BEFORE THE HEARING PANEL APPOINTED BY KAIPARA DISTRICT COUNCIL

IN THE MATTER OF the Resource Management Act 1991 (**RMA**)

AND

IN THE MATTER OF the hearing of submissions on Proposed Private Plan Change 84 by Mangawhai Hills Limited

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OPENING LEGAL SUBMISSIONS BY COUNSEL FOR KAIPARA DISTRICT COUNCIL

DATED 22 MAY 2024

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MAY IT PLEASE THE HEARING PANEL:

1. INTRODUCTION

1.1 I have been asked to present these legal submissions by Kaipara District Council (**Council**) staff, and the author of the section 42A Report for Proposed Private Plan Change 84 by Mangawhai Hills Limited (**PPC84**), Mr Jonathan Clease.

1.2 As the Hearing Panel will be aware, PPC84:

(a) is a plan change request seeking changes to the Operative Kaipara District Plan (**Operative District Plan**) lodged by Mangawhai Hills Limited (**the Applicant**) and accepted by the Council under clause 25(2)(b) of Schedule 1 of the Resource Management Act 1991 (**RMA**);[1]

(b) seeks to re-zone 218.3 hectares of land located between Tara Road, Cove Road, Moir Street and Old Waipu Road in Mangawhai from Rural Zone to a Development Area, including consequential amendments to the planning maps contained in the Operative District Plan.[2] The significance, in planning terms, of PPC84 being a proposed Development Area is that PPC84 seeks to create a stand-alone Chapter in the Operative District Plan with a bespoke zone and Structure Plan (compared to e.g. simply re-zoning land residential zone).[3]

(c) Key features of PPC84 include:

(i) The Structure Plan requires approximately 112 hectares of land to be set aside for ecological restoration, leaving approximately 106 hectares for

1 The Council's decision to "accept" PPC84 was made on 25 July 2023.
2 The Plan Change Request, page 8.
3 For completeness it is noted that this approach is similar to the approach taken for Mangawhai Central.

residential development. The Structure Plan also includes a proposed Landscape Protection Area over part of the site that contains a mixture of exotic trees and native bush.

(ii) The Structure Plan shows an indicative road network running through the site in a North to South and East to West configuration with proposed connections to Cove Road, Tara Road, Old Waipu Road, and Moir Street.

(iii) A minimum lot size of 1,000m2[4] resulting in an estimated yield (over the 106 hectares of developable area) of approximately 600 lots. For the southern one third of the plan change area (approximately 100 lots) the applicant has indicated its preferred option for wastewater servicing is that this be provided by way of connection to the Mangawhai Community Wastewater Scheme (**MCWWS**). For the remaining two thirds of the plan change area (approximately 500 lots) the applicant has indicated its preferred option for wastewater servicing is that this be provided by a private wastewater scheme.[5] Water supply is proposed to be provided by rainwater tanks.[6]

(iv) Lastly, PPC84, as amended by the applicant, provides for three indicative community hubs (Hubs A-C) in locations shown on the Structure Plan, that provide for educational, community and retail activities. In relation to this, the applicant proposes that Hubs A and B be used for retail purposes with up to 1,000m^2 of net floor area provided between them (as a

4 Where lots are connected to a reticulated wastewater network.
5 Evidence-in-chief of Mr Rankin, paragraph 45.
6 Evidence-in-chief of Mr Rankin, paragraphs 28-37.

restricted discretionary activity). The applicant proposes that Hub C be used for up to 5,000m^2 of net floor area for educational purposes (a new school).[7]

1.3 PPC84 has been comprehensively assessed in the section 42A Report prepared by the Council's reporting planner, Mr Clease, the expert assessments provided in support of the section 42A Report,[8] and in the rebuttal evidence by the section 42A team.

1.4 In his section 42A Report, Mr Clease expressed the opinion that the site is, in principle, well located for urban expansion and that there were no fundamental barriers to re-zoning of the site in respect of a wide range of matters. However, based on specialist advice from the independent consultants engaged by the Council, Mr Clease identified three key areas where he considered there were significant "information gaps" and further assessment was required by the applicant. Namely:

(a) The extent and management of geotechnical risk;

(b) The need to sensitivity test the applicant's transport modelling to assess the effects on the roading network if (a) more than 600 dwellings were provided in the plan change area and (b) if the key external roading connections shown on the Structure Plan were not able to be implemented; and

(c) The need to further assess the extent of wetlands, in order to ensure the proposed Structure Plan does not seek to route key internal roading connections or locate housing in areas containing wetlands.

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7 Paragraphs 39-47 of the section 42A Report, and paragraph 4.27 of Mr Clease's Rebuttal evidence.

8 Geotechnical Assessment by Mr Callum Sands, Hawthorn Gedddes; Water Supply Assessment by Ms Melissa Parlane, Asset Management and Capital Delivery Manager, KDC; Stormwater Assessment by Mr Carey Senior, Awa Environmental; Wastewater Servicing Assessment by Mr Clinton Cantrell, SCO Consulting Limited; Transportation Assessment by Ms Rachel Gasson, Commute Transportation Consultants; Ecological Review by Dr Stephen Brown, Wildlands; Freshwater Assessment by Ms Annabeth Cohen, Awa Environmental; and the Economic Assessment by Mr Derek Foy, Formative Limited.

1.5 Accordingly, in light of this, the section 42A Report made a provisional recomedation that PPC84 be approved, subject to further assessment of geotehcnical, transporation and wetland issues.[9]

1.6 The applicant has responded to the matters raised in the section 42A Report through its evidence-in-chief. As indicated by Mr Clease in his rebuttal evidence, the concerns raised in the section 42A Report in relation to geotechnical risk, transportation effects, and the extent of wetlands have now been addressed.[10]

1.7 The remaining areas of disagreement between the applicant and the section 42A team are now very confined in nature, and are limited to:

(a) **Wastewater**: The need for a 3,000m^2 minimum lot size where lots are not connected to a reticulated wastewater network and rely on septic tanks. Mr Clease considers a 3,000m^2 lot size is appropriate based on Mr Cantrell's evidence, and in particular the potential for septic tanks (if not properly maintained) to result in adverse effects on the Mangawhai Harbour.[11] Mr Rankin, the civil engineer to be called on behalf of the applicant, does not support the proposed minimum lot size of 3,000m^2, and considers it sufficient that onsite wastewater systems be designed to comply with AS/NZS 1547:2012.[12]

(b) **Roading**: In relation to connectivity to Tara Road, the section 42A team supports the revised roading connections shown on the updated Structure Plan. Separate from this, the section 42A team consider there to be benefit in showing an alternative roading connection to Moir Street on the Structure Plan, as sought by the Berggren Trust. The section 42A team likewise seek more explicit identification on the Structure Plan of the need to provide pedestrian and cycle connections along Tara

9 Section 42A Report, paragraphs 336-350.
10 Rebuttal evidence of Mr Clease, paragraphs 4.1-4.2.
11 Rebuttal evidence of Mr Clease, paragraphs 4.24-4.26.
12 Evidence-in-Chief of Mr Rankin paragraph 49.

Road and south to Moir Street. The section 42A team do not, however, support making formation of a southern roading connection mandatory as part of development of the first stage of the site, as a tool for enabling internal development of the southern third of the site (as sought by the Berggren Trust).[13]

(c) **Ecology**: With respect to the clearance of indigenous vegetation for track building, Mr Clease considers, based on Dr Brown's evidence, that this should require resource consent as a restricted discretionary activity (rather than being permitted, subject to meeting performance standards). In addition to this, given the potential for bat roosting by Long Tailed Bats in the site, Mr Clease considers that a bat survey should form part of the information requirements under DEV1-REQ6.[14]

(d) **The Rules relating to Community Hubs**: Mr Clease supports Community Hubs A - C proposed by the applicant, and also supports the inclusion of 110 Moir Street as a fourth 'Hub D'[15]. However, he considers it would appropriate to amend the proposed rule framework for the Community Hubs. In particular, to increase the amount of Net Floor Area for commercial activities to 1,000m^2 per hub, in Hubs A, B and D, rather than 1,000m^2 NFA across the entire Mangawhai Hills Development Area.[16]

(e) **Refinements to the plan provisions**: Further minor refinements to the plan provisions, as outlined in Mr Clease's rebuttal evidence.[17]

1.8 Overall, there is now a very high level of agreement between the applicant and the section 42A team. Mr Clease recommends that PPC84

13 Rebuttal evidence of Mr Clease, paragraphs 4.13-4.14.
14 Rebuttal evidence of Mr Clease, paragraphs 4.18-4.21.
15 In response to the submission by Ms Renner.
16 Rebuttal evidence of Mr Clease, 4.27-4.32.
17 Rebuttal evidence of Mr Clease, paragraph 4.33.

be granted, subject to the refinements to the Mangawhai Hills Development Area Provisions (**MHDA Provisions**) and Structure Plan outlined in his rebuttal evidence.[18]

1.9 These submissions address the following legal issues:

(a) The legal framework under the RMA for the Council's decision on PPC84;

(b) The applicability of the National Policy Statement on Urban Development 2020 (**NPS-UD**) to Mangawhai and to PPC84;

(c) The applicability of the National Policy Statement for Highly Productive Land 2022 (**NPS-HPL**) to PPC84;

(d) The relevance and weight the Hearing Panel should place on Chapter 3A of the Mangawhai Structure Plan included in the Operative District Plan and Appendix A growth areas, compared to the Mangawhai Spatial Plan 2020;

(e) The relevant legal requirements that must be satisfied in relation to the provision of wastewater and water supply infrastructure for PPC84; and

(f) Whether there is scope for the Hearing Panel to grant the relief sought in Submission No. 52 by Ms Paula Renner seeking that her property at 110 Moir Street be re-zoned to a commercial or business zoning.

