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

CLOSING SUBMISSIONS IN REPLY FOR ERIC, VINCE AND RAECHEL OSBORNE

Dated 25 September 2026

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MAY IT PLEASE THE PANEL

1. The purpose of these submissions is, firstly, to record in writing the key points made in closing regarding substantive legal and factual issues that emerged during the course of the hearing.

2. Secondly, to identify those matters which the Applicant proposes be addressed through further expert conferencing/provision of further information to respond to more specific points.

3. This includes revisions to the Development Area provisions and Structure Plan, and identification of specific (existing) District Plan provisions that would ensure the design responses and mitigation measures recommended by the technical experts are delivered through the rezoning (if confirmed), as sought by the Fairway Oaks Drive Residents Partnership (**FODRP**).

Deserving Exception

4. As explained at the hearing, the Applicant submits that if the Panel were to find that confirming PC5 would not give effect to the NPS-HPL on its express terms (i.e. essentially rejecting the "pragmatic approach" and drafters intentions argument), this is a clear case for a "deserving exception".

5. As addressed in reply, the deserving exception pathway established by the Supreme Court in *Royal Forest and Bird v New Zealand Transport Agency* is not confined to the exceptions within the NPS-HPL itself. That cannot be the case as otherwise recourse to that broader principle of administrative law,[1] would not be necessary.

6. The Supreme Court gave an *example* of how the exceptions pathway can operate at [119] of the judgment, applying the tests for an exception as available in that case, under the Auckland Unitary Plan. Those provisions were found to establish a genuine exception to NZCPS Policy 11.

7. However, it is submitted that the principle is broader than that.

8. The Panel is referred to paragraphs [121]-[126] of the judgment (included within the appendix to this reply) and in particular those aspects of the specific paragraphs of the judgment as given emphasis in that appendix.

[1] Per [100] of the Supreme Court's decision.

9. This includes the opening words of paragraph [126] whereby the Auckland Unitary Plan is held to contain "just such" an exceptions pathway, but was not said to be the only available avenue of recourse to this more general approach.

10. It is accepted that, as the Supreme Court found, exceptions would be rare (indeed "truly exceptional"), and provide for "difficult cases".[2]

11. This is a difficult case.

12. It is hard to conceive of a situation that would be more unique within Kāpiti District. The Site presents a mosaic of contrasting soils, including a small fraction of the lowest tier (LUC 3) land amidst LUC 4 land, with a very limited overall stock carrying capacity (1 horse); is immediately adjacent to the Te Moana Interchange /Expressway and able to connect to water servicing infrastructure, with existing housing adjoining to the west.

13. The Site has not been, cannot be, and never will be, used for land based primary production, to any sensible degree.

14. As Ms Pascall noted, refusing Stage 2 would lead to a "strange" outcome from an urban form perspective, whereby the front of the Site would be left undeveloped – indeed an outcome which the Applicant submits would be (to quote the Supreme Court) "*plainly inconsistent with the purpose of the RMA*"[3] as well as being "anomalous and unintended" by the drafters of the NPS-HPL.[4]

15. In that respect, while it might be technically feasible to develop the Stage 1 land in isolation, Mr Taylor's opinion was equally that development should be progressed on a holistic approach. As the Chair observed, in *Save the Maitai*, the Walters Bluff area was included within the broader plan change at least through a connection to that specific area, despite otherwise being found to be off limits to a rezoning under the NPS.[5]

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[2] [125] of the decision.
[3] [101] of the decision.
[4] Refer third sentence of [109] of the Supreme Court's judgment.
[5] Refer paragraphs [104] and [131] of the decision.

Structured Analysis

16. PC 5 does not raise the material degree of conflict between the NPS-HPL and NPS-UD as confronted by the Supreme Court in the *Port Otago* case (arising within the NZCPS itself).

17. One of the specific matters for provision of further information (set out below), is the list of policy provisions that provide support for PC5 (and the Applicant submits, provide yet a further basis for the "deserving exception" as addressed above).

18. Those provisions do not however "compel" that PC5 be approved, leaving the Panel having to grapple with how to reconcile that imperative with contrary direction; (in particular) clause 3.6 of the NPS-HPL.

