

BEFORE THE HEARING PANEL

IN THE MATTER OF

the Resource Management Act
1991 (RMA or Act)

AND

IN THE MATTER OF

Private Plan Change 95
Pencarrow Estate
Pongakawa to the Western Bay
of Plenty District Plan

**LEGAL SUBMISSIONS ON BEHALF OF THE
BAY OF PLENTY REGIONAL COUNCIL TOI MOANA (SUBMITTER 27)**

12 November 2024



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REGIONAL COUNCIL'S ROLE AND POSITION

1. The Bay of Plenty Regional Council (**Regional Council**) has a range of functions that are directly relevant to urban rezoning proposals such as these, including those relating to integrated management, and controls on the use of land for a range of purposes including water quality and quantity, ecosystems, and natural hazards. It also has specific functions to ensure that there is sufficient development capacity in relation to housing and business land to meet the expected demands of the region.
2. To fulfil its various functions, Regional Council is also regularly involved in district plan changes throughout the region. Its aim in being involved is two-fold, being to ensure:
 - a. that higher order planning documents, and the Regional Policy Statement in particular, are given effect to in lower order documents; and
 - b. the integrated management of potential adverse effects, such that matters falling within Regional Council's jurisdiction can be suitably addressed at consenting stage.
3. Regional Council is a partner in SmartGrowth. It appreciates that there is need for more housing in the Western Bay and will support proposals that respond to this need – where they are located and designed in an appropriate way that manages environmental impact and is consistent with the concepts underlying the Connected Centres approach. SmartGrowth has prepared a Future Development Strategy (**FDS**) identifying where and how towns and cities in the Western-Bay sub-region are expected to respond to the anticipated shortfall within its urban environments, while ensuring this connected approach.
4. Regional Council's view is that Proposed Plan Change 95 (**PPC95**) does not give effect to, and is rather at odds with, higher order policy and that there is insufficient evidence that it will appropriately manage its adverse stormwater and ecology effects. It is inconsistent with the Connected Centres approach. For those reasons, it is not in position to support PPC95. Regional Council's position is that PPC95 should be declined.

LEGAL FRAMEWORK – PLAN CHANGES

5. The s42A report comprehensively sets out the statutory framework for plan changes.¹
6. I draw attention to a key requirement from the perspective of the Regional Council, which is that district plans must give effect to both National Policy Statements and Regional Policy Statements - s 75(3)(a) and (c).

NATIONAL POLICY DIRECTION

7. The most relevant national policy directives for PPC95 are the National Policy Statements for Urban Development (**NPS-UD**) and Highly Productive Land (**NPS-HPL**). The National Policy Statements for Freshwater Management and Indigenous Biodiversity also have relevance to some of the matters the Regional Council has raised in its submission.
8. The interplay between the NPS-UD and the NPS-HPL is a key issue for PPC95 and is central to the Panel’s task.
9. This is because the site proposed to be rezoned is “highly productive land” for the purposes of the NPS-HPL. There is no dispute about this. The Environment Court in *Bluegrass*² has confirmed that the interim definition of highly productive land, as outlined in clause 3.5(7) of the NPS-HPL, applies until regional councils complete their mapping and update their regional policy statements. Proposed Change 8 to the RPS will give effect to the mapping direction. This is a work in progress and has not yet been notified. The “deliberate holding position” continues to apply.³
10. Urban rezoning of highly productive land like the PPC95 site is to be avoided, except as provided by the provisions of the NPS-HPL (Policy 5). The only pathway provided for the proposed rezoning is via NPS-HPL clause 3.6.
11. Clause 3.6 is a directive policy that restricts urban rezoning of highly productive land unless the three conjunctive tests in clause 3.6 are met. Those tests are interwoven with NPS-UD

¹ At section 4 Statutory Considerations of the s 42A Report.

² *Blue Grass Limited v Dunedin City Council* [2024] NZEnvC 83.

