BEFORE THE HEARING PANEL
APPOINTED BY KAPITI COAST DISTRICT COUNCIL

IN THE MATTER OF | I TE TAKE O	the Resource Management Act 1991
AND | ME	
IN THE MATTER OF | I TE TAKE O	Proposed Plan Change 5 (Private): 100 and 110 Te Moana Road, Waikanae, Kāpiti Coast District

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OUTLINE OF SUBMISSIONS FOR ERIC, VINCE AND RAECHEL OSBORNE

Dated 17 September 2026

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MAY IT PLEASE THE PANEL

Introduction and Summary

1. 29 sheep or 150 houses, that is the essential question posed by the Plan Change 5 (**PC5**) Request.

2. The tenuous fate of any future productive use of 100 and 110 Te Moana Road was effectively sealed by the Mackays to Peka Peka (**M2PP**) Expressway Project.

3. The Plan Change site now sits as an effective island between transport infrastructure and housing on three sides, and non-productive sand dune land on the fourth.

4. The reality is that the Site cannot function as productive rural land. There are long term indeed permanent constraints that cannot practicably be addressed, which make land based primary production from this 5.5 ha severance block following the M2PP project, untenable.

5. The demonstrably "better" option in s 32 terms is a residential zoning extending between the existing housing to the west, and the transport infrastructure to the north and east, which the Site has an immediate connection to.

6. The Site would then be able to contribute to a well-functioning urban environment, as well as the affordability, quality and choice of medium density housing in Kāpiti Coast District, at Waikanae where demand is the highest in that District specifically.[1]

7. Existing and planned wastewater, water supply and transportation infrastructure can service new housing on the Site, subject to detailed design and the requirements of the resource consent processes that would follow the requested rezoning. This includes to confirm that there remains available capacity within the Te Moana interchange having regard to other consented development at the relevant time, and that immediate connections to water supply and wastewater infrastructure can then be made.

8. In the meantime, a feasible and common place method for dealing with natural hazard risks including liquefaction and stormwater/flooding is available for the Site, namely bulk earthworks to form a stable non-liquifiable crust and building platforms clear of flooding hazards, while providing compensatory storage/hydraulic neutrality, maintaining wetland hydrology, and ensuring that

[1] Refer paragpahs 50 to 58 and Appendix 3 of Ms Jones' evidence.

the effective functioning of the residual flow path across the Site is also secured.[2]

9. On site amenity and ecological values can be provided for by retaining the wetland and pond feature, with buffers and landscaping as required on the Site by the conditions of future Regional and District consents, as would be needed to develop the Site assuming the requested zoning is confirmed.[3]

10. In short, there are no natural resource, natural hazard or infrastructure impediments to the rezoning requested under PC5 being confirmed, and significantly greater benefits to be achieved from rezoning the Site to provide for housing, than by maintaining the current rural zoning over an orphan block that simply cannot be used for the purpose.

11. The requested zoning would give effect to all relevant higher order planning instruments and promote the sustainable management purpose of the RMA.

12. PC5 should be confirmed accordingly.

Factual Position – Summary of Expert Opinion

<u>Land based primary production</u>

13. The remaining 5.5 ha of the Osborne's land following completion of the M2PP project comprises two parcels of dune land and sand plains, including 0.76 ha of poorly drained albeit LUC 3 class soils.[4]

14. The LUC 3 land unit presents within a mosaic of LUC 4-6 land having contrasting high or excessive drainage as well as being prone to severe wind erosion.[5] The contrasting limitations between these land units makes management difficult, whereby they require mutually incompatible measures to address the constraints involved.[6]

15. In the result, the long term/permanent constraints to land based primary production on the Site cannot practicably be overcome.[7]

16. The 'highest and best' productive use of the Site as a whole is for some 29 stock units (likely sheep) with limited pine forest opportunity, the economic return from which would not even recover a fraction of the rates bill.[8]

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[2] Evidence of Messrs Smith, Martell and Taylor.
[3] Refer paragraph 12.73 of the s42A report.
[4] Refer section 8.1 of the Land Productivity Report produced with Mr Grant's evidence.
[5] Refer section 8.2 of the Report.
[6] Refer section 9.3 of the Report.
[7] Refer sections 9.3 and 10.3 of the Report, paragraph 23 of Mr Grant's evidence.
[8] Refer sections 9.6 and 10.3 of the Report.

17. The Applicant submits that "land-based primary production"[9] on the Site is not only not economically viable, but untenable.

18. This assessment as confirmed in Mr Grant's evidence applies to the full 1.87 ha area of Highly Productive Land (**HPL**) present within the Site under the NZLRI (1:50,000) scale mapping, and indeed for the Site as a whole.[10]

Transportation

19. The Site has a near immediate connection to the Te Moana Road/Expressway interchange, as well as a cycling lane and public transport services.[11]

20. Extensive and conservative modelling has been completed to confirm that the interchange can continue to operate with an acceptable level of service, applying two distinct but conservative modelling approaches:

    (a) First, at a more direct "interchange" performance level, by modelling traffic generated from the (up to) 150 dwellings that could be delivered if PC5 is confirmed, on top of an assumed (albeit theoretical) 900 dwellings at Ngārara Farm (to the immediate north of the interchange), applying daily and peak hour trip generation rates that are higher than recommended under the Transport Agency's most recent Planning Policy Manual.[12]

    (b) Second, on a more 'integrated network' basis applying a bespoke model produced for Kapiti District (KTM4), where an even higher peak hour trip generation rate has been applied, but alongside the *actually consented* level of development at Ngārara Farm, and assuming a future connection integral to the Ngārara Farm Structure Plan is in place.[13]

21. I refer to the significance of this latter point in addressing case law as to what comprises the relevant 'existing (and future) environment' under the RMA, for the purpose of considering and determining PC5, later in these submissions.

22. Assuming PC 5 is confirmed, existing District Plan requirements for development of the Site would ensure that an Integrated Transport Assessment is completed, to confirm the currently predicted capacity within the interchange

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[9] As defined under the National Policy Statement – Highly Productive Land (as addressed below).
[10] Noting Ms Chambers' evidence requesting confirmation that the assessment applies to the full 1.87 ha of HPL, not just the circa 0.8 ha of LUC 3 land confirmed through paddock scale mapping in the original reports filed with the PC5 request.
[11] Refer Transport Assessment filed with the Plan Change Request (April 2025).
[12] Refer paragraphs 11-14 and 27-28 of Mr Benner's evidence.
[13] Refer paragraphs 32-39 and Annexure 2 of Mr Benner's evidence

remains available, and set appropriate site access arrangements along with cycling and pedestrian connections through consent conditions.[14]

23. Additional policy could be included as recommended by the reporting officer to complement the existing plan requirements in this respect, and ensure that all of the matters covered in Mr Shields' evidence for determination at the resource consent stage are covered.[15] Whether that is necessary or appropriate in s 32 terms would be a matter for the Panel to determine.

Wastewater and water supply servicing

24. Recently completed assessments commissioned by the Council reveal that there is an existing capacity constraint in the local water supply network as a result of ongoing development at Waikanae,[16] which the Council intends to address through significant investments in water supply and reticulation infrastructure. This includes immediate and interim measures intended to be in place by 2027/2028, providing sufficient headroom and capacity for future residential development of the PC5 Site.[17]

25. Similarly, a planned new rising main connecting the pumping station to the west of the Site with the Paraparaumu Wastewater Treatment Plant will address constraints in the local wastewater conveyance network, over the longer term.[18]

26. As with water supply, there are interim and immediate solutions available if development on the PC5 Site precedes the new rising main to avoid overflows in the system, including a low pressure network or centralised attenuation tank within the Site to restrict wastewater flows during heavy rainfall periods.[19]

27. Again, the timing of connection and any specific onsite measures can (and would need to) be confirmed in the future consent process that would follow the requested rezoning of the Site.[20]

Natural hazards

28. There are two primary natural hazard issues raised by PC 5.

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[14] Refer paragraphs 60-62 of Mr Benner's evidence, paragraphs 15-16 and 79-80 of Ms Jones' evidence, and paragraph 22 of Mr Keenan's evidence. Refer also Transport JWS.

[15] Refer paragraph 54 of Mr Shields' evidence, and the Planners' JWS.

[16] Refer Stantec Water Supply Assessment produced with Ms Waterland's evidence, section 4.1.

