FTA-25 -

UNDER the Fast Track Approvals Act 2024 ("**the FTAA**")

IN THE MATTER of an application by CDL Land NZ Limited for approvals under the FTAA for a listed project, Arataki

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MEMORANDUM OF COUNSEL REGARDING MANAGEMENT PLANS AND THE APPLICABILITY OF THE NPS-HPL

16 JULY 2025

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MEMORANDUM OF COUNSEL REGARDING MANAGEMENT PLANS AND THE APPLICABILITY OF THE NPS-HPL

Introduction

1. This memorandum is filed in support of CDL Land NZ Limited's ("**CDL**") application under the Fast Track Approvals Act 2024 ("**FTAA**") for the Arataki proposal ("**Application**"), a listed project under the FTAA. It addresses two matters relevant to the Application, being:

   (a) The test of completeness under clause 5 of Schedule 5 FTAA; and

   (b) The applicability of the National Policy Statement for Highly Productive Land ("**NPS-HPL**").

2. The Application seeks approval for the subdivision and development of the Arataki site at 86, 108, and 122 Arataki Road, Havelock North, Hawke's Bay. It will enable the construction of 171 detached dwellings.

3. With respect to the two questions posed at paragraph 1 above:

Completeness

4. A detailed analysis of this question is set out in **Annexure 1**. A summary of that advice follows:

5. The Application meets the tests in section 46(2) of the FTAA and can be accepted for processing by the EPA. It contains the information set out at Clauses 5 to 8 of Schedule 5[1] and provides that the information "*in sufficient detail to satisfy the purpose for which it is required*"[2].

6. At this early stage of the process, the information needs to be in sufficient detail to enable the EPA to determine whether the application should be accepted for processing. In contrast, a greater quantity and / or better quality of information *may* be needed later in the process to enable a full assessment

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[1] Section 43(3)(a) FTAA.
[2] Section 44 FTAA.

of the merits of the application. If that is the case, then the decision maker can exercise its powers under section 67 FTAA to request further information.

7. Those two steps (completeness assessment and substantive assessment) should not be conflated.

8. The Application is comprehensive, and the AEE details exactly how each of the information requirements are met. To the extent a question arises about whether sufficient information has been provided where proposed conditions of consent require the provision of specified construction and operational management plans, rather than including that detail in finalised form as part of the application:

   (a) This approach adopted by CDL is in accordance with accepted resource management principles and practice and complies with longstanding case law developed under the RMA which remains relevant to the EPA's consideration here. The conditions comply with the principles set out below.[3]

   (b) Draft management plans are provided, even though this is not required.[4] Providing draft rather than final management plans is an appropriate and lawful approach provided the condition complies with the principles set out below.

   (c) No issues as to completeness arise. To the extent there is a concern that the management plan approach is not an appropriate one in the circumstances, or that further detail is required to justify it, that is a matter of merits for consideration as part of the substantive assessment.

The Applicability of the NPS-HPL

9. A detailed analysis of this question is set out in **Annexure 2**. A summary of that advice follows:

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[3] Annexure 1, paragraphs 10.
[4] Annexure 1, paragraph 11.

10. The NPS-HPL applies to "*highly productive land*". An interim definition of "*highly productive land*" is contained at clause 3.5(7) identifying land subject to the constraints of the NPS-HPL prior to the Council undertaking a mapping exercise.

11. The Arataki Site is identified as LUC 3 and has a rural zoning. It therefore meets the criteria at cl 3.5(7)(a) of the NPS-HPL.

12. However, cl 3.5(7)(b) provides an exemption for land which would otherwise be defined as highly productive, but which is "*identified for future urban development*". Land which is "*identified for future development*" is exempt from the directive requirements of the NPS-HPL.

13. Land "*identified for future development*" is defined (relevantly) as being "*identified in a strategic planning document as suitable for commencing urban development over the 10 years [from September 2022]; and at a level of detail that makes the boundaries of the area identifiable in practice*".

14. As detailed in **Annexure 2**, the Arataki Site was identified in a strategic planning document[5] as suitable for commencing urban development over the next 10 years[6] as at the commencement date of the NPS-HPL.

15. Despite our view that the NPS-HPL does not apply to the Arataki Site, out of an abundance of caution an assessment of the proposal under the relevant exemption pathway[1] of the NPS-HPL has been undertaken. That assessment confirms that, even if the Arataki Site qualifies as "*highly productive land*" under the NPS-HPL, it is subject to permanent or long-term constraints and is therefore able to be subdivided, used or developed notwithstanding clauses 3.7 to 3.9 of the NPS-HPL. In those circumstances, granting consent to develop the Arataki Site for housing would not be inconsistent with or contrary to the NPS-HPL.

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[5] The Heretaunga Plains Urban Development Strategy (HPUDS). See Annexure 2, para 2(d)(i).
[6] As per the HPUDS, that detail (timing) is devolved to the Hastings District Plan. See Annexure 2, para 2(d)(ii).

16. While the conclusions expressed above mean that the NPS-HPL is not engaged in any substantive way by the application, if it were:

    (a) The NPS-HPL would be a relevant matter to be considered in assessing a proposal under the FTAA. [7] However, the weight to be placed upon policy statements under the FTAA differs from that under the RMA – with the greatest weight being given to the purpose of the FTAA (being to facilitate the delivery of projects with significant regional benefits).[8]

    (b) It is not open to a panel to form the view that an adverse impact meets the threshold for decline solely on the basis that the adverse impact is inconsistent with or contrary to a provision of a national policy statement.[9] That is, an inconsistency with the NPS-HPL cannot be the sole basis for a Panel concluding that the proposal reaches the threshold for decline.

    (c) The planning assessment submitted with the application assesses the project in accordance with the requirements of the FTAA and the Fruition analysis, and concludes that it is appropriate to approve the project.

DATED this 16th day of July 2025

Douglas Allan / Alex Devine
Counsel for CDL Land NZ Ltd

[7] Clause 17(1), Schedule 5 FTAA.
[8] Clause 17(1), Schedule 5 FTAA.
[9] Section 85(4) FTAA.