³ *Ibid* at [47].

concepts and considerations, meaning the NPS-UD conclusions are also central. As per the NPS-HPL implementation guide (emphasis added):⁴

*Proposed plan changes to rezone HPL to an urban zone are where the NPS-HPL and NPS-UD **directly interact**. The wording of Clause 3.6 of the NPS-HPL has been drafted specifically with this interaction in mind — it enables territorial authorities to implement the NPS-HPL urban rezoning provisions **to effectively fulfil their obligation to provide sufficient development capacity to meet demand for housing and business land under the NPS-UD**.*

*The NPS-HPL also deliberately uses wording and terms that are consistent with those used in the NPS-UD (eg, sufficient development capacity, feasible, well-functioning urban environment), to ensure consistent terminology and interpretation across both national direction instruments. Clause 1.3(3) of the NPS-HPL confirms that terms defined in the NPS-UD have the same definition in the NPS-UD unless otherwise specified. Additionally, Policy 2 and Clause 3.2 of the NPS-HPL requires that HPL is managed in an integrated way that considers the interactions with urban development. This encourages local authorities and developers to consider the **relationship between the NPS-HPL and the NPS-UD in an integrated and effective manner to enable outcomes that best achieve the objectives and requirements of each national direction instrument**.*

12. For that reason, the NPS-HPL and NPS-UD need to be considered alongside each other.

NPS-UD

13. This Panel will need to ensure that the NPS-UD is given effect to, to the extent that it is relevant to its decision. I say this because it is my overarching submission that the NPS-UD does not apply to the PPC95 site at all. This is a planning decision that does not affect an urban environment. This also has implications for cl 3.6 NPS-HPL.

“Urban environment”

14. Urban environment is defined in the NPS-UD as follows:

***urban environment** means any area of land (regardless of size, and irrespective of local authority or statistical boundaries) that:*

- (a) is, or is intended to be, predominantly urban in character; and*
- (b) is, or is intended to be, part of a housing and labour market of at least 10,000 people*

15. The Applicant’s planning evidence concludes that the site is part of two alternative “urban environments” – that it is in the same locality and market as Te Puke and also the Rangiuru

⁴ Ministry for the Environment. 2023. National Policy Statement for Highly Productive Land: Guide to implementation. Wellington: Ministry for the Environment, page 42.

Business Park / Paengaroa (and it sometimes includes the proposed Eastern Centre in that analysis).⁵ The planning evidence of Mr Murphy also relies on Mr Counsell’s opinion that the site is in the same market as Te Puke.⁶

16. By contrast, the 42A Report concludes that the PPC95 site is not in an urban environment.⁷ It is not predominately urban in character and nor is it part of a housing and labour market of at least 10,000 people. Rather, the area is predominately rural in rural character and the proposed site would only have a population of 500-600 people.⁸ It is distant from Te Puke and the Eastern Centre with predominately rural landscape in between.⁹
17. Ms Holden agrees with the approach and conclusions on this issue in the s42A report.¹⁰
18. In my submission, it is contrived to categorise the site as in or affecting an urban environment. The NPS-UD is intended to provide for the intensification and expansion of existing and planned towns and cities across New Zealand. These are the “urban environments”. It is logical that the existing urban environments have been identified as Te Puke and Ōmokoroa for the Western Bay. The NPS-UD cannot reasonably be read in the way being suggested – that the expansion of a small residential settlement into farmland, some distance from any town centre, is in or affects an urban environment. It is difficult to think of what kind of proposal would not be covered if that were the case – there will usually be some economic link able to be established, however tenuous, between various rural settlements and their neighbouring towns. That does not mean they all involve planning decisions affecting urban environments.
19. Neither limb of the definition of urban environment applies, and so neither does the NPS-UD.

If the NPS-UD were to apply

20. If the Panel were to decide that the NPS-UD did apply, it then you have to be satisfied that the proposal gives effect to it.

⁵ For example refer to Richard Coles evidence in chief dated 24 October 2024 at [24] and [50].

⁶ Vincent Murphy evidence in chief at paragraphs 64 and 95.

⁷ At paragraph 8.8.

⁸ At paragraphs 9.40 to 9.75.

⁹ At paragraph 9.45.

¹⁰ Evidence of Lucy Holden at paragraph 10.

21. There is a strong focus in the NPS-UD on enabling *well-functioning* urban environments. The proposal cannot be reasonably be said to result in a well-functioning urban environment itself or contributing to Te Puke or future urban centres being well-functioning. It has little of the characteristics of a well-functioning urban environment – residents will need to drive some distance to access amenities and infrastructure typical of urban environments - to work, education (beyond primary), sports, public transport, supermarkets, medical facilities, restaurants and bars. Enabling expansion of smaller and isolated settlement pockets away from urban centres is at odds with the promotion of well-functioning urban environments.
22. Policy 2 is an important cross-over policy as it deals with sufficient development capacity, which is directly relevant to clause 3.6 of the NPS-HPL.