2. THE LEGAL FRAMEWORK FOR THE DECISION ON PPC84

18 Rebuttal evidence of Mr Clease, paragraphs 4.34-4.35.

2.1 The Hearing Panel has been delegated the power to make a recommendation on PPC84 to the Council, and the Council will then make a decision.[19]

2.2 The Council's decision-making on PPC84 sits within a comprehensive framework established under the RMA. While these provisions are no-doubt well-known to the Hearing Panel, it is useful to set them out.

The relevance of PPC84 being a plan change request

2.3 As I have already noted, PPC84:

(a) is a plan change request that was lodged with the Council by the applicant on 5 March 2023 under clause 21 of Schedule 1 of the RMA; and

(b) was "accepted" by the Council under clause 25(2)(b) of the RMA on 25 July 2023.

2.4 In terms of the requirements that apply to plan change requests that are accepted by the Council the:

(a) process for submissions and hearing is set out in clause 29 of Schedule 1 of the RMA. It is, subject to some modifications, the normal process under Part 1 of Schedule 1 of the RMA; and

(b) Council is required to make a decision on PPC84 and submissions under clause 10 of Schedule 1. The statutory framework that applies to that Council's decision is the same as for any plan change under the RMA.

The statutory framework for the Panel's decision on PPC84

19 Decision of the Council appointing Hearing Commissioners dated 3 April 2024.

2.5 These submissions now address the statutory framework for the Hearing Panel's recommendation and the Council's decision on PPC84.

2.6 Under section 74(1) of the RMA, the Council must change its district plan *in accordance with*:

(a) Its functions under section 31; and

(b) The provisions of Part 2; and

(c) A Ministerial direction (not applicable here); and

(d) Its obligations to prepare a section 32 assessment and have particular regard to it;

(e) A national policy statement, a New Zealand coastal policy statement, and a national planning standard; and

(f) Any regulations.

2.7 When changing a district plan, the Council *must have regard to*:[20]

(a) Any proposed regional policy statement (not applicable because the Northland Regional Policy Statement is operative); and

(b) Any proposed regional plan (here the Proposed Northland Regional Plan);[21] and

(c) Any management plans and strategies prepared under other Acts; and

20 Section 74(2).

21 Counsel understands, from the NRC's website that all appeals have been resolved, and the NRC is taking steps to make the Regional Plan Operative.

(d) Any relevant entry on the New Zealand Heritage List required by the Heritage New Zealand Pouhere Taonga Act 2014[22]; and

(e) Any fisheries regulations to the extent that their content has a bearing on resource management issues in the district; and

(f) The extent to which the district plan needs to be consistent with the plans or proposed plans of adjacent territorial authorities; and

(g) Any emissions reduction plan made in accordance with section 5ZI of the Climate Change Response Act 2002 (in this case, the Te hau marohiki anamata – Towards a productive, sustainable and inclusive economy; Aotearoa New Zealand's First Emissions Reduction Plan, 16 May 2022); and

(h) Any national adaptation plan made in accordance with section 5ZS of the Climate Change Response Act 2002 (in this case the National Adaptation Plan 2022).

2.8 The Council must also *take into account* any relevant planning document recognised by an Iwi authority.[23]

2.9 Finally, Council *must not have regard to* trade competition or the effects of trade competition when changing a district plan.[24]

Content of a district plan

2.10 Under section 75(3), a district plan *must give effect to*:

(a) Any national policy statement; and

22 Noting that there are none identified in this case.
23 Section 74(2A).
24 Section 74(3).

(b) Any New Zealand coastal policy statements; and

(c) A national planning standard; and

(d) Any regional policy statement.

2.11 The Supreme Court in *King Salmon*[25] found the words "give effect to" mean "implement". On the face of it, this is a strong directive, creating a firm obligation on planning authorities.

2.12 A district plan *must not be inconsistent with*:[26]

(a) A water conservation order; or

(b) A regional plan for any matter specified in section 30(1).

2.13 Finally, under section 75(1), district plan policies *must* implement objectives while any rules *must* implement the policies. Section 76(1) requires rules to achieve the objectives and policies of the plan. In making a rule, Council *must have regard to* the actual or potential effect on the environment of activities, including any adverse effect.[27]

Section 32 Evaluation

2.14 PPC84 was lodged with a section 32 assessment prepared by consultants on behalf of the applicant.[28]

2.15 Under section 32(1), an evaluation must:

(a) examine the extent to which the objectives of the proposal being evaluated are the most appropriate way to achieve the purpose of this Act; and

25 *Environmental Defence Society Inc v New Zealand King Salmon Co Ltd* [2014] NZSC 38 at [77].
26 RMA, s 75(4).
27 Section 76(3) RMA.
28 The Private Plan Change Request, Part 9.

(b) examine whether the provisions in the proposal are the most appropriate way to achieve the objectives by:

(i) identifying other reasonably practicable options for achieving the objectives; and

(ii) assessing the efficiency and effectiveness of the provisions in achieving the objectives; and

(iii) summarising the reasons for deciding on the provisions; and

(c) contain a level of detail that corresponds to the scale and significance of the environmental, economic, social, and cultural effects that are anticipated from the implementation of the proposal.

2.16 Each objective must be examined during the evaluation, but it is not necessary that each objective individually be the most appropriate way of achieving the purpose of the Act. The High Court has held that it may be through their interrelationship and interaction that the purpose of the Act is able to be achieved.[29]

2.17 Under Section 32(2) an assessment of the efficiency and effectiveness of the provisions (policies, rules or other methods) under subsection (1)(b)(ii) must:

(a) identify and assess the benefits and costs of the environmental, economic, social, and cultural effects that are anticipated from the implementation of the provisions, including the opportunities for—

29 *Rational Transport Society Inc v New Zealand Transport Agency* [2012] NZRMA 298 HC at [46].

(i) economic growth that are anticipated to be provided or reduced; and

(ii) employment that are anticipated to be provided or reduced; and

(b) if practicable, quantify the benefits and costs referred to in paragraph (a); and

(c) assess the risk of acting or not acting if there is uncertain or insufficient information about the subject matter of the provisions.

Section 32AA further evaluation

2.18 Under section 32AA, a further evaluation is required only for changes made after the evaluation report was completed at notification. A further evaluation must be undertaken in accordance with section 32(1) to (4) and must be undertaken at a level of detail that corresponds to the scale and significance of the changes.

Part 2

2.19 The role Part 2 plays in decision-making processes for plan changes was refined by the Supreme Court in *Environmental Defence Society Incorporated v The New Zealand King Salmon Company Limited*[30] ("*King Salmon*").

2.20 The Supreme Court held that in the absence of invalidity, incomplete coverage or uncertainty of meaning in the relevant higher order statutory planning documents, there is no need to refer back to Part 2 of the RMA when determining a plan change.[31] This is because the higher order planning document is assumed to already give effect to Part 2. However,

30 King Salmon, above note 9.
31 At [85] and [88].

if one or more of these three caveats apply, reference to Part 2 may be justified and it may be appropriate to apply the overall balancing exercise.[32]

2.21 Simply because a higher order planning instrument is operative does not remove the possibility of any of the three caveats applying.

The Council's Decision

2.22 The Council is required under clause 10 of Schedule 1 to give a decision on PPC84 and submissions, including reasons for its decisions.

2.23 When giving reasons, the Council may address submissions by grouping them according to the provisions or subject matter.[33] The Council is not required to address each individual submission.[34]

3. THE APPLICABILITY OF THE NPS-UD TO MANGAWHAI AND PPC84

3.1 The Hearing Panel, in its recommendation, needs to make a finding whether Mangawhai comes within the definition of "urban environment" under the NPS-UD, and accordingly the NPS-UD applies to PPC84.

3.2 In my respectful submission, for the reasons that follow, whether or not Mangawhai comes within the definition of "urban environment" under the NPS-UD is debatable.

