Before a Panel Appointed by the

Dunedin City Council

In the Matter of the Resource Management Act 1991 (**RMA**)

And

In the Matter of Proposed Plan Change 1 (**PC1**) of the Partially Operative 2024 Dunedin City Second Generation District Plan (**2GP**).

Brief of Evidence of **Emma Rayner Peters**
on behalf of Malcolm Burns
(Submission 63)

Dated 20th August 2025

Summary Statement

- Submission 63 seeks a decision which rejects change Ru7.

- Policy 16.2.1.7.b provides a pathway for residential activity on undersized rural zoned sites where that residential activity is associated with long term land management and/or capital investment that will result in: (i) significant positive effects for rural productivity; and/or (ii) a significant contribution to the enhancement or protection of biodiversity values. Change Ru7 seeks to narrow the circumstances in which (ii) can be utilised to: "…*a significant contribution to the ~~enhancement or~~ protection of ~~biodiversity values~~ <u>an existing area of important indigenous vegetation and/or habitat of indigenous fauna and its enhancement</u>*."

- S42a report recommends rejecting submission 63.

- The analysis in the s32 and, therefore, the s42A report is unsound:

    a) The land use consent application resulting in ENV-2022-CHC-024 was supported at the Council level (non-notified hearing) by a s42A report recommending **grant** with that recommendation maintained.

    b) No proper analysis or account of the Court's findings in ENV-2022-CHC-024, based on its preference of the ecological evidence of Dr Kelvin Lloyd over that of Mr Scott Hoosan based on Mr Hooson being unduly influenced by the requirements of a significance assessment in the context of s6(c) of the RMA.

    c) No analysis of fact that most rural land in Dunedin is situated within ecologically degraded land environment shown as red (< 10% indigenous cover left), orange (10-20% indigenous cover left) or yellow (20-30% indigenous cover left) according to Manaaki Whenua Landcare Research Our Environment Threatened Environment Classification. For example, the Taieri Plain has less than 2.9% of its original land cover left. Ecological evidence demonstrating how Change Ru7 will achieve Strategic Direction Objective 2.2.3 (emphasis added):

    > "*Dunedin's significant indigenous biodiversity is protected or enhanced, and restored;* ***and other indigenous biodiversity is maintained or enhanced, and restored; with all indigenous biodiversity having improved connections and improved resilience***."

    d) No evidence provided that the Court's reasoning in ENV-2022-CHC-024 is causing an issue with respect to administration of the district plan. Council staff have provided information this week, showing that the great majority of applications making use of Policy 16.2.1.7 use limb a, surplus dwelling subdivisions, with Council staff only finding two land use applications making use of Policy 16.2.1.7.b.ii, both granted, and a mixed subdivision and land use application which was declined. There has been no 'proliferation' of applications using Policy 16.2.1.7.b.ii since the decision in ENV-2022-CHC-024 was issued on 14 March 2023.

    e) No exploration of the criteria, planning and ecological, that a site must meet to avail the consenting pathway in Policy 16.2.1.7.b.ii.

- The submitter respectfully requests that the Hearing Panel accepts submission 63 and rejects change Ru7.

Background

1. My name is Emma Rayner Peters. I hold a BA and LLB both from the University of Otago and a First Class Honours degree and MA with Distinction, both from the University of Canterbury. I have worked as a solicitor in the areas of commercial and environmental law. I have been the principal of Sweep Consultancy Limited since 2003 providing resource management advice predominantly in the Dunedin City, Clutha, Waitaki, Queenstown Lakes and Central Otago districts. I have produced evidence for hearings at councils and the Environment Court.

2. I have prepared this evidence based upon my investigations and knowledge of the submissions and further submission and Plan Change 1 of the 2GP including Council's s32 report, s42a report and evidence from Council staff as each of these pertain to Change Res13 and Submission 260.

3. I acknowledge we are not before the Environment Court. However, I have read the Code of Conduct for Expert Witnesses within the Environment Court Consolidated Practice Note 2014 and I agree to comply with that Code. This statement is within my area of expertise, except where I state that I am relying on the evidence of another person. To the best of my knowledge, I have not omitted to consider any material facts known to me that might alter or detract from the opinions expressed in this evidence.

4. The scope of this statement will cover the following matters:

    - Submission.
    - Policy 16.2.17 and proposed changes.
    - S42A recommendation.
    - Council’s justifications for Change Ru7
    - Analysis of s32 and s42A justifications for Change Ru7.
    - Conclusion.

Submission

5. The submission, S63, made on behalf of Malcolm Burns opposed change Ru7 and sought a decision rejecting the proposed changes to Policy 16.2.1.7 and assessment guidance for residential activity on undersized sites in rural zones.

Policy 16.2.1.7 and Proposed Changes

6. Policy 16.2.1.7 provides a pathway for residential activity on undersized rural zoned sites and currently reads:

Policy 16.2.1.7	Avoid residential activity in the rural zones on a site that does not comply with the density standards for the zone, unless: a. it is the result of a surplus dwelling subdivision; or b. the residential activity will be associated with long term land management and/or capital investment that will result in: i. significant positive effects for rural productivity; and/or ii. a significant contribution to the enhancement or protection of biodiversity values.

7. Change Ru7 does not propose any changes to limb a. of Policy 16.2.1.7, providing for the subdivision of surplus dwellings, and limb b.i, long term land management and/or capital investment resulting in significant positive effects for rural productivity; with Change Ru7 focusing solely on amendments to limb b.ii and amending associated "…*assessment rules for the contravention of density (Rule 16.12.5.1), the special information requirements in Rule 16.13.2 and Policy 2.2.3.3*."

8. Change Ru7 seeks to narrow the circumstances in which Policy 16.2.1.7.ii can be utilised to:

> "…*a significant contribution to the ~~enhancement or~~ protection of ~~biodiversity values~~ <u>an existing area of important indigenous vegetation and/or habitat of indigenous fauna and its enhancement</u>*."

9. Such a change also entails a change which serves to weaken Strategic Directions Policy 2.2.3.3:

> "*Maintain or enhance indigenous biodiversity in the rural environment through:…b. policies and assessment rules that:…iii. create a pathway for residential activities to be established on sites in the rural zones that contravene the minimum site area for residential activity (density standard) where the activity is associated with a significant contribution to the ~~enhancement or~~ protection of ~~biodiversity values~~ <u>an existing area of important indigenous vegetation and/or habitat of indigenous fauna and its enhancement</u>*."

S42A Recommendation

10. Under the 'Recommendation' heading in relation to Change Ru7, the s42A report states: "*Reject S63.001…*"

Council's Justifications for Change Ru7

11. The s32 and s42A reports provide the following as justifications for Change Ru7:

   i. "*The decision [in ENV-2022-CHC-024] highlighted a number of issues with the drafting of Policy 16.2.1.7.b.ii and the associated assessment guidance (16.12.5.1) and special information requirements (16.13.2.2)*."[1] as "*…the pathway providing for residential activity on undersized sites is wider than intended (as shown through ENV-2022-CHC-024)…*" [2] and, therefore, "*…provided clarity that Policy 16.2.1.7 had issues… which should be addressed*."[3]

   ii. Potential for proliferation of residential development on undersized lots in the rural environment[4] "*…with potentially only a minor or negligible gain for biodiversity values in the district*".[5]

   iii. Ecological advice provided to Council suggests establishment of indigenous vegetation where there was previously none is likely to be less beneficial than the protection and enhancement of existing areas of indigenous vegetation or habitat of indigenous fauna.[6]

   iv. Uncertainty of eventual success of planting.[7]

   v. Appropriate use of highly productive land pursuant to the NPS-HPL[8].

Analysis of Council's Justifications for Change Ru7

12. The analysis below demonstrates that Council's justifications for Change Ru7 are based on erroneous premises.

<u>ENV-2022-CHC-024</u>

13. Policy 16.2.1.7.b was promulgated via the partial settlement of a 2GP appeal by Blueskin Projects Limited and others[9] for which the consent order was issued 13th August 2021.

[1] S32 report, paragraph 1043.
[2] S42A report, page 201.
[3] S42A report, page 201.
[4] S32 report, paragraph 1046; s42A report, page 201.
[5] S42A report, page 201.
[6] S32 report, paragraph 1047; s42A report page 201.
[7] S32 report, paragraph 1048.
[8] S32 report, paragraphs 1049 – 1051.
[9] ENV-2018-CHC-238.

14. It is important to note that Policy 16.2.1.7.b only applies to **existing** sites and cannot, therefore, involve a subdivision. In this sense, Policy 16.2.1.7.b applies to historically fragmented sites.

15. The land use consent application[10] taken on appeal in ENV-2022-CHC-024 was supported by the s42A report planner who recommended a **grant** of consent to the hearing panel at the non-notified hearing. The recommendation of the s42A report planner was ultimately proved correct.

16. Whether any particular site can avail the consenting pathway provided by Policy 16.2.1.7.b.ii comes down to a mixture of planning and ecological factors. Ecological factors include[11]:

    - The site is located on land environments that retain less than 10% of their original indigenous cover, with higher weighting given to land environments that retain even less indigenous cover than this.
    - The site is located in the coastal environment.
    - The site includes a natural water body.
    - The site includes or is adjacent to an area of existing indigenous vegetation.
    - The site contains or would create a significant habitat for indigenous fauna.
    - Where planting is a part of the contribution, it should be at least 0.5 hectares in size and that enduring legal protection is provided over the area in which the significant contribution is made.

    Planning factors include:

    - Availability of legal and practical access.
    - Type of instruments registered on the title.
    - Availability of a building platform which has a low risk of natural hazards and can be situated in a location desirable for residential activity (sun, views, gradient) and in association with the ecological restoration, enhancement and/or protection.
    - Any adverse effects with respect to reverse sensitivity, cumulative effects and

[10] LUC-2022-11.
[11] See paragraphs [105] and [106] of ENV-2022-CHC-024.

effects on rural character and visual amenity are no more than minor (s104D test).

- Activities required to meet the ecological requirements and quantum of cost.
- Extent, if any, that residential activity will displace rural productive activity

On this last point, displacement of land for rural production, an analysis is provided by the Court in ENV-20220-CHC-024 at paragraphs [155] – [174] which is ignored by both the s32 and the s42A reports.

