BEFORE THE KAIPARA DISTRICT COUNCIL

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of a private plan change request by Mangawhai Central Ltd to the Kaipara District Plan ("PC78")

CLOSING LEGAL SUBMISSIONS ON BEHALF OF MANGAWHAI CENTRAL LTD

3 February 2021

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1. INTRODUCTION

1.1. In opening submissions, our overarching submission was that the Panel can justifiably conclude that Plan Change 78 ("PC78") satisfies the relevant provisions of the Resource Management Act 1991 ("RMA") and that it should be approved. Nothing we have heard during the PC78 hearing has altered that principal submission.

1.2. We submit that there are no impediments to PC78's approval, and that if approved it will have significant benefits for Mangawhai and the region. PC78 represents an important and valuable opportunity to positively provide for sustainable growth in Mangawhai.

1.3. In these submissions we do not intend to re-traverse material covered in opening submissions. The purpose of these closing submissions is to address certain matters arising during the hearing.

2. POST-HEARING UPDATES TO PC78

2.1. Including in response to matters raised at the November 2020 hearing, MCL has made some additional amendments to the proposed PC78 provisions, as outlined in Mr Tollemache's supplementary evidence. These are outlined below:

Water supply

2.2. In response to matters raised by submitters at the hearing, Mr Williamson and Mr Dufty provided supplementary evidence detailing water supply proposals for the PC78 site, to provide additional clarity and certainty. Mr Dufty and Mr Williamson's evidence confirms that a water supply system based on two (now consented)[1] onsite high-flow water takes in conjunction with a 100,000m^3 reservoir can very reliably (and sustainably) service the proposed Residential 3A Sub-Zone and the Business 1 Sub-Zone. Such a reticulated system will enable the PC78 development to be essentially self-sufficient because projected water surpluses will enable the provision of water (via tankers) to PC78 lots outside the Reticulated Area, and potentially to wider Mangawhai.[2]

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1 Refer the second supplementary statement of Mr Williamson attaching resource consent references AUT.042407.01.01 and AUT.042407.02.01.

2 Several other high-flow take locations proximate to the PC78 site are available to bolster reservoir levels should this be deemed beneficial in future.

2.3. Mr Tollemache has proposed additional water supply amendments to the proposed PC78 text, including to:

(a) Provide for a reticulated water supply network to service the entire Residential 3A subzone.[3]

(b) Provide a framework for the implementation of rainwater harvesting throughout the PC78 site (either through supplementary rainwater tanks within the reticulated area, or through primary rainwater tanks outside the reticulated area).[4]

(c) Provide a framework for requiring the implementation of water demand management (savings) devices, including specific reference to the Water Efficiency Labelling Scheme.[5]

2.4. It is apparent that much of what submitters in opposition want (for example sustainable wastewater and potable water solutions, rainwater harvesting on all lots, adoption of water saving techniques) is precisely what MCL wants. The supplementary evidence, and proposed amendments to the PC78 text, are proposed to further strengthen the infrastructure provisions, and to provide additional clarity in this regard.

2.5. Since lodging the supplementary evidence, the applicant has obtained consent for the water takes modelled by Mr Williamson and extrapolated by Mr Dufty. The consent is for a duration of 35 years and is subject to conditions which are able to be met. There being no expert evidence to the contrary, the Panel is able to rely on the evidence of Mr Williamson and Mr Dufty as to the ability to service the level of development proposed.

Character: design guidelines

2.6. Mr Munro and Mr Tollemache have proposed updates to provide additional certainty with respect to the relationship between the *Estuary Estates Design and Environmental Guidelines* (Appendix 16.1 of PC78) and the *Mangawhai Design Guidelines* (Appendix 25A of the District Plan), and their application under PC78:

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3 See for example 16.10.10.4.3; 16.3.9.1(6); and 16.10.8.2n) (see also Mr Tollemache's supplementary statement at paragraph 13).

4 See for example 16.10.8.1 d) (see also Mr Tollemache's supplementary statement at paragraph 13).

5 See for example 16.7.4 ee); and 16.7.4.1 e)iii (see also Mr Tollemache's supplementary statement at paragraph 13).

(a) Amendments to Appendix 16.1 confirm that the Mangawhai Design Guidelines at Appendix 25A of the District Plan are incorporated into and form part of Appendix 16.1.

(b) Amendments to the relevant assessment criterion[6] avoid any doubt that Appendix 16.1 (and therefore the design guidelines at Appendix 25A) apply squarely to subdivision applications.

2.7. The above changes will assist to remove any uncertainty, and we submit should provide additional comfort that the character of land-use and subdivision proposals under PC78 will (and can be required to by decision-makers) be designed to respond appropriately to relevant character considerations.

3. SCOPE/JURISDICTION

3.1. During the November 2020 hearing, Mr Savage briefly raised issues of scope/jurisdiction relating to: (a) MCL's post-notification amendment to identify a road connection from the PC78 site to Old Waipu Road; and (b) MCL's proposed amendments relating to a reticulated water network.

The law

3.2. Whether there is scope/jurisdiction for a modification to a plan change depends on whether the amendment sought was raised in a submission "on" the plan change. The law relating to whether a submission is "on" a plan change has been addressed in numerous cases. We generally agree with Mr Savage's summary of the law relating to scope/jurisdiction in his opening submissions. Mr Savage stated:[7]

> *…Whether the modification to a proposed plan change is within scope… will depend on whether it was raised by and is within the ambit of, what was reasonably and fairly raised in submissions. This assessment should be approached in a realistic workable fashion, rather than from the perspective of legal nicety. This "will usually be a question of degree to be judged by the terms of the proposed change and the contents of the submissions".*

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6 16.10.8.2(A).

7 Mr Savage opening legal submissions, paragraphs 22-24, citing *Vernon v Thames-Coromandel District Council* [2017] NZEnvC 2 primarily, and *Clearwater Resort Ltd v Christchurch City Council* HC Christchurch AP34/02, 14 March 2003 (addressed below). Footnotes omitted. See also *Palmerston North City Council v Motor Machinists Ltd* [2013] NZHC 1290.

The limitations on the scope to modify a plan change after it has been notified are also designed to ensure that, procedurally, there is an opportunity for the matter to be addressed in a further s 32 evaluation, and that there has been an opportunity for those potentially affected by the change to participate.

