BEFORE INDEPENDENT HEARING COMMISSIONERS
AT MANGAWHAI

I MUA NGĀ KAIKŌMIHANA WHAKAWĀ MOTUHAKE
KI MANGAWHAI

IN THE MATTER	of the Resource Management Act 1991
AND	
IN THE MATTER	of the hearing of submissions on Private Plan Change 85, Mangawhai East

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LEGAL SUBMISSIONS ON BEHALF OF TERN POINT RECREATION & CONSERVATION SOCIETY INCORPORATED, MANGAWHAI MATTERS INCORPORATED, AND THE NEW ZEALAND FAIRY TERN CHARITABLE TRUST

12 FEBRUARY 2026

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MAY IT PLEASE THE COMMISSIONERS:

1. INTRODUCTION

1.1 These submissions are filed on behalf of 3 entities[1] (collectively, **Residents**), who have a shared interest in ensuring the appropriate future development of Mangawhai, safeguarding the estuary, and the protection of the threatened nationally-critical Tara Iti | New Zealand Fairy Tern.

1.2 The Residents say that PC85's rezoning of 94 ha of land from rural to residential and commercial zoning pursuant is not appropriate and should not proceed. The 4 primary reasons for that position on which these submissions focus are:

(a) **Inappropriate urban form that threatens the ability of Mangawhai to be a well-functioning urban environment –** the urban development proposed by PC85:

(i) is contrary to the long term planning for the land, as set out in the Spatial Plan 2020 (**Spatial Plan**) and the Proposed District Plan (**PDP**);

(ii) threatens to undermine the existing growth strategy for Mangawhai, which is focused on 3 commercial recreation centres and development along Molesworth Drive and which can either be serviced now or in the very near term;

(iii) is not required to provide zoned land for residential development (there is ample zoned land available for development, including through the most recently approved PC78).

(b) **Contrary to NPS-HPL, clause 3.6(5) –** the extent of proposed rezoning and development of HPL is beyond the "minimum necessary to provide the required development capacity while achieving a well-functioning urban environment" and accordingly is contrary to clause 3.6(5) of the NPS-HPL.

(c) **No wastewater servicing or disposal capacity –** there is insufficient wastewater disposal capacity to accommodate the proposed intensive development, and no evidence has been provided that the Council or the developer have the resources to

[1] Mangawhai Matters Incorporated (FS01), Tern Point Recreation and Conservation Society Incorporated (S46), and New Zealand Fairy Tern Charitable Trust.

provide the significant infrastructure required. (And even if the financing were available, the difficulty is more fundamental – there is no certainty of any disposal solution to serve any additional areas of Mangawhai beyond those currently zoned for urban development.) Rezoning land ahead of such capacity being available (or ensuring that the funding is sufficiently certain), and in particular when there is no clear method of providing that capacity, is contrary to the NPS-Infrastructure, NPS-UD and to sound planning practices.

(d) **Significant effects on nationally-critical avifauna:** the proposed development will significantly adversely affect the habitat of the nationally-critical New Zealand Fairy Tern and to a lesser extent the Australian bittern, both directly through impacts on feeding areas and indirectly through increased urban activity (including the presence of additional cats and dogs).

1.3 The worst outcome, from the Residents' and the wider community's perspective, would be for PC85 to rezone land that was not financially feasible to develop, or which could not be developed until the Council identified, consented and constructed, a significant new wastewater disposal solution (currently expected to be greater than 20 years from now, if at all). Accordingly, the Residents say that the matters set out in 1.2 (a) warrant refusal of PC85. They record for completeness that, even if PC85 were to pass the NPS-HPL threshold in 1.2 (b), which they say warrant decline, they do not accept that the matters set out above in 1.2 (c) and (d) can be appropriately addressed by any rules in PC85.

1.4 The Residents are extremely concerned that the proponents of PC85 do not have the funding (or necessarily any intention) to develop the land themselves. Rather, the Residents expect that the current proponents wish to simply have the land rezoned, subject to any number of onerous rules in the PC85 provision, and then on-sell it.

1.5 The Residents' suspicions in this regard are amplified by three factors. First, that the Applicants do not own a large proportion of the land that is proposed to be rezoned.[2] While it is lawful to apply for a rezoning of someone else's land, it is most unusual to do so – the exception perhaps being if there are small sections of land that are owned by third parties within a wider otherwise contiguous land holding. Practically, not owning all of the land subject to a proposed plan change is particularly problematic when it comes to who pays the cost of paying for the infrastructure to service the land. Clearly a pipe that goes only 75% of the required distance is no use to anyone, and can we really expect that the proponents of the

[2] Refer Fig 2, s 42A Report, para 40.

PC85 intend to give the other landowners within the PC85 area a "free ride" as regards infrastructure? Surely not. The result being that any negotiations for a private developer agreement between the Applicants and the Council will become intractable, the developer agreement will not be signed, and the infrastructure will not be provided. The zoned land will languish undeveloped.

1.6 Secondly, even if there was the ability to provide the funding for the infrastructure, there is no disposal capacity for additional urban development beyond that land already zoned. It is not appropriate for intensive urban development to utilise septic tanks, particularly adjacent to such a sensitive receiving environment as the Mangawhai Harbour. Furthermore, while a "solution" to this seemingly intractable problem might be to simply recast PC85 to seek a rural lifestyle zoning, that would be run directly up against the NPS-HPL (which only provides a limited pathway for urban development, but expressly maintains the stringent threshold test for rural lifestyle – refer clauses 3.7 and 3.10, NPS-HPL).

1.7 Thirdly, the Applicants have chosen to pursue a private plan change in parallel with the PDP review. The legal implications of this being that the Applicants will need to effectively "re-run" their rezoning argument in the course of that process. What seems more likely – although I accept it is speculative – is that this PC85 process is being run in order to provide a "baseline" zoning, and will then be further relitigated through the PDP process. The Tern Point Residents explained their significant disquiet about this approach, which was acknowledged by Mr Clease in his s 42A Report (at paragraphs 34-35).