17. Both the s32 and s42A report assume that Policy 16.2.1.7.b.ii, as interpreted by the Court in ENV-2022-CHC-024, will apply to most undersized rural sites and have, therefore, not given proper consideration to the factors required to be met as explained above. In this regard the consenting pathway provided by Policy 16.2.1.7.b.ii is self-regulating and has not resulted in many applications (see section below).

18. The s32 report raises issue with the Court's findings or interpretations with respect to certain words within the policy and associated provisions, for example, 'enhancement' and 'significant contribution' at the 'local level'.

19. However, neither the s32 nor the s42A reports overcome the reasoning of the Environment Court for the preference of the evidence of Dr Kelvin Lloyd over that of Mr Hooson with Environment Judge Steven and Environment Commissioner Myers stating at paragraph [153]:

"*Overall, we consider that Dr Lloyd's assessment is more in line with the 2GP requirements in this context than the assessment undertaken by Mr Hooson, who was too influenced by the requirements of a significance assessment in the context of s6(c) of the RMA*."

This distinction is important when you consider that most of the rural land environment in Dunedin is situated within ecologically threatened land environments shown as red (< 10% indigenous cover left), orange (10-20% indigenous cover left) or yellow (20-30% indigenous cover left) according to Manaaki Whenua Landcare Research Our Environment Threatened Environment Classification, for example, the Taieri Plain has less than 2.9% of its original land cover left.

20. Judge Steven and Commissioner Myers go on to state at paragraphs [190] and

[224]:

"*[190] Dr Lloyd comprehensively discusses the benefits from the restoration and enhancement proposed at the local level. On the basis of Dr Lloyd's assessment, which we prefer to that of Mr Hooson, we find that the restoration proposal will make a significant contribution to the enhancement and protection of the biodiversity values at this local level*."

"*[224] As to the remaining issues, we took much guidance from Dr Lloyd's expert evidence in applying the Policy 16.2.1.7.Y.ii exception whose evidence was accepted in preference to that of Mr Hooson*."

Proliferation

21. The s32 report states: "*The concern is, if the Court's interpretation was to be applied more widely, and the use of the pathway was not limited by any need for existing biodiversity values to be present, it could potentially lead to a proliferation of residential development on undersized lots in the rural environment*." This sentiment is carried over to the s42A report when the reporting planner states: "*I also disagree with Malcolm Burns that the number of applications granted consent since the pathway has been available is a relevant matter for consideration. This is because the change has been promoted through the Environment Court decision, which provided clarity that policy 16.2.1.7 had issues…which should be addressed*."

22. However, both the s32 and s42A reports fail to quantify the extent, if any, that the Court's reasoning in ENV-2022-CHC-024 is causing an issue with respect to administration of the 2GP.

23. Council staff provided information this week, showing that the great majority of applications making use of Policy 16.2.1.7 use limb a, surplus dwelling subdivisions, with Council staff finding only two land use applications making use of Policy 16.2.1.7.b.ii, both granted[12], and a mixed subdivision and land use application which was declined.

24. This clearly demonstrates that there has been no 'proliferation' of applications using Policy 16.2.1.7.b.ii since the decision in ENV-2022-CHC-024 was issued on 14 March 2023 and the concern in the s32 report is baseless and the statement by the s42A reporting planner is erroneous.

[12] One being ENV-2022-CHC-024, the other being granted prior to ENV-2022-CHC-024.

Council's Ecological Advice

25. Paragraph 1047 of the s32 report states: "…*ecological advice provided to Council*…". This statement in fact is only relying on the evidence of Mr Hooson in ENV-2022-CHC-024 as the ecological evidence completed by Zoe Lunniss of Council provided with the s32 report does not cover change Ru7 and copy of no other ecological advice has been made available in relation to change Ru7.

26. As stated above at paragraph 19, the Environment Court did not favour the evidence of Mr Hooson in ENV-2022-CHC-024 primarily due to his being "…*too influenced by the requirements of a significance assessment in the context of s6(c) of the RMA*."

27. This distinction is important to achieving Strategic Direction Objective 2.2.3 (emphasis added):

> "*Dunedin's significant indigenous biodiversity is protected or enhanced, and restored;* ***and other indigenous biodiversity is maintained or enhanced, and restored; with all indigenous biodiversity having improved connections and improved resilience***."

28. Council has failed to provide ecological evidence demonstrating how Change Ru7 will achieve all of Strategic Direction Objective 2.2.3 and, in particular, the emphasised part above within threatened land environments.

Uncertainty of Success

29. Determining the likelihood of success of a proposed ecological restoration, enhancement or protection project in any given case relies on the quality of the expert ecological assessment made coupled with the proposed consent conditions.

30. Requiring any ecological activities (e.g. planting, fencing, pest/weed control) to be in completed prior to commencement of construction of a dwelling, as was the case in ENV-2022-CHC-024, legal protection of the significant contribution and extensive ongoing monitoring, ensure that the significant contribution will be successful.

NPS-HPL

31. In ENV-2022-CHC-024 at paragraphs [193] – [207] the Court provides an analysis of the NPS-HPL that analysis is relevant to this matter, and should in my opinion remain determinative.

32. In particular, the Court's determination that:

> "*[202] We intend to proceed on the basis that the NPS-HPL provisions are among the wide range of identified matters that the consent authority must have regard to.*
>
> *[203] That said, we are unable to conclude that the proposed activity is 'inappropriate' in terms of the NPS-HPL definition. The restoration proposal would be consistent with the exclusions in either of sub-clauses (e) and/or (g) if that were a provision we were required to consider…*
>
> *[204] We consider that the 2GP does not see the use of this land for enhancement of indigenous biodiversity coupled with a residential activity as necessarily inappropriate when considered in the context of Policy 16.2.1.7.Y.ii*."

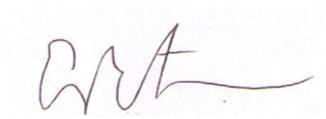
Conclusion

33. Change Ru7 is a misguided and unnecessary attempt by Council to overcome a significant loss it experienced at the Environment Court including a decent costs award made against Council. The Environment Court decision was based on extensive traversing in ecological and planning evidence as well as legal submissions of all relevant factors including interpretation of words Policy 16.2.1.7.b.ii and associated provisions.

34. Information provided by Council staff this week demonstrates that the majority of applications relying on Policy 16.2.1.7 utilise limb a (surplus dwelling subdivisions); there have been only three applications to date which have utilised the pathway provided by 16.2.1.7.b.ii, two granted, one declined.

35. Council have not provided fact and evidence-based justifications to support change Ru7 and, therefore, the Hearing Panel should accept submission 63 and reject change Ru7.

Dated this 20th day of August 2025



Emma Rayner Peters (BA (First Class Honours), MA (Distinction), LLB)

Appendix 1: Decision in Relation to ENV-2022-CHC-024.

IN THE ENVIRONMENT COURT
AT CHRISTCHURCH

I TE KŌTI TAIAO O AOTEAROA
KI ŌTAUTAHI

Decision No. [2023] NZEnvC 45

IN THE MATTER	of the Resource Management Act 1991
AND	an appeal under s120 of the Act
BETWEEN	G S GRAY AND K M SINCLAIR-GRAY
	(ENV-2022-CHC-024)
	Appellants
AND	DUNEDIN CITY COUNCIL
	Respondent

Court:	Environment Judge P A Steven Environment Commissioner S Myers
Hearing:	at Dunedin on 14 December 2022
Appearances:	T Shiels KC for the appellants S Chadwick and J Harman for the respondent
Last case event:	10 March 2023
Date of Decision:	14 March 2023
Date of Issue:	14 March 2023

DECISION OF THE ENVIRONMENT COURT

A: The appeal is allowed.

B: The court's decision is final except in relation to the final set of conditions. These are to be lodged by the appellants, having consulted with the Council in respect of the same. Conditions are to be lodged in 10 working dates of the date of this decision.

REASONS

Introduction

[1] The appellants have appealed a decision declining resource consent for a residential activity on an undersized lot comprising 2.8 ha. The site is located at 68 Currie Road on the Taieri Plains in Dunedin.

[2] The site is zoned Rural – Taieri-Plain in the Dunedin City Council 2GP (2GP). Density performance standards require a minimum site size of 25 ha for a residential activity with some exceptions that are not applicable.

[3] Non-complying activity status is triggered for contravention of the density standard which implements an 'avoid' policy for residential activity on sub-sized lots within the Rural Zone (relevantly), being Policy 16.2.1.7. However, that policy is subject to 'unless' provisions that operate as exceptions to the 'avoid' directive.

[4] The appellants appealed the Council's decision to decline resource consent on grounds including that Policy 16.2.1.7.Y.ii provides an exception for residential activity (relevantly) associated with:

> …long term land management and/or capital investment that will result in:
>
> ii. a significant contribution to the enhancement or protection of biodiversity values.

The proposal

[5] The appellants' proposal involves restorative indigenous vegetation planting on an area of land depicted in a site plan. This proposal is detailed in an Environment Management Plan (EMP) prepared with input from an ecologist

engaged by the appellants, Dr Lloyd of Wildlands Consultants Ltd.

[6] The site plan identifies a building platform, which would contain a modestly sized dwelling together with an indicative driveway alignment to the building platform.

[7] A single storey 'farm-shed' style dwelling not exceeding 4 m in height is proposed, with elevations depicted in plans included within the application.

[8] Restrictions on the form, material and exterior colours of the dwelling are volunteered as conditions, the purpose being to promote the visual integration of the dwelling into the surrounding landscape. The purpose of these conditions is to promote the visual integration of the dwelling into the surrounding landscape.

[9] The balance of the site would continue to be used to grow grass for cut and carry.

[10] Planting[1] will be over 7 contiguous areas, with areas 1-6 to be planted with indigenous vegetation in accordance with the EMP. Within these planted areas, Area 1a is to be planted with low stature indigenous vegetation planting. The planted areas will be fenced for the prevention of stock browsing and would be protected by registered covenant.

[11] Areas 1-7 cover approximately 8,340 m², excluding the building platform itself and the driveway alignment depicted on the site plan. Areas 1-6 cover 7,680 m², the difference being an area comprising an existing pond which is depicted as area 7 on the site plan.

[12] Within these planted areas, area 1a is to be planted with low stature planting. This area was reconfigured at the end of the hearing, to reduce the size to 1,095

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[1] The planted areas underwent minor refinement in submissions given after the close of the hearing.

m^2) with area 1 increasing to 5,220 m^2.[2] A planting list was provided with the appellants' closing submissions, prepared by Dr Lloyd.