3.3 The NPS-UD came into force on 20 August 2020, and was amended in May 2022 (in response to the Resource Management (Enabling Housing Supply and Other Matters) Amendment Act 2021).

3.4 It applies to:

32 At [88].
33 Schedule 1, Cl 10(2).
34 Schedule 1, Cl 10(3).

(a) all local authorities that have all or part of an "urban environment" within their district or region; and

(b) "planning decisions" (including, as here, decisions on a plan change to an operative plan) by any local authority that affect an urban environment.[35]

3.5 Certain areas of New Zealand are urban environments under the NPS-UD by virtue of being identified as tier 1 or tier 2 urban environments in the NPS-UD.[36] Mangawhai is not identified in the NPS-UD as a tier 1 or tier 2 urban environment. However, Mangawhai would be a tier 3 urban environment if it comes within the definition of "urban environment" under the NPS-UD.

3.6 If the Hearing Panel finds that Mangawhai is a tier 3 urban environment, then the consequence of this is that:

(a) PPC84 must give effect to objectives and policies in the NPS-UD that apply to tier 3 urban environments; and

(b) The Kaipara District would be required to comply with obligations in the NPDS-UD on tier 3 local authorities.[37]

3.7 "Urban environment" is defined under the NPS-UD as:

> "Urban environment means any area of land (regardless of size, and irrespective of local authority or statistical boundaries) that:
> a) Is intended to be, predominantly urban in character; and
> b) Is, or is intended to be part of a housing and labour market of at least 10,000 people."

35 NPS-UD, clause 1.3.
36 As listed in Appendix: Tier 1 and tier 2 urban environments and local authorities.
37 These include: meeting obligations on Tier 3 local authorities to provide sufficient development capacity (Part 3, Subpart 1); undertaking specified monitoring of land supply etc (Part 3, Subpart 3); specify "development outcomes" for zones in "urban environments" (Part 3, Subpart 7) and remove rules specifying minimum parking requirements from the District Plan (Part 3, Subpart 8).

3.8 In my submission, the definition of "urban environment" has the following key features:

(a) First, both limb (a) and limb (b) of the definition must be met.

(b) Second, the use of the word "intended" in both limbs of the definition is significant. "Intended" is not defined in the NPS-UD. In the absence of a specific definition, the law requires words used in planning documents under the RMA to be given their plain meaning, in light of their context: *Powell v Dunedin City Council* [2004] 3 NZLR 721.[38] The Collins English Dictionary defines "intended" as "planned or future". Accordingly, in my submission, an area will come within the definition of urban environment under the NPS-UD if there is evidence that it is both planned to be "predominantly urban in character" and is or is planned or projected to be "part of a housing and labour market of at least 10,000 people" at some point in the future.

(c) In terms of "when" that point in the future is, the NPS-UD does not specify a date or timeframe for the assessment of when it is "intended" that an area be predominantly urban in character" and "part of a housing and labour market of at least 10,000 people". However, the NPS-UD includes obligations on local authorities subject to the NPS-UD to plan for the "long term" - defined as meaning "between 10-30 years".

(d) Lastly, in terms of the two limbs of the definition, I note there appears to be a degree of flexibility about limb (b) and the area which can be considered part of the same housing and labour market. This requirement could, conceivably be met if there was evidence that a number of separate towns and villages formed part of one combined housing and labour market of 10,000 or more people. However, the areas that count towards

38 Paragraph [35].

this combined housing and labour market of at least 10,000 people have to be predominantly urban in character under limb (a) of the definition. So, while an agglomeration of towns or villages could meet limb (b) of the definition, rural or rural residential population would not count towards this contribution as they do not satisfy the requirement in (a) of the definition of being "predominantly urban".

3.9 For completeness, with respect to whether or not Mangawhai is an urban environment, I note that:

(a) The Hearing Panel appointed by the Council for Private Plan Change 78: Mangawhai Central made a finding in its recommendation that Mangawhai is an "urban environment" under the NPS-UD. This was (essentially) on the basis of projected population growth in Mangawhai over the next 30 years, and a finding that Mangawhai forms part of a combined housing and labour market with neighbouring Warkworth, Wellsford and Whangarei (exceeding 10,000 people).[39]

(b) The Council has since received and approved an economic assessment by Mr Foy from Formative.[40] This assessment found it was "arguable" whether or not Mangawhai is an urban environment.[41]

3.10 In terms of the evidence before this Hearings Panel, there is a range of views.

3.11 Mr Clease notes Mangawhai is well short of having a population of over 10,000 people, and that a population of 10,000 people will not be reached even with the full development of Mangawhai Central and other currently

39 See the Hearing Panel's Recommendation on Private Plan Change 78, dated 12 March 2021, paragraphs 37-58. The Hearing Panel's Recommendation was adopted as the Council's decision on 28 April 2021.
40 See the Minutes of the Council Meeting dated 29 March 2023.
41 See pages 11 and 14 of the Formative Assessment dated 1 March 2022, at pages 171-184 of the Agenda for the Council Meeting on 29 March 2024.

urban zoned land over the medium term/ 10 year time horizon. Mr Clease also considers Mangawhai is sufficiently separated from other townships so that it does not form part of a combined housing and labour market of more than 10,000 people.[42]

3.12 Mr Cantrell, while not giving evidence on the applicability of the NPS-UD, notes in relation to wastewater, that the Council is committed to upgrading the MCWWS to provide for a total of 5,470 connections (upon completion of the subsurface drip irrigation at the Mangawhai Golf Course).[43] This could result in the ability to service an eventual population of over 10,000 people (even if an allowance is made for some connected properties being holiday homes).

3.13 Ms McGrath and Ms Neal for the applicant appear not to express a view, one way or the other, on whether Mangawhai comes within the definition of "urban environment" under the NPS-UD and simply note that there remains "some debate" on the issue.[44]

3.14 Ms O'Connor for the Berggren Trustee Co considers Mangawhai is an "urban environment". This is on the basis that, in her opinion, Mangawhai is intended to be urban in character and is intended to be part of a housing and labour market of at least 10,000 people. In particular, Ms O'Connor notes Mr Osborne's evidence that Mangawhai is projected (by Infometrics) to have a population of 12,700 people by 2051. Ms O'Connor notes this falls within the definition of "long term" under the NPS-UD.[45]

3.15 In my respectful submission, based on the evidence before the Hearings Panel, it is debateable whether Mangawhai comes within the definition of "urban environment" and the NPS-UD applies to PPC84 because:

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42 Section 42A Report, paragraphs 192-194.

43 Memorandum of Mr Cantrell, paragraph 2.2

44 Evidence of Ms McGrath and Ms Neal, paragraphs 48-50. .

45 Evidence of Ms O'Connor, paragraphs 14-16.

(a) It is common ground that, at present, the population of Mangawhai is less than 10,000 people. There is no particular evidence before this Hearings Panel establishing that Mangawhai is, at present, part of a wider combined housing and labour market with (say) Wellsford, Warkworth and Whangarei that exceeds 10,000 people.

(b) Accordingly, whether or not Mangawhai is an "urban environment" under the NPS-UD turns on whether there is evidence that Mangawhai is "intended" to be part of a housing or labour market of at least 10,000 people at some point in the future. In relation to this:

(i) The Hearings Panel could, potentially, find that Mangawhai is intended to be a housing and labour market of over 10,000 people for the reasons given by Ms O'Connor. Namely, that in the "Long Term" (as defined under the NPS-UD) it is projected that the population of Mangawhai will exceed 10,000 people (and reach 12,700 people by 2051). Noting that, in addition, as outlined by Mr Cantrell, the Council is planning on upgrading the capacity of the MCWWS to allow for capacity for 5,470 connections. However, on the other hand, I note that the Infometrics population projection for Mangawhai for 2051 referred to by Mr Osborne is stated as being for "Mangawhai Heads, Mangawhai and Mangawhai Rural".[46] On the face of it, "Mangawhai Rural" is likely to include population from areas that are not "predominantly urban in character", and therefore do not come within the definition of urban environment. Accordingly, it is unclear from Mr Osborne's evidence whether Mangawhai is projected, by 2051, to have a

46 Evidence-in-chief of Mr Osborne, paragraph 11.

population of 10,000 or more that is predominantly urban in character. The Hearings Panel may like to clarify this with Mr Osborne.

(ii) Furthermore, the argument that "intended" can be equated to population projections is, in my submission, somewhat uncertain. The word "intended" is not defined under the NPS-UD. "Long term" under the NPS-UD is defined to mean "between 10 and 30 years". Accordingly, in the alternative, it would be open to the Hearing Panel to find that Mangawhai is not an urban environment. For example, on the basis of applying a shorter time frame. Or on the basis suggested by Mr Clease. Namely, that Mangawhai will not reach a population of 10,000 people based on its current population and full development of Mangawhai Central and other currently urban zoned land in Mangawhai, at this time.[47]

3.16 If the Hearings Panel does find Mangawhai is an urban environment and the NPS-UD applies, PPC84 must "give effect" to the NPS-UD.

