

**BEFORE THE CENTRAL OTAGO DISTRICT COUNCIL**

**Under**

the Resource Management Act  
1991

**In the Matter**

of the hearing of submissions on  
the Central Otago District Plan –  
Proposed Plan Change 19

**Summary of Legal Submissions on behalf of  
Lowburn Viticulture Limited (Submitter 123)**

Dated: 25 May 2023

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Clause 3.5(7)(a)

## MAY IT PLEASE THE PANEL

1. I have filed detailed legal submissions. Do you have a copy of those? Have read them in full? I cover a lot of detail there, so today I will provide a summary.

## THE SITE

2. The Site is approximately 5.6 ha in area, 1.3km from the Lowburn Valley Rd/SH6 intersection, and is immediately contiguous with the existing Lowburn residential area (**Site**).
3. Have you undertaken or will you undertake a Site visit for the purposes of this hearing and your deliberations? My client is happy to facilitate this.
4. The Site is zoned Rural Resource Area (**RU**) under the Operative Plan. No changes to this zoning are proposed by PC19 as notified, however, the contiguous residential area is proposed to be zoned Large Lot Residential Zone (Precinct 2), which anticipates residential living on 3000m<sup>2</sup> lots.
5. LVL seeks an extension of this zoning to encapsulate its Site.

## CONFLICT

6. Some of you may be aware that LVL has concerns that the Chair has a conflict, in so far as rezoning submissions at Lowburn are concerned. That is because the Chair resides at Lowburn, some 400 metres from LVL's Site. The Chair is potentially affected by and likely has personal views on the appropriateness of the Lowburn rezonings, and for this reason we have requested that he recuse himself from hearing and deliberating on Lowburn submissions, to ensure there is no risk of bias, actual or perceived. This request has been declined, so we are here today, proceeding reluctantly, as we have no other option for our submission to be heard.
7. Nonetheless, we remain concerned about fairness in decision making, and ensuring that personal views on the issues and evidence do not consciously or unconsciously influence outcomes. Those views may be about infrastructure capacity, traffic, visual impacts and the like. You should not apply your own

perspective to these matters, but rely instead on the expert evidence that is before you, and weigh that up in your decision making.

## THE SUBMISSION

8. LVL has extensive involvement with development of the Lowburn residential area. The most recent stage of LVL's development, Turner Terrace, adjoins the Site. There is no clear demarcation, landscape or otherwise, between this area and the Site, and the Site presents as part of the residential catchment.
9. The Site is wholly unproductive, with steep slopes, poor soils and no access to water. It presently has no economic use.
10. A large lot residential zoning would align the residential/rural boundary with a topographical feature (a gully), providing an obvious and logical landscape basis for the delineation of the two zones, which is presently arbitrarily defined by property boundaries.
11. It would also facilitate the provision of additional housing to cater for growth over the life of the District Plan – this being the objective of PC19 – and provide housing variety and choice, as well as providing an economic and efficient use for wholly unproduced land.
12. No submitter opposes the rezoning.

## EVIDENCE

13. Evidence has been filed in support of LVL's submission.
14. Have you read this in full?
15. On the basis that you have, summaries of the evidence will be presented today from:
  - (a) Mr Van Der Velden, LVL director;
  - (b) Andy Carr, traffic engineer;
  - (c) Dr Reece Hill, Soil Scientist (via remote link);
  - (d) Jake Woodward, Planner.

## SECTION 42A REPORT

16. Ms White has assessed the rezoning relief. You will be aware that her assessment was prepared before LVL's evidence was filed, so she did not have the benefit of the evidence when preparing her report.
17. Her assessment is that the zoning relief is generally consistent with the Cromwell Spatial Plan, and would provide a logical expansion to the current Lowburn residential area. Further, that the rezoning would be consistent with the current amenity and character of the Lowburn township.
18. Ms White is of the understanding, however, that part of the land has an LUC3 classification, and that this means, under the NPS-HPL, that the Site cannot be rezoned unless it is necessary to cater for demand in the District, there are no reasonably practicable or feasible alternatives, and the benefits of the rezoning outweigh the costs. Of these three 'tests' she considers the second two are met, but the first is not. The NPS-HPL is a matter you need to consider and one I will cover in more detail very shortly.
19. Aside from the NPS-HPL, Ms White echoes the concerns of Ms Muir, that suitable waste water infrastructure may not be available at Lowburn for a few years yet, and that if the Site were to be rezoned, then this would need to align with necessary infrastructure upgrades. She recommends a Future Growth Overlay (**FGO**) or a bespoke rule in this regard.
20. So, from Ms White's perspective, it's not a case of whether the land *should* be rezoned, but *when* that zoning should take effect.
21. Mr Woodward has addressed the FGO and bespoke rule options in detail in his evidence, which I assume you have carefully read, and he will cover them further here today. I will also make some additional brief comments shortly.
22. So, these are the two issues on which you need to focus your inquiry:
  - (a) the NPS HPL; and
  - (b) whether an FGO or bespoke rule is necessary to ensure development in an extended large lot residential zone is aligned with the Council's infrastructure programme.

