

**UNDER**

the Resource Management Act 1991

**IN THE MATTER**

of a request to Kaipara District Council for  
Private Plan Change 81: Dargaville  
Racecourse by the Dargaville Racing Club Inc

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**SUPPLEMENTARY OPENING LEGAL SUBMISSIONS OF COUNSEL FOR THE APPLICANT**

**27 March 2023**

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**Counsel acting:**

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## INTRODUCTION

1.1 These supplementary opening legal submissions for the Applicant respond to the Addendum to the Council's section 42A report dated 24 March 2023 ("the Addendum 42A report").

### 2. NARROWING OF ISSUES IN ADDENDUM TO THE 42A REPORT

2.1 The following key issues have been addressed in the Addendum 42A report. All but the NPS HPL represent a narrowing of the issues coming into the hearing:

- Wastewater - feasibility of wastewater crossing over Awakino River
- Water supply - seasonal raw water constraints
- Feasibility of shared path
- SH14 intersection upgrade
- Wetlands and freshwater (NPS FM)
- Highly Productive Land (NPS HPL)

#### **Wastewater: Feasibility of wastewater crossing over Awakino River**

2.2 The Addendum 42A report addresses Mr de Wet's evidence with respect to the need for the wastewater pipe to cross the Awakino River and at paragraph 11 states *"there is now sufficient information to conclude that it is feasible to appropriately service the development of PPC81 in relation to wastewater disposal via the Dargaville WWTP"*.

2.3 There are no remaining areas of difference between the Applicant and the Council with respect to wastewater and I submit that there is no wastewater related reason to decline PC81.

#### **Water supply: Seasonal raw water constraints**

2.4 The Addendum 42A report addresses Mr de Wet's evidence and Mr Usmar's memorandum with respect to raw water supply and at paragraphs 14 and 15 states that *"it is feasible to that potable water can be supplied to the site"* and on the basis that *"KDC is committed to addressing the current raw water shortages in Dargaville, that there are options presented to achieve this"* that *"there is no potable water related reason to decline PPC81"*.

2.5 This conclusion is *"subject to evidence that it is feasible for supplementary water supply to be achieved on site"* in particular given the lot sizes in the GRA.

2.6 Mr de Wet and Ms Anich have already addressed this in their primary evidence (at paragraph 6.13 and paragraphs 13-18 to 13.20 respectively). In summary, supplementary supply can be investigated at resource consent stage, the TDA provisions include relevant matters of control and discretion, and water tanks are expressly provided for in the GRA.

- 2.7 Ms Anich has further addressed this in the amended provisions at Appendix 8 to her addendum evidence, recommending amendments to the Three Waters standards to provide that GRA development must be serviced by reticulated water supply, on-site water supply, or a combination of the two.
- 2.8 Mr de Wet will address supplementary supply further at the hearing.
- 2.9 On the one remaining area of difference between the Applicant and the Council with respect to water supply – supplementary supply – I submit that the Applicant’s evidence has addressed the issue and there is no potable water related reason to decline PC81.

**Feasibility of shared path**

- 2.10 The Addendum 42A report addresses Mr McKenzie’s evidence with respect to the feasibility of the shared path and at paragraph 20 states *“I consider it to be generally feasible that PPC81 can be adequately accessed via a shared pedestrian and cycle path, with the detailed design of this to be approved at the time of resource consent”*.
- 2.11 This conclusion is however subject to (at paragraph 22) *“potential safety concerns with a shared path being located in a 100km/hr speed environment given the position expressed by Waka Kotahi that there is not likely to be a speed reduction for SH14 in the foreseeable future”*.
- 2.12 The need for grade separation or fencing from the state highway corridor was raised in the submission from Waka Kotahi and addressed by Mr McKenzie in his primary evidence (at paragraphs 9.13 and 9.14) with Mr McKenzie confirming that the design of the shared path can be addressed through the resource consent detailed design phase.
- 2.13 Mr McKenzie will address the safe separation issue further at the hearing.
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**SH14 intersection upgrade**

- 2.15 The Addendum 42A report addresses Mr McKenzie’s evidence with respect to the form of the intersection and at paragraph 27 states *“There is no dispute in relation to the fact that servicing of PPC81 through an upgraded intersection is feasible, the issue is whether this intersection treatment should be a T-intersection or a roundabout. The Hearing Panel will need to make a decision in this regard, once it has heard all of the evidence”*.
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2.17 There are no remaining areas of difference between the Applicant and the Council with respect to intersection form (Mr Hills supporting a T-intersection) and I submit that:

- There is no intersection form related reason to decline PC81.
- The Applicant's evidence supports a finding that a requirement for a T-intersection is the most appropriate provision for PC81.

**Wetlands and freshwater (NPS FM)**

2.18 The Addendum 42A report addresses Ms Anich's addendum evidence with respect to indicative wetlands, freshwater and the NPS FM and at paragraph 39 states *"I am generally of the opinion that matters in relation to the NPS-FM can be adequately addressed, and there is no specific reason under the NPS-FM to decline PPC81"*.

2.19 This conclusion is however subject to (at paragraph 36) *"concerns with regard to the applicant's referencing the NPS-FM within the rule table, given that best practice with regard to rule drafting is not to refer to other Acts or regulations which may be amended or replaced"*.

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2.21 Ms Anich will address this further at the hearing.

2.22 The Addendum 42A report notes that careful consideration of the National Environmental Standards for Freshwater 2020 ("NES F") will be required at the time of resource consent and that "significant constraints" may be placed across the LLRA depending on the location of lot boundaries in relation to the delineated wetland areas. However, Mr Warden's memorandum is clear that these are indicative wetland areas only which require further assessment against the definition (and exclusions) in the NPS FM to determine if any "natural inland wetlands" are present on the site and their extent. Further, the s42A reporting officer identified in the original 42A report (at paragraph 151) that the NES F exclusively deals with the functions of regional councils pursuant to regulation 5. The NES F has been amended in February 2023 to add a restricted discretionary activity consenting pathway for constructing urban development.

2.23 On the one remaining area of difference between the Applicant and the Council with respect to the NPS FM – a minor wording issue – I submit that the Applicant's evidence has addressed the issue and there is no NPS FM (or NES F) related reason to decline PC81.

### **Highly Productive Land (NPS HPL)**

- 2.24 The Addendum 42A report addresses Ms Anich's addendum evidence with respect to the NPS HPL.
- 2.25 There is no difference of opinion between the reporting officer and Ms Anich that policy 5 of the NPS HPL applies to PC81 and that it requires rezoning of HPL to be avoided except as provided in NPS HPL clause 3.6(4) and (5).
- 2.26 In paragraphs 47 to 57 of the Addendum 42A report the reporting officer asserts that a number of matters in clause 3.6(4) and (5) have not been correctly assessed, or assessed at all, by Ms Anich.
- 2.27 It is unclear whether the reporting officer is not aware of Appendix 7 to Ms Anich's addendum evidence, which sets out an 8 page detailed assessment of NPS HPL clause 3.6(4) and (5), or does not agree with the assessment undertaken.

### ***Clause 3.6(4)(a) – sufficient development capacity to meet expected demand***

- 2.28 The Addendum 42A report states at paragraph 47 *“the Applicant has provided no consideration of plan enabled development capacity, being the development / redevelopment of the existing urban area of Dargaville to provide sufficient capacity to meet housing / business demand”* and at paragraph 48 *“The Applicant has provided no consideration in relation to the wider locality”*.
- 2.29 Ms Anich has addressed those considerations, with respect to clause 3.6(4)(b) (other reasonably practicable and feasible options for providing the capacity).
- 2.30 “Sufficient development capacity” is defined in the NPS UD<sup>1</sup> as plan-enabled, infrastructure-ready, and feasible and reasonably expected to be realised (for housing) or suitable to meet the demands of different business sectors (for business land). On these definitions there is significant overlap between clause 3.6(4)(a) sufficient development capacity and clause 3.6(4)(b) other reasonably practicable and feasible options.
- 2.31 The Ministry's Guide to Implementation provides very little guidance with respect to clause 3.6(4), but does note that 3.6(4)(a) - unlike 3.6(1)(a) for Tier 1 and 2 authorities - does not reference the NPS UD.<sup>2</sup>
- 2.32 Ms Anich's assessment of clause 3.6(4)(a) references the Applicant's Market Demand Report and the Council's Dargaville Spatial Plan to assess expected demand for housing or business land, a core element of clause 3.6(4)(a). The capacity must be sufficient *to meet expected demand*.

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<sup>1</sup> NPS UD Part 3 subpart 1 clauses 3.2 and 3.3

<sup>2</sup> Ministry for the Environment NPS HPL Guide to Implementation December 2022 at page 49

2.33 Even if infill development and the wider locality should have been included in Ms Anich's assessment under clause 3.6(4)(a), those matters were included in her assessment under the closely related 3.6(4)(b). The reporting officer is not correct to say that there was "no consideration" of these matters. It would be out of all proportion if a plan change were to be declined because assessment of a freshly minted national policy statement was undertaken in the row marked (b) when it should have been duplicated in rows (a) and (b).

***Clause 3.6(4)(b) – other reasonably practicable and feasible options***

2.34 The Addendum 42A report states at paragraph 50 *"the Applicant has not presented any evidence that there are limitations to any other "reasonably practicable and feasible options" for residential / business development, namely infill development and/or rezoning and development within the relevant zone" and "there is no real evidence to confirm that there are no practicable or feasible options to achieve this"*.

2.35 Ms Anich has addressed those considerations, with respect to clause 3.6(4)(b), expressly referencing "greater intensification of existing" residential and industrial areas. Ms Anich references specific parts of the Dargaville Spatial Plan, topography, NRC flood hazard mapping, and the Exposure Draft proposed district plan.

2.36 The 'evidence' is those referenced publicly available documents and Ms Anich's evidence for this hearing. I do not understand the reporting officer to be challenging Ms Anich's qualifications and experience (including as the former Planning and Policy Manager for this Council) to undertake this planning assessment.

2.37 The Guide states with respect to 3.6(4)(b) that - unlike 3.6(1)(b) for Tier 1 and 2 authorities - *"there is no list of options that must be assessed to demonstrate there are no other reasonably practicable and feasible options for providing the required development capacity"*.<sup>3</sup>

2.38 With respect to clause 3.6(1)(b) for Tier and 2 authorities, the Guide states (emphasis added):

*"The use of the words 'reasonably practicable option' is intended to align with the assessment of reasonably practicable options in section 32(1)(b)(i) and ensure a pragmatic assessment of realistic and achievable options to provide the required development capacity is completed. It is also important to recognise there are often limitations on the ability to undertake a detailed assessment of other reasonably practicable options. For example, other options may involve constraints that are not readily apparent or cannot be easily identified by ... private plan change applicants as part of the scoping and site selection process.*

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<sup>3</sup> Ministry for the Environment NPS HPL Guide to Implementation December 2022 at page 49

*In the case of private plan changes proposing urban rezoning of HPL, there are often more limitations on the reasonably practicable options that can be assessed – particularly as it is often not possible for a private landowner or developer to acquire a range of other landholdings for development.”<sup>4</sup>*

**Clause 3.6(4)(c) – benefits of rezoning outweigh the costs associated with loss of HPL**

2.39 The Addendum 42A report states at paragraph 53 that the Applicant *“has not provided any assessment of effects of the loss of highly productive land”*.

2.40 Ms Anich provided an entire page assessing the environmental, social and cultural, and economic costs associated with the loss of HPL from land-based primary production, including intangible costs.

2.41 With respect to clause 3.6(1)(c) for Tier and 2 authorities, the Guide states:

*“This assessment can be undertaken as part of an evaluation under section 32 of the RMA, or it can be a separate assessment specifically focused on meeting the tests of Clause 3.6.”<sup>5</sup>*

2.42 The list of intangible costs assessed by Ms Anich was taken directly from this section of the Guide.

**Clause 3.6(5) – spatial extent of rezoning**

2.43 The Addendum 42A report states at paragraph 57 with respect to clause 3.6(5) *“I note that this does not appear to have been addressed in detail by the Applicant”* and *“the Applicant has chosen not to present an alternative development option that protects the highly productive land with the remaining land being proposed for urbanisation”*.

2.44 Ms Anich provided two pages assessing clause 3.6(5). That assessment expressly included consideration of alternative development layouts which avoided urban zoning on the HPL – such as taking access direct from SH14 or from the south eastern corner of the site. Ultimately Ms Anich concluded that alternative layouts would not achieve a well-functioning urban environment as required by clause 3.6(5).

2.45 The reporting officer has focused on protecting the HPL, but clause 3.6(5) is expressed (emphasis added) as *“the minimum necessary to provide the required development capacity while achieving a well-functioning urban environment”*.

2.46 The Supreme Court in *King Salmon* held that, in the context of s5 RMA, *“while”* means *“at the same time as”* and that the words either side of *“while”* should be read as an integrated whole.<sup>6</sup>

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<sup>4</sup> Ministry for the Environment NPS HPL Guide to Implementation December 2022 at page 44

<sup>5</sup> Ministry for the Environment NPS HPL Guide to Implementation December 2022 at page 43

<sup>6</sup> *Environment Defence Society Inc v The New Zealand King Salmon Company Ltd* [2014] NZSC 38 at [24(c)]

2.47 With respect to clause 3.6(5) the Guide states:

*“Comparisons against other reasonably practicable and feasible options may be a way to demonstrate that the loss of HPL is minimised. For example, an urban rezoning proposal may minimise the loss of HPL by being predominantly on non-HPL land and some smaller areas of LUC class 3 land, while deliberately avoiding larger areas of LUC 1 and 2 land. The design of an urban rezoning proposal can also minimise the loss of HPL and ensure any loss of HPL is an efficient use of this land. For example, this may involve efficient location of infrastructure, key roading connections, and/or a structure plan design that ensures a high yield for the development to minimise the loss of HPL while providing the required development capacity and achieving a well-functioning urban environment.”*

2.48 These are exactly the type of considerations assessed by Ms Anich.

### **Conclusion on NPS HPL clause 3.6**

2.49 The Addendum 42A report is entirely incorrect in asserting a failure to assess NPS HPL clause 3.6. This assessment has been undertaken in detail and in accordance with the Ministry’s Guide. I submit that the Applicant’s evidence has addressed clause 3.6 and established that NPS HPL policy 5 is met, and there is no NPS HPL related reason to decline PC81.

## **3. NEW ISSUE RAISED IN ADDENDUM TO THE 42A REPORT**

3.1 The introduction to the Addendum 42A report states:

*“The purpose of this statement is to address additional information received from the Applicant in relation to the following matters:*

- *Infrastructure feasibility.*
- *Road design and pedestrian connections.*
- *NPS-FM.*
- *NPS-HPL.*

*This addendum addresses the additional information in light of the fact it was produced after the circulation, and in response to matters raised within, the original s42A report.”*

3.2 The “Concluding Statement” of the Addendum 42A report however then states an entirely unrelated new issue at paragraphs 61 and 68 (emphasis added):

*“The key question for the Hearing Panel then becomes what zoning of this land is the most appropriate, under section 32 of the RMA. In my opinion, the assumptions provided within the section 32 analysis, including the additional analysis provided by way of the Statement of Evidence of Ms Anich do not provide a clear comparison between various options available for the development of the site, but rely solely on its own objectives as being appropriate, without being consistent with the broader plan objectives...”*

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<sup>7</sup> Ministry for the Environment NPS HPL Guide to Implementation December 2022 at page 43



*“Overall, as matters stand, I continue to be unable to conclude, as required under section 32 of the RMA, that the objectives proposed in PPC81 are the most appropriate way to achieve the purpose of the Act, and that the provisions proposed (including the zoning of the land) are the most appropriate way to achieve the objectives.”*

3.3 The appropriateness of the PC81 objectives to achieve the purpose of the Act, and consistency with the operative Plan objectives, was not raised as an issue in the original s42A report.

