-CHC-024</b>	Nash & Ross Limited
<b>ENV-2023-CHC-028</b>	Wendy Campbell