ANNEXURE 1 - COMPLETENESS

Summary

1. In accordance with accepted resource management principles and practice, CDL proposes conditions of consent that require the provision of specified construction and operational management plans. Draft[10] management plans will be submitted with the FTAA application. In all cases:

   (a) CDL proposes draft conditions of consent with respect to management plans that comply with long-standing caselaw developed under the Resource Management Act 1991 ("**RMA**").

   (b) The expert reports submitted with this application demonstrate how the effects of the activity are to be managed and address the mitigation measures that are to be included in the management plans.

   (c) The experts' conclusions regarding the management of such effects are based on their experience and expertise.

   (d) The objectives and contents of the management plans give effect to and are based on the experts' conclusions as set out in their reports.

2. This following section of this memorandum summarises:

   (a) The RMA and FTAA provisions governing the acceptance or rejection of an application for processing.

   (b) The RMA case law relating to management plans.

   (c) The RMA case law relating to the acceptance or rejection of applications for processing.

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[10] Providing draft rather than final management plans is an appropriate and lawful approach provided the condition complies with the principles set out at paragraph 10. Management plan-type consenting leaves detail to be included and certified by a Council after the conditions have been set by the consent authority, reflecting the very nature of adaptive management as well as practical realities e.g.: inability to finalise a plan ahead of a contractor being appointed. As noted in paragraph 11, the caselaw does not require a draft management plan to be provided.

(d) The relevance of the RMA caselaw to fast-track applications under FTAA.

Relevant RMA and FTAA provisions

3. Re a fast-track application under FTAA:

(a) **Section 46(1) FTAA** provides that "*the EPA must, in consultation with the relevant administering agencies and relevant consent authorities, decide whether a substantive application complies with subsection (2) within 15 working days after receiving it*."

(b) **Section 46(2) FTAA** sets out the requirements for an application to be deemed complete and hence to be accepted under FTAA. It requires an application to contain the information set out at **Clauses 5 to 8 of Schedule 5** (section 43(3)(a) FTAA), and provides that the information, "*must be specified in sufficient detail to satisfy the purpose for which it is required*" (**section 44 FTAA**).

4. Re a resource consent application under RMA:

(a) **Section 88(3) RMA** provides that "a *consent authority may, within 10 working days after an application was first lodged, determine that the application is incomplete if the application does not*" include specified information.

(b) **Clause 1, Schedule 4 RMA** provides with respect to the information to be provided with a resource consent application that, "*Any information required by this schedule, including an assessment under clause 2(1)(f) or (g), must be specified in sufficient detail to satisfy the purpose for which it is required*."

5. Thus **section 46(1) FTAA** provides that the EPA "*must*" decide whether a substantive application complies with subsection (2) whereas **section 88 (3) RMA** provides that a consent authority "*may*" determine that the application is incomplete. That does not represent a substantive difference in the quantity and quality of information that is to be provided by the applicant, however:

(a) The words "*must*" and "*may*" impose obligations on the respective decision-makers, not on the applicant. That is, they require or enable (respectively) the decision-maker to decide whether an application should be accepted. They do not affect the adequacy of the information provided with the application that would inform such a decision.

(b) In contrast, in both circumstances the threshold for adequate information is that it, "*must be specified in sufficient detail to satisfy the purpose for which it is required*".

(c) At this early stage of the process, the information needs to be in sufficient detail to enable the EPA or territorial authority, respectively, to determine whether the application should be accepted for processing. That is, have all the statutory "*boxes*" been ticked. In contrast, a greater quantity and / or better quality of information may be needed later in the process to enable a full assessment of the merits of the application.

(d) That distinction is apparent from the statutory provisions under both FTAA (**section 67 FTAA**) and RMA (**section 92 RMA**) that enable the substantive decision maker to request that the applicant provide further information relating to the application once the application has been accepted for processing. In short, the statutes anticipate that the information that is adequate for the purposes of accepting an application may need to be augmented for the purposes of assessing it on the merits.

6. In terms of what information must be provided with an application, **clauses 5 to 8 of Schedule 5 FTAA** largely mirror **Schedule 4 RMA**. Notably:

(a) An FTAA application must include the conditions that the applicant proposes for the resource consent and must provide information around existing resource consents, if there are any (clauses 5(1)(k) and (l)(ii), Schedule 5 FTAA). That same requirement does not apply to an application under the RMA.

(b) The RMA requirement for the assessment of environmental effects to include such detail as corresponds with the scale and significance of the effects that the activity may have on the environment (clause 2(3)(c), Schedule 4 RMA) does not apply under the FTAA.

(c) Under the FTAA, there is no requirement to include additional information that a district or regional plan specifies as necessary for an assessment of environmental effects.

(d) Under the RMA, an assessment of environmental effects must include possible alternative locations or methods for undertaking the activity where it is likely the activity will result in significant adverse effects. That same requirement does not apply to an application under the FTAA.

(e) Both the RMA and the FTAA contain a requirement to include, "*a description of the mitigation measures (including safeguards and contingency plans where relevant) to be undertaken to help prevent or reduce the actual or potential effect of the activity*" (clause 6(1)(e), Schedule 4 RMA and clause 6(1)(d), Schedule 5 FTAA).

(f) The matters to be covered in assessments of environmental effects are largely the same (for the purposes of this assessment). The one additional matter under the FTAA is that an assessment of environmental effects must cover, "*any unreasonable emission of noise*" (clause 7, Schedule 5 FTAA).

7. **Clause 18, Schedule 5 FTAA** provides that, "*When setting conditions on a consent, the provisions of Parts 6, 9, and 10 of the Resource Management Act 1991 that are relevant to setting conditions on a resource consent apply to the panel, subject to all necessary modifications*."

8. In the circumstances, the statutory frameworks governing the two processes and the imposition of conditions of consent are very similar:

(a) In each case, the applicant needs to provide with its application information specified in the statute, but only in sufficient detail to satisfy the purpose for which it is required.

(b) In practice, the required information is similar, particularly with regard to potential adverse environmental effects that might be generated by a project and which management plans are designed to address.

(c) The RMA provisions governing the imposition of conditions of consent are explicitly incorporated into the FTAA process.