19. In any event, as the Supreme Court recorded in *Port Otago*, the "structured analysis" approach is really directed at the resource consent process rather than in a plan change context.[6]

20. While potentially open to the Panel, the Applicant does not rely on a structured analysis approach, but instead the deserving exception pathway, if the Panel finds PC 5 would not otherwise give effect to the NPS-HPL directly.

Drafters' Intentions

21. There appeared to be a consensus of expert planning opinion before the Panel that confirming PC5 would not be contrary to (and indeed give effect to) the objective of the NPS-HPL, and align with the drafters' intentions for the instrument interpreted as a whole, as revealed through a number of indicators within the NPS. This is despite an apparent degree of conflict with Clause 3.6, assuming the Site's current transitional status as including 1.87ha of HPL (LUC 2 land).

22. For the assistance of the Panel in its deliberations, the Applicant submits by way of summary that these indicators comprise:

    (a) Clause 3.4(1) and (5)(d) – with the 0.67 ha of LUC 3 land not forming a "predominant" part of the Site, nor forming part of a "large and geographically cohesive" area, but instead being a small discrete area separated from any large and geographically cohesive areas of HPL elsewhere. Indeed, the same could be

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[6] Refer paragraphs [72]-[75] of the Supreme Court's decision in *Port Otago*.

said for the full 1.87 ha of LUC 2 land (NZLRI mapping) as it stands.

(b) The fact that LUC 3 land was removed from the constraints on urban rezoning in clause 3.6 in December 2025, i.e. the NPS no longer intends to restrain urban rezoning of LUC3 land to situations where those tests are met.

(c) That in the result however, LUC 3 land is effectively left without a pathway for urban rezoning applying the "as provided in the NPS" wording of Policy 5.

(d) That access to clause 3.10 is sensible in that context.

(e) That land with permanent constraints and a carrying capacity that cannot meet even a fraction of the annual rates bill is not able to support "land based primary production" of the kind that needs to be protected, to serve the objective of the NPS.

23. In short, applying *Gibbston Vines*, confirming PC5 would not impede the drafters' intentions, nor the ability of the Regional Council to give effect to the NPS-HPL when it ultimately gets to the mapping exercise directed by clauses 3.4 and 3.5.

24. As clarified at the hearing, it is not the Applicant's case that clause 3.6 has been fully disengaged for PC5 as it stands. Part of the Site is currently mapped as LUC 2. The point more speaks to the drafters' intentions and the drafting indicators as just summarised, and addressed in opening [7]

Gardon Trust Decision

25. As submitted in closing, the *Gardon Trust* decision is another example of the generally "pragmatic approach" taken by the Environment Court to the NPS-HPL.

26. Reference is made to the general observations of the Court at [232]-[235] in this respect.

27. Factually, there are a number of similarities in terms of the benefits of PC5 and the plan change at issue in that case – refer to the factors set out at paragraph [5] of the decision, many of which are submitted to be applicable here.

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[7] Refer paragraphs 91-94 of the Applicant's opening submissions in this respect.

28. It is noted that in that case, some 91% of the site was HPL under the NPS-HPL transitional provisions – refer paragraph [84], but rezoned regardless.

29. Beyond that, the Applicant deliberately set out to demonstrate that the clause 3.6 tests were satisfied in that case[8] – the Court was not presented with (and nor did it either address or reject) the argument advanced to the Panel for PC5 as summarised in opening, including the deserving exceptions pathway itself.

RMA Reform- visual amenity

30. The Panel raised the issue of the relevance or otherwise for PC5 of the visual/amenity/outlook concern expressed by the FODRP residents (and Mr Button), and the need for any specific mitigation (setbacks, vegetation planting) to address that concern, in light of the impending repeal of the RMA and its replacement with the Planning Act and Natural Environment Acts.

31. Under Schedule 11 to the Planning Bill, s 104 of the RMA is amended to exclude from a consent authority's consideration of a land use activity, the following matters:

- Outlook space;
- Landscaped areas for construction of a building (exception in relation to permeability);
- Views from private property.

