BEFORE THE HEARING PANEL APPOINTED BY KAIPARA DISTRICT COUNCIL

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

AND

IN THE MATTER OF the hearing of submissions on Proposed Private Plan Change 81: Dargaville Racecourse

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OPENING LEGAL SUBMISSIONS BY COUNSEL FOR KAIPARA DISTRICT COUNCIL
DATED 22 MARCH 2023

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MAY IT PLEASE THE COMMISSIONERS:

1. INTRODUCTION

1.1 I have been asked to present these legal submissions by Kaipara District Council (**Council**) staff, and the author of the section 42A Report for Proposed Private Plan Change 81: Dargaville Racecourse (**PPC81**), Ms Louise Cowan.

1.2 As the Hearing Panel will be aware, PPC81:

(a) is a plan change request seeking changes to the Operative Kaipara District Plan (**Operative District Plan**) lodged by the Dargaville Racing Club Incorporated (**the applicant**) and accepted by the Council under clause 25(2)(b) of Schedule 1 of the Resource Management Act 1991 (**RMA**);

(b) seeks to re-zone the 47 hectare Dargaville Racing Club site (**Site**), located around 3.5km north east of Dargaville on the corner of State Highway 14 and Awakino Point North Road, from rural zone to a combination of:

(i) General Residential Area (23.67ha);
(ii) Large Lot Residential Area (3.44ha);
(iii) Light Industrial Area (9.53ha);
(iv) Neighbourhood Centre Area (0.28ha); and
(v) Open Space Area (5.75ha).[1]

(c) would, if approved, amend the Operative District Plan by:

(i) amending the relevant planning maps; and
(ii) including in the Operative District Plan a new Chapter called the Trifecta Development Area containing its own objectives, policies and rules for the Development Area.[2]

1 Page 23 of the Plan Change Request.
2 Page 21 of the Plan Change Request, and Appendix 2.

1.3 PPC81 has been comprehensively assessed by Ms Cowan in her section 42A Report, and supporting expert assessments.[3] Overall, there is agreement between the experts engaged by the applicant, and the authors of the section 42A Report and supporting specialist assessments on a wide range of matters.[4]

1.4 However, as at the date Ms Cowan lodged her section 42A Report (10 March 2023) there were also several aspects of PPC81 that she was unable to support, in some cases due to a lack of information. As noted in her section 42A Report, these include:

(a) The potential for adverse effects to occur in relation to wetland ecology and biodiversity when the site is developed;

(b) Land identified as LUC 2 and LUC 3 should not be rezoned to urban zoning unless the tests included in clause 3.6 of the National Policy Statement for Highly Productive Land 2022 find that it is appropriate to do so;

(c) Sufficient certainty that raw water can be sourced to appropriately supply potable water to the development; and

(d) Sufficient certainty that reticulated wastewater disposal infrastructure can bridge the Awakino River to enable the site to be serviced if it is rezoned as proposed.[5]

1.5 Accordingly, Ms Cowan in her section 42A Report has recommended that PPC81 be declined.[6]

1.6 Since Ms Cowan's section 42A Report, the applicant has indicated that it will:

(a) obtain a site specific soil assessment to confirm whether there is any LUC 1, 2 or 3 land on the site and, if so, its exact extent

3 Mr David Usmar - Water and Wastewater (Appendix H to the section 42A Report), Mr Leo Hills – Transportation (Appendix I to the section 42A Report), and Mr Sejal Sangwai – Stormwater (Appendix J and Appendix L to the section 42A Report).
4 See paragraph 381 of the section 42A Report.
5 For a full list of the various issues, see paragraphs 382-391 of the Section 42A Report.
6 See paragraph 389 of the section 42A Report.

(given the relatively high level nature of the mapping in the New Zealand Land Resource Inventory data base);

(b) obtain a wetland assessment to confirm whether there are any wetlands on the site, as defined under the National Policy Statement for Freshwater Management 2020; and

(c) Lodge these, and an addendum to the applicant's planning evidence addressing these matters, with the Hearing Panel today.

1.7 Ms Cowan will then be given the opporuntity to lodge an addendum to her section 42A Report, including any changes to her reccomendation, on Friday 24 March 2023.

1.8 These submissions reflect the "state of play" as at today's date (22 March 2023), and address the following legal issues:

(a) The legal framework under the RMA for the Council's decision on PPC81;

(b) The applicability of the National Policy Statement on Urban Development 2020 (**NPS-UD**) to Dargaville and to PPC81;

(c) In response to the Hearing Panel's directions dated 3 February 2023, the applicability and weight the Panel should place on the following documents:

(i) The National Policy Statement for Highly Productive Land 2022;

(ii) Te hau marohiki anamata – Towards a productive, sustainable and inclusive economy; Aotearoa New Zealand's First Emissions Reduction Plan, 16 May 2022; and

(iii) The Kaipara District Spatial Plan 2050.

(d) The relevance and weight the Panel should place on the National Adaptation Plan.

(e) The relevance and weight the Panel should place on the exposure draft of the Proposed Kaipara District Plan.

(f) The relevance of the site not being within the Greater Structure Plan Policy Area for Dargaville (in Chapter 3 of the Operative District Plan).