RMA Caselaw governing Management Plans

9. As resource consents and accompanying conditions have become more complex over time, decision makers have increasingly had recourse to conditions of consent that, rather than seeking to specify in detail all actions to be undertaken to mitigate effects, identify overriding principles in terms of the management of such effects and require the subsequent development and certification of management plans to incorporate detailed mitigation measures.

10. The caselaw governing such conditions is settled and confirms that management plans are an appropriate means of managing environmental effects.[11] In that regard, to be acceptable and lawful, management plan conditions, *inter alia*, must be certain and must not delegate substantive decision making to the management plan process. To that end:

(a) Where management plans are proposed, it is imperative that conditions of consent identify the performance standards that are to be met and that the management plans identify how those standards are able to be achieved.[12]

(b) While a management plan can provide information as to how parameters or limits can or will be met, the parameters or limits themselves need to be specified in conditions rather than being left to the management plan.[13]

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[11] See for example, *Final Report and Decision of the Board of Inquiry into the Transmission Gully Proposal (June 2012)* – in particular paras [179] – [194].
[12] *Re Canterbury Cricket Association Inc* [2013] NZEnvC 184 at [125].
[13] *Wellington Fish and Game Council v Manawatu-Wanganui Regional Council* [2017] NZEnvC 37 at [175].

(c) Conditions must specify the objective(s) of the management plan and summarise the contents of the management plan (i.e.: the matters it must address).[14]

(d) Conditions must not require Council *approval* for measures, although conditions will typically provide for the council to *certify* that the management plan addresses all matters specified in the condition.[15]

(e) Overall, the decision maker must be satisfied that the management plan can operate in a way that can serve the purpose of the RMA.[16]

11. The case law does not require an applicant relying on a management plan as a method of avoiding, remedying or mitigating effects, to provide a draft management plan (let alone a final management plan) when lodging their application for consent, although that approach is available to an applicant. Having said that, for particularly complex or novel proposals, the Court has on occasion used draft management plans as part of the evidence to satisfy itself that sufficient detail is provided in the conditions.[17]

RMA Caselaw regarding the Acceptance / Rejection of Resource Consent Applications

12. For completeness we also briefly summarise the case law which addresses the level of information required for an application:

(a) The cases draw a distinction between the level of information required when an application is lodged, and the level of information which may be required when a decision maker is considering the substance of the application (all emphasis added):

(i) As set out by the High Court in *Wakatu Inc v Tasman District Council* [2008] NZRMA 187:

[14] *Final Report and Decision of the Board of Inquiry into the Transmission Gully Proposal (June 2012)* at [194].
[15] *Re Canterbury Cricket Association Inc* [2013] NZEnvC 184 at [126].
[16] *Crest Energy Kaipara Limited v Northland Regional Council* EnvC Auckland, A132/09, 22 December 2009 at [229].
[17] *Remediation (NZ) Ltd v Taranaki Regional Council* [2024] NZEnvC 213 at [331] and [468].

> *"…What will be relevant for potential submitters is whether the information is sufficient to enable them to ascertain the effect of the application on them. The question at this stage is whether the application has sufficient information to enable potential submitters to make that assessment. It is not whether the information is sufficient to enable the consent authority to determine the effect on the environment. That comes later …"*

(ii) This distinction between information sufficient to be accepted for lodgement, and information sufficient for evaluating an application's substance was reinforced in *Aspros v Wellington City Council* [2019] NZHC 1684 where Cull J found that:

> *"[29] Thus, the discretion to decide whether an application is complete is an administrative decision to be made in the light of that particular application. It is not a merits-based consideration, which comes later in time. There is therefore a critical distinction between the time at which an application is made and the time at which the resource consent decision is made. This is borne out by s 92, which gives the consent authority, once it has accepted the resource consent application, an opportunity to request further information related to the application. The wording of s 92(1) is instructive …*
>
> *[30] The information at the time the application is made must conform with the requirements of sch 4, in order for the application to be accepted as complete. At the time of the decision to refuse or grant the application, however, the question then arises whether the Council had adequate information to make its decision. This second inquiry has no place in the s 88 consideration of completeness of the application."*

(b) In terms of the level of information that needs to be provided with an application, the cases confirm that the AEE must provide enough detail as to the scale and significance of the potential effects to enable the proposal to be fully understood.[18] This goes to the ability of the Council to identify potentially affected parties, and to the ability of the potentially affected parties to assess their position in relation to the

[18] *Mawhinney v Auckland Council* [2017] NZEnvC 162; *Country Lifestyles Ltd v Auckland Council* [2022] NZEnvC 247.

application and decide whether or not they wish to make submissions.[19]

(c) While section 92 RMA enables the substantive decision maker to request that the applicant provide further information, where an application does not include fundamental elements, it is not acceptable for a council to fill the gaps using section 92.[20]

13. In summary:

(a) The information provided should be sufficient to enable an adequate assessment of the proposal's elements. That is, it should be sufficient to enable the EPA to understand the proposal and enable invited parties to ascertain its effects on them.

(b) Any decision to reject an application as incomplete must be fair and reasonable.

(c) The enquiry at this stage is not about whether the information is sufficient for the Panel to determine the effects on the environment, because the decision-making process enables the Panel to obtain any further information necessary to determine the application.

Application of RMA caselaw to FTAA

14. The EPA initially rejected the Winton Sunfield application for processing under section 46 of the FTAA, in part because no draft management plans were submitted with the application. It is unclear whether that rejection reflected a departure on the part of EPA from the established RMA caselaw regarding management plan conditions or was, instead, a consequence of the overall quality of the Winton application.

15. For completeness, CDL summarises below the reasons why it considers that the RMA caselaw relating to management plans remains relevant to applications under FTAA:

[19] *Wakatu Inc v Tasman District Council* [2008] NZRMA 187.
[20] *Wellington Fish and Game Council v Manawatu-Wanganui Regional Council* [2017] NZEnvC 37 at [149].

(a) Clause 18 of Schedule 5 FTAA applies to the FTAA process the RMA provisions imposing conditions of consent, and there is no explicit requirement in FTAA for draft management plans to be provided with applications for consent.