Policy 2

Tier 1, 2, and 3 local authorities, at all times, provide at least sufficient development capacity to meet expected demand for housing and for business land over the short term, medium term, and long term.

23. The recent SmartGrowth work identifies where the demand for development capacity within the existing and intended urban environments is to be met.
24. The 42A Report concludes that this site is not needed to meet expected demand for housing.¹¹
25. In my submission, the 42A Report conclusion is to be preferred as it falls naturally out of the relevant documents prepared under the NPS-UD. The 42A Report has a detailed assessment of the settlement pattern for the Western Bay of Plenty,¹² including how the subject site fits with the FDS.¹³ The 42A Report conclusion that the application is “*misaligned*”¹⁴ with these key strategic planning documents is the appropriate one.
26. I draw the Panel’s attention to paragraph 9.14 of the 42A report and Map 18 in particular:¹⁵

¹¹ At paragraph 10.22

¹² Refer to Section 9 – Settlement Pattern, from para 9.11 onwards.

¹³ The FDS is within the SmartGrowth Strategy 2024-2074.

¹⁴ 42A Report, paragraph 8.8.

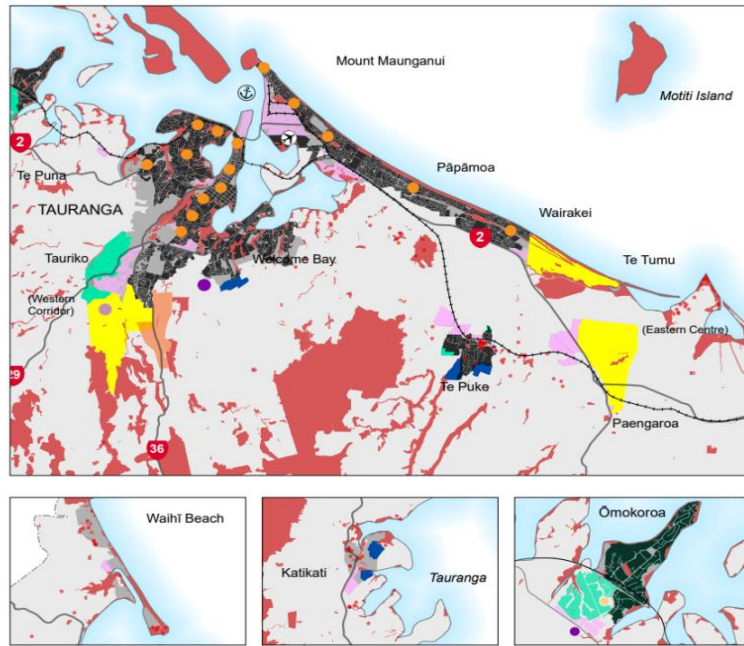
¹⁵ Map 18: Future Development Strategy – Staging Map

Map 18: Future Development Strategy – Staging Map

- Port of Tauranga
 - Tauranga Airport
 - Existing Urban Area
 - Existing Urban Areas – increased density and housing choice
 - Industry Zone
 - Potential Long-term Growth Area
 - High Density Residential
 - Medium Density Residential
 - Potential Long-Term Growth Area – Business Land
 - Long-term Growth Area – Business Land
- STAGED GROWTH AREAS***
- Short term
 - Medium term
 - Long term
- NO GO AREAS**
- Important environmental, cultural and heritage values.
 - Areas at risk from coastal or inner harbour erosion.

The staging timeframes shown on this map are based on when development will commence in the area. Detail around development in each greenfield area is available in the tables and text in the Future Development Strategy section.

The future development areas shown are indicative only. Detailed information for individual areas is available in the respective District or City Plan (as applicable) or will be developed through future planning processes.



*Further work is required to determine staging, spatial extent and mix of land uses for the Eastern Centre and Western Corridor (Upper Belk Road)

Figure 4: Map 18 – Future Development Strategy – Staging Map, image taken from SmartGrowth Strategy 2024–2074

27. Map 18 shows why the subject site is not needed to meet demand and that Pongakawa is not an existing or staged urban growth area.
28. Since the subject site is not shown on any of the relevant maps, the applicant has to rely on indirect reasons to show the site is required to meet demand. This largely turns on the proposition that the subject site somehow forms part of Te Puke and the Eastern Centre, and so is part of the wider urban environment. The 42A Report comprehensively refutes this argument,¹⁶ and in my submission is correct to do so. The applicant’s evidence is not compelling compared to the reasoning in the 42A report.