32. These amendments come into force one month after the Act receives Royal assent (which is currently imminent), and apply to any land use consent application lodged during the transitional period.[9]

33. Beyond that, and once the new legislation is fully in force, these same effects would be excluded under s 14 of the Planning Act (views from private property in particular).

34. As also noted in closing, there is case law that decision makers must apply the law as it stands, albeit with rare exceptions where a Bill is

[8] Refer paragraph [4] and [59]-[60] of the decision.

[9] Being the date from one month after the Act receives Royal assent and until an order in Council is issued at the point when regional spatial plans are in place nationally, or at a regional level- refer Part 2 of Schedule 11, and clauses 1, 4 and 12B of Schedule 1 to the Planning Act.

before Parliament and its passage into law is imminent/inevitable.[10] That case law has generally been applied in an "adjournment" context (i.e. considering whether a case should proceed to hearing, when it may be rendered moot in light of pending changes to the controlling legislation).

35. I submit we are past that point here.

36. The Planning Act and Natural Environment Acts have now passed their third reading and will come into force on the date of Royal assent, with the transitional implications set out above from one month after that date.

37. The reality is that if PC5 is confirmed, any land use consent would be lodged either during the transitional period when the amendments to s 104 apply, or beyond that under the Planning Act itself.

38. For practical purposes however, and as again referred to further below (and addressed at the hearing), mitigation of any visual/amenity impact from Fairway Oaks Drive would largely be achieved through the stormwater attenuation requirements, with the Structure Plan/Development Area provisions for that purpose to be confirmed through expert conferencing.

39. As Mr Taylor explained, the compensatory storage area would need to be in the lowest part of the Site, adjacent to the boundary of the Fairway Oaks Drive properties.

40. The revised Structure Plan can show the general location of that stormwater management area, but as with the wetland buffer planting concern also addressed below, this outcome is better secured through a framework of Development Area provisions (policies/criteria) than solely through a notation on the Structure Plan in isolation.

41. Beyond that, there is a conceptual difficulty (contradiction) inherent to Mr Button's proposition that "screening" should be provided to address what he referred to as a loss of 'openness' resulting from PC5. Any vegetation might provide for some filtering of outlook, but stormwater management needs to be the overriding consideration.

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[10] Refer *Transpower New Zealand Limited v Southland Regional Council* [2025] NZEnvC 77 at [55].

Housing Affordability and Choice

42. A question was put to Ms Jones as to whether her evidence regarding the benefits of PC5 (and alignment with the RPS provisions) in terms of provision of housing supply, quality, affordability and choice was based on evidence or speculation.

43. The Applicant submits that there is expert planning opinion (supported by Mr McGillivray's assessment) confirming that medium density housing in this specific location would address a real and present housing constraint /limiting factor on housing choice and affordability.[11]

44. Acknowledging that there is (in terms of the HBA assessment completed by the Council) a surplus of housing supply for Waikanae,[12] as Mr McGillivray explained at the hearing, projected supply is one thing, but feasibility, whether the development is "realisable", and/or actually delivered to meet that projected capacity can be another thing altogether – as market conditions fluctuate and supply and demand and respond accordingly.

45. As also noted in *Gardon*, this is not simply a supply concern, issues of quality and price also arise.[13]

46. In short, it is submitted that the asserted benefits for housing supply, affordability and choice have substance.

47. The statutory backing of PC5 from those plan provisions implementing NPS-UD Policies 2, 8 and clause 3.8 in particular, support this proposition and will be subject of expert conferencing as detailed below.

FODRP Response – General

48. At a general level, counsel refers back to the submissions made at paragraphs 147-155 of opening submissions.

49. The further information to be provided through expert conferencing as to how the design responses and expert recommended mitigation measures would be delivered through the District Plan requirements, should substantively address the key point made in FODRP's presentation to the Panel at the hearing, that those design responses

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[11] Refer paragraph 12.13 of the s 42A report and paragraph 40 of Mr McGillivray's memorandum.
[12] Paragraph 32 of Mr McGillivray's memorandum.
[13] Refer paragraph [182] of the decision.

and mitigation measures are not all recorded within specific requirements of PC 5 itself.[14]

50. More broadly, it is respectfully submitted that the Panel should (as it no doubt would regardless), place primary weight on the consensus of expert opinion before the Panel as it stands.

