BEFORE THE INDEPENDENT HEARING COMMISSIONER APPOINTED BY KAIPARA DISTRICT COUNCIL

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of the hearing of submissions on the Proposed Kaipara District Plan

LEGAL SUBMISSIONS BY COUNSEL FOR KAIPARA DISTRICT COUNCIL FOR THE OPENING HEARING ON THE PROPOSED DISTRICT PLAN

22 August 2025

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MAY IT PLEASE THE COMMISSIONER:

INTRODUCTION

1. These opening submissions are prepared on behalf of Kaipara District Council ("Council") for the opening hearing on the Proposed Kaipara District Plan ("PDP"). Council is the proponent of the PDP which was notified on 28 April 2025 pursuant to clause 5 of Schedule 1 of the Resource Management Act 1991 ("RMA").

2. As set out in the public notice[1] for the hearing, the purpose of the opening hearing is three-fold:

   (a) To provide a high-level planning overview of the PDP, including the process followed by Council in preparing the PDD and an overview of the key planning issues the Council anticipates the subsequent hearings will need to address;

   (b) To provide an overview of the legal framework within which the Hearing Panel's decisions are to be made; and

   (c) To provide primary submitters the opportunity to "set the scene" by providing a brief overview of the key issues raised in their submission that will be presented at subsequent hearings.

3. The planning overview will be presented by Katherine Overwater, Council's Planning and Policy Manager, and will precede the presentation of these legal submissions.

4. The purpose of these submissions is to provide, by way of an introductory scene setting, an overview of the legal framework for the decision-making process. It is considered that presenting this framework at an early stage, prior to the chapter topic hearings, may assist submitters when preparing their evidence in support of submissions, especially for key changes being sought in submissions such as rezoning requests.

[1] Public Notice dated 15 August 2025.

5. It is acknowledged this opening hearing is taking place before the notification of the summary of submissions, and therefore before further submitters are identified. Council has been careful to ensure the information presented in this hearing is high- level and does not respond to any submission, other than late submissions. As set out in the Council report for this hearing, it is both necessary and efficient for the Commissioners to make decisions on whether to accept five (5) submissions received after the closing date for submissions. If they are accepted, they will be summarised, included in the notified summary of submissions and interested parties will have an opportunity to lodge further submissions (in support or opposition) on those submissions.

6. Given the high-level nature of these submissions, it is submitted that no submitter or future further submitter is prejudiced by the timing of this hearing. All submitters will have an opportunity to appear at the relevant topic hearing and present evidence in support of their submission and/or further submission. As mentioned, the intent of these submissions is to assist the Commissioners and submitters by providing the framework in which decisions will be made at subsequent hearings on submissions.

MATTERS COVERED IN LEGAL SUBMISSIONS

7. These submissions address the following matters relevant to the Hearing Panel's decision-making:

   (a) The Kaipara District Council – jurisdictional boundaries and Council's role as submitter;

   (b) Nature of district plan review;

   (c) The legal framework for district plans including:
      (i) Preparing and changing a district plan;
      (ii) Content of a district plan;
      (iii) Section 32 evaluation;
      (iv) Section 32AA further evaluation;

(d) The role of Part 2 RMA;

(e) Decisions under Schedule 1 RMA;

(f) National planning instruments;

(g) Relevance of proposed changes to national direction; and

(h) Jurisdiction to amend the PDP.

THE KAIPARA DISTRICT COUNCIL

Jurisdictional boundaries

8. The Council was constituted as a territorial authority under the Local Government (Northland Region) Re-organisation Order 1989, under the framework of the Local Government Act 1974.[2]

9. Despite early proposals to shift the northern part of the former Rodney District into the Kaipara District, the boundary of the Kaipara District was not amended through the 2010 re-organisation of local government in the Auckland Region. However, due to the territory of the former Rodney District falling within the jurisdiction of the Auckland Council, the super-city now adjoins Kaipara District's southeastern boundary. The remaining boundaries are adjoined by Whangarei District Council (to the north and northeast) and a small boundary by the Far North District Council (to the northwest in the upper Kaipara area).

10. The adjacent territorial councils are relevant because section 74(2)(c) of the RMA requires the Council, when preparing a proposed plan, to have regard to "the extent to which the district plan needs to be consistent with the plans or proposed plans of adjacent territorial authorities." Neither Auckland Council, Whangarei District Council or Far North District

[2] The Council was established on 1 November 1989.

Council lodged a primary submission on the PDP. It is fair to assume they do not consider the PDP to be inconsistent with their respective district plans.

11. The Council resolved on 26 March 2025 to notify the PDP on 28 April 2025 with the primary submission period closing on 30 June 2025. The PDP applies to the entire Kaipara District and, in time, will replace the Operative Kaipara District Plan 2013 ("ODP"). The PDP will ensure the Kaipara District has an updated and more efficient and enabling approach to the management of the natural and physical resources in its district.