(b) The caselaw governing conditions of consent under RMA, and in particular conditions concerning management plans, is therefore equally applicable to the conditions on which a resource consent required under RMA can be granted under FTAA.

(c) For the reasons set out in the RMA caselaw summarised above, requiring a management plan as a condition – provided it meets the criteria set out in paragraph 10 above – is a legitimate technique for managing potential adverse effects of a development.

16. CDL's application relies on provision of a number of management plans. Draft plans have been attached to the application. In all cases:

(a) The expert reports submitted with this application demonstrate how the effects of the activities are to be managed and address the mitigation measures that are to be included in the management plans.

(b) The key parameters and limits that are to be complied with are specified in proposed conditions of consent. These have been informed by the expert's conclusions regarding the management of effects.

(c) The objective(s) and required contents of the management plans are specified in proposed conditions. The objectives and contents of the management plans give effect to, and are based, on the experts' conclusions as set out in their reports.

(d) The conditions require Council certification that the management plans address all matters specified in the conditions (as opposed to delegating approval functions to the subsequent process).

17. With regard to the EPA's obligation under section 46 FTAA to accept or reject an application for processing, for the reasons set out above, it is not

appropriate to reject the CDL application on the grounds that it provides draft rather than final management plans.

18. More broadly, there is a distinction to be drawn between matters which render an application incomplete, matters that could be resolved by an information request, and matters which go to whether the substantive consent should be granted:

(a) Both FTAA and RMA:

(i) First, require a determination as to whether an application is complete (section 46 FTAA);

(ii) Secondly, provide an ability for the decision maker to request further information (section 67 FTAA); and

(iii) Thirdly, provide for the decision maker to make a substantive decision in reliance on all the information then available to them.

(b) That framework anticipates and enables a more detailed analysis of the project as it moves through the FTAA process. Thus, the extent and nature of information that is necessary for the "*purpose*" for which it is required is likely to change and develop as the application moves from:

(i) The initial EPA assessment of its adequacy for the purposes of acceptance; to

(ii) The Panel's assessment of the project on its merits and its determination of whether consent can be granted; to

(iii) The Panel's determination as to the wording of the conditions that are to be imposed on a consent and in particular:

- Whether matters can be addressed via a management plan; and

- If so, whether the Panel needs to see and approve the management plan text or can address that issue via a detailed condition of consent.

(c) Accordingly, whether the Panel ultimately considers that a management plan is the appropriate approach (or considers it requires further information to make that determination) is not a matter which goes to the completeness of the application, but rather goes to the merits of the proposal to be decided under the substantive decision-making sections of the FTAA.

ANNEXURE 2 – APPLICABILITY OF THE NPS-HPL

Introduction / Summary

1. The following analysis sets out the implications of the National Policy Statement on Highly Productive Soils (the "**NPS-HPL**") on CDL's proposal to develop its land holdings in Arataki Road, Havelock North, Hawkes Bay (the "**Arataki Site**").[21]

2. It is our view that the NPS-HPL does not apply to the Arataki Site. This is because:

   (a) The NPS-HPL applies only to "*highly productive land*" as defined in the NPS-HPL.

   (b) On its face, the Arataki Site meets the relevant definition of "*highly productive land*" and is therefore subject to the constraints of the NPS-HPL.

   (c) However, land which would otherwise be defined as highly productive, but which is "*identified for future urban development*" or subject to a council initiated or adopted plan change to urbanise it, is not considered to be "*highly productive land*" and is therefore exempt from the directive requirements of the NPS-HPL.

   (d) The Arataki Site has been identified in a strategic planning document as suitable for commencing urban development over the 10 years from September 2022:

      (i) The Site was identified in the Heretaunga Plains Urban Development Strategy (the "**HPUDS**") as a Growth Area in 2010. While the 2017 HPUDS downgraded the Arataki Site to a Reserve Growth Area on the basis of reverse sensitivity issues caused by its proximity to a neighbouring mushroom plant:

[21] Being lots 86, 108 and 122 Arataki Road.

- Reserve growth areas are still identified as suitable for future greenfield growth; and

- The HPUDS provides that the Arataki Site shall be reintroduced as a growth area ahead of other growth areas should the reverse sensitivity issues be resolved – which they have been, as the mushroom farm is no longer operating.

(ii) The HPUDS simply identifies land suitable for development for the period 2015 to 2045 and does not identify timing for development within that period.[22] As per the HPUDS, that detail (timing) is devolved to the Hastings District Plan (the "**District Plan**").[23] In that regard:

- The District Plan identifies the Arataki Site as land that will be required during the life of the District Plan (i.e.: 10 years).

- The relevant aspects of the District Plan were made operative in July 2017 (after the 2017 HPUDS was confirmed) so the Arataki Land has been identified as suitable for commencing development before 2027, well within the NPS-HPL 10-year timeframe from October 2022.

(iii) Because both the HPUDS and District Plan were in place prior to the NPS-HPL commencement date, CDL does not face the same issues as the applicant in *Save the Maitai Inc v Nelson City Council* [2024] NZEnvC 155.

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[22] Aside from delineating between growth areas and reserve growth areas, with the intention being that reserve growth areas act as replacements, and may also be advanced if there is a rapid and significant change in growth demand, or retirement village needs cannot reasonably be met within the preferred greenfields areas. Although, as noted above, in the case of the Arataki Site, the HPUDS specifically records an intention to reintroduce it ahead of other growth areas should the issues with the mushroom farming operations be overcome.

[23] HPUDS at 3.1, which notes that HPUDS leave sequencing decisions to the individual territorial authorities to decide, as a matter of policy and programming through the LTPs and District Plans.

(iv) Based on the timing indicated in the District Plan and our understanding that the reverse sensitivity issues have now been resolved as the mushroom plant has closed, we consider that the land was "*suitable for commencing development over the next 10 years*" as at October 2022 (and remains so) and therefore meets the requirements of "*land identified for future urban development"* in the NPS-HPL.

