BEFORE WESTERN BAY OF PLENTY DISTRICT COUNCIL

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

A N D

IN THE MATTER Schedule 1 public hearing of proposed Plan Change 93 (Private)to the operative Western Bay of Plenty District Plan

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LEGAL SUBMISSIONS ON BEHALF OF TE PUNA SPRINGS LIMITED

Dated 5 July 2022

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MAY IT PLEASE THE HEARINGS PANEL COMMISSIONERS:

1. Introduction

1.1 These submissions are presented on behalf of the private plan change Applicant Te Puna Springs Estate Limited("TPS"). TPS seeks a commercial business zoning to enable commercial uses over its site.

1.2 The private plan change request (PPC93) is made on behalf of the applicant Te Puna Springs Estate Ltd ("TPS). It is submitted that commercial rather than rural is the most appropriate proposed zoning, based on the merits and the evidence before the Panel.

2. Witnesses to be Called

2.1 TPZ have provided evidence briefs from the following expert witnesses, who will be appearing in the following order:

(a) Mr. Tim Heath– Economist of Property Economics Limited.
(b) Ms. Ann Fosbery– Traffic Engineer of Aurecon Ltd.
(c) Mr. Neill Raynor-Stormwater and Infrastructure Engineer of Aurecon Ltd.
(d) Mr. Morne Hugo–Landscape Architect/ Urban Designer of Boffa Miskell Ltd.
(e) Ms. Fiona Wilbow, Ecologist of Wildlands Consultants;
(f) Ms. Annaliese Michel -Director of Te Puna Springs Limited (non-expert).
(g) Mr. Aaron Collier– Planning Consultant of Collier Consultants Ltd.

2.2 My understanding is the Panel has pre-read all the evidence and rebuttal evidence, with the presenting witnesses expected to provide a summary only today, and to be available for questions from the Panel.

3. Outline of submissions

3.1 These submissions are structured as follows:

(a) Legal framework and general requirements of Plan Change.

(b) Planning framework of Higher order documents.

(c) Regional Policy Statement

(d) Environment effects.

(e) Scope and relief sought/ available.

(f) Non statutory documents.

(g) evidence and remaining areas of disagreement, issues for determination.

(h) Concluding comments.

4. Legal Framework and General requirements of Plan Change

4.1 The plan change request contains all the necessary information and assessments required by Clause 22 of Schedule 1 of the RMA. The purpose and reasons for the plan change request have been outlined in the Planning Report, the supporting technical reporting and the evidence in chief and rebuttal evidence presented before this hearing.

4.2 Clause 29(1) of Schedule 1, Part 1 of Schedule 1 (which also applies to council-initiated or adopted plan changes) applies with all necessary modifications, meaning there is a degree of commonality between both. This includes provisions for the making of submissions, decisions, and appeals. Other provisions of the RMA, including sections 31, 32, 74 and 75, and Part 2 of the RMA, apply to changes to a district plan, regardless of whether a plan change is a Council-initiated or a private plan change request.

Section 31

4.3 Under s 31(1) of the RMA, Council as a territorial authority has a number of relevant functions for the purpose of giving effect to the RMA in its District, including:

(a) 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; and

(b) Establishment, implementation, and review of objectives, policies, and methods to ensure that there is sufficient development capacity in respect of housing and business land to meet the expected demands of the district.

4.4 The Council is therefore required to consider the plan change request in accordance with its function of achieving integrated management of land use. The use and development of the land for the purposes outlined in PC93 is within the scope of the Council's functions under s31.

Section 32

4.5 Under Clause 22(1) of Schedule 1 of the RMA, a private plan change request must "contain an evaluation report prepared in accordance with s32 for the proposed plan change."

4.6 In *Port Otago Ltd v Otago Regional Council*[1] at paragraphs 48-55 the Environment Court considered in detail whether the conventional approach to section 32 analysis remained correct following substantive amendment to section 32 and 32AA in 2013. The Court concluded that those amendments did not change the fundamentals required, but that "*[t]hey simply mean that the analysis of economic growth and employment prospects should be given in more detail (and wherever possible expressly rather than implicitly)".*

4.7 It follows those economic considerations of the proposed commercial zoning in comparison to the option of retention of rural zoning of the site are an important element of a section 32 or 32AA assessment, consistent with Section 7 of the RMA, but they are not the only element. The assessment should consider all the matters relevant to the purpose of the Act.

4.8 Section 32 of the RMA requires the evaluation report under clause 22 above to examine the extent to which the objectives of the proposal being evaluated are the most appropriate way to achieve the purpose of the RMA under subsection (1)(a), and whether the provisions in the proposal (i.e., objectives, policies, rules and other methods) are the most appropriate way of achieving the objectives of the plan change under subsection (1)(b). Within this, an evaluation must take into account the benefits and costs of policies, rules, or other methods.

4.9 An evaluation under s32(1) must contain a level of detail that corresponds to the scale and significance of the environmental, economic, social, and cultural effects that are anticipated from the proposal (as required by s32(1)(c)).

[1] [2018] NZEnvC 183

4.10 The evaluation must also consider the efficiency and effectiveness of a proposal, taking into consideration benefits and costs, and the risk of acting or not acting.

4.11 A detailed section 32 analysis has been undertaken for the PC93 request with further Section 32AA analysis undertaken by Mr. Collier, in reliance on evidence of Ms. Wilcox and Mr. Raynor considering the further amendments made to the proposed structure plan.

4.12 In *Kerr Trust v Whangarei DC* [2] the Court noted:

"... *there is no onus of justification or burden of proof on a referrer to establish that a provision is correct or otherwise; instead, the proceedings are in the nature of an enquiry to ascertain the extent to which land use controls are necessary, whether the controls are the most appropriate approach, and to ensure that the controls achieve the objectives and policies of the plan*."