Council's role as submitter

12. As well as being the proponent of the PDP, the Council is also a submitter on the PDP. Clause 6(2) of Schedule 1 provides that a local authority in its own area may make a submission on a proposed plan. The Council's submission largely seeks to improve the workability of the document (for example better clarification and consistency throughout the plan). The submission also seeks to amend three special purpose zones,[3] which have been established to give effect to recent private plan changes made to the ODP, to better integrate those zone provisions into the National Planning Standards format used in the PDP. The Council's submission does not seek to change the overarching policy direction in the notified PDP.

13. The Council's submission is to be treated in the same way as any other submission. There is no presumption that, as the proponent of the PDP, the Council's submission is to be accepted by the Hearing Panel or that the provisions of the PDP are correct or appropriate on notification.[4] Equally, if the section 42A report writer addressing any aspect of the

[3] Estuary Estates Special Purpose Zone, Trifecta Special Purpose Zone and Mangawhai Hills Special Purpose Zone.
[4] *Leith v Auckland City Council* [1995] NZRMA 400 at [408].

Council submission is a Council officer, that does not warrant the Hearing Panel giving less weight to the Council's submission than other submissions. It must be considered on its own merits.

NATURE OF THE DISTRICT PLAN REVIEW

14. In 2018, Council commenced a full review of its ODP pursuant to section 79(4) of the RMA. This means every section (or chapter) of the ODP has been replaced, as opposed to a provision-by-provision review which occurs in a rolling (partial) review under section 79 (1) to (3) RMA.[5]

15. As a full district plan review, Council's intention is to release one comprehensive decision on all submissions at the same time to ensure integrated decision-making across all chapters of the PDP in accordance with its statutory function under s31(1)(a) and Part 2 of the RMA.

THE LEGAL FRAMEWORK FOR DISTRICT PLANS

Preparing and changing a district plan

16. The Hearing Panel's decision-making on submissions on the PDP sits within a comprehensive framework established under the RMA. While the key provisions are well known to the Hearing Panel, it is helpful to set them out for submitters.

17. The starting point is Council's functions set out in section 31 of the RMA which provides (relevantly):

> 31(1). Every territorial authority shall have the following functions for the purpose of giving effect to this Act in its district:
>
> (a) the establishment, implementation, and review of objectives, policies, and 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:

[5] *Tussock Rise Limited v Queenstown Lakes District Council* [2019] NZEnvC 111 at [4].

> (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:
>
> (b) the control of any actual or potential effects of the use, development, or protection of land…

18. These functions are achieved, in part, through the implementation of a district plan or proposed plan. The RMA requires that there shall at all times be one district plan for each district.[6] A district plan may be changed by a territorial authority in the manner set out in Schedule 1 of the RMA.[7] The purpose of a district plan is to assist a territorial authority to carry out its functions in order to achieve the purpose of the Act.[8]

19. The Council is required to establish, implement and *review* the objectives, policies and methods of its district plan. The concept of *review* signals that the district plan is an evolving document which changes with the changing needs of the district and its community. The current planning regime in the Kaipara District was established in 2011 when decisions on the then Kaipara Proposed District Plan were notified. This is now 14 years ago.

20. Significant changes have occurred in the planning landscape since that time:

    (a) Numerous national policy statements and national environmental standards have come into force.

    (b) The Northland Regional Policy Statement ("NRPS") was made operative in 2016.

    (c) The Northland Proposed Combined Regional Plan ("Proposed Regional Plan) was notified in 2017 and all appeals have now been

[6] Resource Management Act 1991, s 73(1) ("RMA").
[7] Section 73(1A).
[8] Section 72.

resolved. The Northland Regional Council is taking steps to make the Proposed Regional Plan fully operative under clause 20 of Schedule 1.

(d) The Kaipara District Spatial Plan – Ngā Wawata 2050- Our Aspirations was adopted in December 2020.

(e) Population growth and demand for housing and business developments have occurred, particularly in Mangawhai, in part due to its proximity to Auckland Council.

21. Under section 74(1), Council must change its district plan *in accordance with*:

(a) Its functions under section 31; and

(b) The provisions of Part 2; and

(c) (not applicable); and

(d) Its obligations to prepare an evaluation report in accordance with sections 32; and

(e) Its obligations to have particular regard to an evaluation report prepared in accordance with section 32; and

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

(g) Any regulations.

22. When changing a district plan, Council *must have regard to*:[9]

(a) Any proposed regional policy statement (not applicable); and

(b) Any proposed regional plan (applicable);[10] and

[9] Section 74(2).
[10] Proposed Northland Combined Regional Plan.

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

(d) Any relevant entry on the New Zealand Heritage List required by the Heritage New Zealand Pouhere Taonga Act 2014; 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) New Zealand's second emissions reduction plan 2026-30 (2024) made under the Climate Change Response Act 2002; and

(h) New Zealand's first national adaptation plan (2022) made under the Climate Change Response Act 2002.

23. Council ***must*** also ***take into account*** any relevant planning document recognised by an Iwi authority,[11] to the extent that its content has a bearing on the resource management issues of the district.