[13] The appellants say that plantings will be undertaken in the first planting season after obtaining resource consent, rather than staging as initially proposed at the Council hearing. Dwelling construction, excluding earthworks for the access and building platform, would not commence until the planting is completed.

[14] Dr Lloyd has calculated that 5,335 plants will be required to be planted. Along with ground preparation (including spraying) and other associated costs, the capital investment associated with this planting proposal is approximately $60,000.[3]

[15] Dr Lloyd was also engaged to undertake an assessment of the ecological values of the site and to formulate the EMP that defines this proposal. Dr Lloyd gave evidence in support of the proposal before the Council hearing. He assisted in the provision of the information requirements required by the Council for the processing of the original application. This included a restoration plan providing:[4]

(a) a description of the area or areas to be enhanced;
(b) a description of any indigenous vegetation present including a species list;
(c) a description of any indigenous wildlife present and known to use the site;
(d) an ecological assessment of the significance of the site using the criteria in the 2GP;
(e) an assessment of how ecological restoration may contribute to providing connectivity with ecological corridors or nearby areas of ecological importance;

[2] This takes into account reconfiguring of areas 1 and 1a in closing submissions.
[3] Gray EIC, at [8].
[4] Lloyd EIC, Appendix 1, Ecological Management Plan for 68 Currie Road, Outram.

(f) an assessment of the benefits to biodiversity values of a range of practical options for biodiversity enhancement and confirmation that the proposed option is suitable for the site;

(g) a detailed planting plan, a schedule of species to be planted, and other information pertaining to the ongoing maintenance of the planted area; and

(h) whether the restoration works would constitute a "significant contribution to the enhancement or protection of biodiversity values".

The Council decision

[16] The application did not require any form of notification, although it had gone before a hearings committee appointed by the Council for the purpose of obtaining guidance on the application of the policy exception, in circumstances where the s42A report had recommended granting consent subject to various conditions.[5]

[17] The Council declined to grant resource consent for reasons including that the proposal did not meet the requirements of the policy exception "by a wide margin". In coming to its decision to decline the application, the Council determined that substantial ecological values had to exist on the site in order for the exception to apply, finding that the subject site held no pre-existing biodiversity values.

[18] The 25 ha density limit was then used as an "inferred proxy at an order of magnitude level for what may comprise a "significant contribution" to biodiversity values". The Council was unpersuaded by Dr Lloyd's assessment that the restoration proposal would make a significant contribution to biodiversity values at a local level.

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[5] Peters EIC, at [15]-[16].

Site and locational ecological features

[19] The site comprises four paddocks on the side of Currie Road approximately 5 kilometres south-west of Outram. It is located on gently rolling land at the foot of Maungatua, a prominent schist range rising to just under 900 m above sea level to the west.

[20] An unnamed stream flows through the property halfway along its northern boundary and for a short distance through the property before entering a sizeable man-made pond in the north-eastern corner of the site. The pond discharges into a growth of willow and pine teres and then into a drain which flows into another unnamed stream and then on to the contour channel and ultimately into Lake Waipori.

[21] Dr Lloyd gave evidence of the site's ecological context noting its location in the Tokomairiro Ecological District which includes alluvial plains, Maungatua coastal hills, and rolling hills from Mosgiel to south of Balclutha. Maungatua, an important habitat for forest birds and invertebrates.

[22] High producing exotic grassland is the dominant land cover in the Tokomairiro Ecological District, covering 88,720 ha. Exotic forest is also extensive covering 4,943 ha. While there is practically no indigenous forest remaining on the alluvial plains, Dr Lloyd considers that the plains do provide a habitat for 2,853 ha of herbaceous freshwater vegetation, mostly comprising indigenous wetland vegetation.[6]

[23] Mr Hooson gave ecological evidence for the Council, having undertaken a site visit in order to assess the existing biodiversity values of the site, it's ecological context in relation to the wider landscape including ecological linkages, corridors and buffering and to consider how the ecological restoration measures proposed by the appellants could contribute to the enhancement or protection of

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[6] Lloyd EIC, Appendix 1, at 3.6.

biodiversity values.

Statutory assessment

[24] As a non-complying activity, having identified relevant s104 matters, the threshold tests in s104D must be applied to the proposal. This requires that the court must be satisfied that either:

> (a) the adverse effects of the activity on which the environment (other than any effect to which s104(3)(a)(ii) applies) will be minor; or
>
> (b) the application is for an activity that will not be contrary to the objectives and policies of –
>
> > (i) …
> >
> > (ii) the relevant proposed plan, if there is a proposed plan but no relevant plan in respect of the activity; …

[25] If one of these tests is met, the court has a discretion to grant consent having regard to all relevant s104 matters.

Relevant s104 matters

[26] As a non-complying activity, having identified relevant s104 matters, the threshold tests in s104D must be applied to the proposal. This requires that the court must be satisfied that either:

> (a) the adverse effects of the activity on which the environment (other than any effect to which s104(3)(a)(ii) applies) will be minor; or
>
> (b) the application is for an activity that will not be contrary to the objectives and policies of –
>
> > (i) …
> >
> > (ii) the relevant proposed plan, if there is a proposed plan but no relevant plan in respect of the activity; …

[27] If one of these tests is met, the court has a discretion to grant consent having regard to all relevant s104 matters.

[28] Relevant s104 matters were identified in the evidence given by the planners:

(a) Ms Emma Peters, for the appellants; and
(b) Ms Emma Spalding, for the Council.

[29] The planners caucused and produced a joint witness statement (Planning JWS) setting out matters of agreement including that the relevant policy framework is primarily found in Chapter 16 Rural Zones. However, Strategic Directions Chapter 2 and Natural Environment Chapter 10 were also referred to.

Section 104(1)(a) – actual and potential effects

[30] Before we turn to the relevant policy framework, we note that the Planning JWS set out an agreed position on the actual and potential effects of the proposal on the environment, in the context of s104(1)(a) and s104D of the RMA in particular, agreeing that the following adverse effects would be no more than minor:

(a) rural character and amenity values;
(b) reverse sensitivity;
(c) transportation;
(d) waste disposal;
(e) water supply;
(f) hazards; and
(g) reverse sensitivity.

[31] Differing opinions were held as to the quantum of any adverse effect on rural productivity including any cumulative effect, with Ms Spalding assessing the adverse effects on rural productivity including any cumulative effect as being more than minor. Ms Peters assessed this effect as being no more than minor.

[32] Disagreement pivoted on whether the area to be planted should be included when considering loss of rural productivity, both in terms of the effects assessment and in terms of a relevant policy on rural productivity – Policy 16.2.4.2. Ms Peters excludes the planted area because the planting of indigenous vegetation is a permitted activity, although Ms Spalding says the planted area should be included when considering the area of land that would be displaced.

Section 104(1)(b) plan provisions

Strategic directions chapter

[33] We were told that the 2GP policy framework is set up so that the six strategic directions and their associated objectives and policies (in Chapter 2) carry forward into the zone objectives and policies, performance standards and assessment rules.[7]

[34] The planners both state that Strategic Objective 2.2.3 and implementing Strategic Policy 2.2.3.3 are relevant to their assessment. They observe that these provisions differentiate between 'significant indigenous biodiversity' and 'other indigenous biodiversity'.

[35] We note that strategic direction provisions will not always be relevant to a s104(1)(b) evaluation. However, the introductory text in cl 2.1 Chapter 2 of the 2GP states that:

> ... they may also be relevant to the assessment of resource consent applications…

[36] Accordingly, it is relevant to refer to Strategic Objective 2.2.3 which is that:

> Dunedin's significant indigenous biodiversity is protected or enhanced and restored; and other indigenous biodiversity is maintained or enhanced and restored; with all indigenous biodiversity having improved connections and

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[7] Peters EIC, at [19].

improved resilience.

[37] This objective is implemented by three policies, the first of which (Policy 2.2.3.1) is to:

> Protect areas of significant indigenous vegetation and/or significant habitats of indigenous fauna, including by:
>
> a. identifying these areas for protection in a schedule as Areas of Significant Biodiversity Value (ASBVs) where they meet the criteria in Policy 2.2.3.2;
>
> X. promoting the additional legal protection of these areas through QEII covenants, and/or other legal covenants; and
>
> b. assessment rules which require the consideration of significance as part of the assessment of effects on biodiversity.

[38] Policy 2.2.3.2 contains criteria for the identification of areas of significance to be protected in accordance with the preceding policy (the significance criteria). Significant areas are only listed in the district plan as ASBVs with the consent of landowners.[8]

[39] Policy 2.2.3.3 is to maintain or enhance indigenous biodiversity in the rural environment through a range of rules that are listed, as well as (relevantly):

> …
>
> Y. policies and assessment rules that:
>
> …
>
> iii.. create a pathway for residential activities to be established on sites in the rural zones that contravene the minimum site area for residential activity (density standard) where the activity is associated with a significant contribution to the enhancement or protection of biodiversity values.

[40] Policy 2.2.3.3 encompasses all biodiversity values referred to in Objective 2.3.3, that is, those that are assessed as being significant and 'other' biodiversity

[8] See A1.2 Introduction to Areas of Significant Biodiversity Value.

values.

Rural Zone chapter

Objective 16.2.1

[41] Objective 16.2.1 is an important provision. This provides that rural zones "... are reserved for ...":

(a) productive rural activities;
(b) protection and enhancement of the natural environment; and
(c) certain activities that support the wellbeing of communities where these activities are most appropriately located in the rural zone rather than in an urban environment.

[42] The proposal involves a productive rural activity and the protection and enhancement of the natural environment in the context of this objective.

Policy 16.2.1.7

[43] Objective 16.2.1 is implemented by a suite of policies. Only one of these is enabling in its expression, that being Policy 16.2.1.1 which is enabling of "farming, grazing and conservation".

[44] Other policies are restrictive in their approach to all other activities, including Policy 16.2.1.7 which is to:

> ... avoid residential activity in the rural zones on a site that does not comply with the density standards...

– unless meeting one of two stated exceptions.

Policy 16.2.1.7 exceptions

[45] The 'avoid' directive in Policy 16.2.1.7 applies 'unless':

(a) Policy 16.2.1.7 X – the residential activity is the result of a surplus dwelling subdivision; or

(b) Policy 16.2.1.7 Y – the residential activity will be associated with long-term land management and/or capital investment that will result in:

(i) significant positive effects for rural productivity; and/or

(ii) a significant contribution to the enhancement or protection of biodiversity values.

