

9 February 2024

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Central Otago District Council
PO Box 122
Alexandra 9340

Sent via email: resource.consent@codc.govt.nz

Otago Regional Council (ORC) submission on application for subdivision and land use of a property at 172 Burn Cottage Road, Lowburn

ORC is not a trade competitor for the purposes of this submission.

ORC would like to speak to its submission if there is the opportunity.

Decision requested:

ORC requests that the application as notified be declined.

Application Details

ORC's submission relates to the information and property details below given in the application, further information and the public notification by Central Otago District Council (CODC).

Consent Number: RC220453
Applicant: Burn Cottage Road JV Limited
Location: 172 Burn Cottage Road, Lowburn

Reasons:

A section of the property (proposed Lot 4 of 3.6 ha) is identified by Manaaki Whenua Landcare Research as containing land mapped as Land Use Classification 3 (LUC 3). Under the National Policy Statement for Highly Productive Land (NPSHPL), land which is classified as LUC 3 is considered Highly Productive Land (HPL). No appropriately qualified evidence has been provided by the applicant to demonstrate the subdivision meets the relevant exception tests under the NPSHPL.

ORC therefore considers the proposed subdivision activity to be contrary to the NPS HPL, as well as regional and district planning frameworks and consent should be declined.

National Policy Statement for Highly Productive Land

Status of the LUC 3 classification

1. The NPSHPL came into force on 12 September 2022.
2. There is currently no regional mapping of HPL in Otago as directed by Clause 3.4 (1) of the NPSHPL. Until this mapping exercise is completed, Clause 3.5(7) (a)(i) and (ii) of the NPS HPL provide transitional provisions for applying this national direction.
3. The site is zoned as Rural Resource Area under the CODC District Plan.

4. The application acknowledges the proposed Lot 3 contains land classified as LUC 3, as identified on the Manaaki Whenua Landcare Research¹ mapping.
5. The subject site therefore meets the test as containing HPL under Clause 3.5(7) (a)(i) and (ii).

Implementation of the NPS HPL

6. Section 3.8 of the NPS HPL requires that territorial authorities must, unless specified exemptions are met, avoid the subdivision of highly productive land. Section 3.9 similarly directs avoidance of the inappropriate use or development of highly productive land that is not land-based primary production.
7. ORC considers the transitional provisions of the NPS HPL apply to this application, and those provisions require the subdivision of HPL to be avoided.

Exemptions and Exceptions

8. ORC has reviewed the application, further information request and subsequent correspondence exchanges between the CODC and the applicant in respect to matters relating to the NPSHPL and HPL.
9. ORC disagrees with the applicant's interpretation of how the NPSHPL is to be implemented within this resource consent process and agrees with the CODC that it has a duty to follow the directives of the NPSHPL, specifically as set out in Clauses 3.8 and 3.9.
10. Section 55 of the Resource Management Act 1991 (RMA) sets out the matter of 'Local authority recognition of national policy statements. Section 55(3) states:

"A local authority must also take any other action that is directed by the national policy statement."
11. As such, ORC does not share the applicant's view that under s104(1)(b)(iii) of the RMA the requirement to "*have regard*" to a national policy statement (NPS) is simply a weighting consideration, in so far that non-compliance with an NPS should be balanced against other s104 considerations.
12. ORC's view is that "*have regard*" requires that, subject to any exemption or exception provisions (and those provisions being met), the NPS's directions for avoiding subdivision and inappropriate use and development of highly productive land should hold primacy in the consideration of the relevant activities under s104 and guidance of a decision.
13. The applicant is correct that ORC is yet to complete the mapping exercise it is required to undertake under the NPSHPL. It is a complex technical exercise that must be completed across the entire region. The process will involve Schedule 1 consultation.

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14. While the section 32 evaluation report for the NPSHPL² noted the NPSHPL was careful not to make protection of HPL absolute, the report emphasises (page 7 and elsewhere through the report) that the test for exceptions is intentionally strong to avoiding undermining the intent of the entire NPSHPL.
15. ORC does not accept the applicant's view that application of the NPSHPL in this process is only a policy issue. ORC's view is that any assessment of land and its classification in respect to HPL, and applying the exceptions provision of the NPSHPL, requires appropriate technical input.
16. ORC could not identify any qualified, expert evidence provided to support the application's statements made in respect to the land not being HPL and being solely contained within proposed Lot 4, as well as meeting various exception provisions of Clause 3.10 of the NPSHPL.
17. In respect to the HPL, and the level of evidence this application can be expected to provide, it is useful to consider the planning context of the proposal:
 - a) It is a discretionary activity under the District Plan
 - b) It is inconsistent with the relevant productive soil policies of the District Plan
 - c) It is inconsistent with the relevant policy framework of the ORC's Regional Policy Statements (being the partially operative and the proposed RPS)

Of importance, the application is subject to a national direction - the NPS HPL.

18. Some degree of reliance and weight can be afforded to the section 32 report for the NPS HPL. It provides details on the intention of the policy framework which was developed and passed into law. The report highlights that any consenting decisions made that result in a loss of HPL during while the transitional phase of the NPS HPL is in effect, will inform any subsequent plan changes.
19. If a subsequent plan change is to be informed by consents granted under the NPS transitional provisions, then for reasons of due process and natural justice, our communities must have confidence that those consents (such as being applied for) were supported by evidence that was qualified, and commensurate to the technical matters under consideration.
20. In this case, due to the absence of a commensurate level of assessment and expert evidence addressing all relevant matters required to be under the NPS HPL, ORC considers the application does not demonstrate it meets the NPSHPL exemption or exception tests of the NPSHPL as the application promotes.