24. Finally, Council ***must not have regard to*** trade competition or the effects of trade competition when changing a district plan.[12]

25. Case law has established that "have regard to means that decision makers must give the matters "genuine attention and thought," but they do not necessarily have to accept them.[13]

26. The Proposed Combined Regional Plan will be fully operative at the time decisions on the PDP are made. As such, there will be no need to consider the three current operative Northland regional plans.[14]

[11] Section 74(2A).
[12] Section 74(3).
[13] *Foodstuffs (South Island) Ltd v Christchurch City Council* [1999] NZRMA 481 at page 9.
[14] Northland Regional Water and Soil Plan 2004, Regional Coastal Plan 2004 and Regional Air Quality Plan 2005.

Content of a district plan

27. Pursuant to section 75(3), a district plan *must give effect to*:

    (a) Any national policy statement; and

    (b) Any New Zealand costal policy statements; and

    (c) A national planning standard; and

    (d) Any regional policy statement.

28. The Supreme Court in the *King Salmon* decision[15] held the words "give effect to" simply means "implement". The Court said on the face of it, it is a strong directive, creating a firm obligation on planning authorities.

29. A district plan *must not be inconsistent with*:[16]

    (a) A water conservation order; or

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

30. Under section 75(1), district plan policies *must* implement objectives while any rules *must* implement the polices. Section 76(1) requires rules to achieve the objectives and policies of a plan. In making a rule, Council *must have regard to* the actual or potential effect on the environment of activities, including any adverse effect.[17]

31. All of the above requirements from sections 72-77 RMA, together with the section 32 requirements discussed below, were set out by the Environment Court in *Colonial Vineyard Limited v Marlborough District Council*[18] ("Colonial Vineyard"). These matters remain part of the matters the Hearing Panel is required to consider in making decisions on submissions. An updated summary that incorporates amendments that

[15] *Environmental Defence Society Inc v New Zealand King Salmon Co Ltd* [2014] NZSC 38 at [77].
[16] RMA, s75(4).
[17] RMA, s76(3).
[18] *Colonial Vineyard Limited v Marlborough District Council* [2014] NZEnvC 55.

have been made to the relevant RMA provisions since the issue of Colonial Vineyard, is set out in **Appendix A** to these submissions for ease of reference.

Section 32 Evaluation

32. When preparing a proposed plan, the critical component of the legal framework assessment is the section 32 evaluation. The primary function served by the section 32 evaluation is to ensure that Council has properly assessed the appropriateness of the PDP prior to notification.

33. Each chapter of the notified PDP was accompanied by a separate section 32 evaluation report (34 individual reports in total). In addition, a single section 32 overview report ("Overview Report") was prepared. The purpose of the Overview Report was to record material common to all chapters regarding the process that led to the notified PDP, introduce the relevant planning instruments and the individual section 32 reports. All section 32 reports are public documents and are available on the Council's website.

34. Pursuant to 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
>
> (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.

35. 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.[19]

36. The "most appropriate" test does not mean the most "superior" method.[20] The High Court has held section 32 requires a value judgment as to what, on balance, is the most appropriate when measured against the relevant objectives. "Appropriate" means suitable.

37. Section 32(2) provides that an assessment of the efficiency and effectiveness of the provisions (being policies, rules or other methods) under subsection (1)(b)(ii) must –

> (2) An assessment 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—
>
> (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.

38. "Effectiveness" assesses the contribution new provisions make towards achieving the objective, and how successful they are likely to be in solving the problem they were designed to address."[21]

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[19] *Rational Transport Society Inc v New Zealand Transport Agency* [2012] NZRMA 298 HC at [46].
[20] Ibid, at [45].
[21] Ministry for the Environment, 2017, *A guide to section 32 of the Resource Management Act: incorporating changes as a result of the Resource legislation Amendment Act 2017* at 18.

39. "Efficiency" means:[22]

> "Efficiency measures whether the provisions will be likely to achieve the objectives at the lowest total cost to all members of society or achieves the highest net benefit to all of society. The assessment of efficiency under the RMA involves the inclusion of a broad range of costs and benefits, many intangible and non-monetary.
>
> There have been differing views of how efficiency should be interpreted. In one case an approach based on a strict economic theory of efficiency was taken. A more holistic approach was adopted in another case. Referring to those two cases, the High Court stated that:
>
> "The issue of whether s32 requires a strict economic theory of efficiency or a more holistic approach was raised before Woodhouse J in *Contact Energy Limited v Waikato Regional Council* [2011] NZEnvC 380…while economic evidence can be useful, a s32 evaluation requires a wider exercise of judgment. This reflects that it is simply not possible to express some benefits or costs in economic terms…in this situation it is necessary for the consent authority to weigh market and non-market impacts as part of its broad overall judgement under Part 2 of the RMA. "

40. The MFE Guidance explains benefits and costs in the context of section 32(2) in the following way:[23]

> "A cost, or negative effect, can be described as what society has to sacrifice to obtain a desired benefit.
>
> A benefit, or positive effect, can be described as a consequence of an action (e.g., a plan change) that enhances well-being within the context of the RMA.
>
> The RMA defines costs and benefits to include those that are both monetary or non-monetary. Requiring the benefits and costs to be identified and assessed encourages a thorough approach is taken to examine provisions, drawing on sound evidence."

