



*When is highly productive land not highly productive?
What changes are being signalled by the government and why?*

INTRODUCTION

In this article we take a look at the *National Policy Statement – Highly Productive Land 2022* (Ministry for the Environment *National Policy Statement – Highly Productive Land 2022* (NPS-HPL, 2024) (NPS-HPL), review and comment on an important case in the Environment Court in the South Island, and look to the future for what the Government has signalled might be on the horizon for the NPS-HPL.

BACKGROUND TO THE NPS-HPL

The right to food is included in international agreements and conventions that New Zealand is a signatory to. These include that “everyone has the right to a standard of living which provides for their health and well-being, including food” (Universal Declaration of Human Rights A/RES/217(III) (adopted December 10, 1948), art 25(1)) and “the right of everyone to an adequate standard of living for himself and his family, including adequate food” (International Covenant on Economic, Social and Cultural Rights 993 UNTS 3 (opened for signature 19 December 1966, entry into force 3 January 1976), art 11).

Fortunately, we do not face issues around the right to food and food security as acutely as other nations. New Zealand is a world leader in food production exporting food and beverage products to millions of people in over 120 countries. However, threats to our status as an abundant global food producer have long been recognised along with the need to protect the around 15 per cent of New Zealand’s land that is categorised as highly productive.

The Ministry for the Environment estimates that in the past

Authors:

Joanna Beresford,
Partner, Beresford Law and
Helen Atkins, Barrister &
Commissioner



20 years, over 35,000 hectares of highly productive land has been lost to urban or rural residential development. The carve-up of land for lifestyle blocks poses an even greater risk because it consumes even larger areas of highly productive land. Lifestyle blocks under 8 hectares in size now occupy more than 170,000 hectares of land considered to be highly productive. The relatively small size of lifestyle blocks often makes it difficult to use them for a viable productive use.

When the Government consulted on introducing the NPS-HPL in 2019, the then Minister of Agriculture, Damien O’Connor expressed it this way (“Government moves to protect elite soils” (14 August 2019) *Beehive*):

One of the greatest challenges facing the world right now is the need to feed a growing population.

We have a well-earned reputation for producing some of the best food in the world.

Continuing to grow food in the volumes and quality we have come to expect depends on the availability of land and the quality of the soil. Once productive land is built on, we can't use it for food production, which is why we need to act now.

The right to adequate housing is also enshrined in international law. Successive New Zealand governments have committed to implement the International Bill of Human Rights (consisting of the Universal Declaration of Human Rights, the International Covenant on Economic Social and Cultural Rights and the International Covenant on Civil and Political Rights (International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 19 December 1966, entered into force 23 March 1976)), and human rights agreements, such as the Convention on the Rights of the Child (Convention on the Rights of the Child 1577 UNTS 3 (opened for signature 20 November 1989, entered into force 2 September 1990)) and the Convention on the Rights of Persons with Disabilities (Convention on the Rights of Persons with Disabilities A/RES/61/106 (opened for signature on 30 March 2007, entered into force 3 May 2008)), which include the right to a decent home.

Reconciling these tensions between securing food supply through the protection of highly productive land and the provision of adequate land for housing are matters that speak directly to the heart of the sustainable management purpose of the Resource Management Act 1991 (RMA) with its land use enabling and life-supporting elements. The NPS-HPL (coupled with the *National Policy Statement on Urban Development 2020* (Ministry for the Environment *National Policy Statement on Urban Development 2020* (ME 1513, May 2022) (NPS-UD)) provided long overdue national level guidance to policy and decision makers on how to reconcile these tensions.

NPS – HPL 2022

The NPS-HPL came into effect on 17 October 2022. The current version of the NPS-HPL incorporates amendments made by the Minister for the Environment under s 53(1) of the RMA and notified in the New Zealand Gazette on 16 August 2024. Those amendments concern specified infrastructure, intensive indoor primary production and greenhouse activities and took effect from 14 September 2024.

The NPS-HPL is structured in the now familiar four-part structure for NPSs, being Part 1: Preliminary Provisions, Part 2: Objectives and Policies, Part 3: Implementation and Part 4: Timing.