(g) With respect to the infrastructure necessary to service PPC81, the relevant legal requirements that must be satisfied in relation to the provision of wastewater and water infrastructure; and

(h) The issue of whether the upgrade to the intersection of Awakino Point North Road and State Highway 14, required under the PPC81 provisions, should be a T-intersection or a round-about (in response to the submission from Waka-Kotahi).

2. THE LEGAL FRAMEWORK FOR THE DECISION ON PPC81

2.1 I understand that the Hearing Panel has been delegated the power to make a recommendation on PPC81 to the Council, and the Council will then make a decision.

2.2 The Council's decision-making on PPC81 sits within a comprehensive framework established under the RMA. While these provisions are no-doubt well-known to the Hearing Panel, it is useful to set them out.

The relevance of PPC81 being a plan change request

2.3 As I have already noted, PPC81:

(a) is a plan change request that was lodged with the Council by the applicant on 21 February 2022 under clause 21 of Schedule 1 of the RMA; and

(b) was “accepted” by the Council under clause 25(2)(b) of the RMA on 27 July 2022.

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

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

(b) Council is required to make a decision on PPC81 and submissions under clause 10 of Schedule 1. The statutory framework that applies to that Council’s decision is the same as for any plan change under the RMA.

The statutory framework for the Panel’s decision on PPC81

2.5 These submissions now address the statutory framework for the Hearing Panel’s recommendation and the Council’s decision on PPC81.

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

(a) Its functions under section 31; and

(b) The provisions of Part 2; and

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

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

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

(f) Any regulations.

2.7 When changing a district plan, the Council *must have regard to*:[7]

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

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

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

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

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

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

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

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

2.8 The Council must also *take into account* any relevant planning document recognised by an Iwi authority.[8]

7 Section 74(2).
8 Section 74(2A).

2.9 Finally, Council *must not have regard to* trade competition or the effects of trade competition when changing a district plan.[9]

Content of a district plan

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

(a) Any national policy statement; and

(b) Any New Zealand coastal policy statements; and

(c) A national planning standard; and

(d) Any regional policy statement.

2.11 The Supreme Court in *King Salmon*[10] found the words "give effect to" mean "implement". On the face of it, this is a strong directive, creating a firm obligation on planning authorities.

2.12 A district plan *must not be inconsistent with*:[11]

(a) A water conservation order; or

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

2.13 Finally, under section 75(1), district plan policies *must* implement objectives while any rules *must* implement the policies. Section 76(1) requires rules to achieve the objectives and policies of the plan. In making a rule, Council *must have regard to* the actual or potential effect on the environment of activities, including any adverse effect.[12]

Section 32 Evaluation

2.14 PPC81 was lodged with a section 32 assessment prepared by consultants on behalf of the applicant.

9 Section 74(3).
10 *Environmental Defence Society Inc v New Zealand King Salmon Co Ltd* [2014] NZSC 38 at [77].
11 RMA, s 75(4).
12 Section 76(3) RMA.

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

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

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

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

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

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

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

2.16 Each objective must be examined during the evaluation, but it is not necessary that each objective individually be the most appropriate way of achieving the purpose of the Act. The High Court has held that it may be through their interrelationship and interaction that the purpose of the Act is able to be achieved.[13]

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

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

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

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

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

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

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

Section 32AA further evaluation

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

Part 2

2.19 The role Part 2 plays in decision-making processes for plan changes was refined by the Supreme Court in *Environmental Defence Society Incorporated v The New Zealand King Salmon Company Limited*[14] ("*King Salmon*").

2.20 The Supreme Court held that in the absence of invalidity, incomplete coverage or uncertainty of meaning in the relevant higher order statutory planning documents, there is no need to refer back to Part 2 of the RMA when determining a plan change.[15] This is because the higher order planning document is assumed to already give effect to Part 2. However, if one or more of these three caveats apply, reference

14 King Salmon, above note 10.
15 At [85] and [88].

to Part 2 may be justified and it may be appropriate to apply the overall balancing exercise.[16]

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

2.22 Ms Cowan, as the author of the section 42A Report:

(a) Does not, for her own part, have concerns that any of the three caveats identified in King Salmon (i.e. invalidity, incomplete coverage, or uncertainty of meaning) apply to the higher order policy documents she has assessed; however

(b) She has assessed PPC81 against Part 2, in any case, to assist the Panel, in the event it were to arrive at a different conclusion.[17]

The Council's Decision

2.23 The Council is required under clause 10 of Schedule 1 to give a decision on PPC81 and submissions, including reasons for its decisions.

2.24 When giving reasons, the Council may address submissions by grouping them according to the provisions or subject matter.[18] The Council is not required to addresses each individual submission.[19]

3. THE APPLICABILITY OF THE NPS-UD TO DARGAVILLE AND PPC81

3.1 The Hearing Panel, in its recommendation, needs to make a finding whether Dargaville comes within the definition of "urban environment" under the NPS-UD, and accordingly the NPS-UD applies to PPC81.

16 At [88].
17 See paragraphs 198-206 of the section 42A Report.
18 Schedule 1, Cl 10(2).
19 Schedule 1, Cl 10(3).

3.2 In my respectful submission, the evidence before the Hearing Panel establishes Dargaville is not an "urban environment" under the NPS-UD for the reasons that follow.