41. Under section 32(2)(a), the assessment of benefits and costs should encompass the full spectrum of environmental, economic, social and cultural effects so that "all of these types of effects are considered in the s32 evaluation, rather than to create an artificial distinction between these categories. These ensures a regulatory impact of a proposal insight is comprehensively evaluated."[24]

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[22] Ministry for the Environment, above n 21, at 18 (footnotes within the quote are omitted).
[23] Ministry for the Environment, above n 21, at 18.
[24] Ministry for the Environment, above n 21, at 19.

Section 32AA further evaluation

42. Under section 32AA, a further evaluation is required only for any changes made to the PDP since the evaluation report was completed at notification. Any 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.

43. A further evaluation must be published in a report made available for public inspection at the same time as the decision on the PDP is notified or be referred to in the decision-making record in sufficient detail to demonstrate that the further evaluation was undertaken in accordance with section 32AA.

44. The Hearing Panel must have particular regard to the further evaluation when making its decision and must include a further evaluation in its decision.[25] This effectively means the further evaluation report needs to be prepared before a decision is made. To assist the Hearing Panel to meet its obligations under Schedule 1, the section 42A report writer for each hearing topic will include in their report, a further evaluation prepared under section 32AA to support any recommended changes to the notified PDP in response to submissions.

THE ROLE OF PART 2

45. The role Part 2 plays in decision-making processes for plan changes/proposed plans at the regional and district level plans was refined by the Supreme Court in *Environmental Defence Society Incorporated v The New Zealand King Salmon Company Limited*[26] ("*King Salmon*"). The Supreme Court held that, absent 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.[27] This is because the higher order

[25] RMA, Sch 1, Cl 10(2)(ab) and 10(4)(aaa).
[26] *King Salmon,* above n 15.
[27] At [85] and [88].

planning document already gives substance to Part 2. 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.[28]

46. If, in relation to a higher order planning document, there is conflict or tension between one or more provisions that pull in opposite and competing directions, the Supreme Court held provisions expressed in more directive terms carry more weight than those expressed in less directive terms[29]. If the conflict cannot be resolved, then this, along with any unresolved ambiguity in relation to any provision in the higher order planning document, amounts to "uncertainty of meaning", being one of the caveats identified by the Supreme Court. In such circumstance, it is necessary to separately refer back to Part 2 when determining the particular provisions on the PDP.

47. In the post *King Salmon* era, the timing of higher order planning documents is particularly relevant. Planning instruments prepared after the release of the *King Salmon* decision are more likely to give effect to Part 2 and, adopting the language of the Court of Appeal in *RJ Davidson Family Trust v Marlborough District Council,*[30] be "competently prepared" having regard to Part 2 and with a "coherent set of policies designed to achieve clear environmental outcomes." This is because up until the *King Salmon* decision, planning instruments were prepared, in reliance on case law at the time, that Part 2 would automatically apply to all plan change and resource consent assessments under the "overall broad judgment" approach. This provided an extra lens through which plan changes and resource consents would be assessed.

48. Since the *King Salmon* decision, greater care has been applied across the board by authors of planning instruments to ensure plan provisions are expressed in the way they are intended and with the knowledge that the

[28] At [88].
[29] At [129].
[30] *RJ Davidson Family Trust v Marlborough District Council* [2018] NZCA 316, at [74] and [75].

final "safeguard of Part 2" would only be available, in the case of plan changes and proposed plans, in very limited circumstances. The result is that plans prepared in the post *King Salmon* era arguably have a greater focus on Part 2 considerations during the drafting of the plan than was previously the case.

49. The NRPS was made operative on 9 May 2016. While this was two years after the Supreme Court released its decision in *King Salmon* in 2014,[31] it appears it was notified in October 2012. It is not clear when decisions on submissions were issued. When the *King Salmon* decision was released, the then proposed NRPS Policy was very likely to be in the appeal stage.

50. Therefore, given the then proposed NRPS was most likely prepared and notified well before the *King Salmon* decision, it cannot be said with any certainty that it gives substance to Part 2 in all respects ("incomplete coverage").

51. In light of the above, when considering each PDP hearing topic, if the Hearing Panel is uncertain as to whether a higher order planning document (including the NRPS) gives effect to Part 2, it is appropriate and indeed necessary to refer back to Part 2.

DECISIONS UNDER SCHEDULE 1

52. The Hearing Panel is required, under clause 10, to give decisions on the provisions and matters raised in submissions, including reasons for its decisions. In its reasons the Hearing Panel may address the submissions by grouping them according to the provisions or subject matter.[32] However the Hearing Panel is not required to give a decision that addresses each submission individually.[33]

[31] *King Salmon,* above n 15.
[32] RMA, Sch 1, Cl 10(2).
[33] Schedule 1, Cl 10(3).

53. As mentioned above, the decision must include a further evaluation of the PDP under section 32AA[34] and must have particular regard to the further evaluation when making its decision.[35] The decision may include any consequential alterations necessary to the PDP arising from the submission.[36]

54. Pursuant to clause 10(4)(a), decisions on submissions on the PDP must be given no later than two years after notification of the PDP under clause 5. This means decisions must be given no later than 28 April 2027. In light of the impending resource management reform, with Phase Three (replacement of the RMA) expected to be in force in 2027, Council expects that decisions can issue within the two-year timeframe.