- In the section dealing with s32 evaluation, paragraph 79 of the original s42A report identified four options (status quo, whole site industrial, whole site residential, and PC81 split) that the reporting officer “would expect to see assessed”. (Ms Anich provided additional assessment of these options in Appendix 1 to her primary evidence). There was no mention in that section of the original s42A report of any perceived inadequacy of the Applicant’s s32 assessment of the objectives of the operative Plan.
- Appendix G to the original s42A report is the reporting officer’s assessment of PC81 against the objectives and policies of the operative Plan – chapters 2, 3, 5 and 7. Nowhere in the reporting officer’s commentary on the objectives is any reference made to any perceived inadequacy of the Applicant’s s32 assessment of the objectives of the operative Plan. The only matters raised are productive land, effects on ecosystems, and the feasibility of servicing (raw water supply, bridging of the Awakino River for wastewater, and the shared path). In response to Chapter 3 objectives the reporting officer comments (emphasis added) *“In the main I accept the assessment of the objectives and policies provided within the Applicant’s further information response dated 20 April 2022, apart from those matters that have been previously raised”* (referencing raw water supply, bridging of the Awakino River for wastewater, and the shared path).
- Section 11 of the original s42A report is the Conclusion. In paragraph 382 the reporting officer sets out “aspects of PPC81 that I cannot support due to lack of information”, listing effects on wetlands and biodiversity, highly productive land, raw water supply, and bridging of the Awakino River for wastewater. At paragraph 391 the reporting officer recommends that the Applicant provide an amended set of provisions to address a “clear cascade” of objectives, policies and rules; raw water supply; bridging of the Awakino River for wastewater; feasibility of the shared path; NPS HPL; and NPS FM. Nowhere in the reporting officer’s Conclusion is any reference made to any perceived inadequacy of the Applicant’s s32 assessment of the objectives of the operative Plan.

- 3.4 It is extraordinary that a s42A report would not raise any issue with the Applicant's s32 assessment of the objectives of the operative Plan – even when requesting additional s32 assessment of options – and then on the eve of hearing recommend declining a plan change for this newly identified perceived inadequacy.
- 3.5 Even more extraordinary is that this s32 analysis was undertaken by the Applicant a year ago in response to the Council's Request for Further Information, accepted by the Council at that time, and specifically accepted in the original s42A report by the reporting officer.
- 3.6 Ms Anich will address this further at the hearing.
- 3.7 The reporting officer also maintains her view that the PC81 objectives and policies require redrafting to follow a "formative cascade" but has again declined to offer any specific feedback on the objectives and policies or suggest any improvements to their drafting. The Applicant cannot be expected to chase shadows.
- 3.8 Ms Anich remains open to minor amendments to improve the objectives and policies should the Commissioners identify any drafting issues.
- 3.9 I submit that the Applicant's evidence has comprehensively addressed s32 and there is no s32 related reason to decline PC81.

#### **4. CONCLUSION**

- 4.1 I submit that having regard to the evidence for the Applicant there are no matters identified in the Addendum 42A Report that justify a recommendation to decline PC81.



**Sarah Shaw**

Counsel for Dargaville Racing Club Inc

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2.36 The 'evidence' is those referenced publicly available documents and Ms Anich's evidence for this hearing. I do not understand the reporting officer to be challenging Ms Anich's qualifications and experience (including as the former Planning and Policy Manager for this Council) to undertake this planning assessment.

2.37 The Guide states with respect to 3.6(4)(b) that - unlike 3.6(1)(b) for Tier 1 and 2 authorities - *"there is no list of options that must be assessed to demonstrate there are no other reasonably practicable and feasible options for providing the required development capacity"*.<sup>3</sup>

2.38 With respect to clause 3.6(1)(b) for Tier and 2 authorities, the Guide states (emphasis added):

*"The use of the words 'reasonably practicable option' is intended to align with the assessment of reasonably practicable options in section 32(1)(b)(i) and ensure a pragmatic assessment of realistic and achievable options to provide the required development capacity is completed. It is also important to recognise there are often limitations on the ability to undertake a detailed assessment of other reasonably practicable options. For example, other options may involve constraints that are not readily apparent or cannot be easily identified by ... private plan change applicants as part of the scoping and site selection process.*

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<sup>3</sup> Ministry for the Environment NPS HPL Guide to Implementation December 2022 at page 49



*In the case of private plan changes proposing urban rezoning of HPL, there are often more limitations on the reasonably practicable options that can be assessed – particularly as it is often not possible for a private landowner or developer to acquire a range of other landholdings for development.”<sup>4</sup>*

**Clause 3.6(4)(c) – benefits of rezoning outweigh the costs associated with loss of HPL**

2.39 The Addendum 42A report states at paragraph 53 that the Applicant *“has not provided any assessment of effects of the loss of highly productive land”*.

2.40 Ms Anich provided an entire page assessing the environmental, social and cultural, and economic costs associated with the loss of HPL from land-based primary production, including intangible costs.

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*“This assessment can be undertaken as part of an evaluation under section 32 of the RMA, or it can be a separate assessment specifically focused on meeting the tests of Clause 3.6.”<sup>5</sup>*

2.42 The list of intangible costs assessed by Ms Anich was taken directly from this section of the Guide.

**Clause 3.6(5) – spatial extent of rezoning**

2.43 The Addendum 42A report states at paragraph 57 with respect to clause 3.6(5) *“I note that this does not appear to have been addressed in detail by the Applicant”* and *“the Applicant has chosen not to present an alternative development option that protects the highly productive land with the remaining land being proposed for urbanisation”*.

2.44 Ms Anich provided two pages assessing clause 3.6(5). That assessment expressly included consideration of alternative development layouts which avoided urban zoning on the HPL – such as taking access direct from SH14 or from the south eastern corner of the site. Ultimately Ms Anich concluded that alternative layouts would not achieve a well-functioning urban environment as required by clause 3.6(5).

2.45 The reporting officer has focused on protecting the HPL, but clause 3.6(5) is expressed (emphasis added) as *“the minimum necessary to provide the required development capacity while achieving a well-functioning urban environment”*.

2.46 The Supreme Court in *King Salmon* held that, in the context of s5 RMA, *“while”* means *“at the same time as”* and that the words either side of *“while”* should be read as an integrated whole.<sup>6</sup>

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<sup>4</sup> Ministry for the Environment NPS HPL Guide to Implementation December 2022 at page 44

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<sup>6</sup> *Environment Defence Society Inc v The New Zealand King Salmon Company Ltd* [2014] NZSC 38 at [24(c)]

2.47 With respect to clause 3.6(5) the Guide states:

*“Comparisons against other reasonably practicable and feasible options may be a way to demonstrate that the loss of HPL is minimised. For example, an urban rezoning proposal may minimise the loss of HPL by being predominantly on non-HPL land and some smaller areas of LUC class 3 land, while deliberately avoiding larger areas of LUC 1 and 2 land. The design of an urban rezoning proposal can also minimise the loss of HPL and ensure any loss of HPL is an efficient use of this land. For example, this may involve efficient location of infrastructure, key roading connections, and/or a structure plan design that ensures a high yield for the development to minimise the loss of HPL while providing the required development capacity and achieving a well-functioning urban environment.”*

2.48 These are exactly the type of considerations assessed by Ms Anich.

### **Conclusion on NPS HPL clause 3.6**

2.49 The Addendum 42A report is entirely incorrect in asserting a failure to assess NPS HPL clause 3.6. This assessment has been undertaken in detail and in accordance with the Ministry’s Guide. I submit that the Applicant’s evidence has addressed clause 3.6 and established that NPS HPL policy 5 is met, and there is no NPS HPL related reason to decline PC81.

### **3. NEW ISSUE RAISED IN ADDENDUM TO THE 42A REPORT**

3.1 The introduction to the Addendum 42A report states:

*“The purpose of this statement is to address additional information received from the Applicant in relation to the following matters:*

- *Infrastructure feasibility.*
- *Road design and pedestrian connections.*
- *NPS-FM.*
- *NPS-HPL.*

*This addendum addresses the additional information in light of the fact it was produced after the circulation, and in response to matters raised within, the original s42A report.”*

3.2 The “Concluding Statement” of the Addendum 42A report however then states an entirely unrelated new issue at paragraphs 61 and 68 (emphasis added):

*“The key question for the Hearing Panel then becomes what zoning of this land is the most appropriate, under section 32 of the RMA. In my opinion, the assumptions provided within the section 32 analysis, including the additional analysis provided by way of the Statement of Evidence of Ms Anich do not provide a clear comparison between various options available for the development of the site, but rely solely on its own objectives as being appropriate, without being consistent with the broader plan objectives...”*

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<sup>7</sup> Ministry for the Environment NPS HPL Guide to Implementation December 2022 at page 43

*“Overall, as matters stand, I continue to be unable to conclude, as required under section 32 of the RMA, that the objectives proposed in PPC81 are the most appropriate way to achieve the purpose of the Act, and that the provisions proposed (including the zoning of the land) are the most appropriate way to achieve the objectives.”*

3.3 The appropriateness of the PC81 objectives to achieve the purpose of the Act, and consistency with the operative Plan objectives, was not raised as an issue in the original s42A report.

- In the section dealing with s32 evaluation, paragraph 79 of the original s42A report identified four options (status quo, whole site industrial, whole site residential, and PC81 split) that the reporting officer “would expect to see assessed”. (Ms Anich provided additional assessment of these options in Appendix 1 to her primary evidence). There was no mention in that section of the original s42A report of any perceived inadequacy of the Applicant’s s32 assessment of the objectives of the operative Plan.
- Appendix G to the original s42A report is the reporting officer’s assessment of PC81 against the objectives and policies of the operative Plan – chapters 2, 3, 5 and 7. Nowhere in the reporting officer’s commentary on the objectives is any reference made to any perceived inadequacy of the Applicant’s s32 assessment of the objectives of the operative Plan. The only matters raised are productive land, effects on ecosystems, and the feasibility of servicing (raw water supply, bridging of the Awakino River for wastewater, and the shared path). In response to Chapter 3 objectives the reporting officer comments (emphasis added) *“In the main I accept the assessment of the objectives and policies provided within the Applicant’s further information response dated 20 April 2022, apart from those matters that have been previously raised”* (referencing raw water supply, bridging of the Awakino River for wastewater, and the shared path).
- Section 11 of the original s42A report is the Conclusion. In paragraph 382 the reporting officer sets out “aspects of PPC81 that I cannot support due to lack of information”, listing effects on wetlands and biodiversity, highly productive land, raw water supply, and bridging of the Awakino River for wastewater. At paragraph 391 the reporting officer recommends that the Applicant provide an amended set of provisions to address a “clear cascade” of objectives, policies and rules; raw water supply; bridging of the Awakino River for wastewater; feasibility of the shared path; NPS HPL; and NPS FM. Nowhere in the reporting officer’s Conclusion is any reference made to any perceived inadequacy of the Applicant’s s32 assessment of the objectives of the operative Plan.

- 3.4 It is extraordinary that a s42A report would not raise any issue with the Applicant's s32 assessment of the objectives of the operative Plan – even when requesting additional s32 assessment of options – and then on the eve of hearing recommend declining a plan change for this newly identified perceived inadequacy.
- 3.5 Even more extraordinary is that this s32 analysis was undertaken by the Applicant a year ago in response to the Council's Request for Further Information, accepted by the Council at that time, and specifically accepted in the original s42A report by the reporting officer.
- 3.6 Ms Anich will address this further at the hearing.
- 3.7 The reporting officer also maintains her view that the PC81 objectives and policies require redrafting to follow a "formative cascade" but has again declined to offer any specific feedback on the objectives and policies or suggest any improvements to their drafting. The Applicant cannot be expected to chase shadows.
- 3.8 Ms Anich remains open to minor amendments to improve the objectives and policies should the Commissioners identify any drafting issues.
- 3.9 I submit that the Applicant's evidence has comprehensively addressed s32 and there is no s32 related reason to decline PC81.

#### **4. CONCLUSION**

- 4.1 I submit that having regard to the evidence for the Applicant there are no matters identified in the Addendum 42A Report that justify a recommendation to decline PC81.



**Sarah Shaw**

Counsel for Dargaville Racing Club Inc

27 March 2023

**UNDER**

the Resource Management Act 1991

**IN THE MATTER**

of a request to Kaipara District Council for  
Private Plan Change 81: Dargaville  
Racecourse by the Dargaville Racing Club Inc

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**SUPPLEMENTARY OPENING LEGAL SUBMISSIONS OF COUNSEL FOR THE APPLICANT**

**27 March 2023**

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## INTRODUCTION

1.1 These supplementary opening legal submissions for the Applicant respond to the Addendum to the Council's section 42A report dated 24 March 2023 ("the Addendum 42A report").

## 2. NARROWING OF ISSUES IN ADDENDUM TO THE 42A REPORT

2.1 The following key issues have been addressed in the Addendum 42A report. All but the NPS HPL represent a narrowing of the issues coming into the hearing:

- Wastewater - feasibility of wastewater crossing over Awakino River
- Water supply - seasonal raw water constraints
- Feasibility of shared path
- SH14 intersection upgrade
- Wetlands and freshwater (NPS FM)
- Highly Productive Land (NPS HPL)

### **Wastewater: Feasibility of wastewater crossing over Awakino River**

2.2 The Addendum 42A report addresses Mr de Wet's evidence with respect to the need for the wastewater pipe to cross the Awakino River and at paragraph 11 states *"there is now sufficient information to conclude that it is feasible to appropriately service the development of PPC81 in relation to wastewater disposal via the Dargaville WWTP"*.

2.3 There are no remaining areas of difference between the Applicant and the Council with respect to wastewater and I submit that there is no wastewater related reason to decline PC81.

### **Water supply: Seasonal raw water constraints**

2.4 The Addendum 42A report addresses Mr de Wet's evidence and Mr Usmar's memorandum with respect to raw water supply and at paragraphs 14 and 15 states that *"it is feasible to that potable water can be supplied to the site"* and on the basis that *"KDC is committed to addressing the current raw water shortages in Dargaville, that there are options presented to achieve this"* that *"there is no potable water related reason to decline PPC81"*.

2.5 This conclusion is *"subject to evidence that it is feasible for supplementary water supply to be achieved on site"* in particular given the lot sizes in the GRA.

2.6 Mr de Wet and Ms Anich have already addressed this in their primary evidence (at paragraph 6.13 and paragraphs 13-18 to 13.20 respectively). In summary, supplementary supply can be investigated at resource consent stage, the TDA provisions include relevant matters of control and discretion, and water tanks are expressly provided for in the GRA.

- 2.7 Ms Anich has further addressed this in the amended provisions at Appendix 8 to her addendum evidence, recommending amendments to the Three Waters standards to provide that GRA development must be serviced by reticulated water supply, on-site water supply, or a combination of the two.
- 2.8 Mr de Wet will address supplementary supply further at the hearing.
- 2.9 On the one remaining area of difference between the Applicant and the Council with respect to water supply – supplementary supply – I submit that the Applicant’s evidence has addressed the issue and there is no potable water related reason to decline PC81.

#### **Feasibility of shared path**

- 2.10 The Addendum 42A report addresses Mr McKenzie’s evidence with respect to the feasibility of the shared path and at paragraph 20 states *“I consider it to be generally feasible that PPC81 can be adequately accessed via a shared pedestrian and cycle path, with the detailed design of this to be approved at the time of resource consent”*.
- 2.11 This conclusion is however subject to (at paragraph 22) *“potential safety concerns with a shared path being located in a 100km/hr speed environment given the position expressed by Waka Kotahi that there is not likely to be a speed reduction for SH14 in the foreseeable future”*.
- 2.12 The need for grade separation or fencing from the state highway corridor was raised in the submission from Waka Kotahi and addressed by Mr McKenzie in his primary evidence (at paragraphs 9.13 and 9.14) with Mr McKenzie confirming that the design of the shared path can be addressed through the resource consent detailed design phase.
- 2.13 Mr McKenzie will address the safe separation issue further at the hearing.
- 2.14 On the one remaining area of difference between the Applicant and the Council with respect to the shared path – safe separation – I submit that the Applicant’s evidence has addressed the issue and there is no shared path related reason to decline PC81.

#### **SH14 intersection upgrade**

- 2.15 The Addendum 42A report addresses Mr McKenzie’s evidence with respect to the form of the intersection and at paragraph 27 states *“There is no dispute in relation to the fact that servicing of PPC81 through an upgraded intersection is feasible, the issue is whether this intersection treatment should be a T-intersection or a roundabout. The Hearing Panel will need to make a decision in this regard, once it has heard all of the evidence”*.
- 2.16 Mr McKenzie’s evidence addresses the intersection form issue and he will address this issue further at the hearing.

