

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

**AND**

**IN THE MATTER** of **Private Plan Change 51** – Karaka and Drury Limited (KDL) to the Auckland Unitary Plan – Operative in Part.

### **MEMORANDUM OF THE HEARING PANEL**

#### **ISSUING THE HEARING PANEL'S DECISION IN TWO PARTS - TOWN CENTRE AND RESIDENTIAL ZONING**

1. Pursuant to sections 34 and 34A of the RMA, Auckland Council (the Council) has appointed a Hearing Panel consisting of independent hearing commissioners Greg Hill (Chairperson), Mark Farnsworth and Karyn Kurzeja. The Hearing Panel has been delegated the authority to hear the plan change request and submissions, and make a decision on the plan change proposal.
2. The hearing of this plan change was completed on the 2 December 2021.
3. The Hearing Panel has received a Memorandum from the Applicant dated 25 January 2022. It, among other matters, has requested at paragraph 22(c):

*KDL therefore requests that the Panel:*

*Issue its decision arranged in two parts (being Residential and Town Centre rezoning respectively), so that KDL can appropriately address any refusal by the Council to notify the residential rezoning decision, once it is issued.*
4. The Hearing Panel understands the motivation of the Applicant to seek our decision in two parts as set out in the Memorandum. However, for the following reasons we have decided not to split the decision as requested.
5. Our decision is at an advanced stage of drafting. We have investigated whether the draft decision could be split as requested; but we have determined that it would be very difficult, if not impossible, to do so.
6. Moreover, the plan change was presented by the Applicant in an integrated way, and submitters addressed it this way as well. We did not consider whether the town centre and the residential zonings could 'stand alone'. While we acknowledge the Town Centre was the major focus for the Applicant, the plan change has sought to rezone 18.36ha of land for residential use and 15.29ha of land for the Town Centre. In this regard the town centre and the residential zonings are significant components of the plan change.
7. In summary, given the integrated nature of the plan change as proposed and as presented through legal submissions and evidence, we have determined that we cannot arrange the decision in two parts as requested by the Applicant.

8. Any enquiries regarding this Memorandum should be directed to the Council's Senior Hearing Advisor, Mr Sam Otter by email at [sam.otter@aucklandcouncil.govt.nz](mailto:sam.otter@aucklandcouncil.govt.nz)

A handwritten signature in black ink, appearing to read "Greg Hill", followed by a period.

Greg Hill - Chairperson

27 January 2021

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

**AND**

**IN THE MATTER** of an application to **AUCKLAND  
COUNCIL** by **KARAKA AND  
DRURY LIMITED** for a private  
plan change (PC51) to the partly  
operative Auckland Unitary Plan  
to rezone 33.65 hectares of land  
in Drury West

**MEMORANDUM OF COUNSEL FOR KARAKA AND DRURY LIMITED  
REGARDING ISSUING AND NOTIFICATION OF PC51 DECISION**

**Introduction**

1. Karaka and Drury Limited ("KDL") understands that:
  - (a) The Panel has been provided with a memorandum from Auckland Council's ("Council") Plans and Places Team, dated 20 January 2022.
  - (b) The memorandum:
    - (i) Purports to address the implications for Plan Change 51 ("PC51") of the Resource Management (Enabling Housing Supply and Other Matters) Amendment Act 2021 ("HSA"); and
    - (ii) "Recommends" that the decision on PC51 not be released and notified as soon as it has been prepared, because this may result in complexities and an inefficient process, given the requirements of clause 34(1) of Schedule 12 to the Resource Management Act 1991 ("RMA") (which was introduced by the HSA).
2. The Council did not serve this memorandum on KDL when it was sent to the Panel. We also understand that, even if the Panel issues its decision (contrary to the Council's "recommendation"), the Council may then refuse to notify the decision, notwithstanding the requirements of clause 10(4)(b) of Schedule 1 to the RMA.
3. KDL made a major investment in the hearing of PC51 and is hopeful that it will be approved. That KDL's rights and interests are at stake is clear for all to see. In these circumstances, KDL is concerned that the Council has acted unilaterally to provide this advice to the Panel without any reference to KDL.
4. KDL is also concerned that the assumptions upon which the Council's advice is based is flawed and that acting in accordance with the Council's "recommendation" would be directly contrary to the legislation it is referring to.