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

3.4 It applies to:

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

(b) "planning decisions" (includes, as here, decisions on a plan change to an operative plan) by any local authority that affect an urban environment.[20]

3.5 Certain areas of New Zealand are urban environments under the NPS-UD by virtue of being identified as tier 1 or tier 2 urban environments in the NPS-UD.[21] Dargaville is not identified in the NPS-UD as a tier 1 or tier 2 urban environment. However, Dargaville would be a tier 3 urban environment if it comes within the definition of "urban environment" under the NPS-UD.

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

(a) PPC81 must give effect to objectives and policies in the NPS-UD that apply to tier 3 urban environments; and

(b) The Kaipara District would be required to comply with obligations in the NPDS-UD on tier 3 local authorities.[22]

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

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

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

3.8 There is currently no case law on the definition of "urban environment" under the NPS-UD, and how it is to be applied.

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

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

(b) Second, the use of the word "intended" in both limbs of the definition is significant. "Intended" is not defined in the NPS-UD. In the absence of a specific definition, the law requires words used in planning documents under the RMA to be given their plain meaning, in light of their context: *Powell v Dunedin City Council* [2004] 3 NZLR 721.[23] The Collins English Dictionary defines "intended" as "planned or future". Accordingly, in my submission, an area will come within the definition of urban environment under the NPS-UD if there is evidence that it is both planned to be "predominantly urban in character" and is or is planned or projected to be "part of a housing and labour market of at least 10,000 people" at some point in the future.

(c) In terms of "when" that point in the future is, the NPS-UD does not specify a date or timeframe for the assessment of when it is "intended" that an area be predominantly urban in character" and "part of a housing and labour market of at least 10,000 people". However, the NPS-UD includes obligations on local authorities subject to the NPS-UD to plan for the "long term" - defined as meaning "between 10-30 years", in this case by around 2053. In my submission, that provides a

23 Paragraph [35].

logical end point for any assessment of whether it is "intended" an area be predominantly urban in character" and "part of a housing and labour market of at least 10,000 people".

(d) Lastly, in terms of the two limbs of the definition, I note there appears to be a degree of flexibility about limb (b) and the area which can be considered part of the same housing and labour market. This requirement could, conceivably be met if there was evidence that a number of separate towns and villages formed part of one combined housing and labour market of 10,000 or more people. However, the areas that count towards this combined housing and labour market of at least 10,000 people have to be predominantly urban in character under limb (a) of the definition. So, while an agglomeration of towns or villages could meet limb (b) of the definition, rural or rural residential population would not count towards this contribution as they do not satisfy the requirement in (a) of the definition of being "predominantly urban".

3.10 While not directly relevant to the Hearing Panel's finding on whether Dargaville is an "urban environment" under the NPS-UD, I note that:

(a) The Hearing Panel Recommendation and the Council's decision on Private Plan Change 78: Mangawhai Central found that Mangawhai comes within the definition of "urban environment" under the NPS-UD.

(b) This was (essentially) on the basis of projected population growth in Mangawhai over the next 30 years and a finding that Mangawhai forms part of a combined housing and labour market with neighbouring Warkworth, Wellsford and Whangarei (exceeding 10,000 people).[24]

(c) Since the Council's decision on PC78, Council officers have taken further advice on the applicability of the NPS-UD to the

24 See the Hearing Panel's Recommendation on Private Plan Change 78, dated 12 March 2021, paragraphs 37-58. The Hearing Panel's Recommendation was adopted as the Council's decision on 28 April 2021.

Kaipara District, and are currently seeking guidance from Elected Members about how the NPS-UD will be applied, going forward, as part of the district plan review.[25]

3.11 I understand the applicant's position is that Dargaville is not an "urban environment", as it is not part of a housing or labour market of 10,000 people. Accordingly, the NPS-UD does not apply to PPC81. [26] Although, the applicant considers PPC81 to be consistent with the NPS-UD.[27]

3.12 For the section 42A team, Ms Cowan also does not consider Dargaville to be an "urban environment" under the NPS-UD as:

(a) Dargaville's current population (2022) is only 5,214 people, and this is projected to increase to only 6,167 people by 2054; and

(b) There is no evidence to suggest that Dargaville forms part of a "combined" housing and labour market with other urban areas exceeding 10,000 people.[28]

3.13 Accordingly, in my respectful submission, the evidence before the Hearings Panel establishes that Dargaville is not an urban environment under the NPS-UD. Accordingly, the NPS-UD does not apply to PPC81.

4. THE APPLICABILITY OF THE NPSHPL 2022 TO PPC81

4.1 The Hearing Panel has directed the parties to address the applicability and weight the Hearing Panel should place on the National Policy Statement for Highly Productive Land 2022 (**NPS-HPL**).[29]

4.2 In my submission, for the reasons that follow:

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25 With this matter being an agenda item before the Council at an upcoming meeting.
26 Plan Change 81, page 248.
27 Evidence of Ms Anich, paragraph 12.56.
28 See paragraphs 102-108 of the section 42A Report. Ms Cowans's analysis is underpinned by a more detailed assessment by Formative, attached as Appendix C to the section 42A Report.
29 Second Direction of the Hearing Panel dated 3 February 2023.