2.17 There are no remaining areas of difference between the Applicant and the Council with respect to intersection form (Mr Hills supporting a T-intersection) and I submit that:

- There is no intersection form related reason to decline PC81.
- The Applicant's evidence supports a finding that a requirement for a T-intersection is the most appropriate provision for PC81.

**Wetlands and freshwater (NPS FM)**

2.18 The Addendum 42A report addresses Ms Anich's addendum evidence with respect to indicative wetlands, freshwater and the NPS FM and at paragraph 39 states "*I am generally of the opinion that matters in relation to the NPS-FM can be adequately addressed, and there is no specific reason under the NPS-FM to decline PPC81*".

2.19 This conclusion is however subject to (at paragraph 36) "*concerns with regard to the applicant's referencing the NPS-FM within the rule table, given that best practice with regard to rule drafting is not to refer to other Acts or regulations which may be amended or replaced*".

2.20 Ms Anich addressed this matter in her addendum evidence (at paragraphs 2.4(b) and 2.9 to 2.10) recommending amendments to ensure that any identified "natural inland wetlands" and any other freshwater features (eg intermittent streams) are appropriately provided for consistent with the NPS and the requirement to give effect to Te Mana o Te Wai.

2.21 Ms Anich will address this further at the hearing.

2.22 The Addendum 42A report notes that careful consideration of the National Environmental Standards for Freshwater 2020 ("NES F") will be required at the time of resource consent and that "significant constraints" may be placed across the LLRA depending on the location of lot boundaries in relation to the delineated wetland areas. However, Mr Warden's memorandum is clear that these are indicative wetland areas only which require further assessment against the definition (and exclusions) in the NPS FM to determine if any "natural inland wetlands" are present on the site and their extent. Further, the s42A reporting officer identified in the original 42A report (at paragraph 151) that the NES F exclusively deals with the functions of regional councils pursuant to regulation 5. The NES F has been amended in February 2023 to add a restricted discretionary activity consenting pathway for constructing urban development.

2.23 On the one remaining area of difference between the Applicant and the Council with respect to the NPS FM – a minor wording issue – I submit that the Applicant's evidence has addressed the issue and there is no NPS FM (or NES F) related reason to decline PC81.



### **Highly Productive Land (NPS HPL)**

- 2.24 The Addendum 42A report addresses Ms Anich's addendum evidence with respect to the NPS HPL.
- 2.25 There is no difference of opinion between the reporting officer and Ms Anich that policy 5 of the NPS HPL applies to PC81 and that it requires rezoning of HPL to be avoided except as provided in NPS HPL clause 3.6(4) and (5).
- 2.26 In paragraphs 47 to 57 of the Addendum 42A report the reporting officer asserts that a number of matters in clause 3.6(4) and (5) have not been correctly assessed, or assessed at all, by Ms Anich.
- 2.27 It is unclear whether the reporting officer is not aware of Appendix 7 to Ms Anich's addendum evidence, which sets out an 8 page detailed assessment of NPS HPL clause 3.6(4) and (5), or does not agree with the assessment undertaken.

### ***Clause 3.6(4)(a) – sufficient development capacity to meet expected demand***

- 2.28 The Addendum 42A report states at paragraph 47 *“the Applicant has provided no consideration of plan enabled development capacity, being the development / redevelopment of the existing urban area of Dargaville to provide sufficient capacity to meet housing / business demand”* and at paragraph 48 *“The Applicant has provided no consideration in relation to the wider locality”*.
- 2.29 Ms Anich has addressed those considerations, with respect to clause 3.6(4)(b) (other reasonably practicable and feasible options for providing the capacity).
- 2.30 “Sufficient development capacity” is defined in the NPS UD<sup>1</sup> as plan-enabled, infrastructure-ready, and feasible and reasonably expected to be realised (for housing) or suitable to meet the demands of different business sectors (for business land). On these definitions there is significant overlap between clause 3.6(4)(a) sufficient development capacity and clause 3.6(4)(b) other reasonably practicable and feasible options.
- 2.31 The Ministry's Guide to Implementation provides very little guidance with respect to clause 3.6(4), but does note that 3.6(4)(a) - unlike 3.6(1)(a) for Tier 1 and 2 authorities - does not reference the NPS UD.<sup>2</sup>
- 2.32 Ms Anich's assessment of clause 3.6(4)(a) references the Applicant's Market Demand Report and the Council's Dargaville Spatial Plan to assess expected demand for housing or business land, a core element of clause 3.6(4)(a). The capacity must be sufficient *to meet expected demand*.

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<sup>1</sup> NPS UD Part 3 subpart 1 clauses 3.2 and 3.3

<sup>2</sup> Ministry for the Environment NPS HPL Guide to Implementation December 2022 at page 49

2.33 Even if infill development and the wider locality should have been included in Ms Anich's assessment under clause 3.6(4)(a), those matters were included in her assessment under the closely related 3.6(4)(b). The reporting officer is not correct to say that there was "no consideration" of these matters. It would be out of all proportion if a plan change were to be declined because assessment of a freshly minted national policy statement was undertaken in the row marked (b) when it should have been duplicated in rows (a) and (b).

***Clause 3.6(4)(b) – other reasonably practicable and feasible options***

2.34 The Addendum 42A report states at paragraph 50 *"the Applicant has not presented any evidence that there are limitations to any other "reasonably practicable and feasible options" for residential / business development, namely infill development and/or rezoning and development within the relevant zone" and "there is no real evidence to confirm that there are no practicable or feasible options to achieve this"*.

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2.48 These are exactly the type of considerations assessed by Ms Anich.

### **Conclusion on NPS HPL clause 3.6**

2.49 The Addendum 42A report is entirely incorrect in asserting a failure to assess NPS HPL clause 3.6. This assessment has been undertaken in detail and in accordance with the Ministry’s Guide. I submit that the Applicant’s evidence has addressed clause 3.6 and established that NPS HPL policy 5 is met, and there is no NPS HPL related reason to decline PC81.

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*“Overall, as matters stand, I continue to be unable to conclude, as required under section 32 of the RMA, that the objectives proposed in PPC81 are the most appropriate way to achieve the purpose of the Act, and that the provisions proposed (including the zoning of the land) are the most appropriate way to achieve the objectives.”*

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#### **4. CONCLUSION**

- 4.1 I submit that having regard to the evidence for the Applicant there are no matters identified in the Addendum 42A Report that justify a recommendation to decline PC81.



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## INTRODUCTION

1.1 These supplementary opening legal submissions for the Applicant respond to the Addendum to the Council's section 42A report dated 24 March 2023 ("the Addendum 42A report").

### 2. NARROWING OF ISSUES IN ADDENDUM TO THE 42A REPORT

2.1 The following key issues have been addressed in the Addendum 42A report. All but the NPS HPL represent a narrowing of the issues coming into the hearing:

- Wastewater - feasibility of wastewater crossing over Awakino River
- Water supply - seasonal raw water constraints
- Feasibility of shared path
- SH14 intersection upgrade
- Wetlands and freshwater (NPS FM)
- Highly Productive Land (NPS HPL)

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2.2 The Addendum 42A report addresses Mr de Wet's evidence with respect to the need for the wastewater pipe to cross the Awakino River and at paragraph 11 states *"there is now sufficient information to conclude that it is feasible to appropriately service the development of PPC81 in relation to wastewater disposal via the Dargaville WWTP"*.

2.3 There are no remaining areas of difference between the Applicant and the Council with respect to wastewater and I submit that there is no wastewater related reason to decline PC81.

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2.4 The Addendum 42A report addresses Mr de Wet's evidence and Mr Usmar's memorandum with respect to raw water supply and at paragraphs 14 and 15 states that *"it is feasible to that potable water can be supplied to the site"* and on the basis that *"KDC is committed to addressing the current raw water shortages in Dargaville, that there are options presented to achieve this"* that *"there is no potable water related reason to decline PPC81"*.

2.5 This conclusion is *"subject to evidence that it is feasible for supplementary water supply to be achieved on site"* in particular given the lot sizes in the GRA.

2.6 Mr de Wet and Ms Anich have already addressed this in their primary evidence (at paragraph 6.13 and paragraphs 13-18 to 13.20 respectively). In summary, supplementary supply can be investigated at resource consent stage, the TDA provisions include relevant matters of control and discretion, and water tanks are expressly provided for in the GRA.



- 2.7 Ms Anich has further addressed this in the amended provisions at Appendix 8 to her addendum evidence, recommending amendments to the Three Waters standards to provide that GRA development must be serviced by reticulated water supply, on-site water supply, or a combination of the two.
- 2.8 Mr de Wet will address supplementary supply further at the hearing.
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- 2.10 The Addendum 42A report addresses Mr McKenzie’s evidence with respect to the feasibility of the shared path and at paragraph 20 states *“I consider it to be generally feasible that PPC81 can be adequately accessed via a shared pedestrian and cycle path, with the detailed design of this to be approved at the time of resource consent”*.
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- 2.12 The need for grade separation or fencing from the state highway corridor was raised in the submission from Waka Kotahi and addressed by Mr McKenzie in his primary evidence (at paragraphs 9.13 and 9.14) with Mr McKenzie confirming that the design of the shared path can be addressed through the resource consent detailed design phase.
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- There is no intersection form related reason to decline PC81.
- The Applicant's evidence supports a finding that a requirement for a T-intersection is the most appropriate provision for PC81.

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2.18 The Addendum 42A report addresses Ms Anich's addendum evidence with respect to indicative wetlands, freshwater and the NPS FM and at paragraph 39 states "*I am generally of the opinion that matters in relation to the NPS-FM can be adequately addressed, and there is no specific reason under the NPS-FM to decline PPC81*".

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### **Highly Productive Land (NPS HPL)**

- 2.24 The Addendum 42A report addresses Ms Anich's addendum evidence with respect to the NPS HPL.
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- 2.28 The Addendum 42A report states at paragraph 47 *“the Applicant has provided no consideration of plan enabled development capacity, being the development / redevelopment of the existing urban area of Dargaville to provide sufficient capacity to meet housing / business demand”* and at paragraph 48 *“The Applicant has provided no consideration in relation to the wider locality”*.
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- 2.31 The Ministry's Guide to Implementation provides very little guidance with respect to clause 3.6(4), but does note that 3.6(4)(a) - unlike 3.6(1)(a) for Tier 1 and 2 authorities - does not reference the NPS UD.<sup>2</sup>
- 2.32 Ms Anich's assessment of clause 3.6(4)(a) references the Applicant's Market Demand Report and the Council's Dargaville Spatial Plan to assess expected demand for housing or business land, a core element of clause 3.6(4)(a). The capacity must be sufficient *to meet expected demand*.

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<sup>1</sup> NPS UD Part 3 subpart 1 clauses 3.2 and 3.3

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2.33 Even if infill development and the wider locality should have been included in Ms Anich's assessment under clause 3.6(4)(a), those matters were included in her assessment under the closely related 3.6(4)(b). The reporting officer is not correct to say that there was "no consideration" of these matters. It would be out of all proportion if a plan change were to be declined because assessment of a freshly minted national policy statement was undertaken in the row marked (b) when it should have been duplicated in rows (a) and (b).

***Clause 3.6(4)(b) – other reasonably practicable and feasible options***

2.34 The Addendum 42A report states at paragraph 50 *"the Applicant has not presented any evidence that there are limitations to any other "reasonably practicable and feasible options" for residential / business development, namely infill development and/or rezoning and development within the relevant zone" and "there is no real evidence to confirm that there are no practicable or feasible options to achieve this"*.

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2.36 The 'evidence' is those referenced publicly available documents and Ms Anich's evidence for this hearing. I do not understand the reporting officer to be challenging Ms Anich's qualifications and experience (including as the former Planning and Policy Manager for this Council) to undertake this planning assessment.

2.37 The Guide states with respect to 3.6(4)(b) that - unlike 3.6(1)(b) for Tier 1 and 2 authorities - *"there is no list of options that must be assessed to demonstrate there are no other reasonably practicable and feasible options for providing the required development capacity"*.<sup>3</sup>

2.38 With respect to clause 3.6(1)(b) for Tier and 2 authorities, the Guide states (emphasis added):

*"The use of the words 'reasonably practicable option' is intended to align with the assessment of reasonably practicable options in section 32(1)(b)(i) and ensure a pragmatic assessment of realistic and achievable options to provide the required development capacity is completed. It is also important to recognise there are often limitations on the ability to undertake a detailed assessment of other reasonably practicable options. For example, other options may involve constraints that are not readily apparent or cannot be easily identified by ... private plan change applicants as part of the scoping and site selection process.*

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<sup>3</sup> Ministry for the Environment NPS HPL Guide to Implementation December 2022 at page 49

*In the case of private plan changes proposing urban rezoning of HPL, there are often more limitations on the reasonably practicable options that can be assessed – particularly as it is often not possible for a private landowner or developer to acquire a range of other landholdings for development.”<sup>4</sup>*

**Clause 3.6(4)(c) – benefits of rezoning outweigh the costs associated with loss of HPL**

2.39 The Addendum 42A report states at paragraph 53 that the Applicant *“has not provided any assessment of effects of the loss of highly productive land”*.

2.40 Ms Anich provided an entire page assessing the environmental, social and cultural, and economic costs associated with the loss of HPL from land-based primary production, including intangible costs.

2.41 With respect to clause 3.6(1)(c) for Tier and 2 authorities, the Guide states:

*“This assessment can be undertaken as part of an evaluation under section 32 of the RMA, or it can be a separate assessment specifically focused on meeting the tests of Clause 3.6.”<sup>5</sup>*

2.42 The list of intangible costs assessed by Ms Anich was taken directly from this section of the Guide.

**Clause 3.6(5) – spatial extent of rezoning**

2.43 The Addendum 42A report states at paragraph 57 with respect to clause 3.6(5) *“I note that this does not appear to have been addressed in detail by the Applicant”* and *“the Applicant has chosen not to present an alternative development option that protects the highly productive land with the remaining land being proposed for urbanisation”*.

2.44 Ms Anich provided two pages assessing clause 3.6(5). That assessment expressly included consideration of alternative development layouts which avoided urban zoning on the HPL – such as taking access direct from SH14 or from the south eastern corner of the site. Ultimately Ms Anich concluded that alternative layouts would not achieve a well-functioning urban environment as required by clause 3.6(5).

2.45 The reporting officer has focused on protecting the HPL, but clause 3.6(5) is expressed (emphasis added) as *“the minimum necessary to provide the required development capacity while achieving a well-functioning urban environment”*.

2.46 The Supreme Court in *King Salmon* held that, in the context of s5 RMA, *“while”* means *“at the same time as”* and that the words either side of *“while”* should be read as an integrated whole.<sup>6</sup>

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<sup>4</sup> Ministry for the Environment NPS HPL Guide to Implementation December 2022 at page 44

<sup>5</sup> Ministry for the Environment NPS HPL Guide to Implementation December 2022 at page 43

<sup>6</sup> *Environment Defence Society Inc v The New Zealand King Salmon Company Ltd* [2014] NZSC 38 at [24(c)]

2.47 With respect to clause 3.6(5) the Guide states:

*“Comparisons against other reasonably practicable and feasible options may be a way to demonstrate that the loss of HPL is minimised. For example, an urban rezoning proposal may minimise the loss of HPL by being predominantly on non-HPL land and some smaller areas of LUC class 3 land, while deliberately avoiding larger areas of LUC 1 and 2 land. The design of an urban rezoning proposal can also minimise the loss of HPL and ensure any loss of HPL is an efficient use of this land. For example, this may involve efficient location of infrastructure, key roading connections, and/or a structure plan design that ensures a high yield for the development to minimise the loss of HPL while providing the required development capacity and achieving a well-functioning urban environment.”*

2.48 These are exactly the type of considerations assessed by Ms Anich.

**Conclusion on NPS HPL clause 3.6**

2.49 The Addendum 42A report is entirely incorrect in asserting a failure to assess NPS HPL clause 3.6. This assessment has been undertaken in detail and in accordance with the Ministry’s Guide. I submit that the Applicant’s evidence has addressed clause 3.6 and established that NPS HPL policy 5 is met, and there is no NPS HPL related reason to decline PC81.