2. LEGAL FRAMEWORK

2.1 The legal framework for plan changes will be well understood by the Panel and is concisely summarised in the s 42A Report (refer paragraphs 15-22). I endorse and respectfully adopt that summary.

3. BASES OF OPPOSITION

3.1 The Residents have raised a wide variety of grounds for opposing PC85, however in the interests of brevity my submissions address the four core grounds of opposition. Those other grounds, as expressed in their written submissions, remains a concern to them.

Contrary to planned urban form and not required by NPS-UD

3.2 Mr Clease discusses issues of urban form and development capacity at some length in his s 42A Report (refer paragraphs 230 – 320). From a legal perspective I support many of his opinions, and in the interests of brevity I will address below only those matters where I disagree or where I wish to emphasise a particular aspect.

3.3 In any RMA assessment, the factual context of any particular proposal is crucial. The existing urban form of Mangawhai comprises three separate nodes that are in the process of becoming a functionally single township (those three nodes being Mangawhai Heads and Mangawhai Village, linked by Mangawhai Central). This connection is aptly demonstrated and reinforced by the recently completed shared pedestrian and bike path that links these 3 areas. By contrast, PC85 would create a fourth node, located on the southern side of the harbour.

3.4 So too is the planning context crucial – especially where, as here, there is a proposal to insert a new section into an existing District Plan. Acknowledging that the ODP is dated, there is still a requirement for the new provisions to sit appropriately within that existing framework and to give effect to any applicable objectives and policies. (To the extent that this might cause the Applicants a problem, then that is a problem directly arising from the Applicants' decision to pursue a plan change to the ODP rather than seeking just to amend the PDP through that submission process.)

3.5 The Council's Spatial Plan for Mangawhai was primarily prepared between July and December 2019. It was subsequently finalized and adopted in late 2020. My instructions are that the Spatial Plan was developed through consultation sessions and an 'Inquiry-By-Design' workshop to map out growth for the area over a 20–25 year period. Since that time the Council has finalised Private Plan Changes 78, 83 and 84 relating to land areas at Mangawhai Central, The Rise and Mangawhai Hills respectively, and incorporated those lands and related provisions into its ODP. It has adopted Long Term Plans under the Local Government Act which include funding for infrastructure needed to enable development on that rezoned land. I am also instructed that the Council has adopted commensurate development levy regimes requiring new developments to pay their share of those infrastructure costs. PC85 is clearly not a part of any of that planning work.

3.6 Spatial plans can play an important role in guiding development, and to ensure that necessary infrastructure can be staged to match that development demand – essentially, spatial plans assist in ensuring the right

development, in the right places, at the right time. While spatial plans are not new, they are being used more often, and are set to play an important role in the reformed RMA framework that will soon be upon us. Mr Clease explains the steps that the Council has taken in preparing the Spatial Plan for Mangawhai, and how the Spatial Plan has been implemented. He concludes that PC85 does not align with the Spatial Plan. He says:

> 253. PPC85 does not therefore align with the Spatial Plan in terms of the outcomes anticipated. The Spatial Plan is a document prepared under Local Government Act processes rather than the RMA. As such it is not determinative to the more detailed examination enabled through this private plan change process. It does nonetheless provide a relatively recent assessment of how Mangawhai might grow, informed by public consultation and considered in a holistic, township-wide, manner.

3.7 I would be stronger – PC85 does not only "not align", but rather is "directly contrary to" the Spatial Plan. Further, in my submission, it is open to the Panel to place a material degree of weight on this document, despite it being prepared under a Local Government Act process. It was clearly prepared in consultation with the community, over a lengthy period, and appears to be the cornerstone of planning for Mangawhai. It can be had regard to under s 31(1)(a) [territorial authorities' functions include] "methods to achieve integrated management of the effects of the use, development or protection of land and associated natural and physical resources of the district", s 74(1) [territorial authority must prepare and change its plan in accordance with] "its functions under s 31", s 74(2) [when preparing or changing its plan a territorial authority must also have regard to "management plan and strategy prepared under any other Acts", and clauses 10(2)(b)(ii) and 29, Schedule 1, Schedule 1A, RMA, namely that the Panel's decision may include "any other matter relevant to the [plan change] arising from the submissions".

3.8 The NPS-UD is relevant directly under s 75(3) "a district plan must give effect to any national policy statement", s 74(ea) "a territorial authority must prepare and change its district plan in accordance with a national policy statement", and indirectly under s 31(aa) "the establishment, implementation, and review of objectives, policies, and methods to ensure that there is sufficient development capacity in respect of housing and business land to meet the expected demands of the district".

3.9 There is significant debate between the economists about whether there is "sufficient" development capacity already provided in Mangawhai without PC85. In reliance on Mr Foy's research, Mr Clease concludes in respect of Policy 2, NPS-UD:

> 266. I therefore conclude that there is more than sufficient capacity relative to demand, especially when considered over the medium term/ 10 year

> time frame which is the period that the NPS-UD requires capacity to be both zoned and capable of being serviced.

3.10 I agree.

3.11 Mr Clease, however, goes on to say at his paragraph 271 that "the NPS-UD raises no policy hurdles to providing more capacity than is required, provided that such capacity is able to be serviced and is located such that it results in a well- functioning urban environment." He then notes, in relation to Policy 8, NPS-UD, that "the Council therefore still needs to be responsive to development proposals that seek to add significant additional capacity, such as PPC85."

3.12 While I agree with his recital of what Policy 8 says, I do not agree that the verb "responsive" means that the Council must agree with, support, or enable such development. If the NPS-UD was meant to "enable" such development, then the document would have said so. In my opinion, being "responsive to" simply means being prepared to consider such proposals on their merits, and not to refuse them "in principle" because they are unanticipated or out of step. As Mr Clease notes, some guidance is provided in clause 3.8. But, again, this clause merely requires a council to "have particular regard to the development capacity provided by a plan change", it does not say that such development capacity "must be enabled". It would be open to the Panel to "have particular regard to the development capacity enabled by PC85" and still decline PC85 without falling foul of the statutory requirement in s 75(3) to give effect to a national policy statement.