The Interpretation section (cl 1.3) defines of the following key concepts:

highly productive land means land that has been mapped in accordance with clause 3.4 and is included in an operative regional policy statement as required by clause 3.5 (but see clause 3.5(7) for what is treated as highly productive land before the maps are included in an operative regional policy statement and clause 3.5(6) for when land is rezoned and therefore ceases to be highly productive land).

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.

productive capacity, in relation to land, means the ability of the land to support land-based primary production over the long term, based on an assessment of:

- (a) physical characteristics (such as soil type, properties, and versatility); and
- (b) legal constraints (such as consent notices, local authority covenants, and easements); and
- (c) the size and shape of existing and proposed land parcels

The NPS-HPL contains a singular objective, being that “highly productive land is protected for use in land-based primary production, both now and for future generations” (cl 2.1), supported by nine policies (cl 2.2):

Policy 1: *Highly productive land is recognised as a resource with finite characteristics and long-term values for land-based primary production.*

Policy 2: *The identification and management of highly productive land is undertaken in an integrated way that considers the interactions with freshwater management and urban development.*

Policy 3: *Highly productive land is mapped and included in regional policy statements and district*

plans.

Policy 4: *The use of highly productive land for land-based primary production is prioritised and supported.*

Policy 5: *The urban rezoning of highly productive land is avoided, except as provided in this National Policy Statement.*

Policy 6: *The rezoning and development of highly productive land as rural lifestyle is avoided, except as provided in this National Policy Statement.*

Policy 7: *The subdivision of highly productive land is avoided, except as provided in this National Policy Statement.*

Policy 8: *Highly productive land is protected from inappropriate use and development.*

Policy 9: *Reverse sensitivity effects are managed so as not to constrain land-based primary production activities on highly productive land.*

The objectives and policies themselves are concise and deceptively simply, with the detail of how these will be given to effect to contained in the implementation section.

The starting point for implementation is mapping highly productive land and identifying it in regional policy statements and district plans.

Clause 3.5 requires that, as soon as practicable, and no later than three years after the commencement date, every regional council must, using a process in sch 1 of the RMA, notify in a proposed regional policy statement (RPS), by way of maps, all the land in its region that is required by cl 3.4 to be mapped as highly productive land.

The land required to be mapped in this way is land in a general rural zone or rural production zone; that is predominantly Land Use Capability (LUC) class 1, 2, or 3 land, forms a large and geographically cohesive area but does not include land identified for future urban development at the commencement date.

Mapping based on the New Zealand Land Resource Inventory is conclusive of LUC status, unless a regional council accepts any more detailed mapping that uses the Land Use Capability classification in the New Zealand Land Resource Inventory (cl 3.4(5)(a)). Where possible the boundaries of large cohesive areas are to be referenced

to natural or legal boundaries (cl 3.4(5)(b)). There are discretions as to whether small areas of land that are not LUC 1, 2 and 3 within a larger cohesive area of LUC 1, 2 and 3 are included (cl 3(5)(c)) and whether small discrete areas of LUC 1, 2, and 3 that are separated from geographically large areas of LUC 1, 2, and 3 are included (cl 3.4(5)(b)).

Once an RPS containing the highly productive land maps becomes operative, territorial authorities have six months to identify highly productive land in their districts and much do so using maps that are “exactly equivalent” to the regional mapping and without using the sch 1 of the RMA process for amending plans (cl 3.5(3) and (4)).

If highly productive land is rezoned from general rural or rural production, then the land ceases to be highly productive land from when the rezoning becomes operative (cl 3.5(6)).

There are quite onerous restrictions (with directive language) on how highly productive land can be used and zoned. In summary, territorial authorities may only allow urban rezoning where it is required to provide sufficient capacity for housing or business land to and there are no other reasonably practicable and feasible options, and the environmental social and cultural benefits would outweigh the costs (cl 3.6). Territorial authorities must avoid rezoning of highly productive land as rural lifestyle except as provided in cl 3.10 (cl 3.7). Territorial authorities are to avoid subdivision of highly productive land unless the productive capacity of the land will be retained over the long term, the land is specified Māori land or required for defence facilities (cl 3.8). Measures must also be taken to avoid, remedy or mitigate cumulative loss or reverse sensitivity effects on surrounding primary production activities and territorial authorities are to avoid inappropriate use of development of highly productive land that is not land based primary production.

