BEFORE THE INDEPENDENT HEARINGS PANEL APPOINTED BY THE WESTERN BAY OF PLENTY DISTRICT COUNCIL

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

AND

IN THE MATTER of Proposed Private Plan Change 95 to the Western Bay of Plenty District Plan: Pencarrow Estate Pongakawa

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MEMORANDUM OF COUNSEL ON BEHALF OF WESTERN BAY OF PLENTY DISTRICT COUNCIL

Dated: 28 March 2025

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MAY IT PLEASE THE COMMISSIONERS

1. The Hearing Commissioners have requested any comments by 5pm Friday 28 March in relation to the recent Environment Court decision *Gardon Trust & Ors v Auckland Council* [2025] NZEnvC 058. This memorandum provides brief comments on behalf of Council.

2. The *Gardon Trust* case related to a private plan change to the Auckland Unitary Plan to rezone 30ha of land from rural to residential adjacent to the existing residential area of Waiuku (southwest of Auckland).

3. Auckland Council declined the private plan change because of concerns the rezoning was not necessary and therefore did not meet the requirement for the exemption of HPL under the NPS-HPL. The appeal by the plan change applicant was successful and the Environment Court endorsed the rezoning concluding:

> …this minor extension, which will allow the development of 30 hectares directly adjacent to the Waiuku township, is an exception and also forms a sound planning approach to an existing well-functioning urban area.[1]

4. The Court's comments in relation to the meaning of "urban environment" under the NPS-UD provide useful guidance on the question of whether the NPS-UD is relevant to PPC95.

5. Waiuku is a town with a population of nearly 10,000 and is the second largest town in the Auckland region. When considering the applicability of the NPS-UD the Court stated:

> We agree that clearly this site forms part of an existing urban environment and that the urban environment is Waiuku. It already has a population exceeding that prescribed in the NPS-UD Definitions and therefore in itself must provide the well-functioning urban environment envisaged in the policy statement.
>
> To suggest that surrounding rural areas, villages and other areas such as Clarks Beach and Patumahoe form part of this urban environment is patently incorrect. The widespread areas of rural land between these areas makes clear that they do not form part of a well-functioning urban environment as envisaged by the NPS-UD.[2]

6. In my submission, the Court's comments support the submissions on behalf of Council that the NPS-UD is not relevant to PPC95, because the land is not within or affecting an "urban environment".

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[1] *Gardon Trust & Ors v Auckland Council* [2025] NZEnvC 058 at paragraph 15.
[2] Ibid at paragraphs 145 to 146.

7. The application of the wording of clause 3.6 of the NPS-HPL was at the heart of the Environment Court case, and in particular the meaning of the phrase "*within the same locality and market*". The Environment Court heard detailed and contested expert evidence on these matters and concluded the appropriate spatial extent for defining the locality and market in that case was the Waiuku catchment (and not the wider West Franklin area). It concluded:

> …if it is to provide for urban growth to meet demand for Waiuku, it needs to be contiguous with Waiuku's existing urban zoning.[3]

8. In my opinion, given the significant difference between an adjoining extension of the existing settlement of Waiuku (itself an urban environment of 10,000 people) and the proposed extension of the existing rural settlement of 85 residential properties in Arawa Road, Pongakawa, which is separated from urban environments by widespread areas of rural land, the Court's findings in relation to the tests in clause 3.6 are of limited relevance to PPC95 and the Pongakawa context.

9. The Court's conclusion that the proposed rezoning was appropriate was summarised as:

> Overall, looking at both the NPS-HPL and NPS-UD, we do not consider that it is intended that all development around towns be precluded simply because they would involve inclusion of land with prime soils. Small areas of land, say less than 40 to 50 hectares, may be justified if they become defensible boundaries. They may also be justified where they add significantly to a well-functioning urban environment already existing.[4]

[3] Ibid at paragraph 222(c).
[4] Ibid at paragraph 232.

10. In my submission the Environment Court decision is consistent with the approach outlined in the submissions on behalf of Council at the hearing that the existing Arawa Road settlement is not an “urban environment” to which the NPS-UD relates, and the threshold necessary to meet the requirements of clause 3.6(1) of the NPS-HPL to rezone highly productive land is high and cannot be met by PPC95 based on the Court’s interpretation of urban environment.

Dated: 28 March 2025

Kate Stubbing
Counsel for the Western Bay of Plenty District Council