Regulatory Assessment

21. Under section 104 of the RMA, the applications must be considered by having regard to:

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- a) the partially operative Regional Policy Statement 2019 (poRPS 2019), and
 - b) the proposed Regional Policy Statement 2021 (pRPS 2021), and
 - c) Giving effect to the CODC District Plan
22. The pRPS 2021 has been notified, and hearings for both the freshwater and the non-freshwater components have now been completed. Therefore, some legal weight can be given to any relevant provisions of the pRPS 2021.
23. ORC considers the application as notified to be inconsistent with the poRPS 2019 and the pRPS 2021. In particular;

poRPS 2019

- a) **Chapter 3** sets out a planning framework to support Otago having high quality resources and ecosystems.
- b) **Objective 3.1** seeks that *'The values (including intrinsic values) of ecosystems and natural resources are recognised and maintained, or enhanced where degraded'*;
- c) **Objective 3.2** seeks that *'Otago's significant and highly-valued natural resources are identified and protected, or enhanced where degraded'*
- d) **Chapter 5** sets out a planning framework to ensure people can use and enjoy Otago's natural and built environment
- e) **Objective 5.3** seeks that sufficient land is managed and protection for economic production
- f) A suite of policies support Objectives 3.1, 3.2 and 5.3 with those of relevance being:

- i. Policy 3.1.7 Soil Values
- ii. Policy 3.2.18 Managing significant soil
- iii. Policy 5.3. Rural Activities

24. These policies align with the direction given in the NPS HPL as to the importance of recognising and protecting HPL from subdivision of land that may result in the loss of productive capacity and efficiency.
25. Overall, ORC considers the application to be contrary to the PORPS 2019 as it promotes subdivision and development that is inconsistent with the management of soils with significant values and would further increase the risk of a loss of productive capacity and efficiency.

pRPS 2021

26. The following objectives and policies are of particular relevance:

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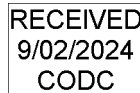
- a. IM- 03 Environmentally sustainable impact
- b. IM-P1 Integrated approach
- c. LF-LS-011 Land and soil
- d. LF-LS-012 Use of Land
- e. LF-LS-P17 Soil Values
- f. LF-LS-P19 Highly productive land
- g. UFD-O4 – Development in rural areas
- h. UFD-P7 – Rural Areas

27. The policy framework of the proposed RPS 2021 builds on the direction of the RPS 2019 and more strongly reflects the NPS HPL.
28. ORC considers that application is inconsistent with the pRPS 2021 as it promotes subdivision and development that would see a reduction in the productive potential and capacity of highly productive land.

Central Otago District Plan

29. ORC considers the proposal to be contrary with the objectives and policies of the CODC district plan, in particular;

Chapter 4: Rural Resource Area



- **4.3.7 Objective - Soil Resource**
To maintain the life-supporting capacity of the District's soil resource to ensure that the needs of present and future generations are met.

- **4.4.6 Policy – Adverse Effects on the Soil Resource**
To ensure that the location, construction and/or operation of land use activities and subdivision make adequate provision for the protection of the soil resource by avoiding, remedying or mitigating the adverse effects of practices which may cause:
 - (a) Erosion, instability or loss of topsoil,
 - (b) Loss of nutrient or incidence of soil contamination,
 - (c) Loss of soils with special qualities,
 - (d) A reduction in vegetation cover and moisture holding capacity, and
 - (e) Soil compaction.

- **4.4.10 Policy** – Rural Subdivision and Development To ensure that the subdivision and use of land in the Rural Resource Area avoids, remedies or mitigates adverse effects on:

...

(e) The loss of soils with special qualities,....

Chapter 16: Subdivision

- **16.3.5 Objective** - Water and Soil Resources To ensure that subdivision does not facilitate development that may compromise the life-supporting capacity of the District's water and soil resources.

30. As provided, the application does not demonstrate a proposal that maintains the life supporting capacity of the district soil resource, as it would result in subdivision of land potentially loss of, highly productive soils.

31. ORC considers objective 16.3.5 reflects that subdivision (and associated land use) should not compromise life supporting capacity of the district's soil resource, and as discussed above the proposal may do so. There are no policies which support this objective. ORC has considered that Objective 16.3.5 (in addition to Objective 16.3.11) is useful for considering the potential for adverse impacts of the disposal of wastewater on to HPL which would preclude its use for primary production in the future.

Conclusion

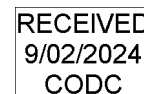
32. ORC considers that the proposal for subdivision and land use as applied for is contrary to the NPSHPL, the Objectives and Policies of the ORC's partially operative Regional Policy Statement 2019, and proposed Regional Policy Statement 2021, and the objectives, policies and rules of the Central Otago District Plan. Therefore, the application should be declined.

If you have any questions, please contact Warren Hanley (warren.hanley@orc.govt.nz), Senior Resource Planner Liaison at ORC's Dunedin Office.

Yours sincerely



Anita Dawe
General Manager, Policy and Science



cc: Allan Cubitt, allan@cubittconsulting.co.nz