It is not necessary for the submission "matter" in question to be identified as a form of relief in the submission for it to be able to provide scope to amend the planning document on which the submission was made. Provided a submission, read as a whole, effectively raises the issue in substance, and the proposed modification in response does not go beyond what was fairly and reasonably raised in the submissions, then the decision-maker will have scope to entertain it subject to the further obligations to comply with s 32AA.

3.3. *Clearwater Resort Ltd v Christchurch City Council*[8] *("Clearwater")* sets out the accepted bipartite approach regarding whether a submission is "on" a plan change. Two aspects require consideration:[9]

1. *A submission can only fairly be regarded as "on" a variation if it is addressed to the extent to which the variation changes the preexisting status quo.*

2. *But if the effect of regarding a submission as "on" a variation would be to permit a planning instrument to be appreciably amended without real opportunity for participation by those potentially affected, this is a powerful consideration against any argument that the submission is truly "on" the variation.*

Old Waipu Road connection

3.4. The issue of provision of a roading connection to Old Waipu Road (for vehicle traffic) was clearly raised in submissions. For example:

(a) The submission of Ms Martin[10] states the following:[11]

Arterial routes: I see no arterial routes have been included in the Plan change. With the growth anticipated &… the increase in volumes of traffic into Mangawhai central ***the most common sense approach would be to include an arterial***

8 *HC Christchurch* AP34/02.

9 *Clearwater Resort Ltd v Christchurch City Council HC Christchurch* AP34/02, 14 March 2003 (paragraph 66). *Clearwater* has been endorsed in numerous later decisions, including: *Palmerston North City Council v Motor Machinists Ltd* [2013] NZHC 1290 (paragraph 91); and *Turners & Growers Horticulture Ltd v Far North District Council* [2017] NZHC 764 (paragraphs 22-23).

10 Submission 149.

11 Emphasis added. The summary of submissions records the following with respect to Ms Martin's submission: *"Concerned that no arterial routes through Old Waou [sic] into the Cove have been proposed given the increased traffic. One way in and out proposed - this should be readdressed."*

route through Old Waipu road into Cove**. We have markets every weekend which will also add to Saturday morning congestion. Some people only wish to go to these and **it seems reasonable to be able to take another route. One way in and one way out is not a plan for success. I would like to see this readdressed in the plan change.

(b) The submission of Ms Sheffield[12] explicitly seeks a *"…second road access on the western boundary towards Old Waipu Rd".*

(c) The submission of Johanna Kloostenboer squarely raises the "*Old Waipu Rd connection."*[13]

(d) The submission of Ms Squire[14] states:

*Traffic - **adequate provision to be made to provide several road outlets to Heads and Village areas**, rather than the majority of traffic being funneled into Molesworth Drive.*

(e) Numerous other submissions raise a wide range of transportation network/access matters.[15]

3.5. The further submissions of the Northland Transportation Alliance ("NTA"), which – with respect to the Old Waipu Road connection – explicitly supported (in part) the submissions by Johanna Kloostenboer and Garett Hall,[16] address the matter of the Old Waipu Road connection in considerable detail.

3.6. With respect to *Clearwater,* we agree with Mr Bangma that the Old Waipu Road connection point clearly satisfies the first *Clearwater* limb. In respect to the second limb, in the event that the Panel has any concerns regarding scope, MCL is ultimately agnostic about the provision of the connection. This is because the Old Waipu Road connection was identified on the structure plan by MCL only as a good faith response to submissions (previously, only a walking and cycling connection to Old Waipu road was shown on the Structure Plan). It would come at a significant cost to MCL. The NTA strongly supports provision of an Old Waipu Road connection as part of the "route protection" of a link

12 Submission 29. The summary of submissions documents prepared by the Council lists the relief sought by Ms Sheffield as *"[a]mend application to require second road access on the western boundary towards Old Waipu Road"*.

13 Submission 100. The summary of submissions documents prepared by the Council includes explicit reference to the *"Old Waipu Road connection"* in summarising Johanna Kloostenboer's submission.

14 Submission 111. The quotation from the submission set out above is addressed in summary form in the summary of submissions.

15 The summary of submissions (Part B) lists 24 submissions under the heading of "traffic/roading".

16 Submission 52.

from Molesworth Drive through to Cove Road (being a 30-50 year strategic planning proposal).[17] The Council has also confirmed that an Old Waipu Road connection is consistent with Council planning, including the recently-adopted Mangawhai Spatial Plan and the Draft Network Operating Framework for Mangawhai.[18] Importantly, however, the transport evidence on behalf of MCL is that the transportation effects will be appropriate with or without the connection.[19]

Reticulated water network

3.7. We agree with Mr Bangma that the Panel can be assured that there are no issues as to scope/jurisdiction with respect to the reticulated water network provisions.

3.8. Numerous submitters raised a wide range of water supply matters, including with respect to a reticulated water supply network.[20] The reticulated network provisions forming part of PC78 as now proposed by MCL are squarely within the scope of submissions.

3.9. With respect to the *Clearwater* limbs, we agree with Mr Bangma that the first limb is clearly satisfied. The submissions on the reticulated water supply network fall within the ambit of PC78.[21] We also agree with Mr Bangma that the second limb is not offended

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17 As confirmed at the hearing during the presentation of evidence for the NTA.

18 Statement of evidence of Mr Sephton dated 16 December 2020 (in response to Panel Directions), section 5.

19 Mr Hills EIC, paragraphs 54-55.

20 The submission by Mangawhai Central Limited (Submission 182) squarely raised the reticulated water network (and associated storage), stating: *"[w]hile the existing KDP provisions for network utilities in Chapter 10 are applicable to the PPC78 area, the provisions relating to water are not considered to adequately enable a* ***water storage facility to provide water supply to development anticipated by the Estuary Estates Zone****. 6. …there is no resource management reason to apply a more restrictive volume or activity status to water storage associated with a* ***reticulated water supply****"* [emphasis added]. Other submitters also raised the matter of a reticulated water supply network. For example, the submission of John Stephens (Submission 46) states: *"I oppose the plan change provisions in respect of water supply because:* ***The proposals in respect of the aquifer and rainwater harvesting in tanks do not adequately provide sufficient water for the development****"…" All proposed dwellings should have water tanks made mandatory due to critical drain on local water resource"… "[t]here are minimal details of the* ***water supply network****, no reference to management of the* ***network****, and the treatment of";* [emphasis added] and the submission of Rachael Williams (Submission 71) states: *"[t]he proposals in respect of the aquifer and rainwater harvesting in tanks do not adequately provide sufficient water for the development",* and *"…Mangawhai does not have the available ground water to allow a development of this size to use the current water source, as it's only water source. 6.* ***Provisions for tanks/alternate water source for this development and reports required****. Also further detail regarding its water management and treatment must be made a priority, before any further works are commenced"* [emphasis added]. Other examples of submissions raising broad water supply matters include: Anne Robbins (Submission 47); Gary Colhoun (Submission 59); Aaron McConchie (Submission 64); Allana Pendleton (Submission 67); and Gail Williams (submission 66). The "Mangawhai Matters" further submission (Further Submission 3 by Douglas Lloyd and others) also raises broad water supply issues.