**Purpose and scope of memorandum**

5. Against that background, the purpose of this memorandum on behalf of KDL as the proponent of PC51 is to:

- (a) Object to the Council's material being provided to the Panel without it also having been served on KDL and KDL being given the opportunity to formally respond to it; and
  - (b) Request that the Panel issue its decision in two parts, so that KDL can appropriately address any refusal by the Council to notify the Panel's decision once it is issued.
6. In doing so, it is proposed to address:
- (a) The basis for KDL's objection to the manner in which the Council's memorandum has been provided to the Panel;
  - (b) The legal correctness of the Council's "recommendation" to the Panel;
  - (c) KDL's request regarding the structure of the Panel's decision; and
  - (d) The outcome sought.

**Procedural/fairness issues with provision of the Council's memorandum**

7. KDL now has a copy of the Council's memorandum; however, we confirm that it was not served on or made available to KDL at the same time it was provided to the Panel. The memorandum is a public document that has been prepared in the context of a formal, public hearing process under Schedule 1 to the RMA. The Council is aware that KDL is legally represented in that process and that we (as counsel) are the relevant address for service.
8. Given that KDL's rights and interests are directly affected, the failure by the Council to make the memorandum available to KDL at the same time as it was sent to the Panel represents an unacceptable abuse of process, contrary to how the remainder of the PC51 hearing has been conducted. On that basis, KDL submits that the Panel is entitled to:
- (a) Refuse to receive the memorandum at all; and/or
  - (b) Determine that the Panel is not required to withhold the issuing of its decision on PC51 as the Council "recommends", even if it does receive the memorandum.
9. If, notwithstanding that position, the Panel considers it may be required (or wish) to consider the Council's "recommendation", KDL's firm position is that it must have the opportunity to formally respond to the Council's memorandum before the Panel makes any determination in that regard. In which case, KDL requests that the Panel issue timetabling directions for the parties to make formal submissions on this issue, and the subsequent hearing of those submissions by the Panel.

**The legal basis for the Council's "recommendation" is flawed**

10. As indicated, counsel will file submissions addressing the legal correctness of the Council's "recommendation" in detail, if the Panel considers that necessary. For the purposes of this memorandum, it is sufficient to note the following two points in that regard.
11. First, there is nothing in either the HSA or the RMA which explicitly requires the Panel to withhold issuing its decision on PC51. This is acknowledged at paragraphs 8 and 9 of the Council's memorandum, which (as relevant) state:

"8. *The transitional provisions do not direct what is to occur with PPCs prior to the notification of a variation...*"

"9. *While the Act does not specifically state that a decision cannot be made by the Council on a PPC request where clause 34(1) applies...*"

12. Second, concluding that the Panel is required to withhold its decision on PC51 as a result of the HSA is contrary to the purpose and intent of that Act. That purpose is expressed in the Select Committee Report on the Resource Management (Enabling Housing Supply and Other Matters) Amendment Bill (as it then was) ("Bill") as follows:<sup>1</sup>

*"The Resource Management (Enabling Housing Supply and Other Matters) Amendment Bill seeks to rapidly accelerate the supply of housing in urban areas where demand for housing is high. It would apply to territorial authorities in New Zealand's larger cities: Auckland, and greater Hamilton, Tauranga, Wellington, and Christchurch."*

13. As the Panel is aware, PC51 seeks to rezone 18.36ha of land in Drury West for residential use, and a further 15.29ha of land for a Town Centre, to support the existing and planned urbanisation of Drury West. It is thus exactly the type of development that the HSA intends to "rapidly accelerate".