3. Despite our view that the NPS-HPL does not apply to the Arataki Site, Fruition has undertaken an assessment of the proposal under the relevant exceptions pathway of the NPS-HPL (i.e.: clause 3.10). That assessment confirms that, even if the Arataki Site qualified as "*highly productive land*" under the NPS-HPL, it is subject to permanent or long-term constraints and is therefore able to be subdivided, used or developed notwithstanding clauses 3.7 to 3.9 of the NPS-HPL. In the circumstances, granting consent to develop the Arataki Site for housing would not be inconsistent with or contrary to the NPS-HPL.

4. While the conclusions expressed in (2) and (3) above mean that the NPS-HPL is not engaged in any substantive way by the application, if it were:

(a) The NPS-HPL would be a relevant matter to be considered in assessing a proposal under the FTAA.[24] However, the weight to be placed upon policy statements under the FTAA differs from that under the RMA – with the greatest weight being given to the purpose of the FTAA (being to facilitate the delivery of projects with significant regional benefits).[25]

(b) It is not open to a panel to form the view that an adverse impact meets the threshold for decline solely on the basis that the adverse impact is inconsistent with or contrary to a provision of a national policy statement.[26] That is, an inconsistency with the NPS-HPL cannot be the

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[24] Clause 17(1), Schedule 5 FTAA.
[25] Clause 17(1), Schedule 5 FTAA.
[26] Section 85(4) FTAA.

sole basis for a Panel concluding that the proposal reaches the threshold for decline.

(c) The planning assessment submitted with the application assesses the project in accordance with the requirements of the FTAA and the Fruition analysis, and concludes that it is appropriate to approve the project.

5. Finally, we note that the Government is currently consulting on a proposal to remove land identified as LUC 3 from the protections of the NPS-HPL. The Arataki Site is identified as LUC 3. Once the NPS-HPL has been amended (expected to be sometime in 2025), it will cease to be relevant to the Arataki proposal.

Legal Framework

6. The NPS-HPL seeks to ensure "*highly productive land*"[27] is protected for use in land-based primary production. To achieve this, urban rezoning, subdivision and development of highly productive land is to be "*avoided*" except as provided for in the NPS-HPL. Limited pathways are provided for land identified as highly productive to be urbanised.

7. The NPS-HPL contains guidelines for the mapping of highly productive land and, following that, its identification in regional policy statements and identification and protection through district plans. In recognition of the fact that this mapping exercise will take time, the NPS-HPL includes an interim approach to identifying highly productive land.

8. As the Hawkes Bay Regional Council has yet to undertake the mapping exercise directed by the NPS-HPL, the interim approach to applying highly productive land applies.

9. This interim approach is set out at clause 3.5(7) of the NPS-HPL. This provides that:

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[27] As defined at clause 1.3, NPS-HPL.

> *(7) Until a regional policy statement containing maps of highly productive land in the region is operative, each relevant territorial authority and consent authority must apply this National Policy Statement as if references to highly productive land were references to land that, at the commencement date:*
>
> *(a) is*
>
> *(i) zoned general rural or rural production; and*
>
> *(ii) LUC 1, 2, or 3 land; but*
>
> *(b) is not:*
>
> *(i) identified for future urban development; or*
>
> *(ii) subject to a Council initiated, or an adopted, notified plan change to rezone it from general rural or rural production to urban or rural lifestyle.*

10. That is, until the mapping exercise is complete, territorial authorities must treat land that, at the commencement date, was zoned rural or rural production and classified as LUC 1, 2 or 3 as highly productive for the purposes of the NPS-HPL, unless that land has been identified for future urban development or is subject to a council initiated / adopted plan change for urbanisation.

11. With respect to the exceptions at clause 3.5(7)(b)(i), land that is "*identified for future urban development*" is defined at clause 1.3 as follows:

> ***identified for future urban development*** *means:*
>
> *(a) identified in a published Future Development Strategy as land suitable for commencing urban development over the next 10 years; or*
>
> *(b) identified:*
>
> *(i) in a strategic planning document as an area suitable for commencing urban development over the next 10 years; and*
>
> *(ii) at a level of detail that makes the boundaries of the area identifiable in practice*

12. That is, land is considered to be identified for future urban development where it has been identified as being "*suitable*" for commencing urban development over the next 10 years, either in a published Future Development Strategy or a strategic planning document. If it is the latter, it must be identified at a level of detail that makes the boundaries of the area identifiable in practice.

13. To qualify for that exception, the land must have been identified for future urban development at the commencement date, being 17 October 2022.[28]

Analysis

14. The Arataki Site is zoned Plains Production (one of the two rural zones in the Hastings District Plan[29]) and is LUC Class 3 land and was identified as such at the NPS-HPL commencement date. Therefore, unless one of the exceptions at clause 3.5(7)(b) applies, it will be considered as highly productive land for the purposes of the NPS-HPL.

15. With respect to clause 3.5(7)(b), the Site is not subject to a Council plan change to urbanise it and therefore does not meet the exception at clause 3.5(7)(b)(ii). This leaves clause 3.5(7)(b)(i), being whether or not the Site is "*identified for future urban development*".

16. Land "identified for future urban development" is defined as land identified in a published Future Development Strategy or in a strategic planning document as, "land suitable for commencing urban development over the next 10 years; and at a level of detail that makes the boundaries of the area identifiable in practice".[30] This requires two things:

    (a) That the land be identified in a strategic planning document as suitable for urban development, at a sufficient level of detail; and

    (b) That the timeframe within which such development could commence is 10 years (being 2032).

17. Addressing each limb in turn:

Is the Arataki Site identified in a future development strategy or strategic planning document as suitable for urban development, at a sufficient level of detail?

18. At the commencement date, Hawkes Bay did not have a Future Development Strategy. It did, however, have the Heretaunga Plains Urban Development Strategy (the "**HPUDS**"). As a strategic document concerning long term

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[28] Clause 3.5(7).
[29] The other being the Rural Zone.
[30] Clause 1.3, NPS-HPL.

growth of the Region, the HPUDS can be considered a strategic planning document in terms of clause 1.3 of the NPS-HPL.