[17] Mr Pillai's evidence at paragraphs 14-19.

[18] Mr Robinson's evidence at paragraph 31.

[19] Mr Robinson's evidence at paragraph 33 and Mr Taylor's evidence at paragraphs 21 and 58-59.

[20] Mr Taylor's evidence at paragraphs 89-90, Ms Jones' evidence at paragraphs 14-16, and Appendix 1. Refer also Planners' JWS at page 3.

29. The first is liquefaction risk (particularly for the lower lying areas of the Site) , which can be managed through large-scale earthworks to create a non-liquefiable crust and stable building platforms along with specific foundation design, as would be confirmed through the more detailed monitoring and assessment requirements of the resource consent and building consent processes that would follow if PC 5 is confirmed.[21]

30. The second is direct flooding associated with the Waimeha Stream, along with the unlikely event of a stopbank breach on the Waikanae River, as would discharge into the Site from the east through a residual flow path under the M2PP Expressway.[22]

31. The Council's TUFLO model has been employed to quantify both potential risks (i.e. direct and residual flow path flooding). The Flood Assessment & Stormwater Management Memorandum filed in support of PC5 [23] confirms that feasible development options exist to ensure building platforms are above future flood levels (allowing for climate change), compensatory storage is provided sufficient to achieve hydraulic neutrality, and the effective functioning of the residual flow path is maintained, along with wetland hydrology.[24]

32. It should be noted that a stopbank breach scenario is considered very unlikely (i.e. would only occur with a rainfall event significantly greater than the 100-year 2115 (with climate change) event which the stopbank is designed to manage), with the likelihood of direct and residual flow path flooding combining on the Site being extremely remote.[25]

33. In response to Mr Oakely's evidence produced with the s 42A report, further specific modelling has now been completed to confirm that the recommended approach to stormwater and flooding risk management is feasible with reference to a conceptual earthworks plan for development of the Site, including bulk earthworks to create the elevated building platforms.[26]

34. Mr Taylor's evidence also addresses a range of "inter-disciplinary" issues raised in Mr Oakley's evidence including wetland hydrological functioning.[27] In doing so, Mr Taylor (as with Mr Martell) has drawn on local experience as to how low

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[21] Refer paragraph 11 of Mr Smith's evidence, and paragraph 19 of Mr McDermott's evidence.
[22] Refer paragraphs 18-21 of Mr Martell's evidence.
[23] August 2025, pages 14-16.
[24] Refer paragraph 24 of Mr Martell's evidence.
[25] Mr Martell's evidence at paragraph 22. Refer also Stormwater and Flood Hazard JWS at page 3.
[26] Mr Martell's evidence at paragraphs 56-61, Mr Taylor's Earthworks Concept Plan (Annexure A to his evidence), and Mr Taylor's evidence at paragraphs 15-17 and 75.
[27] Paragraphs 65- 88 of Mr Taylor's evidence.

impact stormwater solutions can be employed to mimic natural hydrology on the Site (e.g. distributed soakage through enviro pods/bio filtration).[28]

35. Mr Taylor and Mr Martell also confirm that compaction of the sandy soils present within the Site to form the building platforms will not affect their infiltration characteristics for low impact stormwater solutions to be employed,[29] and nor would drainage invert levels need to be altered (potentially affecting the wetland).[30]

36. These points are all confirmed as agreed in the Stormwater and Flood Hazard JWS.

<u>Ecology and landscape</u>

37. The only significant ecological feature and values inherent to the PC5 Site are those associated with the wetland as protected by both a QEII covenant, and the District Plan Significant Ecological Site Overlay (Ecological Site KO68).

38. There are no Threatened or At Risk bird or lizard species present on the Site nor likely to use it as breeding habitat, and the terrestrial vegetation is not ecologically significant.[31]

39. Mr Usher's evidence confirms that wetland ecology would be adequately protected by the 10 m buffer requirements of the National Environmental Standards – Freshwater (**NES-F**), including any planting within the buffer found to be necessary as part of the regional and district level consenting processes that would follow PC 5 being confirmed.[32]

40. Beyond that, the Site has low natural character and landscape values and development of the Site would have low to moderate (minor) adverse effects on such natural character and landscape values as remain, following extensive modification to the landscape in this setting.[33]

41. In this respect, the following statement from within the Landscape & Visual Effects Assessment filed in support of PC5 is considered highly apposite.

> The proposed re-zoning would allow for future residential development. This would result in a change of character and land use from a highly modified, undeveloped pocket of land with very limited productive capacity to one of

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[28] Mr Taylor's evidence at paragraphs 36-38, Mr Martelll's evidence at paragraph 42(c).
[29] Paragraph 67 of Mr Taylor's evidence, paragraph 43 of Mr Martell's evidence.
[30] Mr Taylor's evidence at paragraphs 85- 86.
[31] Refer paragraphs 18-25 of Mr Ussher's evidence.
[32] Refer s 42A report at paragraph 12.73, Ms Jones' evidence at paragraphs 95-97 and paragraphs 46 and 52 of Mr Ussher's evidence. This point remains an issue of contention for the PC5 stage of the process, refer Planners' JWS at page 4.
[33] Refer Mr Ormsby's and Mr Buttons evidence.

residential character and land use with associated infrastructure, roading, dwellings and residential activities.

…

Considering the site is land locked between existing and developing residential development, the Kāpiti expressway, Te Moana Road and a private Urupa further south, the site is well placed for this type of development. Furthermore, the unproductive capacity of the site and pastoral land is at odds with the surrounding built environment and residential character. Natural character values are low and the existing ecological values within the QEII site will be retained. Therefore, the anticipated landscape effects of a plan change from general rural, to general residential is considered **low**. [34]

42. While Mr Ormsby acknowledges that extensive earthworks across the steeper and more elevated dune areas in the southern part of the Site could have low to moderate (minor) natural character impacts, that concern would be adequately managed through the District Plan controls on earthworks, consistent with Mr Button's evidence referenced in the s 42A report.[35]

43. Any visual amenity impact on the Fairway Oaks Drive properties to the west would be consistent with the expectations for development of that neighbouring land.[36]

44. One matter remaining in contention between the experts[37] is as to the need for any bespoke setback controls of the kind proposed by Mr Button to address amenity effects at the PC5 Site boundary, but not considered necessary or appropriate by Ms Jones or Mr Ormsby.[38] The Applicant submits these controls should not be imposed, and would conflict with the MDRS plan settings.

Archaeology and cultural values

45. Effects on any resources of archaeological value within the Site can also be appropriately managed through a future statutory process (archaeological authority from Heritage New Zealand Pouhere Taonga), assuming PC 5 is confirmed.[39]

46. Acknowledging the cultural significance of the Site and setting including the scheduled wāhi tapu listing on adjacent land, as confirmed by Ms Jones, mana whenua engaged prior to lodging the Plan Change Request have not raised any

[34] Pages 12-13 of the Report.
[35] Paragraph 12.61 of the s 42A report, paragraph 3.6 of Mr Button's evidence, paragraph 19 of Mr Ormbsy's evidence.
[36] Refer paragraph 31 of Mr Ormsby's evidence, paragraph 87 of Ms Jones' evidence.
[37] Refer Planners' JWS at page 3.
[38] Paragraphs 86-91 of Ms Jones' evidence, paragraphs 37- 40 of Mr Ormsby's evidence.
[39] Ms O'Keeffe's evidence, s 42A report at paragraphs 12.90 and 12.91.

concerns and would continue to be engaged through the resource consent processes to follow.[40]

Statutory Tests

47. The statutory tests for the Panel to apply in considering PC5 are well established and summarised in case law.[41]

48. The Environment Court's overview of the relevant statutory requirements in *Colonial Vineyard Limited v Marlborough District Council,* and more recently in *Edens v Thames-Coromandel District Council* following amendment to s 32(3) in 2013, are as set out in Appendix 1 to these submissions.

49. These tests are comprehensively addressed in the Plan Change Request as summarised in Ms Jones' evidence, and in the s 42A report.

50. Rather than repeating all of that material, it is adopted for the purpose of these submissions, noting paragraph 12 of Ms Jones' evidence in particular. Ms Jones concludes that PC5 meets all of the relevant statutory tests including through giving effect to all higher order planning instruments, and that PC5 is the most appropriate option in terms of s 32 of the RMA.