**3. NEW ISSUE RAISED IN ADDENDUM TO THE 42A REPORT**

3.1 The introduction to the Addendum 42A report states:

*“The purpose of this statement is to address additional information received from the Applicant in relation to the following matters:*

- *Infrastructure feasibility.*
- *Road design and pedestrian connections.*
- *NPS-FM.*
- *NPS-HPL.*

*This addendum addresses the additional information in light of the fact it was produced after the circulation, and in response to matters raised within, the original s42A report.”*

3.2 The “Concluding Statement” of the Addendum 42A report however then states an entirely unrelated new issue at paragraphs 61 and 68 (emphasis added):

*“The key question for the Hearing Panel then becomes what zoning of this land is the most appropriate, under section 32 of the RMA. In my opinion, the assumptions provided within the section 32 analysis, including the additional analysis provided by way of the Statement of Evidence of Ms Anich do not provide a clear comparison between various options available for the development of the site, but rely solely on its own objectives as being appropriate, without being consistent with the broader plan objectives...”*

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*“Overall, as matters stand, I continue to be unable to conclude, as required under section 32 of the RMA, that the objectives proposed in PPC81 are the most appropriate way to achieve the purpose of the Act, and that the provisions proposed (including the zoning of the land) are the most appropriate way to achieve the objectives.”*

3.3 The appropriateness of the PC81 objectives to achieve the purpose of the Act, and consistency with the operative Plan objectives, was not raised as an issue in the original s42A report.

- In the section dealing with s32 evaluation, paragraph 79 of the original s42A report identified four options (status quo, whole site industrial, whole site residential, and PC81 split) that the reporting officer “would expect to see assessed”. (Ms Anich provided additional assessment of these options in Appendix 1 to her primary evidence). There was no mention in that section of the original s42A report of any perceived inadequacy of the Applicant’s s32 assessment of the objectives of the operative Plan.
- Appendix G to the original s42A report is the reporting officer’s assessment of PC81 against the objectives and policies of the operative Plan – chapters 2, 3, 5 and 7. Nowhere in the reporting officer’s commentary on the objectives is any reference made to any perceived inadequacy of the Applicant’s s32 assessment of the objectives of the operative Plan. The only matters raised are productive land, effects on ecosystems, and the feasibility of servicing (raw water supply, bridging of the Awakino River for wastewater, and the shared path). In response to Chapter 3 objectives the reporting officer comments (emphasis added) *“In the main I accept the assessment of the objectives and policies provided within the Applicant’s further information response dated 20 April 2022, apart from those matters that have been previously raised”* (referencing raw water supply, bridging of the Awakino River for wastewater, and the shared path).
- Section 11 of the original s42A report is the Conclusion. In paragraph 382 the reporting officer sets out “aspects of PPC81 that I cannot support due to lack of information”, listing effects on wetlands and biodiversity, highly productive land, raw water supply, and bridging of the Awakino River for wastewater. At paragraph 391 the reporting officer recommends that the Applicant provide an amended set of provisions to address a “clear cascade” of objectives, policies and rules; raw water supply; bridging of the Awakino River for wastewater; feasibility of the shared path; NPS HPL; and NPS FM. Nowhere in the reporting officer’s Conclusion is any reference made to any perceived inadequacy of the Applicant’s s32 assessment of the objectives of the operative Plan.

- 3.4 It is extraordinary that a s42A report would not raise any issue with the Applicant's s32 assessment of the objectives of the operative Plan – even when requesting additional s32 assessment of options – and then on the eve of hearing recommend declining a plan change for this newly identified perceived inadequacy.
- 3.5 Even more extraordinary is that this s32 analysis was undertaken by the Applicant a year ago in response to the Council's Request for Further Information, accepted by the Council at that time, and specifically accepted in the original s42A report by the reporting officer.
- 3.6 Ms Anich will address this further at the hearing.
- 3.7 The reporting officer also maintains her view that the PC81 objectives and policies require redrafting to follow a "formative cascade" but has again declined to offer any specific feedback on the objectives and policies or suggest any improvements to their drafting. The Applicant cannot be expected to chase shadows.
- 3.8 Ms Anich remains open to minor amendments to improve the objectives and policies should the Commissioners identify any drafting issues.
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#### **4. CONCLUSION**

- 4.1 I submit that having regard to the evidence for the Applicant there are no matters identified in the Addendum 42A Report that justify a recommendation to decline PC81.



**Sarah Shaw**

Counsel for Dargaville Racing Club Inc

27 March 2023



**UNDER**

the Resource Management Act 1991

**IN THE MATTER**

of a request to Kaipara District Council for  
Private Plan Change 81: Dargaville  
Racecourse by the Dargaville Racing Club Inc

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**SUPPLEMENTARY OPENING LEGAL SUBMISSIONS OF COUNSEL FOR THE APPLICANT**

**27 March 2023**

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**Counsel acting:**

Sarah Shaw Barrister

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Kamo 0141

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2.38 With respect to clause 3.6(1)(b) for Tier and 2 authorities, the Guide states (emphasis added):

*"The use of the words 'reasonably practicable option' is intended to align with the assessment of reasonably practicable options in section 32(1)(b)(i) and ensure a pragmatic assessment of realistic and achievable options to provide the required development capacity is completed. It is also important to recognise there are often limitations on the ability to undertake a detailed assessment of other reasonably practicable options. For example, other options may involve constraints that are not readily apparent or cannot be easily identified by ... private plan change applicants as part of the scoping and site selection process.*

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<sup>3</sup> Ministry for the Environment NPS HPL Guide to Implementation December 2022 at page 49

*In the case of private plan changes proposing urban rezoning of HPL, there are often more limitations on the reasonably practicable options that can be assessed – particularly as it is often not possible for a private landowner or developer to acquire a range of other landholdings for development.”<sup>4</sup>*

**Clause 3.6(4)(c) – benefits of rezoning outweigh the costs associated with loss of HPL**

2.39 The Addendum 42A report states at paragraph 53 that the Applicant *“has not provided any assessment of effects of the loss of highly productive land”*.

2.40 Ms Anich provided an entire page assessing the environmental, social and cultural, and economic costs associated with the loss of HPL from land-based primary production, including intangible costs.

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*“This assessment can be undertaken as part of an evaluation under section 32 of the RMA, or it can be a separate assessment specifically focused on meeting the tests of Clause 3.6.”<sup>5</sup>*

2.42 The list of intangible costs assessed by Ms Anich was taken directly from this section of the Guide.

**Clause 3.6(5) – spatial extent of rezoning**

2.43 The Addendum 42A report states at paragraph 57 with respect to clause 3.6(5) *“I note that this does not appear to have been addressed in detail by the Applicant”* and *“the Applicant has chosen not to present an alternative development option that protects the highly productive land with the remaining land being proposed for urbanisation”*.

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2.45 The reporting officer has focused on protecting the HPL, but clause 3.6(5) is expressed (emphasis added) as *“the minimum necessary to provide the required development capacity while achieving a well-functioning urban environment”*.

2.46 The Supreme Court in *King Salmon* held that, in the context of s5 RMA, *“while”* means *“at the same time as”* and that the words either side of *“while”* should be read as an integrated whole.<sup>6</sup>

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<sup>4</sup> Ministry for the Environment NPS HPL Guide to Implementation December 2022 at page 44

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2.47 With respect to clause 3.6(5) the Guide states:

*“Comparisons against other reasonably practicable and feasible options may be a way to demonstrate that the loss of HPL is minimised. For example, an urban rezoning proposal may minimise the loss of HPL by being predominantly on non-HPL land and some smaller areas of LUC class 3 land, while deliberately avoiding larger areas of LUC 1 and 2 land. The design of an urban rezoning proposal can also minimise the loss of HPL and ensure any loss of HPL is an efficient use of this land. For example, this may involve efficient location of infrastructure, key roading connections, and/or a structure plan design that ensures a high yield for the development to minimise the loss of HPL while providing the required development capacity and achieving a well-functioning urban environment.”*

2.48 These are exactly the type of considerations assessed by Ms Anich.

**Conclusion on NPS HPL clause 3.6**

2.49 The Addendum 42A report is entirely incorrect in asserting a failure to assess NPS HPL clause 3.6. This assessment has been undertaken in detail and in accordance with the Ministry’s Guide. I submit that the Applicant’s evidence has addressed clause 3.6 and established that NPS HPL policy 5 is met, and there is no NPS HPL related reason to decline PC81.

**3. NEW ISSUE RAISED IN ADDENDUM TO THE 42A REPORT**

3.1 The introduction to the Addendum 42A report states:

*“The purpose of this statement is to address additional information received from the Applicant in relation to the following matters:*

- *Infrastructure feasibility.*
- *Road design and pedestrian connections.*
- *NPS-FM.*
- *NPS-HPL.*

*This addendum addresses the additional information in light of the fact it was produced after the circulation, and in response to matters raised within, the original s42A report.”*

3.2 The “Concluding Statement” of the Addendum 42A report however then states an entirely unrelated new issue at paragraphs 61 and 68 (emphasis added):

*“The key question for the Hearing Panel then becomes what zoning of this land is the most appropriate, under section 32 of the RMA. In my opinion, the assumptions provided within the section 32 analysis, including the additional analysis provided by way of the Statement of Evidence of Ms Anich do not provide a clear comparison between various options available for the development of the site, but rely solely on its own objectives as being appropriate, without being consistent with the broader plan objectives...”*

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<sup>7</sup> Ministry for the Environment NPS HPL Guide to Implementation December 2022 at page 43



*“Overall, as matters stand, I continue to be unable to conclude, as required under section 32 of the RMA, that the objectives proposed in PPC81 are the most appropriate way to achieve the purpose of the Act, and that the provisions proposed (including the zoning of the land) are the most appropriate way to achieve the objectives.”*

3.3 The appropriateness of the PC81 objectives to achieve the purpose of the Act, and consistency with the operative Plan objectives, was not raised as an issue in the original s42A report.

- In the section dealing with s32 evaluation, paragraph 79 of the original s42A report identified four options (status quo, whole site industrial, whole site residential, and PC81 split) that the reporting officer “would expect to see assessed”. (Ms Anich provided additional assessment of these options in Appendix 1 to her primary evidence). There was no mention in that section of the original s42A report of any perceived inadequacy of the Applicant’s s32 assessment of the objectives of the operative Plan.
- Appendix G to the original s42A report is the reporting officer’s assessment of PC81 against the objectives and policies of the operative Plan – chapters 2, 3, 5 and 7. Nowhere in the reporting officer’s commentary on the objectives is any reference made to any perceived inadequacy of the Applicant’s s32 assessment of the objectives of the operative Plan. The only matters raised are productive land, effects on ecosystems, and the feasibility of servicing (raw water supply, bridging of the Awakino River for wastewater, and the shared path). In response to Chapter 3 objectives the reporting officer comments (emphasis added) *“In the main I accept the assessment of the objectives and policies provided within the Applicant’s further information response dated 20 April 2022, apart from those matters that have been previously raised”* (referencing raw water supply, bridging of the Awakino River for wastewater, and the shared path).
- Section 11 of the original s42A report is the Conclusion. In paragraph 382 the reporting officer sets out “aspects of PPC81 that I cannot support due to lack of information”, listing effects on wetlands and biodiversity, highly productive land, raw water supply, and bridging of the Awakino River for wastewater. At paragraph 391 the reporting officer recommends that the Applicant provide an amended set of provisions to address a “clear cascade” of objectives, policies and rules; raw water supply; bridging of the Awakino River for wastewater; feasibility of the shared path; NPS HPL; and NPS FM. Nowhere in the reporting officer’s Conclusion is any reference made to any perceived inadequacy of the Applicant’s s32 assessment of the objectives of the operative Plan.

- 3.4 It is extraordinary that a s42A report would not raise any issue with the Applicant's s32 assessment of the objectives of the operative Plan – even when requesting additional s32 assessment of options – and then on the eve of hearing recommend declining a plan change for this newly identified perceived inadequacy.
- 3.5 Even more extraordinary is that this s32 analysis was undertaken by the Applicant a year ago in response to the Council's Request for Further Information, accepted by the Council at that time, and specifically accepted in the original s42A report by the reporting officer.
- 3.6 Ms Anich will address this further at the hearing.
- 3.7 The reporting officer also maintains her view that the PC81 objectives and policies require redrafting to follow a "formative cascade" but has again declined to offer any specific feedback on the objectives and policies or suggest any improvements to their drafting. The Applicant cannot be expected to chase shadows.
- 3.8 Ms Anich remains open to minor amendments to improve the objectives and policies should the Commissioners identify any drafting issues.
- 3.9 I submit that the Applicant's evidence has comprehensively addressed s32 and there is no s32 related reason to decline PC81.

#### **4. CONCLUSION**

- 4.1 I submit that having regard to the evidence for the Applicant there are no matters identified in the Addendum 42A Report that justify a recommendation to decline PC81.



**Sarah Shaw**

Counsel for Dargaville Racing Club Inc

27 March 2023

**UNDER**

the Resource Management Act 1991

**IN THE MATTER**

of a request to Kaipara District Council for  
Private Plan Change 81: Dargaville  
Racecourse by the Dargaville Racing Club Inc

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**SUPPLEMENTARY OPENING LEGAL SUBMISSIONS OF COUNSEL FOR THE APPLICANT**

**27 March 2023**

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## INTRODUCTION

1.1 These supplementary opening legal submissions for the Applicant respond to the Addendum to the Council's section 42A report dated 24 March 2023 ("the Addendum 42A report").

## 2. NARROWING OF ISSUES IN ADDENDUM TO THE 42A REPORT

2.1 The following key issues have been addressed in the Addendum 42A report. All but the NPS HPL represent a narrowing of the issues coming into the hearing:

- Wastewater - feasibility of wastewater crossing over Awakino River
- Water supply - seasonal raw water constraints
- Feasibility of shared path
- SH14 intersection upgrade
- Wetlands and freshwater (NPS FM)
- Highly Productive Land (NPS HPL)

### **Wastewater: Feasibility of wastewater crossing over Awakino River**

2.2 The Addendum 42A report addresses Mr de Wet's evidence with respect to the need for the wastewater pipe to cross the Awakino River and at paragraph 11 states *"there is now sufficient information to conclude that it is feasible to appropriately service the development of PPC81 in relation to wastewater disposal via the Dargaville WWTP"*.

2.3 There are no remaining areas of difference between the Applicant and the Council with respect to wastewater and I submit that there is no wastewater related reason to decline PC81.

### **Water supply: Seasonal raw water constraints**

2.4 The Addendum 42A report addresses Mr de Wet's evidence and Mr Usmar's memorandum with respect to raw water supply and at paragraphs 14 and 15 states that *"it is feasible to that potable water can be supplied to the site"* and on the basis that *"KDC is committed to addressing the current raw water shortages in Dargaville, that there are options presented to achieve this"* that *"there is no potable water related reason to decline PPC81"*.

2.5 This conclusion is *"subject to evidence that it is feasible for supplementary water supply to be achieved on site"* in particular given the lot sizes in the GRA.

2.6 Mr de Wet and Ms Anich have already addressed this in their primary evidence (at paragraph 6.13 and paragraphs 13-18 to 13.20 respectively). In summary, supplementary supply can be investigated at resource consent stage, the TDA provisions include relevant matters of control and discretion, and water tanks are expressly provided for in the GRA.

2.7 Ms Anich has further addressed this in the amended provisions at Appendix 8 to her addendum evidence, recommending amendments to the Three Waters standards to provide that GRA development must be serviced by reticulated water supply, on-site water supply, or a combination of the two.

2.8 Mr de Wet will address supplementary supply further at the hearing.

2.9 On the one remaining area of difference between the Applicant and the Council with respect to water supply – supplementary supply – I submit that the Applicant’s evidence has addressed the issue and there is no potable water related reason to decline PC81.

#### **Feasibility of shared path**

2.10 The Addendum 42A report addresses Mr McKenzie’s evidence with respect to the feasibility of the shared path and at paragraph 20 states *“I consider it to be generally feasible that PPC81 can be adequately accessed via a shared pedestrian and cycle path, with the detailed design of this to be approved at the time of resource consent”*.