21 Refer *Palmerston North City Council v Motor Machinists Ltd* [2013] NZHC 1290 (paragraph 80), as endorsed by *Turners & Growers Horticulture Ltd v Far North District Council* [2017] NZHC 764 (paragraph 23).

against. No potential submitters are adversely affected by the reticulated network proposals, and we note that interested parties had the opportunity to submit or further submit on these matters (as several did). The submissions relating to a reticulated network were not out of *"left field*" and did not *"propose something completely novel*", as set out in paragraph 3.12 below.[22]

3.10. We submit that Mangawhai Matters' assertion regarding absence of scope with respect to the proposed reticulated water network is puzzling given that a large part of Mangawhai Matters' case is directed at Mangawhai's potable water supply constraints, including with respect to rainwater harvesting and tanker top-ups.

3.11. Provision of a reservoir and reticulated network at Mangawhai Central will go a long way to enhancing the sustainability of water supply (and security/resilience of supply) for Mangawhai Central beyond the rainwater tank only *status quo* prevailing in the Operative Chapter 16 and the rest of Mangawhai. The reservoir will also be able to supplement tanker supplies to the rest of Mangawhai, if reservoir levels are sufficient for that purpose at any given time. In short, the proposed reservoir, reticulated network, and suite of rainwater harvesting and water saving initiatives represents an innovative and sustainable water supply solution.

3.12. Reticulated supply is provided for in operative Chapter 16 and in PC78 as notified (which cross-referenced the district-wide provisions relating to water in Chapters 13 (Residential) and 14 (Business Commercial and Industrial)). Amending, by strengthening, the PC78 water supply provisions with respect to reticulated supply in response to assertions by submitters that rainwater harvesting alone is not sustainable for the additional 500 dwellings proposed is not only legitimate and credible, but the very kind of iterative response that the law around plan making calls for. In this regard, the complaints levelled at the applicant by Mr Boonham in his third memorandum (2 February 2021) are without grounds and somewhat specious.

3.13. As outlined above, we re-iterate that MCL has already obtained regional consents for two onsite high-flow surface water takes (together with the existing groundwater take) to supply the proposed reservoir and reticulated network.

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22 *Palmerston North City Council v Motor Machinists Ltd* [2013] NZHC 1290 (paragraphs 24 and 55 respectively).

4. CONSULTATION

4.1. A number of submitters raised concerns with perceived PC78 consultation deficiencies. We addressed consultation in our opening legal submissions.[23]

4.2. We reiterate that the MCL team and its advisors have, over several years, engaged in good faith with a wide range of parties – including tangata whenua, the Council and the local community – and have genuinely sought to address concerns.[24]

4.3. Mangawhai Matters raised perceived consultation grievances at the hearing.[25] We reiterate that that MCL continued to engage with submitters (and the Council), including in the period leading up to the November 2020 hearing. Several of MCL's expert team held peer to peer discussions or meetings with experts engaged by Mangawhai Matters and the Council. Mr Tollemache met with Ms O'Connor for Mangawhai Matters as late as 20 October 2020.

5. RELEVANCE OF NON-STATUTORY DOCUMENTS

5.1. We understand that there is broad agreement between counsel for the Council, Mangawhai Matters, and MCL that – to the extent they are relevant – the Panel must have regard to management plans and strategies prepared under statutes other than the RMA;[26] and may consider other non-statutory documents.[27] Documents under the second limb include the 2020 Mangawhai Spatial Plan, the 2017 Mangawhai Community Plan, and the 2005 Mangawhai Structure Plan.

5.2. The planners for MCL and the Council agree that PC78 is consistent with the full suite of statutory and non-statutory documents referred to in the AEE and s42A Report. While non-statutory documents provide some useful background to inform the Panel's consideration of PC78, we submit that it is clearly the statutory RMA documents that are key to the Panel's consideration of PC78 and which should be given primary weight by the Panel.[28]

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23 Paragraphs 4.2-4.4.

24 Mr Tollemache has detailed in his EIC and supplementary evidence a suite of proposed changes that have been made to address matters raised by the Council and submitters.

25 See paragraph 3(d) of the legal submissions of Mr Savage.

26 *See s74(2)(b)(i) of the RMA which states that when preparing or changing a district plan, a territorial authority shall have regard to "any management plans and strategies prepared under other Acts"*

27 See for example *Kiwi Property Holdings Ltd v Christchurch City Council [2012] NZEnvC 92 at paragraphs [46]-[47].*

28 Refer to paragraph 6.5(b) of Mr Bangma's opening legal submissions where he agrees with this submission.

5.3. With respect to the 2005 Mangawhai Structure Plan, while Mr Savage in opening submissions referred extensively to this document,[29] both the Operative Plan and PC78 provisions explicitly provide that the provisions of Chapter 16 and the Estuary Estates Structure Plan have precedence over the Mangawhai Structure Plan 2005[30] (which is unsurprising given the age of the 2005 Mangawhai Structure Plan and its relationship with the later in time Estuary Estates Structure Plan and Chapter 16 provisions). The Mangawhai Structure Plan 2005 must be read in that context. In addition, the body of work culminating in the recently adopted Mangawhai Spatial Plan 2020 demonstrates that Mangawhai has changed drastically since 2005, and that Mangawhai's RMA planning needs can be better served than by a blinkered focus on the 15 year old Mangawhai Structure Plan 2005.