51. With respect, the s 42A report essentially reaches the same conclusion,[42] albeit with three reservations recorded at paragraph 1.12 and 13.3 of the s 42A report regarding Lot 1 (100 Te Moana road).

52. However, as also recorded in Ms Jones' evidence, those reservations have been comprehensively addressed and responded to in the Applicant's evidence in turn.[43]

53. Ms Jones records that she defers to counsel for submissions addressing the National Policy Statement – Highly Productive Land (**NPS-HPL**).[44]

54. These submissions now address that topic, along with the recently released National Policy Statement – Natural Hazards 2025 (**NPS-NH**).

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[40] Paragraphs 35-38 of Ms Jones' evidence.
[41] Refer for example decision of the Environment Court in *Save the Maitai Incorporated v Nelson City Council* [2024] NZEnvC 155 at [14] (a case dealing with a Plan Change where issues of highly productive land and the NPS-HPL were in play, as addressed further later in these submissions), and citing *Colonial Vineyard Limited v Marlborough District Council* [2014] NZEnvC 55 and *Edens v Thames-Coromandel District Council* [2020] NZEnvC 13 updating the tests set out in *Colonial Vineyard* following RMA amendments in 2013.
[42] Refer paragraph 12.21 of the s42A report.
[43] Paragraphs 94, 103 and 108-115 of Ms Jones' evidence in particular.
[44] Paragraph 19 of her evidence.

55. Brief submissions are then made regarding the s 32 tests as relevant to PC5 and certain other matters of relevance in that context, along with the submissions made on PC5.

NPS-HPL

56. The NPS-HPL is engaged because as at the date of commencement of that instrument, some 1.87 ha of the PC5 Site is identified as LUC 2 land under the New Zealand Land Resource Inventory (**NZLRI**) 1:50000 scale mapping.[45]

57. As the Environment Court confirmed in *Blue Grass Limited v Dunedin City Council,*[46] it is this mapping that "counts" for the purpose of the NPS-HPL transitional provisions, not any more accurate "paddock scale" assessment of the kind that would precede the regional council led mapping exercise required under clauses 3.4 and 3.5 of the NPS-HPL.

58. The fact that the 1.87 ha of HPL as mapped under the NZLRI system is actually largely LUC 4 land (along with 0.67 ha of poorly drained LUC 3 land),[47] is irrelevant in terms of whether the NPS-HPL *applies*.

59. For the reasons now addressed however, this more detailed "paddock scale" assessment is *highly relevant* in terms of whether PC5 gives effect to the NPS-HPL and/or should be approved to promote the sustainable management purpose of the RMA.

60. At the time the Plan Change Request was lodged, it was anticipated that the NPS-HPL would soon be amended to remove LUC 3 land (altogether) and that the regional council mapping task would have progressed to a point confirming that there is no LUC 1 or LUC 2 land present on the Site, such that the NPS-HPL was no longer engaged,[48] before PC5 was determined.

61. The Applicant's preferred option whereby both stages of the Plan Change Request would be approved was advanced on that basis. A contingency 'backup' and less preferred option applying a Deferred Residential Precinct over Stage 2 (encompassing the HPL land as mapped under the NZLRI) was included in the Plan Change Request, in case the NPS-HPL amendment and regional council mapping did not eventuate.[49]

62. The Applicant submits while LUC 3 land was not removed from the NPS-HPL altogether, and the timeframe for the regional council mapping exercise was

[45] Refer paragraph 12 of Mr Grant's evidence.
[46] [2024] NZEnvC 83.
[47] Refer paragraph 15 of Mr Grant's evidence and the Land Productivity Report produced with Mr Grant's evidence.
[48] Refer Executive Summary and section 4.9 of the Plan Change Request.
[49] Refer sections 3.1.1 and 3.2 of the Plan Change Request.

deferred,[50] the preferred option can be adopted and the fallback (staged) option is no longer relied upon by the Applicant.[51]

63. This submission is now explained in more detail, with reference to the amendments that were made to the NPS-HPL in December 2025 (**NPS-HPL-Am**) and the evidence and information before the Panel, particularly as produced by Mr Grant.

Pragmatic approach

64. As an overarching point, the Environment Court has generally adopted what can be described as a "pragmatic" approach to interpretation of the NPS-HPL,[52] which applies as much to the NPS-HPL-Am, as it did to the instrument as first promulgated.

65. As an example of that approach, the Environment Court in *Gibbston Vines Limited v Queenstown Lakes District Council* [53] approved a two lot subdivision, including land that was deemed to be HPL under clause 3.5(7), as with the situation under PC5.[54]

66. Despite the deemed (transitional) classification of the Site as HPL (per *Blue Grass*), the Court had regard to the actual productive capacity of the land being subdivided.[55] The Court found that while the subdivision would not assist the intentions of the NPS-HPL, nor would it materially impede them, *along with the capacity of the Regional Council to give effect to the NPS-HPL*.[56]

67. In reaching its findings, the Court focused on the express objective and policies of the instrument, rather than the implementation clauses, noting with reference to Policy 7 as follows:

> [47] Policy 7 is an avoidance policy. However, its direction to not allow subdivision would only capture the Modified Proposal insofar as we find it is not "provided in" the NPS-HPL. In terms of the statutory purpose of the NPS-HPL in the context of our consideration of the appeal, that provision is in the extent that the granting of consent to the Modified Proposal *would not conflict*

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[50] Through new clause 4.1(2) of the NPS-HPL as amended in December 2025.
[51] For completeness however, and in case the Panel reaches a different view, submissions addressing that fallback option (including application of a Deferred Residential Precinct) are addressed in Appendix 2 to these submissions. This point is addressed further below.
[52] Refer for example Resource Management Journal article (November 2025) *Environment Court Tackles Stuttering Development with Pragmatic Approach* – addressing the *C J Industries v Tasman District* and *Johnson v Dunedin City Council* decisions, referred to in the submissions further below.
[53] [2023] NZEnvC 265.
[54] Refer paragraph [22] of the decision.
[55] Refer paragraphs [79] and [86] of the decision
[56] Refer paragraph [87] of the decision.

> *with the intentions of the NPS-HPL, particularly as expressed through the objective in cl 2.1 and associated policies in cl 2.2.*
>
> (emphasis added)

68. Having regard to that decision, the Panel in this case should, I submit, place the singular objective of the NPS-HPL-Am at the forefront of its consideration of whether PC5 would give effect to the NPS.

69. That objective is as follows:

> Highly Productive Land is protected for use in land based primary production, both now and for future generations.

70. The unavoidable reality, which is uncontested, is that the PC5 Site (including the 1.87 ha of deemed HPL itself) cannot realistically or viably be used for land based primary production, and is “highly productive” only by deemed operation of the transitional provisions.

71. Whatever the policies and implementation clauses might say (as addressed presently), a 5ha parcel of land surrounded by housing and transport infrastructure which can only sustain 29 stock units, and has long term or permanent constraints that cannot practicably be addressed, is not *highly productive*. This is simply not the type of land or soils resource the NPS-HPL-Am seeks to protect, as recorded in the express objective.

72. In seeking to provide for a demonstrably superior alternative use, PC 5 would therefore, if not directly give effect to every provision of the NPS, certainly not conflict with or impede the intentions of that instrument (per *Gibbston Vines*).

Giving effect to Policy 5

73. That point aside, the Applicant submits that PC5 gives effect to the NPS-HPL-Am for the following reasons, regardless.

74. Policy 5 is most relevant and states as follows:

> The urban rezoning of Highly Productive Land is avoided, *except as provided in this National Policy Statement*.
>
> (emphasis added)

75. As with Policy 7 (referred to in *Gibbston,* as cited above), Policy 5 is clearly an avoidance policy. As the Environment Court found in another case, Policy 5 is

a highly directive provision that sets a very high bar in terms of meeting the statutory obligation to give effect to the NPS-HPL.[57]

76. The manner of implementation of Policy 5 is as expressed in clause 3.6 ("*Restricting urban rezoning of highly productive land*").

77. Clause 3.6 was amended in December 2025 (i.e. under the NPS-HPL-Am) by adding the following new clause 6:

> (6) Clauses 3.6(1), 3.6(2), 3.6(3) and 3.6(4) do not apply to urban zoning of LUC 3 land.