[46] We read the exceptions in (b)(i) and (ii) as being available in the alternative although there would be nothing to prevent both being invoked. We further approach these exceptions on the basis that Policy 16.2.1.7.Y (ii) creates the pathway referred to in Policy 2.2.3.3 in the Strategic Directions chapter.

[47] The planners agree that if components of either one of these exceptions are met, there is a pathway for residential activity on existing undersized rural sites, irrespective of the size of the site relative to the density performance standard for the relevant rural zone.[9] Otherwise, the 'avoid' directive would apply with the rigour of prohibited activity status.

[48] Notably, the Planning JWS further records agreement that for the purposes of Policy 16.2.1.7 Y (the 'Y' exception), the appellants' proposal will involve long-term land management and capital investment such that this component is met by the proposal.[10]

[49] However, they differ as to whether the proposal amounts to a *significant*

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[9] Planning JWS, at [33]-[35].

[10] Planning JWS, at [38].

contribution to the enhancement or protection of biodiversity values.

[50] They agree that this requirement is to be determined by an ecological assessment undertaken by a suitably qualified person and informed by the special information requirements set out in Rule 16.13.X.2.

[51] We agree that this is the central issue raised in the appeal.

Objective 16.2.4, Policies 16.2.4.2 and 16.2.4.4

[52] Objective 16.2.4 is a further important objective for the rural zones and is that "[t]he productivity of rural activities in the rural zones is maintained or enhanced". The Planning JWS states that what must be assessed here is whether rural productivity is *maintained* by the proposal. We agree.

[53] The objective is implemented by four policies, two of which have relevance to this proposal (Policies 16.2.4.2 and 16.2.4.4). These state that:

> Policy 16.2.4.2
>
> Only allow activities other than farming on highly productive land where:
>
> a. the scale, size and nature of the activity means that any loss of current or potential future rural productivity would be:
>   i. insignificant in any high class soils mapped area; and
>   ii. no more than minor in other areas of highly productive land; unless
>
> b. for mining, the activity must located on highly productive land due to operational requirements and there are no practicable alternative locations.
>
> Policy 16.2.4.4
>
> Require residential activity in the rural zones to be at a density that will not, over time and/or cumulatively, reduce rural productivity by displacing rural activities.

[54] In the context of Policy 16.2.4.2.a.i, the planners agree that the site is not depicted as being within a "high class soils mapped area".

[55] Accordingly, the relevant question is whether the proposal would result in the loss of current or potential future rural productivity that is "no more than minor", as the site is in "other areas of highly productive land" in terms of Policy 16.2.4.2.a.ii.

Natural Environment chapter

[56] Chapter 10 is titled 'Natural Environment'. This chapter is identified as being of relevance in the Planning JWS. Ms Peter's position is that:[11]

> … Policy 16.2.1.7 Y.ii sits within the Rural Zone policy framework because it provides an exception to the residential density performance standard in rural zones via a pathway provided by the Natural Environment policy framework.

[57] No provision in Chapter 10 is identified by Ms Peters. We were unable to identify any policy in Chapter 10 referencing the Rural Zones policy pathway, although as noted above, it is referenced at a strategic level in Policy 2.2.3.3. We assume that this is the chapter intended to be referenced and not the Natural Environment Chapter.

"guidance on the assessment of resource consents"

[58] We were referred to other 2GP provisions that are relevant to our statutory evaluation including, provisions described as "guidance on the assessment of resource consents for non-complying activities" in rule 16.12.2. This applies to listed activities, including the density rule contravened by the proposal and states (relevantly):

(a) the objectives and policies that are to be treated as 'priority

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[11] Planning JWS, at [28].

considerations', being Objectives 16.2.1, 16.2.2, 16.2.3, 16.2.4;

(b) that "the activity does not detract from, or preferably contributes to, the strategic direction objectives, including, but not limited to, those related to Objectives 2.2.2, 2.2.3, 2.2.4, and 2.3.1";

(c) the effects for which "consideration will be given to" in assessing the significance of effects, namely:

    (i) "short to long-term effects, including effects in combination with other activities";[12] and

    (ii) "the potential for cumulative adverse effects arising from similar activities occurring as a result of a precedent being set by the granting of a resource consent".

[59] We were also referred to the "guidance on the assessment of resource consents" for a contravention of the density standard contained in Rule 16.12.5.1. This identifies (relevantly):

(a) objectives and policies that are to be treated as 'priority considerations'; being Objectives 16.2.1, 16.2.3 and 16.2.4; Policies 16.2.3.2, 16.2.4.4 and 16.2.1.7.X and/or Y; and

(b) provisions described as 'general assessment guidance' in assessing whether a proposal "may meet Policy 16.2.1.7.Y.ii", which states that the "Council will consider the ecological context of the site and proposal at a local level, rather than requiring the contribution to be significant at an ecological district or citywide level".

[60] These provisions were the focus of reply submissions for the Council. Counsel submitted that these guidance provisions "supplement" the non-complying density standard and provide further rules "for managing the non-complying proposal" that must be applied in the court's statutory evaluation.

[12] Which are cumulative effects.

[61] Consideration of these provisions is said to be mandatory given the directive nature of the term "will", particularly regarding the requirement to consider cumulative effects and precedent (in Rule 16.12.5.1) in the application of the s104D and s104(1)(b)(vi) evaluations.

[62] We have made our own evaluation of the relevant s104 matters, having due regard to these provisions.

Special information requirements

[63] The Council referred to the "special information requirements" set out in Rule 16.13.X which applies where resource consent applications are made for proposals for land management or capital investment for productivity or biodiversity gains, including applications seeking to invoke the 'Y(ii)' exception.

[64] (Relevantly) Rule 16.13.X states that a resource consent application must be supported by an ecological restoration plan prepared by an ecologist or similarly qualified person which contains the listed information. An ecological assessment of the significance of the site using the criteria in Policy 2.2.3.2 is included.

[65] In opening submissions, the Council submitted that the requirement to include a significance assessment influences an interpretation of the 'Y(ii)' exception meaning that the pre-existing biodiversity values on the subject site need to be *significant* having been assessed against the significance criteria in Policy 2.2.3.2.

[66] That approach was opposed by the appellants, for reasons we agree with, namely that it is the contribution (to the enhancement or protection of biodiversity values), rather than the pre-existing biodiversity values that must be significant. In closing submissions, the Council clarified its opening position on that issue, seemingly accepting this approach.

2GP guides

[67] In reply submissions for the Council, reference was made to the 2GP User and Style Guides which (we were told) provide further guidance to the application of the relevant 2GP provisions. However, these documents were not referred to by the planners or by counsel in submissions or in cross-examination at the hearing.[13]

[68] We do not intend to resort to these for assistance, and nor would it be appropriate to do so, including for reasons of natural justice. More relevantly, however, these documents cannot influence on our interpretation of the Policy 16.2.1.7 and/or its exceptions.

Ecologists' assessments

[69] The ecologists undertook caucusing and produced a joint witness statement (Ecology JWS). This included agreement in relation to the ecological values of the site focussing on the existing pond. They agreed that:

(a) the pond on the site meets the RMA definition of a wetland although it is not a natural wetland for the purposes of the NPS-FM because it was artificially constructed;

(b) because it was artificially constructed, the pond does not comprise a naturally uncommon ecosystem and does not have the critically endangered status of a naturally uncommon ephemeral wetland;

(c) the pond functions as an ephemeral wetland because of its hydrology;

(d) it has been naturally colonised by the indigenous wetland plant species *Elatine gratioloides*. This species provides habitat for indigenous wetland birds.

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[13] We were told that we are able to find the documents on the Council's website. The court is generally familiar with the content of the same.

[70] Dr Lloyd describes the *Elatine gratioloides* as locally uncommon within the ecological district. However, Mr Hooson was not satisfied with the sufficiency of the evidence relied upon by Dr Lloyd in coming to that conclusion.

Are biodiversity values present on the site?

[71] The Ecology JWS further addressed the position of the ecologists on the importance of the starting point (or baseline) for ecological enhancement in the policy context, agreeing that:

(a) the context of the site is relevant for setting the contribution of a proposal to enhance or protect indigenous biodiversity values;
(b) undertaking indigenous restoration planting on land environments that retain the less than 10% indigenous vegetation, nationally, is important.

[72] However, they were not agreed that there are sufficient existing values to successfully invoke the policy exception. The dispute revolves around the wording of the policy, in particular, the reference to *enhancement or protection* of biodiversity values.

[73] Mr Hooson considers that protecting or enhancing a site that has existing indigenous biodiversity is of greater benefit than reconstructing indigenous biodiversity at a site with no or very little indigenous biodiversity values.

[74] Dr Lloyd disagreed with that position. While agreeing with Mr Hooson that 'protection' requires something worthy of protection to begin with, Dr Lloyd considers that the 'enhancement' part should have a lower threshold so as to operate as an incentive to undertake ecological restoration in the depleted and highly modified part of the district where it is most needed.[14]

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[14] Lloyd reply evidence, at [11].

[75] That said, Dr Lloyd disputes that the site has *no* existing values as the ecological restoration would be associated with productive soils, a natural stream, a constructed wetland and pond with established indigenous and exotic plantings around the pond. He referred to the stock exclusion fencing undertaken by the appellants which had promoted the growth of tall grass swards which provide shelter for resting and breeding water birds, being one in a network of three ponds on a 400 m-long reach of the same stream system all of which have stock exclusion fencing.

[76] These values are enhanced by the presence of a constructed, albeit functioning ephemeral wetland.

[77] Dr Lloyd considers that the pond is an important site for breeding of indigenous fauna and that its habitat is used by four indigenous water bird species including one 'At Risk' species. In his opinion, these features could be considerably enhanced to create better habitats for indigenous fauna.

[78] Dr Lloyd considers that if the requirement is for something substantial in terms of the existing biodiversity values, there would be no incentive to convert pasture or other exotic vegetation to indigenous vegetation and habitat by planting.

[79] He explained that such planting has a transformative impact: changing indigenous cover, improving indigenous ecosystem and source structure, and creating indigenous fauna habitat. This would result in an increase or improvement in the quality, value and extent of indigenous biodiversity on a site.[15]

Are pre-existing values significant under significance criteria?

[80] The ecologists undertook an assessment of the site under the significance criteria in the 2GP, summarising their differing positions in the Ecology JWS.

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[15] Lloyd reply evidence, at [13].