55. It this timeframe is not met; Council must apply to the Minister to extend the timeframe beyond the two-year period.[37]

NATIONAL PLANNING INSTRUMENTS

56. The section 32 Overview Report identified all of the relevant national policy statements and environmental standards in force at the time the PDP was notified. No new ones have been introduced since notification. Decisions on the PDP must give effect to these high order documents. Two national policy instruments require particular comment.

National Policy Statement on Urban Development

57. The National Policy Statement on Urban Development 2020 ("NPS-UD") seeks to ensure that urban environments are well-functioning, responsive to growth and provide for sufficient housing and business needs. It applies to tier 1, 2 and 3 local authorities and to planning decisions by a local authority that affect an urban environment[38]. Council is not listed as a tier 1 or 2 local authority in the NPS-UD. Council falls

[34] Schedule 1, Cl 10(2)(ab).
[35] Schedule 1, Cl 10(4)(aaa).
[36] Schedule 1, Cl 10(2)(b).
[37] RMA, Sch 1, Cl 10A.
[38] NPS-UD, clause 1.3.

within the definition of a tier 3 local authority only if it has all or part of an urban environment within its district. An *urban environment* is defined to mean:

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

58. Council resolved on 29 March 2023 that neither Mangawhai nor Dargaville came within the definition of an "urban" environment" as defined in the NPS-UD and that therefore the NPS-UD did not apply to the Kaipara District. The resolution notes that Council can revisit this decision at any time in the future, including if further information on population projections is available. Only Council can make this determination. This decision was confirmed by Council on 26 March 2025.

59. Accordingly, whilst there is no requirement for the PDP to give effect to the NPS-UD, recent 2024 decisions made on private plan changes in the Mangawhai area do give effect to the NPS-UD. Those private plan change provisions have been carried through to the PDP.

National Policy Statement for Indigenous Biodiversity

60. The National Policy Statement for Indigenous Biodiversity ("NPS-IB") came into force in August 2023. This required territorial authorities to identify and map Significant Natural Areas ("SNA") in their district plans. However, in 2024 the RMA was amended[39] to suspend this requirement during the three-year period commencing on 25 October 2024 when the Resource Management (Freshwater and Other Matters) Amendment Act 2024 came into force.

[39] Section 78 was inserted, on 25 October 2024, by section20 of the Resource Management (Freshwater and Other Matters) Amendment Act 2024.

61. Accordingly, the section 32 Overview Report records that the PDP does not give full effect to the NPS-IB as it does not identify and map SNAs.

RELEVANCE OF *PROPOSED CHANGES* TO NATIONAL DIRECTION

Nature and timing of changes

62. Post notification of the PDP, the Government has released four consultation packages signalling its intention to amend 12 existing national direction instruments and introduce 4 new ones.

63. Three consultation packages were released on 29 May 2025. Package 1 - Infrastructure and Development ("Package 1") seeks to introduce two new national policy statements and two new national environmental standards:

    (a) National Policy Statement for Infrastructure;

    (b) National Policy Statement for Natural Hazards;

    (c) National Environmental Standards for Papakainga; and

    (d) National Environmental Standards for Granny Flats (Minor Residential Units).

64. It also seeks amendments to a number of existing national policy statements and national environmental standards. Consultation Package 2 – Primary Sector ("Package 2") seeks to amend eight national direction instruments, including the New Zealand Coastal Policy Statement 2010 and the National Policy Statement for Highly Productive land 2022. Consultation Package 3 – Freshwater ("Package 3") seeks changes to two national direction instruments.

65. Consultation on Packages 1 to 3 closed on 27 July 2025. The Government has announced that the proposed changes are expected to be in force before the end of the year.

66. On 18 June 2025 the Government released Package 4: Going for Housing Growth ("Package 4 – Pillar 1"). This document is structured around three Pillars. Only Pillar 1: Freeing up land for urban development, including removing unnecessary barriers, has been open for consultation and closed on 17 August 2025. Changes arising from Pillar 1 are proposed to be made to the NPS-UD.

67. Any changes resulting from feedback on the Package 4- Pillar 1 proposals are not intended to be implemented until the new resource management system is in place as part of Phase Three of the RMA reform. Legislation to replace the RMA is intended to be introduced to Parliament by the end of 2025 but will not be in force until the middle of 2026 at the earliest. Whilst the NPS-UD does not currently apply to Council, this may change in the future, either because of an amendment to the NPS itself or by Council resolution that it is a tier 3 local authority.