78. In the result, the NPS-HPL-Am no longer sets out to restrict the urban rezoning of LUC 3 land to situations where this is required to provide sufficient development capacity to meet demand for housing or business land, and there are no other reasonably practicable and feasible options for providing that capacity. The Applicant submits this is highly relevant in determining the *intentions* of the instrument relative to what is in fact, for the PC5 Site, LUC 3 land at best.

79. Furthermore, as the Environment Court also found in *Gibbston Vines*, while the directives in Part 3 (Implementation) give directions as to how the policies are to be achieved, those directives are non-exhaustive.[58]

80. In that respect, the Applicant submits that the NPS-HPL should be interpreted as a whole, particularly in considering the words "*except as provided in this National Policy Statement*" within Policy 5 itself.

81. Specifically, the Applicant relies on clause 3.10.

82. Before turning to that, counsel must acknowledge the Environment Court decision in *Nahkies v Selwyn District Council,* [59] in which the Court accepted (albeit without extensive argument), that "*where clause 3.6 applies there can be no recourse to clause 3.10 if the requirements in clause 3.6 are not met"*,[60] and that clause 3.10 is a 'stand alone provision".[61]

83. However, as noted above, clause 3.6 has now been amended and no longer applies to LUC 3 land. This amendment therefore enables clause 3.10 to be

[57] Refer *Save the Maitai Incorporated v Nelson City Council*, Appendix 1 at paragraphs [100]-[103].
[58] Paragraph [39] of the decision.
[59] [2025] NZEnvC 259.
[60] Refer paragraph [23] of the decision.
[61] Ibid, at paragraph [24].

engaged, despite that clause only referring to activities "not otherwise enabled under clauses 3.7, 3.8 or 3.9.

84. LUC 3 land is otherwise written out of Clause 3.6, but with nowhere else for a rezoning of LUC 3 land to go within the NPS-HPL-Am, and leaving no work for the words "*except as provided in this National Policy Statement"* to do for any proposed rezoning of LUC 3 land. It would be a strange even perverse outcome for there to be an exception pathway for rezoning of LUC 1 and 2 land under the NPS-HPL- Am (i.e. clause 3.6), but no pathway at all for LUC 3 land .

85. That cannot have been the intention of the drafters in making the amendment.

86. In short, the Applicant submits the restriction against access to clause 3.10 in *Nahkies* no longer applies to the rezoning of LUC 3 land, as a result of the 2025 amendments.

87. Mr Grant's evidence (along with the comprehensive assessment in the Land Productivity Report) compellingly establish that all of the tests for an exemption under clause 3.10 are made out.[62]

88. To address concerns raised in Ms Chambers' evidence, the clause 3.10 assessment now covers the full 1.87 ha of deemed HPL under the NZLRI mapping.

89. On this basis, the Applicant submits that PC5 would give effect to Policy 5 of the NPS-HLP-Am, having regard to the exception in clause 3.10, as *providing for* the requested rezoning, in terms of the express wording of that policy.

90. In that respect, and as a further example of the pragmatic approach applied by the Environment Court to the NPS-HPL, the Panel is referred to the Environment Court's decision in *Johnson v Dunedin City Council*[63] where a similar assessment was accepted by the Court as satisfying the requirements of clause 3.10.[64]

Deserving Exception

91. The counter argument might be that while LUC 3 land has been removed from the exception pathway in clause 3.6 (enabling access to clause 3.10) , unless and until the Greater Wellington Regional Council (**GWRC**) completes its mapping exercise, the Site remains encumbered by LUC 2 category land under

[62] Refer section 10.3 of the report in particular.
[63] [2025] NZEnvC 144.
[64] Refer paragraph [75]-[80] of the Environment Court decision.

the NZLRI mapping that remains in place, and the rezoning should not take place unless a case for that is made out under clause 3.6.

92. Two responses are made to that potential counter argument.

93. First, as submitted above, the clause 3.10 assessment completed by Mr Grant establishes that the requested rezoning is consistent with the NPS-HPL-Am objective and the drafter's intentions, because the land simply cannot realistically or viably be used for land based primary production.

94. The NPS-HPL clearly does not (or no longer) intends to restrain LUC 3 land from being rezoned (i.e. unless the clause 3.6 tests for an exception are met). Appling a pragmatic approach, PC5 can be confirmed as giving effect to the NPS-HPL -Am accordingly, and/or would not impede the GWRC from later giving effect to the NPS in completing its mapping exercise (per *Gibbston Vines* at [87], as cited above), because at best the Site only contains a very small area of LUC 3 land, in fact.

95. Second, as now addressed with reference to decisions of the Senior Courts interpreting 'avoidance' policies set through other national direction under the RMA, and the need to provide for 'deserving exceptions' that do not subvert the policy's purpose, to prevent outcomes which are plainly inconsistent with the purpose of the RMA itself.

96. Firstly, reference is made to the Supreme Court decision in *Royal Forest and Bird Protection Society v New Zealand Transport Agency* [65] in which Policy 11 of the NZCPS was directly at issue, albeit in a s 104 and s 171 rather than Plan Change context.[66]

97. The following extracts of the judgment are set out in full.

> [99] Waka Kotahi argued that "have regard to" introduces flexibility into the application of directive policies in a way that "give effect to" would not permit. We do not agree that ss 104 and 171 have this effect, for reasons we will come to, but we do agree that, in principle, flexibility in the application of Policy 11 does not inevitably subvert it. On the contrary, despite Policy 11 being rule-like and containing something in the nature of a bottom line, *there will still be room for deserving exceptions that do not subvert the policy's purpose.* In short, wriggle room is built into the policy layers of the system.
>
> [100] This argument is not new. As Lord Reid said in *British Oxygen Co Ltd v Minister of Technology*, there is often no practical difference between a policy and a rule. Through long application or careful drafting, a policy

[65] [2024] NZLR 241.
[66] This distinction not being material to the argument in a Plan Change context, refer paragraphs [106]-[108] of the decision.

> can evolve into something so precise that it might as well be a rule. "There can," his Lordship considered, "be no objection to that, *provided the authority is always willing to listen to anyone with something new to say*". That proviso is now a cornerstone principle of administrative law. It is also important for the practical application of the NZCPS, this notwithstanding that the NZCPS is a statutory scheme of objectives and policies expressly designed to constrain the exercise of otherwise open-ended discretions.
>
> [101] The interpretive approach required here must reconcile the fact that policies mean what they say with the fact that they are still policies. *A residual discretion to prevent outcomes plainly inconsistent with the purpose of the RMA must be preserved in order to ensure that, when applied to difficult cases, the policies do not subvert that purpose*. Seen this way, recognising a residual discretion will ensure the policy will not be implemented unlawfully. We turn now to applying this interpretive approach.

98. In line with the Supreme Court's approach, the High Court in *Te Rūnanga o Ngāti Whātua v Auckland Council,*[67] found as follows with respect to the avoidance policies of the Auckland Unitary Plan (and their exceptions pathways) as follows:

> [285] Before moving to the issue of material harm, *it is necessary to observe that as with the avoid policies themselves, any express exceptional pathway standards must be read in light of their purpose and context*. They cannot be so rigid as to make the exception standard impossible to satisfy, but they must be sufficiently robust to achieve the purpose of those standards, that is to only allow activity that is demonstrably needed, minimises the scale of adverse effects as far as is practicable and is justified. This approach accords with the fact that they must be reconciled with objectives and policies that expressly provide for infrastructure, including for example landfills.

99. This case law was in turn expressly adopted by the Environment Court in *C J Industries Limited v Tasman District Council*[68] in yet another example of the pragmatic approach to the NPS-HPL, with reference to the avoidance policies of the NPS-HPL and the exceptions pathway in clause 3.9 specifically.

100. The Environment Court stated:

> [254] We are satisfied that the cl 3.9(3)(a) requirements to minimise or mitigate any actual loss or potential cumulative loss of the availability and productive capacity of Highly Productive Land in the district are met. It would be too rigid an interpretation to require no loss of availability or productive capacity occur, if that were the intended purpose then this would be unworkable. *A common sense interpretation of this clause clearly contemplates some loss of productivity.*

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[67] [2024] NZHC 3794.
[68] [2025] NZEnvC 213.