[81] Dr Lloyd identified significance in terms of two of the significance criteria:

(a) rare species, as the area provides habitat for indigenous species that are threatened or at risk or uncommon, nationally or within an ecological district. Dr Lloyd considers the presence of *Elatine gratioloides* meets this criterion; and

(b) the ecological context of the area, being important for indigenous fauna on a regular or temporary basis, for breeding, refuge, feeding or resting. Dr Lloyd considers the presence of breeding, feeding and resting habitat for indigenous wetland birds meets this criterion.

[82] Dr Lloyd referred to Ms Spalding's discussion of the Waikouaiti application previously approved through this policy pathway. That had also been referred to by Mr Hooson.

[83] The Waikouaiti proposal was held out by Mr Hooson and Ms Spalding as a "strong starting point" for a proposal assessed in this policy context. The decision to grant resource consent for that proposal had justified the Council's decision that the pre-existing values need to be substantial.

[84] The Waikouaiti site contained an area of remnant forest described as an example of an area of rare and representative remnant forest that warranted enhancement and protection, in terms of Policy 16.2.1.7.Y.(ii).

[85] Dr Lloyd gave evidence of his reading of the ecological assessment that accompanied the Waikouaiti application. Planting was proposed on an area comprising 1.3 ha, 1 ha of which was additional planting to supplement an existing 0.3 ha area of bush remnant.

[86] He notes that the ecologist for the applicant considered that much of the dryland forest represented by the bush remnant has been lost in the relevant ecological district. The relevant land environment had retained less than 10% of its original indigenous cover although Dr Lloyd said the same applies to the land

environment at 68 Currie Road.

[87] Mr Hooson expressed a contrary opinion to Dr Lloyd. He considers that the constructed pond provided only a limited habitat for a low diversity of widespread and common wetland bird species that are classified as not threatened nationally.

[88] Mr Hooson's overall opinion is that the ecological values of the site are not significant under any of the criteria for identifying areas of significant biodiversity values.

Ecological context, connectivity and corridors

[89] As to the wider context, the ecologists agreed that:

(a) the existing pond habitat contributes to a network of wetland sites in the wider area;

(b) the proposed planted forest will provide habitat for kereru, tui, bellbird, piwakawaka/fantail, pipihi/silvereye, riroriro/grey warbler and pipirihika/brown creeper, all of which are present in the Woodside remnant and the closest part of the Maukaatua Scenic Reserve to the site;

(c) the proposed planted forest will be part of a network of habitats for indigenous bird species within the existing rural landscape of riparian vegetation, exotic woodlots, amenity trees and shelterbelts. However, Mr Hooson considers that these habitats are only likely to be utilised by a small number of common and widespread indigenous bird species such that this planting would not result in a significant contribution to biodiversity at the local level;

(d) the proposed planted forest, when sufficiently mature/tall will buffer the 30 m reach of the existing waterway upstream of the pond, improving its ecological function.

Proposed plant species appropriate

[90] The ecologists agreed that in the context of this proposal, staging of the planting was not important. If necessary, species like mahoe could be planted when suitable shelter was available.

[91] They also agreed that the plant species and numbers selected for planting for each of the planting zones is appropriate.

Whether the proposal represents a significant contribution to the enhancement or protection of biodiversity values

[92] Mr Hooson started by noting that a significance assessment is typically applied to naturally occurring indigenous vegetation and habitats of indigenous fauna under s6(c) of the RMA but not for discrete areas of planting such as that proposed by the appellants.

[93] He considers that a key consideration in terms of whether the proposal represents a significant contribution is the extent and value of existing indigenous biodiversity at the site, rather than the threatened land environment the site is on which had influenced Dr Lloyd's assessment.

[94] Mr Hooson was also critical of the requirement in Policy 16.2.1.7.Y.(ii), that the assessment of ecological context is to be considered at a local level, rather than at an ecological district or city-wide, as would be required for a s6(c) RMA assessment.[16]

[95] Accordingly, finding no guidance in the 2GP as to how to assess the contribution at a local level, Mr Hooson treated the relevant context as the wider Taieri Plan and its surrounding hillslopes as far south as Lake Waipori, the Waipori

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[16] Hooson EIC, at [74].

River and the Sinclair Wetlands including the foothill slopes of Maungatua.

[96] Mr Hooson considers that it would take several decades to achieve restoration of representative indigenous forest with natural ecological functioning and processes, and several centuries before the climax vegetation of a representative forest of late successional kahikatea, totara, matai forest is achieved.

[97] They both agreed that in the short term, most of the significance criteria would not be met by the planting proposal. However, when canopy closure is achieved, Dr Lloyd considers that the site would meet the rare vegetation and habitats criterion 'rarity (e)'[17] which relates to indigenous vegetation that has been reduced to less than 20% of its former extent nationally, regionally or within a relevant land environment, ecological district or freshwater environment including wetlands.

[98] Dr Lloyd agreed with Mr Hooson that the local level must take account of the ecological context of the site, which includes the connection between the Maukaatua Scenic Reserve as forest birds will move between these two areas. However, he disagreed on the wider scale of the local level. He restricted this to the plains habitat.

[99] Dr Lloyd disagreed with Mr Hooson's view[18] that the planted indigenous vegetation would only meet the rarity criterion once matured into a complex, representative, natural functioning ecosystem.

[100] Dr Lloyd approached this assessment on the basis that the criterion requires an assessment of the *planted* indigenous vegetation. In his opinion, the planted indigenous vegetation would meet this criterion by virtue of comprising and restoring indigenous vegetation located on a land environment that retains only

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[17] See also Policy 2.2.3.2b(ii).
[18] Hooson EIC, at [83].

2.9% of its indigenous cover nationally.

[101] He considers that it would also meet 'ecological context' criterion (h)(ii)i),[19] which assesses whether a site is important for indigenous fauna, on a regular or temporary basis, for breeding, refuge, feeding, or resting. In Dr Lloyd's opinion, the planted forest will comprise a diverse range of habitat resources for the breeding and feeding of indigenous forest birds.

[102] Dr Lloyd emphasised that canopy cover could be achieved within five years at which point it would begin to achieve natural ecological functioning and regeneration processes, noting that some of the planted species would by then be producing viable seed.

[103] He described the matai, totara, kahikatea forest which would have originally been widespread but now has almost vanished from the Taieri Plains with the last remaining area being a 3.6 ha remnant near Woodside, less than 3 km from the site.

[104] He considers that the proposed planting will regenerate into tall forest making a significant contribution at a local level increasing the extent of indigenous forest vegetation on the plains.[20]

[105] In his evidence, Dr Lloyd considered how guidance could be provided on where sites meeting the policy requirements might be located, identifying the following factors as relevant in his professional opinion:[21]

(a) the site is located on land environments that retain less than 10% of the original indigenous cover, with higher weighting given to land environments that retain even less indigenous cover than this;

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[19] See also Policy 2.2.3.e(iii).
[20] Lloyd EIC, at [15] and reply evidence at [49].
[21] Lloyd reply evidence, at [62].

(b) the site is located in the coastal environment;

(c) the site includes a natural water body;

(d) the site includes or is adjacent to an area of existing indigenous vegetation;

(e) the site contains or would create a significant habitat for indigenous fauna.

[106] In addition, Dr Lloyd would recommend a minimum planting area of .5 ha where planted vegetation made up part of the significant contribution, and that enduring legal protection is provided over the area in which the significant contribution is made.

[107] Dr Lloyd's overall assessment of the appellants' proposal is that:

(a) the planting proposed at the site will make a significant contribution to indigenous biodiversity at the local level by restoring indigenous cover to a land environment which retains only 2.9% of its indigenous cover;

(b) the planting proposal would provide important habitat for indigenous forest birds which will easily dispose to the site from the nearby scenic reserve including indigenous forest birds that are not currently present at the site;

(c) most of the detracting points raised by Mr Hooson are also relevant to the other consented development at Waikouaiti and apart from the existing indigenous vegetation at that site, the scenario was very similar in many respects to the 68 Currie Road scenario. The difference pertains to the extent of existing indigenous biodiversity values.

Maintenance requirements

[108] The ecologists agreed that the key short-term actions to promote positive long-term biodiversity outcomes should include:

(a) fencing to exclude stock;

(b) pest plant control;

(c) planting at a sufficient density to achieve canopy closure as soon as possible;

(d) monitoring to ensure the trajectory of the planted vegetation is proceeding as anticipated; and

(e) legal protection in perpetuity such as a QEII covenant.

[109] However, Mr Hooson considers that because of the small size of the site, its position in the rural landscape and the inclusion of low stature vegetation, pest plant invasion would be an ongoing issue. In his opinion, long-term maintenance will be required to maintain ecological integrity of the site.

Edge effects

[110] Mr Hooson considers that edge effects would be an important constraint in achieving long-term biodiversity outcomes. He notes that edge effects are well documented in the literature. They include elevated radiation levels, air and soil temperatures, wind speeds and vapour pressure deficits. These abiotic affects result in complex changes to the composition of vegetation communities, the distribution of animals, species interactions and ecological processes.

[111] His evidence is that studies in New Zealand and elsewhere suggest that the extent of edge influences extend 50 to 100 m into forest habitats. Due to the small size of the planted area proposed by the appellants, its shape and location in an open rural landscape, the planted area, even when mature, would be vulnerable to a range of ongoing edge effects.

[112] Dr Lloyd acknowledges that edge effects are well documented, although he considers that if the existence of edge effects was a significant factor to be considered then that would mean most ecological restoration of projects and protection projects would not be undertaken.

[113] He referred specifically to the Waikouaiti forest remnant, observing that this Waikouaiti forest remnant was small in size, being 0.3 ha, comprising entirely edge habitat. He disputed that edge effects are an important consideration with respect to ecological functioning of a planted forest or small forest remnants.

[114] He notes that typically forest develops a side canopy of dense foliage on the forest margin, which limits the penetration of edge effects. When questioned at the hearing, Dr Lloyd considered that the plantings, including the lower stature vegetation would be densely planted and therefore resistant to edge effects and to weed invasion.[22]

[115] In his opinion, other factors such as grazing by stock or feral animals could have significantly greater adverse effect on indigenous biodiversity and ecosystem functions and forest remnants. Further monitoring (of edge effects) was volunteered at the close of the hearing in closing submissions.

Our consideration of Policy 16.2.1.7.Y components

[116] The exception in Policy 16.2.1.7.Y.(ii) is the focus of the dispute between the parties.