6. MĀORI CULTURAL MATTERS

6.1. MCL acknowledges the Māori cultural perspective expressed at the hearing by Mr Ferguson.[31] As summarised in opening submissions, including through consultation with Te Uri o Hau (who is not a submitter on PC78), MCL considers that PC78 appropriately recognises and provides for Māori cultural matters, including as expressed in the RMA (s6(e), s7(a), and s8) and the range of relevant planning documents. Te Uri o Hau has provided Cultural Values Assessments relating to the Mangawhai Central development, covering the entire PC78 site.

7. MANGAWHAI MATTERS EXPERT EVIDENCE

7.1. During opening submissions, we outlined orally that while MCL does not take issue with the expert credentials possessed by Mangawhai Matters' expert witnesses, the following matters go to the independence of certain witnesses.[32] We understand that:

(a) Dr Cayford is a founding member (and founding committee member) of Mangawhai Matters.[33]

29 Mr Savage opening submissions, paragraphs 48-53.
30 See 16.1.2.
31 Submission 130.
32 All Mangawhai Matters' expert witnesses have confirmed they agree to comply with the Code of Conduct for expert witnesses as set out in the Environment Court Consolidated Practice Note 2014.
33 Refer Dr Cayford's evidence (paragraph 1.1).

(b) Dr McDermott and Dr Cayford made **personal** submissions in opposition to PC78.[34]

(c) Mr Scott and Dr McDermott were key witnesses for the applicant during the Plan Change 22 process resulting in the Operative Chapter 16 provisions.[35]

(d) Dr McDermott lives in Mangawhai Heads; and Dr Cayford is building a home in Mangawhai Heads, having "enjoyed" a bach there for 15 years.[36]

7.2. In our collective experience, it is unprecedented for a party's experts to be so broadly affected by such a range of material matters going to their independence. As we acknowledged during the November 2020 hearing, to their credit the Mangawhai Matters witnesses have been upfront regarding their personal involvement. However, we submit that – both in isolation and especially when considered together – the above factors (together with the content of the evidence) demonstrate that several key Mangawhai Matters expert witnesses (being those witnesses identified above) are not independent in the context of this hearing.

7.3. For these witnesses, their role as an independent expert witness has blurred with the role of an advocate. It was clear from their demeanor when responding to questions from the Panel that they felt strongly about the issues they were speaking to and which Dr McDermott and Dr Cayford had earlier submitted on. We therefore submit that their evidence should be given reduced weight (and, in fact, limited weight) by the Panel.

7.4. In particular, Mr Scott and Dr McDermott are too close to the existing Chapter 16 to give their Plan Change 78 evidence much weight. In our submission, at the hearing Mr Scott was promoting his personal version of environmentalism, going well beyond matters of landscape architecture, which manifests itself in the Operative Chapter 16. His evidence focused largely on the Operative Chapter 16 and the work underpinning it, and very little on PC78. We understood Mr Scott to be stringently defending large parts of his earlier work as being critical to remain in the District Plan.

7.5. An example of a decision in which expert evidence has been given reduced weight due to issues of advocacy/lack of independence is *Blueskin Energy Ltd v Dunedin City*

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34 Submissions 144 and 154 respectively. See also the joint further submission by Douglas Lloyd, Dr McDermott, Dr Cayford, Rachael Williams, and Peter Nicholas.

35 As an aside, we note that Mr Savage was also the lawyer representing the Plan Change 22 applicant

36 Refer Dr McDermott's evidence (paragraph 1.1) and Dr Cayford's evidence (paragraph 1.1).

Council [2017] NZEnvC 150. In that case, an expert witness had also lodged a personal submission relating to the proposal being considered by the Court. The Court found:[37]

> *…Dr Stephenson made a submission on the application for resource consent strongly in support of the grant of consent… When an expert appears to take the position of an advocate this compromises the evidence they give. Given the strength of her views in the submission we are unable to give Dr Stephenson's evidence much weight, and this is so despite her assurances that her views did not taint the opinions expressed in evidence.*

7.6. With respect to the evidence of Ms O'Connor, we submit that her evidence does not reflect the same level of detailed consideration and analysis as the evidence of Mr Tollemache and the s42A Report. Ms O'Connor's reference to the applicable planning provisions is very limited. In our submission, Ms O'Connor's evidence does not identify a cogent set of planning provisions demonstrably justifying her opinion that PC78 is inconsistent with the applicable planning documents and is inappropriate.

7.7. In terms of Mr Lunday's evidence, he confirmed that at the time he wrote and filed his evidence in chief he had not visited the PC78 site for "25 years". We submit that this is extraordinary for an urban design expert, especially one whose evidence in chief relies heavily on landform considerations.[38] Mr Lunday stated that he visited the site in the morning before he appeared at the November 2020 hearing, although we are advised that the site visitor logs do not indicate that he went on to the site itself. This contrasts with Mr Munro and Mr Riley who have both undertaken recent visits of the site and the surrounding area (Mr Munro, on numerous occasions).

7.8. Furthermore, Mr Lunday's responses to questions from the Panel seemed to be cross referenced a range of other examples that were not obvious comparators and it was difficult to identify a coherent theme from his advice. He appeared to advocate for pockets of intensity within a wider area of managed vegetation but stopped short of suggesting practical measures which might achieve that.

7.9. Overall, we submit that the expert evidence on behalf of Mangawhai Matters exhibits an analytical approach beginning with the premise that PC78 is inappropriate, and then backfilling from this presupposition.

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37 Paragraph 203 of the decision (footnote 167).

38 See Mr Lunday EIC, paragraphs 28(c), 40, and 69 for example.

8. WASTEWATER AND POTABLE WATER PLANNING AND FUNDING

8.1. We agree with the Panel's memorandum dated 19 January 2021 that the Panel was entitled to obtain from the Council the information provided by Mr Sephton on 16 December 2020, and that the Panel can consider that information for the purposes of making its decision on PC78.

Wastewater

8.2. With respect to wastewater, Mr Sephton's evidence confirms that: there is immediate capacity at the Mangawhai Community Wastewater Treatment Plant ("CWWTP") for 389 additional connections; and there is currently planned (including forecasted funding) capacity available to service all connections enabled by PC78. In other words, both planning and forecast funding are in place to deliver the necessary upgrades to the CWWTP to cater for the demands on the CWWTP associated with the full build-out of PC78.

8.3. While submitters have placed considerable focus on wastewater capacity issues both during and after[39] the November 2020 hearing, all independent expert witnesses with specialisations in engineering, infrastructure and/or wastewater matters agree with the above.