Section 74 and 75

4.13 The legal process for Councils preparation of its plan is set out in Section 74 and 75 of the Resource Management Act 1991(RMA). A summary of the general requirements for a plan change process is set out in Colonial Vineyards Ltd v Marlborough DC [2014] NZEnvC 55 at [17].

4.14 A district plan (change) should be designed to *accord with* [s 74(1)] RMA - and assist the territorial authority to *carry out* – its functions [s 31] so as to achieve the purpose of the Act [s 72 and 74(1) RMA].

4.15 The district plan (change) must also be prepared in accordance with any regulation [s 74(1) RMA] (there are none at present) and any direction given by the Minister for the Environment [s 74(1) RMA].

4.16 When preparing its district plan (change) the territorial authority must give effect to [s 75(3) RMA] any national policy statement or New Zealand Coastal Policy Statement.

4.17 When preparing its district plan (change) the territorial authority shall:

a) *have regard to* any proposed regional policy statement [s 74(2)(a)(i)].
b) give *effect to* any operative regional policy statement [s 75(3)(c)].

[2] Kerr Trust v Whangarei DC Decision A060/2004 at page 7

4.18 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 [s 75(4)]; and

b) *must have regard to* any proposed regional plan on any matter of regional significance etc [s 74(2)(a)(ii)].

4.19 When preparing its district plan (change) the territorial authority must also:

a) *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 [s 74(2)(b)] 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 [s 74(2)(c)].

b) *take into account* any relevant planning document recognised by an iwi authority [s 74(2A)]; and

c) not have regard to trade competition [s 74(3)] or the effects of trade competition.

4.20 The formal requirement that a district plan (change) must [s 75(1)] also state its objectives, policies, and the rules (if any) and may [s 75(2)] state other matters.

Objectives [the section 32 test for objectives]

4.21 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 [ss 74(1) and 32(3)(a)].

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

4.22 The policies are to *implement* the objectives, and the rules (if any) are to *implement* the policies [s75(1)(b) and (c), see also s76(a)].

4.23 Each proposed policy or method (including each rule) is to be examined, having *regard to its efficiency and effectiveness*, as to whether it is the most appropriate method for achieving the objectives of the district plan [s32(3)(b)] *taking into account*:

a) the benefits and costs of the proposed policies and methods (including rules); and

b) 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 [s32(4)]; and

a) 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 [s32(3A)].

Rules

4.24 In making a rule the territorial authority must have regard to the actual or potential effect of activities on the environment [s76(3)].

4.25 Rules have the force of regulations [s76(2)].

4.26 Rules may be made for the protection of property from the effects of surface water, and these may be more restrictive [s76(2A)] than those under the Building Act 2004.

4.27 There are special provisions for rules about contaminated land [s76(5)].

Other statutes

4.28 Territorial authorities may be required to comply with other statutes.

5. Environmental effects

5.1 "*Environment*" is defined in section 2 of the RMA although the meaning of the word needs to be understood with reference to case law. The environment "*as it exists*" can be considered the starting point for an assessment of what constitutes the "*environment*". However, in *Queenstown Lakes District Council v Hawthorn Estate Ltd*, [3] the Court of Appeal found the word "environment" has a wider meaning, holding that "*when considering the actual and potential effects on the environment of allowing an activity, it is permissible, and will often be desirable or even necessary, for the consent authority to consider the future state of the environment, on which such effects will occur*."

5.2 The RMA remains an effects-based, forward-looking statute. Its overall purpose has not changed since enacted in 1991. Section 5(1) of RMA states as the purpose of the Act “to promote the sustainable management of natural and physical resources”.

[3] [2006] NZRMA 424.*Hawthorn,* at 57

5.3 The relevant Section 32 assessment is to assess the effects of the proposed change to the land uses enabled by rezoning, not existing zoned land or consents that already forms part of the existing environment, even though this additional land has been spatially included in the proposed Structure Plan area.

5.4 A summary of these effects is:

(a) The area comprises a small and highly modified land resource with a mix of rural and commercial zoning, that sits at the edge of rural Te Puna. The location is characterised by the “four corners” of Te Puna, due to being on the edge of the recently redeveloped State Highway, and in an area with an elevated level of local demand for local retail, entertainment, and community services as stated in the evidence of Mr. Collier and Mr. Heath and confirmed by submissions which refer to the number of ad hoc consents granted in this locality.

(b) The site is within an area that has already been in variety of urban uses for many years. There is an existing petrol station and Four-Square supermarket, and an area of land that was compromised during the construction of the State Highway, when used by Waka Kotahi as a construction site and for access to what was a previous hall site fronting SH2.The plan area includes Council land containing the Te Puna Hall. This facility, which when granted consent, noted as its purpose "to meet social and cultural needs as a physical hub for the community to gather[4]“. As stated in the expert rebuttal evidence of Mr. Hugo, the area already has [OBJ]the look and feel of an urbanised/peri-urban area[OBJ]. The plan change seeks to rezone this land to recognise this character and ensure it will be managed sustainably into the future. The land will not be used for a purpose envisaged by the existing rural zoning, albeit that it has not been used for rural purposes for many years, since it was purchased from the adjacent Kirk family

(c) The evidence filed in support of the Plan Change and the Section 42 A report confirm that the proposed commercial zoning is the most appropriate of the two zones, and that retention of a rural zone is not the most economic or practicable alternative given its location, current uses, and demand for further commercial business land in this locality.

(d) Any potential effects on the environment can be appropriately avoided, remedied, or mitigated through the proposed provisions, and the zoning will more appropriately

[4] Commissioner decision on Plan Change and applicant planner Janine Falwell evidence.

recognise the site as commercial and provide plan provisions to enhance outcomes for the site and freshwater streams, as well as the wider rural area by avoidance of further ad-hoc consents sought to meet business demand.

(e) The performance standards set out the infrastructure requirements to service the land, provide an attractive and efficient layout of future development, will enable public viewing and potential future access to and along streams once their protection/enhancement has been completed (if they are vested in the Council), and will maintain appropriate amenity outcomes with planting and buffers along the two rural boundary interfaces.