[117] For the Council, Ms Chadwick refers to the wording of the policy exception and submits that this requires the following elements to be present:

(a) that the residential activity will be associated with:
   (i) long-term management; and/or
   (ii) long-term capital investment.
(b) where that long-term land management and/or capital investment will result in:
   (i) significant positive effects for rural productivity; and/or
   (ii) a significant contribution to the enhancement or protection of

[22] NOE, p 29.

biodiversity values.

[118] In her further submissions, counsel submitted that there is a "high *bar*" to overcome when considering whether (a) and (b) are met, due to the use of the word "will" in these provisions, coupled with the requirement for a "significant contribution" to the enhancement or protection of biodiversity values.[23]

[119] We address a breakdown of the policy components as raised in the submissions and in evidence of the experts.

Does the capital investment need to be recurring or ongoing?

[120] The Planners JWS records agreement that the proposed planting, the volunteered covenant and ongoing monitoring meets the component of the policy exception requiring long-term management and/or capital investment.

[121] The Planning JWS further records agreement on the wording of a condition to secure the long-term legal protection of the planting:

> Prior to commencement of construction of the dwelling, a covenant document for registration on the title of the site protecting the areas of ecological enhancement and restoration must be submitted to the Council via rcmonitoring@dcc.govt.nz for approval of the Resource Consent Manager.

[122] However, legal submissions the Council noted disagreement that this component of the policy exception has been established. The Council considers that a "one-off" planting proposal, at a cost of $60,000 and where the planting would be completed over a 12-month period, is not a long-term capital investment.

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[23] We note that counsel contended that an "even higher bar" is set when the proposal will result in displacement of highly productive land in terms of an evaluation under Objective 16.2.4 and Policy 16.2.4.2.

Our evaluation

[123] We consider that the requirement for the residential activity to be associated with long-term management and/or capital investment does not require ongoing capital investment. The two are expressed as alternative methods, with a capital investment being one of the options for pursuing either of the two pathways under these policy exceptions.

[124] However, this investment is not qualified by the requirement that it be 'long-term' in the sense of involving ongoing investment.

[125] The "guidance on the assessment of resource consents" in Rule 16.12.5.1, which counsel contends are provisions that must be referred to, offers some guidance on this. This refers to a substantial investment in farm buildings or other farm assets for commercial scale horticulture of other commercial scale farming as an example of a capital investment in the context of Policy 16.2.1.7.Y.i. These are 'one-off' capital investments.

[126] We see no reason why the capital investment required where exception 'Y.(ii)' is invoked ought to be any different.[24] We agree with Mr Shiels KC for the appellants, that "capital investment" refers to the investment of money with a view to recurring benefits whereas it is the management that has to be long-term.

[127] We find that this component of the policy exception is met and accordingly we agree with the evaluation of the planners.

[128] We further note and agree with the planners' acceptance of the adequacy of content of the EMP in relation to monitoring for edge effects and woody weed invasion. The EMP provides for yearly monitoring for the first five years after planting is completed. Their agreement is subject to the further requirement that monitoring occur biannually at the end of the five year period of annual monitoring

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[24] Bundle of Planning Provisions, p 240.

together with a mechanism for the Council to assess the necessity for the continuance of the biannual monitoring.

[129] An amendment to the condition was proposed by the planners in the JWS,[25] we agree that amendment should be imposed.

[130] However, the planners were also agreed that there was no longer any uncertainty about the ability of the appellants to monitor the control of pest plans. We also agree with the planners on that.

[131] We further note the additional monitoring suggested for edge effects volunteered in the appellants closing submissions which was suggested by Dr Lloyd and accepted by the appellants. It states:

> The required monitoring will also monitor the indigenous plantings to ensure there are no adverse edge effects. Where any adverse edge effects are found, action shall be taken to remedy those edge effects in accordance with the Ecological Management Plan.

[132] The Council does not support the wording of this proposed condition as it considers the EMP does not address the management of edge effects, and that the edge effects remain a significant issue.[26]

[133] However, we do not consider this additional condition is necessary as the proposed conditions already address monitoring of the plantings, including the amendment proposed by the planners to address biannual monitoring at the end of the five year annual monitoring period.

[134] We were persuaded by the evidence from Dr Lloyd on the relevance of edge effects. In his opinion, edge effects are not important with respect to the ecological functioning of planted forest or small forest remnants. His evidence is

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[25] Planning JWS, at [65].
[26] Reply submissions, at [78].

that forest typically develops a side canopy of dense foliage on the forest margin, which limits the penetration of edge effects. In his opinion, grazing by stock or feral animals have a significantly greater adverse effect on indigenous biodiversity and ecosystem functions in forest remnants.

[135] Accordingly, we see no need for this additional monitoring as it would be encompassed by the broader monitoring requirements in the EMP.

Do existing biodiversity values need to be significant?

[136] In opening submissions for the Council, it was submitted that exception 'Y.(ii)' can only be invoked where the site contains existing significant biodiversity values when assessed in accordance with the assessment criteria for determining significance, consistent with the approach of Mr Hooson.

[137] Counsel noted that this was the approach that was taken by the Council in its original decision and in the only other resource consent decision where the policy pathway had been invoked (the Waikouaiti proposal).

[138] Relying on the ecology evidence, the Planning JWS records that the baseline for an assessment of existing site values on the subject site is 'other indigenous biodiversity' referred to in Strategic Objective 2.3.3. They further agreed that the assessment of whether there will be a 'significant contribution' must be informed by that baseline.

[139] In response to the court's questioning of the Council's position on this issue, the Council acknowledged that a site need not contain an existing area of significant indigenous biodiversity (as assessed under Policy 2.2.3.2), although where that does exist, applying the policy pathway is "more straightforward".[27]

[140] The Council considers that in relation to this proposal, the planting is over

[27] Reply submissions, at [35].

too small an area, the success of the planting too uncertain, and that biodiversity values will not be achieved for 20-30 years.[28]

Our consideration

[141] We start by noting our reluctance to determine that a rural zoned site must contain some existing biodiversity values before exception 'Y' is able to be invoked, particularly as on the evidence of Dr Lloyd, virtually all of the rural zoned land in the Taieri Plains is deplete of any biodiversity value.

[142] The Council contends that the plain meaning of 'enhancement' would assume a starting point where something exists that is capable of being enhanced such that it cannot be invoked on a site that is devoid of any values. While in a literal sense, that may be true, we do not need to decide that issue in the context of this proposal.

[143] That said, tentatively, we would be reluctant to accept the Council's stance, particularly having regard to the approach in Strategic Directions, notably Objective 2.2.3, which refers to "…all indigenous biodiversity having improved connections and improved resilience". It is difficult to restrict the interpretation of this objective to biodiversity values that are significant or substantial.

[144] We further note that in the introductory text to Chapter 10 Natural Environment reference is made to the maintenance of the city's biodiversity being challenging for reasons including that:

> Maintaining indigenous biodiversity requires both the protection of sites of especially high biodiversity value and the growth, creation or restoration of new or existing sites;…

[145] We find that the 2GP adopts various methods to identify, protect and

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[28] Reply submissions, at [36]-[37].

enhance *all* biodiversity values within the district, not being limited to those that meet the significance criteria in Policy 2.2.3.2.

[146] Policy 16.2.1.7 includes an exception that incentives improvements to the resilience of biodiversity values in the rural zones. This incentive should be available even when pre-existing values are not significant or even substantial.

[147] We accept Dr Lloyd's evidence that there *are* existing biodiversity values at present on the appellants' site. We also accept Dr Lloyd's evidence that the proposed planting will achieve natural ecological functioning and processes at canopy closure five years after the initial planting. By ten years, a structurally diverse forest canopy will have developed and that other ecological processes such as woody decomposition processes will take much longer.

[148] We disagree that the Special Information Requirements in Rule 16.13.X, which includes a significance assessment (along with other items of information), supports its position that a site must contain significant pre-existing biodiversity values before pursuing the policy pathway.

[149] The information required to be included within a resource consent application necessarily informs an evaluation of the proposal in light of the policy framework; as its purpose. It may also result in the identification of sites that contain significant biodiversity values warranting protection.

[150] However, the information requirements for a resource consent application cannot influence the interpretation of the policy framework in the manner (initially) contended for by the Council.

[151] We accept the planners' position that the 'baseline' for our evaluation of the pre-existing site is "other biodiversity values" recorded in the JWS. We find that this is a sufficient baseline for the operation of this policy exception in agreement with Dr Lloyd.

[152] We have put to one side the approach taken by the Council in the Waikouaiti decision. We must apply the statutory provisions to this proposal and consider it on its own merits. If we find out that the proposal is consistent with these provisions, as we have do in this case, there is nothing in the Act to warrant refusing the application on the grounds that another applicant has achieved a higher standard.[29]

[153] Overall, we consider that Dr Lloyd's assessment is more in line with the 2GP requirements in this context than the assessment undertaken by Mr Hooson, who was too influenced by the requirements of a significance assessment in the context of s6(c) of the RMA.

[154] We are satisfied that this component of the policy exception will be met by the appellants' proposal; the site has existing biodiversity values that are able to be enhanced by the restoration proposal.

Relevance of displacement of land for rural production

[155] The Council further contends that an interpretation of the second part of policy exception 'Y' ought to account for the fact that the policy itself contemplates that a proposal could provide both significant positive affects for rural productivity *and* a significant contribution to the enhancement or protection of biodiversity values.

[156] Leveraging from there, counsel submits that the proposal would bring no positive effects for rural productivity, as only a biodiversity proposal is being offered. This would result in a negative impact on rural productivity such that the proposal should be viewed as being directly contrary to the first limb (X) of the policy exceptions.

[157] Counsel contends for "an even higher bar" for assessing the second limb

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[29] *Fleetwing Farms Ltd v Marlborough District Council* [1997] 3 NZLR 257.

(in Y ii) which requires a significant contribution to the enhancement or protection of biodiversity values.

[158] We note that the Council's approach to this policy exception is consistent with submissions on its approach to Objective 16.2.4 and Policy 16.2.4.2. In that context, counsel notes that the indigenous vegetation planting occupies at least 33% of the site which amounts to a loss of highly productive land that is not insignificant, thereby making the proposal contrary to Objective 16.2.4 and implementing Policy 16.2.4.2.

[159] In further submissions, counsel submitted that the 2GP has only provided for the policy pathway to be an exception to Policy 16.2.1.7.Y; not being extended to any other applicable policy, referring particularly to Policy 16.2.4.2.