51. That is, there are no feasibility level impediments to PC5 being confirmed, with all matters of design detail regarding flood/stormwater/groundwater management, geotechnical constraints and infrastructure/servicing capacity appropriately left to the resource consent stage.

52. The expert conferencing will also produce provisions that serve to more expressly secure the intended outcomes of the 10 m wetland buffer for ecological purposes, and provide mitigation for residential amenity/outlook as addressed above.

Wetland Buffer

53. As identified further below, expert conferencing is proposed to frame Development Area provisions providing direction on the specific outcomes sought to be achieved for any wetland buffer planting.

54. Mr Pickett confirmed at the hearing that uncertainty over the wetland extent (particularly in the southern area), can be addressed through expert delineation at the resource consent stage, and the need for and appropriateness of planting equally confirmed at that stage.

Expert Conferencing – Specific Information and Drafting

55. Against that background, the Applicant proposes that expert conferencing take place on the following specific issues, along with provision of the further information and detail outlined, to support the points made in this reply and ensure that PC5 provides an additional degree of surety around specific areas of concern, including to the FODRP.

56. Specifically, the Applicant proposes as follows:

    (a) Conferencing between the planners and ecologists to draft revised Development Area provisions requiring and addressing:

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[14] Refer for example questions 4-11 as set out on page 11 of FODRP's Consolidated Hearing Report.

- Delineation of the extent of the wetland at resource consent stage;
- The specific purposes/functions for any planting within the wetland buffer;
- The criteria to be applied to determine the location, extent and type of wetland planting;
- Consideration of whether vegetation planting would have any adverse ecological consequences including for wetland hydrology;
- Maintenance of the planting in perpetuity.

(b) Similarly, expert conferencing between the planners and landscape experts (along with Mr Taylor), to frame Development Area provisions to be applied at the resource consent stage as to the need for/type and extent of any vegetation planting alongside compensatory storage, within an identified distance from the boundary of the Fairway Oaks Drive properties (4, 6, 8 and 10), with a suitable annotation on the Development Area Structure Plan for those provisions to attach to (i.e. showing the provisional location of the compensatory storge area) .

(c) Conferencing between the planners (Ms Jones/Ms Pascall) to agree and set out in table form, all relevant District Plan/LDMR requirements (rules/standards/relevant matters of control/discretion in particular), that would serve to ensure the design responses and mitigation measures recommended by the technical experts are secured through the resource consent process, in relation to the following matters:

- Stormwater/flooding;
- Groundwater (including installation of piezometers ongoing monitoring);
- Geotechnical;
- Transportation (including Te Moana interchange capacity, site access arrangements/pedestrian/cycling connections);
- Wastewater/water supply capacity;
- Ecological Site/Wetland function

– Amenity and Landscape/Natural Character.

(d) Production of a final Development Area Structure Plan covering the matters noted above (e.g. indicative compensatory storage area) including a revised indicative road alignment that would provide access to lots within the southern part of the Site while minimising effects on dune landform legibility (supported by advice to that effect from Mr Taylor and Mr Ormsby).

(e) A revised figure delineating the Stage 1/Stage 2 boundaries overlaid on the existing HPL mapping (figure at section 7.3 of the Land Productivity report).

(f) Planners to set out a list of those NPS, RPS Regional Plan and District Plan policies provisions that are supportive of PC5.

(g) Conferencing between the planners to agree on any other any additional or consequential changes to the Development Area provisions including to amend (currently proposed) Rule DEV4-R1 to require that land use activities be in "general" accordance with the Structure Plan.

57. The Applicant respectfully proposes this information (including a Joint Witness statement(s) for matters requiring conferencing) be submitted to the Panel by 5.00 pm Friday 9 October.