101. It is noted for completeness that the Environment Court's decision in *C J Industries Limited* was appealed to the High Court but on other grounds i.e. whereby the Court's adoption of the High Court's approach in *Ngāti Whātua* was not disturbed.[69]

102. In essence, the Applicant submits that the Panel in this case should consider not just the express wording of Policy 5 and clause 3.6 as they now stand following amendment in 2025, but *in light of their purpose and context*.[70]

103. Having regard to the content of Mr Grant's evidence and associated Land Productivity Report, this is clearly a case that warrants a deserving exception, applying the Panel's residual discretion to prevent outcomes that would be 'plainly inconsistent' with the purpose of the RMA (per *Royal Forest & Bird*).

104. Interpreting and applying the NPS-HPL as a whole as submitted by the Applicant would not subvert Policy 5, bearing in mind the factual reality that the Site does not actually have LUC 2 land but instead a very small component of poorly draining LUC 3 soil (0.67 ha), which the NPS-HPL-Am no longer seeks to prevent from being rezoned.

105. It cannot sensibly be said that it was the intention of the NPS-HPL-Am to effectively freeze or "blight" land that could provide significant social and economic benefits through contributing to housing affordability, quality and supply, so as to protect the capacity of that land to accommodate 29 stock units for all time.

106. That would be a perverse outcome that is "plainly inconsistent" with the broader sustainable management purpose of the RMA, including to provide for the reasonably foreseeable needs of existing and future generations.

107. In summary, the Applicant submits that PC5 would give effect to the NPS-HPL-Am interpreted in the round and in light of its express objective.

108. If that is not accepted by the Panel, as the Environment Court found in *Gibbston Vines,* PC5 at would at least not impede the intentions of the NPS-HPL-Am, nor the future capacity of the GWRC to give effect to the NPS.[71] Confirming PC5 as a deserving exception is necessary to promote the broader RMA purpose , and would not subvert the purpose of Policy 5 (per the Supreme Court decision *in Royal Forest and Bird Protection Society v New Zealand Transport Agency*).

[69] *Valley Residents v Tasman District Council* [2026] NZHC 2202.
[70] Per *Ngāti Whātua* as set out above.
[71] Paragraph [87] of the *Gibbston* decision.

109. As further support for the submission just made, the following two specific points are noted:

(a) If the PC5 Site is rezoned, there would be no question that the land owner could draw on clause 3.10 of the NPS-HPL-Am to support a resource consent application to “subdivide, use or develop” the Site, with the evidence before the Panel being compelling that future application of clause 3.10 in a resource consent context would have significant merit. It cannot be said to subvert the intent of the NPS-HPL-Am to allow for rezoning of land that would readily qualify for resource consent, *assuming* that zoning is confirmed.

(b) Similarly, as with *Gibbston Vines*, rezoning the Site would not impede future capacity of the Regional Council to give effect to the NPS. When the GWRC gets to the mapping exercise, the parcel would not be seen to “form a large and geographically cohesive area” (per clause 3.4 (1)(c)) and as such almost certainly not be mapped as a HPL- despite the 0.67 ha of LUC 3 land present within the Site when assessed at paddock scale.

110. For all of these reasons, PC5 can be confirmed relative to the NPS-HPL-Am which squarely signalled an intention to remove LUC 3 land (which the Site actually holds) from the restrictions in clause 3.6.

111. On that basis, as noted above, resort need not be had to the alternative approach involving a Deferred Residential Precinct over Stage 2. The submissions in Appendix 2 are nevertheless made out of completeness, and for the Panel’s benefit in case it disagrees with all of the submission points just made.

NPS-NH

112. As recorded in Ms Jones’ evidence and the s 42A report, alongside the NPS-HPL amendment, a range of other amended and new national instruments were released in December 2025, including the NPS-NH.[72]

113. The specific objective of the NPS-NH is as follows:

> Natural hazard risk to people and property associated with subdivision use and development is managed using a risk-based proportionate approach.

114. The “proportionate approach” theme resonates throughout the instrument including in subsequent policies, implementation clause 3.3, and in the requirement to use the ‘best available information’ in clause 3.4. The recent

[72] Refer paragraph 11.5 of the s 42A report and Ms Jones’ paragraph 19 and Appendix 2.

consent order issued by the Environment Court dealing with (*inter alia*) the natural hazard provisions of the Wellington Regional Policy Statement (**WRPS**) are reflective of the proportionate approach directed by the NPS-NH.[73]

115. Specific policies of relevance to PC5 are as follows:

> **Policy 3:** Where subdivision, use or development is assessed as having very high natural hazard risk, that risk must be avoided.
>
> **Policy 4:** Where subdivision, use or development, including any associated mitigation measures will create or increase significant natural hazard risk on other sites, that risk must be avoided or mitigated using an approach that is proportionate to the level of natural hazard risk.

116. Policy 5 in turn records that decisions must be based on the best information available, even where that information is uncertain or incomplete.

117. To determine whether subdivision, use or development would have "very high" or "significant" natural hazard risk for the purposes of Policies 3 and 4, the Risk Matrix set out in Appendix 1 to the NPS-NH must be applied.

118. Having regard to Mr Martell's assessment of flooding natural hazard risks in particular, the Applicant submits as follows:

(a) The level of risk as determined in accordance with the NPS-NH Risk matrix is at worst low-medium,[74] and as such Policy 3 does not apply.

(b) While a rating of low-medium risk (just) triggers the definition of "significant natural hazard risk" in the NPS-NH, the source of this risk is the existing flood hazard affecting the Site (including the residual flow path). It is not a risk created by the proposed rezoning or future residential redevelopment of that Site.[75]

(c) The modelling of Mr Taylor's Conceptual Earthworks Plan confirms that the Site can accommodate both development and flood mitigation (including for the unlikely scenario of a stopbank breach), with no increase to offsite flood risk.[76]

(d) In the result, the rezoning of the Site would be consistent with Policy 4 of the NPS-NH because future subdivision use or development of the

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[73] Refer amendments of Objective 19, Policy 29 and Policy 51 in particular (refer Appendix 5 to Ms Jones' evidence).
[74] Paragraph 38 of Mr Martell's evidence.
[75] Paragraph 63 of Mr Martell's evidence.
[76] Paragraphs 56-61 of Mr Martell's evidence.

Site would not "create or increase" significant natural hazard risks to <u>other sites</u>.

(e) With respect, the Panel should not defer its decision on PC5 to await further modelling from the Regional Council (as referred to by Mr Oakley)[77] as this would be contrary to Policy 5 and the "best information" principle in implementation clause 3.4. In any event, as Mr Martell further advises, the modelling of the Chillingworth breach scenario is itself inherently very conservative as it stands.[78]

119. On this basis, it is submitted that confirming PC5 would give effect to the NPS-NH.

Section 32 of the RMA

120. The Plan Change Request contains a detailed assessment of PC5 under s 32 of the RMA and concludes that the Applicant's preferred option (rezoning the whole Site) is the most appropriate to achieve the purpose of the RMA.[79]

121. The following additional points are made regarding the requirements of s 32:

(a) Section 32 was amended in 2003 to remove any "necessity" requirement and replace that with the test of what is "most appropriate", as considered by the Court in *Eldamos Investments Limited v Gisborne District Council.*[80] This amendment was argued to make it easier for a local authority to initiate a scheme change and assume a proactive rather than reactive role.

(b) Section 32 does not require planning perfection or the ultimate outcome. As the High Court found in *Rational Transport Society v New Zealand Transport Agency,* [81] the test of what is "most appropriate" means "suitable", rather than necessarily being the "superior" method. As the Environment Court found in *TKC Holdings Limited v Western Bay of Plenty District Council,*[82] the overall test under s 32 is simply as to which provisions "<u>better</u> meet the purpose of the Act".

(c) In *Port Otago Limited v Otago Regional Council*[83] the Environment Court considered the requirements for "economic" evaluation as

[77] Paragraphs 6.22-6.26.
[78] Refer paragraphs 53-54 of Mr Martell's evidence, refer also Stormwater and Flooding JWS, at page 4.
[79] Refer section 9.5 of the Plan Change Request.
[80] EnvC W/047/05.
[81] [2012] NZRMA 298, at [45].
[82] [2015] NZEnvC 100, at [88].
[83] [2018] NZEnvC 183, at [47]-[55].

introduced in 2013. The Court found that the revised wording of s 32(2) had not changed the requirements of the fundamental analysis in any significant way, but simply meant that the analysis of economic growth and employment prospects should be given in more detail (and wherever possible, expressly rather than implicitly).