(a) Unless a site specific soil assessment shows the land use capability data base is wrong and the site does not contain any LUC 2 or 3 land, the site will contain some highly productive land as defined under the NPS-HPL. The extent of this, based on current information, is shown in Ms Cowan's section 42A Report.[30]

(b) The NPS-HPL contains a strong directive that the urban rezoning of highly productive land is "avoided", except as provided for under the NPS-HPL.

(c) Accordingly, if the site does contain highly productive land, for those parts of the site to be re-zoned urban, the applicant needs to provide an assessment justifying this under clause 3.6(4) of the NPS-HPL.[31] Alternatively, the applicant could consider amending its proposal so those parts of the site had a "non-urban" zoning.

Whether the site contains any highly productive land as defined under the NPS-HPL

4.3 The NPS-HPL came into force on 17 October 2022,[32] with the aim of ensuring "highly productive land" is protected for use in land-based primary production, both now and for future generations.[33]

4.4 The NPS-HPL does not contain any transitional or savings provisions that prevent it from applying to PPC81.[34]

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

> …land that has been mapped in accordance with clause 3.4 and is included in an operative regional policy statement as required by clause 3.5 (but see clause 3.5(7) for what is treated as highly productive land before the maps are included in an operative regional policy statement

30 See paragraphs 125 – 149 of the section 42A Report, and in particular the map below paragraph 130.
31 See paragraph 149 of the section 42A Report.
32 NPSHPL, clause 1.2.
33 NPSHPL, Objective 1.
34 If this plan change was a Council initiated or adopted plan change the NPSHPL notified before 17 October 2022, the NPSHPL would not apply due to clause 3.5(7)(b)(ii).

and clause 3.5(6) for when land is rezoned and therefore cases to be highly productive land)

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

> Until a regional policy statement containing maps of highly productive land in the region is operative, each relevant territorial authority and consent authority must apply this National Policy Statement as if references to highly productive land were references to land that, at the commencement date:
>
> (a) is
>
> (i) zoned general rural or rural production; and
>
> (ii) LUC 1, 2 or 3 land; but
>
> (b) is not:
>
> (i) identified for future urban development; or
>
> (ii) subject to a Council initiated, or an adopted, notified plan change to rezone it from general rural or rural production to urban or rural lifestyle.

4.7 Applying the transitional definition of highly productive land to the plan change site, as at 17 October 2022:

(a) The site was zoned rural land;

(b) As set out in Ms Cowan's section 42A Report, the New Zealand Land Resource Inventory data base identifies the site as containing small portions of LUC 2 land (which PPC81 seeks to rezone light industrial and residential) and a portion of LUC 3 land (which PPC81 seeks to rezone to large lot residential and open space).[35]

35 See paragraph 130 of the section 42A Report, and the map below.

(c) Clause 3.5(7)(b) contains an exclusion from the transitional definition of highly productive land where, at the commencement date, land was "identified for future urban development". "Identified for future urban development" is defined in the NPS-HPL as meaning:

> "Identified in a published Future Development Strategy as land suitable for commencing urban development over the next 10 years; or
>
> identified:
>
> (i) in a strategic planning document as an area suitable for commencing urban development over the next 10 years; and
>
> (ii) at a level of detail that makes the boundaries of the area identifiable in practice."

(d) In terms of the exclusions from the definition of highly productive land where land was (as at 17 October 2022) "identified for future urban development", in my submission, neither of the exclusions apply because:

(i) The Kaipara District Council does not have any published "Future Development Strategy". These are only required under the NPS-UD for tier 1 and 2 local authorities.[36]

(ii) Part of the site is identified in a "strategic planning document", the Kaipara District Spatial Plan 2050, as being zoned industrial land (i.e. urban). However, there is nothing in the Spatial Plan indicating that the site will be industrial within the next 10 years (the Spatial Plan has a 30 year time frame). Furthermore, it is arguable whether the spatial plan is at a level of detail that means property boundaries are identifiable in practice.

36 See Subpart 4 of the NPSUD.

4.8 Accordingly, in my submission:

(a) Unless a site specific soil assessment shows the land use capability data base is wrong and the site does not contain any LUC 2 or 3 land[37], the strip of land within the site that contains LUC 2 soils and runs along the site's boundary with Awakino Point North Road and the elevated part of the site containing LUC 3 soils will be "highly productive land" and subject to the NPS-HPL.[38]

(b) However, the balance of the site does not come within the definition of "highly productive land" under the NPS-HPL, and the NPS-HPL does not apply. Guidance from the Ministry for the Environment confirms that where the transitional definition of highly productive land applies to only part of a land parcel and the balance of the land parcel is LUC class 4-8, the NPS-HPL only applies to the part of the lot that comes within the definition of highly productive land.[39]

The planning consequences of being "highly productive land" under the NPS-HPL

4.9 As explained above, the NPS-HPL contains a sole objective:
"*Highly productive land is protected for use in land-based primary production, both now and for future generations."*

4.10 With respect to the urban rezoning of highly productive land Policy 5 of the NPS-HPL provides:
"***Policy 5****: the urban rezoning of highly productive land is avoided, except as provided in this National Policy Statement*."