58. Panel directions to that effect are sought accordingly.

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itself that the proposal provides for environmental offset and compensation packages that both minimise and make up for the damage the proposal will do in the SEA. These packages will necessarily be exceptional as even then, the consent authority will still need to be satisfied that any remaining harm is justified. For the purposes of clarity, if a proposal satisfies the requirements of this exceptions pathway in the AUP, we consider it will be a genuine exception to NZCPS Policy 11 which does not subvert its objectives; the proposal will have "thread[ed] the needle" appropriately.[113] As stated above, this pathway is particular to the specific circumstances of this case, although particular considerations within it may be relevant in similar cases.

[120] In her reasons, Glazebrook J says that our analysis subverts *King Salmon*'s bottom line approach to the NZCPS avoid policies and that we will render redundant the *Port Otago Ltd v Environmental Defence Society Inc* methodology for resolving unavoidable conflicts between directive policies.[114] We have explained that the facts in *King Salmon* were materially different to those in the present case. It would be wrong to treat the distinctive context of Auckland and the EWL as irrelevant; this would risk subverting the purpose of the RMA.[115]

[121] Two further points. First, as we have already noted, the Court in *King Salmon* acknowledged that the prescriptive power of a policy will depend not only on the directive verb it employs, but also on the level of abstraction and generality of its subject matter.[116] In other words, the fact that Policy 11 uses "avoid" is not solely determinative of its prescriptive power. Second, it must be kept in mind that the issue in *King Salmon* was whether, in the context of a "give effect to" duty, the use of "avoid" should control the outcome or just be one mandatory relevant factor among many. There was no consideration of, nor any need to consider, the more difficult cases in the area between these extremes. Those cases fall for consideration now. The EWL is one such case. It provides an opportunity, in accordance with the common law method, to further refine prior broadly framed authoritative propositions of law by applying them to materially different circumstances.

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113 See above at [88].
114 *Port Otago Ltd v Environmental Defence Society Inc* [2023] NZSC 112, [2023] 1 NZLR 205; and see the reasons of Glazebrook J below at [330].
115 See above at [99] and following.
116 *King Salmon*, above n 67, at [80].

[122] *Port Otago* is not sidelined by our approach. The task set for the Court in *Port Otago* was to resolve conflicts between equally powerful directive policies. Its methodology is directed at finding a workable compromise between them. Waka Kotahi's task is far more difficult. The starting point for the EWL is that it may not be built because Policy 11 may not be compromised. But there is a rider. Policy 11 should not be interpreted in a way that produces perverse outcomes plainly inconsistent with sustainable management. So, for example, if in the absence of practicable alternatives, abandoning the EWL will pose a genuine risk of injury to the regional or national economy, then Policy 11's "bottom line" should not stand in the way—that is, not without very good reason. That leads to the final step of analysis in the exceptions pathway: if on a proper appraisal of the adverse environmental effects, those effects still outweigh the adverse impact on human communities, then the SEA values must be protected.

[123] It may assist to put the foregoing into more concrete regulatory terms. In the *Port Otago* case, where there was a conflict between directive policies, the Regional Coastal Plan could have given some port activities discretionary or even restricted discretionary activity status[117] in areas subject to avoid policies, if they satisfied regional policies drafted to give effect to the *Port Otago* methodology. By contrast, achieving any status more permissive than non-complying would be impossible for roading infrastructure on any scale in the Māngere Inlet. This is because in the case of the EWL, there is no contest between equally powerful directive policies and *Port Otago* does not apply.

[124] Glazebrook J also says that there is no justification for the creation of a "freestanding" exception to the NZCPS bottom lines as *King Salmon* has already established what they should be. But the *King Salmon* exceptions merely confirm that invalid, uncertain or inapplicable policies cannot have directive effect.[118] By contrast, the exception being discussed here is a merits-based one, by reference to the purpose of the RMA. Further, Glazebrook J does not discount the possibility that the facts of the case may themselves justify an exception to "avoid", even where there is no

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117 RMA, ss 77A(2)(c)–(d) and 87A(3)–(4).