(f) The risks from natural hazards have been addressed through the engineering and infrastructure reporting and have confirmed that the site is suitable for the business land development outcomes that are anticipated.

(g) The plan change provides for additional plan provisions to not only manage and avoid environment effects, but enhance the existing site characteristics and local environment, as covered in the evidence of Mr. Collier and Ms. Willcox.

6. Scope of Submissions

6.1 In *Albany North Landowners v Auckland City Council*, the High Court indicated that the scope for a coherent submission being "on" a proposed District Plan in the context of a full plan review is very wide[5] :

> *"… A Council must consider whether any amendment made to a proposed plan or plan change as notified goes beyond what is reasonably and fairly raised in submissions on the proposed plan or plan change." To this end, the Council must be satisfied that the proposed changes are appropriate in response to the public's contribution. The assessment of whether any amendment was reasonably and fairly raised in the course of submissions should be approached in a realistic workable fashion rather than from the perspective of legal nicety. The "workable" approach requires the local authority to take into account the whole relief package detailed in each submission when considering whether the relief sought had been reasonably and fairly raised in the submissions. It is*

[5] *Albany North Landowners v Auckland Council* [2016] NZHC 138 at paragraph 15 see also *Clearwater Resort Ltd v Christchurch City Council* HC Christchurch AP 34/02, 14 March 2003; *Palmerston North City Council v Motor Machinists Ltd* [2014] NZRMA 519 (HC) re plan scope and process.

sufficient if the changes made can fairly be said to be foreseeable consequences of any changes directly proposed in the reference."

6.2 The High Court in *Albany North Landowners* also noted:

"… there can be nothing wrong with approaching the resolution of issues raised by submissions in a holistic way – that is the essence of integrated management demanded by ss 30(1)(a) and 31(1)(b) and the requirement to give effect to higher order objectives and policies pursuant to ss 67 and 75 of the RMA. It is entirely consistent with this scheme to draw on specific submissions to resolve issues raised by generic submissions on the higher order objectives and policies and/or the other way around in terms of framing the solutions (in the form of methods) to accord with the resolution of issues raised by generic submissions."[6]

6.3 There had been some positive outcomes from engaging in consultation with submitters involved and concerns raised. Amendments to the proposed plan changes through the Schedule 1 process can be made, so long as the amendments fall within scope of submissions. The legal principles on limitations of scope are set out below.

6.4 The scope of an appeal is bounded by the submission at one end and the notified plan at the other. This principle is summarised by Judge Kirkpatrick in *Federated Farmers & Ors v Otorohanga District Council*:[7]

A careful reading of the text of the relevant clauses in Schedule1 shows how the submission and appeal process in relation to a proposed plan is confined in scope. Submissions must be on the proposed plan and cannot raise matters unrelated to what is proposed. If a submitter seeks changes to the proposed plan, then the submission should set out the specific amendments sought. The publicly notified summary of submission enables others who may be affected by the amendments sought in submissions to participate either by opposing or supporting those amendments, but further submissions cannot introduce additional matters. The Council's decisions must be in relation to the provisions and matters raised in

[6] Paragraph 129.
[7] [2014] NZEnvC 070 at [11].

submissions, and any appeal from a decision of council must be in respect of identified provisions or matters.

6.5 The extent to which the jurisdiction of the Environment Court is delineated by the relief sought in the submissions then limits any subsequent appeal. This topic has been the subject of discussion in numerous higher authorities. The test as to whether a provision or matter has been referred to in a submission was set out by the Full Court of the High Court in *Countdown Properties (North/ands) Limited v Dunedin City Council*[8].

"The local authority must consider whether any amendment made to the plan change as notified goes beyond what is reasonably and fairly raised in submissions on the plan change or review. It will usually be a question of degree to be judged by the terms of the proposed change and of the content of the submissions."

6.6 The leading authority on whether a submission is "on" a variation or plan change is the High Court decision in *Clearwater Resort Ltd v Christchurch City Council*. It set out a two-limb test:

(a) Whether the submission addresses the changes to the pre-existing status quo advanced by the proposed plan change; and

(a) Whether there is a real risk that people affected by the plan change (if modified in response to the submission), would be denied an effective opportunity to participate in the plan change process.

6.7 A submission can only fairly be "on" a proposed plan if it meets both these limbs. The Clearwater test has been adopted in a number of High Court decisions.

6.8 The Clearwater test was applied by Kos J in Palmerston North City Council v Motor Machinists. He described the first limb in the Clearwater test as the dominant consideration, namely whether the submission addresses the proposed plan change itself. This was said to involve two aspects: the degree of alteration to the status quo proposed by the notified plan change; and whether the submission addressed that alteration.

[8] [1994] NZRMA 145 (FC)

6.9 The High Court in *Motor Machinists* set out two further tests for determining whether a submission can be reasonably said to fall within the ambit of the plan change (being the first limb of Clearwater):

a) If a submission raises matters that should have been addressed in the section 32 evaluation and report, then it is unlikely to be within the ambit of the plan change.

b) If the submission seeks a new management regime in a district plan for a particular resource, it must be in response to a plan change that alters the management regime.

6.10 The second test is most relevant in considering those submissions, if any, that seek to add a management regime for the district wide matters that have not been notified.