3.17 In relation to this, Ms McGrath and Ms Neal consider that PPC84, subject to amendments they have proposed, gives effect to the NPS-UD.[48] It is understood Mr Clease is of a similar view. For her part, Ms O'Connor considers there needs to be greater certainty that proposed roading connections within the plan change area and to Moir Street can be realised, for PPC84 to be consistent with Policy 1 of the NPS-UD relating to achieving a well-functioning urban environment.[49]

47 Section 42A Report, paragraphs 192-194.
48 Evidence-in-chief of Ms McGrath and Ms Neal, paragraph 55.
49 Evidence-in-chief of Ms O'Connor, paragraphs 18 and 19.

4. THE APPLICABILITY OF THE NPS-HPL TO PPC84

4.1 The Hearing Panel in its recommendation will also need to make a finding whether the plan change area contains any "highly productive land" as defined under clause 3.5(7) of the NPS-HPL. If so, the NPS-HPL applies.

4.2 In my respectful submission, for the reasons that follow, although the plan change area does contain a small area (approximately 3 hectares) of land that is LUC 3 land, this land does not come within the definition of highly productive land under clause 3.5(7) of the NPS-HPL on the basis this land is "identified for future urban development" under the Mangawhai Spatial Plan 2020.

4.3 The NPS-HPL came into force on 17 October 2022[50] with the aim of ensuring "highly productive land" is protected for use in land-based primary production, both now and for future generations.[51]

4.4 Under the NPS-HPL "highly productive land" is defined as:

> …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 cases to be highly productive land)

4.5 As at the time of this hearing, the Northland Regional Council has not yet notified changes to its Regional Policy Statement to give effect to the NPS-HPL. This means that the "transitional" definition of highly productive land in clause 3.5(7) applies. This provides as follows:

> 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

50 NPSHPL, clause 1.2.
51 NPSHPL, Objective 1.

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.

4.6 Applying the transitional definition of highly productive land in clause 3.5(7) of the NPS-HPL to PPC84:

(a) The plan change area was zoned rural under the Operative District Plan at the commencement date of the NPS-HPL on 17 October 2022;

(b) The plan change area includes a small portion of land (approximately 3 hectares) that is classified in the New Zealand Land Resource Inventory (**NZLRI**) as being LUC 3 land.[52] The plan change area does not include any LUC 1 or 2 land.

(c) As explained by Ms McGrath and Ms Neal, the applicant commissioned a site specific assessment by Handmore Land Management (dated 18 April 2023).[53] This assessment concluded that the plan change area does not, in fact, include any LUC1, 2 or 3 land and the mapping in the NZLRI in (due to

52 See Figure 22 of the Section 42A Report, where this area is identified in light green.
53 Provided as Appendix 14 of the plan change application lodged with the Council.

its scale) in error. However, this site specific assessment cannot be relied on in light of the Environment Court's decision in *Blue Grass Limited v Dunedin City Council* [2024] NZEnvC 83. Accordingly, the land identified in the NZLRI as LUC 3 land remains LUC 3 land, for the purposes of the definition of highly productive land under clause 3.5(7) of the NPS-HPL .

(d) The definition of highly productive land contains an exclusion (in clause 3.5(7)(b) where, at the commencement date, land was "identified for future urban development".

(e) "Identified for future urban development" is defined in the NPS-HPL as meaning:

> "Identified in a published Future Development Strategy as land suitable for commencing urban development over the next 10 years; or
>
> 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."

4.7 In relation to "identified for future urban development", the Council does not have a published "Future Development Strategy".[54] However, as identified by Mr Clease in the section 42A Report, the part of the plan change area containing the 3 hectares of LUC 3 land is identified in the Mangawhai Spatial Plan 2020 (a strategic planning document adopted by the Council) as falling within one of only two priority areas in Mangawhai for urban growth (being Area D). The Spatial Plan anticipates that this

54 These are only required for Tier 1 and Tier 2 local authorities.

area will be developed to a residential density of 600m2. This area is also identified as being serviced by the MCWWS.[55]

4.8 The Mangawhai Spatial Plan 2020 is intended to set out a vision for how Mangawhai will grow over a 30 year timeframe.[56] To come within the definition of "identified for future urban development" land must be identified, in the strategic planning document, as being suitable for commencing development over the next 10 years.

4.9 In my respectful submission, this requirement is satisfied in relation to the southern part of the site where the LUC 3 land is located. This is because:

(a) As outlined, above, the land is identified as one of only two priority areas for urban growth in Mangawhai. This identification is mapped to a cadastral boundary level of detail.

(b) There is nothing in the Structure Plan indicating the development of this land is to take place in more than 10 years time i.e. growth areas are not shown as being staged or otherwise differentiated into medium and long-term horizons. In terms of servicing, as outlined in Mr Cantrell's evidence, there is currently capacity in the MCWWS and the Council is committed to further upgrades to ensure this area, and others, can be serviced. A key reason for its identification in the Spatial Plan as a priority area was the fact that it had long been identified in the Operative District Plan as an area that was to be serviced with reticulated wastewater.

(c) From a policy perspective, it is understood that the exemption for areas identified for future urban development within the next few years, is intended to apply where planning for growth in those areas, and investment in associated infrastructure is

55 Section 42A Report, Figure 19, and paragraphs 207-208.
56 Mangawhai Spatial Plan 2020, Foreword, page 3.

progressed. In my submission, these requirements are met here. This part of the site (where the LUC 3 land is located) can be distinguished from other land identified in the Spatial Plan for growth, on the basis that it is both identified as a priority growth area in the Spatial Plan, and in the Operative District Plan as an area to be serviced with reticulated wastewater.

4.10 Overall, for the reasons set out above, in my respectful submission the site does not contain any highly productive land, as defined under clause 3.5(7) of the NPS-HPL, and accordingly the NPS-HPL does not apply.

4.11 If, in the alternative, the Hearing Panel finds that the (approximately) 3 hectares of land identified in the NZLRI as LUC 3 does come within the definition of "highly productive land",[57] Policy 5 of the NPS-HPL applies. This provides:

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

4.12 Clause 3.6 of the NPS-HPL sets out the circumstances in which local authorities may allow the urban rezoning of highly productive land. In Kaipara's case, this is set out in clause 3.6(4) which provides:

> *"Territorial authorities that are not Tier 1 or 2 may allow urban rezoning of highly productive land only if:*
> *(a) the urban zoning is required to provide sufficient development capacity to meet expected demand for housing or business land in the district; and*
> *(b) there are no other reasonably practicable and feasible options for providing the required development capacity; and*
> *(c) the environmental, social, cultural and economic benefits of rezoning outweigh the environmental, social, cultural and economic costs associated with the loss of highly productive land for land-based primary production, taking into account both tangible and intangible values."*

4.13 In addition, clause 3.6(5) of the NPS-HPL also applies and provides that:

57 On the basis that the exclusion on the basis of the land being "identified for future urban development' does not apply.

"Territorial authorities must take measures to ensure that the spatial extent of any urban zone covering highly productive land is the minimum necessary to provide the required development capacity while achieving a well-functioning urban environment."

4.14 Mr Foy's evidence is that there is currently sufficient development capacity to provide for growth in Mangawhai until at least 2038, and potentially well beyond that time.[58] In addition, even if further development capacity was needed, the Hearing Panel would need to be satisfied (under clause 3.6(b) of the NPS-HPL) that there were no other reasonably practicable and feasible alternatives (to this part of the site) in which this additional capacity could be provided. Accordingly, in my submission, in the event the Hearing Panel did find that the part of the site containing land identified in the NZLRI as LUC 3 land is "highly productive land" under the NPS-HPL, the requirements under clause 3.6(4) of the NPS-HPL that must be satisfied to re-zone this land urban, would not be met. Accordingly, the zoning of that part of the site would remain rural.

5. THE WEIGHT THE HEARING PANEL SHOULD PLACE ON THE CHAPTER 3A MANGAWHAI STRUCTURE PLAN PROVISIONS AND GROWTH AREA PROVISIONS IN THE OPERATIVE DISTRICT PLAN COMPARED TO THE MANGAHAWHAI SPATIAL PLAN

5.1 I now address the weight the Hearing Panel should place on the Chapter 3A Mangawhai Structure Plan provisions and Appendix A Growth Area provisions included in the Operative District Plan, compared to the weight it should place on the Mangawhai Spatial Plan 2020.