8.4. It is worth pointing out that there will not be an immediate rush of connections if PC78 is approved. The supermarket (approved by resource consents) is expected to connect to the wastewater network in 2021, and then residential lots are expected to begin connecting in 2022. This is in line with planned funding and upgrades. The existing and proposed Plan provisions are sufficient to ensure that development cannot progress unless wastewater connections (and water supply) are available.[40] The situation is no different than any other proposed development throughout the district.

Potable water

8.5. As has been acknowledged by MCL throughout the PC78 process, because there are currently no plans for the Council to deliver a reticulated water supply to Mangawhai, the funding and construction of potable water supplies (including any reticulated network) is

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39 See for example the memoranda by Mr Boonham dated 15 January and 26 January 2021, and the "additional comments" by Mr Dickie dated 21 January 2020.

40 See the s42A Report at paragraph 245, Mr Tollemache's EIC at paragraph 9.22, and Rules 13.14.4 and 14.13.4 (water supply) and 13.14.6 and 14.13.6 (wastewater).

MCL's responsibility.[41] Now that water take consents are in place, MCL can proceed with applications to install the take equipment, the reservoir and the necessary network.

8.6. The supplementary evidence of Mr Dufty demonstrates that current technology enables water saving devices to be installed at the level of individual dwellings and to operate as crucial components of a sustainable system. The PC78 provisions require incorporation of these systems so that residential activity will deliberately include measures relevant to current levels of water supply. In this respect, PC78 would be unlike any other part of Mangawhai or the wider Kaipara district.

9. DEVELOPMENT CONTRIBUTIONS AND FINANCIAL CONTRIBUTIONS

9.1. To be clear, as outlined in Mr Sephton's evidence for the Council and highlighted above:

(a) water supply infrastructure funding and construction is the sole responsibility of MCL (there is no public water supply available); and

(b) development contributions can be levied through standard mechanisms to require MCL to pay contributions for wastewater and other infrastructure in line with the increased demand caused by the Mangawhai Central proposal, as would be the case under Chapter 16.

9.2. Given the District's history with respect to infrastructure provision and funding, many submitters are understandably anxious that MCL pay its fair share towards infrastructure. As we confirmed in opening submissions:

(a) MCL is fully committed to funding its fair share of the infrastructure associated with PC78. MCL has been working collaboratively with the Council to advance arrangements for infrastructure funding and a development agreement framework is in place. MCL is committed to continue working collaboratively with the Council under the established framework to confirm funding arrangements.

(b) The Panel can be assured that there are mechanisms available, and an established framework, to provide for MCL's (significant)[42] contribution to funding of the infrastructure required in a manner consistent with its statutory obligations.

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41 As confirmed in Mr Sephton's statement at paragraph 1.3(b).

42 For context, based on 1,000 dwellings the PC78 wastewater development contributions alone would, under the current Development Contributions Policy, be in excess of $22million (1,000 x $22,113 per unit of demand, as referenced in Mr Sephton's statement at paragraph 3.11).

10. THE NPS-UD

10.1. The NPS-UD was addressed in detail in Mr Tollemache's evidence.[43] In opening submissions, Counsel for both MCL and Mangawhai Matters submitted that the NPS-UD does apply to PC78 due to the NPS-UD's definition of "urban environment" being satisfied in this case;[44] while Mr Bangma submitted that there is not currently sufficient evidence for the Panel to make a conclusion on the issue. If the NPS-UD does apply, counsel for both MCL and the Council submit that PC78 is consistent with it and gives effect to it, while Mr Savage identifies certain NPS-UD provisions with which he asserts PC78 is inconsistent.

10.2. We do not intend to re-traverse the NPS-UD matters addressed in evidence and at the hearing but address two matters arising during the hearing: Policy 6 (amenity values) and Objective 6 (infrastructure).

Policy 6 – amenity values

10.3. Policy 6 provides:

> ***Policy 6:*** *When making planning decisions that affect urban environments, decision-makers have particular regard to the following matters:*
>
> *(a) the planned urban built form anticipated by those RMA planning documents that have given effect to this National Policy Statement*
>
> *(b) that the planned urban built form in those RMA planning documents may involve significant changes to an area, and those changes:*
>
> *(i) may detract from amenity values appreciated by some people but improve amenity values appreciated by other people, communities, and future generations, including by providing increased and varied housing densities and types; and*
>
> *(ii) are not, of themselves, an adverse effect*
>
> *(c) the benefits of urban development that are consistent with well-functioning urban environments (as described in Policy 1)*

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43 Mr Tollemache EIC, section 8.1-8.17 and rebuttal evidence paragraph 25-37.

44 See clause 1.3(1)(b) of the NPS-UD which confirms it applies to *"planning decisions by any local authority that affect an urban environment"*. If the Panel finds that in this case there is an "urban environment" as defined, then the NPS-UD will apply to PC78 (Kaipara District Council will be a Tier 3 territorial authority, having a Tier 3 urban area within the district). This means that all general objectives and policies in Part 1 will apply; however, some specific objectives, policies, and provisions in Parts 3 and 4 apply only to tier 1, 2, or 3 local authorities. (Notwithstanding this, clause 1.5 states that *"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."*).

(d) any relevant contribution that will be made to meeting the requirements of this National Policy Statement to provide or release development capacity

(e) the likely current and future effects of climate change.

10.4. At the November 2020 hearing, Mr Savage submitted that Policy 6(a) and 6(b) do not apply to PC78 because in this case there are currently no RMA planning documents that have given effect to the NPS-UD. On that basis, Mr Savage asserted that the Panel could entirely disregard the NPS-UD's direction that decision makers have regard to the matters in Policy 6(a) and 6(b), including that giving effect to the NPS-UD may involve significant changes to an area, and that those *changes "may detract from amenity values appreciated by some people but improve amenity values appreciated by other people"* and those changes *"are not, of themselves an adverse effect"*.

10.5. In terms of Policy 6(a), given the NPS-UD was only recently released, the extent to which applicable "RMA planning documents" give effect to the NPS-UD is unclear. Aspects of the RPS, Regional Plan, and District Plan likely do give effect to aspects of the NPS-UD, while others do not. Any giving effect to the NPS-UD by prior instruments will be coincidental.