6.11 Turning to the first test posed by Motor Machinists, the Environment Court in *Bluehaven Management Limited v Western Bay of Plenty District Counci*l considered the inquiry into matters raised in the section 32 report. The Court did not regard the inclusion or exclusion of matters in the section 32 report as determinative as to whether the submission is reasonably within the plan change. It stated:

[39] *Our understanding of the assessment to be made under the first limb of the test is that it is an inquiry as to what matters should have been included in the s32 evaluation report and whether the issue raised in the submission addresses one of those matters. The inquiry cannot simply be whether the s32 evaluation report did or did not address the issue raised in the submission. Such an approach would enable a planning authority to ignore a relevant matter and thus avoid the fundamentals of an appropriately thorough analysis of the effects of a proposal within robust, notified, and informed public participation*.[9]

6.12 The High Court in Albany North Landowners departed from the Motor Machinists section 32 test but in the context of a full district plan review. Whata J stated:

[9] *Bluehaven Management Limited v Western Bay of Plenty District Council [2016] NZEnvC 191, Smith J and Kirkpatrick J (sitting together) para 39.*

…I respectfully doubt that Kós J contemplated that his comments about s32 applied to preclude departure from the outcomes favoured by the s32 report in the context of a full district plan review. Indeed, Kós J's observations were clearly context specific, that is relating to a plan change and the extent to which a submission might extend the areal reach of a plan change in an unanticipated way. A s32 evaluation in that context assumes greater significance because it helps define the intended extent of the change from the status quo.

6.13 In contrast, PPC 93 s32 and S 32 AA reports are in the context of a limited and discreet district plan change, in comparison to a District Plan full review. The caselaw indicates there are differing relevant considerations in whether a submission is reasonably and fairly raised by a submission depending on the extent and complexity of the Plan change.

6.14 Accordingly, while most of the evidence and changes sought in submissions on this PPC93 may be within scope, some matters covered in evidence are far removed that I submit they are out of scope. They are not specifically subject to the original section 32 evaluation (for example seeking other land be considered for rezoning or other LGA decisions or future RMA plan changes yet to be notified).

6.15 The case law on scope dealing with discrete plan changes is differing to that of a full district plan review or a (substantive) partial review when it comes to scope. Plan changes or variations are usually directed at defined geographical areas or specific issues to be resolved. By contrast, a plan review by its nature involves a broader approach to the question of scope. This difference was acknowledged by the High Court in the A*lbany North Landowners* decision when Whata J stated:

[*129] Returning to the present case, the Auckland Unitary Plan planning process is far removed from the relatively discrete variations or plan changes under examination in Clearwater; Option 5 and Motor Machinists. The notified PAUP encompassed the entire Auckland region… and purported to set the frame for resource management of the region for the next 30 years. Presumptively, every aspect of the status quo in planning terms was addressed by the PAUP…The scope for a coherent submission being "on" the PAUP in the sense used [in Clearwater] was therefore very wide.*

6.16 The difference in scope considerations between a plan change and a replacement plan was also identified by the Environment Court in *Tussock Rise Limited v Queenstown Lakes District Council*, where it stated:[10]

"*There appears to be a large difference between the strict rules of engagement prescribed by the High Court for submissions on plan changes and the much looser rules for submissions on new (replacement) plans. Much of that difference can be understood in the context of specific plan changes. For example, if a local authority wishes to change a rule in a plan, submissions on the operative objectives and policies would be beyond jurisdiction as not "on" the plan change. In contrast, on new plans almost everything may be open to challenge as in Albany North, although the strategic issues I have identified do then often arise.*"

6.17 This is relevant to matters raised in Te Puna Heartlands evidence by Beth Bowden where decisions made by the Council under the Local Government Act in relation to infrastructure or what is not included in this plan change as notified are treated as valid submissions on this plan change; or where the submitters Kirk and Regional Council expert witnesses criticise existing rules within the District Plan as inadequate for addressing natural hazards or the fact that wider strategies for an extensive plan review have not been included in this plan change. If the submission is not on this plan change, it is submitted the Council has no jurisdiction to consider them under Schedule 1, Clause 6 and caselaw on scope.

7. High Order Documents and Planning Framework

National Policy Statements

7.1 There are five national policy statements that are currently in place covering matters such as urban development, freshwater, renewable electricity generation, electricity generation and the coastal environs. Only two of these are relevant to this plan change, being the National Policy Statement on Urban Development (NPS-UD), which came into force on the 20 August

[10] [2019] NZEnvC 111

2020 and the National Policy Statement for Freshwater Management (NPS-FW) which came into force on the 3 September 2020.

7.2 The Proposed National Policy Statement – Highly Productive Land has not been addressed, as it has no weight at this time. It is noted however that much of the PPC area has already been subject to significant earthworks, construction, compaction, and existing buildings, with those parts of the site still in a semi natural state being able to be set aside for wetlands and natural stream rehabilitation.

National Policy Statement on Urban Development (NPS-UD)2020

7.3 The NPSUD replaces the NPSUDC, which was promulgated to ensure that district/ city councils would adequately plan for urban growth. As the Environment Court has said, the purpose of the NPSUDC was: "…*to open doors for and encourage development of land for business and housing, not to close them.*"

7.4 The NPSUDC did not, however, contain directive provisions relating to plan responsiveness and agility. In addressing why, the NPSUD was needed, the Ministry for the Environment ("MfE") website states:

"*Some urban areas in New Zealand are growing quickly. To support productive and well-functioning cities, it is important that there are adequate opportunities for land to be developed to meet community, business, and housing needs.*"

7.5 In September 2017, the Government established the Urban Growth Agenda (UGA). The NPS-UD contributes to the Government's Urban Growth Agenda, which is described by the Ministry for the Environment as a programme that aims to remove barriers to the supply of land and infrastructure. The NPS-UD contributes to the Urban Growth Agenda by addressing constraints in the planning system to ensure our system enables growth and supports well-functioning urban environments. Te Puna and the Western Bay of Plenty District projected population is set to grow, with the wider Western Bay of Plenty treated holistically as a high growth area (noting that Te Puna on its own is not characterised as an urban environment as it does not have a population exceeding 10,000). Along with the Bay of Plenty Regional Council and Tauranga City

Council, the three councils are identified collectively as Tier 1 Councils with stronger directives to enable growth than Tier 2 or 3 councils.

7.6 Policy 1 (c) requires well-functioning urban environments to have, amongst other things, "*…good accessibility for all people between housing, jobs, community services, natural spaces, and open spaces, including by way of public or active transport…".*

7.7 Policy 3 requires Tier 1 urban environments to enable 'intensification' in City Centre and Metropolitan Centre Zones in a prescribed manner, and to consider building heights and density 'at other locations. Other business locations (such as Te Puna) are based on accessibility and demand.