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

37 I note the definition of LUC 1, 2 or 3 land in the NPSHPL provides for "more detailed mapping to be undertaken that uses the Land Use Capability classification".
38 As shown on the map at paragraph 130 of the section 42A Report.
39 National Policy Statement for Highly Productive Land, Guide for Implementation, December 2022, page 18.

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

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

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

4.13 For completeness, I note that Policy 6 of the NPS-HPL provides:
"***Policy 6****: The rezoning and development of highly productive land as rural lifestyle is avoided, except as provided in this National Policy Statement."*

4.14 Clause 3.7 of the NPS-HPL provides that territorial authorities must avoid the re-zoning of highly productive land to rural lifestyle, except as provided for under clause 3.10.

4.15 However, in my submission, Policy 7 and clauses 3.7 and 3.10 do not apply as PPC81 does not propose to re-zone any land as "rural lifestyle". The re-zonings that are proposed under PPC81 are all to "urban" zones, as defined – including the residential large lots.

4.16 Accordingly, overall, in my submission, if the site does contain highly productive land:

(a) for that part of the site to be re-zoned urban, as set out in Ms Cowan's Report, the applicant needs to provide an

assessment justifying this under clause 3.6(4) of the NPS-HPL.[40]

(b) Alternatively, the applicant could consider amending its proposal so those parts of the site had a "non-urban" and "non-rural lifestyle" zoning.

5. THE APPLICABILITY AND WEIGHT THE PANEL SHOULD PLACE ON THE EMISSIONS REDUCTION PLAN 2022

5.1 The Hearing Panel has directed the parties to address the applicability and weight the Hearing Panel should place on Te hau marohiki anamata – Towards a productive, sustainable and inclusive economy; Aotearoa New Zealand's First Emissions Reduction Plan, 16 May 2022 (**ERP**).

5.2 Section 74(2)(d) of the RMA was inserted into the RMA on 30 November 2022 by section 21 of the Resource Management Amendment Act 2020. It requires a territorial authority, when preparing or changing a district plan to "have regard" to "*any emissions reduction plan made in accordance with section 5ZI of the Climate Change Response Act 2002*."

5.3 The ERP was made by the Minister for the Environment under section 5ZI of the Climate Change Response Act 2002 (**CCRA**) and contains strategies, policies and actions for achieving the Government's 2022-2025 emissions budget, which are in turn designed to achieve the net-zero greenhouse gas emissions target in section 5Q of the CCRA.

5.4 The primary purpose of the ERP appears to be to outline the actions that Central Government will take to help reduce emissions. For example, increasing access to electric vehicles, supporting businesses to improve energy efficiency, introducing emissions pricing for agriculture, reducing waste, establishing native forests as carbon sinks, replacing coal and other carbon intensive fuels. Many of these initiatives are not directly relevant to a plan change application.[41]

40 See paragraph 149 of the section 42A Report.
41 Page 10 of the ERP.

5.5 I understand Ms Robins, for Waka Kotahi, considers the ERP to require provision to be made in the PPC81 provisions for cycle parking, electric vehicle charging spaces and infrastructure to support electric vehicle use and walking and cycling networks within the site that connect to wider networks.[42]

5.6 While there could be merit in that suggestion, from a legal point of view, the key point is that as a result of the transitional and savings provisions that apply, there is no requirement for this Hearing Panel to "have regard" to the ERP under section 74(2)(d) of the RMA as part of its recommendation on PPC81 because:

(a) The transitional and savings provisions that apply are set out in clause 26 of Schedule 12 of the RMA;

(b) These provide that where (as here) a private plan change request has immediately before 30 November 2022 (described in the transitional provisions as the "effective date") been publicly notified but not yet proceeded to the stage where no further appeal is possible, it must be determined as if the various "climate change amendments" (includes the amendment inserting section 74(2)(d) of the RMA) "had not been enacted".

6. THE RELEVANCE AND WEIGHT THE PANEL SHOULD PLACE ON THE NATIONAL ADAPTATION PLAN

6.1 The Hearing Panel has not directed the parties to address the applicability and weight the Hearing Panel should place on the National Adaptation Plan.

6.2 Section 74(2)(e) of the RMA was inserted into the RMA on 30 November 2022 by section 21 of the Resource Management Amendment Act 2020 – the same section of the Amendment Act that inserted the requirement to "have regard" to the ERP (discussed above). Section 74(2)(e) of the RMA requires a territorial authority, when preparing or changing a district plan to "have regard" to "*any*

42 Evidence of Ms Robins, paragraph 8.18.

national adaptation plan made in accordance with section 5ZS of the Climate Change Response Act 2002."

6.3 New Zealand's first National Adaptation Plan (**NAP**) was published in August 2022. The NAP sets out Central Government's approach to adaptation and outlines "*Government-led strategies, policies and proposals that will help New Zealand adapt to the changing climate and its effects.*"[43]

6.4 However, in my submission, there is no requirement on the Hearing Panel to "have regard" to the NAP under section 74(2)(e) of the RMA as part of its recommendation on PPC81. This is because section 74(2)(e) of the RMA is subject to the same transitional and savings provisions contained in clause 26 of Schedule 12 of the RMA, as set out above. Accordingly, section 74(2)(e) of the RMA does not apply to PPC81 as it was notified before 30 November 2022, but not yet proceeded to a state where no further appeal is possible.