3.13 Furthermore, the provision of any further development capacity is subject to a "well-functioning urban environment" resulting, and that there is "adequate development infrastructure to support the development of land" (refer definition of "development capacity" and "development infrastructure" in NPS-UD). Given the significant hurdle posed by the lack of any wastewater disposal capacity, I agree with Mr Clease's conclusions in respect of Policy 8 below:

> 279. If a proposal cannot be adequately serviced by the necessary infrastructure it cannot be said to contribute to development capacity and therefore cannot use the Policy 8 pathway. The above assessment on servicing has confirmed that the site can be serviced for stormwater and is able to also be plausibly serviced for water supply subject via roof water capture and an appropriate firefighting water supply. There is however no capacity in the wastewater treatment network, either currently, or under programmed upgrades, over and above capacity that is already needed to service existing urban zoned areas.
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> 280. If the constraints on wastewater capacity cannot be overcome, then the capacity proposed by the applicant cannot be realised, and therefore PPC85 will not pass through Policy 8.

3.14 The importance of the necessary development infrastructure is emphasised by Objective 6(a) and (b) of the NPS-UD, namely that "local authority decisions on urban development" are "integrated with infrastructure and funding decisions" and are "strategic over the medium and long term". Any approval of PC85 in the absence of any viable and credible wastewater disposal solution would be contrary to both of those objectives.

3.15 Any reliance on the NPS-UD provisions is also subject to the plan change resulting in a well-functioning urban environment. The Residents do not agree that PC85 would result in a well-functioning urban environment, and they share Mr Clease's concern set out below as to the resulting urban form:

> 320. In the event that a wastewater effluent disposal solution is able to be identified, then I consider the proposal is capable of delivering a well-functioning urban environment in terms of its internal layout in accordance with the PPC85 Structure Plan. I have less confidence when the site is viewed through a wider lens of township urban form. It creates a fourth urban node on the far side of the harbour where none is needed for several decades and where a more compact urban form would be delivered if existing growth areas on the northern side of the harbour were developed first. A high level of confidence regarding the delivering of a shared path over the causeway is also integral to the site's ability to deliver a well-functioning urban environment.

3.16 Finally, I would urge the Panel to be cautious of a "zone it and they will come" approach, which appears to underlie some of the comments made in the reports. While the availability of zoned land could put downward pressure on house prices, that only occurs in reality if that zoned land is infrastructure-enabled. In other words, ample land can be zoned, but it will not have a depressing effect on prices unless it can be developed. Furthermore, while the current focus, the cost of housing must not be the sole focus of urban planning. Decisions about rezoning land should also be undertaken through the lens of many other equally important objectives – what is the vision for an urban area over the short, medium and long term. How can development be undertaken in a way that can be efficiently (and affordably) serviced by infrastructure? What areas are best suited for residential activity, and which for other commercial or industrial uses? Are there any areas that should remain "no-go areas" because, for example, of ecological sensitivities? How can an urban area, particularly a small settlement, retain its "vibe" and vitality?

3.17 So, in summary, PC85:

(a) Is contrary to key objectives of the ODP;

(b) Is contrary to the Spatial Plan, prepared to help guide the future shape of Mangawhai;

(c) Is contrary to the notified PDP;

(d) Is not required to give effect to the NPS-UD because:

(i) It is not a mandatory requirement because Kaipara District is not a Tier 1 or Tier 2 territorial authority;

(ii) There is ample development capacity within Mangawhai without the additional development to be enabled by PC85 (in other words, Policy 2 will be met without PC85);

(iii) There is no associated proposal for the necessary "development infrastructure" to support the additional capacity, and accordingly the Policy 8 gateway is not available.

(e) Is contrary to Policy 6(a) and (b) of the NPS-UD because of the lack of any viable and credible wastewater disposal solution.

(f) To the extent the NPS-UD does apply, it only supports those components of PC85 that fall within the definition of "urban development".

(g) In respect of any qualifying urban development:

(i) The Policy 2 requirement to provide "at least" sufficient development capacity is not a mandatory requirement to provide more than that.

(ii) The requirement of Policy 8 to "be responsive" to proposals in unanticipated locations is not a requirement to always agree to such proposals, and, in any event, that obligation is qualified by a requirement that a "well-functioning urban environment" would result. Given the (in practice) insurmountable hurdle presented by the lack of wastewater disposal capacity and the PC85 land's distance and separation from Mangawhai Village, PC85 will not result in a well-functioning urban environment; indeed there is doubt whether there will be any actual development at all.

(iii) The Spatial Plan should in my submission be considered to be a future development strategy (or FDS) under the NPS-UD - refer clause 3.12(4):

> (4) If a local authority that is not a tier 1 or 2 local authority chooses to prepare an FDS, either alone or with any other

local authority, this subpart applies as if it were a tier 1 or 2 local authority, except that any reference to an HBA may be read as a reference to any other document that contains broadly equivalent information

(iv) I refer to the process adopted for the Spatial Plan, described above, and also to the following clauses in Part 3, Sub-Part 4 of the NPS-UD – clauses 3.13 (2) Purpose and content of FDS – the Spatial Plan "ticks these boxes":

> (2) Every FDS must spatially identify:
>
> (a) the broad locations in which development capacity will be provided over the long term, in both existing and future urban areas, to meet the requirements of clauses 3.2 and 3.3; and
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> (b) the development infrastructure and additional infrastructure required to support or service that development capacity, along with the general location of the corridors and other sites required to provide it; and
>
> (c) any constraints on development.