5.2 As outlined by Mr Clease in his section 42A Report:

(a) Chapter 3A of the Operative District Plan includes, as part of the District Plan, "Mangawhai Structure Plan – Policy Areas" based

58 Memorandum of Mr Foy dated 8 April 2024, paragraph 6.1.

on a structure planning exercise undertaken in 2005. The Mangawhai Structure Plan – Policy Areas (now nearly 20 years old) identify the Plan Change Area as being suitable for a mix of rural residential development and conservation.[59]

(b) Appendix A to the Operative District Plan also outlines anticipated growth areas for the various towns in the District. In relation to this Mr Clease notes the site is not identified in Appendix A to the Operative District Plan as a growth area.[60]

(c) The Mangawhai Spatial Plan was adopted by the Council in 2020. It identifies the southern one third of the plan change area as being one of only two "priority growth areas" (Area D) for urban density residential development in Mangawhai. As further explained by Mr Clease, Area D anticipates residential development to a density of 600m^2, with an overall yield of 300 lots. The Mangawhai Spatial Plan identifies the remaining two thirds of the site as "Frecklington Farms" and identifies this for rural residential development with a yield of 79 lots.[61]

5.3 In terms of the relevance of the plan change area being located within the Mangawhai Structure Plan Policy Area contained in Chapter 3A of the Operative District Plan, I note that the underlying zoning is still rural. However, the Hearing Panel is required to assess PPC84 against the outcomes of the Mangawhai Structure Plan, the Mangawhai Design Guidelines, and against the additional objectives and policies contained in Chapter 3 of the Operative District Plan.[62] Accordingly, the relevance of the site being located within the Mangawhai Strcuture Plan Policy Area is that the plan change application must be assessed against the settled objectives and policies contained in Chapters 3 and 3A of the Operative District Plan.

59 Section 42A Report, paragraph 201, and Figure 17.
60 Section 42A Report, paragraph 202 and Figure 18.
61 Section 42A Report, paragraphs 206-208 and Figure 19.
62 See 3A2: How to use this Chapter of the District Plan.

5.4 In terms of the Mangawhai Spatial Plan 2020, in my submission, the Hearing Panel is required to "have regard" to the Spatial Plan under section 74(2)(b)(i) of the RMA as a document prepared under another Act. In this case, the Spatial Plan meets these requirements as it has been the subject of consultation and adopted by the Council under the Local Government Act 2002. See for example *Middle Hill Ltd v Auckland Council* [2022] NZEnvC 162 and *Kiwi Property Holdings Ltd v Christchurch CC* [2012] NZEnvC 92.[63]

5.5 In terms of the requirement on the Hearing Panel to "have regard" to the Spatial Plan, the High Court in *Unison Networks v Hastings DC* held in relation to the requirement under the RMA to "have regard" to a particular matter that:

> *"The phrase is not synonymous with "shall take into account"; all of any of the appropriate matters may be rejected or given such weight as the case suggests is suitable: R v CD [1976] 1 NZLR 436 (SC). Nor is the phrase synonymous with "give effect to", so that such matters for consideration may be rejected or accepted only in part, provided they are not rebuffed at outset by a closed mind so as to make the statutory process some idle exercise: New Zealand Fishing Industry Association Inc v Minister of Agriculture and Fisheries [1988] 1 NZLR 544(CA). The matters must be given genuine attention and thought, and such weight as it considered to be appropriate, but the decision maker is entitled to conclude the matter is not of sufficient significance either alone or together with other matters to outweigh other contrary considerations which it must take into account in accordance with its statutory function."*

5.6 Accordingly, the requirement on the Hearing Panel to "have regard to" the Spatial Plan means the Spatial Plan must be given consideration, but does not necessarily need to be followed.

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63 In Middle Hill Ltd the Court found it was required to have regard to a Spatial Plan. In Kiwi Property Holdings Limited the Court had regard to a wide range of other plans and documents including area plans and urban development strategies prepared under the LGA02.

5.7 In my respectful submission, in terms of the relevance and weight that should be placed on the Mangawhai Spatial Plan in the Hearing Panel's recommendation:

(a) The Spatial Plan is relevant to the Hearing Panel's assessment of PPC84. It has had the benefit of public consultation and community engagement and at the current time, sets the Council's high level vision for future growth and development in Mangawhai: see for example *Middle Hill Ltd v Auckland Council* [2022] NZEnvC 162

(b) However, the weight that the Hearing Panel should give to the Spatial Plan is, in my submission, relatively limited.[64] The Hearing Panel's primary focus in its assessment of PPC84 must be on the RMA statutory planning documents. While the Spatial Plan signals an expectation that the southern one third of the site will be re-zoned for conventional residential development and the northern two thirds of the site be re-zoned for rural residential development, this is not "set in stone". It is open to the Hearing Panel to find that another zoning is "more appropriate" in section 32 terms.

5.8 Mr Clease considers PPC84 generally aligns with the policy direction and outcomes in Chapter 3A of the Operative District Plan, apart from in relation to density. [65] In relation to the Spatial Plan, he considers PPC84 to be less well aligned, but still broadly consistent with the outcomes of the Spatial Plan.

6. THE RELEVANT LEGAL REQUIREMENTS THAT MUST BE MET IN RELATION TO WASTEWATER AND POTABLE WATER SUPPLY TO PPC84

64 Apart from noting that, in relation to the NPS-HPL, there is a specific exemption for land identified for future urban development, that means the Spatial Plan is particularly relevant.

65 Section 42A Report, paragraph 204.

6.1 With respect to the wastewater and water supply infrastructure required to service the plan change area, the applicant has identified that:

(a) In relation to wastewater servicing, this could be either by way of connection to the MCWWS, a private standalone reticulated wastewater treatment plant on site, or by way of septic tanks on individual lots. The applicant's preferred option (at this stage) is for the 500 lots proposed in the northern two thirds of the site to be serviced though a private wastewater disposal scheme requiring resource consent from the Northland Regional Council (**NRC**); and the 100 proposed lots in the southern one third of the site to connected to the MCWWS.[66]

(b) Potable water supply is to be provided by rainwater tanks.[67]

6.2 The Council understands that the NRC has recently granted the applicant resource consent for the onsite wastewater disposal system referred to in evidence.

6.3 In my submission, it is important to acknowledge that this hearing is a hearing for the proposed re-zoning of land, in response to a private plan change request, not a resource consent application. Accordingly, the detail of how servicing is provided may change.

6.4 Furthermore, with plan changes, and in particular (as here) a private plan change request, the infrastructure necessary to service the development will often not been built yet. However, it does not need to be. As the Environment Court held in *Foreworld Developments Limited v Napier City Council*[68], the Environment Court stated that (my emphasis):

> [*15]* ***It is bad resource management practice and contrary to the purpose of the Resource Management Act - to promote the sustainable***

66 Evidence-in-chief of Mr Rankin, paragraphs 44-45.
67 Evidence-in-chief of Mr Rankin, paragraphs 28-33.
68 Decision No. W 008/2005.

management of natural and physical resources; to zone land for an activity when the infrastructure necessary to allow that activity to occur without adverse effects on the environment does not exist, and there is no commitment to provide it. *In McIntyre v Tasman District Council (W 83/94) the Court said:*

> *We agree with Mr Robinson that in this case the extension of services such as the sewage system and roading should be carried out in a co-ordinated progression. We hold that if developments proceed on an ad hoc basis they cannot be sustainably managed by the Council- an aspect which is not commensurate with section 5 of the Act.*
>
> *There are similar comments in decisions such as Prospectus Nominees v Queenstown-Lakes District Council (C 74/97), Bell v Central Otago District Council (C 4/97) and confirmation that the approach is correct in the High Court decision of Coleman v Tasman District Council [1999] NZRMA 39.*

6.5 In light of the above, in my respectful submission:

(a) There is no requirement for the Hearing Panel to be satisfied that all of the wastewater infrastructure necessary to service PPC84 and other "live zoned" residential land in Mangawhai exists at present; however

(b) The Hearing Panel needs to be satisfied that where the infrastructure does not already exist, providing it is feasible and that there is a commitment to providing it.

6.6 Given this is a plan change, if it were to be approved, it is also important that the plan provisions provide the Council with appropriate matters of discretion and assessment criteria to allow the Council to assess, at the resource consent stage, whether adequate wastewater supply can be provided for a particular proposal at the time that land comes to be developed.

Wastewater Servicing

6.7 As outlined above, the applicant has indicated that wastewater servicing could be provided by way of connection to the MCWWS, a private standalone reticulated wastewater treatment plant on site, or by way of septic tanks on individual lots. While the applicant has indicated its current preferred option is based on a private scheme servicing the 500 lots proposed in the northern two thirds of the site and the 100 proposed lots in the southern one third of the site being connected to the MCWWS, this could change, and will not be confirmed until subdivision consent stage.

6.8 Accordingly, Mr Cantrell, has assessed the ability of the plan change area to be serviced for wastewater under three scenarios. Scenario 1 being the applicant's currently preferred option. Scenario 2 being all properties being serviced by the MCWWS. Scenario 3 being the plan change area being serviced by on-lot septic tanks.