122. While not needing to be "superior" (but instead "better"), it is submitted that a residential zoning of the PC 5 Site is demonstrably superior to retaining the existing rural zoning, regardless.

123. As noted at the outset, the reality is that the Site simply cannot function as rural land. The highest and best use of the property would be 29 stock units and a small amount of forestry that would not even cover the annual rates bill.

124. Retaining a rural zoning cannot sensibly be submitted to be either appropriate (effective or efficient), to serve the sustainable management purpose of the RMA in these circumstances.

125. Ms Jones' assessment of the rezoning relative to the policy requirements for a well-functioning environment of the NPS-UD and WRPS serves to confirm the demonstrably better outcomes that would be achieved through the proposed rezoning sought under PC5.

126. Conversely, as one of the submitters would have it, the Site should be left to function as a "strategically designated rural buffer".[84]

127. It is trite and long established law under the RMA that land cannot be rezoned for an effective open space or buffer purpose, but instead formally designated and acquired by the local authority if that is the true intention.

128. Short of designation and acquisition for that purpose, the untenable future of the Site as a rural prospect should be abandoned, and the Site zoned for future residential use given the significantly greater benefits that would be achieved through that rezoning, not least in terms of housing affordability and choice in the most rapidly growing part of Kāpiti Coast District.

129. As the outline of opinion evidence traversed earlier in these submissions confirms, there is adequate existing or planned infrastructure to support new housing on the Site to deliver those benefits, and all potential adverse effects (landscape/amenity, ecology, natural hazards or otherwise) can be effectively addressed through the resource consent processes that would follow the rezoning, if PC5 is confirmed.

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[84] Refer Ms Jones evidence, at paragraph 27.

Existing Environment

130. As also referred to earlier in these submissions, comprehensive and conservatively applied modelling of the capacity of the Te Moana Road interchange to accommodate development of the Site has been completed.

131. This includes modelling of scenarios encompassing both a theoretical development yield from the Ngārara Farm site, and as *actually consented*.

132. The Applicant firmly submits however that only the latter approach is legally valid in terms of what comprises the existing (and future) environment for RMA assessment purposes.

133. As the Court of Appeal found in *Queenstown Lakes District Council v Hawthorne Estate Limited:*[85]

> In our view, the word "environment" embraces the future state of the environment as it might be modified by the utilisation of rights to carry out permitted activity under a District Plan. It also includes the environment as it might be modified by the implementation of resource consents <u>which have been granted</u> at the time a particular application is considered, where it appears likely that those resource consents will be implemented.[86]
>
> (emphasis added)

134. As Mr Benner explained, the most recent modelling completed includes traffic generated only by those new dwellings (or dwelling equivalents) within the Ngārara Farm site that have actually been consented or are in the process of being consented, rather than the hypothetical yield of 900 dwellings assumed in the initial modelling.[87]

135. The fact is that new dwellings under the Ngārara Farm Structure Plan are not permitted as of right under the Kāpiti Coast District Plan but instead require resource consent (as would new dwellings on the PC5 Site itself).

136. As a matter of law, the assessment of intersection capacity should only factor in those dwellings that have actually been consented including within the more recent modelling completed by Mr Wignall and discussed in Mr Benner's evidence.

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[85] [2006] NZRMA 443.
[86] Refer paragraph [84] of the judgment.
[87] Refer paragraph 41 of Mr Benner's evidence.

137. For completeness, it is equally submitted that the Waikanae North Development referred to in Mr Shields' evidence (yet to be consented under the Fast Track process[88]) is legally irrelevant in this context.

Other Matters

NPS-UD- development capacity and demand issues

138. The Applicant notes Ms Jones' evidence (consistent with the assessment in the s 42A report[89]) that the NPS-UD is enabling and does not confine rezoning to situations where there is a demonstrated shortage of housing (that is, there is no requirement to supply "just enough" development capacity).[90]

139. Policy 8 of the NPS-UD along with implementation Clause 3.8 (and the WRPS provisions that give effect to clause 3.8), enable "out of sequence" or "unanticipated" housing to be approved, with the directive in Policy 2 being to provide "at least" sufficient development capacity.[91]

140. PC5 would nevertheless serve to meet specific demand within the District for smaller houses and medium density developments,[92] and whereby the ongoing supply of housing and the type of housing being supplied remains a factor limiting housing choice, and a contributing factor to housing affordability for the Kāpiti Coast District.[93]

141. As Ms Jones explains in her evidence, the Site had been considered for inclusion within the Council's growth strategy *Te Tupu Pai* (and as part of Plan Change 2), with it being recognised in these processes that more detailed evaluation needed to be completed to address potential site constraints.[94] This is precisely what the PC5 process has entailed.

142. As Mr Taylor's evidence also confirms, the PC5 Site has been specifically identified in the Council's Development Contributions Policy Catchment Maps and within the Council's Zone Management Plan (**ZMP**) for the purpose of infrastructure planning.[95]

143. To that extent, rezoning of the PC5 Site is not "unanticipated" in any event.

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[88] Paragraph 13 of Mr Shields' evidence.
[89] Paragraph 12.14 of the s 42A report.

[90] Ms Jones' evidence at paragraph 48.
[91] Paragraphs 48-55 of Ms Jones' evidence.
[92] Paragraph 12.13 of the s 42A report.
[93] Paragraph 40 of Mr McGillivray's report appended to the s 42A report.
[94] Paragraphs 41-44 of Ms Jones' evidence.
[95] Paragraph 51 of Mr Taylor's evidence.

S 42A report reservations and additional policies

144. For the reasons advanced by Ms Jones, the Applicant submits that the reservations to the preferred option being adopted as recorded in paragraphs 1.12 and 13.3 of the s 42A report have been comprehensively addressed.

145. PC5 can be confirmed in full accordingly.

146. For the further reasons recorded by Ms Jones,[96] it is submitted that the additional provisions proposed to be included in the District Plan as recommended by the reporting officer are unnecessary, save in relation to recommended new policy items GRZ-P293, 4 and 5 to supplement existing District Plan consent triggers and ensure that transport infrastructure capacity and design are all considered at the resource consent stage of the process, in the manner recommended in the Transport Assessment filed in support of the Plan Change Request.

Response to Submissions on PC5

147. The Applicant has carefully considered and responded to the submissions on PC5, particularly as made by the New Zealand Transport Agency (**NZTA**) and the Fairway Oaks Drive Residents Partnership (**FODRP**).

148. This includes through the substantial additional modelling effort and engagement between the respective transportation experts as outlined in Mr Benner's statement, to the point as Mr Keenan now confirms, NZTA no longer opposes the rezoning (subject to subclauses 3, 4 and 5 of the Council's recommended site specific Policy GRZ-P29 being included).

149. Ms Jones and Mr Taylor's evidence sets out a detailed response to the various points made in the FODRP submission and indeed all of the expert opinion evidence being called by the Applicant addresses, in substance, the range of issues raised in the FODRP submission in a comprehensive way.

150. The FODRP has responsibly acknowledged that the Applicant's expert evidence "materially strengthens" the case for PC5.

151. That evidence nevertheless sets out a range of key propositions for the Hearings Panel to consider, aspects of which are responded to in Ms Jones' rebuttal evidence.

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[96] Paragraphs 116-118 of Ms Jones' evidence. Refer also Planners JWS, this remaining a matter in contention for Clauses 1 and 2, along with any need for a Structure Plan.

152. With respect to FODRP, there appears to be a misunderstanding that Mr Taylor’s earthworks concept plan must be adhered to as a “tightly defined mitigated development concept”.

153. As Ms Jones explains in her rebuttal, the earthworks concept plan is in effect a “strawman” proposal, to demonstrate that development of the Site is feasible.

154. It is the District (and indeed Regional and NES-F) Plan requirements that provide the structural rigour sought by FODRP, to ensure that all the recommended design responses and mitigation measures assumed by the various experts in providing their opinion, can and would need to be secured through consent conditions at the resource consent stage.

155. Acknowledging the care and attention that the FODRP submission has obviously been prepared with, it is respectfully submitted that all of the matters raised are addressed through the body of expert opinion before the Panel.

Martin Williams

17 September 2026

APPENDIX 1

Colonial Vineyard Limited v Marlborough District Council at [17].