7. THE APPLICABILITY AND WEIGHT THE PLANEL SHOULD PLACE ON THE KAIPARA SPATIAL PLAN 2050

7.1 The Hearing Panel has directed the parties to address the applicability and weight the Hearing Panel should place on the Kaipara Spatial Plan 2050 (**Spatial Plan**).[44]

7.2 In my submission, the Hearing Panel is required to "have regard" to the Spatial Plan under section 74(2)(b)(i) of the RMA as a document prepared under another Act. In this case, the Spatial Plan meets these requirements as it has been the subject of consultation and adopted by the Council under the Local Government Act 2002. See for example *Middle Hill Ltd v Auckland Council* [2022] NZEnvC 162 and *Kiwi Property Holdings Ltd v Christchurch CC* [2012] NZEnvC 92.[45]

7.3 In terms of the requirement on the Hearing Panel to "have regard" to the Spatial Plan, the High Court in *Unison Networks v Hastings DC*

43 Aotearoa New Zealand's First National Adaptation Plan, Executive Summary.
44 Second Direction of the Hearing Panel, dated 3 February 2023.
45 In Middle Hill Ltd the Court found it was required to have regard to a Spatial Plan. In Kiwi Property Holdings Limited the Court had regard to a wide range of wide range of other plans and documents including area plans and urban development strategies prepared under the LGA02.

held in relation to the requirement under the RMA to "have regard" to a particular matter that:

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

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

7.5 While the site is currently zoned rural under the Operative District Plan, the Spatial Plan identifies part of the site as being within the Awakino Point area, that the Spatial Plan identifies for future industrial use.[46]

7.6 In relation to the Spatial Plan I note that it:

(a) has been the subject of consultation with the community and adopted by the Council under the Local Government Act 2002.

(b) Is stated as reflecting the views of the community (as expressed through consultation) that more industrial zoned land be made available in Dargaville in the future.[47]

(c) However, as the Spatial Plan acknowledges, the purpose of the Spatial Plan is to create a "frame work" for future growth. In this regard, the Spatial plan is simply the first step, and to be given effect needs to be followed by further decisions and

46 Part 2, the Dargaville Spatial Plan, page 58.
47 Part 2, the Dargaville Spatial Plan, page 58.

more detailed assessment, including structure planning, infrastructure planning, and ultimately a change in zoning as part of the district plan review, or a plan change.[48]

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

(a) The Spatial Plan is relevant to the Hearing Panel's assessment of PPC81. It has had the benefit of public consultation and community engagement and at the current time, sets the Council's high level vision for future growth and development in Dargaville: see for example *Middle Hill Ltd v Auckland Council* [2022] NZEnvC 162

(b) However, the weight that the Hearing Panel should give to the Spatial Plan is, in my submission, relatively limited. The Hearing Panel's primary focus in its assessment of PPC81 must be on the RMA statutory planning documents, such as the NPS-UD, NPS-HPL, Regional Policy Statement and Regional Plan. While the Spatial Plan signals an expectation that this land will be re-zoned, the industrial zoning for the site indicated in the Spatial Plan is in no way "set in stone". It is open to the Hearing Panel to find that the mix of zoning proposed under PPC81 is "more appropriate" in section 32 terms than zoning the entire site industrial (as contemplated under the Spatial Plan).

8. THE RELEVANCE AND WEIGHT THE PANEL SHOULD PLACE ON THE EXPOSURE DRAFT OF THE PROPOSED KAIPARA DISTRICT PLAN

8.1 As identified in Ms Cowan's section 42A Report, the exposure draft of the Kaipara District Council's proposed district plan shows the site as being zoned Heavy Industrial.[49]

48 Page 12 of the Structure Plan.
49 Paragraph 143 of the section 42A Report.

8.2 In my submission, the exposure draft of the proposed district plan has no legal status. The zoning proposed for the site in the exposure draft could be changed between now and when the proposed plan is publicly notified. Once publicly notified, the proposed district plan will need to go through a hearing process with rights of appeal. Accordingly, this Hearings Panel should not place any weight on the site's zoning under the exposure draft, as part of its decision.

9. THE RELEVANCE OF THE SITE NOT BEING WITHIN THE GREATER STRUCTURE PLAN POLICY AREA FOR DARGAVILLE

9.1 As identified in Ms Cowan's section 42A Report, the plan change site sits just outside of the Greater Structure Plan Policy Area for Dargaville.[50] The extent of this area is identified on maps included at Appendix A – Growth Areas, Dargaville and Maungaturoto, and subject to objectives and policies contained in Chapter 3 Land Use and Development Strategy of the Operative Kaipara District Plan.