[160] Counsel then reverts to the Rule 16.12 guidance provisions that highlight the priority objectives and policies where non-complying activity is sought, observing that it would be open to the decision-maker within the overall evaluation under s104D(1)(b) and s104(1)(b) to place greater weight on these priority considerations if the proposal is contrary to the policy direction.

Our consideration

[161] We are required to make a thorough attempt to read the provisions of relevance to our evaluation in a coherent manner, reconciling the rural zone objectives and policies when approaching them in the s104(1)(b) and s104D context. This will be important where there is a disparity between closely related provisions as there appears to be in this case.[30] That approach was accepted by counsel.

[162] In the court's view, this should account for:

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[30] *Environmental Defence Society Inc v King Salmon Company Ltd* [2014] NZSC 38, at [131].

(a) Objective 16.2.1 which reserves the rural zones for productive rural activities *and* the protection and enhancement of the natural environment;

(b) Strategic Directions Policy 2.2.3.2 which supports and is implemented by the Policy 16.2.1.7.Y.(ii) exception.

(c) Policy 16.2.7.Y.(ii) has been deliberately included to operate as an incentive for landowners to improve connections and resilience for all indigenous biodiversity within Dunedin. It has to be approached as a trade-off made by the Council at the policy level, albeit a trade-off that requires an evaluative judgement to be made by the decision-maker in the s104 and 104D context.

[163] Any proposal to significantly enhance and/or protect biodiversity on a site that is less than 25 ha will result in the displacement of *some* land otherwise able to be used for rural production. The greater the contribution to biodiversity, the greater the extent of that displacement relative to the land area left to be used for rural production, particularly if the site is significantly below the 25 ha standard for a single dwelling as it is here.

[164] However, we note (and agree with) the Planning JWS that records:[31]

> The planners agree that Policy 16.2.1.7.Y.ii applies to any existing site in the rural zones which is below the residential density performance standard for the particular rural zone in which the site is located – how undersized an existing, rural site is, is not relevant to the operation of this policy.

[165] We must also account for the fact that planting of indigenous vegetation is permitted within the rural zone, implementing Objective 16.2.1 (amongst other provisions), notwithstanding that the rural productive capacity of the land would necessarily be displaced.

[31] Planning JWS, at [35].

[166] There is nothing to prevent a landowner carrying out a similar indigenous vegetation restoration proposal on an undersized lot in the rural zone without seeking consent for a dwelling, although the Council has made a strategic decision to incentivise a rural landowner to add to the resilience of biodiversity within the rural zones in return.

[167] Taken to its logical conclusion, the Council's approach would mean that every proposal relying on the 'Y(ii)' exception would be contrary to Objective 16.2.4 and Policies 16.2.4.2 and 16.2.4.4 (where the land is highly productive) as the planting would result in the displacement of rural productive land.

[168] In reply submissions, counsel for the Council states that it will be very challenging to formulate a proposal to pass the policy pathway on production land, as land will be lost to production. However, counsel submits that it would be possible to formulate a proposal which meets the 'unless' test in Policy 16.2.1.7.Y if the land was on steep terrain, or lesser, non-productive soils and/or where the site already contains indigenous vegetation.

[169] Those propositions these put to the ecology experts. We are reluctant to limit application of this policy exception to biodiversity restoration proposals on the poorer quality or the steeper soils within the rural zones of the district.

[170] We agree with Ms Peters that the operation of Policy 16.2.1.7.Y.ii will necessarily result in some displacement of rural activities in favour of the enhancement or protection of biodiversity values and associated activity. Although this necessarily entails a level of inconsistency with Objective 16.2.4 and Policy 16.2.4.4, we find that this creates only a minor degree of tension, more so with the policy than the objective.[32]

[171] However, we do not consider that this supports the finding that the proposal is contrary to these provisions, as the Council contends. It is also artificial

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[32] Which provides for rural productive use and conservation.

to conclude that a proposal seeking to invoke only exception Y (and not both X and Y) is contrary to the first exception X due to displacement of land otherwise available for rural production. The exceptions are enabling in their language. Meeting either one of these exceptions is a means of escaping the 'avoid' directive. The fact that a proposal does not find support from a policy exception expressed in enabling terms, does not mean it is contrary to it.

[172] We find that the extent of displacement of land able to be used for rural production resulting from the restoration proposal is minor, as it is considered to be by Ms Peters (in the Planning JWS) and as found by the Council in its first instance decision.[33]

[173] As to that, we acknowledge the appellants further condition volunteered in closing conditions, the effect of which would be to increase productivity on the land that is to be used for 'cut and carry'. This was suggested by Dr Lloyd and is that:

> The areas that are to be retained for pastoral purposes are to be sprayed and planted in a more productive mix of rye grass, white clover (small and large leaf) and plantain or some other similar productive grass and herb mix or crop.

[174] There would be nothing to prevent the appellants from increasing the productivity of their 'cut and carry' activity, however, we do not intend to impose this as a condition of the resource consent. We find that it is not justified in terms of s108AA(b)(i) of the RMA, despite the condition having been volunteered by the appellants.

Will the proposal make a significant contribution to the enhancement or protection of biodiversity values?

[175] We commence by noting a further element of the Council's case on this

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[33] The decision records that the proposal would [decrease] by a small degree the rural capacity of the land.

issue, as raised in counsel's reply submissions. This relates to the burden on an application seeking to pursue this limb of policy pathway. Counsel leans on the use of the word "will", in submitting that this places an onus on an applicant to show that the significant contribution *will* happen. Counsel submits that this component has been overlooked by the appellants.

[176] However, the 'onus' is no different to that which falls on every applicant or party in the sense that they must bring material of probative value which tends to logically show the existence of facts consistent with the findings sought to be made, and/or to support a contention. In other words, there must be a sufficient evidential foundation to provide the court with the reasonable assurance that the proposal will achieve the intended outcome.

[177] Nor do we accept that the appellants have overlooked this requirement of the policy exception. The Council's decision was appealed because the findings made by the Panel were not accepted by the appellants. Moreover, refinements have been made to the restoration proposal since the Council made its decision. These refinements 'shore up' the proposal when considered in light of this component.

[178] The question of whether the contribution is significant (or not), has to be undertaken at a 'local level'. As earlier noted, the Ecology JWS agreement records that the 'local level' includes the Maukaatua Scenic Reserve.

[179] As to the wider scale of the local level, we have earlier referred to the dispute about how this is to be determined. The ecologists acknowledge that 'local level' is not defined in the 2GP. Nor is there any guidance on how to assess a significant contribution to the enhancement or protection of biodiversity at a 'local level'.

[180] However, we accept Dr Lloyd's criticisms of the 'relatively large local level' identified by Mr Hooson, comprising an area of approximately 20,000 ha. Dr

Lloyd considers this too large to be a 'local level'[34] and we agree with this position. We note that no rationale is provided by Mr Hooson for his wide depiction of the 'local level'.

[181] We were attracted to Dr Lloyd's explanation for the approach that he had taken, which included consideration of the local area requirements of the miromiro/tomtit (*Petroica macrocephala*) as guidance.

[182] He referred to the fact that the miromiro require at least 30 ha of forest habitat within a 750 m radius to persist at a site, and that an area comprising twice the miromiro range (i.e. within a 1.5 km radius) would comprise 707 ha of habitat.

[183] He also excluded the foothills, as the planting site is located on the plains, although he observed that regardless of whether the local level was as small as he describes it "or within two, five, or ten kilometres of the site, there is practically no indigenous forest on the plains at any of these scales."[35]

[184] We agree that the local level should be restricted to no more than the plains habitat, and not including the foothills which Mr Hooson included. Even on the basis that the local area is the Taieri Plains, Dr Lloyd considers that the planting of 0.58 ha of indigenous forest (excluding the low stature planting)[36] would make a significant contribution at a local level as it would increase the extent of indigenous forest vegetation on the plains by 14%.

[185] In his rebuttal evidence, Dr Lloyd states that the relatively large area of indigenous forest bird habitat will make a significant contribution to forest bird habitat in the local area., noting that birds will easily disperse to the planted forest from the Maukaatua Scenic Reserve, using intervening exotic woodlots and

[34] Lloyd reply evidence, at [47]-[49].
[35] Lloyd reply evidence, at [49].
[36] This does not account for the reconfiguration of areas 1 and 1a in the closing submissions, which would increase the area of planted forest.

riparian vegetation as stepping stones.

[186] He states that indigenous birds that would utilise the planted forest at the site include kereru, tui, and bellbird (which already utilise kowhai on the adjacent property), piwakawaka/fantail, pipihi/silvereye, riroriro/grey warbler and pipirihika/brown creeper, which have been observed at Woodside Glen and which would be present in the closest part of the Maukaatua Scenic Reserve to the site.

[187] He observes that all of these species, with the exception of the pipirihika/brown creeper are adept at crossing gaps between habitats.

Our finding

[188] The appellants' restoration proposal must be considered within its local context, which on the evidence of Dr Lloyd, comprises a land environment highly depleted of any indigenous vegetation. The ecologists both agreed that undertaking indigenous restoration planting on land environments that retains less than 10% indigenous vegetation is important.[37]

[189] The information requirements in Rule 16.13.X includes provision of an assessment of the benefits to biodiversity values of options for biodiversity enhancement, an assessment of how ecological restoration may contribute to connectivity including with nearby areas of ecological importance amongst other items of information, all of which was addressed in Dr Lloyd's assessment.

[190] Dr Lloyd comprehensively discusses the benefits from the restoration and enhancement proposed at the local level. On the basis of Dr Lloyd's assessment, which we prefer to that of Mr Hooson, we find that the restoration proposal will make a significant contribution to the enhancement and protection of the biodiversity values at this local level.

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[37] Ecology JWS, at [12].

[191] Accordingly, we find that the proposal will meet this (and all other) components of the exception in Policy 16.2.1.7.Y.ii.

The RPS

[192] The Planning JWS records that little weight can be given to the Proposed Regional Policy Statement 2021 (Non-Freshwater Parts) as it remains in the further submission period. We agree with that position.

The NPS-HPL

[193] The only national policy statement potentially relevant is the National Policy Statement-Highly Productive Land (NPS-HPL) which is referred to in the Planning JWS. This was gazetted on 19 September 2022 and came into force on 17 October 2022.