The different legal standards to be applied are emphasised, and we have underlined the changes and additions[97] since *High Country Rosehip[98]:*

A. General requirements

1. A district plan (change) should be designed to accord with[99] - and assist the territorial authority to carry out - its functions[100] so as to achieve the purpose of the Act.[101]

2. The district plan (change) must also be prepared in accordance with any regulation[102] (there are none at present) and any direction given by the Minister for the Environment.[103]

3. When preparing its district plan (change) the territorial authority must give effect to[104] any national policy statement or New Zealand Coastal Policy Statement[105].

4. When preparing its district plan (change) the territorial authority shall:
   (a) have regard to any proposed regional policy statement";[106]
   (b) give effect to any operative regional policy statement.[107]

5. In relation to regional plans:
   (a) the district plan (change) must not be inconsistent with an operative regional plan for any matter specified in section 30(1) or a water conservation order;[108] and

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97 Some additions and changes of emphasis and/or grammar are not identified.
98 Noting also:
(a) that former A6 has been renumbered as A2 and all subsequent numbers in A have dropped down one;
(b) that the list in D has been expanded to cover fully the 2005 changes.
99 Section 74(1) of the Act.
100 As described in section 31 of the Act.
101 Sections 72 and 74(1) of the Act.
102 Section 74(1) of the Act.
103 Section 74(1) of the Act added by section 45(1) Resource Management Amendment Act 2005.
104 Section 75(3) RMA.
105 The reference to "any regional policy statement" in the *Rosehip* list here has been deleted since it is included in (3) below which is a more logical place for it.
106 Section 74(2)(a)(i) of the RMA.
107 Section 75(3)(c) of the Act [as substituted by section 46 Resource Management Amendment Act 2005].
108 Section 75(4) of the Act [as substituted by section 46 Resource Management Amendment Act 2005].

(b) must have regard to any proposed regional plan on any matter of regional significance etc.[109]

6. When preparing its district plan (change) the territorial authority must also:
   - have regard to any relevant management plans and strategies under other Acts, and to any relevant entry in the Historic Places Register and to various fisheries regulations[110] to the extent that their content has a bearing on resource management issues of the district; and to consistency with plans and proposed plans of adjacent territorial authorities[111];
   - take into account any relevant planning document recognised by an iwi authority[112]; and
   - not have regard to trade competition[113] <u>or the effects of trade competition</u>;

7. The formal requirement that a district plan (change) must[114] also state its objectives, policies and the rules (if any) and may[115] state other matters.

B. Objectives [the section 32 test for objectives]

8. Each proposed objective in a district plan (change) is to be evaluated by the extent to which it is the most appropriate way to achieve the purpose of the Act[116].

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

9. The policies are to implement the objectives, and the rules (if any) are to implement the policies[117];

10. Each proposed policy or method (including each rule) is to be examined, having regard to its efficiency and effectiveness, as to

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109 Section 74(2)(a)(ii) of the Act.
110 Section 74(2)(b) of the Act.
111 Section 74(2)(c) of the Act.
112 Section 74(2A) of the Act.
113 Section 74(3) of the Act as amended by section 58 Resource Management (Simplifying and Streamlining) Act 2009.
114 Section 75(1) of the Act.
115 Section 75(2) of the Act.
116 Section 74(1) and section 32(3)(a) of the Act.
117 Section 75(1)(b) and (c) of the Act (also section 76(1)).

whether it is the most appropriate method for achieving the objectives[118] of the district plan taking into account:

(i) the benefits and costs of the proposed policies and methods (including rules); and
(ii) the risk of acting or not acting if there is uncertain or insufficient information about the subject matter of the policies, rules, or other methods;[119] and
(iii) if a national environmental standard applies and the proposed rule imposes a greater prohibition or restriction than that, then whether that greater prohibition or restriction is justified in the circumstances.[120]

D. Rules

11. In making a rule the territorial authority must have regard to the actual or potential effect of activities on the environment.[121]

12. Rules have the force of regulations.[122]

13. Rules may be made for the protection of property from the effects of surface water, and these may be more restrictive[123] than those under the Building Act 2004.

14. There are special provisions for rules about contaminated land.[124]

15. <u>There must be no blanket rules about felling of trees[125]in any urban environment</u>.[126]

E. Other statues:

16. Finally territorial authorities may be required to comply with other statutes.

F. (On Appeal)

118 Section 32(3)(b) of the Act.
119 Section 32(4) of the RMA.
120 Section 32(3A) of the Act added by section 13(3) Resource Management Amendment Act 2005.
121 Section 76(3) of the Act.
122 Section 76(2) RMA.
123 Section 76(2A) RMA.
124 Section 76(5) RMA as added by section 47 Resource Management Amendment Act 2005 and amended in 2009.
125 Section 76(4A) RMA as added by the Resource Management (Simplifying and Streamlining) Amendment Act 2009.
126 Section 76(4B) RMA- this "Remuera rule" was added by the Resource Management (Simplifying and Streamlining) Amendment Act 2009.

17. On appeal[127] the Environment Court must have regard to one additional matter - the decision of the territorial authority.[128]

Edens v Thames-Coromandel District Council at [11].

[11] Acknowledging the comprehensiveness of the listing of matters for consideration in that decision, for relative ease of reference the particular issues that arise for consideration and determination in these appeals may efficiently be summarised in much the same way as they were in *Eldamos v Gisborne District Council,*[129] but updated to account for subsequent amendments to s 32 and for the regular changes to statutory numbering:

A. An objective in a district plan is to be evaluated by the extent to which:

 1 it is the most appropriate way to achieve the purpose of the Act (s32(1)(a)); and

 2 it assists the territorial authority to carry out its functions in order to achieve the purpose of the Act (s72); and

 3 it is in accordance with the Council's functions under s 31 and the provisions of Part 2 (s74(1)).

B. A policy, rule, or other method in a district plan is to be evaluated by whether:

 1 it is the most appropriate way to achieve the objectives of the plan (s32(1)(b)) 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 by identifying and assessing (quantitatively if practicable) the benefits and costs of the effects anticipated from its implementation together with the risk of acting or not acting if there is uncertain or insufficient information about the matter; and

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

 2 it assists the territorial authority to carry out its functions in order to achieve the purpose of the Act (s72);

[127] Under section 290 and Clause 14 of the First Schedule to the Act.
[128] Section 290A RMA as added by the Resource Management Amendment Act 2005.
[129] *Eldamos Investments Ltd v Gisborne District Council Decision,* fn 1, at [128].

3 it is in accordance with the Council's functions under s 31 and the provisions of Part 2 (s74(1)); and

4 (if a rule) it achieves the objectives and policies of the plan (s 76(1)(b)).

[12] The most relevant functions of the Council under s 31 RMA for the purposes of this decision are:

(1) Every territorial authority shall have the following functions for the purpose of giving effect to this Act in its district:

(a) the establishment, implementation, and review of objectives, policies, and methods to achieve integrated management of the effects of the use, development, or protection of land and associated natural and physical resources of the district:

…

(b) the control of any actual or potential effects of the use, development, or protection of land, including for the purpose of-

(i) the avoidance or mitigation of natural hazards; and

…

(iia) the prevention or mitigation of any adverse effects of the development, subdivision, or use of contaminated land:

(ii) the maintenance of indigenous biological diversity:

…

(f) any other functions specified in this Act.

(2) The methods used to carry out any functions under subsection (1) may include the control of subdivision.

APPENDIX 2

STAGE 2 OPTION – DEFERRED RESIDENTIAL PRECINCT

1. As signalled in the body of these submissions, the purpose of the content of this Appendix is to outline the legal and planning rationale behind the proposed “Deferred Residential Precinct” for what is described and evaluated as “Option 3” in the Plan Change Request.[130]

2. The Panel is requested to have regard to the content of this Appendix, if it rejects the Applicant’s principal submission that rezoning of the full Site (both Stage 1 and Stage 2 areas) can proceed in a manner that would give effect to the NPS-HPL Am, and/or by way of “deserving exception” to prevent an outcome plainly inconsistent with the purpose of the RMA.

3. The nature and substance of the proposal is this.

4. Assuming the Panel is satisfied that the statutory tests are *otherwise* met (including for a residential zone to be the most appropriate option in s 32 terms), having regard to the wider range of considerations (infrastructure and servicing capacity, flooding/stormwater etc), the entire Site would be rezoned General Residential.