9.2 In terms of the relevance of being in the Structure Plan Policy Area:

> This Chapter provides objectives and policies for Council to respond to growth and economic development opportunities. While this Chapter does contain methods, it does not contain 'rules'. The outcomes sought for land use and development (how the objectives and policies are implemented) are to be achieved through land use and subdivision rules and performance standards in the Zone Chapters, through Part B and through future Structure Planning of the identified Growth Areas. How Council intends to implement future Structure Plans is demonstrated through the implementation of Chapter 3B, the Mangawhai Growth Area. While there are no Rules in this Chapter, **if you are doing a Private Plan Change or require a Resource Consent (particularly if you are preparing an Integrated Development subdivision application), Council will consider how your proposal contributes to the objectives and policies of this Chapter including, where relevant, the Structure Plan outcomes contained in Appendix 3.1 to this Chapter, and Chapter 3B. (our emphasis)**

9.3 If the site did fall within the Structure Plan Area, it would be subject to assessment against additional objectives and policies in Chapter 3 that may (or may not) support the land being re-zoned. Given the plan

50 Paragraph 144 of the section 42A Report.

change site is not within the Structure Plan Area, the objectives and policies in Chapter 3 do not apply. However, the fact that the plan change site is located just outside of the Structure Plan area identified in the Operative Plan does not act as a "bar" to the land being re-zoned.

9.4 For completeness, I note that the areas identified for growth under the Spatial Plan from 2020 may (arguably) express a more up-to-date statement of the Council's intentions for growth, compared to the Structure Plan Area that dates from when the Kaipara District Plan was made Operative in 2013.

10. THE RELEVANT LEGAL REQUIREMENTS THAT MUST BE MET IN RELATION TO THE PROVISION OF RETICULATED WASTEWATER AND POTABLE WATER TO PPC81

10.1 With respect to the infrastructure required to service the plan change site, the applicant proposes that:

(a) All wastewater from the site (apart from the large-lot Residential), will be treated at the Council's Dargaville Wastewater Treatment Plant (**Dargaville WWTP**), with the wastewater being conveyed to the Dargaville WWTP by pipe, including a pipe over the Awakino River, that it is proposed would be attached to the existing Waka Kotahi bridge.[51]

(b) Potable water would be provided from the existing Dargaville Water Treatment Plant (**Dargaville WTP**). As the applicant has acknowledged, due to limitations in raw water supply to the Dargaville WTP, rain water harvesting to reduce water demand, and ground water from a community bore may also need to be considered.[52]

10.2 In my submission, it is important to acknowledge that this hearing is a hearing for the proposed re-zoning of land, not a resource consent application. With plan changes, and in particular (as here) a private plan change request, it is very often the case that the infrastructure

51 Civil Engineering Assessment by Lands and Survey Limited, lodged with PPC81, pages 15-17.
52 Civil Engineering Assessment by Lands and Survey Limited, lodged with PPC81, pages 28-30.

necessary to service development has not been built yet. However, it does not need to be. As the Environment Court held in *Foreworld Developments Limited v Napier City Council*[53], the Environment Court stated that (my emphasis):

> [*15] **It is bad resource management practice and contrary to the purpose of the Resource Management Act - to promote the sustainable management of natural and physical resources; to zone land for an activity when the infrastructure necessary to allow that activity to occur without adverse effects on the environment does not exist, and there is no commitment to provide it.** In McIntyre v Tasman District Council (W 83/94) the Court said:*
>
> > *We agree with Mr Robinson that in this case the extension of services such as the sewage system and roading should be carried out in a co-ordinated progression. We hold that if developments proceed on an ad hoc basis they cannot be sustainably managed by the Council- an aspect which is not commensurate with section 5 of the Act.*
>
> *There are similar comments in decisions such as Prospectus Nominees v Queenstown-Lakes District Council (C 74/97), Bell v Central Otago District Council (C 4/97) and confirmation that the approach is correct in the High Court decision of Coleman v Tasman District Council [1999] NZRMA 39.*

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

(a) There is no requirement for the Hearing Panel to be satisfied that all of the infrastructure necessary to service PPC81 exists at present; however

(b) The Hearing Panel needs to be satisfied that where the infrastructure does not already exist, providing it is feasible and that, in this case the Council, is committed to providing it.

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

53 Decision No. W 008/2005.

Wastewater servicing

10.5 The capacity of the Dargaville WWTP has been comprehensively assessed by Mr David Usmar in his memorandum attached to the section 42A Report. In summary, although PPC81 (as a private plan change request) sits outside the Council's "business as usual" planning, Mr Usmar concludes there will be sufficient capacity in the Dargaville WWTP to service all of the growth anticipated from PPC81 under both Scenarios 2 and 3 that he has modelled.[54] Mr Usmar will be available at the hearing to answer any questions from the Hearing Panel.

10.6 In terms of the ability to convey wastewater from the plan change site to the Dargaville WWTP, both Mr Usmar and Ms Cowan appropriately raised, in the section 42A Report:

(a) a question about the feasibility of this; and

(b) noted the applicant has indicated conveyance over the Awakino River would be based on a pipe being attached to the existing Waka Kotahi Bridge, but Waka Kotahi's permission has not yet been obtained.[55]

10.7 The applicant has provided evidence in response that:

(a) Providing river or stream crossings for utility services is a "routine matter" that can be dealt with at resource consent stage; and

(b) While permission from Waka Kotahi has not yet been obtained, the Code of the New Zealand Utilities Advisory Group may apply.[56]

10.8 In light of the above evidence, in my submission, provided the Hearings Panel is satisfied with the applicant's evidence a pipeline crossing the

54 Water and Wastewater Infrastructure Planner Memo. Page 5.
55 Ibid, page 5 and section 42A Report, page 68.
56 Evidence of Hendrick de Wet, paragraphs 6.9 – 6.11.