[194] We agree with Mr Shiels KC, that the NPS-HPL does not of itself have the effect of altering the district plan in any manner. Section 55 of the RMA states that local authorities are to recognise national policy statements by amending their plan or proposed plan but only if the national policy statement directs them to.

[195] By cl 3.5(1) of the NPS-HPL, regional councils are directed, as soon as practicable and no later than three years after the commencement of the NPS, to notify maps of highly productive land and changes to their regional policy statements.

[196] Under cl 3.5(3), territorial authorities are directed to change their plans, but only if a regional policy statement has already been amended in accordance with cl 3.5(1).

[197] We agree that cl 3.5(7) does not of itself create any obligations on territorial authorities either as planning authorities or as consent authorities. As counsel notes, the current duties of territorial authorities under the NPS-HPL are found

in:

(a) cl 3.6 Restricting urban rezoning;

(b) cl 3.7 Avoiding re-zoning to rural lifestyle;

(c) cl 3.8 Avoiding subdivision; and

(d) cl 3.9 Avoiding 'inappropriate' use or development.

[198] We agree that cl 3.6, cl 3.7 and cl 3.8 do not apply to the proposal. Clause 8 is yet to be implemented by the Council.

[199] Clause 3.9(4) requires territorial authorities to include objectives, policies and rules in the plan to give effect to cl 3.9. This method of recognition is contemplated by s55(2) of the RMA and is consistent with the direction in cl 3.5(3) of the NPS-HPL.

[200] In the interim, this clause is problematic in a consenting context, particularly due to the nature of the direction in cl 3.9(2) which refers to measures in sub clause (3) that are required to be undertaken by the Council.

[201] Clause 3.9(4) requires territorial authorities to include objectives, policies and rules in the plan to give effect to cl 3.9. This is method of recognition is contemplated by s55(2) of the RMA and is consistent with the direction in cl 3.5(3) of the NPS-HPL.

[202] We intend to proceed on the basis that the NPS-HPL provisions are among the wide range of identified matters that the consent authority must have regard to.

[203] That said, we are unable to conclude that the proposed activity is 'inappropriate' in terms of the NPS-HPL definition. The restoration proposal would be consistent with the exclusions in either of sub-clauses (e) and/or (g) if that were a provision we were required to consider. It may even come within the

further exemption in cl 3.10(b)(i) due to the small size of the site area.[38]

[204] We consider that the 2GP does not see the use of this land for enhancement of indigenous biodiversity coupled with a residential activity as *necessarily* inappropriate when considered in the context of Policy 16.2.1.7.Y.ii.

[205] We note that in the further submissions filed by the Council, extensive reference is made to a recently issued Guidance Notes for the NPS-HPL published by the Ministry for the Environment (MfE). Counsel refers to passages containing examples of inappropriate activities for the purposes of cl 3.9, urging that approach upon the court, noting alignment with the Guidance Notes discussion with the approach of Ms Spalding on this issue.

[206] However, we are not prepared to give any weight to the discussion of the NPS-HPL in the MfE guidelines. We refer to the High Court's observation on the relevance of the Guidance Notes published by MfE for the NZCPS 2010 which we respectfully agree with and are in any event bound by:[39]

> The first question is what status should be given to the Department of Conservation's Guidance Notes. It is clear that they have no statutory basis, and that whilst helpful, they are not legally binding on the Court as necessarily properly interpreting the provisions of either the Act or the NZCPS. Whilst the Supreme Court may have referred to the Guidance Notes, not surprisingly it did not determine that the Guidance Notes are determinative, and indeed the Guidance Notes themselves include a disclaimer that they are not a substitute for legal advice, neither are they official government policy.

[207] This position is further reflected in subsequent decisions of the Environment Court, including in *Federated Farmers of New Zealand v Northland*

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[38] In that regard, the site may not qualify for inclusion as highly productive land in maps yet to be prepared by the Council in terms of cl 3.4 unless it forms part of a large and geographically cohesive area.

[39] *Opoutere Ratepayers and Residents Association v Waikato Regional Council* [2015] NZEnvC 105, at [97].

Regional Council.[40]

Part 2 matters

[208] We were not told of any invalidity, incomplete coverage or uncertainty within the 2GP that would justify an assessment in terms of Part 2 of the RMA, and accordingly, these provisions will not be further referred to.

True exception

[209] We address this as the final matter, being addressed by the Planning JWS as a potentially relevant matter in the s104(1)(c) context.[41] The Planning JWS records that:

> 63. With respect to 'true exception', Ms Peters is of the opinion that by meeting Policy 16.2.1.7.Y.ii including relevant factors set out in paragraph 62 of the evidence in reply of Dr Lloyd and paragraph 74 of the evidence in reply of Ms Peters, the proposal will be sufficiently 'unusual' to meet the 'true exception' test.
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> 64. In contrast, Ms Spalding is of the opinion that meeting Policy 16.2.1.7.Y.ii is insufficient to set the proposal apart as a true exception as the residential activity remains non-complying and there is nothing to differentiate the site from other existing undersized sites within the Taieri Plain Rural zone.

[210] For the Council, Ms Chadwick made the argument that the grant of consent would create an undesirable precedent effect unless the application was a 'true exception' in the sense of being unique to a sufficient degree from the generality of cases, so as to allow a grant of consent. Counsel referred to the *Auckland Regional Council v Roman Catholic Diocese of Auckland*[42] where the court said that both precedent and integrity effects must be largely based on the particular

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[40] [2022] NZEnvC 016.
[41] Planning JWS, at [63] and [64].
[42] [2008] NZRMA 409.

circumstances of an application.

[211] Counsel then referred to *Russell v Dunedin City Council*[43] where the phrase "true exception" was coined to assist with an analysis of a proposal to subdivide for residential purposes where a consideration was whether the proposal could be described as an exception to the generality of cases such that consent might be granted. That also involved an application for a noncomplying activity consent.

[212] Counsel acknowledges that subsequent cases comment that the case need not be truly unique before issues of precedent or plan integrity cease to be a relevant factor. The decision-maker must look to consider whether there are factors which take the particular proposal out of the generality of cases.

[213] Various cases were referred to where such questions had been raised, although they are all fact specific and not very helpful in this particular context.

[214] It suffices to note that the particular concern for the Council is revealed in the assessment undertaken by Ms Spalding who states that there may be as many as 157 sites of a similar size and the rural Taieri Plain zone which might seek to rely on a precedent set by a grant of this application.

[215] Reference is made in counsel's further submissions to Ms Spalding's analysis of the related concept of cumulative effects, particularly her evidence that the 'tipping point' for cumulative effects on highly productive land has been reached on the Taieri Plain.[44]

[216] It is in this context that Ms Spalding has identified a significant risk of precedent being set by a grant of consent which would further contribute to cumulative effects on the availability of highly productive land if consent to this

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[43] ENC Christchurch C092/03, 8 July 2003.
[44] Spalding EIC, at [42].

proposal is granted.

[217] The Council's case on these issues appears to be intertwined with its position that the proposal is contrary to priority objectives and policies within the 2GP such that the integrity of the plan would be affected if consent were to be granted in circumstances where the proposal was not a true exception to the generality of cases that might seek to invoke this policy pathway.

[218] Counsel further addressed the question framed by the court as to whether there is a need for a 'true exception' test if a proposal seeks to rely on and is able to meet the pathway in 16.2.1.7.Y.ii. Counsel notes that this may depend on whether the court agrees that the proposal is only contrary to Policy 16.1.2.7 and no others, attributing this position to Ms Peters.

[219] However, we have found that the proposal is not contrary to the 'avoid' directive in Policy 16.2.1.7, even if that is Ms Peter's position. Importantly, the proposal is able to bypass that directive by coming within the Y exception. Accordingly, and based upon the court's findings, questions of plan integrity and precedent do not arise if consent is granted to this proposal. If any precedent is set by a grant of this consent, it is not an undesirable precedent in our opinion.

[220] We further agree with Mr Shiels KC that the basis upon which the Council granted consent for the Waikouaiti site is irrelevant. The factual circumstances applying in that case were significantly different. The appellants do not rely on that decision as a precedent in support of their own application.

[221] As we set out below, we have found that the application is for an activity that is not contrary to any of the relevant objectives and policies of the 2GP in fact it is supported by some of those provisions.

[222] We do not find it helpful to apply a further non-statutory test of whether the proposal is a true exception. Unlike other cases, the 2GP policy framework is somewhat unusual, in that it provides a pathway through the policy framework by

which consent may be obtained for a non-complying activity. It cannot be said that the 2GP is rigidly set against all residential activity on sub-standard rurally zoned sits. That factor sets this plan apart.

Findings on statutory assessment

[223] We have identified all relevant matters under s104 and considered the threshold tests in s104D. We note the agreement of the planners in the Planning JWS as to the adverse effects in the context of the first threshold test. On the question of whether there would be adverse effects on rural production, we accept the evidence of Ms Peters set out in para [31].

[224] As to the remaining issues, we took much guidance from Dr Lloyd's expert evidence in applying the Policy 16.2.1.7.Y.ii exception whose evidence was accepted in preference to that of Mr Hooson.

[225] We find that each of the s104D test is met as:

(a) the effects on the environment associated with loss of rural productive land, rural character and amenity effects in particular will be no more than minor;
(b) the activity is not contrary to relevant objectives and policies of the 2GP identified in the evidence; in fact it is supported by some, including the Policy 16.2.1.7.Y.ii exception.

[226] Having found that both tests in s104D are able to be met, we have a discretion to consider a grant of consent, having regard to all relevant s104 matters.

Exercise of the court's discretion

[227] We find that a grant of consent to the proposal as sought in the application, together with subsequent amendments is appropriate.

[228] Accordingly, the appeal against the Council decision is allowed. The decision is overturned and resource consent is granted to the application proposed by the appellants subject to conditions, including (for the avoidance of doubt):

(a) the additional condition requiring biannual monitoring after the end of the five year period of annual monitoring agreed to by the planners in the JWS;

(b) the condition proposed by the planners requiring a registered covenant, set out in para [121] of this decision which we consider is appropriately worded.

[229] The court's decision is final in relation to our statutory evaluation under ss 104 and 104D, but interim in relation to the final set of conditions. These are to be lodged by the appellants having consulted with the Council in respect of the same. Conditions are to be lodged in 10 working dates of the date of this decision.

For the court

THE SEAL OF THE ENVIRONMENT COURT NEW ZEALAND

P A Steven
Environment Judge