Impact of proposed changes on decision-making

68. The Hearing Panel is not required to give any weight to any draft/proposed changes to national direction in existence when hearing and deciding submissions on the PDP. This was confirmed by the Environment Court in *Mainpower NZ Limited v Hurunui District Council.*[40] The Court held that while draft national policy statements can be considered in the context of matters, no weight should be given to them as they may yet change.[41]

69. Further, in a very recent decision issued on 1 July 2025, the High Court in *Box Property Investments Limited v The Expert Consenting Panel*[42] held that decisions must be made based on the law as it currently stands, not on potential future legislative changes:

[40] *Mainpower NZ Limited v Hurunui District Council* [2011] NZEnvC 384 at [27].
[41] At [49].
[42] *Box Property Investments Limited v The Expert Consenting Panel* [2025] NZHC 1773

> [35] All parties, …. agree, and I concur, that the Panel was required to apply to law as it stood at the time it made its decision. Ministerial statements suggesting a possible legislative change to the mandatory requirements of the MDRS were not relevant to the substantive evaluation the Panel was required to carry out.

Impacts on decision making once changes in force

70. Whilst none of these proposed changes to national direction are currently in force, it is very likely they will come into force before decisions are made on the PDP. The issue that arises is what impact does that have on your decision-making on the PDP?

71. Once any changes to national direction instruments are in force, Council can amend the PDP without using the Schedule 1 process where the NPS directs such changes to be made under section 55(1) RMA. Such changes would occur independent of the hearing process.

72. However, all other changes required to the PDP to give effect to any new or amended national direction must be made using the Schedule 1 process. The Hearing Panel can only make changes through the current PDP Schedule 1 process if there is scope in the submissions to make the changes. Where amendments are required to give effect to any approved national direction at the time of decisions, and those amendments are not within the scope of submissions on the PDP, a further variation or plan change using the Schedule 1 process will be required.

RELEVANCE OF NON-STATUTORY DOCUMENTS

73. The Kaipa Kai Project was adopted by Council in June 2020. The project was set up to fuel economic growth by identifying opportunities for landowners to draw greater value from their land use. There may be submissions requesting the Hearing Panel to take it into account in its decision-making on the PDP.

74. Section 74(2)(b)(i) does not apply to this activation plan as it is not a management plan or strategy prepared under other Acts.[43] Non-statutory documents can however be considered in the context of a plan change and given such weight as the Panel considers appropriate,[44] having regard to the hierarchy of RMA documents.[45]

JURISDICTION TO AMEND PDP ("SCOPE")

75. Submissions on the PDP are made under clause 6 of Schedule 1:

> Once a proposed … plan is publicly notified under clause 5, the persons described in subclauses (2) to (4) may make a submission **on it** to the relevant local authority. (our emphasis added)

76. The Panel's role is to hear submissions on the PDP and give a decision on the provisions and matters raised in submissions.[46]

77. In terms of the Panel's jurisdiction to make changes to the PDP in response to a submission:

    (a) A submission must first be "on" the PDP; and

    (b) The changes made to the PDP must be within the scope of the submission.

[43] *Auckland Memorial Park Ltd v Auckland Council* [2014] NZEnvC 9 at [70].
[44] *Tram Lease Limited v Auckland Council* [2015] NZEnvC 133 at [81], where the Court considered a spatial outline/plan that addressed strategic direction for Auckland's growth, was a non-statutory document. Its only intent was to inform strategic planning for the Auckland Council, that will have informed the preparation of the Proposed Unitary Plan. The Court held that it could have no status in the Court in the context of a plan change. To that end, the Court gave no weight to the aspects of the evidence of the witnesses that relied upon the spatial outline to justify intensification of commercial buildings within particular zones.
[45] *South Epsom Planning Group Inc v Auckland Council* [2016] NZEnvC 140 at [168-184]; *Friends of Shearer Swamp Inc v West Coast Regional Council* [2012] NZEnvC 6 at [12]; *St Lukes Group Ltd v The Auckland City Council* A132/2001, 3 December 2001.
[46] RMA, Sch 1, cl 8(B) and 10(1).

Principles from case law

78. The test laid down by the High Court in *Countdown Properties (Northlands) Limited v Dunedin City Council*[47] is whether an amendment made to a proposed plan as notified is "reasonably and fairly raised in submissions" on the proposed plan. This was endorsed by the High Court in *Albany North Landowners v Auckland Council*[48].

79. The Courts have also stated that whether any amendment is reasonably and fairly raised in the course of submissions should be approached "in a realistic and workable fashion, rather than from the perspective of legal nicety"[49]. The "workable" approach requires the Hearing Panel to take into account the whole relief package detailed in each submission[50].

80. The leading authority[51] on whether a submission is "on" a variation or plan change is the High Court decision in *Clearwater Resort Ltd v Christchurch City Council.*[52] It set out a two-limb test:[53]

    (a) Whether the submission addresses the changes to the pre-existing status quo advanced by the proposed plan change; and

    (b) 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.

[47] *Countdown Properties (Northlands) Limited v Dunedin City Council* [1994] NZRMA 145 at 166.
[48] *Albany North Landowners v Auckland Council* [2017] NZHC 138, Whata J. This case concerned the Proposed Unitary Plan.
[49] *Royal Forest and Bird Protection Society of New Zealand v Buller Coal* [2012] NZRMA 552 at [13], confirmed by the High Court in *Albany North Landowners v Auckland Council* [2017] NZHC 138.
[50] *Shaw v Selwyn District Council* [2001] 2 NZLR 277 at [31].
[51] As confirmed by the High Court in *Turners & Growers Ltd v Far North District Council* [2017] NZHC 764.
[52] *Clearwater Resort Ltd v Christchurch City Council* AP 34/02, 14 March 2013, Young J.
[53] At [66].