2.11 This conclusion is however subject to (at paragraph 22) *“potential safety concerns with a shared path being located in a 100km/hr speed environment given the position expressed by Waka Kotahi that there is not likely to be a speed reduction for SH14 in the foreseeable future”*.

2.12 The need for grade separation or fencing from the state highway corridor was raised in the submission from Waka Kotahi and addressed by Mr McKenzie in his primary evidence (at paragraphs 9.13 and 9.14) with Mr McKenzie confirming that the design of the shared path can be addressed through the resource consent detailed design phase.

2.13 Mr McKenzie will address the safe separation issue further at the hearing.

2.14 On the one remaining area of difference between the Applicant and the Council with respect to the shared path – safe separation – I submit that the Applicant’s evidence has addressed the issue and there is no shared path related reason to decline PC81.

#### **SH14 intersection upgrade**

2.15 The Addendum 42A report addresses Mr McKenzie’s evidence with respect to the form of the intersection and at paragraph 27 states *“There is no dispute in relation to the fact that servicing of PPC81 through an upgraded intersection is feasible, the issue is whether this intersection treatment should be a T-intersection or a roundabout. The Hearing Panel will need to make a decision in this regard, once it has heard all of the evidence”*.

2.16 Mr McKenzie’s evidence addresses the intersection form issue and he will address this issue further at the hearing.

2.17 There are no remaining areas of difference between the Applicant and the Council with respect to intersection form (Mr Hills supporting a T-intersection) and I submit that:

- There is no intersection form related reason to decline PC81.
- The Applicant's evidence supports a finding that a requirement for a T-intersection is the most appropriate provision for PC81.

**Wetlands and freshwater (NPS FM)**

2.18 The Addendum 42A report addresses Ms Anich's addendum evidence with respect to indicative wetlands, freshwater and the NPS FM and at paragraph 39 states *"I am generally of the opinion that matters in relation to the NPS-FM can be adequately addressed, and there is no specific reason under the NPS-FM to decline PPC81"*.

2.19 This conclusion is however subject to (at paragraph 36) *"concerns with regard to the applicant's referencing the NPS-FM within the rule table, given that best practice with regard to rule drafting is not to refer to other Acts or regulations which may be amended or replaced"*.

2.20 Ms Anich addressed this matter in her addendum evidence (at paragraphs 2.4(b) and 2.9 to 2.10) recommending amendments to ensure that any identified "natural inland wetlands" and any other freshwater features (eg intermittent streams) are appropriately provided for consistent with the NPS and the requirement to give effect to Te Mana o Te Wai.

2.21 Ms Anich will address this further at the hearing.

2.22 The Addendum 42A report notes that careful consideration of the National Environmental Standards for Freshwater 2020 ("NES F") will be required at the time of resource consent and that "significant constraints" may be placed across the LLRA depending on the location of lot boundaries in relation to the delineated wetland areas. However, Mr Warden's memorandum is clear that these are indicative wetland areas only which require further assessment against the definition (and exclusions) in the NPS FM to determine if any "natural inland wetlands" are present on the site and their extent. Further, the s42A reporting officer identified in the original 42A report (at paragraph 151) that the NES F exclusively deals with the functions of regional councils pursuant to regulation 5. The NES F has been amended in February 2023 to add a restricted discretionary activity consenting pathway for constructing urban development.

2.23 On the one remaining area of difference between the Applicant and the Council with respect to the NPS FM – a minor wording issue – I submit that the Applicant's evidence has addressed the issue and there is no NPS FM (or NES F) related reason to decline PC81.

### **Highly Productive Land (NPS HPL)**

- 2.24 The Addendum 42A report addresses Ms Anich's addendum evidence with respect to the NPS HPL.
- 2.25 There is no difference of opinion between the reporting officer and Ms Anich that policy 5 of the NPS HPL applies to PC81 and that it requires rezoning of HPL to be avoided except as provided in NPS HPL clause 3.6(4) and (5).
- 2.26 In paragraphs 47 to 57 of the Addendum 42A report the reporting officer asserts that a number of matters in clause 3.6(4) and (5) have not been correctly assessed, or assessed at all, by Ms Anich.
- 2.27 It is unclear whether the reporting officer is not aware of Appendix 7 to Ms Anich's addendum evidence, which sets out an 8 page detailed assessment of NPS HPL clause 3.6(4) and (5), or does not agree with the assessment undertaken.

### ***Clause 3.6(4)(a) – sufficient development capacity to meet expected demand***

- 2.28 The Addendum 42A report states at paragraph 47 *“the Applicant has provided no consideration of plan enabled development capacity, being the development / redevelopment of the existing urban area of Dargaville to provide sufficient capacity to meet housing / business demand”* and at paragraph 48 *“The Applicant has provided no consideration in relation to the wider locality”*.
- 2.29 Ms Anich has addressed those considerations, with respect to clause 3.6(4)(b) (other reasonably practicable and feasible options for providing the capacity).
- 2.30 “Sufficient development capacity” is defined in the NPS UD<sup>1</sup> as plan-enabled, infrastructure-ready, and feasible and reasonably expected to be realised (for housing) or suitable to meet the demands of different business sectors (for business land). On these definitions there is significant overlap between clause 3.6(4)(a) sufficient development capacity and clause 3.6(4)(b) other reasonably practicable and feasible options.
- 2.31 The Ministry's Guide to Implementation provides very little guidance with respect to clause 3.6(4), but does note that 3.6(4)(a) - unlike 3.6(1)(a) for Tier 1 and 2 authorities - does not reference the NPS UD.<sup>2</sup>
- 2.32 Ms Anich's assessment of clause 3.6(4)(a) references the Applicant's Market Demand Report and the Council's Dargaville Spatial Plan to assess expected demand for housing or business land, a core element of clause 3.6(4)(a). The capacity must be sufficient *to meet expected demand*.

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<sup>1</sup> NPS UD Part 3 subpart 1 clauses 3.2 and 3.3

<sup>2</sup> Ministry for the Environment NPS HPL Guide to Implementation December 2022 at page 49

2.33 Even if infill development and the wider locality should have been included in Ms Anich's assessment under clause 3.6(4)(a), those matters were included in her assessment under the closely related 3.6(4)(b). The reporting officer is not correct to say that there was "no consideration" of these matters. It would be out of all proportion if a plan change were to be declined because assessment of a freshly minted national policy statement was undertaken in the row marked (b) when it should have been duplicated in rows (a) and (b).

***Clause 3.6(4)(b) – other reasonably practicable and feasible options***

2.34 The Addendum 42A report states at paragraph 50 *"the Applicant has not presented any evidence that there are limitations to any other "reasonably practicable and feasible options" for residential / business development, namely infill development and/or rezoning and development within the relevant zone" and "there is no real evidence to confirm that there are no practicable or feasible options to achieve this"*.

2.35 Ms Anich has addressed those considerations, with respect to clause 3.6(4)(b), expressly referencing "greater intensification of existing" residential and industrial areas. Ms Anich references specific parts of the Dargaville Spatial Plan, topography, NRC flood hazard mapping, and the Exposure Draft proposed district plan.

2.36 The 'evidence' is those referenced publicly available documents and Ms Anich's evidence for this hearing. I do not understand the reporting officer to be challenging Ms Anich's qualifications and experience (including as the former Planning and Policy Manager for this Council) to undertake this planning assessment.

2.37 The Guide states with respect to 3.6(4)(b) that - unlike 3.6(1)(b) for Tier 1 and 2 authorities - *"there is no list of options that must be assessed to demonstrate there are no other reasonably practicable and feasible options for providing the required development capacity"*.<sup>3</sup>

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2.48 These are exactly the type of considerations assessed by Ms Anich.

### **Conclusion on NPS HPL clause 3.6**

2.49 The Addendum 42A report is entirely incorrect in asserting a failure to assess NPS HPL clause 3.6. This assessment has been undertaken in detail and in accordance with the Ministry’s Guide. I submit that the Applicant’s evidence has addressed clause 3.6 and established that NPS HPL policy 5 is met, and there is no NPS HPL related reason to decline PC81.

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*“Overall, as matters stand, I continue to be unable to conclude, as required under section 32 of the RMA, that the objectives proposed in PPC81 are the most appropriate way to achieve the purpose of the Act, and that the provisions proposed (including the zoning of the land) are the most appropriate way to achieve the objectives.”*

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**27 March 2023**

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2.4 The Addendum 42A report addresses Mr de Wet's evidence and Mr Usmar's memorandum with respect to raw water supply and at paragraphs 14 and 15 states that *"it is feasible to that potable water can be supplied to the site"* and on the basis that *"KDC is committed to addressing the current raw water shortages in Dargaville, that there are options presented to achieve this"* that *"there is no potable water related reason to decline PPC81"*.

2.5 This conclusion is *"subject to evidence that it is feasible for supplementary water supply to be achieved on site"* in particular given the lot sizes in the GRA.

2.6 Mr de Wet and Ms Anich have already addressed this in their primary evidence (at paragraph 6.13 and paragraphs 13-18 to 13.20 respectively). In summary, supplementary supply can be investigated at resource consent stage, the TDA provisions include relevant matters of control and discretion, and water tanks are expressly provided for in the GRA.

2.7 Ms Anich has further addressed this in the amended provisions at Appendix 8 to her addendum evidence, recommending amendments to the Three Waters standards to provide that GRA development must be serviced by reticulated water supply, on-site water supply, or a combination of the two.

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2.18 The Addendum 42A report addresses Ms Anich's addendum evidence with respect to indicative wetlands, freshwater and the NPS FM and at paragraph 39 states "*I am generally of the opinion that matters in relation to the NPS-FM can be adequately addressed, and there is no specific reason under the NPS-FM to decline PPC81*".

2.19 This conclusion is however subject to (at paragraph 36) "*concerns with regard to the applicant's referencing the NPS-FM within the rule table, given that best practice with regard to rule drafting is not to refer to other Acts or regulations which may be amended or replaced*".

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2.23 On the one remaining area of difference between the Applicant and the Council with respect to the NPS FM – a minor wording issue – I submit that the Applicant's evidence has addressed the issue and there is no NPS FM (or NES F) related reason to decline PC81.



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- 2.24 The Addendum 42A report addresses Ms Anich's addendum evidence with respect to the NPS HPL.
- 2.25 There is no difference of opinion between the reporting officer and Ms Anich that policy 5 of the NPS HPL applies to PC81 and that it requires rezoning of HPL to be avoided except as provided in NPS HPL clause 3.6(4) and (5).
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- 2.28 The Addendum 42A report states at paragraph 47 *“the Applicant has provided no consideration of plan enabled development capacity, being the development / redevelopment of the existing urban area of Dargaville to provide sufficient capacity to meet housing / business demand”* and at paragraph 48 *“The Applicant has provided no consideration in relation to the wider locality”*.
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- 2.31 The Ministry's Guide to Implementation provides very little guidance with respect to clause 3.6(4), but does note that 3.6(4)(a) - unlike 3.6(1)(a) for Tier 1 and 2 authorities - does not reference the NPS UD.<sup>2</sup>
- 2.32 Ms Anich's assessment of clause 3.6(4)(a) references the Applicant's Market Demand Report and the Council's Dargaville Spatial Plan to assess expected demand for housing or business land, a core element of clause 3.6(4)(a). The capacity must be sufficient *to meet expected demand*.

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2.33 Even if infill development and the wider locality should have been included in Ms Anich's assessment under clause 3.6(4)(a), those matters were included in her assessment under the closely related 3.6(4)(b). The reporting officer is not correct to say that there was "no consideration" of these matters. It would be out of all proportion if a plan change were to be declined because assessment of a freshly minted national policy statement was undertaken in the row marked (b) when it should have been duplicated in rows (a) and (b).

***Clause 3.6(4)(b) – other reasonably practicable and feasible options***

2.34 The Addendum 42A report states at paragraph 50 *"the Applicant has not presented any evidence that there are limitations to any other "reasonably practicable and feasible options" for residential / business development, namely infill development and/or rezoning and development within the relevant zone" and "there is no real evidence to confirm that there are no practicable or feasible options to achieve this"*.

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2.36 The 'evidence' is those referenced publicly available documents and Ms Anich's evidence for this hearing. I do not understand the reporting officer to be challenging Ms Anich's qualifications and experience (including as the former Planning and Policy Manager for this Council) to undertake this planning assessment.

2.37 The Guide states with respect to 3.6(4)(b) that - unlike 3.6(1)(b) for Tier 1 and 2 authorities - *"there is no list of options that must be assessed to demonstrate there are no other reasonably practicable and feasible options for providing the required development capacity"*.<sup>3</sup>

2.38 With respect to clause 3.6(1)(b) for Tier and 2 authorities, the Guide states (emphasis added):

*"The use of the words 'reasonably practicable option' is intended to align with the assessment of reasonably practicable options in section 32(1)(b)(i) and ensure a pragmatic assessment of realistic and achievable options to provide the required development capacity is completed. It is also important to recognise there are often limitations on the ability to undertake a detailed assessment of other reasonably practicable options. For example, other options may involve constraints that are not readily apparent or cannot be easily identified by ... private plan change applicants as part of the scoping and site selection process.*

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*In the case of private plan changes proposing urban rezoning of HPL, there are often more limitations on the reasonably practicable options that can be assessed – particularly as it is often not possible for a private landowner or developer to acquire a range of other landholdings for development.”<sup>4</sup>*

**Clause 3.6(4)(c) – benefits of rezoning outweigh the costs associated with loss of HPL**

2.39 The Addendum 42A report states at paragraph 53 that the Applicant *“has not provided any assessment of effects of the loss of highly productive land”*.

2.40 Ms Anich provided an entire page assessing the environmental, social and cultural, and economic costs associated with the loss of HPL from land-based primary production, including intangible costs.

2.41 With respect to clause 3.6(1)(c) for Tier and 2 authorities, the Guide states:

*“This assessment can be undertaken as part of an evaluation under section 32 of the RMA, or it can be a separate assessment specifically focused on meeting the tests of Clause 3.6.”<sup>5</sup>*

2.42 The list of intangible costs assessed by Ms Anich was taken directly from this section of the Guide.

**Clause 3.6(5) – spatial extent of rezoning**

2.43 The Addendum 42A report states at paragraph 57 with respect to clause 3.6(5) *“I note that this does not appear to have been addressed in detail by the Applicant”* and *“the Applicant has chosen not to present an alternative development option that protects the highly productive land with the remaining land being proposed for urbanisation”*.

2.44 Ms Anich provided two pages assessing clause 3.6(5). That assessment expressly included consideration of alternative development layouts which avoided urban zoning on the HPL – such as taking access direct from SH14 or from the south eastern corner of the site. Ultimately Ms Anich concluded that alternative layouts would not achieve a well-functioning urban environment as required by clause 3.6(5).

2.45 The reporting officer has focused on protecting the HPL, but clause 3.6(5) is expressed (emphasis added) as *“the minimum necessary to provide the required development capacity while achieving a well-functioning urban environment”*.

2.46 The Supreme Court in *King Salmon* held that, in the context of s5 RMA, *“while”* means *“at the same time as”* and that the words either side of *“while”* should be read as an integrated whole.<sup>6</sup>

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<sup>4</sup> Ministry for the Environment NPS HPL Guide to Implementation December 2022 at page 44

<sup>5</sup> Ministry for the Environment NPS HPL Guide to Implementation December 2022 at page 43

<sup>6</sup> *Environment Defence Society Inc v The New Zealand King Salmon Company Ltd* [2014] NZSC 38 at [24(c)]

2.47 With respect to clause 3.6(5) the Guide states:

*“Comparisons against other reasonably practicable and feasible options may be a way to demonstrate that the loss of HPL is minimised. For example, an urban rezoning proposal may minimise the loss of HPL by being predominantly on non-HPL land and some smaller areas of LUC class 3 land, while deliberately avoiding larger areas of LUC 1 and 2 land. The design of an urban rezoning proposal can also minimise the loss of HPL and ensure any loss of HPL is an efficient use of this land. For example, this may involve efficient location of infrastructure, key roading connections, and/or a structure plan design that ensures a high yield for the development to minimise the loss of HPL while providing the required development capacity and achieving a well-functioning urban environment.”*

2.48 These are exactly the type of considerations assessed by Ms Anich.

**Conclusion on NPS HPL clause 3.6**

2.49 The Addendum 42A report is entirely incorrect in asserting a failure to assess NPS HPL clause 3.6. This assessment has been undertaken in detail and in accordance with the Ministry’s Guide. I submit that the Applicant’s evidence has addressed clause 3.6 and established that NPS HPL policy 5 is met, and there is no NPS HPL related reason to decline PC81.