19. The HPUDS sets out the strategic direction for the growth of the Heretaunga Plains Urban Development Strategy Area over the 30 year period of 2015 – 2045. It was adopted by Hastings District Council, Napier City Council and Hawkes Bay Regional Council in August 2010 (the "**2010 HPUDS**") but was reviewed, updated and readopted in early 2017 (the "**2017 HPUDS**").[31] While it was intended that the HPUDS would be updated every five years, it has not been updated since 2017. This is due to the introduction of the National Policy Statement on Urban Development 2020, which led to the councils focusing their efforts on a Future Development Strategy ("**FDS**") instead. As the FDS was not in place at the NPS-HPL commencement date, it is not relevant to the question of whether the Arataki Site was identified for future urban development and is not discussed further in this letter.

20. The HPUDS adopts a settlement pattern which identifies 'key growth areas' and 'reserve growth areas' for greenfield growth.[32] These defined areas are the areas that have been identified as appropriate for development through to 2045. Urbanisation outside of those areas is not anticipated, except in very limited circumstances.

21. The difference between 'greenfield growth areas' and 'reserve growth areas' is that the latter act as replacements if, subject to further assessment, any of the identified greenfield growth areas are deemed unviable or are unable to be progressed in a timely manner.

22. The Arataki Site is identified as a 'reserve growth area'[33] in the 2017 HPUDS, but with a specific proviso that it may be reintroduced as a greenfield growth area *ahead of other growth areas*, should the odour and reverse sensitivity issues due to proximity of the (then) adjacent mushroom farming operations,

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[31] The 2010 HPUDS contains much of the detailed context which is not contained in the 2017 HPUDS and as such it is important to read the two documents together. In the event of a conflict, the 2017 HPUDS prevails (2017 HPUDS, p 7). The 2017 HPUDS was adopted in early 2017.
[32] 2017 HPUDS, p 13.
[33] As addressed further below, the 2010 HPUDS identified the Arataki Site as a key growth area.

be overcome.[34] That puts it in a different category to the other reserve growth areas, as its inclusion as a greenfield growth area is contingent on a site specific issue being resolved rather than the more generic reference to change in growth projections or being need to replace other growth areas which otherwise applies.

23. The settlement pattern map included in the HPUDS (copy appended as **Appendix A**) identifies the Arataki Site as a reserve growth area in the HPUDS at a level of detail which makes the boundaries of the area identifiable in practice.

24. In our view, the Arataki Site meets the first limb, being land that is identified in a development strategy as suitable for urban development and identified at a sufficient level of detail.

25. We now turn to address the second limb:

Is the Arataki Site identified as being suitable for commencing urban development over the next 10 years?

26. As noted above, the HPUDS identifies 'greenfield growth areas' and 'reserve growth areas' for greenfield growth. Although greenfield growth areas are intended to be sequenced ahead of reserve growth areas, the HPUDS anticipates that reserve growth areas could be brought forward (i.e.: ahead of or in replacement of greenfield growth areas) and to that end there is no presumption that reserve growth areas are not suitable for commencing urban development over the next 10 years. Moreover:

    (a) Generally, for a Reserve Growth Area to be progressed as a greenfield growth area in the future, it will need to replace another HPUDS greenfield growth area, unless growth projections exceed current projections.[35]

    (b) However, with respect to the Arataki Site, the 2017 HPUDS records the intention that this area be introduced as a greenfield growth area ahead of other growth areas, should the odour and reverse sensitivity

[34] 2017 HPUDS, p 5.
[35] 2017 HPUDS, p 18.

issues due to proximity to the mushroom farming operations be overcome.[36]

(c) Those reverse sensitivity issues have now been resolved as the mushroom plant has been sold and operations have ceased, with a light industrial business park operating under an interim, short-term consent.

27. In any event, beyond identifying these areas as areas suitable for development in the period 2015 to 2045, the HPUDS does not specify timing or sequencing. Rather, those decisions are identified as being a matter of policy and programming to be resolved through the long term and district plans.[37] As such, to understand whether land is suitable for commencing urban development over the next 10 years, one must look to the relevant planning documents.

28. In that regard, the relevant recommendations from HPUDS have been incorporated into the Hawkes Bay Regional Policy Statement (the "**RPS**") and the Hastings District Plan (the "**District Plan**").

29. The RPS:

(a) Adopts specific objectives and policies seeking that urban development reflect the settlement pattern outlined in HPUDS.[38]

(b) Specifies the Arataki Site as one of the areas where future residential greenfield growth for the 2015 – 2045 period has been identified as appropriate.[39]

(c) Like the HPUDS, the RPS does not identify a timeframe for development beyond the 30 year period between 2015 to 2045.

30. The District Plan:

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[36] HPUDS, p 5.
[37] 2017 HPUDS, pp 11 and 16.
[38] See generally chapter 3.1B: Managing the Built Environment.
[39] Pol UD4.3

(a) Records that it will implement the directions from the RPS regarding the HPUDS, as well as other recommendations from the HPUDS itself.[40] As part of that, it identifies the greenfield growth areas and reserve growth areas (from HPUDS and the RPS) as areas that are appropriate for new greenfield growth.

(b) Then identifies which of those areas that the Council has prioritised as being required during the life of the plan (i.e.: within 10 years).[41] The Arataki Site is identified as a Site that may be required during the life of the Plan, as shown in **Figure 1** below.