NPS-HPL

29. *Save the Maitai* says that the NPS-HPL sets a “very high bar” before urban rezoning can occur.¹⁷ This is the implication of the directive language used – highly productive land is protected, rezoning can occur only if required, only if there are no other options, only if the benefits outweigh the costs.
30. In the context of the New Zealand Coastal Policy Statement *Royal Forest and Bird* makes it clear that there is little wiggle room when giving effect to policy formulations using this sort of language.¹⁸

¹⁶ At 9.40 to 9.75.

¹⁷ *Save the Maitai Incorporated v Nelson City Council* [2023] NZEnvC 46 at [103].

¹⁸ *Royal Forest and Bird Protection Society of New Zealand Incorporated v New Zealand Transport Agency* [2024] NZSC 26.

31. In my submission, the high bar set under clause 3.6 is not met:

a. The Plan Change site is not needed to meet housing or business land demand. The two Councils' evidence is compelling as it better reflects documents prepared under NPS-UD. By contrast, the applicant's position is "misaligned" with these documents (in the words of the 42A Report), and of need relies on a strained interpretation to demonstrate the need to use the subject site.

b. In terms of whether there are no better options, the 42A Report (supported by Ms Holden) shows that the applicant's assessment is not sufficiently detailed. Case law shows that a comprehensive, district wide assessment is needed to meet this limb of Clause 3.6 even if that is an onerous requirement. In my submission it is not just economic factors when this limb is being assessed, which is a key focus in the evidence. While there is a need to understand the market and locality, the NPS-HPL also asks whether existing urban areas are better suited for urban expansion. Both Te Puke and Paengaroa are potential candidates, but the discussion and assessment of intensification in existing areas gets comparatively little treatment covering just a few paragraphs:

1. The evidence in chief of Mr Richard Coles reflects the position put forward in further information to the District Council (see para 10.49 of that report). Mr Coles says in evidence that:¹⁹

The yield added to the WBOPDC district urban areas by Plan Change 92 also do not provide sufficient development capacity as called for by the NPS-UD.

2. He further suggests that there are constraints on Te Puke's greenfield areas owing to infrastructure concerns.²⁰ Mr Vincent Murphy's planning evidence makes similar points.²¹

3. By contrast, the 42A Report indicates that (my emphasis):

In terms of Plan Change 92 and the intensification that it enabled, it is worth noting that there was limited ability for Council to undertake in depth engagement on the MDRS within Te Puke and as such Council did not explore further intensification options within the commercial area for high density residential provisions. Council's current Te Puke Spatial Planning exercise and the subsequent plan change that is intended to commence in

¹⁹ Evidence of Richard Coles dated 24 October 2024 at [46].

²⁰ At paragraph 76.

²¹ Evidence in chief of Mr Vincent Murphy dated 24 October 2024 at [95].

2025 will consider where further intensification might be possible. It is not possible to say that intensification of Te Puke is completely plan enabled.

4. A similar concern is raised in the 42A report in regard to whether additional capacity can be found in Paengaroa.²²
 5. In my submission, this short treatment is not the sort of detailed assessment the Court envisaged in *Save the Maitai*.²³ In particular, the District Council's evidence is that Te Puke has not been fully assessed for intensification.
 6. The fact there has not been a full assessment of intensification for Te Puke does not sit well against *Save the Maitai*. This point should be afforded considerable weight by this Panel when assessing the adequacy of the (1)(b) assessment.
- c. In terms of whether the benefits outweigh the costs, Regional Council adopts the District Council's position and technical evidence. This concludes that the applicant has not undertaken a sufficiently detailed assessment. We recognise that some further attempts have been made to assess these in the Applicant's evidence but remain of the view that the high bar expected for the required analysis has not been reached.
32. The evidence of Ms Holden and the s42 Report are aligned and conclude that Policy 3.6 is not met.

REGIONAL POLICY STATEMENT

33. Ms Holden's evidence discusses the RPS direction. Based on the conclusion that the site is not in an "urban environment", Regional Council's position is that Policy UG 7A is not relevant here. Policy UG 7A is relevant to proposals for "development of urban environments and urban growth that forms part of an urban environment".
34. It gives effect to Objective 6(c) and Policy 8 of the NPS-UD. Policy 8 says:

Policy 8: Local authority decisions affecting urban environments are responsive to plan changes that would add significantly to development

²² At paragraph 10.41.