6.9 In Mr Cantrell's opinion, PPC84 can be adequately serviced for wastewater in all three scenarios. However, in relation to relation to Scenario 3 (all lots being serviced by septic tanks) Mr Cantrell notes that:

(a) In his opinion this would result in a yield of less than 600 lots due to the required minimum lot size that is necessary to ensure there is sufficient space for on site primary and secondary irrigation fields for wastewater disposal;

(b) There may be ecological sensitivity in relation to the cumulative effects arising from the widespread use of septic tanks due to the close proximity of Mangawhai Harbour;

(c) Overall, while septic tanks can provide an appropriate solution for rural lifestyle blocks or small numbers of dwellings, it is in his opinion preferable for residential development of this scale to

have wastewater servicing provided through a centralised network. In Mr Cantrell's opinion, centralised systems provide greater protection for the environment, and mitigation of the cumulative risks associated with inadequate operation and maintenance of individual private onsite wastewater disposal systems; and

(d) If individual septic tanks are to be used, Mr Cantrell considers a minimum lot size of 3,000m^2 to be appropriate. In his opinion, this will ensure there is sufficient room available for disposal fields, as well as reduced the potential for cumulative adverse effects on the Mangawhai Harbour from a large number of septic tanks.[69]

6.10 Given that some, or all, of the plan change area may be serviced by the MCWWS, Mr Cantrell has provided the Hearing Pannel with a comprehensive assessment of both the current capacity of the MCWWS and increases in capacity due to planned future upgrades of the MCWWS. As Mr Cantrell explains:

(a) The Council requires all new development in urban Mangawhai to connect to the MCWWS and encourages existing development to connect, due to improved environmental outcomes and because this will result in lower average costs.

(b) There are currently 2,764 connections to the MCWWS, with a current WWTP capacity of 3,550 connections as a result of the installation of an inDENSE system that has been purchased by the Council and will be commissioned by June. This means there is currently capacity for a further 786 connections.

(c) The capacity of the MCWWS is planned to be further increased to provide capacity for a total of around 5,470 connections by

69 Memorandum by Mr Cantrell dated 11 April 2024, paragraphs 2.4 and 3.15 and Rebuttal Evidence of Mr Cantrell, paragraphs 4.2-4.7.

2026/2027 through the discharge of treated wastewater to the Mangawhai Golf course. This has been assessed as technically feasible. It is acknowledged that this will require a resource consent, and agreement from the Golf Club.[70]

6.11 In terms of the funding of these upgrades, the Council has approved funding for Stages 1 and 2 of proposed upgrades to the MCWWS (which includes the inDENSE system referred to by Mr Cantrell).[71] Funding for the works required to enable the discharge of treated wastewater to the Mangawhai Golf course will be confirmed through the Council's 2024-2027 Long Term Plan.

6.12 In light of the above, the evidence before the Hearing Panel establishes PPC84 can be adequately serviced for wastewater (under the three different scenarios modelled by Mr Cantrell). However, if wastewater servicing is to be provided by on-site septic tanks (rather than a connection to a centralised system) then Mr Cantrell and Mr Clease consider a minimum lot size of 3,000m^2 is appropriate.

6.13 Overall, in my respectful submission, there is no wastewater related reason to decline PPC84.

Potable water supply

6.14 With respect to potable water supply, the applicant has proposed that that all potable water for PPC84 be provided by rainwater tanks. To ensure that an adequate supply of potable water is provided the applicant has proposed, as part of the PPC84 provisions, a table of minimum rain water tank sizes based on roof size and likely demand (based on number of bedrooms).[72]

70 Memorandum of Mr Cantrell dated 11 April 2024, paragraph 2.2.
71 See the Minutes of the Council Meeting held in October 2023, attached to Mr Cantrell's Memorandum as Attachment C.
72 See the evidence of Mr Rankin, paragraphs 28-37.

6.15 Ms Parlane for the Council considers the table will adequately address water supply needs, and no amendment to the table is required.[73]

6.16 In light of the above, in my respectful submission, the evidence before the Hearing Panel establishes that there is no potable water related reason to decline PPC84 (noting that most of Mangawhai and much of Northland is serviced by rainwater tanks).

7. WHETHER THERE IS SCOPE TO GRANT THE RELIEF SOUGHT IN SUBMISSION NO. 52 BY MS RENNER

7.1 Submission No. 52 by Ms Renner seeks that her property at 110 Moir Street by re-zoned "commercial".

7.2 As outlined in the section 42A Report, the relief sought by Ms Renner gives rise to an issue of whether the relief sought in the submission is within scope, and can be granted by the Hearing Panel.[74]

7.3 In my respectful submission, for the reasons that follow:

(a) Re-zoning 110 Moir Street business commercial is not within scope; however;

(b) Re-zoning the land Mangawhai Development Area (as per PPC84) and providing for an additional community hub (providing for up to 1,000m^2 of commercial or community activities) on the site with the balance of the land being used for residential purposes is, on balance, within scope. If the Hearing Panel agrees, it will then need to proceed to an assessment of the merits of doing this from a planning perspective.

73 Memorandum of Ms Parlane, dated 5 April 2024.
74 Section 42A Report, paragraph 30.

Case law on scope

7.4 Case law provides that for the Hearings Panel to have jurisdiction to make changes to PC84 in response to submissions:

(a) The changes must be within the scope of a submission; and

(b) The submission must be "on" PP84.

7.5 With respect to whether proposed changes are within the scope of a submission, the test is whether the proposed changes were "reasonably and fairly raised" in a submission on the plan change: *Countdown Properties (Northlands) Limited v Dunedin City Council*[75]. Case law sets out a number of key principles in relation to this:

(a) This will usually be a question of degree to be judged by the terms of the plan change and the content of the submissions;[76]

(b) The question of scope should be approached in a realistic workable fashion rather than from the perspective of legal niceties;[77]

(c) Another way of considering the issue is whether the amendment can be said to be a "foreseeable consequence" of the relief sought;[78]

(d) To take a legalistic view and hold that a decision-maker could only accept or reject the relief sought in any given submission would be unreal;[79] and

75 [1994] NZRMA 145 at 166.
76 At 166.
77 Royal Forest and Bird Protection Society Inc v Northland District Council [1997] NZRMA 408 (HC) at 413.
78 Westfield (NZ) Ltd v Hamilton CC [2004] 10 ELRNZ (HC) 254 at [73]. This decision related to whether an appeal provided scope for the changes made by the Environment Court.
79 General Distributors v Waipa District Council (2008) 15 ELRNZ 59 (HC) at 72.

(e) The whole relief package detailed in submissions should be considered when determining scope.[80]

7.6 The leading authority[81] on whether a submission is "on" a plan change is the High Court decision in *Clearwater Resort Ltd v Christchurch City Council*,[82] which sets out a two limb test:

(a) First, whether the submission addresses the changes to the pre-existing status quo advanced by the plan change; and

(b) Second, whether there is a real risk that people affected by the plan change (if modified in response to the submission), would be denied an effective opportunity to participate in the plan change process.

7.7 A submission can only fairly be "on" a proposed plan if it meets both these limbs. The *Clearwater* test has been adopted in a number of High Court decisions. In *Option 5 Inc v Marlborough District Council*[83] the High Court stated that the first limb may not be of particular assistance in many cases, but the second limb of the test will be of vital importance in many cases and may be the determining factor in some cases.[84]

7.8 The *Clearwater* test was applied by Kos J in *Palmerston North City Council v Motor Machinists*.[85]

7.9 In relation to the first limb of the Clearwater test Kos J:

(a) Described the first limb in the *Clearwater* test as the dominant consideration, namely whether the submission addresses the proposed plan change itself. This was said to involve two aspects: the degree of alteration to the status quo proposed by

80 Shaw v Selwyn District Council [2001] 2 NZLR 277 (HC).
81 As confirmed by the High Court in Turners & Growers Ltd v Far North District Council [2017] NZHC 764.
82 Clearwater Resort Ltd v Christchurch City Council AP 34/02, 14 March 2013, Young J.
83 Option 5 Inc v Marlborough District Council CIV 2009-406-144 28 September 2009, HC Blenheim.
84 At [29].
85 Palmerston North City Council v Motor Machinists [2013] NZHC 1290.

the notified plan change; and whether the submission addressed that alteration. Or, as Kos J said, to put it another way, whether the submission reasonably falls within the ambit of the plan change. [86]

(b) In relation to the first limb (whether the submission addresses the plan change) Kos J also observed that the section 32 evaluation report in support of a plan change involves a comparative evaluation of the efficiency, effectiveness and appropriateness of options. Accordingly, for variations advanced in submission to be "on" the plan change, they should be assessed in the section 32 assessment. If a change advanced in a submission is not a matter that was addressed, or should have been addressed, in the section 32 evaluation, then in his Honour's view, the change is unlikely to be meet the first limb of the test in *Clearwater*.[87]