23. If you can be satisfied on these matters, then there is no reason not to rezone the Site.

### LEGAL FRAMEWORK FOR DECISION MAKING

24. I think it will assist your deliberations if I make some brief comment on the legal framework within which you need to make your decision.
25. In general terms, the purpose of the preparation, implementation, and administration of district plans (and changes) is to assist councils to carry out their functions in order to achieve the purpose of the Resource Management Act (RMA or Act).
26. Your role here today is as a decision maker under the RMA, not as a Councillor or community representative. Your task is not to effect what you understand to be community wishes and aspirations, but to make a decision on a plan change proposal and submissions thereon, in accordance with the statutory framework, and in a manner that gives effect to the purpose of the Act.
27. The Cromwell Spatial Plan is a precursor to this plan change process, but it is not a statutory document to which you must have regard when hearing submissions, and it should have no significant bearing on your deliberations. What you need to decide is which of the zoning options before you today best achieves the purpose of the Act and the objectives of PC19 (not the intent of the Spatial Plan).
28. More particularly, when hearing and making decisions on submissions on Plan Change 19, you must do so in accordance with:
- (a) the functions under section 31. These include the Council's obligations under subsection (1)(aa) to ensure that there is *sufficient development capacity in respect of housing ...land to meet the expected demands of the district*; and
  - (b) the provisions of Part 2 of the Act; and
  - (c) section 32 of the Act, addressing costs, benefits and alternatives; and

- (d) relevant national policy statements - here the National Policy Statement on Urban Development (**NPS-UD**), and the National Policy Statement on Highly Productive Land (**NPS-HPL**).
29. Section 32 sets out the framework within which you must consider the submissions, evidence and reports before you. Under section 32, you must examine whether what is proposed is the *most appropriate* way to achieve the purpose of the Act, and the objectives or purpose of the plan change. You also need to identify and assess *other reasonably practicable options* to achieve the objectives, and the *efficiency and effectiveness* of the options, as well as the *benefits and costs*.
30. The Courts have helpfully articulated several principles to assist and guide your assessment. These are:
- (a) You should not start with *any particular presumption* as to the appropriate zoning outcome. That is, you should *not* commence your deliberations on the basis that PC19 as notified is the correct or best option and that it is for submitters to disprove that.
- (b) Rather, this hearing is more the nature of an *inquiry* into the merits of the options, in accordance with the statutory framework.
- (c) Your task is to seek to obtain the *optimum* planning solution, based on an evaluation of the totality of the evidence before you.
- (d) When deciding what, on balance, is 'the *most appropriate*' option you do not need to be satisfied that it is the 'best' option, rather, that option you decide on is merely 'suitable' for achieving the various objectives.
- (e) When considering the zoning options, you must bear in mind that it is the restrictions on the freedom to develop that must be justified, rather than the permissions. To put it more succinctly, it is the 'noes' in the plan change that must be justified, not the 'ayes'.
- (f) Where the purpose of the Act and the other relevant planning documents can be met by a less restrictive regime, then that *less restrictive regime must be preferred*. In other words, where you have two options that

achieve the Act's purpose and the objectives of the plan change and other statutory documents, then you must choose the least restrictive, most enabling option. This is particularly relevant to your consideration of an FGO or bespoke rule to address wastewater matters. If there is another less restrictive/more enabling way to address this, for example, an existing rule, then that is the option you should prefer in your decision making.