(v) If so, the Panel must have regard to that Spatial Plan under the NPS-UD when considering PC85 - refer, eg, Part 3, Sub-Part 4, NPS-UD, and in particular clause 3.17. While that sub-part is mandatory for tier 1 and tier 2 local authorities, refer to clause 1.5 "Implementation by tier 3 local authorities":

> (1) Tier 3 local authorities are strongly encouraged to do the things that tier 1 or 2 local authorities are obliged to do under Parts 2 and 3 of this National Policy Statement, adopting whatever modifications to the National Policy Statement are necessary or helpful to enable them to do so.

Contrary to NPS-HPL

3.18 The s 42A Report at paragraphs 364 to 401 addresses the NPS-HPL in some detail. The amendments to the NPS-HPL have been addressed in supplementary planning evidence from the Council's reporting officer, Mr Clease, dated 23 January 2026 (at paras 9.1-9.13).

3.19 The effect of the proposed amendments is that **some of** the threshold tests for rezoning rural land "do not apply to the urban rezoning of LUC 3 land" (refer new clause 3.6(6), NPS-HPL). The relevant tests that apply to PC85 were those set out in clause 3.6(4)(a)-(c). But, as my submissions explain,

there are other parts of Section 3 – Implementation, particularly clause 3.6(5), that remain fully in play, and which must be given effect to by the Panel.

3.20 As noted by Mr Clease, the threshold tests in clause 3.6(4)(a)-(c) only provide an exception for "urban zoning", and accordingly any part of PC85 that seeks to rezone land to rural-residential (for example) would need to meet those tests.[3]

3.21 Mr Clease further records at his paragraph 9.7 that the exception in clause 3.6(6) only applies to clauses 3.6(4), and accordingly the test in clause 3.6(5) remains engaged. Mr Clease then opines that such an interpretation would "defeat the clear intent of the amendments which are to enable to urbanisation of LUC3 land", and notes that this issue will be addressed by legal counsel for the Council. It appears that Mr Clease is suggesting that clause 3.6(5) should not be applied.

3.22 In my submission:

(a) Clause 3.6(5) must be read and applied on its terms, namely that (emphasis added):

> (5) 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**.

(b) It is inconceivable that the authors of the NPS-HPL amendments would not have considered whether or not to add a reference to clause 3.6(5) in the new exclusion clause, 3.6(6). In other words, the omission of a reference to clause 3.6(5) is not a mistake that needs to be rectified by a strained interpretation of the plain words.

(c) Clause 3.6(5) does not "undermine" the effect of the legislative amendments, rather it simply states that any urban rezoning of HPL land must be "minimum necessary to provide the required development capacity while achieving a well-functioning urban environment". Contrary to Mr Clease's comment, I do not agree that the effect of the amendments was to "enable" the urban zoning of LUC3 land, rather that the effect was to reduce the severity of threshold tests for being able to undertake any such

[3] "Urban zone" is defined by the NPS-HPL, clause 1.3, as a collection of zones, and it includes a "low density residential zone" but does not include any "rural-residential" zone. Refer also to clause 3.7 of the NPS-HPL "Avoiding rezoning of highly productive land for rural lifestyle – this clause does not include a similar exemption to that in clause 3.6(6).

rezoning. But, importantly, any rezoning must still meet the "minimum necessary" requirement in clause 3.6(5).

(d) This overarching requirement that any urban rezoning be "the minimum necessary to provide the required development capacity" is consistent with broader objectives and policies of the NPS-HPL.

(e) In that regard, any discussion of Section 3 should be caveated by reference to clause 3.1(1) (emphasis added):

> This Part sets out a non-exhaustive list of things that local authorities must do to give effect to the objective and policies of this National Policy Statement, but **nothing in this Part limits the general obligation under the Act to give effect to that objective and those policies**.

(f) The Panel's decision on PC85, including whether the relevant tests for the rezoning of LUC 3 are met, must be made within the context of:

(i) The NPS-HPL's objective: "Highly productive land is recognised as a resource with finite characteristics and long- term values for land-based primary production."

(ii) 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."

(iii) Policy 8: "Highly productive land is protected from inappropriate use and development."

3.23 Accordingly, insofar as the NPS-HPL is concerned, the fundamental questions for the Panel remain those set out in clause 3.6(5):

(a) What is the "required development capacity" for Mangawhai; and

(b) Is the form of urban zoning proposed by PC85 "the minimum necessary" to provide for that capacity.

3.24 In respect of that first question, the analysis undertaken by Council's expert and referred to by Mr Clease in his report (eg at paragraphs 375-388) remains applicable despite the recent amendments to the NPS-HPL. In my submission, that analysis demonstrates that there is sufficient development capacity elsewhere within existing zoned land. On that basis, and applying policy 3.6(5) of the NPS-HPL, the "minimum necessary" urban

zoning on the LUC 3 land would be effectively zero (refer also paragraph 388 of the s 42A Report, where Mr Clease reaches the same conclusion).

3.25 The northwest corner of the site is proposed to be rezoned rural lifestyle zone, or RLZ. As Mr Clease notes, the threshold tests for rezoning to an RLZ are different to those that apply to an urban zone (see his paragraphs 395-401). First, the recently NPS-HPL amendments do not apply to clause 3.7. Accordingly that "avoid policy" has full effect, subject only to the exception provided by clause 3.10(1), NPS-HPL. While Mr Clease considers that exemption to be met, in my submission insufficient weight has been placed on clause 3.10(1)(c) and in particular the importance of considering the environmental costs, including the tangible and intangible values, associated with the loss of the highly productive land. In this case, those environmental costs relate to the effects on avifauna.

Lack of wastewater servicing and disposal capacity

3.26 The Residents are particularly concerned about the proposed rezoning of PC85 preceding any certainty about how the wastewater from the new urban development area will be disposed of

3.27 The Residents would not agree to any type of "threshold rule" in the PC85 provisions, eg that development cannot proceed until there is an appropriate wastewater disposal solution.