118 We do not comment on the Treaty of Waitangi-based procedural exception referred to in *King Salmon*, above n 67, at [88].

conflict with another directive policy.[119] Our point is that the no alternative-based policies in the AUP provide a framework for assessing when these facts arise.

[125] At a broader level, Glazebrook J's concern appears to be that exceptions of any kind will erode the directive effect of avoid policies and open the floodgates. We do not share that concern. As we have emphasised, the threshold for approval of infrastructure is high and so will be truly exceptional, and even then the avoid policies will continue to powerfully constrain decision makers throughout the approval process. Rather, our concern is that interpreting avoid policies as imposing a no-exceptions ban on infrastructure in the CMA brings with it a risk of undermining the RMA's purpose. It is impossible to predict every circumstance to which a generally framed avoid policy will be applied. For example, if an avoid policy were interpreted and applied in a manner that exposed a coastal community to inundation or erosion, there would have to be a question about whether that interpretation is consistent with sustainable management. These are the difficult cases. It seems unlikely that those who promulgated the NZCPS chose environmental protection over, say, the safety of an existing settlement by using avoid language—and that this choice would be the embodiment of sustainable management. Potential exceptions like this will be truly rare, but there can be no doubt that it is necessary to construe avoid policies so as to allow for them.[120]

[126] The AUP contains just such an exceptions pathway. Its sole purpose is to ensure that applying avoid language to general objects, such as those referred to in Policy 11, does not generate outcomes so plainly contrary to s 5 as to be perverse. And, again, the pathway is plan-driven, residual and narrow; it is based on proven necessity and absence of alternatives. It will not be enough that the project is a good idea—even a very good idea—or that a failure to approve the project would be very inconvenient for the community that expects to benefit from it. This is not, on any view, a step back to overall judgment. Nor will the floodgates open.

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119 Below at [238] and [249]–[250]. Accepting that there is such a possibility is difficult to reconcile with the strict application of *King Salmon* by Glazebrook J.

120 We say potential, because, even if there was no choice but to build the seawall or undertake the reclamation required to protect the settlement, it would still need to be the case that the benefits plainly justify the environmental cost.

[127] We turn now to consider in more detail the reasons why the Board and the High Court both accepted, though for different reasons, that the EWL met the relevant policies.

The Board's reasons

[128] The Board's summary of its s 104D conclusions was in these terms:[121]

> [662] ... In some consent applications a provision may be so central to a proposal that it sways the s104D decision, but generally the s104D assessment will be made across the objectives and policies of the plan as a whole and not determined by individual provisions. The Board finds that the latter applies in this case, notwithstanding that there are indeed some inconsistencies between the [Waka Kotahi] Proposal and relevant objectives and policies, particularly in the areas of reclamation and biodiversity. In doing so, the Board has given measured weight to the word "avoid", which is clearly not a direction to be ignored.
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> [663] On balance, the Board finds that the Proposal is not contrary to the objectives and policies of the [AUP] when considered as a whole. Its consideration has given particular focus to the provisions most directly relevant to the activities with noncomplying status but has also recognised the broader planning assessments of Ms Rickard and Mr Gouge. The Board is left in no doubt that its conclusion would be strengthened if it were to look in detail at every relevant objective and policy (of which there are many), rather than those provisions of most relevance, as it has done.
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> [664] While the Proposal is concluded to be contrary to a small number of policies or subclauses of policies, the Board does not consider those individually or cumulatively as reason to conclude that the Proposal is repugnant to the policy direction of the [AUP] with respect to the resource consents sought. The Board's conclusion is that where the Proposal infringes policies, neither individually nor cumulatively do those infringements tilt the balance for s 104D purposes against the Proposal as a whole.

[129] In its final section, entitled "Overall Judgment", the Board slightly reframed these conclusions. It accepted that some activities within the EWL, particularly the reclamations, were contrary to the AUP(plans) avoid policies, but this was outweighed by the effect of the policies overall, the ecologically compromised state of the Inlet and the lack of a practicable alternative to the proposed coastal location.[122] It therefore "squeeze[d] through" the s 104D(1)(b) gateway.[123]

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121 Footnotes omitted.
122 At [1364].
123 At [1364].