7.10 In relation to the second limb of the *Clearwater* test Kos J in *Motor Machinists* stated:

(a) The second limb in *Clearwater* concerns procedural fairness. It is whether there is a real risk that persons directly or potentially affected by the additional changes proposed in the submission (so called "submissional side-winds") have been denied an opportunity to respond to those proposed changes.[88]

(b) In particular, the specific concern is whether the amendment to the plan change sought in a submission, if confirmed, would change who the Council considers to be likely to be directly affected by the proposed plan, noting that directly affected persons are required to be served with notice of the plan

86 At [80] to [81].
87 At [76].
88 At [83].

change under clause 5(1A)(a) of the RMA. In relation to this his Honour stated:

> *"A core purpose of the statutory plan change process is to ensure that persons potentially affected, and in particular those "directly affected", by the proposed plan change are adequately informed of what is proposed. And that they may then elect to make a submission, under clauses 6 and 8, thereby enabling them to participate in the hearing process. It would be a remarkable proposition that a plan change might so morph that a person not directly affected at one stage (so as to have received notification initially under clause 5(1A)) might then find themselves directly affected but speechless at a later stage by dint of a third party submission not directly notified as it would have been had it been included in the original instrument. It is that unfairness that militates the second limb of the Clearwater test."*[89] (my emphasis)

Whether the relief sought by Ms Renner is within scope

7.11 In my submission, for the reasons that follow, re-zoning of 110 Moir Street business commercial is not within scope. However, re-zoning the land Mangawhai Hills Development Zone (as per PPC84) and providing for an additional community hub (providing for up to 1,000m^2 of commercial or community activities) on the site with the balance of the land being used for residential purposes is, on balance, within scope.

Whether the relief sought is "reasonably and fairly raised" in submissions

7.12 Submission No 52 by Ms Renner seeks her property at 110 Moir Street be given a "commercial designation". The Operative District Plan has a Business commercial zoning.

7.13 While Ms Rener's submission uses the term "designation" it is clear from the submission that it is seeking the land be zoned to enable commercial

89 Paragraph [77].

activities. The relief sought is fairly and reasonably raised in the submission.

Whether the relief sought is in a submission "on" the Plan Change

7.14 Given this, the issue then becomes whether the relief sought is "on" PPC84 in terms of the two limb test set out in *Clearwater,* and confirmed in *Motor Machinists*.

The first limb of the Test in Clearwater

7.15 As set out above, the first limb of this test is whether the submission addresses the changes to the pre-existing status quo advanced by PPC84.

7.16 In my submission, applying this to the relief sought in Ms Renner's submission:

(a) With respect to seeking that 110 Moir Street be re-zoned commercial, on balance, it is difficult to see this relief as relating to the change to the pre-existing status quo advanced by the plan change. PPC84 is a plan change that seeks to re-zone land (via a bespoke zone and structure plan) for large lot residential development and ecological enhancement. 110 Moir Street owned by Ms Renner is 1.07 hectares in size. If the land is re-zoned business commercial then there is a maximum height limit of 12 metres and no limitations on building coverage meaning there is the potential for significant commercial development across a large part of the site. As the Hearing Panel will be aware, PPC84 does not include a commercial or industrial zone component.[90] Consideration of commercial or industrial zoning is not a matter covered in the section 32 assessment. An alternative view would be to categorise the change to the pre-existing status-quo more broadly, and say

90 Although it does provide for Community Hubs.

that PPC84 is a plan change that seeks to re-zone the plan change area from rural to an "urban zoning". Viewed in that way, Ms Renner's submission, and any submission seeking an alternative urban zoning, would relate to the change to the pre-existing status quo advanced by the plan change. However, in my view, it is problematic to take such a broad approach. The more correct analysis is that PPC84 is a plan change seeking large lot residential development and ecological enhancement.

(b) Ms Renner's submission clearly seeks the enablement of some commercial activity on her land. As outlined earlier in these legal submissions, PPC84 does make provision for community hubs. With community hubs the underlying zoning remains Mangawhai Hills Development Zone; with the community hub providing an additional rule framework over the top allowing for up to 1,000m^2 of commercial or community activities.[91] In relation to Ms Renner's site (approximately 1 hectare) a community hub would enable the provision of up to 1,000m^2 of commercial space (sufficient for e.g. some local neighbourhood shops fronting onto Moir Street) with the balance of the site being used for large lot residential. Accordingly, adding a community hub over Ms Renner's site (in response to her submission) would not change the zoning, but would change the rules that apply to the site, under the Mangawhai Hills Development zone. In my view, where land is being re-zoned, it must be open to submitters to seek changes to the rule framework that applies to that re-zoned land. The changes enabled by adding an indicative community hub to 110 Moir Street would, as outlined above, be comparatively modest compared to re-zoning all of the site Business Commercial zone.

(c) Accordingly, in my submission, while re-zoning the land business commercial does not relate to the pre-existing change

91 Based on rule amendments proposed by Mr Clease in his rebuttal evidence.

to the status quo advanced by the plan change, re-zoning the land Mangawhai Hills Development zone, and adding an indicative community hub, on balance, does.

The Second Limb of the Test in Clearwater

7.17 Then there is the second limb of the test in *Clearwater* that must be met and involves questions of procedural fairness. In particular, in my submission this involves consider of whether there are parties who the Council considered directly affected by the plan change and were served with notice of the plan change under clause 5(1A) of Schedule 1 of the RMA but decided not to submit, who might have changed their minds if they had known that (in this case) Ms Renner's property would be re-zoned business commercial, rather than residential, or alternatively subject to an indicative community hub, in response to Ms Renner's submission

7.18 **Attached** to these legal submissions as **Attachment A** is a map provided by Mr Waanders at the Council showing all of the properties who were served notice of PPC84 under clause 5(1A) of Schedule 1 of the RMA.

7.19 **Attache**d to these legal submissions as **Attachment B** is a map showing surrounding properties and whether or not they have submitted on PPC84. In relation to this:

(a) The location of Ms Renner's property at 110 Moir Street is shown with a blue outline.

(b) One submission, has been lodged by Mr Walters (submitter no. 25) in support of the plan change. The location of Mr Walter's property is shown as No. 2.

(c) Submissions have not been lodged by submitters at properties 1, and 3-15 on the attached map.

7.20 As outlined above, in my submission, Ms Renner's submission seeking 110 Moir Street be re-zoned business commercial does, on balance, not relate to the change to the pre-existing status quo advanced by PPC84 which seeks to enable large lot residential development, with ecological enhancement. Accordingly, the first limb of the test in *Clearwater* is not met. However, in case the Hearing Panel disagrees with that assessment, I consider the second limb of the test in *Clearwater* in relation to this relief. In relation to this, I note that re-zoning the land business commercial is likely to result in a more intensive level of adverse effects, than large lot residential (with a minimum lot size of 1,000m^2). A commercial zoning will typically involve more people coming onto a site, greater vehicle movements and noise, and overall, a higher intensity of activity than a large lot residential zoning - the later typically being regarded as relatively benign. Accordingly, in my submission it is possible that the relief sought by Ms Renner i.e. re-zoning the land business commercial could have changed the position of at least some of the 14 or so parties who were served notice but did not submit, as the plan change was seeking to re-zone the land large lot residential.

7.21 In relation to if the Hearing Panel were to apply an indicative community hub over 110 Moir Street, the effects of this relief are, I understand, less significant than if the land was re-zoned business-commercial. Furthermore, commercial space is still subject to a requirement to obtain resource consent (i.e. is not permitted). In my submission, on balance, it seems less likely that the parties who chose not to submit on the plan change would have decided to do so had they known of this relief. Nor does the relief sought (arguably) change the nature of the plan change in a fundamental way. Albeit if the Hearing Panel wished to take a conservative approach on this issue, I accept it might reach a different view.

7.22 For the reasons set out above, in my respectful submission:

(a) Re-zoning the land business commercial is not within scope; however;

(b) Re-zoning the land Mangawhai Hills Development Zone (as per PPC84) and providing for a relatively limited indicative community hub providing for up to 1,000m^2 of community or commercial space with the balance of the land being used for large lot residential is, on balance, within scope.

7.23 If the Hearing Panel agrees with these submissions on scope that is, of course, not the end of the matter. The Hearing Panel will need to undertake an assessment of the merits.