3.28 This is because, once the land is rezoned, the "horse has bolted" and the pressure will inevitably come on to the Council to make provision for that wastewater capacity in this location. To continue the metaphor, that would be the case of putting the cart before the horse (if it hadn't already bolted). Alternatively, the developer of the PC85 land might seek resource consents for a lesser form of development (ie rural residential, with onsite treatment). Under the NPS-HPL that lower intensity form of development "must be avoided".

3.29 I acknowledge that threshold type rules can be appropriately used in resource consents or plan changes, but that is generally where the provision of the infrastructure is "just a matter of time" (ie the infrastructure works have commenced), or that that the infrastructure is within the capacity of the developer to provide (ie an intersection upgrade at the entry to a development site).

3.30 The situation here is far from that "just a matter of time" scenario. The fundamental concerns are well summarised in the s 42A Report, at paragraphs 130-156. In short, not only is there no funding available to provide the necessary disposal capacity to accommodate the PC85 urban

development, and there is no intention to provide that funding, but there is not even any viable disposal solution identified!

3.31 The only way that wastewater from the PC85 development could be accommodated would be:

(a) On site treatment and disposal, which is inappropriate unless the lots are sufficiently large to include a disposal area and a reserve area, and caution is needed because of the very sensitive adjacent receiving environment.

(b) Taking up wastewater disposal capacity which is otherwise being relied on by existing land zoned for urban development. That is inappropriate, not only from a fairness and equity perspective, but also as a matter of planning practice. It will inevitably result in a "gold rush" of newly developed sections wanting to connect, but there will, just as inevitably, be a large number that cannot connect because the disposal capacity would have run out. That would then leave developers with the costs of having developed subdivisions and made the sites ready for sale, but would not be able to sell them.

(c) The proponents of PC85 identifying, consenting, and paying for a long term wastewater disposal system for Mangawhai (ie a large rural property or an ocean outfall) – that option, with respect, seems fanciful, particularly given that the proponents only own about 2/3rds of the land that is subject to PC85. It is certainly not an option that this Panel can place any weight on.

3.32 The concerns expressed by Mr Clease in respect of the wastewater servicing issue come through loud and clear – for example, he says (emphasis added):

> 145. With Stage 3 in place, there will therefore be sufficient wastewater treatment capacity to meet anticipated levels of demand, and to service most of the township that already has an urban zoning. **There is however no excess capacity to service an additional greenfield area beyond the locations that have long-formed part of the alignment between the servicing, funding, and planning functions of the Council**. Connection of PPC85 to the MCWWS as well would mean that, in the long term, existing urban zoned areas that have already been approved for development will not be able to be serviced by the MCWWS as the capacity that has been otherwise programmed to service these existing areas will have been taken up by PPC85.
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> 146. **The issue of timing and infrastructure alignment would not be such a problem if there was a readily achievable solution for wastewater discharge beyond 6,500 HUEs. Such a solution for Mangawhai is not**

> **however apparent**. As Mr Cantrell identifies, ocean outfalls can face significant consenting, community, and cultural challenges. Land-based disposal will require the identification and acquisition of a large landholding that has a suitable topography and soil characteristics to facilitate irrigated water absorption, does not have any sensitive neighbours, and where consenting and funding challenges are able to be overcome.

3.33 Mr Clease is also alive to the risks of hundreds of septic tanks and their effect on the Mangawhai Harbour (emphasis added):

> 149. Whilst individual septic tanks are proven solutions for more isolated dwellings, I do not consider it to be good practice to rely on such a solution for a large urban area comprising hundreds of lots. **This is especially the case for a site that directly drains into the Harbour and where a key driver of the establishment of the Council's reticulated network in Mangawhai was to reduce nutrient loading in the Harbour generated by the historically widespread use of septic tanks**.

3.34 I cannot put the issue more eruditely than the following paragraphs of Mr Clease's conclusion in this section of his report (emphasis added):

> 154. As outlined by Mr Bennetts, **the Council's current wastewater planning**, while sufficient to provide for growth already enabled in Mangawhai, **does not include the capacity necessary to also service PPC85. Servicing PPC85 as well would require the Council to identify and plan for further upgrades, and in particular an additional wastewater disposal solution**. As outlined by Mr Bennetts, the Council is unable to commit to this, given the impending transfer of the Council's responsibilities for wastewater to the planned new Water CCO, and possible re-organisation of local government in Northland. Overall, the Council, as MCWWS asset owner, does not agree to PPC85 being connected to the MCWWS. Moreover, given the fundamental nature of these issues, these are not matters that can be addressed by way of a development agreement.
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> 155. **Given the constraints in the MCWWS set out above, combined with the lack of a deliverable solution for long-term effluent disposal, I am unable to support the plan change due to the challenges with servicing it with wastewater infrastructure without concurrently removing the ability to deliver such services from already urban zoned parts of the township.**
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> 156. Reliance on individual septic tanks may be an alternative solution were the plan change to be reconfigured to only seek rural lifestyle zoning and the number of lots were limited such that cumulative effects of new septic tanks on harbour water quality was able to be confirmed as being acceptable.