7.8 In Part 3 Implementation, every Tier 1 territorial authority must identify, by location, the building heights and densities required by Policy 3[11]. There are also qualifying matters that can be taken into account[12].

7.9 The overall anticipation of the district population growth is reflected in the Tier 1 status of both WBOPDC, TCC and BOPRC and demand for business land is meant to be addressed through plan changes. Previous urban limit constraints, or planning policy opposed to 'out of sequence' development is no longer the primary objective or criteria that BOPRC and WBOPDC must consider.

7.10 NPS-UD 2020 contains a broad suite of objectives and policies that encompass high level goals and explicit instructions to Councils as to how to accomplish those goals based on a three-tiered approach. The NPS-UD defines and promotes "well-functioning environments" with the following objectives and policies being particularly relevant to this site.

(a) Objective 1: *"New Zealand has well-functioning urban environments that enable all people and communities to provide for their social, economic, and cultural wellbeing, and for their health and safety, now and into the future"*.

(b) Objective 3: *"Regional policy statements and district plans enable more people to live in, and more businesses and community services to be located in, areas of an urban environment in which one or more of the following apply:*

(i) the area is in or near a centre zone or other area with many employment

[11] 3.31 Tier 1 territorial authorities implementing intensification policies
[12] 3.32 Qualifying matters

opportunities.

(ii) the area is well-serviced by existing or planned public transport.

(iii) there is high demand for housing or for business land in the area, relative to other areas within the urban environment."

7.11 Focusing on the directives around business land, the BOPRC and WBOPDC Council must assess business land demand and provide sufficient development capacity for business land in the short, medium, and long term. In this context, "sufficient" is a minimum, not a maximum, and means both plan-enabled and infrastructure-ready. This site should be plan-enabled, as it is infrastructure ready with necessary Section 32 and 32AA assessments undertaken to consider the infrastructure needs as part of this plan change and subsequent resource consent processes that will follow under the proposed provisions.

7.12 There are explicit directions within NPS UD 2020 that all three local Authorities with the Tauranga Urban Environment, including BOPRC, are to work together to better enable land supply for urban development. Objective 3 and 6, and policy 3.3 and 3.4 are relevant here. It is not for BOPRC to sit back as "arbitrator" over WBOPDC on what suitable level of urban development is or to focus on prioritising policies in NPS FW, over its duties under the NPSUD 2020. It is for the panel as the decision makers for the District Council to weigh up these matters and make this decision.

7.13 BOPRC and WBOPDC as Tier 1 local authorities under the NPS UD must be actively working (together) towards delivering capacity for both business and residential land in its district/region to provide for 'at least' sufficient development capacity, plus the appropriate competitiveness margin to meet expected demand, regardless of whether it is out of sequence with the RPS (which is now out of date with NPSUD 2020).

7.14 Mr Heath evidence states that there is f current and short-term unmet demand for business land in Te Puna and this applies regardless of whether the site is within urban limits or defined as an urban environment or not. This plan change will release business land development potential to address current demand and is consequently consistent with the NPSUD's general directives for both Councils.

7.15 PPC93 aligns and gives effect to the objectives and policies of the NPS-UD 2020 in relation to directing more supply of business land, as it will:

(a) Contribute to a well-functioning urban environment (Objective 1 of the NPS-UD 2020). Relevant parts of Policy 1 description of well-functioning urban environments are 'support the competitive operation of land and development markets'; 'support reductions in greenhouse gas emissions'(through less car trips into City to access commercial services and businesses); and are resilient to the likely current and future effects of climate change(although the site is not identified as subject to climate change natural flooding areas, indicative developable areas have been modelled for the site based on worst cases, along with 1-in 100 year flooding predictions to achieve neutral 1% off site effects.

(b) PPC93 enable additional business (and residential) capacity in a location that is adjacent to an existing commercial area, readily accessible to the Minden and Te Puna local area (which already provides residential, business, employment, and transport options) and are planned around the community facility of the Te Puna Hall and its outdoor surrounds which is land owned by Council. It was always the intention to develop the whole site for commercial land and integrate with the Hall land when Mr McIntyre offered to sell this piece of land for the community hall to be moved to this location and avoid the costs and risks of the other site location (fronting the state highway), which was appealed at the time by neighbours the Muggeridge family.

(c) Additional business land in this locality enables more people to live in an area that is near to employment opportunities.

(d) Developing the land in this manner responds to the changing needs of people, communities, and future generations (Objective 4). PC93 aligns with this objective as it reflects changing living needs/expectations for local areas to offer local community commercial offerings and services without the necessity to take car trips into townships further away.

(e) Provide for the development of land in a manner that takes into account the principles of the Treaty of Waitangi (Objective 5). The evidence of Mr Collier confirms this principle have been taken into account through early engagement and discussions with Pirirakau

with a focus on Te Mana o Te Wai, through restoration of the Puna and buffers along the stream tributaries on the site.

(f) PPC 93 will improve the existing urban environment in the 'Four Corners' of Te Puna to be better integrated with infrastructure planning and funding decisions; it will address current and short-term demand for business land in this location and is sufficiently small scale and strategically located to not compromise medium term and long-term strategies and future plan changes (Objective 6).

(g) The Section 42A report and evidence of Ms Fosbery, Ms Wilcox and Mr Raynor confirms infrastructure planning is in place for roading and wastewater (Council approval to connect for reticulation); flooding and freshwater matters are able to be addressed on site to achieve neutral water quantity flows off the site, and water quality improvements (Raynor, Wilcox). PC 93 consequently represents both 'plan-enabled' (i.e., zoned) and infrastructure-ready land referred to in the NPS-UD, based on this evidence.