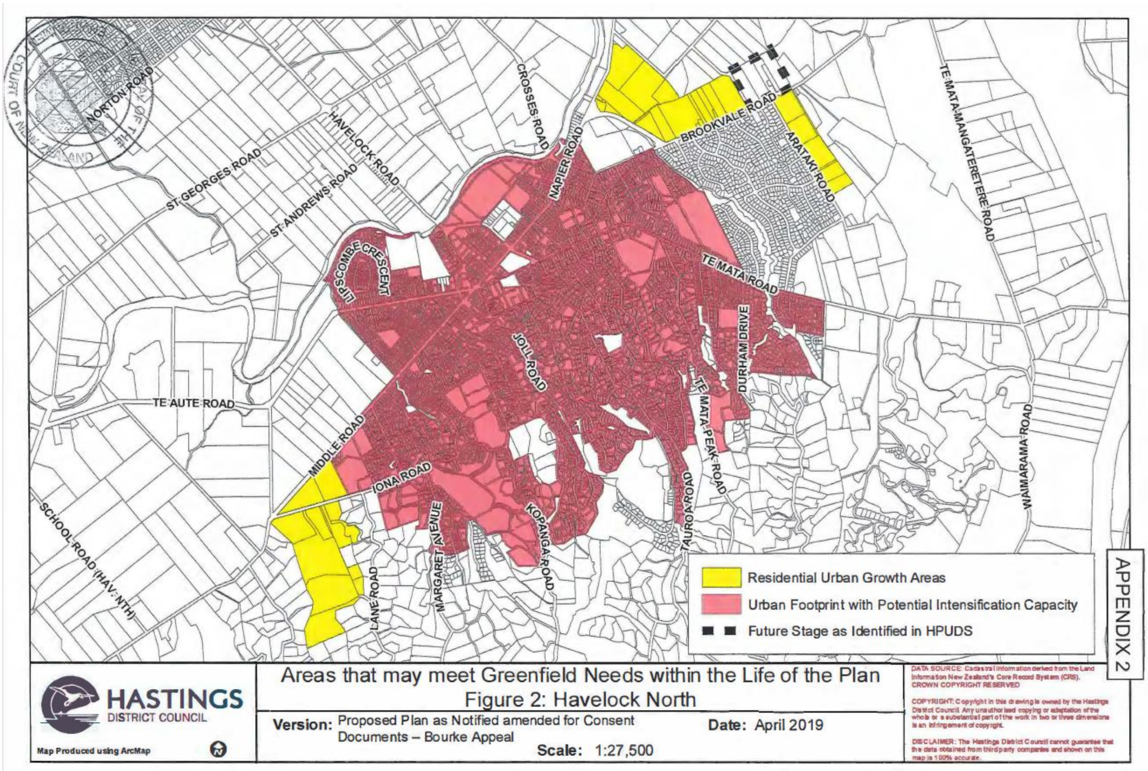

Figure 1 *District Plan Appendix 2 Areas that May Meet Greenfield Needs within the Life of the Plan.*

(c) The readiness of the Arataki Site for residential development is reinforced by the discussion in Chapter 2.4 of the District Plan which records (emphasis added):

> *Residential Zones: The District Plan will incorporate a number of Residential Zones, and will progressively add land to these to provide for future greenfield development. The areas required for*

[40] 2.4.4, District Plan.
[41] At Part A Introduction (1.1 – 4.1) / 2.4 Urban Strategy.

future residential expansion through to 2045 have been identified through the HPUDS study. These growth areas have been embedded in the Regional Policy Statement and are outlined in Appendix 1. <u>Not all of those areas will be required to meet the demand over the life of this District Plan. The Council has identified the areas which are likely to be required to ensure continuity of supply of residential greenfield sites within the District over the ten year life of the District Plan</u>. <u>These areas are:</u>

1. Hastings - Lyndhurst Extension (North)
- Kaiapo Road
- Howard Street

2. Havelock North
<u>- Arataki Extension</u>
- Iona Road - Hill Site (Lots 1, 2 &3 DP24404, Lot 6 ¼ share in Lot 9 DP24404)
- Brookvale and Romanes Drive (Brookvale Romanes Urban Development Area)

These areas are identified in Appendix 2. In the meantime their current Plains zoning will remain. Structure Plans will be prepared ahead of their rezoning to residential.

31. In short, the District Plan, identifies the Site as likely to be required during the ten year life of the District Plan.[42] In doing so, it is implicit that the Arataki Site is suitable for commencing urban development within that period. While the District Plan notes that urbanisation is subject to the preparation of structure plans and rezoning – that would be required for urbanisation of any growth area identified in the HPUDS.

32. Before setting out our conclusion regarding the second limb, we note that:

    (a) The test in the NPS-HPL relates to the "*suitability*" for urban development and to that end it can be distinguished from whether the land is *programmed* for such development over the requisite 10-year timeframe.

    (b) The Arataki Site is considered suitable for urbanisation; its current status as a 'reserve growth area' is a function of a specific issue

[42] This element of the District Plan was in place in 2017, meaning that the ten year life of the plan can be taken to be 2017 – 2027.

relating to the mushroom plant; and that, absent that plant, the Arataki Site is identified as being suitable for commencing development over the next 10 years because:

(i) The HPUDS explicitly refers to the Arataki Site being reinstated as a greenfield growth area in such circumstances.

(ii) While that could occur during a future HPUDS review process[43], it need not await such an event. The HPUDS is a non-statutory document and CDL could seek a private plan change for urban rezoning given that the issue identified in the HPUDS has been resolved.

(c) The position in (b) is reinforced by the District Plan. As the HPUDS defers timing decisions to the District Plan, we consider that these documents must be read together to determine suitability and timing for urban development. In that regard, and as noted above, the District Plan specifically identifies the Arataki Site as being likely to be required for development within the ten year life of the District Plan, and in doing so, we consider it is implicit that it is identifying it as suitable for commencing development within that period.

33. In our view, having regard to the above, the Arataki Site meets the second limb, being identified as suitable for commencing urban development over the next 10 years.

34. For completeness we record that the HPUDS and relevant District Plan chapters setting timeframes for development were in place prior to the NPS-HPL implementation date (17 October 2022). It can therefore be distinguished from the situation in *Save the Maitai Inc v Nelson City Council* [2024] NZEnvC 155. In that case, the land was identified in an FDS adopted prior to the NPS-HPL commencement date, but the (separate) implementation plan did not exist until after the NPS-HPL commencement date. In those circumstances,

[43] This has occurred in practice, with the recommended version of the FDS (May 2025) identifying Arataki as a short-medium term priority.

the Court found that the land could not be seen as "identified for future urban development" in terms of its transitional definition at cl 3.5(7) of the NPS-HPL.

Overall Assessment

35. As set out above, in our view, the Arataki Site is identified:

(a) In a future development strategy or strategic planning document (the HPUDS) as suitable for urban development, at a sufficient level of detail; and

(b) As being suitable for commencing urban development before 2032, being 10 years from the commencement date of the NPS-HPL.