10.6. However, with respect, we submit that Mr Savage's interpretation of Policy 6(b)'s application to PC78 is strained, incorrect, and ultimately self-serving. Mr Savage's interpretation would lead to the untenable (and illogical) position that Policy 6(b) was of no relevance or application for any resource consent decision before an initial plan change or review of a district plan, regional plan, or regional policy statement was undertaken to give effect to the NPS-UD; or indeed for any initial plan change or review itself. Under Mr Savage's interpretation, Policy 6(b) would be of no effect to any plan change or resource consent application until after an applicable RMA planning document had been changed to give effect to the NPS-UD. There is no such reservation in the NPS-UD.

10.7. We submit that it is clear that the matters in Policy 6(b) are highly relevant (and apply) to the Panel's decision on PC78. Assuming there is an urban environment, there is no doubt that PC78 must give effect to the NPS-UD.[45] In addition, the initial text of Policy 6 also requires that ***"[w]hen making planning decisions that affect urban environments**, decision-makers have particular regard to the following matters…".*[46] We submit that for the purposes of the Panel's decision, it is the planned urban built form

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45 Clause 3 of the NPS-UD states that the NPS-UD applies to *"planning decisions by any local authority that affect an urban environment".* Mr Savage accepts (and we agree) that the Panel is dealing with an urban environment in the case of PC78.

46 Emphasis added.

anticipated by PC78 (if the Panel considers PC78 gives effect to the NPS-UD) that Policy 6(b) refers to.[47] In our submission, it would be antithetical to the purpose and intent of the NPS-UD and its amenity provisions for the Panel to disregard relevant Policy 6 matters on the basis asserted by Mr Savage.

10.8. Without wanting to labour the point, we submit that when considering the application of Policy 6 it is important to understand its rationale. We therefore set out at **Annexure A** several excerpts from relevant NPS-UD documents, which we submit reinforce Policy 6's relevance and application in this case.[48] The NPS-UD guidance documentation is also consistent with our interpretation of Policy 6.[49] We have not identified any documents that confirm Mr Savage's interpretation.

10.9. The submissions (and the hearing) on PC78 demonstrate that PC78 is exactly the type of situation that Policy 6 is intended to apply to – where change that is necessary to provide for business and housing growth is opposed by some (largely existing residents who seek the retention of Mangawhai's existing character) but will improve amenity values appreciated by others (especially future residents of Mangawhai Central). Policy 6 starkly sets out that the views of existing residents who resist change (and who inevitably feature heavily in publicly notified processes) should not predominate over the views of future residents for whom change will be a positive. In fact, Policy 6 goes further and requires that decision-makers have regard to the fact that change (while it may be negatively perceived by some existing residents) is not in itself an adverse effect and may be a positive for others, including future residents.

10.10. Addressing a line of questioning from the Panel at the November 2020 hearing, we submit that the NPS-UD does not remove the ability for people, including existing residents, to oppose proposals on the basis of amenity effects. Nor does it remove the ability of decision-makers to consider such effects. However, the NPS-UD clearly signals that there is a critical need to better supply a range of business and housing development, and that the *change* resulting from such development is not *in itself* an

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47 We submit that the references in Policy 6 to *"…those RMA planning documents…"* are not intended to limit the Policy's application in the manner asserted by Mr Savage. Rather, that language is simply the drafters' attempt to neatly capture the future built form outcomes required by the NPS-UD.

48 All emphasis (bold text) in the excerpts at **Annexure A** is ours.

49 NPS-UD Introductory Guide, page 10 summarises Policy 6 in the following terms: "*Decision-making: Councils have particular regard to the following **when making planning decisions**: anticipated outcomes, the benefits of urban development that are consistent with well-functioning urban environments, the need for urban environments to change, development capacity requirements and the effects of climate change."* In addition, NPS-UD Introductory Guide, page 9 states with reference to Objective 4 and Policy 6: *"Clarifying amenity and change in urban environments: Directs councils to enable New Zealand's urban environments, including their amenity values, to change over time."*

adverse effect.[50] We submit that what the NPS-UD clearly signals is that there is no merit to assertions by existing residents (or others) that a proposal should be declined simply because it might appear different to what currently exists, which is a theme running through many of the submissions on PC78. Existing residents in Mangawhai (or anywhere else) do not have a monopoly on amenity value/character.

10.11. Notwithstanding the above, regardless of how Policy 6(a) and (b) are to be interpreted:

(a) The requirement to "have particular regard to" planned built form needs to be read alongside the other clauses in Policy 6, including that particular regard be had to:

(i) *"the benefits of urban development that are consistent with well-functioning urban environments";*[51]

(ii) *"any relevant contribution that will be made to meeting the requirements of this National Policy Statement to provide or realise development capacity".*[52]

(b) Objective 4 (which is linked to Policy 6) is certainly relevant and states:

> ***Objective 4:*** *New Zealand's urban environments, including their amenity values, develop and change over time in response to the diverse and changing needs of people, communities, and future generations.*

Objective 4 is sufficiently wide to capture the considerations identified in Policy 6.

Objective 6 - infrastructure

10.12. Objective 6 of the NPS-UD states:

> ***Objective 6:*** *Local authority decisions on urban development that affect urban environments are:*
>
> *(a) Integrated with infrastructure planning and funding decisions; and*
>
> *(b) Strategic over the medium term and long term; and*
>
> *(c) Responsive, particularly in relation to proposals that would supply significant development capacity.*

10.13. Objective 6(a) provides that decisions on urban development which affect urban environments are **integrated with** infrastructure planning and funding decisions. It does

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50 As identified above, the NPS-UD also identifies that the same change can be adverse for some and positive for others.

51 As set out in Mr Tollemache's evidence, PC78 will make a significant contribution to Mangawhai as a well-functioning urban environment

52 As set out in the evidence for MCL, including Mr Colegrave's EIC, PC78 will contribute to meeting current (and projected) demand for development capacity in Mangawhai.

not require (nor is it intended to require) that all infrastructure planning and funding, including under other legislation such as the Local Government Act 2002, must necessarily be established with complete certainty *before* a plan change can be approved. As Commissioner David Hill indicated during questions at the November 2020 hearing, it would be nonsensical for councils to be required in every instance to fully plan and fund infrastructure before growth can be approved under RMA plans.