National Policy Statement Freshwater (NPS-FM) and National Environmental Standards for Freshwater (NES – F)

7.16 The NPS-FM and NES-F came into effect on the 3 of August 2020. This instrument is premised on the concept of 'Te Mana o te Wai', the fundamental importance of water and the role its good health plays within the wider environment and in protecting the mauri of water and mana of tangata whenua as kaitiaki. The NPS-FM therefore has an overarching objective of ensuring that natural and physical resources are managed in a way that prioritises:

(a) first, the health and well-being of water bodies and freshwater ecosystems,
(b) second, the health needs of people and
(c) third, the ability of people and communities to provide for their social, economic, and cultural well-being now and into the future.

7.17 As set out in the evidence of Mr Raynor and Ms Wilcox, the site contains fresh watercourses and an existing stormwater pond with adjacent manmade wetland at its margin.

7.18 The proposed detailed site diagram prepared by Mr Raynor and included with his rebuttal evidence confirms that the earthworks and stormwater management on site will substantially

exclude the potential for disturbance of the watercourses. Mr Raynor's engineering response allows their margins will be set aside and enhanced with planting in ecological reserve type areas shown on the Structure Plan. These areas may be vested with Council as part of future commercial development or subdivisions on the site. This provides for the likely ongoing protection and rehabilitation of these natural watercourses and their margins.

7.19 The proposed plan change thereby satisfies the directly relevant Policy 7 which directs that the loss of river (and, stream) extent and values are avoided to the extent practicable. As noted by Mr. Collier, the Applicant's commitment to stream and Te Puna protection and enhancement were agreed to early on with engagement with tangata whenua of the area (Pirirakau through Pirirakau' s RMA manager Julie Sheppard and in workshops with Kaumatua), thereby satisfying Policy 2 of the NPS-FM. Contrary to the evidence of Mr Hamill, Ms Wilcox opinion in her evidence is that the buffer margins and wetland reserve areas are also sufficiently large to enable considerable riparian planting opportunities to improve the quality of these streams and tributaries. These streams and their margins are already well defined on site.

7.20 The delivery on the outcomes sought by the NPS-FM will further be demonstrated at the regional consent stage of the development (for a stormwater discharge and stream works consent) however the proposed plan change is consistent with the provisions of the NPS-FM by way of avoiding the loss of watercourses and providing for the ongoing protection of wetlands to be created as part of the plan change area.

8. Regional Policy Statement

8.1 Mr. Collier has covered in his evidence and in the plan change itself relevant policies in the Regional Policy statement, which I will not repeat here.

8.2 These submissions are only to address context of the current Bay of Plenty Regional Policy Statement ("RPS"). A regional Council's RPS aims to achieve integrated management and protection of natural and physical resources by identifying and addressing resource management issues within the region. The RPS must give effect to National Policy Statements. Importantly , BOPRPS is currently out of date in so much as the NPS-UD 2020 post-dates the RPS, so it does not fully reflect its directives with regard to urban growth

other than a recent plan change required to include HBA assessment of 'bottom lines' for housing.

8.3 Therefore, there is an issue of 'incomplete coverage' with regard to business and housing capacity that Councils have been directed to enable, even where not anticipated with existing growth areas (such as Appendix E to the RPS). The analysis in the BOPRPS of business land was last updated in 2018. As noted by Mr Collier in his evidence, there has been no business land in Te Puna zoned since the 1990s.

8.4 Future development strategy for housing and business land following NPS_UD 2020 for the Sub region is due in 2024. These changes to the RPS will need to go through a plan change process and therefore will be some time away. One change has already been made to the RPS, relating to housing bottom lines for short-medium term and long-term. To the extent the RPS UG provisions are contrary to or inconsistent with NPSUD 2020 (such as that cited in Beth Bowden's Evidence UG 7A), priority must be given to the up-to-date national directives in NPSUD 2020, until the RPS is updated in 2024.

9. Evidence and areas of disagreement -issues for determination

9.1 Mr. Nathan Te Pairi's planning evidence on behalf of the Regional Council states at para 24 "*In considering proposals to urbanise land, it not uncommon to undertake a process to identify and resolve competing priorities i.e., land use and stormwater or ecology*." This is correct. However, Mr Te Pairi's does not cover at all the competing directions of NPS UD 2020 and prescriptive directives that the Regional Council must adhere to with respect to providing for business land, with NPS FW. There is no reference to this document at all nor attempt to analyse this "competing priority".

9.2 The Regional Council submission recognises this broadly "*Overall, the Bay of Plenty Regional Council (BOPRC) does not object to the principle of either plan changes (93 and 94) as we recognise the need to provide for increased commercial and industrial development capacity in each of the locations."*

9.3 The evidence of the Regional Council witnesses appearing must be viewed in the context and scope of its originating submission, which does not overall object to rezoning proposal for land to rezoned from rural to commercial.

9.4 Some of the evidence filed by submitters raise new issues or areas of disagreement, some of which were not covered through submissions lodged. The Applicant's witnesses have however attempted in good faith to address relevant RMA issues, even though the rebuttal evidence filed, so that the Committee is assisted in narrowing of issues and with a clear understanding of the remaining areas of disagreement in the various expert's evidence.

9.5 It is unfortunate for the panel that the aim of the Local Authorities to reach agreement or gain focus in areas of disagreement with the plan change, so that the overall cost of the proceedings to all is reduced has not happened with the Regional Council. The duty of local authority experts engaging in a Plan change process in particular should be to narrow points of difference and save hearing time (and cost) with the aim of reaching a common understanding of the relevant facts and issues.

9.6 The Section 42A report has been criticised in submitters evidence for being cursory or incorrect in some of the characterisation of submitters positions (Kirk, Te Puna Hall). However, where there are relevant issues of concern set out in submitters evidence these are subsequently addressed by the Applicant. In my submission the Hearings Panel can rely and refer to the Section 42A report and rebuttal evidence, which succinctly identify and focus on the key issues of disagreement between the experts.