36. As such, we consider the Arataki Site qualifies as land that is "*identified for future urban development*" and is therefore exempted from the definition of highly productive land at clause 3.5(7) of the NPS-HPL. On that basis, the Arataki Site is exempt from the directive requirements of the NPS-HPL.

Other Matters

37. Despite our view that the NPS-HPL does not apply to the Arataki Site, Fruition has undertaken an assessment of the proposal under the relevant exceptions pathway of the NPS-HPL (i.e.: clause 3.10). That assessment confirms that, even if the Arataki Site qualified as "*highly productive land*" under the NPS-HPL, it is subject to permanent or long-term constraints and is therefore able to be subdivided, used or developed notwithstanding clauses 3.7 to 3.9 of the NPS-HPL. In the circumstances, granting consent to develop the Arataki Site for housing would not be inconsistent with or contrary to the NPS-HPL.

38. While the conclusions expressed in (35) and (36) above mean that the NPS-HPL is not engaged in any substantive way by the application, if it were:

(a) The NPS-HPL would be a relevant matter to be considered in assessing a proposal under the FTAA. [44] However, the weight to be placed upon policy statements under the FTAA differs from that under the RMA –

[44] Clause 17(1), Schedule 5 FTAA.

with the greatest weight being given to the purpose of the FTAA (being to facilitate the delivery of projects with significant regional benefits).[45]

(b) It is not open to a panel to form the view that an adverse impact meets the threshold for decline solely on the basis that the adverse impact is inconsistent with or contrary to a provision of a national policy statement.[46] That is, an inconsistency with the NPS-HPL cannot be the sole basis for a Panel concluding that the proposal reaches the threshold for decline.

(c) The planning assessment submitted with the application assesses the project in accordance with the requirements of the FTAA and the Fruition analysis and concludes that it is appropriate to approve the project.

39. Finally, we note that the Government is currently consulting on a proposal to remove land identified as LUC 3 from the protections of the NPS-HPL. The Arataki Site is identified as LUC 3. Once that occurs (expected to be sometime in 2025), the NPS-HPL will cease to be relevant to the Arataki proposal at all.

[45] Clause 17(1), Schedule 5 FTAA.
[46] Section 85(4) FTAA.

APPENDIX A

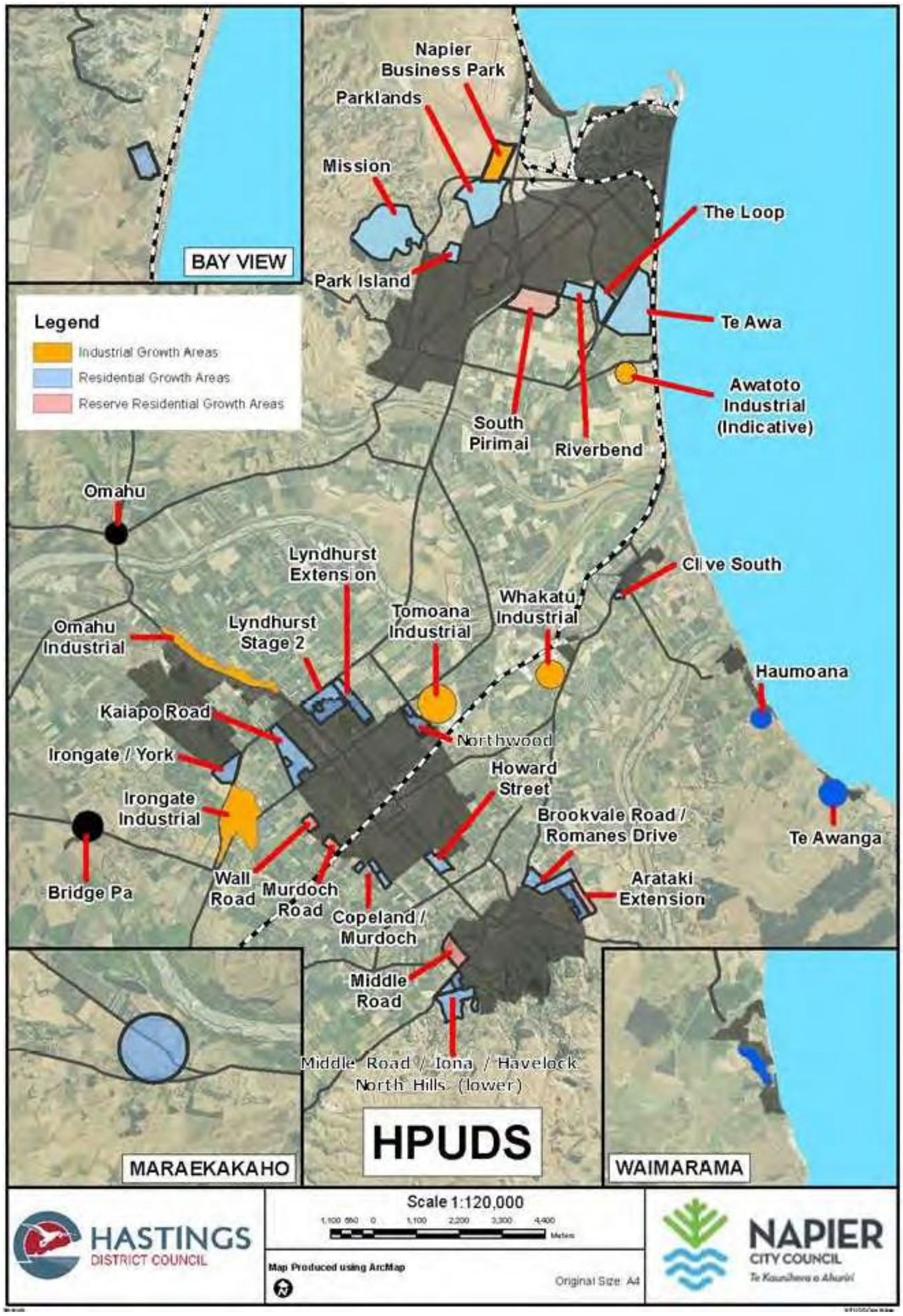

Figure 2 HPUDS Map 1: Heretaunga Plains Settlement Pattern 2017, Source: HPUDS, p. 3.