5. However, a Deferred Residential Precinct would be applied over the Stage 2 area, being that portion of the Site currently mapped as HPL under the NZLRI classification.[131]

6. If this approach is adopted, PC5 would introduce the following provisions into the District Plan:

   <u>Deferred Residential Precinct [Chapter Description]</u>:

   The purpose of the Deferred Residential Precinct is to recognise sites where subdivision and development in accordance with the provisions of the General Residential Zone are deferred until such time as a constraint preventing residential development is addressed.

   - Deferred Residential Precinct – 100 & 110 Te Moana Road will be lifted when the Land Use Capability Class of the soils within it are no

[130] Refer pages 117-119 and 123-127 of the Plan Change Request document.
[131] Refer Executive Summary and Figure 1 and Sections 3.1 to 3.2 and Figure 12 of the Plan Change Request, along with the regional scale map at page 7 of the Land Productivity Report produced with Mr Grant’s evidence.

longer classified as 'highly productive' under the National Policy Statement for Highly Productive Land.

GRZ-Policy XXX – Deferred Residential Precinct

Subdivision, use and development within the Deferred Residential Precinct wilt be undertaken in accordance with the General Rural Zone provisions (including the objectives and policies) <u>so that the main purpose of this area remains rural</u> until the Deferred Residential Precinct is uplifted, and the General Residential Zone provisions take effect.

GRZ Rule XXX – Uplifting of Deferred Residential Precinct – 100 & 110 Te Moana Road

The Deferred Residential Precinct will be uplifted, and the General Residential Zone provisions will take effect when the land within it is no longer defined as 'highly productive' under the National Policy Statement for Highly Productive Land.

(emphasis added)

7. In essence, the new Precinct provisions would preclude residential use of the Stage 2 area (currently mapped as HPL) so that its *main purpose* remains rural, until that land is no longer classified as HPL under the NPS-HPL-Am.

8. Rather than having to go through the full Plan Change evaluation process at that point, (as now already being progressed in a comprehensive way), and assuming that the GWRC ultimately produces mapping under the NPS-HPL-Am that does not include HPL within the Site, the Deferred Residential Precinct would cease to apply, crystallising the General Residential zoning of the Stage 2 area and enabling that land to be used for residential purposes.

9. This would be considerably more efficient than rejecting the rezoning over the Stage 2 area altogether.

10. In legal terms, the logic of the argument is this.

11. First and foremost, to the extent applicable (i.e. effectively rejecting the Applicant's principal submissions on the NPS-HPL-Am), Policy 5 and clause 3.6 of the NPS-HPL-Am constrain the "urban rezoning" of HPL.

12. This then raises the question of whether, with the overlying Precinct in place, confirming PC5 subject to the Deferred Residential Precinct would comprise an "*urban rezoning*".

13. The Applicant submits that it would not, because the PC5 Site could not be "*used predominantly*" for residential activities while the Precinct overlay is in force, applying the provisions of the National Planning Standards (**NPSd**), as now explained.

14. The NPS-HPL-Am defines the term "urban" as a description of a zone, to mean (*inter alia*):

> (a) low density residential, general residential, medium density residential, large lot residential, and high density residential.[132]

15. The NPS-HPL-Am further states that a reference in that NPS to a zone, is a reference to a zone as described in Standard 8 of the NPSd (or nearest equivalent zone).[133]

16. Standard 8 of the NPSd defines the listed residential zones as being:

> Areas <u>used predominantly for</u> residential activities....[134]

17. As a form of District Spatial layer, the NPSd defines "Precincts" as follows:

> A precinct spatially identifies and manages an area where additional place-based provisions apply to modify or refine aspects of the policy approach or outcomes anticipated in the underlying zone(s).

18. With the Deferred Residential Precinct in place, the Stage 2 land could not be used "predominantly" (or indeed at all) for residential activities.

19. It would instead be required to be "used predominantly for" rural activities such that regardless of the underlying rezoning, the District Plan would retain in substance, what the NPSd defines as a General Rural or Rural Production zone over the Site, namely:

> Areas <u>used predominantly for</u> primary production activities....[135]

20. As case law interpreting the transitional provisions of the NPS-HPL confirms, it is the *substance* rather than the name or label which matters.

21. In *Wakatipu Equities Limited v Queenstown Lakes District Council,*[136] the Environment Court was required to consider whether the "Wakatipu Basin

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[132] Refer clause 1.3 of the NPS-HPL-Am.
[133] Ibid.
[134] Refer page 36 of the NPSd.
[135] Refer page 36 of the NPSd.
[136] [2023] NZEnvC 188.

Rural Amenity Zone" (**WBRAZ**) was a General Rural or Rural Production zone, for the purpose of clause 3.5(7)(a)(i) of the NPS-HPL.

22. In doing so, the Environment Court had regard to the history and purpose of the WBRAZ, including with reference to its objectives and policies.[137]

23. The Environment Court also considered the NPSd zone definitions (as referred to in clause 1.3 of the NPS-HPL), and found that the words "used predominantly for" in each zone definition, require consideration of what the *main purpose* of the zone in question is.[138]

24. The Environment Court found that the main purpose of the WBRAZ was not rural production, but instead maintaining or enhancing landscape character and visual amenity values.[139] It found that the WBRAZ therefore best aligned with what the NPSd refers to as a Rural Lifestyle Zone. [140]

25. Alongside that issue, the Environment Court was required to consider whether a specific "Precinct" within the WBRAZ was a separate zone to the WBRAZ, or instead part of it.

26. Again, the Environment Court drew on the definition of "Precinct" in the NPSd, as set out above.[141]

27. The Environment Court found that the Precinct was not a separate zone but instead part of the WBRAZ, in part because it did not have its own policy and rule framework.[142]

28. Under the PC5 Request, the Deferred Residential Precinct is deliberately placed as a distinct planning layer, with a specific policy and rule framework included (as set out above), to ensure that the *main purpose* of the Stage 2 area remains rural (until the GWRC mapping exercise is complete).

29. The Precinct would apply to "modify or refine" aspects of the policy approach and outcomes anticipated in the underlying zone (Residential, if PC5 is otherwise confirmed).

30. The key point to take from *Wakatipu Equities* however is that (as submitted above), it is substance rather than name that is the dominant consideration.

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137 Refer paragraphs [38] and [49]-[52] of the decision in particular.
138 Refer paragraphs [17]-[19] of the decision.
139 Refer paragraphs [46] and [55]-[57] of the decision.
140 Refer paragraph [73] of the decision
141 Refer paragraph [25] of the decision.
142 Refer paragraphs [32] to [35] of the decision.

31. In *Wakatipu Equities*, a Rural Amenity zone was found to be a Rural Lifestyle zone.[143]

32. The Precinct was not found to qualify as a separate zone, *not because of its name as a Precinct*, but because it lacked distinctive planning provisions in its own right.[144]

33. This same approach was applied in *Save the Maitai*, whereby an "Area" within a broader zone *was* found to comprise a separate zone, having regard to its main or predominant purpose (as distinct from the remainder of the zone), having regard to the specific provisions of that planning area.[145]

34. Again, the Environment Court applied the "main purpose" test set with reference to the NPSd, as established in *Wakatipu Equities*.[146]

35. For all of these reasons, and applying similar logic and reasoning to the Environment Court in *Wakatipu Equities* and *Save the Maitai*, it is submitted that with application of the Deferred Residential Precinct, PC5 would not comprise an "urban rezoning" of the HPL area of the Site, with the Deferred Residential Precinct in place requiring that it retain a main purpose of rural activity, until the GWRC mapping exercise is completed and no longer classifies that part of the Site as HPL.

36. If the Panel is minded to adopt Option 3, a specific finding that "but for" the NPS-HPL-Am requirements, rezoning of the full Site as General Residential would be the most appropriate option in s 32 terms (and otherwise meet the statutory tests under the RMA) should be recorded in the Panel's decision such that as submitted earlier, that zoning can crystallise on completion of the GWRC mapping exercise, and assuming that the Site no longer contains HPL at that point in time.

[143] Refer paragraph [73] of the decision.
[144] Paragraph [32] of the decision as referred to above.
[145] Refer paragraphs [49]-[72] of Appendix 1 the Environment Court's decision, addressing the "Rural High-Density Small Holdings Area falling otherwise within the wider Rural zone provisions.
[146] Refer paragraph [58] of the decision.