²³ Saying at [100]:

"In our view these [Policy 3.6(1)(b) and (c)] are strategic matters that should be assessed by the Council, likely (although not necessarily) as part of a Schedule 1 process as signalled in cl 4.1(2) of the NPS-HPL."

capacity and contribute to well-functioning urban environments, even if the development capacity is:
(a) unanticipated by RMA planning documents; or
(b) out-of-sequence with planned land release.

35. The reach of this responsive direction is not as far as the evidence of the Applicant would tend to suggest. Councils do not need to enable all urban development proposals in growth areas they've never identified. In fact some intention for an area to be predominately urban on the part of the local authority is central to the definition of urban environment (as discussed in the s42A Report).²⁴ This policy drives at loosening defined urban limits and sequencing in policy statements and plans – something that was in the RPS here but was removed in response to NPS-UD Policy 8 (and related provisions) in RPS Proposed Change 6 (PC6).
36. Councils are to be responsive to plan changes even if they are not identified in their RMA planning documents (defined as an RPS, regional or district plan), or go out of order. This is what “unanticipated or out-of-sequence” means when you are interpreting and applying the NPS-UD and Policy UG 7A of the RPS. These are not telling us to enable all urban growth even if outside contemplation for development under, for example the FDS or UFTI. It is simply directing those that have RMA planning documents that identify urban areas that any boundaries or sequencing can no longer be treated as “immovable”.²⁵
37. If the Panel were to find that the site was in an “urban environment” and so Policy UG 7A did apply, for similar reasons to that outlined in respect of the NPS-UD and in both the s42A report and Ms Holden’s evidence, PPC95 is not consistent with it.
38. For completeness, while there are appeals on RPS PC6 and a consent order pending, no appeals sought to delete or amend RPS Policy UG 7A in a manner that would have a particular bearing on your decision. The 5-hectare threshold was sought to be deleted, but the site is more than 5 hectares anyway. There were no appeals seeking the amendment of key aspects such as the requirements to assess the extent to which the proposal is able to support multi modal transport options, and that it is located with good accessibility between housing, employment, community and other services and open space. Those present real hurdles for approving the proposed rezoning.

²⁴ [add citation]. This reasoning for the intention being that of the local authority is supported as being the only logical reading.

²⁵ NPS on Urban Development 2020 – Understanding and implementing responsive planning policies, pg 3.

39. There were no appeals on RPS Policy UG 14B, which we say is the key policy applicable to PPC95. Ms Holden agrees with the s42A Report author that the proposal is not consistent with Policy UG 14B. The RPS mirrors to some extent the interaction between the NPS-UD and the NPS-HPL, with the direction being to restrict growth of urban activities outside urban environments other than in limited situations, and a focus of these being on the finite land resource.
40. Ms Holden also addresses the suite of RPS policies promoting reduced reliance on private motor vehicles and integration of land use and transportation.
41. In my submission the proposal does not find support in any of the relevant RPS policies. Regional Council has been consistent in this position throughout its engagement with the Applicant.

TECHNICAL ISSUES

42. The outstanding issues raised in the evidence of the Regional Council focus on:
 - a. Stormwater management; and
 - b. The development setback from the Puanene Stream.
43. Ms Holden also suggests some amendments to provisions in her Appendix 1.

Stormwater Management

44. There is often a tension in plan change processes between leaving flexibility to adapt at detail design stage and address issues via later consent process and having some certainty so that structure plans and provisions can be finalised and there is confidence that effects can be appropriately managed later. The need for flexibility is certainly acknowledged. However decisions made at the plan change stage can limit the mitigation options available when it comes to consenting and make cumulative effects hard to manage. Ms Southerwood's evidence explains that this is a particular risk here, due to her concerns with the stormwater soakage calculations and potential effects. A mitigation threshold is suggested in Ms Southerwood's and Ms Holden's evidence, and a recommendation made

that further soakage testing be undertaken to confirm there is sufficient space for the mitigation required.

Development setback

45. Mr Dean's evidence supports a wider riparian buffer than is being proposed for the Puanene Stream, and Ms Holden has suggested that this be 8m rather than 4 and 6m. Due to risks associated with having buffers on private titles, the recommendation is also that an alternative mechanism that ensures the riparian buffer remains intact. Ms Holden has suggested a council reserve.

46. If the Panel is minded to recommend PPC95 be approved, notwithstanding the issues with the higher order planning direction, then in my submission these are key matters that need to be resolved before finalisation of the structure plan and planning provisions.

Rachel Boyte