10.14. Demonstrating the point that the NPS-UD does not require infrastructure planning and funding to *precede* local authority RMA decisions, Policy 8 of the NPS-UD states:[53]

> ***Policy 8:*** *Local authority decisions affecting urban environments are responsive to plan changes that would add significantly to development capacity and contribute to well functioning urban environments, even if the development capacity is:*
>
> *(a) unanticipated by RMA planning documents; or*
>
> *(b) out-of-sequence with planned land release.*

10.15. The NPS-UD Guidance Documentation provides that Objective 6(c) (and Policy 8):[54]

> *…recognises local authorities cannot predict the location or timing of all possible opportunities for urban development. It therefore directs local authorities to be responsive to significant development opportunities when they are proposed.*
>
> *The proposed development may be:*
>
> - *out of sequence (eg, locations identified for future urban development but dependent on sequenced land release) or*
> - *unanticipated in existing plans or other strategies (eg, locations outside of areas identified for urban development, or areas currently zoned for urban uses but with less development capacity).*

10.16. Policy 8 directs local authority decisions to be responsive to certain plan changes that are unanticipated by RMA planning documents and/or out of sequence with planned land release. By their nature, such plan changes can hardly be expected to be the subject of completely settled infrastructure planning and funding decisions. For example, Long Term Plans are generally reviewed every three years.

10.17. Under the Operative Chapter 16, the PC78 site is currently zoned for urban use, but with less residential development capacity. We therefore submit that PC78 is an example of where the level, but not the location, of proposed development capacity is unanticipated

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53 See also Objective 6(c) and clause 3.8.

54 *Understanding and Implementing the Responsive Planning Policies*, page 2. Emphasis added.

by RMA planning documents (at least the District Plan). Objective 6 and Policy 8 therefore provide direct support for PC78.[55]

10.18. Several sources reinforce that: (a) a key thrust of Objective 6 and Policy 8 is to enable responsiveness, as opposed to being intended to impose more onerous obligations with respect to infrastructure than previously existed; and (b) RMA decision-making can (and in some cases *should*) pre-date infrastructure planning and funding under other legislation. We have set out at **Annexure B** relevant excerpts from various documents.

10.19. Notwithstanding that the NPS-UD does not require infrastructure planning and funding to precede RMA decision-making; we submit that the supplementary evidence demonstrates that infrastructure planning and funding for PC78 is in fact in place to a sufficient degree of detail and certainty, and that PC78 is integrated with infrastructure planning and funding. MCL and the Council have shown how the infrastructure needed to service development will be provided.

10.20. Despite Mr Boonham and Mr Dickie's dissatisfaction with the situation,[56] the Council has confirmed, including though Mr Sephton's evidence (outlined above), that infrastructure planning and funding for necessary wastewater treatment plant upgrades is in place or in train. Here, Mr Sephton's evidence points to the proximity of the 2021 and 2024 LTP rounds and the fact that these processes will respond to a higher degree of detail as that emerges (from this process) and the implications of that for development contributions required at resource consent stage.[57]

10.21. All water supply infrastructure will be funded and delivered by the developer, not the Council; and MCL has recently obtained regional consents for water takes capable of supplying the proposed potable water reservoir/network. This represents a very high degree of certainty with respect to potable water supply. We therefore submit that the infrastructure planning and funding associated with PC78 is sufficient in the context of the NPS-UD, including Objective 6.

10.22. In summary, we submit that the Commissioners need to be satisfied that infrastructure to service PC78 can be provided. MCL and the Council have provided considerable evidence that this is the case. We therefore submit that there are no infrastructure planning or funding issues precluding PC78, including with respect to the NPS-UD.

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55 See also the evidence of Mr Tollemache on the application of the NPS-UD.

56 Refer the memoranda by Mr Boonham dated 15 January and 26 January 2021, and the "additional comments" by Mr Dickie dated 21 January 2020.

57 Refer footnote 42 above as to current cost of a wastewater connection per dwelling.

NPS-UD summary

10.23. We submit that it is entirely consistent with the intent and purpose of the NPS-UD that it applies in this case, including the context of:

(a) the uncertain and untested definition of "urban environment" in the NPS-UD (especially with respect to the spatial extent of any "urban environment");[58]

(b) the fact that in this case Mangawhai is *at the very least* on the cusp of being an urban environment (and if holiday populations are included, which we submit should be, Mangawhai almost certainly qualifies as an urban environment as defined); and

(c) the rapid population growth in Mangawhai and the associated need for quality urban planning and development;

10.24. When interpreting the NPS-UD's provisions (including Policy 6 and Objective 6), we also submit that the Panel should remain cognizant of the NPS-UD's overall purpose. To focus too closely on the minutiae of detailed (and untested) interpretation issues risks losing sight of the wood for the trees.

10.25. With respect to the relationship between the "enabling" provisions versus the infrastructure provisions in the 2016 NPSUDC (the NPS-UD's forerunner), the Environment Court commented that the NPDUDC was designed to:[59]

> *… open doors for and encourage development of land for business and housing, not to close them.*

10.26. We submit that the same can be said of the 2020 NPS-UD.

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58 Given that urban environment means *"any area of land (regardless of size, and irrespective of local authority or statistical boundaries) that: is, or is intended to be,* ***predominantly*** *urban in character…"* the relevant urban area in this case could legitimately include large areas of rural land (and populations) as long as the whole area for the purposes the defined "urban environment" is predominantly urban (i.e. the "main" or "chief" element is urban).

59 *Bunnings Limited v Queenstown Lakes District Council* [2019] NZEnvC 59 at [39].

The application of the NPS-UD is not determinative

10.27. Finally, as we submitted in opening submissions, the application (or otherwise) of the NPS-UD is not determinative. PC78's notification pre-dates the NPS-UD, and PC78 was the most appropriate planning framework at that time. If Mangawhai is deemed to be an urban environment, then we submit that the NPS-UD provides additional direct policy support for PC78, and no barriers to its approval. (We agree with the Council's planners that PC78 gives effect to the relevant provisions of the NPS-UD.)[60] If it is not deemed an urban environment, then PC78 remains the most appropriate planning framework.

10.28. MCL is not seeking to rely on the NPS-UD to justify greater housing numbers or greater densities than PC78 originally proposed, or even to justify what is proposed. MCL is simply pointing to the NPS-UD as providing additional policy support and confirmation that PC78 is appropriate. We submit that the urgent need to provide adequate housing supply and choice to meet community needs remains a critical factor for the Panel's consideration, whether or not the NPS-UD applies.