Awakino River is feasible, there is no wastewater related reason to decline PPC81.

Potable water supply

10.9 The ability of the Dargaville WTP to supply the plan change site with potable water has been has been assessed by Mr David Usmar in his memorandum attached to the section 42A Report.

10.10 In summary, there is sufficient treatment capacity in the water treatment plant itself to supply the plan change area. However, the Dargaville WTP currently experiences shortages of raw water in the summer months that mean, at present, it would not be able to meet projected demand for potable water from the plan change area. As outlined by Mr Usmar, the Council is currently investigating different options for the shortages of raw water to be addressed, and is committed to progressing this through an options assessment this year.[57]

10.11 By way of response, the applicant has indicated that:

(a) "supplementary supply", which is understood to mean supply from rainwater tanks, or possibly from ground water, could be used during the summer months; and

(b) The Council has signalled plans towards developing a solution to the raw water shortage.[58]

10.12 As set out above, there is no requirement for the Hearing Panel to be satisfied that all of the infrastructure necessary to service PPC81 exists at present.

10.13 For the Hearing Panel to recommend decline of PPC81 on the basis of inadequate potable water supply, it would need to be satisfied that it was not feasible to provide potable water to the plan change site, or that it was feasible but the Council was not committed to providing this

57 Water and Wastewater Infrastructure Planner Memo, page 6.
58 Evidence of Henk de Wet, paragraphs 6.13-6.14.

(e.g. due to remoteness of the site and the cost of servicing). In relation to this, as explained by Mr Usmar:

(a) The Council has identified a number of different options to secure further raw water to address current summer shortages, and allow for growth in Dargaville. Mr Usmar will be available at the hearing to answer questions from the Hearings Panel in relation to these different options; and

(b) The Council will complete an options assessment process to identify its preferred option to increase raw water supply, and then look to commit funding for this in its Long Term Plan.

10.14 In addition, Mr de Wet has indicated that "supplementary water supply" (i.e. rainwater tanks) may be able to relied on. Counsel suggests that the Hearing Panel may like to ask Mr de Wet questions in this regard. In particular, to confirm, in general terms, the ability of 500m2 residential lots to accommodate rainwater tanks (as is understood to be the case in Mangawhai, which does not have a reticulated water supply).

10.15 Overall, in my submission, on the basis of Mr Usmar's evidence that the Council is committed to addressing current raw water shortages in Dargaville and there are options to do this, and any additional evidence provided by Mr de Wet regarding the ability to provide supplementary water supply on site, there does not appear to be a potable water related reason to decline PPC81.

11. THE ISSUE OF WHETHER THE INTERSECTION OF SHW14 AND AWAKINTO POINT NORTH ROAD SHOULD BE UPGRADED TO A T-INTERSECTION OR A ROUNDABOUT

11.1 As the Hearing Panel will be aware, it is proposed that vehicles will access the plan change site from State Highway 14, via the existing intersection of State Highway 14 and Awakino Point North Road.

11.2 The applicant proposes that to address both traffic efficiency and safety effects arising from increased vehicle movements at this intersection

(if PPC81 is approved) there would be a requirement to upgrade this intersection to a T-intersection. This must completed prior to the undertaking of any activity (other than faming) in the Light Industrial area and prior to the occupation of any residential unit.[59]

11.3 In relation to this, I note that there is a contest on the evidence as to whether a T-intersection or a roundabout should be required:

(a) Mr McKenzie for the applicant considers the proposed T-intersection to provide an appropriate solution in terms of both traffic efficiency and safety. In particular, Mr McKenzie considers a T-intersection to provide "equivalent safety outcomes compared to [a] roundabout option", and to be cost effective, while still allowing an upgrade to a round-about in the future, if needed.[60]

(b) Mr Hill, for the section 42A team considers that the safety difference between the T-intersection that is proposed a roundabout to be "minimal". While he considers a roundabout would be "safest", he considers the proposed T-intersection would adequately mitigate the effects of PPC81.[61]

(c) Mr Collins, for Waka Kotahi considers a roundabout to be the preferred option, as the geometry of a roundabout will require drivers to slow down, meaning it does not require any reduction in the speed limit.[62]

(d) Mr Marshall, for the Northland Transportation Alliance considers a roundabout would be the "most appropriate" solution, combined with a speed limit reduction.[63]

11.4 In my submission, before it can impose a requirement in the plan provisions requiring the applicant to upgrade the intersection in a certain way, the Hearing Panel must be satisfied that the standard of the upgrade being specified is directly connected to the adverse effects

59 See TDA-LU-s4- Transport.
60 Evidence of Mr McKenzie, paragraphs 9.7-9.10.
61 Commute Transportation Consultants Memo attached as Appendix I to the section 42A Report, paragraph 6.2.
62 Evidence of Mr Collins, paragraph 4.3.
63 Page 2 of his evidence.

of the proposal. Mr Hill, on behalf of the section 42A team considers, in this case, a T-intersection will address the traffic efficiency and safety effects of PPC81, and a roundabout is not needed.

12. CONCLUSION

12.1 I am happy to answer any questions.

Warren Bangma
Counsel for the Kaipara District Council
22 March 2023