9.7 I submit that the areas of differences in evidence for decision-making of the Panel are not significant. There are effectively two appropriate zones which the Panel need to decide between for a small piece of land where the zoning is being changed, by weighing up probative evidence that is supported by sound facts and assumptions.

9.8 The submission and subsequent evidence filed by Beth Bowden on behalf of the Te Puna Heartlands and Ms. Gravatt for the Te Puna Hall Committee is concerning in several aspects.

9.9 Firstly, Te Puna Hall is an incorporated society set up for the purpose of operating the Te Puna local hall. It effectively operates by virtue of the good graces of Council to provide it a peppercorn lease to be located over Council land. Having reviewed its constitution and the Council lease agreement, in my submission it is questionable whether the Te Puna Hall has legal scope to be making a submission to a Plan change as it does not fall within its objectives as an incorporated society as set out in its constitution. There is a question of appropriateness of

opposing a plan change in an area to which Council officers have recommended be granted and to which her own committee chair provided written support for. This occurred at around the same time as the land was offered by Mr. McIntyre to locate the Hall and as noted in the evidence of Ms Michel, he provided support for the resource consent to enable the hall.

9.10 There has been no information as to their number of financial members by either Te Puna heartlands or the Te Puna Hall Committee. Recent financial statements are not recorded with the Companies Office. The extent to which either they on behalf of the Te Puna Hall or Te Puna Heartlands Committee have been mandated or delegated to speak, act, or represent the wider Te Puna Community is questioned given there is no detail provided as to who they represent. It is normal for societies to clearly identify their financial membership numbers with submissions lodged or subsequent evidence filed. Whilst there is no doubt Ms Gravatt and Ms Bowden as local residents on these local committees are both individuals who are passionate about their local community and this is to be commended, they do not have a mandate to speak for others beyond current financial members based on current financial returns filed with the Companies Office. If there are committee resolutions in place for them to speak on behalf of financial members in accordance with their incorporated society rules, it is suggested that these details need to be tabled with the Committee. Further , the applicant has not received any formal advice that the written approval for the Plan Change provided by both the previous Hall Committee Chairperson and secretary have been revoked by the current committee and it is unfortunate that Ms. Gravatt indicates in her evidence that the current committee has no knowledge the prior committee has provided written approval to Mr. McIntyre for his future plan change, no doubt under good faith reciprocity for his approval of the Te Puna hall to be moved onto his land (that was subsequently sold to Council for this purpose).

9.11 It seems trite to have to point out that it is current appointed Councillors who are representatives elected to act for their communities and have statutory duties under the Local Government Act, RMA, and other statutes. Ms. Bowden appears upset that the current Councillors resolved to allow Te Puna Springs commercial zoned area to connect to wastewater. Whilst this not a matter that can be challenged through this RMA process, it seems incongruous that the Te Puna Heartlands should seek to oppose what is a significant environmental improvement to the current situation of unsustainable onsite effluent disposal in the area. It was a significant issue of contention that the Te Puna Hall planned to utilise a septic tank disposal method when it is open to public events and within what effectively is an urban area,

close to streams. It is expected that that the Te Puna Hall will be connected to the reticulated system, as the pipework has already been extended to this area.

9.12 Ms. Bowden does not have any professional or technical expertise in planning or engineering, and it is submitted that these technical issues are addressed in expert's evidence. It is for the Panel to assess the remaining narrow areas of disagreement as set out in the expert witness statements, and where there is conflicting expert evidence, this will need to be weighed up.

9.13 There is a limited number of topics in the planning positions taken from the planners involved in this hearing. Mr. Childs evidence focusses on providing some helpful suggestions related to the interface with Mr. Kirks property and the commercial zone, to avoid reverse sensitivity with kiwifruit operations and to address potential visual effects. There are valid concerns raised in Mr. Kirks evidence regarding concerns over reverse sensitivity, which have either been agreed with, clarified as already addressed through plan provisions, or are disagreed with, and which are explained in the evidence of Mr. Collier and Mr. Hugo.

9.14 The Commissioners will need to weigh up the expert ecological and engineers' evidence of the Bay of Plenty Regional Council and the Applicant, to inform their decision as to whether the matters identified are addressed through the Plan Change or appropriately able to be managed through subsequent consents required for the Plan change area. If the Panel consider that the site should be recognised for commercial use, then the zoning with the Structure plan (with updated amendments) and the proposed plan provisions, are considered most appropriate for the site.

9.15 Criticisms with respect to the operative plan provisions raised in the Regional Council evidence are not part of this plan change and should be left for the next full plan review. It is understood that full plan review will be required by both Councils by 2024.

9.16 The evidence of the Applicant is sufficiently robust to provide support to rely on as to effects. The site is sufficiently small scale that it will easily achieve coherent integration with the future plan reviews or plan changes if future strategies enable more urban zoning for either residential or business land.

9.17 The only issue of disagreement between the Council reporting planner and Mr. Collier as

reflected in the Section 42A report, is the issue of permitted height for the commercial buildings. Mr. Hugo and Mr. Collier's evidence covers the reasons why in their opinion a maximum height of 12 metres can be supported within the plan change area without adverse effects on the surrounding area.

9.18 There have been some additional suggested changes to the provisions in response to the evidence of other submitters, which should give the Panel confidence to prefer a commercial zone with the proposed provisions. The proposed zoning and provisions ensure consistency with existing uses within the structure plan area, the future outcomes sought for the site, as well as integration with other chapters in the WBOPDC and compliance with higher order documents. The plan change represents a block of land with significant potential to provide a modern and mixed-use commercial development to complement the existing Te Puna commercial areas either zoned or consented.

10. Non statutory documents

10.1 Some submitters have referenced non-RMA documents or strategies that have not followed either a full consultative process under the LGA or the RMA. There are several cases that directly oppose the appropriateness of giving weight or relying on non-RMA statutory documents when going through a Schedule 1 process, namely *Infinity Group Ltd v Queenstown Lakes District Council C10/2005* (paras 80-87), *Redvale Lime Company v Wigglesworth A 140/2005*.