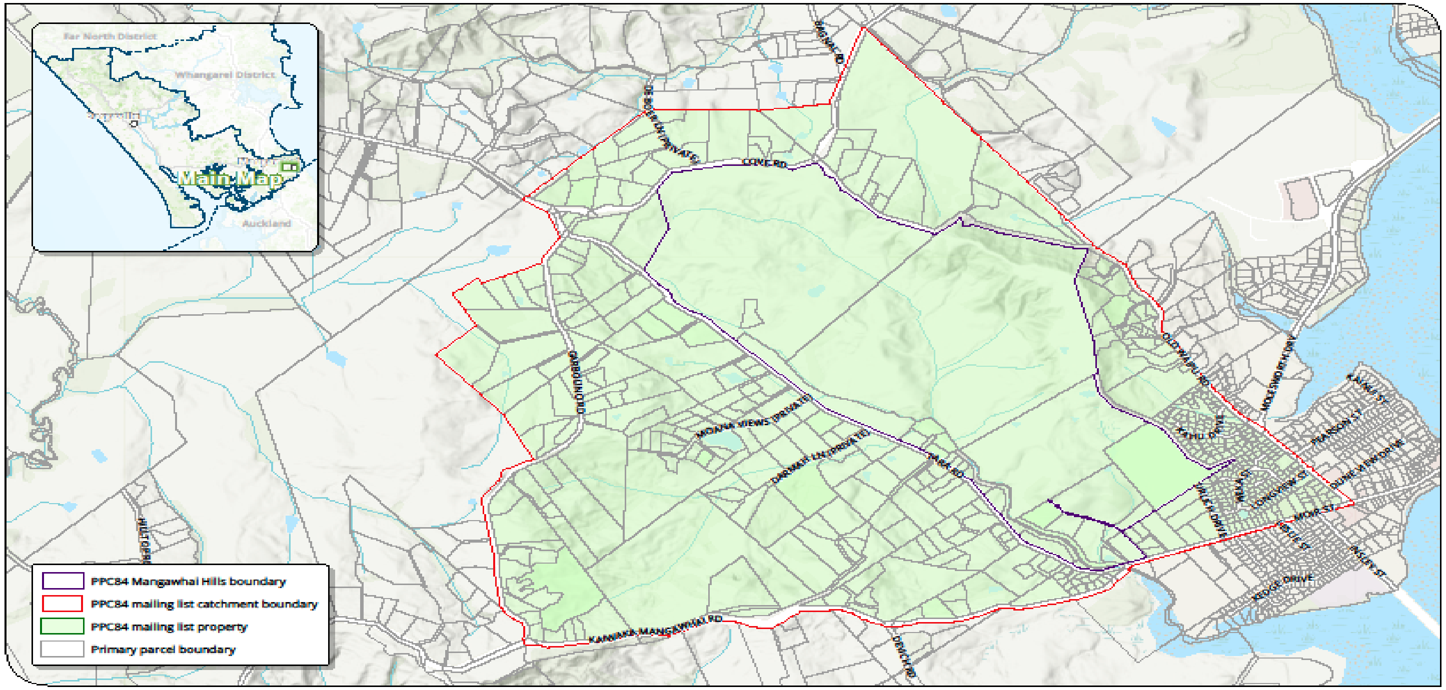
7.24 In relation to this, I understand that, from a merits perspective, Mr Clease is supportive of applying an indicative community hub on the basis it would help address the imbalance of residential and commercial land in Mangawhai, identified by Mr Foy.

8. CONCLUSION

8.1 The section 42A team recommend that PPC84 be confirmed, subject to the amendments contained in **Attachment 1** and **Attachment 2** to Mr Clease's rebuttal evidence, for the reasons set out in the section 42A report, rebuttal evidence and these submissions.

Warren Bangma
Counsel for the Kaipara District Council
22 May 2024

Attachment A – Map showing properties served with notice of PPC84 under clause 5(1A) of Schedule 1 of the RMA



KAIPARA DISTRICT

PPC84 Mailing List Catchment and Properties

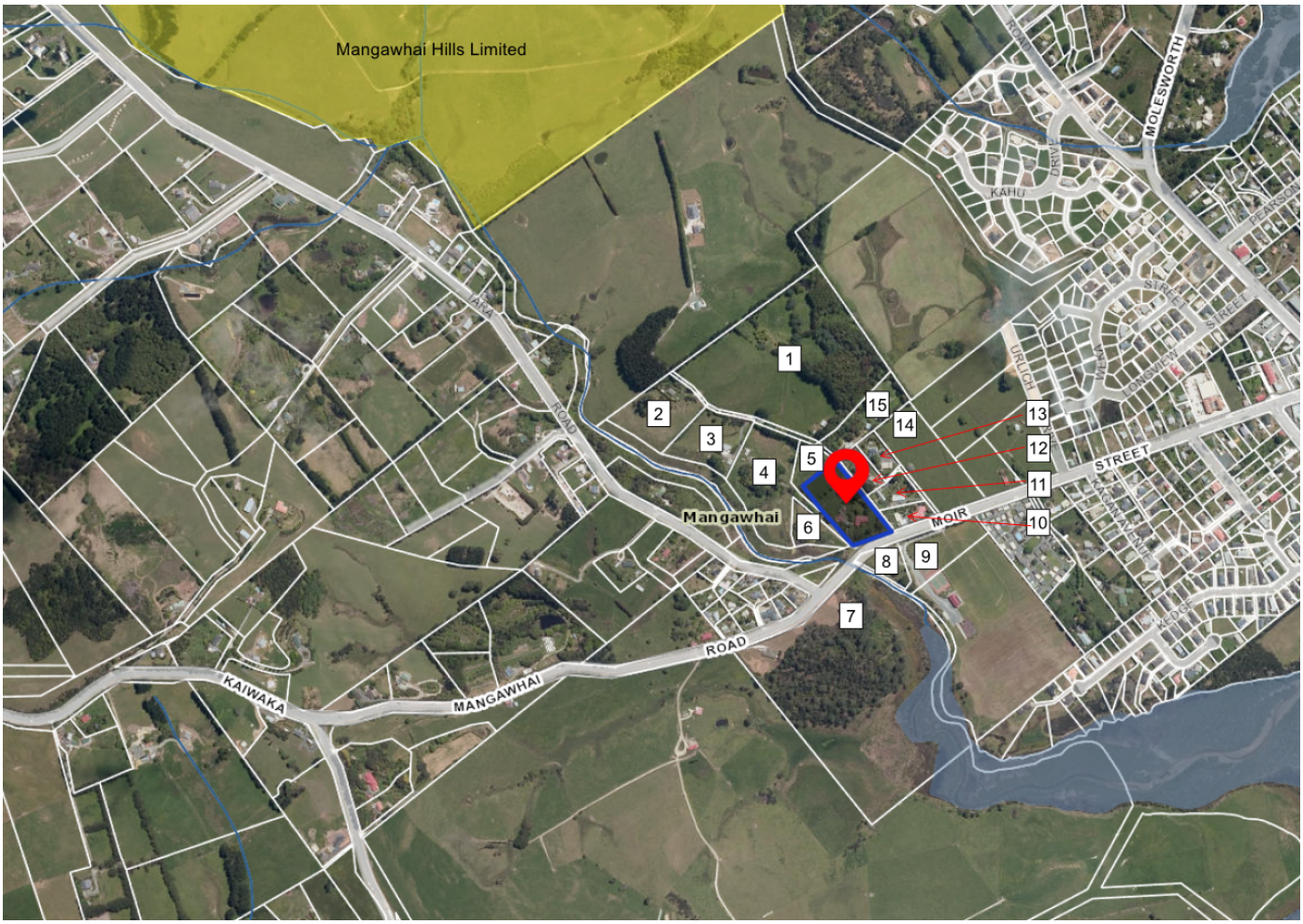
0 800
Metres
Scale: 1:20,000@ A4
July 19 2023
N

docid

PPC84: PROPERTIES AFFECTED BY RENNER RE-ZONING SUBMISSION				
Map Key	**Registered Owner**	**Address**	**Record of Title**	**Submitter**
1	Peter Mark Farnham	106B Moir Street	NA82D/518	No
2	Patrick Michael Cullinan, John Muru Walters	104 Moir Street	NA82D/517	Yes
3	Aaron John Cameron, Deidre Maree Lennix	106 Moir Street	NA82D/516	No
4	Keith Douglas Jackson, Moira Annette Jackson	112 Moir Street	825049	No
5	Ezra Billy Kowhai Mckenzie, Shannon Rachelle Williams	Moir Street	825050	No
6	Deborah Carol Page-Wood, Gary Page-Wood	114 Moir Street	709017	No
7	David John Wood	1256 Kaiwaka-Mangawhai Road	NA562/281	No
8	Kaipara District Council	75 Moir Street	NA1816/63	No
9	The Mangawhai Domain Society	75 Moir Street	NA1816/62	No
10	Tessa Coron Sutherland	104 Moir Street	NA92C/27	No
11	Robert Ronald Ewing, Joanne Milica Yuretich	104 Moir Street	NA92C/28	No
12	Sharon Doreen Anderson and Shaun Michael Anderson, Kevin McDonald Trustee Limited	104B Moir Street	NA92C/29	No
13	Carol June Adams and Darrell Alfred Forster Adams	104C Moir Street	NA92C/30	No
14	Kaipara District Council	96 Moir Street	NA577/175	No

Attachment B – Map and table showing parties who have and have not submitted on PPC84

15	Dylan James Denny	Moir Street	NA82D/519	No



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