**3. NEW ISSUE RAISED IN ADDENDUM TO THE 42A REPORT**

3.1 The introduction to the Addendum 42A report states:

*“The purpose of this statement is to address additional information received from the Applicant in relation to the following matters:*

- *Infrastructure feasibility.*
- *Road design and pedestrian connections.*
- *NPS-FM.*
- *NPS-HPL.*

*This addendum addresses the additional information in light of the fact it was produced after the circulation, and in response to matters raised within, the original s42A report.”*

3.2 The “Concluding Statement” of the Addendum 42A report however then states an entirely unrelated new issue at paragraphs 61 and 68 (emphasis added):

*“The key question for the Hearing Panel then becomes what zoning of this land is the most appropriate, under section 32 of the RMA. In my opinion, the assumptions provided within the section 32 analysis, including the additional analysis provided by way of the Statement of Evidence of Ms Anich do not provide a clear comparison between various options available for the development of the site, but rely solely on its own objectives as being appropriate, without being consistent with the broader plan objectives...”*

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<sup>7</sup> Ministry for the Environment NPS HPL Guide to Implementation December 2022 at page 43

*“Overall, as matters stand, I continue to be unable to conclude, as required under section 32 of the RMA, that the objectives proposed in PPC81 are the most appropriate way to achieve the purpose of the Act, and that the provisions proposed (including the zoning of the land) are the most appropriate way to achieve the objectives.”*

3.3 The appropriateness of the PC81 objectives to achieve the purpose of the Act, and consistency with the operative Plan objectives, was not raised as an issue in the original s42A report.

- In the section dealing with s32 evaluation, paragraph 79 of the original s42A report identified four options (status quo, whole site industrial, whole site residential, and PC81 split) that the reporting officer “would expect to see assessed”. (Ms Anich provided additional assessment of these options in Appendix 1 to her primary evidence). There was no mention in that section of the original s42A report of any perceived inadequacy of the Applicant’s s32 assessment of the objectives of the operative Plan.
- Appendix G to the original s42A report is the reporting officer’s assessment of PC81 against the objectives and policies of the operative Plan – chapters 2, 3, 5 and 7. Nowhere in the reporting officer’s commentary on the objectives is any reference made to any perceived inadequacy of the Applicant’s s32 assessment of the objectives of the operative Plan. The only matters raised are productive land, effects on ecosystems, and the feasibility of servicing (raw water supply, bridging of the Awakino River for wastewater, and the shared path). In response to Chapter 3 objectives the reporting officer comments (emphasis added) *“In the main I accept the assessment of the objectives and policies provided within the Applicant’s further information response dated 20 April 2022, apart from those matters that have been previously raised”* (referencing raw water supply, bridging of the Awakino River for wastewater, and the shared path).
- Section 11 of the original s42A report is the Conclusion. In paragraph 382 the reporting officer sets out “aspects of PPC81 that I cannot support due to lack of information”, listing effects on wetlands and biodiversity, highly productive land, raw water supply, and bridging of the Awakino River for wastewater. At paragraph 391 the reporting officer recommends that the Applicant provide an amended set of provisions to address a “clear cascade” of objectives, policies and rules; raw water supply; bridging of the Awakino River for wastewater; feasibility of the shared path; NPS HPL; and NPS FM. Nowhere in the reporting officer’s Conclusion is any reference made to any perceived inadequacy of the Applicant’s s32 assessment of the objectives of the operative Plan.

- 3.4 It is extraordinary that a s42A report would not raise any issue with the Applicant's s32 assessment of the objectives of the operative Plan – even when requesting additional s32 assessment of options – and then on the eve of hearing recommend declining a plan change for this newly identified perceived inadequacy.
- 3.5 Even more extraordinary is that this s32 analysis was undertaken by the Applicant a year ago in response to the Council's Request for Further Information, accepted by the Council at that time, and specifically accepted in the original s42A report by the reporting officer.
- 3.6 Ms Anich will address this further at the hearing.
- 3.7 The reporting officer also maintains her view that the PC81 objectives and policies require redrafting to follow a "formative cascade" but has again declined to offer any specific feedback on the objectives and policies or suggest any improvements to their drafting. The Applicant cannot be expected to chase shadows.
- 3.8 Ms Anich remains open to minor amendments to improve the objectives and policies should the Commissioners identify any drafting issues.
- 3.9 I submit that the Applicant's evidence has comprehensively addressed s32 and there is no s32 related reason to decline PC81.

#### **4. CONCLUSION**

- 4.1 I submit that having regard to the evidence for the Applicant there are no matters identified in the Addendum 42A Report that justify a recommendation to decline PC81.



**Sarah Shaw**

Counsel for Dargaville Racing Club Inc

27 March 2023

**UNDER**

the Resource Management Act 1991

**IN THE MATTER**

of a request to Kaipara District Council for  
Private Plan Change 81: Dargaville  
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**SUPPLEMENTARY OPENING LEGAL SUBMISSIONS OF COUNSEL FOR THE APPLICANT**

**27 March 2023**

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**Counsel acting:**

Sarah Shaw Barrister

PO Box 4146

Kamo 0141

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022 587 8952

## INTRODUCTION

1.1 These supplementary opening legal submissions for the Applicant respond to the Addendum to the Council's section 42A report dated 24 March 2023 ("the Addendum 42A report").

## 2. NARROWING OF ISSUES IN ADDENDUM TO THE 42A REPORT

2.1 The following key issues have been addressed in the Addendum 42A report. All but the NPS HPL represent a narrowing of the issues coming into the hearing:

- Wastewater - feasibility of wastewater crossing over Awakino River
- Water supply - seasonal raw water constraints
- Feasibility of shared path
- SH14 intersection upgrade
- Wetlands and freshwater (NPS FM)
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### **Wastewater: Feasibility of wastewater crossing over Awakino River**

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*In the case of private plan changes proposing urban rezoning of HPL, there are often more limitations on the reasonably practicable options that can be assessed – particularly as it is often not possible for a private landowner or developer to acquire a range of other landholdings for development.”<sup>4</sup>*

**Clause 3.6(4)(c) – benefits of rezoning outweigh the costs associated with loss of HPL**

2.39 The Addendum 42A report states at paragraph 53 that the Applicant *“has not provided any assessment of effects of the loss of highly productive land”*.

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*“This assessment can be undertaken as part of an evaluation under section 32 of the RMA, or it can be a separate assessment specifically focused on meeting the tests of Clause 3.6.”<sup>5</sup>*

2.42 The list of intangible costs assessed by Ms Anich was taken directly from this section of the Guide.

**Clause 3.6(5) – spatial extent of rezoning**

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2.45 The reporting officer has focused on protecting the HPL, but clause 3.6(5) is expressed (emphasis added) as *“the minimum necessary to provide the required development capacity while achieving a well-functioning urban environment”*.

2.46 The Supreme Court in *King Salmon* held that, in the context of s5 RMA, *“while”* means *“at the same time as”* and that the words either side of *“while”* should be read as an integrated whole.<sup>6</sup>

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<sup>4</sup> Ministry for the Environment NPS HPL Guide to Implementation December 2022 at page 44

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2.47 With respect to clause 3.6(5) the Guide states:

*“Comparisons against other reasonably practicable and feasible options may be a way to demonstrate that the loss of HPL is minimised. For example, an urban rezoning proposal may minimise the loss of HPL by being predominantly on non-HPL land and some smaller areas of LUC class 3 land, while deliberately avoiding larger areas of LUC 1 and 2 land. The design of an urban rezoning proposal can also minimise the loss of HPL and ensure any loss of HPL is an efficient use of this land. For example, this may involve efficient location of infrastructure, key roading connections, and/or a structure plan design that ensures a high yield for the development to minimise the loss of HPL while providing the required development capacity and achieving a well-functioning urban environment.”*

2.48 These are exactly the type of considerations assessed by Ms Anich.

**Conclusion on NPS HPL clause 3.6**

2.49 The Addendum 42A report is entirely incorrect in asserting a failure to assess NPS HPL clause 3.6. This assessment has been undertaken in detail and in accordance with the Ministry’s Guide. I submit that the Applicant’s evidence has addressed clause 3.6 and established that NPS HPL policy 5 is met, and there is no NPS HPL related reason to decline PC81.

**3. NEW ISSUE RAISED IN ADDENDUM TO THE 42A REPORT**

3.1 The introduction to the Addendum 42A report states:

*“The purpose of this statement is to address additional information received from the Applicant in relation to the following matters:*

- *Infrastructure feasibility.*
- *Road design and pedestrian connections.*
- *NPS-FM.*
- *NPS-HPL.*

*This addendum addresses the additional information in light of the fact it was produced after the circulation, and in response to matters raised within, the original s42A report.”*

3.2 The “Concluding Statement” of the Addendum 42A report however then states an entirely unrelated new issue at paragraphs 61 and 68 (emphasis added):

*“The key question for the Hearing Panel then becomes what zoning of this land is the most appropriate, under section 32 of the RMA. In my opinion, the assumptions provided within the section 32 analysis, including the additional analysis provided by way of the Statement of Evidence of Ms Anich do not provide a clear comparison between various options available for the development of the site, but rely solely on its own objectives as being appropriate, without being consistent with the broader plan objectives...”*

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*“Overall, as matters stand, I continue to be unable to conclude, as required under section 32 of the RMA, that the objectives proposed in PPC81 are the most appropriate way to achieve the purpose of the Act, and that the provisions proposed (including the zoning of the land) are the most appropriate way to achieve the objectives.”*

3.3 The appropriateness of the PC81 objectives to achieve the purpose of the Act, and consistency with the operative Plan objectives, was not raised as an issue in the original s42A report.

- In the section dealing with s32 evaluation, paragraph 79 of the original s42A report identified four options (status quo, whole site industrial, whole site residential, and PC81 split) that the reporting officer “would expect to see assessed”. (Ms Anich provided additional assessment of these options in Appendix 1 to her primary evidence). There was no mention in that section of the original s42A report of any perceived inadequacy of the Applicant’s s32 assessment of the objectives of the operative Plan.
- Appendix G to the original s42A report is the reporting officer’s assessment of PC81 against the objectives and policies of the operative Plan – chapters 2, 3, 5 and 7. Nowhere in the reporting officer’s commentary on the objectives is any reference made to any perceived inadequacy of the Applicant’s s32 assessment of the objectives of the operative Plan. The only matters raised are productive land, effects on ecosystems, and the feasibility of servicing (raw water supply, bridging of the Awakino River for wastewater, and the shared path). In response to Chapter 3 objectives the reporting officer comments (emphasis added) *“In the main I accept the assessment of the objectives and policies provided within the Applicant’s further information response dated 20 April 2022, apart from those matters that have been previously raised”* (referencing raw water supply, bridging of the Awakino River for wastewater, and the shared path).
- Section 11 of the original s42A report is the Conclusion. In paragraph 382 the reporting officer sets out “aspects of PPC81 that I cannot support due to lack of information”, listing effects on wetlands and biodiversity, highly productive land, raw water supply, and bridging of the Awakino River for wastewater. At paragraph 391 the reporting officer recommends that the Applicant provide an amended set of provisions to address a “clear cascade” of objectives, policies and rules; raw water supply; bridging of the Awakino River for wastewater; feasibility of the shared path; NPS HPL; and NPS FM. Nowhere in the reporting officer’s Conclusion is any reference made to any perceived inadequacy of the Applicant’s s32 assessment of the objectives of the operative Plan.

- 3.4 It is extraordinary that a s42A report would not raise any issue with the Applicant's s32 assessment of the objectives of the operative Plan – even when requesting additional s32 assessment of options – and then on the eve of hearing recommend declining a plan change for this newly identified perceived inadequacy.
- 3.5 Even more extraordinary is that this s32 analysis was undertaken by the Applicant a year ago in response to the Council's Request for Further Information, accepted by the Council at that time, and specifically accepted in the original s42A report by the reporting officer.
- 3.6 Ms Anich will address this further at the hearing.
- 3.7 The reporting officer also maintains her view that the PC81 objectives and policies require redrafting to follow a "formative cascade" but has again declined to offer any specific feedback on the objectives and policies or suggest any improvements to their drafting. The Applicant cannot be expected to chase shadows.
- 3.8 Ms Anich remains open to minor amendments to improve the objectives and policies should the Commissioners identify any drafting issues.
- 3.9 I submit that the Applicant's evidence has comprehensively addressed s32 and there is no s32 related reason to decline PC81.

#### **4. CONCLUSION**

- 4.1 I submit that having regard to the evidence for the Applicant there are no matters identified in the Addendum 42A Report that justify a recommendation to decline PC81.



**Sarah Shaw**

Counsel for Dargaville Racing Club Inc

27 March 2023



**UNDER**

the Resource Management Act 1991

**IN THE MATTER**

of a request to Kaipara District Council for  
Private Plan Change 81: Dargaville  
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**SUPPLEMENTARY OPENING LEGAL SUBMISSIONS OF COUNSEL FOR THE APPLICANT**

**27 March 2023**

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## INTRODUCTION

1.1 These supplementary opening legal submissions for the Applicant respond to the Addendum to the Council's section 42A report dated 24 March 2023 ("the Addendum 42A report").

### 2. NARROWING OF ISSUES IN ADDENDUM TO THE 42A REPORT

2.1 The following key issues have been addressed in the Addendum 42A report. All but the NPS HPL represent a narrowing of the issues coming into the hearing:

- Wastewater - feasibility of wastewater crossing over Awakino River
- Water supply - seasonal raw water constraints
- Feasibility of shared path
- SH14 intersection upgrade
- Wetlands and freshwater (NPS FM)
- Highly Productive Land (NPS HPL)

#### **Wastewater: Feasibility of wastewater crossing over Awakino River**

2.2 The Addendum 42A report addresses Mr de Wet's evidence with respect to the need for the wastewater pipe to cross the Awakino River and at paragraph 11 states *"there is now sufficient information to conclude that it is feasible to appropriately service the development of PPC81 in relation to wastewater disposal via the Dargaville WWTP"*.

2.3 There are no remaining areas of difference between the Applicant and the Council with respect to wastewater and I submit that there is no wastewater related reason to decline PC81.

#### **Water supply: Seasonal raw water constraints**

2.4 The Addendum 42A report addresses Mr de Wet's evidence and Mr Usmar's memorandum with respect to raw water supply and at paragraphs 14 and 15 states that *"it is feasible to that potable water can be supplied to the site"* and on the basis that *"KDC is committed to addressing the current raw water shortages in Dargaville, that there are options presented to achieve this"* that *"there is no potable water related reason to decline PPC81"*.

2.5 This conclusion is *"subject to evidence that it is feasible for supplementary water supply to be achieved on site"* in particular given the lot sizes in the GRA.

2.6 Mr de Wet and Ms Anich have already addressed this in their primary evidence (at paragraph 6.13 and paragraphs 13-18 to 13.20 respectively). In summary, supplementary supply can be investigated at resource consent stage, the TDA provisions include relevant matters of control and discretion, and water tanks are expressly provided for in the GRA.

- 2.7 Ms Anich has further addressed this in the amended provisions at Appendix 8 to her addendum evidence, recommending amendments to the Three Waters standards to provide that GRA development must be serviced by reticulated water supply, on-site water supply, or a combination of the two.
- 2.8 Mr de Wet will address supplementary supply further at the hearing.
- 2.9 On the one remaining area of difference between the Applicant and the Council with respect to water supply – supplementary supply – I submit that the Applicant’s evidence has addressed the issue and there is no potable water related reason to decline PC81.