3.35 The Environment Court has addressed this issue of infrastructure more generally in a number of cases:

(a) *Norsho Bulc Ltd v Auckland Council* [2017] NZEnvC 109:

> **[92]** … It is a relevant resource management consideration to seek to manage the effects of activities on such resources in a way or at a rate that enables people and communities to provide for

> the various aspects of their well-being while sustaining their potential to meet the reasonably foreseeable needs of future generations[23]. As the Court has said:[24]
>
> > It is bad resource management practice and contrary to the purpose of the [Act] … 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.
>
> [93] It is accordingly open to a Council to refuse a plan change on the grounds that it would cause unnecessary expense to the ratepayers.[25] It is also a lawful basis on which to refuse an application for resource consent.[26]

(b) *Foreworld Developments Ltd v Napier City Council* [2005] NZEnvC 38 (cited at fn 24 in the case above) similarly involved a proposed rezoning for residential purposes and the Council not being prepared to commit to providing sewerage infrastructure. The full context of the quote above is at paragraph 15 of that decision:

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

(c) I would also draw your attention to the subsequent paragraph 20, where the Court highlighted the concerns about "deferred zoning" (ie zoning subject to some infrastructure being provided in future) because that is exactly the concern that the Residents have in this case:

> [20] It does not answer the point to say, as Mr Petersen does, that is there is some form of deferred zoning, issues about the provision of infrastructure for more intensive levels of development can be considered as part of any necessary resource consent application. If

> there is a deferred zoning, by whatever name, and no intention on the part of the Council to provide infrastructure within the life of the Plan, the problems identified in *Mcintyre v Tasman District Council* immediately emerge. **Unmeetable expectations are raised and the Council is put under pressure to spend money it has decided, as a matter of managing the City in an integrated fashion, to commit elsewhere.** That is the antithesis of the function of integrated management of resources imposed on territorial authorities by the RMA. Mr Petersen wants, in essence, a return to the contents of the existing Plan and its provisions for the deferred zoning of parts of the settlement. The short answer to that wish is that time has moved on, and the lessons of giving land deferred zoning when there can be no commitment to providing the necessary infrastructure have been learnt. Deferred zoning has the distinct potential to pre-empt analysis that is still to be done. It is to be borne in mind also that there are more issues than just infrastructure to be considered before more intensive zoning might be appropriate. For instance, issues of coastal erosion, or flooding hazard (depending on the exact locality) might be relevant considerations in achieving the Council's responsibilities for integrated management.

(d) I also must bring the decision of *High Quality Ltd v Auckland Council* to the Panel's attention, because this is slightly less definite about an infrastructure deficit resulting in a rezoning being refused. This case was in the context of an application for resource consent and in the Future Urban Zone of Auckland, and furthermore, there was no issue about whether or not the infrastructure could be provided – it was just about who would pay for it. In that respect, I submit that it can and should be distinguished. The relevant part of the judgment reads (emphasis added):

> **[30]** Mr Fuller in his final submission discussed the Mexican standoff in this tension between the zoning and infrastructure. His position is that infrastructure availability should never be a reason to decline a rezoning. ….
>
> **[31]** We understand his concern is that the current impasse at Drury is due to the Council's inability or unwillingness to fund infrastructure development. This requires them to delay the rezoning of the land until funding becomes available or is supplied by the developers.
>
> **[32]** This is a situation not unfamiliar to the Court and it is clear that a number of the planning decisions and zones, including Future Urban Zoning in Auckland, are subject to this very constraint. **While the ability to provide infrastructure to any area may properly justify it being rezoned, it is difficult to see inability to provide the infrastructure as a full and complete basis to refuse to rezone land which is identified as future urban land**.

3.36 The Environment Court addressed this exact issue most directly in the recent determination of the consent order disposing of appeals against Plan Change 78 (Mangawhai Central) Plan Change: *Boonham v Kaipara District Council* [2022] NZEnvC 49. In that determination, the Court:

(a) Noted that the Commissioners at first instance, in relation to wastewater capacity, accepted that "not all the ducks are yet lined up, but they are sufficiently aligned for plan change purposes" (at [22]);

(b) Recorded that: " … it appears to be clear that PC78 and other development in Mangawhai will require significant upgrade to the wastewater treatment system in due course (amongst other infrastructure). Given the sensitivity of the receiving environment, it is clear that this needs to be undertaken prior to utilisation of new development to ensure that the capacity of the existing infrastructure is not overstretched. (at [23])";

(c) Recorded further that: " … Under the NPS-UD, in circumstances where no long-term plan is made for the infrastructure, it would seem inappropriate for councils to provide for subdivision or development. On the other hand, were they do so in reliance upon the long-term plan funding for adequate wastewater infrastructure, they have created a legitimate expectation by developers that the same will be provided within the timescale." (at [33]) and further " I also note that NPS-UD requires such a long-term plan and that it provides for infrastructure including wastewater. Accordingly, this wording represents a clear connection between that requirement and Plan Change 78."(at [35]); and

(d) Decided that greater certainty needed to be provided in the wording of the plan change provisions about future upgrades to the wastewater network.

3.37 By contrast, in this case, not only are the ducks not sufficiently aligned, but the ducks themselves are entirely absent. The Court has clearly identified the concern about the sensitivity of the receiving environment, and the need for the Council not to put itself in a position whereby there are adverse wastewater effects arising from allowing the infrastructure to be "over-stretched".

Significant adverse effects on avifauna

3.38 I have had the benefit of reviewing the submissions to be presented on behalf of the Director-General of Conservation, and gratefully adopt those

submissions insofar as it generally relates to the effects on avifauna and the application of the relevant planning and policy framework. That issue is of primary concern to the New Zealand Fairy Tern Charitable Trust, and the Trust appreciates the Director-General taking the lead. As the Panel will see, however, my clients do not agree that the Director-General's proposed solution (eg a ban on dogs) provides sufficient certainty to allow PC85 to proceed.

3.39 I wish however to make three submissions by way of emphasis and to highlight why my clients have that different opinion:

(a) First, the perilous state of the Fairy Tern means that their protection must be front of mind in respect of any decisions on PC85, which is literally on the doorstep of the only known area of Fairy Tern breeding and which overlaps their foraging area.