### PLAN CHANGE 19 OBJECTIVE

31. When working through these statutory tests and weighing up the options, you must bear in mind the objective or purpose of PC19, as this will necessarily inform your assessment as to which of the zoning options is the 'most appropriate'.
32. The objective or purpose of PC19 is set out in the section 32 evaluation prepared prior to the notification of the plan change.
33. In sum, the plan change's purpose is to respond to demand for residential land and housing, and plan for growth over the next 30 years, that is, over the life of the District Plan and beyond:<sup>1</sup>

*"PC19 has been driven by, and is intended to implement the direction set out in, the Vincent and Cromwell Spatial Plans, in relation to the District's residential areas. These plans have been prepared by the Council **to respond to demand for residential land and housing affordability concerns in the District, and in order to plan for the anticipated growth over the next 30 years.** Given the immediate need to address these issues, Council has decided to progress this plan change ahead of the full Plan Review."*

### ZONING OPTIONS

34. In terms of the zoning options for your consideration under section 32, these are:
  - (a) **Option A:** Retain the operative rural (RU) zoning of the Site;
  - (b) **Option B:** Apply a LLR (P2) zoning to the Site (LVL's relief).

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<sup>1</sup> Section 32 Evaluation Report, para 4.

35. As I have summarised earlier, Ms White generally agrees that a large lot residential zoning aligns well with the objective of PC19 (and indeed the spatial planning that preceded PC19), and would not give rise to adverse effects.
36. The issues you need to resolve are whether the NPS-HPL precludes the residential zoning, and if it doesn't, whether a deferred zoning (FGO) or bespoke rule is required to address waste water matters. I now address these issues.

### NPS-HPL

37. The National Policy Statement on Highly Productive Land (**NPS-HPL**) came into force on 17 October 2022, with immediate effect. While this was after the notification of and submission period for PC19, PC19 must nonetheless 'give effect' to it (section 75(3)(a) of the Act).
38. The NPS-HPL applies to 'highly productive land', and places restrictions on the use of that land, including for urban (residential) development and zonings.
39. 'Highly productive land' is land that as mapped as such by a regional council, or, where, as here, no mapping has been undertaken, and until such time as it is, it is land that is, at the time the NPS-HPL came into force, is (relevantly) (clause 3.5(7)):
- (i) zoned general rural or rural production; and
  - (ii) LUC 1, 2, or 3 land.
40. In terms of the first limb (i), Ms White and Mr Woodward agree that the Operative District Plan's Rural Resource Area, being the zoning of the Site at the time the NPS-HPL came into force, is equivalent to a 'general rural' or 'rural production' zone. This means that LVL's land meets the first limb of the 'highly productive land' definition.
41. We then need to consider the second limb, and whether LVL's land is 'LUC 1, 2, or 3 land', as defined.
42. The NPS-HPL defines LUC 1, 2 or 3 land as:

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

*I think this is intended to read that*



- 43. For some context to this definition, the Land Use Capability Classification (**LUC**) is a system in use in New Zealand since the 1950s that classifies all of New Zealand's rural land into one of eight classes, based on its physical characteristics and attributes. Class 1 land is the most versatile and can be used for a wide range of land uses. Class 8 land is the least versatile and has many physical limitations.
- 44. The New Zealand Land Resource Inventory mapping (**Resource Inventory Mapping**), which is referenced in the NPS-HPL definition, was undertaken in the 1970s at a regional scale (1:50,000). The LUC unit boundaries it maps do not always align with topography and other geographic features, primarily because the Resource Inventory LUC mapping is based on hard copy maps showing 20 metre topography.
- 45. As Dr Hill explains, more recent technology enables a much closer examination of land and may identify different LUC boundaries to those mapped in the Resource Inventory due to the different (finer) scale of the mapping (between 1:5,000 and 1:15,000).

46. Ms White relies on the Resource Inventory Mapping classification of LVL's Site. This classifies part of the Site as LUC 3, with the remainder being LUC 7 (non-productive). LUC 3 is highly productive land for the purposes of the NPS-HPL.

47. However, since Ms White prepared her report, Dr Hill has undertaken more detailed investigations of the Site, as contemplated by the latter part of the definition. To recap: "LUC 1, 2, or 3 land means land identified as Land Use Capability Class 1, 2, or 3, as mapped by the New Zealand Land Resource Inventory or by any more detailed mapping that uses the Land Use Capability classification."