10.2 Section 74(2) states that a Council shall have regard to "*management plans and strategies prepared under other Acts*". However, it is submitted very little weight should attach to non-Schedule 1 strategy documents cited unless they have been formally prepared under a similar public consultative process as expected for as significant policy documents under the LGA.

"*Clearly even less than the minimal weight that can usually be given to statutory instruments newly proposed and not yet tested by submissions*" (para 71) and in *Campbell v Napier City Council* 067/2005 at para 57 the Court stated "We *can place little weight on these documents for two reasons. First, they cannot be a substitute for statutory documents produced under the processes of Schedule 1 of the Act by which the public are entitled to comment through formal processes of submissions and appeal*."

10.3 In the case of *Tram Lease Limited v Auckland Council* [2015] NZEnvC 133 at [81], the Court considered aspatial outline/plan that addressed strategic direction for Auckland's growth, as a non- statutory document. Its only intent was to inform strategic planning for the Auckland Council, that will have informed the preparation of the Proposed Unitary Plan. The Court held that it could have no status in the Court in the context of a plan change. To that end, the Court gave no weight to the aspects of the evidence of the witnesses that relied upon the spatial outline to justify intensification of commercial buildings within particular zones. This is similar to evidence that seeks other consultation or spatial plans to be given weight with regard to this PPC process.

10.4 The public process of a plan changes provides for members of the public to have their say on PPC 93 as a private plan change that was fully notified to the Public. The Public is able to comment through submissions and a public hearing is the opportunity for public comments and evidence.

10.5 There has only been a very limited number of opposing submissions to this plan change, consistent with an indication that this plan change is acceptable to the majority of the community. Most of the submissions in opposition have had the issues raised addressed to the point of not appearing or the applicant being prepared to amend the plan provisions to provide the relief sought (e.g., Te Toi Public Health, and Te Puna Hall with respect to removal of permitted industrial activities).

10.6 It is certainly not a rushed plan change as suggested by Ms. Bowden. As this Panel will be aware, the intention for this land to be rezoned has been well known for over 5 years. The plan change has been delayed several times, including to allow for community consultation to be undertaken by the Council and for wastewater matters to be addressed. Whilst some of the submitters may not like the plan change as proposed, that is not a reason to either delay it or decline it.

10.7 A zone, rather than a land use consent, provides the flexibility and environmental standards necessary to meet changing needs for shopping and decentralised employment as the community grows and expectations change. A District Plan needs to recognise and support the changing nature of demands for business land, which includes in areas outside of centralised Centres where it can be provided efficiently and effectively. There is more than sufficient expert evidence to provide confidence in the outcomes projected as enabled by the rezoning to support a commercial zoning of the site.

10.8 The suggestion that declining of this plan changes needs to happen to wait for a fuller plan review is not sustained by any robust evidence or supported by the directions of NPSUD 2020. Repetition of this assertion by various submitter witnesses does not provide any further evidence of weight to be given on this issue which is outside of the scope of the notified plan change.

11. Concluding statements

11.1 Mr Raynor's and Ms Wilcox's evidence and rebuttal evidence proves that there is a sustainable stormwater solution for the site that will result in ecological and stream enhancement because of the plan change. The expense and extent of a detained engineering and ecological analysis undertaken exceeds that necessary for a plan change process but has been completed by the applicant to counter the concerns of the Regional Council raised in its submissions which are limited to a discreet issue related to stormwater and freshwater.

11.2 The Committee in its deliberations will need to be satisfied that there are sound stormwater solutions available to support the plan change. I submit that there is, as outlined in the evidence of Mr Raynor. Furthermore, this solution does not rely on site mitigation such as the attenuation of stormwater under carparking areas which is also available to the applicant if required. Mr Collier has suggested further provisions in his evidence as permitted standards for stormwater which will apply to the plan change under the structure plan provisions for the site that address the Regional Councils concerns as to water quality as relevant to this plan change. Water quantity volumes have been modelled and addressed by Mr Raynor who confirms that additional run off from this site will add less than 1% to the overall catchment.

11.3 The evidence of Mr Hugo addresses the matter of building height and scale and concludes that the concerns raised by Mr. Kirk and his planning witness will be addressed through the plan provisions related to daylighting that mitigate height through setbacks.

11.4 The evidence of Ms Wilcox and the more detailed in the spatial structure plan area provided by Mr. Raynor rebuttal confirms that the streams values can be retained and enhanced by keeping the stormwater pond offline from the stream tributaries running through the site.

11.5 In summary:

(a) The rezoning of land sought through the PPC 93 provisions are in the opinion of Mr. Collier and Ms. Price as the Council reporting planner to be the most appropriate outcome for the site and will best achieve the broad policy objectives of the NPS-UD 2020 and the purpose of the RMA.

(b) The zoning and provisions now proposed align with national planning documents and good planning practice, and are efficient and effective; and

(c) The commercial zone by meeting existing and short-term demand for business land in this area will discourage ad-hoc out of zone uses to be applied for on other rural zoned land in the future.

11.6 The Applicant seeks plan provisions that address the benefits and amenity the commercial area will provide to the Community, recognise, and support changes inherent in a commercial area over time, whilst addressing infrastructure, cultural and environmental issues. It is acknowledged the likelihood of future changes over the next ten years and beyond that may affect Te Puna and the wider region, but it is considered the interrelationship of effects on that process from this small parcel of land being rezoned as suggested by submitter witnesses is not just subjective and speculative, but factually incorrect as one will not affect the other in any material way given the size and character of the land included with this PPC.

11.7 Te Puna Springs request that the Hearing Panel confirm the commercial zoning in the manner proposed in Mr. Collier's evidence, and as modified through amendments to the provisions set out in the additional evidence provided in response to other submitter evidence.

Signature:

Kate Barry-Piceno Legal Counsel for Te Puna Springs Ltd

Dated: 05 July 2022