11. THE COUNCIL'S SUMMARY STATEMENTS

11.1. We commend Mr Badham and Ms Neal for the clear and succinct summary provided in their recent statement dated 29 January 2021, especially with respect to water and wastewater matters. There is a very high level of agreement between the Council's expert's and MCL's experts, and no material matters of disagreement.

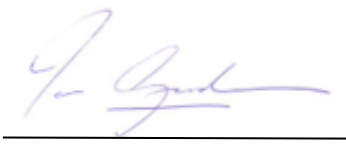
11.2. Mr Badham and Ms Neal continue to recommend that the Panel commission an additional report to assess population projections in the context of the NPS-UD's definition of "urban environment". As we submitted in opening, further reporting on this matter, which will be inherently "speculative" and which will involve judgments regarding the relatively vague definition of urban environment in the NPS-UD, may not provide additional certainty or assistance. It is not necessary in our submission. The key point for the purposes of PC78 is that the planners for both the Council and MCL consider that PC78 should be approved whether or not the NPS-UD applies.

60 Section 42A Report, at paragraph 47.

12. OVERARCHING SUBMISSION

12.1. In conclusion, we submit that the Panel can justifiably conclude that PC78 satisfies the relevant provisions of the RMA and should be approved. In short, PC78 will provide for sustainable growth in Mangawhai.

Dated this 3rd day of February 2021



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ANNEXURE A: EXCERPTS RELEVANT TO NPS-UD POLICY 6

(a) The NPS-UD Recommendations and Decisions Report confirms that the intent of the amenity provisions in the NPS-UD is:[61]

> *…to allow* ***urban environments to change in response to changing needs****. The provisions also intend to* ***ensure local authorities do not unduly prioritise maintaining and enhancing existing amenity values enjoyed by individuals at the expense of future positive urban outcomes for wider communities****. The objectives and policies as proposed sought to:*
>
> - *emphasise that* ***amenity values can change over time****, with changes in communities and their values, and through the opportunities urban development offers*
> - ***shift the current perception that urban development has only negative effects on amenity for individuals to recognise it can enhance amenity for other people and communities***
> - *emphasise that* ***local authorities should consider amenity values for both current and future communities.***

(b) The NPS-UD s32 analysis states:

> ***[Policy 6] [a]ffords specific direction to local authorities and decision makers to consider the impacts of proposals for future generations, particularly for notified application processes where the focus through public submissions received on development proposals generally focus on effects on existing residents / community.*** [62]
>
> *The integration of a policy framework that recognises amenity values can change over time will* ***catalyse a shift in focus for decision-makers from preserving or maintaining the existing and short-term or 'existing environment' amenity values of the current urban environment, to considering a wider array of amenity values for both existing and future communities and that the nature of amenity value will change over time. It places emphasis on long term, community wide amenity outcomes.*** [63]
>
> *…* ***By recognising that amenity values are diverse (positive to some while negative to others) this will help decision-makers to efficiently make decisions. The current prevailing approach appears to be to focus on change to amenity values as a negative, which fails to consider potential positive amenity values for future generations of such change****.* [64]

61 Section 9, page 44.
62 Page 44.
63 Page 43.
64 Page 43.

> ***The risk of not acting retains the current issues of 'status quo' bias to amenity values (e.g. the amenity of the existing community is not considered alongside the potential amenity values for future generations).*** *This risks slowing the rates of urban growth and development, which will have high social and economic costs…*[65]
>
> ***Development is less likely to be unduly curtailed by Councils favouring the preservation or maintenance of amenity values at the cost of development.*** [66]
>
> *The preferred approach* ***provides decision-makers and plan users with greater clarity to recognise and provide for changing amenity values and the license to decide that they may not be an adverse effect. This approach increases the scope of the values that can be considered in plan making and consent decisions with respect to amenity values.*** [67]

(c) The NPS-UD Recommendations and Decisions Report refers to the Environment Court's decision in *Summerset Villages (St Johns) Ltd v Auckland Council*[68] where the Court found that the 2016 NPS-UDC envisaged a *"more future-oriented, outcome-focused"* approach to planning and gave clear:[69]

> *…direction to decision-makers to have regard to urban growth outcomes which have previously been under-emphasised in favour of local environmental or amenity considerations.*

(d) The NPS-UD s32 analysis explicitly identifies the following as a "cost" for existing landowners:[70]

> *Potential to enable development in communities in which the majority may wish to maintain the existing amenity values of a particular area, where a proposed development is perceived to adversely affect those existing amenity values.*

65 Page 43.
66 Page 43.
67 Page 43.
68 [2019] NZEnvC 173.
69 Decision, paragraphs 49 and 50.
70 Page 44.

ANNEXURE B: EXCERPTS RELEVANT TO NPS-UD OBJECTIVE 6

(a) The NPS-UD Recommendation and Decision report states that one of the key issues with respect to the wording of an early consultation version of the proposed "responsiveness" policy was that:[71]

> ***the conditions risked imposing a more stringent test than for private plan changes under the status quo;*** *following section 32 of the Resource Management Act 1991 (RMA), analysis of the proposed approach found ensuring 'infrastructure to enable the long-term development of the land can be provided' could result in private plan change requests being rejected more readily than they are now.*
>
> *…*
>
> *…* ***the NPS-UD (as an RMA document) is unable to direct infrastructure funding governed by other statutes or central government infrastructure plans and processes****, and therefore cannot address a key constraint to responsiveness in the current system.*

(b) Importantly, the NPS-UD Guidance Documentation provides:[72]

> ***The responsive planning policies seek to ensure flexibility to enable development that may not be currently in council infrastructure plans. Private plan-change proposals should therefore show how the infrastructure needed to service the development would be provided.***
>
> *This could occur in a number of ways including:*
>
> - *the local authority agreeing to amend their relevant infrastructure plans, budgets and financial policies (eg, development contributions policy)*
> - *the local authority and landowner entering into contractual agreements with the relevant infrastructure providers to enable the direct provision of development infrastructure, and ongoing ownership and maintenance requirements*
> - *establishing a 'special purpose vehicle' to finance infrastructure under the Infrastructure Funding and Financing Act 2020.*

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71 Section 12, page 60.

72 *Understanding and Implementing the Responsive Planning Policies*, page 5. Emphasis added.