WHAT DOES THE NPS-HPL MEAN?

Earlier this year the Environment Court released its decision in *Blue Grass Ltd v Dunedin City Council* [2024] NZEnvC 83 (the *Blue Grass* case). This case directly deals with the definition of highly productive land in the NPS-HPL. There have been a few other cases that have dealt with the NPS-HPL but the specific question that the *Blue Grass* case had to answer was not front and centre in those other cases.

In its first decision the Court determined that the NPS-

HPL applied to its consideration of the appeals filed by the appellants (Blue Grass Ltd and others) because, in each case, the land that is the subject of the appeals does not come within the exemption under cl 3.5(7)(b) of the NPS-HPL (see *Balmoral Developments (Outram) Ltd v Dunedin City Council* [2023] NZEnvC 59, [2023] ELHNZ 76).

The question the Court determined in its second decision (at [2]) was a preliminary legal issue to do with interpretation of the NPS-HPL, namely:

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

The short answer to this question was “no” and the Court stated this very succinctly (at [54]). The Court does make a few more comments.

The Court found that it is not open for applicants in consent processes to challenge the Land Use Capability of their land as mapped by the New Zealand Land Resource Inventory even if more detailed site investigations conclude that land is not LUC 1, 2 or 3. So, this means that land zoned rural, which the Land Resource Inventory (Inventory) has mapped as LUC 1, 2 or 3, is basically ‘stuck’ as highly productive land, until regional councils introduce changes to their regional policy statements.

The Court noted (at [23]) that:

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

The Inventory was developed by Manaaki Whenua Landcare Research (and its predecessor – the Department of Scientific and Industrial Research developed the first

edition of the Inventory between 1973 and 1979. The scale of mapping was updated in a second edition between 1992 – 1999 and a third edition in 2000 contained a restructured polygon attribute table to allow the core Inventory to complement the newly created fundamental soil layers with minimal duplication). There are a number of criticisms that the Inventory was never intended to be a regulatory tool in the way it is being used in the NPS-HPL. There are also criticisms that in a number of cases the mapping work was done over 50 years ago, and it needs updating.

This *Blue Grass* case (which has not been appealed) means that until land is re-mapped and the LUC is altered from LUC 1, 2 or 3 that is the default for that land.

WHAT IS CURRENTLY HAPPENING?

For consent applications caught by this interim position, the “as soon as practicable” (but not later than three years) timeframe for regional councils to update the highly productive land maps will no doubt seem an intolerable delay.

Further, we know that some regional councils have started undertaking this mapping and some have not. Given the moving feast that is environmental policy in this country at the moment it is not surprising that a number of regional councils are playing a wait and see game.

It is clear that although the *Blue Grass* case does not set a legal precedent it is being treated by the councils as though it does. Many councils are applying *Blue Grass* and not accepting site specific expert evidence and reports that provide different soil mapping outcomes from the Inventory.

Until the mapping has been completed *Blue Grass* states that cl 3.5(7) of the NPS-HPL sets up the interim definition of HPL as being land which “at the commencement date” of the NPS-HPL is (with some exclusions specifically listed in the NPS-HPL):

- zoned general rural or rural production; and
- identified as LUC 1, 2 or 3.

This means that landowners and consent applicants are unable to undertake their own mapping of specific sites to seek to lessen the LUC of their land and therefore remove it from a highly productive land classification, which eases the consenting pathway. Instead, they have to wait for the regional council to notify a change to its regional policy

statement relating to highly productive land and participate in that process if they wish to argue that their land is not highly productive.

GOVERNMENT RESPONSE

Perhaps unsurprisingly those directly affected by the *Blue Grass* decision have sought central government intervention to 'fix' the decision. The most recent Cabinet

paper that considers the amendment programme for the RMA does include a reference to removing the LUC 3 reference from the NPS-HPL. The timing of this is currently stated to be in the first quarter of 2025.

This supports the comment above that regional councils are, more than likely, waiting to see if any changes are made to the NPS-HPL before they undertake their mapping exercise. The timing will be tight!