(b) Second, while I acknowledge that covenants preventing cats and dogs within subdivisions can be an appropriate method of controlling their natural predatory behaviour in some circumstances (either by a ban or requiring dogs to be fenced or leashed), relying on covenants in this case is not appropriate:

(i) The importance of the Fairy Tern population has been referred to in numerous Environment Court cases. By way of example only, refer:

(aa) *Mangawhai Harbour Restoration Society Inc v Northland Regional Council* [2012] NZEnvC 232, where the Court said at [13]: "The Mangawhai sandspit and harbour is a nationally and internationally important habitat for a range of birds. It is the most significant breeding site for the New Zealand Fairy Tern (fairy tern) and an important breeding site for the New Zealand Dotterel (dotterel). The Caspian Tern, Variable Oyster Catcher and Pied Stilt also nest on the sandspit. Other species observed in the harbour include the Grey Duck, Banded Dotterel, South Island Pied Oyster Catcher, Caspian Tern, Pied Shag, Black-billed Gull and Red-billed Gull. Migratory species using the harbour include the Godwit, Knot and Turnstone. The Banded Rail, Fernbird, Bittern and Spotless Crake are present in the marshes on the fringe of the harbour."

(bb) *New Zealand Fairy Tern Charitable Trust v Auckland Council* [2019] NZEnvC 172, where the Court recorded at [5]: "Again, there was no

dispute between the parties that the New Zealand Fairy Tern is an endangered species with only 37 tern remaining in the Mangawhai area, all of which are now breeding at Mangawhai spit several kilometres to the north. There was a breeding pair at the Te Arai stream but that appears to have been unsuccessful and they no longer nest there."

(cc) *New Zealand Fairy Tern Charitable Trust v Auckland Council* [2020] NZEnvC 188, in which the Court refused to make a costs order against the Trust. The Court recorded at [16]: "In equity and good conscience, I do not consider it is appropriate that I should make an order of costs against the Trust. It was motivated to achieve the preservation of one of New Zealand's rarest species, and I acknowledge the potential danger to the fairy tern population as a result of the dam in question." Relevant to the effect of PC85 on the fairy tern's habitat, the Court also said at [22]: "Progress for the future turns on a high level of consensus as to the steps that need to be taken to improve the habitat for the fairy tern and inanga of the area, as well as the Mangawhai Harbour. This may need to involve cooperation with the Northland Regional Council."

(ii) The "soft pressure" referred to by Mr Clease in his s 42A report at paragraph 177 might exist for small bespoke clustered subdivisions, managed by a well-functioning residents' society. In contrast, the urban development in this case involves up to 800 lots and commercial zones. It is not "a subdivision" as such – it is a new urban area.

(iii) It is fanciful to suggest that, with that number of properties, and the resulting numbers of residents and visitors, there will be compliance with covenants against the keeping of cats or fencing of dogs (and only walking on leash).

(iv) Furthermore, the commercial area will attract not only local customers, but also customers and suppliers from beyond the immediate area who might have no knowledge of the controls around dogs and the requirement for them to be on leash.

(v) Put simply, more houses and more people, mean an exponentially greater likelihood of roaming cats and

dogs who will disturb and predate on Fairy Tern. This is an unnecessary and inappropriate risk to the Fairy Tern.

(c) Thirdly, while some aspects of the proposal might normally be seen as a positive way of providing the public with access to the CMA (eg esplanade walkways and a proposed new boat ramp – see PC85 structure plan), those facilities will be detrimental to the Fairy Tern. The best thing that we can do to assist the recovery of the Fairy Tern is to stay well away from their breeding and foraging areas. In that regard, I refer to Policy 19(3)(a) of the NZCPS, "Only impose a restriction on public walking access to, along or adjacent to the coastal marine area where such a restriction is necessary: (a) to protect threatened indigenous species; or".

4. OTHER MATTERS

NPS-Infrastructure

4.1 As well as the NPS-HPL, the Panel must also give effect to other national and regional policy statements. I have addressed the NPS-HPL and the NPS-UD above. Mr Clease's supplementary statement also addresses the impact of the new NPS, the NPS-Infrastructure. Broadly I agree with Mr Clease's opinion that the effect of the NPS-Infrastructure is to provide further support to the development of infrastructure, even in potentially sensitive areas.

4.2 However, in my submission:

(a) Nothing in the NPS-Infrastructure "guarantees" that the infrastructure required by PC85 (particularly the wastewater upgrade) will obtain the necessary consents, let alone be funded and constructed.

(b) While I accept that there is a "functional or operational need" for the shared path to be constructed adjacent the existing causeway, there is no such obvious "functional or operational need" for any additional wastewater to be discharged into the Mangawhai Harbour.

4.3 Furthermore, while the NPS-Infrastructure is enabling of infrastructure, it also requires decision makers, such as this Panel, to have regard to the extent that infrastructure is planned for by infrastructure providers. That is directly relevant because of the lack of any planned servicing of the PC85 land (see discussion above).

4.4 Policies in this regard include:

(a) Policy 3:

Policy 3: Considering spatial planning

(1) Decision-makers must:

(a) have regard to the extent to which the infrastructure has been identified within a strategic planning document, while recognising that not all infrastructure can be spatially identified in advance; and

(b) consider relevant spatial plans and master plans prepared by the infrastructure provider and provided to the decision-maker.

(b) Policy 10:

Policy 10: Planning for and managing the interface and compatibility of infrastructure with other activities

(2) Decision-makers on planning instruments must:

(a) engage with infrastructure providers to:

(i) understand their existing and planned infrastructure activities and medium to long-term plans;
…
(iii) support the strategic integration of infrastructure with land use activities;

5. STATUTORY ANALYSIS

Planning instruments

5.1 I make the following brief submissions on the statutory analysis recorded in the s 42A Report at paragraphs 343-437 – many of these matters have been addressed earlier:

(a) Mr Clease states at paragraph 344 that the proposal "gives effect to" the NPS-UD. I find this hard to reconcile with Mr Clease's opinion set out earlier. While the NPS-UD does encourage the provision of capacity for urban development, that must be accompanied by appropriate development infrastructure – which in relation to wastewater disposal capacity is entirely absent in respect of PC85.