14. Consistent with that purpose, the HSA never intended to delay or impede existing plan changes that provide for urbanisation. Rather, it intended to achieve the exact opposite. This is clearly demonstrated in the following extracts from the Select Committee Report on the Bill:<sup>2</sup>

*"We agree that the transitional provision could affect housing supply in the short term. We consider that proposed district plans and plan changes that are well progressed should be able to proceed. We therefore recommend removing the requirement for them to be withdrawn.*

*We recommend amending the transitional provision to enable the following:*

...

- *Plan changes, including private plan changes, that have been notified at the time of enactment could proceed. In a case where a decision on the plan change had not been notified at the time of enactment, a variation to the plan change could then be notified alongside the relevant council's IPI to ensure that the plan change incorporates the MDRS and the NPS-UD...*

*It is the intent of the majority of this committee that private plan changes in progress are, at the least, not significantly delayed, and at best could be accelerated by this bill."*

*(Emphasis added)*

15. Applying clause 34 of Schedule 12 to the RMA as the Council has recommended would delay a decision being made on PC51 by at least 18-24 months. Clearly, this is anomalous with the outcomes the HSA intended to achieve. Accordingly, the Council's position is contrary to the widely accepted rule that statutes should be interpreted in a way which avoids absurdity or anomalous outcomes.
16. For the above reasons, KDL's position is that the Council's recommendation is not based on a legally robust or correct interpretation of the HSA.

### **Structure of the Panel's decision**

17. KDL has been advised that if, contrary to the Council's "recommendation", the Panel issues its decision, the Council may then refuse to notify the decision, notwithstanding the requirements of clause 10(4)(b) of Schedule 1 to the RMA. KDL accepts that notification of the decision is a matter that is outside of the Panel's control.

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<sup>1</sup> Report of the Environment Committee into the Resource Management (Enabling Housing Supply and Other Matters) Amendment Bill, December 2021, at page 2.

<sup>2</sup> Ibid, at page 20.

18. That said, we note that the HSA only applies to the residential aspects of PC51 (i.e. the 18.36ha of land to be rezoned as either Mixed Housing Urban or Terrace House and Apartment Building). Thus, even if the basis of the Council's reasoning was correct (which is not conceded), the Council's "recommendation" does not apply to the 15.29ha of land that PC51 seeks to be rezoned Town Centre.
19. KDL therefore requests that to the extent possible, the Panel arrange its decision on PC51 into two clearly identifiable parts:
  - (a) One addressing the land to be rezoned Residential; and
  - (b) The other addressing the land to be rezoned Town Centre.
20. This would enable KDL to mount a legal challenge to a Council refusal to notify the decision on the residential rezoning, should that become necessary, while leaving the important remainder of the decision intact.

**Outcome requested**

21. To summarise, having regard to the above:
  - (a) The Council's conduct in producing this memorandum and providing it to the Panel without contemporaneously making it available to KDL (and the other parties to PC51) represents an unacceptable failure to comply with the principles of fairness and natural justice. KDL (and other parties) are entitled to be heard in relation to Council advice that has the potential to affect their rights and interests.
  - (b) The legal basis for the Council's position is open to question and the Council's "recommendation" is directly contrary to the intent of the legislation that the Council is purporting to uphold.
22. KDL therefore requests that the Panel:
  - (a) Provide KDL with the opportunity to formally respond to the Council's memorandum regarding the HSA, but only in the circumstance that the Panel considers it may be required (or wish) to adopt the "recommendation" from that memorandum;
  - (b) If required for the purposes of (a) above, issue timetabling directions for the parties to make formal submissions on this issue, and the subsequent hearing of those submissions by the Panel; and
  - (c) Issue its decision arranged in two parts (being Residential and Town Centre rezoning respectively), so that KDL can appropriately address any refusal by the Council to notify the residential rezoning decision, once it is issued.
23. We thank the Panel for its attention to these matters and are happy to address the Panel on them orally if that would assist.

**Dated 25 January 2022**



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**S J Berry / H C Andrews**  
Counsel for Karaka and Drury Limited