81. 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*[54] 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.[55]

82. The *Clearwater* test was applied by Kos J in *Palmerston North City Council v Motor Machinists.*[56] He 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 the notified plan change and whether the submission addressed that alteration[57].

83. The first test is arguably of limited relevance to a plan review because a notified PDP will not always change that status quo. This is because under section 79, Council must, even after reviewing operative provisions and deciding they do not need altering, notify them as part of the PDP. Therefore, there may be no change to the "status quo" on a review.

84. The High Court noted 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 ("submissional side-winds") have been denied an opportunity to respond to those proposed changes.[58]

[54] *Option 5 Inc v Marlborough District Council* CIV 2009-406-144 28 September 2009, HC Blenheim.
[55] At [29].
[56] *Palmerston North City Council v Motor Machinists* [2013] NZHC 1290.
[57] At [80] to [81].
[58] At [83].

85. The High Court in *Motor Machinists* set out a further test that is of relevance to determining whether a submission can be reasonably said to fall within the ambit of a full district plan review (first limb of *Clearwater*):[59]

    (a) If the submission seeks a new management regime in a district plan for a particular resource, it must be in response to a plan change that alters the management regime.

86. This test will be most relevant in considering those submissions, if any, that seek to add a management regime for the district wide matters that have not been notified in the PDP. An example will be any submissions which seek to make provision for genetically modified organism or identification of SNAs.

87. The above case law on scope, whilst still applicable, largely deals with discrete variations or plan changes rather than a full district plan review. Plan changes or variations are usually directed at defined geographical areas or specific issues to be resolved. By contrast, a plan review by its nature involves a broader approach to the question of scope. This difference was acknowledged by the High Court in the *Albany North Landowners* decision when Whata J stated:

> [129] Returning to the present case, the Auckland Unitary Plan planning process is far removed from the relatively discrete variations or plan changes under examination in *Clearwater*; *Option 5* and *Motor Machinists*. The notified PAUP encompassed the entire Auckland region… and purported to set the frame for resource management of the region for the next 30 years. **Presumptively, every aspect of the status quo in planning terms was addressed by the PAUP…The scope for a coherent submission being "on" the PAUP in the sense used [in *Clearwater*] was therefore very wide.**
>
> (Our emphasis added)

[59] At [81].

88. The difference in scope considerations between a plan change and a replacement plan was also identified by the Environment Court in *Tussock Rise Limited v Queenstown Lakes District Council*, where it stated:[60]

> "There appears to be a large difference between the strict rules of engagement prescribed by the High Court for submissions on plan changes and the much looser rules for submissions on new (replacement) plans. Much of that difference can be understood in the context of specific plan changes. For example, if a local authority wishes to change a rule in a plan, submissions on the operative objectives and policies would be beyond jurisdiction as not "on" the plan change. **In contrast, on new plans almost everything may be open to challenge as in *Albany North***, although the strategic issues I have identified do then often arise."
>
> (Our emphasis added)

89. The exception to this approach may be rezoning requests which relate to a particular geographic area of land notified in the PDP, similar to that of a plan change. Council has not yet undertaken an analysis of the rezoning requests. It is more appropriate that separate submissions on scope be presented at the commencement of the rezoning topic, if issues of scope arise during the preparation of the section 42A hearing report.

Approach to scope issues on the PDP

90. Council staff have not reviewed the primary submissions on the PDP to determine whether they are "on" the PDP. The section 42A reporting officer for each topic will identify any submissions that they consider may be out of scope. The Hearing Panel will need to carefully consider those submissions through the hearings as they arise, on a case-by-case consideration.

[60] *Tussock Rise Limited,* above n 5, at [62].

91. Finally, I offer some general comments on scope that often arise during district plan reviews that is worth bearing in mind:

(a) There will likely be primary submissions that do not specify with sufficient particulars, the relief sought. The Panel will need to decide whether, when read as a whole, the relief can be reasonably and fairly identified. Submitters can be asked to clarify the relief sought either before or at the hearing. However, a submitter cannot expand the scope of their written submission through their evidence at the hearing.

(b) It is common for further submissions under clause 8 to seek to extend the scope of the primary submission. Further submissions can only be in support of, or opposition to, a primary submission. A further submission cannot seek relief beyond the scope of the original submission[61]. Such relief must be disregarded by the Panel.

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Counsel for Kaipara District Council

[61] *Offenberger v Masteron District Council* WO53/6 (PT).