(b) Because of the potential significant adverse effects on avifauna, I do not agree that PC85 gives effect to the NZCPS as it is required to do by s 75(3)(b), RMA. In my submission:

(i) the subject land is "within the coastal environment" as that term is understood by the NZCPS. Not only is it in close physical proximity to MHWS, but it is also very nearly bisected by an inlet of the upper harbour that is recognised by the NRC as being part of the coastal environment (refer Fig 26, s 42A Report, paragraph 356);

(ii) While Mr Clease refers to Objective 6 of the NZCPS (his paragraph 362), that policy refers to "development in *appropriate* places and forms, and within *appropriate* limits" (emphasis added). Primarily because of the proximity of the Fairy Tern, this is not an appropriate place for the proposed form of development.

(iii) Other objectives, seemingly not commented on by Mr Clease are more directly on point, in particular:

(aa) Objective 1 – sustaining the coastal environment's ecosystems, including protecting significant natural ecosystems and maintaining the diversity of coastal fauna. The habitat of the Fairy Tern is a significant natural ecosystem.

(bb) Policy 11 – "To protect indigenous biodiversity in the coastal environment, (a) avoid adverse effects on: (i) indigenous taxa that are listed as threatened or at risk in the New Zealand Threat Classification System lists; … (ii) habitats of indigenous species where the species are at the limit of their natural range, or are naturally rare;" Avoid is the strongest planning directive, and this policy applies directly to Fairy Tern and their habitats.

(cc) Policy 6 – "encourage the consolidation of existing coastal settlements and urban areas where this will contribute to the avoidance or mitigation of sprawling or sporadic patterns of settlement and urban growth". This would support the consolidation of the existing urban area around the 3 identified growth nodes,

rather than PC85's sprawl onto a previously undeveloped section of the coastal environment.

(c) I agree with Mr Clease's opinion that the lack of a wastewater disposal solution means that PC85 does not give effect to the NRPS (paragraphs 409-414, s 42A Report). While Mr Clease considers, charitably, that PC85 sits "uneasily" against Policy 5.1.2 "Enable … development that: (a) consolidates urban development within or adjacent to existing coastal settlements and avoids sprawling or sporadic patterns of development", in my opinion PC85 is squarely contrary to that key policy. (Noting that this policy is giving effect to Policy 6 of the NZCPS discussed immediately above.)

(d) There are other applicable components of the NRPS not commented on by Mr Clease. In respect to potential effects on avifauna, these include: Objective 3.4 "(a) Protecting … significant habitats of indigenous fauna" and "(c) Where practicable, enhancing indigenous habitats, particularly where this contributes to the reduction in the overall threat status of regionally and nationally threatened species." The explanation to that policy states: "Part (c) of the objective seeks an overall reduction in the threat status of threatened and at risk species. This applies to the management of activities that affect indigenous ecosystems and activities that impact on indigenous species living outside them." Refer also to Policy 4.4.1 "(1) In the coastal environment, avoid adverse effects on indigenous taxa that are listed as threated or at risk in the New Zealand Threat Classification System lists." Note – in the coastal environment, this requirement is to avoid all adverse effects on those species – not just avoid significant effects, and not avoid, remedy or mitigate effects. It is a very high policy bar. Developing a new urban area, including people and the inevitable dogs and cats, within and immediately adjacent the habitat of a near-extinct species seems entirely contrary to this objective and the related policies.

5.2 The Panel will be cognisant of its requirement to test the plan change request against s 32, RMA. In respect of Mr Clease's discussion of this assessment, I make the following submissions:

(a) I agree with Mr Clease that the status quo would better give effect to Part 2 of the RMA than PC85, however to Mr Clease's list

of reasons at paragraph 444 I would add that the status quo better protects significant indigenous fauna (particularly the Fairy Tern) and its habitat (ss 5(2), 6(c), and 7(g) RMA). Subject to that qualification, I also agree with Mr Clease's assessment of the 3 possible options (paragraphs 447-461).

(b) I also agree with Mr Clease's conclusion (his paragraph 464-465) that PC85 is inconsistent with key objectives and policies of the ODP in respect of urban form and the integration of development with infrastructure.

6. EVIDENCE TO BE CALLED

6.1 The evidence presented at this hearing by the Resident consists of:

(a) Expert evidence from Mr Ian Southey, on behalf of the NZ Fairy Tern Charitable Trust.

(b) Lay evidence will be presented from the following submitters:

(i) Mr Cayford, on behalf of Mangawhai Matters Incorporated;

(ii) Ms Burns (Chair) and Mr Dunning, on behalf of the Tern Point Recreation and Conservation Society Incorporated;

(iii) Ms Rogan, on behalf of the NZ Fairy Tern Charitable Trust.

6.2 In addition to those listed above, I understand that the following submitters are content to remain within the umbrella of these submissions and do not wish to speak directly to the Panel:

(a) D&A Hurley

(b) K Burns

(c) R Dunning

(d) I McDell

(e) J Budelmann

(f) M Kaemper

7. CONCLUDING SUBMISSION

7.1 In my submission, PC 85 and the development it would enable:

(a) Does not give effect to key provisions of the NZCPS because it would represent sporadic urban sprawl rather than the consolidation of an existing coastal village, and it does not protect significant indigenous fauna or its habitat;

(b) Is not required pursuant to NPS-UD, and the lack of infrastructure alignment is contrary to key provisions of the NPS-HPL;

(c) Does not fall within the exception in clause 3.6(5) NPS-HPL because there is no need for any new development capacity (ie beyond that already zoned and which is intended to be serviced by wastewater);

(d) Is contrary to key objectives and policies of the ODP;

(e) Is contrary to the Council's Spatial Plan 2020;

(f) Is not the most appropriate way to achieve the purpose of the RMA

7.2 The Residents respectfully request that PC85 be declined.

Dated: 12 February 2026

Bal Matheson KC

Counsel for Tern Point Recreation & Conservation Incorporated Society, Mangawhai Matters Incorporated, and the New Zealand Fairy Tern Charitable Trust