#### **Feasibility of shared path**

- 2.10 The Addendum 42A report addresses Mr McKenzie’s evidence with respect to the feasibility of the shared path and at paragraph 20 states *“I consider it to be generally feasible that PPC81 can be adequately accessed via a shared pedestrian and cycle path, with the detailed design of this to be approved at the time of resource consent”*.
- 2.11 This conclusion is however subject to (at paragraph 22) *“potential safety concerns with a shared path being located in a 100km/hr speed environment given the position expressed by Waka Kotahi that there is not likely to be a speed reduction for SH14 in the foreseeable future”*.
- 2.12 The need for grade separation or fencing from the state highway corridor was raised in the submission from Waka Kotahi and addressed by Mr McKenzie in his primary evidence (at paragraphs 9.13 and 9.14) with Mr McKenzie confirming that the design of the shared path can be addressed through the resource consent detailed design phase.
- 2.13 Mr McKenzie will address the safe separation issue further at the hearing.
- 2.14 On the one remaining area of difference between the Applicant and the Council with respect to the shared path – safe separation – I submit that the Applicant’s evidence has addressed the issue and there is no shared path related reason to decline PC81.

#### **SH14 intersection upgrade**

- 2.15 The Addendum 42A report addresses Mr McKenzie’s evidence with respect to the form of the intersection and at paragraph 27 states *“There is no dispute in relation to the fact that servicing of PPC81 through an upgraded intersection is feasible, the issue is whether this intersection treatment should be a T-intersection or a roundabout. The Hearing Panel will need to make a decision in this regard, once it has heard all of the evidence”*.
- 2.16 Mr McKenzie’s evidence addresses the intersection form issue and he will address this issue further at the hearing.

2.17 There are no remaining areas of difference between the Applicant and the Council with respect to intersection form (Mr Hills supporting a T-intersection) and I submit that:

- There is no intersection form related reason to decline PC81.
- The Applicant's evidence supports a finding that a requirement for a T-intersection is the most appropriate provision for PC81.

**Wetlands and freshwater (NPS FM)**

2.18 The Addendum 42A report addresses Ms Anich's addendum evidence with respect to indicative wetlands, freshwater and the NPS FM and at paragraph 39 states "*I am generally of the opinion that matters in relation to the NPS-FM can be adequately addressed, and there is no specific reason under the NPS-FM to decline PPC81*".

2.19 This conclusion is however subject to (at paragraph 36) "*concerns with regard to the applicant's referencing the NPS-FM within the rule table, given that best practice with regard to rule drafting is not to refer to other Acts or regulations which may be amended or replaced*".

2.20 Ms Anich addressed this matter in her addendum evidence (at paragraphs 2.4(b) and 2.9 to 2.10) recommending amendments to ensure that any identified "natural inland wetlands" and any other freshwater features (eg intermittent streams) are appropriately provided for consistent with the NPS and the requirement to give effect to Te Mana o Te Wai.

2.21 Ms Anich will address this further at the hearing.

2.22 The Addendum 42A report notes that careful consideration of the National Environmental Standards for Freshwater 2020 ("NES F") will be required at the time of resource consent and that "significant constraints" may be placed across the LLRA depending on the location of lot boundaries in relation to the delineated wetland areas. However, Mr Warden's memorandum is clear that these are indicative wetland areas only which require further assessment against the definition (and exclusions) in the NPS FM to determine if any "natural inland wetlands" are present on the site and their extent. Further, the s42A reporting officer identified in the original 42A report (at paragraph 151) that the NES F exclusively deals with the functions of regional councils pursuant to regulation 5. The NES F has been amended in February 2023 to add a restricted discretionary activity consenting pathway for constructing urban development.

2.23 On the one remaining area of difference between the Applicant and the Council with respect to the NPS FM – a minor wording issue – I submit that the Applicant's evidence has addressed the issue and there is no NPS FM (or NES F) related reason to decline PC81.

### **Highly Productive Land (NPS HPL)**

- 2.24 The Addendum 42A report addresses Ms Anich's addendum evidence with respect to the NPS HPL.
- 2.25 There is no difference of opinion between the reporting officer and Ms Anich that policy 5 of the NPS HPL applies to PC81 and that it requires rezoning of HPL to be avoided except as provided in NPS HPL clause 3.6(4) and (5).
- 2.26 In paragraphs 47 to 57 of the Addendum 42A report the reporting officer asserts that a number of matters in clause 3.6(4) and (5) have not been correctly assessed, or assessed at all, by Ms Anich.
- 2.27 It is unclear whether the reporting officer is not aware of Appendix 7 to Ms Anich's addendum evidence, which sets out an 8 page detailed assessment of NPS HPL clause 3.6(4) and (5), or does not agree with the assessment undertaken.

### ***Clause 3.6(4)(a) – sufficient development capacity to meet expected demand***

- 2.28 The Addendum 42A report states at paragraph 47 *“the Applicant has provided no consideration of plan enabled development capacity, being the development / redevelopment of the existing urban area of Dargaville to provide sufficient capacity to meet housing / business demand”* and at paragraph 48 *“The Applicant has provided no consideration in relation to the wider locality”*.
- 2.29 Ms Anich has addressed those considerations, with respect to clause 3.6(4)(b) (other reasonably practicable and feasible options for providing the capacity).
- 2.30 “Sufficient development capacity” is defined in the NPS UD<sup>1</sup> as plan-enabled, infrastructure-ready, and feasible and reasonably expected to be realised (for housing) or suitable to meet the demands of different business sectors (for business land). On these definitions there is significant overlap between clause 3.6(4)(a) sufficient development capacity and clause 3.6(4)(b) other reasonably practicable and feasible options.
- 2.31 The Ministry's Guide to Implementation provides very little guidance with respect to clause 3.6(4), but does note that 3.6(4)(a) - unlike 3.6(1)(a) for Tier 1 and 2 authorities - does not reference the NPS UD.<sup>2</sup>
- 2.32 Ms Anich's assessment of clause 3.6(4)(a) references the Applicant's Market Demand Report and the Council's Dargaville Spatial Plan to assess expected demand for housing or business land, a core element of clause 3.6(4)(a). The capacity must be sufficient *to meet expected demand*.

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<sup>1</sup> NPS UD Part 3 subpart 1 clauses 3.2 and 3.3

<sup>2</sup> Ministry for the Environment NPS HPL Guide to Implementation December 2022 at page 49

2.33 Even if infill development and the wider locality should have been included in Ms Anich's assessment under clause 3.6(4)(a), those matters were included in her assessment under the closely related 3.6(4)(b). The reporting officer is not correct to say that there was "no consideration" of these matters. It would be out of all proportion if a plan change were to be declined because assessment of a freshly minted national policy statement was undertaken in the row marked (b) when it should have been duplicated in rows (a) and (b).

***Clause 3.6(4)(b) – other reasonably practicable and feasible options***

2.34 The Addendum 42A report states at paragraph 50 *"the Applicant has not presented any evidence that there are limitations to any other "reasonably practicable and feasible options" for residential / business development, namely infill development and/or rezoning and development within the relevant zone" and "there is no real evidence to confirm that there are no practicable or feasible options to achieve this"*.

2.35 Ms Anich has addressed those considerations, with respect to clause 3.6(4)(b), expressly referencing "greater intensification of existing" residential and industrial areas. Ms Anich references specific parts of the Dargaville Spatial Plan, topography, NRC flood hazard mapping, and the Exposure Draft proposed district plan.

2.36 The 'evidence' is those referenced publicly available documents and Ms Anich's evidence for this hearing. I do not understand the reporting officer to be challenging Ms Anich's qualifications and experience (including as the former Planning and Policy Manager for this Council) to undertake this planning assessment.

2.37 The Guide states with respect to 3.6(4)(b) that - unlike 3.6(1)(b) for Tier 1 and 2 authorities - *"there is no list of options that must be assessed to demonstrate there are no other reasonably practicable and feasible options for providing the required development capacity"*.<sup>3</sup>

2.38 With respect to clause 3.6(1)(b) for Tier and 2 authorities, the Guide states (emphasis added):

*"The use of the words 'reasonably practicable option' is intended to align with the assessment of reasonably practicable options in section 32(1)(b)(i) and ensure a pragmatic assessment of realistic and achievable options to provide the required development capacity is completed. It is also important to recognise there are often limitations on the ability to undertake a detailed assessment of other reasonably practicable options. For example, other options may involve constraints that are not readily apparent or cannot be easily identified by ... private plan change applicants as part of the scoping and site selection process.*

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*In the case of private plan changes proposing urban rezoning of HPL, there are often more limitations on the reasonably practicable options that can be assessed – particularly as it is often not possible for a private landowner or developer to acquire a range of other landholdings for development.”<sup>4</sup>*

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### **Conclusion on NPS HPL clause 3.6**

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*“Overall, as matters stand, I continue to be unable to conclude, as required under section 32 of the RMA, that the objectives proposed in PPC81 are the most appropriate way to achieve the purpose of the Act, and that the provisions proposed (including the zoning of the land) are the most appropriate way to achieve the objectives.”*

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2.5 This conclusion is *"subject to evidence that it is feasible for supplementary water supply to be achieved on site"* in particular given the lot sizes in the GRA.

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2.7 Ms Anich has further addressed this in the amended provisions at Appendix 8 to her addendum evidence, recommending amendments to the Three Waters standards to provide that GRA development must be serviced by reticulated water supply, on-site water supply, or a combination of the two.

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2.10 The Addendum 42A report addresses Mr McKenzie’s evidence with respect to the feasibility of the shared path and at paragraph 20 states *“I consider it to be generally feasible that PPC81 can be adequately accessed via a shared pedestrian and cycle path, with the detailed design of this to be approved at the time of resource consent”*.

2.11 This conclusion is however subject to (at paragraph 22) *“potential safety concerns with a shared path being located in a 100km/hr speed environment given the position expressed by Waka Kotahi that there is not likely to be a speed reduction for SH14 in the foreseeable future”*.

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2.17 There are no remaining areas of difference between the Applicant and the Council with respect to intersection form (Mr Hills supporting a T-intersection) and I submit that:

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- The Applicant's evidence supports a finding that a requirement for a T-intersection is the most appropriate provision for PC81.

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2.18 The Addendum 42A report addresses Ms Anich's addendum evidence with respect to indicative wetlands, freshwater and the NPS FM and at paragraph 39 states "*I am generally of the opinion that matters in relation to the NPS-FM can be adequately addressed, and there is no specific reason under the NPS-FM to decline PPC81*".

2.19 This conclusion is however subject to (at paragraph 36) "*concerns with regard to the applicant's referencing the NPS-FM within the rule table, given that best practice with regard to rule drafting is not to refer to other Acts or regulations which may be amended or replaced*".

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2.23 On the one remaining area of difference between the Applicant and the Council with respect to the NPS FM – a minor wording issue – I submit that the Applicant's evidence has addressed the issue and there is no NPS FM (or NES F) related reason to decline PC81.

### **Highly Productive Land (NPS HPL)**

- 2.24 The Addendum 42A report addresses Ms Anich's addendum evidence with respect to the NPS HPL.
- 2.25 There is no difference of opinion between the reporting officer and Ms Anich that policy 5 of the NPS HPL applies to PC81 and that it requires rezoning of HPL to be avoided except as provided in NPS HPL clause 3.6(4) and (5).
- 2.26 In paragraphs 47 to 57 of the Addendum 42A report the reporting officer asserts that a number of matters in clause 3.6(4) and (5) have not been correctly assessed, or assessed at all, by Ms Anich.
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- 2.28 The Addendum 42A report states at paragraph 47 *“the Applicant has provided no consideration of plan enabled development capacity, being the development / redevelopment of the existing urban area of Dargaville to provide sufficient capacity to meet housing / business demand”* and at paragraph 48 *“The Applicant has provided no consideration in relation to the wider locality”*.
- 2.29 Ms Anich has addressed those considerations, with respect to clause 3.6(4)(b) (other reasonably practicable and feasible options for providing the capacity).
- 2.30 “Sufficient development capacity” is defined in the NPS UD<sup>1</sup> as plan-enabled, infrastructure-ready, and feasible and reasonably expected to be realised (for housing) or suitable to meet the demands of different business sectors (for business land). On these definitions there is significant overlap between clause 3.6(4)(a) sufficient development capacity and clause 3.6(4)(b) other reasonably practicable and feasible options.
- 2.31 The Ministry's Guide to Implementation provides very little guidance with respect to clause 3.6(4), but does note that 3.6(4)(a) - unlike 3.6(1)(a) for Tier 1 and 2 authorities - does not reference the NPS UD.<sup>2</sup>
- 2.32 Ms Anich's assessment of clause 3.6(4)(a) references the Applicant's Market Demand Report and the Council's Dargaville Spatial Plan to assess expected demand for housing or business land, a core element of clause 3.6(4)(a). The capacity must be sufficient *to meet expected demand*.

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<sup>1</sup> NPS UD Part 3 subpart 1 clauses 3.2 and 3.3

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2.33 Even if infill development and the wider locality should have been included in Ms Anich's assessment under clause 3.6(4)(a), those matters were included in her assessment under the closely related 3.6(4)(b). The reporting officer is not correct to say that there was "no consideration" of these matters. It would be out of all proportion if a plan change were to be declined because assessment of a freshly minted national policy statement was undertaken in the row marked (b) when it should have been duplicated in rows (a) and (b).

***Clause 3.6(4)(b) – other reasonably practicable and feasible options***

2.34 The Addendum 42A report states at paragraph 50 *"the Applicant has not presented any evidence that there are limitations to any other "reasonably practicable and feasible options" for residential / business development, namely infill development and/or rezoning and development within the relevant zone" and "there is no real evidence to confirm that there are no practicable or feasible options to achieve this"*.

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2.36 The 'evidence' is those referenced publicly available documents and Ms Anich's evidence for this hearing. I do not understand the reporting officer to be challenging Ms Anich's qualifications and experience (including as the former Planning and Policy Manager for this Council) to undertake this planning assessment.

2.37 The Guide states with respect to 3.6(4)(b) that - unlike 3.6(1)(b) for Tier 1 and 2 authorities - *"there is no list of options that must be assessed to demonstrate there are no other reasonably practicable and feasible options for providing the required development capacity"*.<sup>3</sup>

2.38 With respect to clause 3.6(1)(b) for Tier and 2 authorities, the Guide states (emphasis added):

*"The use of the words 'reasonably practicable option' is intended to align with the assessment of reasonably practicable options in section 32(1)(b)(i) and ensure a pragmatic assessment of realistic and achievable options to provide the required development capacity is completed. It is also important to recognise there are often limitations on the ability to undertake a detailed assessment of other reasonably practicable options. For example, other options may involve constraints that are not readily apparent or cannot be easily identified by ... private plan change applicants as part of the scoping and site selection process.*

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*In the case of private plan changes proposing urban rezoning of HPL, there are often more limitations on the reasonably practicable options that can be assessed – particularly as it is often not possible for a private landowner or developer to acquire a range of other landholdings for development.”<sup>4</sup>*

**Clause 3.6(4)(c) – benefits of rezoning outweigh the costs associated with loss of HPL**

2.39 The Addendum 42A report states at paragraph 53 that the Applicant *“has not provided any assessment of effects of the loss of highly productive land”*.

2.40 Ms Anich provided an entire page assessing the environmental, social and cultural, and economic costs associated with the loss of HPL from land-based primary production, including intangible costs.

2.41 With respect to clause 3.6(1)(c) for Tier and 2 authorities, the Guide states:

*“This assessment can be undertaken as part of an evaluation under section 32 of the RMA, or it can be a separate assessment specifically focused on meeting the tests of Clause 3.6.”<sup>5</sup>*

2.42 The list of intangible costs assessed by Ms Anich was taken directly from this section of the Guide.

**Clause 3.6(5) – spatial extent of rezoning**

2.43 The Addendum 42A report states at paragraph 57 with respect to clause 3.6(5) *“I note that this does not appear to have been addressed in detail by the Applicant”* and *“the Applicant has chosen not to present an alternative development option that protects the highly productive land with the remaining land being proposed for urbanisation”*.

2.44 Ms Anich provided two pages assessing clause 3.6(5). That assessment expressly included consideration of alternative development layouts which avoided urban zoning on the HPL – such as taking access direct from SH14 or from the south eastern corner of the site. Ultimately Ms Anich concluded that alternative layouts would not achieve a well-functioning urban environment as required by clause 3.6(5).

2.45 The reporting officer has focused on protecting the HPL, but clause 3.6(5) is expressed (emphasis added) as *“the minimum necessary to provide the required development capacity while achieving a well-functioning urban environment”*.