48. Dr Hill has undertaken the more detailed mapping contemplated by the definition. His assessment, using the Land Use Capability classification, is that the Site is not LUC class 1, 2, or 3, but that the slopes are LUC 7 land and the flatter parts are more properly classified LUC 4 land, at best.

49. LUC 4 (and 7) land is not 'highly productive land' for the purpose of the NPS-HPL. Thus the NPS-HPL does not apply to the Site and need not be considered in your inquiry. That is, the NPS-HPL does not preclude or restrict rezoning the Site for residential purposes.

Classes 3, 5, 7(a)  
 refers to LUC 1, 2 or 3  
 the definition of that,  
 allows for alternate assessment.

3:10

Flawed Rationale

50. With that matter resolved, we turn our minds to infrastructure.
51. [I note that if you do not accept Dr Hill's evidence, there is a pathway for the rezoning under NPS-HPL clause 3.6(4). I've addressed this at length in my full legal submissions, as has Mr Woodward in his evidence.

### **Infrastructure**

52. As I've noted, infrastructure servicing, waste water in particular, is identified as a temporary constraint to zoning additional land at Lowburn, with Ms Muir reporting that the reticulated wastewater main requires reconfiguration to enable it to operate effectively and provide additional capacity.
53. She records that funding is allocated and the necessary work will occur between 2026 and 2028 that is, in as soon as (just over) two years' time. (Although the indication given yesterday was that these works may commence sooner, in 2025).
54. This will provide increased capacity to accommodate growth.
55. Ms White recommends a bespoke rule or FGO is applied to ensure future development on LVL's Site aligns with this planned upgrade. That is, she supports the rezoning, subject to these parameters.
56. LVL's position is that an FGO or similar is both unnecessary and unsatisfactory.
57. When undertaking the final stage of the existing residential development at Lowburn (Turner Terrace), LVL was required to and in 2018 did pay a development contribution of \$73,000. The contribution was required for the purpose of upgrading the Lowburn wastewater pump station to accommodate growth at Lowburn.
58. From correspondence with the Council and on the basis of Ms Muir's report it appears that, some five years on, this contribution has not yet been applied for the purpose for which it was taken. It further appears that CODC's decision not to apply the development contribution and undertake the upgrade works is the primary reason why LVL's submission is not supported now.
59. Issues of fairness arise.

60. In any case, Ms Muir's evidence is that the works required to upgrade the wastewater infrastructure to cater for growth are planned and funding is allocated. As Mr Woodward details, it is highly likely that the timing of the planned upgrade will coincide with development under a large lot residential zoning.
61. Deferring the residential zoning, via a bespoke rule or an overlay, is unnecessary in these circumstances and it would be inefficient as it would add unnecessary cost and delay to development that is otherwise acknowledged as appropriate.
62. Furthermore, the subdivision rules that would apply to any large lot development enable wastewater matters to be assessed at that time (under rule SUB-R4), and, given subdivision is proposed to be a restricted discretionary activity, consent can be declined if they are not adequately addressed.
63. Moreover, development contributions will inevitably be required for any residential development and can be applied to undertake or facilitate any necessary wastewater upgrades if these have not otherwise occurred.
64. In all these circumstances, an FGO or bespoke rule is unnecessary and cannot be justified under section 32, noting here that the notified large lot rule framework contains methods through which these infrastructure issues can suitably be addressed, and that as the least restrictive regime, it should be preferred in your decision making.

## **SUMMARY**

65. In summary and conclusion, LVL's land is a suitable candidate for rezoning, because it:
- (a) is contiguous to the established Lowburn residential area;
  - (b) it would present as a logical and coherent extension to that;
  - (c) it does not contain highly productive soils and is otherwise unproductive;
  - (d) it would not give rise to any adverse landscape effects, but would provide a robust landscape and landform based boundary to the residential area;

(e) it can be serviced for infrastructure over the life of the Plan, with infrastructure upgrades planned in the near future;

(f) No submitter opposes it.

66. Moreover, it provides land that is wholly unproductive with an economic use, which will benefit not only LVL, but the community more generally in so far as it will provide housing supply and choice, thus meeting demand for housing over the life of the District Plan, this being the purpose or objective of PC19, and bearing in mind that demand is not only concerned with the *number* of houses, but also the *nature, type and location* of housing.

**R Wolt**

**Counsel for Lowburn Viticulture Limited**