APPENDIX A: LEGAL REQUIREMENTS FOR DISTRICT PLANS

A. General requirements - district plan (change)

1. A district plan (change) should be designed to **accord with**[1] — and assist the territorial authority to **carry out** — its functions[2] so as to achieve the purpose of the Act[3].
2. The district plan (change) must also be prepared **in accordance with** any national policy statement, New Zealand Coastal Policy Statement*, a national planning standard,[4] regulation[5] and any direction given by the Minister for the Environment[6].
3. When preparing its district plan (change) the territorial authority **must give effect** to[7] any national policy statement (including Policies 3 and 4 of the NPS-UD), New Zealand Coastal Policy Statement*, and national planning standard.[8]
4. When preparing its district plan (change) the territorial authority shall:
   (a) **have regard to** any proposed regional policy statement (change);[9]
   (b) **give effect** to any operative regional policy statement.[10]
5. In relation to regional plans:
   (a) the district plan (change) must **not be inconsistent** with an operative regional plan for any matter specified in section 30(1) or a water conservation order*;[11] and
   (b) the district plan (change) **must have regard** to any proposed regional plan (change) on any matter of regional significance etc.[12]
6. When preparing its district plan (change) the territorial authority must also:
   - **have regard to** any relevant management plans and strategies under other Acts, and to any relevant entry in the New Zealand Heritage List/Rārangi Kōrero and to various fisheries regulations* and to any relevant project area and project objectives (if section 98 of the Urban

[1] RMA, section 74(1).
[2] As described in section 31 of the RMA.
[3] RMA, sections 72 and 74(1).
[4] RMA, section 74(1)(ea).
[5] RMA, section 74(1).
[6] RMA, sections 74(1)(c) and 80L.
[7] RMA, section 75(3).
[8] The reference to "any regional policy statement" in the Rosehip list here has been deleted since it is included in (4) below which is a more logical place for it.
[9] RMA, section 74(2)(a)(i).
[10] RMA, section 75(3)(c). Section 77G(8) provides that the requirement in section 77G(1) to incorporate the MDRS into a relevant residential zone applies irrespective of any inconsistent objective or policy in a regional policy statement.
[11] RMA, section 75(4).
[12] RMA, section 74(2)(a)(ii).

Development Act 2020 applies)*[13] to the extent that their content has a bearing on resource management issues of the district; and to consistency with plans and proposed plans of adjacent territorial authorities[14] and to any emissions reduction plan and any national adaptation plan made under the Climate Change Response Act 2002*[15];

- **take into account** any relevant planning document recognised by an iwi authority;[16] and
- not have regard to trade competition or the effects of trade competition:[17]

7. The formal requirement that a district plan (change) must[18] also state its objectives, policies and the rules (if any) and may[19] state other matters.

B. Objectives [the section 32 test for objectives]

8. **Examine** the extent to which the objectives of the proposal being evaluated are the most appropriate way to achieve the purpose of the Act.[20]

C. Policies and methods (including rules) [the section 32 test for policies and rules]

9. The policies are to **implement** the objectives, and the rules (if any) are to **implement** the policies;[21]

10. Whether the provisions (the policies, rules or other methods) are the most appropriate way to achieve the purpose of the district plan change and the objectives of the district plan by:[22]

(a) identifying other reasonably practicable options for achieving the objectives;[23] and

(b) assessing the efficiency and effectiveness of the provisions in achieving the objectives, including by:[24]

i. identifying and assessing 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:

- economic growth that are anticipated to be provided or reduced;[25] and

[13] RMA, section 74(2)(b).
[14] RMA, section 74(2)(c).
[15] RMA, section 74(2)(d) and (e).
[16] RMA, section 74(2A).
[17] RMA, section 74(3)
[18] RMA, section 75(1).
[19] RMA, section 75(2).
[20] RMA, section 74(1) and section 32(1)(a).
[21] RMA, section 75(1)(b) and (c).
[22] See summary of tests under section 32 of the RMA for 'provisions' in *Middle Hill Limited v Auckland Council* Decision [2022] NZEnvC 162 at [30].
[23] RMA, section 32(1)(b)(i).
[24] RMA, section 32(1)(b)(ii).
[25] RMA, section 32(2)(a)(i).

- employment that are anticipated to be provided or reduced;[26]

ii. if practicable, quantifying the benefits and costs;[27] and

iii. assessing the risk of acting or not acting if there is uncertain or insufficient information about the subject matter of the provisions;[28]

- Summarising the reasons for deciding on the provisions;[29]
- If a national environmental standard applies and the proposed rule imposes a greater prohibition or restriction than that, then whether that greater prohibition or restriction is justified in the circumstances.[30]

D. Rules

11. In making a rule the territorial authority must **have regard to** the actual or potential effect of activities on the environment.[31]
12. Rules have the force of regulations.[32]
13. Rules may be made for the protection of property from the effects of surface water, and these may be more restrictive[33] than those under the Building Act 2004.
14. There are special provisions for rules about contaminated land.[34]
15. There must be no blanket rules about felling of trees[35] in any urban environment.[36]

DI. Other statues:

16. Finally territorial authorities may be required to comply with other statutes (which within the Waikato Region includes the Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010).

[26] RMA, section 32(2)(a)(ii).
[27] RMA, section 32(2)(b).
[28] RMA, section 32(2)(c).
[29] RMA, section 32(1)(b)(iii).
[30] RMA, section 32(4).
[31] RMA, section 76(3).
[32] RMA, section 76(2).
[33] RMA, section 76(2A).
[34] RMA, section 76(5).
[35] RMA, section 76(4A).
[36] RMA, section 76(4B).