2.46 The Supreme Court in *King Salmon* held that, in the context of s5 RMA, *“while”* means *“at the same time as”* and that the words either side of *“while”* should be read as an integrated whole.<sup>6</sup>

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<sup>4</sup> Ministry for the Environment NPS HPL Guide to Implementation December 2022 at page 44

<sup>5</sup> Ministry for the Environment NPS HPL Guide to Implementation December 2022 at page 43

<sup>6</sup> *Environment Defence Society Inc v The New Zealand King Salmon Company Ltd* [2014] NZSC 38 at [24(c)]

2.47 With respect to clause 3.6(5) the Guide states:

*“Comparisons against other reasonably practicable and feasible options may be a way to demonstrate that the loss of HPL is minimised. For example, an urban rezoning proposal may minimise the loss of HPL by being predominantly on non-HPL land and some smaller areas of LUC class 3 land, while deliberately avoiding larger areas of LUC 1 and 2 land. The design of an urban rezoning proposal can also minimise the loss of HPL and ensure any loss of HPL is an efficient use of this land. For example, this may involve efficient location of infrastructure, key roading connections, and/or a structure plan design that ensures a high yield for the development to minimise the loss of HPL while providing the required development capacity and achieving a well-functioning urban environment.”*

2.48 These are exactly the type of considerations assessed by Ms Anich.

### **Conclusion on NPS HPL clause 3.6**

2.49 The Addendum 42A report is entirely incorrect in asserting a failure to assess NPS HPL clause 3.6. This assessment has been undertaken in detail and in accordance with the Ministry’s Guide. I submit that the Applicant’s evidence has addressed clause 3.6 and established that NPS HPL policy 5 is met, and there is no NPS HPL related reason to decline PC81.

## **3. NEW ISSUE RAISED IN ADDENDUM TO THE 42A REPORT**

3.1 The introduction to the Addendum 42A report states:

*“The purpose of this statement is to address additional information received from the Applicant in relation to the following matters:*

- *Infrastructure feasibility.*
- *Road design and pedestrian connections.*
- *NPS-FM.*
- *NPS-HPL.*

*This addendum addresses the additional information in light of the fact it was produced after the circulation, and in response to matters raised within, the original s42A report.”*

3.2 The “Concluding Statement” of the Addendum 42A report however then states an entirely unrelated new issue at paragraphs 61 and 68 (emphasis added):

*“The key question for the Hearing Panel then becomes what zoning of this land is the most appropriate, under section 32 of the RMA. In my opinion, the assumptions provided within the section 32 analysis, including the additional analysis provided by way of the Statement of Evidence of Ms Anich do not provide a clear comparison between various options available for the development of the site, but rely solely on its own objectives as being appropriate, without being consistent with the broader plan objectives...”*

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<sup>7</sup> Ministry for the Environment NPS HPL Guide to Implementation December 2022 at page 43

*“Overall, as matters stand, I continue to be unable to conclude, as required under section 32 of the RMA, that the objectives proposed in PPC81 are the most appropriate way to achieve the purpose of the Act, and that the provisions proposed (including the zoning of the land) are the most appropriate way to achieve the objectives.”*

3.3 The appropriateness of the PC81 objectives to achieve the purpose of the Act, and consistency with the operative Plan objectives, was not raised as an issue in the original s42A report.

- In the section dealing with s32 evaluation, paragraph 79 of the original s42A report identified four options (status quo, whole site industrial, whole site residential, and PC81 split) that the reporting officer “would expect to see assessed”. (Ms Anich provided additional assessment of these options in Appendix 1 to her primary evidence). There was no mention in that section of the original s42A report of any perceived inadequacy of the Applicant’s s32 assessment of the objectives of the operative Plan.
- Appendix G to the original s42A report is the reporting officer’s assessment of PC81 against the objectives and policies of the operative Plan – chapters 2, 3, 5 and 7. Nowhere in the reporting officer’s commentary on the objectives is any reference made to any perceived inadequacy of the Applicant’s s32 assessment of the objectives of the operative Plan. The only matters raised are productive land, effects on ecosystems, and the feasibility of servicing (raw water supply, bridging of the Awakino River for wastewater, and the shared path). In response to Chapter 3 objectives the reporting officer comments (emphasis added) *“In the main I accept the assessment of the objectives and policies provided within the Applicant’s further information response dated 20 April 2022, apart from those matters that have been previously raised”* (referencing raw water supply, bridging of the Awakino River for wastewater, and the shared path).
- Section 11 of the original s42A report is the Conclusion. In paragraph 382 the reporting officer sets out “aspects of PPC81 that I cannot support due to lack of information”, listing effects on wetlands and biodiversity, highly productive land, raw water supply, and bridging of the Awakino River for wastewater. At paragraph 391 the reporting officer recommends that the Applicant provide an amended set of provisions to address a “clear cascade” of objectives, policies and rules; raw water supply; bridging of the Awakino River for wastewater; feasibility of the shared path; NPS HPL; and NPS FM. Nowhere in the reporting officer’s Conclusion is any reference made to any perceived inadequacy of the Applicant’s s32 assessment of the objectives of the operative Plan.

- 3.4 It is extraordinary that a s42A report would not raise any issue with the Applicant's s32 assessment of the objectives of the operative Plan – even when requesting additional s32 assessment of options – and then on the eve of hearing recommend declining a plan change for this newly identified perceived inadequacy.
- 3.5 Even more extraordinary is that this s32 analysis was undertaken by the Applicant a year ago in response to the Council's Request for Further Information, accepted by the Council at that time, and specifically accepted in the original s42A report by the reporting officer.
- 3.6 Ms Anich will address this further at the hearing.
- 3.7 The reporting officer also maintains her view that the PC81 objectives and policies require redrafting to follow a "formative cascade" but has again declined to offer any specific feedback on the objectives and policies or suggest any improvements to their drafting. The Applicant cannot be expected to chase shadows.
- 3.8 Ms Anich remains open to minor amendments to improve the objectives and policies should the Commissioners identify any drafting issues.
- 3.9 I submit that the Applicant's evidence has comprehensively addressed s32 and there is no s32 related reason to decline PC81.

#### **4. CONCLUSION**

- 4.1 I submit that having regard to the evidence for the Applicant there are no matters identified in the Addendum 42A Report that justify a recommendation to decline PC81.



**Sarah Shaw**

Counsel for Dargaville Racing Club Inc

27 March 2023

**UNDER**

the Resource Management Act 1991

**IN THE MATTER**

of a request to Kaipara District Council for  
Private Plan Change 81: Dargaville  
Racecourse by the Dargaville Racing Club Inc

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**SUPPLEMENTARY OPENING LEGAL SUBMISSIONS OF COUNSEL FOR THE APPLICANT**

**27 March 2023**

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**Counsel acting:**

Sarah Shaw Barrister

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Kamo 0141

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022 587 8952

## INTRODUCTION

1.1 These supplementary opening legal submissions for the Applicant respond to the Addendum to the Council's section 42A report dated 24 March 2023 ("the Addendum 42A report").

### 2. NARROWING OF ISSUES IN ADDENDUM TO THE 42A REPORT

2.1 The following key issues have been addressed in the Addendum 42A report. All but the NPS HPL represent a narrowing of the issues coming into the hearing:

- Wastewater - feasibility of wastewater crossing over Awakino River
- Water supply - seasonal raw water constraints
- Feasibility of shared path
- SH14 intersection upgrade
- Wetlands and freshwater (NPS FM)
- Highly Productive Land (NPS HPL)

#### **Wastewater: Feasibility of wastewater crossing over Awakino River**

2.2 The Addendum 42A report addresses Mr de Wet's evidence with respect to the need for the wastewater pipe to cross the Awakino River and at paragraph 11 states *"there is now sufficient information to conclude that it is feasible to appropriately service the development of PPC81 in relation to wastewater disposal via the Dargaville WWTP"*.

2.3 There are no remaining areas of difference between the Applicant and the Council with respect to wastewater and I submit that there is no wastewater related reason to decline PC81.

#### **Water supply: Seasonal raw water constraints**

2.4 The Addendum 42A report addresses Mr de Wet's evidence and Mr Usmar's memorandum with respect to raw water supply and at paragraphs 14 and 15 states that *"it is feasible to that potable water can be supplied to the site"* and on the basis that *"KDC is committed to addressing the current raw water shortages in Dargaville, that there are options presented to achieve this"* that *"there is no potable water related reason to decline PPC81"*.

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**Clause 3.6(4)(c) – benefits of rezoning outweigh the costs associated with loss of HPL**

2.39 The Addendum 42A report states at paragraph 53 that the Applicant *“has not provided any assessment of effects of the loss of highly productive land”*.

2.40 Ms Anich provided an entire page assessing the environmental, social and cultural, and economic costs associated with the loss of HPL from land-based primary production, including intangible costs.

2.41 With respect to clause 3.6(1)(c) for Tier and 2 authorities, the Guide states:

*“This assessment can be undertaken as part of an evaluation under section 32 of the RMA, or it can be a separate assessment specifically focused on meeting the tests of Clause 3.6.”<sup>5</sup>*

2.42 The list of intangible costs assessed by Ms Anich was taken directly from this section of the Guide.

**Clause 3.6(5) – spatial extent of rezoning**

2.43 The Addendum 42A report states at paragraph 57 with respect to clause 3.6(5) *“I note that this does not appear to have been addressed in detail by the Applicant”* and *“the Applicant has chosen not to present an alternative development option that protects the highly productive land with the remaining land being proposed for urbanisation”*.

2.44 Ms Anich provided two pages assessing clause 3.6(5). That assessment expressly included consideration of alternative development layouts which avoided urban zoning on the HPL – such as taking access direct from SH14 or from the south eastern corner of the site. Ultimately Ms Anich concluded that alternative layouts would not achieve a well-functioning urban environment as required by clause 3.6(5).

2.45 The reporting officer has focused on protecting the HPL, but clause 3.6(5) is expressed (emphasis added) as *“the minimum necessary to provide the required development capacity while achieving a well-functioning urban environment”*.

2.46 The Supreme Court in *King Salmon* held that, in the context of s5 RMA, *“while”* means *“at the same time as”* and that the words either side of *“while”* should be read as an integrated whole.<sup>6</sup>

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<sup>4</sup> Ministry for the Environment NPS HPL Guide to Implementation December 2022 at page 44

<sup>5</sup> Ministry for the Environment NPS HPL Guide to Implementation December 2022 at page 43

<sup>6</sup> *Environment Defence Society Inc v The New Zealand King Salmon Company Ltd* [2014] NZSC 38 at [24(c)]

2.47 With respect to clause 3.6(5) the Guide states:

*“Comparisons against other reasonably practicable and feasible options may be a way to demonstrate that the loss of HPL is minimised. For example, an urban rezoning proposal may minimise the loss of HPL by being predominantly on non-HPL land and some smaller areas of LUC class 3 land, while deliberately avoiding larger areas of LUC 1 and 2 land. The design of an urban rezoning proposal can also minimise the loss of HPL and ensure any loss of HPL is an efficient use of this land. For example, this may involve efficient location of infrastructure, key roading connections, and/or a structure plan design that ensures a high yield for the development to minimise the loss of HPL while providing the required development capacity and achieving a well-functioning urban environment.”*

2.48 These are exactly the type of considerations assessed by Ms Anich.

### **Conclusion on NPS HPL clause 3.6**

2.49 The Addendum 42A report is entirely incorrect in asserting a failure to assess NPS HPL clause 3.6. This assessment has been undertaken in detail and in accordance with the Ministry’s Guide. I submit that the Applicant’s evidence has addressed clause 3.6 and established that NPS HPL policy 5 is met, and there is no NPS HPL related reason to decline PC81.

## **3. NEW ISSUE RAISED IN ADDENDUM TO THE 42A REPORT**

3.1 The introduction to the Addendum 42A report states:

*“The purpose of this statement is to address additional information received from the Applicant in relation to the following matters:*

- *Infrastructure feasibility.*
- *Road design and pedestrian connections.*
- *NPS-FM.*
- *NPS-HPL.*

*This addendum addresses the additional information in light of the fact it was produced after the circulation, and in response to matters raised within, the original s42A report.”*

3.2 The “Concluding Statement” of the Addendum 42A report however then states an entirely unrelated new issue at paragraphs 61 and 68 (emphasis added):

*“The key question for the Hearing Panel then becomes what zoning of this land is the most appropriate, under section 32 of the RMA. In my opinion, the assumptions provided within the section 32 analysis, including the additional analysis provided by way of the Statement of Evidence of Ms Anich do not provide a clear comparison between various options available for the development of the site, but rely solely on its own objectives as being appropriate, without being consistent with the broader plan objectives...”*

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<sup>7</sup> Ministry for the Environment NPS HPL Guide to Implementation December 2022 at page 43

*“Overall, as matters stand, I continue to be unable to conclude, as required under section 32 of the RMA, that the objectives proposed in PPC81 are the most appropriate way to achieve the purpose of the Act, and that the provisions proposed (including the zoning of the land) are the most appropriate way to achieve the objectives.”*

3.3 The appropriateness of the PC81 objectives to achieve the purpose of the Act, and consistency with the operative Plan objectives, was not raised as an issue in the original s42A report.

- In the section dealing with s32 evaluation, paragraph 79 of the original s42A report identified four options (status quo, whole site industrial, whole site residential, and PC81 split) that the reporting officer “would expect to see assessed”. (Ms Anich provided additional assessment of these options in Appendix 1 to her primary evidence). There was no mention in that section of the original s42A report of any perceived inadequacy of the Applicant’s s32 assessment of the objectives of the operative Plan.
- Appendix G to the original s42A report is the reporting officer’s assessment of PC81 against the objectives and policies of the operative Plan – chapters 2, 3, 5 and 7. Nowhere in the reporting officer’s commentary on the objectives is any reference made to any perceived inadequacy of the Applicant’s s32 assessment of the objectives of the operative Plan. The only matters raised are productive land, effects on ecosystems, and the feasibility of servicing (raw water supply, bridging of the Awakino River for wastewater, and the shared path). In response to Chapter 3 objectives the reporting officer comments (emphasis added) *“In the main I accept the assessment of the objectives and policies provided within the Applicant’s further information response dated 20 April 2022, apart from those matters that have been previously raised”* (referencing raw water supply, bridging of the Awakino River for wastewater, and the shared path).
- Section 11 of the original s42A report is the Conclusion. In paragraph 382 the reporting officer sets out “aspects of PPC81 that I cannot support due to lack of information”, listing effects on wetlands and biodiversity, highly productive land, raw water supply, and bridging of the Awakino River for wastewater. At paragraph 391 the reporting officer recommends that the Applicant provide an amended set of provisions to address a “clear cascade” of objectives, policies and rules; raw water supply; bridging of the Awakino River for wastewater; feasibility of the shared path; NPS HPL; and NPS FM. Nowhere in the reporting officer’s Conclusion is any reference made to any perceived inadequacy of the Applicant’s s32 assessment of the objectives of the operative Plan.

- 3.4 It is extraordinary that a s42A report would not raise any issue with the Applicant's s32 assessment of the objectives of the operative Plan – even when requesting additional s32 assessment of options – and then on the eve of hearing recommend declining a plan change for this newly identified perceived inadequacy.
- 3.5 Even more extraordinary is that this s32 analysis was undertaken by the Applicant a year ago in response to the Council's Request for Further Information, accepted by the Council at that time, and specifically accepted in the original s42A report by the reporting officer.
- 3.6 Ms Anich will address this further at the hearing.
- 3.7 The reporting officer also maintains her view that the PC81 objectives and policies require redrafting to follow a "formative cascade" but has again declined to offer any specific feedback on the objectives and policies or suggest any improvements to their drafting. The Applicant cannot be expected to chase shadows.
- 3.8 Ms Anich remains open to minor amendments to improve the objectives and policies should the Commissioners identify any drafting issues.
- 3.9 I submit that the Applicant's evidence has comprehensively addressed s32 and there is no s32 related reason to decline PC81.

#### **4. CONCLUSION**

- 4.1 I submit that having regard to the evidence for the Applicant there are no matters identified in the Addendum 42A Report that justify a recommendation to decline PC81.



**Sarah Shaw**

Counsel for Dargaville Racing Club Inc

27 March 2023