



18 May 2020

Celia Davison / Craig Cairncross
Managers, Planning Central and South
Auckland Council
Private Bag 92300
Victoria Street West
AUCKLAND 1142

Email: celia.davison@aucklandcouncil.govt.nz
craig.cairncross@aucklandcouncil.govt.nz

Dear Ms Davison and Mr Cairncross

KARAKA AND DRURY LIMITED – PRIVATE PLAN CHANGE REQUEST FOR STAGE B2 OF AURANGA DEVELOPMENT IN DRURY WEST

1. INTRODUCTION

- 1.1 We are acting for Karaka and Drury Limited ("KDL") in relation to its private plan change ("PPC") request for the next stage (Stage B2) of the "Auranga" development in Drury West, Auckland. As you are aware, this is a comprehensively planned, quality residential development proposed for the inner reaches of the Manukau Harbour. It is being undertaken by Charles Ma of Ma Development Enterprises Limited ("MADE").
- 1.2 In brief summary, the requested PPC seeks the following amendments¹ to the partly operative Auckland Unitary Plan ("AUP"):
- (a) Rezone the Stage B2 land from Future Urban under the AUP to a mix of Town Centre, Terrace Housing and Apartment Building and Mixed Housing Urban, in order to facilitate and support commercial and residential development on that land; and
 - (b) Provide for a new "Drury 2 Precinct", which incorporates additional objectives, policies and rules for the Stage B2 land.

Purpose and scope of letter

- 1.3 Against this brief background, the purpose of this letter is to:
- (a) Formally lodge (**enclosed**) the PPC request to alter the AUP, in accordance with clause 21 of Schedule 1 of the Resource Management Act 1991 ("RMA"). in order to enable KDL to implement Stage B2 of the Auranga development.
 - (b) Summarise the proposal and address relevant legal issues.

¹ Attachment 3 to the PPC Request documents.

- 1.4 To that end, the remainder of this letter:
- (a) Provides a brief summary of the growth of the Auranga development to date (Section 2);
 - (b) Addresses the following relevant legal issues:
 - (i) The Council’s jurisdiction to accept and process KDL’s PPC request despite the AUP being partly operative; and
 - (ii) Compliance of the PPC request with the requirements of the RMA and AUP (Section 3);
 - (c) Addresses timing and process issues (Section 4); and
 - (d) Sets out concluding comments and KDL’s request (Section 5).

2. **THE AURANGA DEVELOPMENT**

- 2.1 The Auranga development is being undertaken in stages. We briefly comment on each, as well as the Council’s own structure planning process for the area, as follows.

Stage A/PV15

- 2.2 Stage A covers an area of 84.6ha in Bremner Road, Drury and was declared a special housing area under the Housing Accords and Special Housing Areas Act 2013 (“HASHAA”). Karaka and Drury Consultant Limited (“KDCL”, a related company to KDL) applied for authorisations to develop Stage A under HASHAA in May 2016, and those applications were granted in August 2016.
- 2.3 The planning framework for Stage A is now operative and has been incorporated into the AUP as the Drury 1 Precinct. Construction within Stage A is well underway, with the upgrades to Bremner Road completed, houses being built and the first residents expected to move in by the end of 2020.

Stage B1/PPC6

- 2.4 In May 2017, KDL lodged a PPC for development of Stage B1, also under clause 21 of Schedule 1 of the RMA. Stage B1 covers two separate pieces of land (comprising approximately 83ha) to the west of Stage A. This PPC was subsequently accepted by Auckland Council (“Council”) as PPC6, the first privately initiated plan change to the AUP. Following a hearing before a panel of independent commissioners, PPC6 was approved in July 2018 and is now fully operative (as of 14 February 2020).
- 2.5 Based on the master planning and structure plan work it had undertaken to date, KDL was keen to progress with Stage B1 as a proposal that both provided for the anticipated residential development and confirmed the location of the Drury West rail station and centres network.
- 2.6 During the consultation process, the Council advised that it understood and accepted the arguments in favour of KDL’s proposal for residential land, as well as the need for a town centre and rail station in Drury West. However, Council staff remained strongly of the view that only a Council-led structure plan could confirm the location of the rail station and centres network. They also advised that they were shortly to start work on that structure plan exercise. KDL therefore

agreed to split its proposal in two, to form Stage B1 (or what became PPC6) and the now proposed Stage B2.

Council's Drury-Opaheke Structure Plan

- 2.7 Consistent with the advice from staff, the Council commenced its own structure plan process for Drury West and East (the Drury-Opaheke Structure Plan ("DOSP")) in 2017. Following input from all the major landholders in the area (including KDL), the Council officers continued to refine their thinking and released the final DOSP in August 2019. Importantly, the DOSP:
- (a) Generally aligned with the preferred outcomes that had been developed through KDL's own master planning and structure plan processes;
 - (b) Included a large area of land to the north of State Highway 22 ("SH22") which was identified as a "Centre"; and
 - (c) Did not conclude there was any need to change the Council's Future Urban Land Supply Strategy ("FULSS", as refreshed in 2017), despite having the opportunity to do so. In that regard, the FULSS recommended that the land north of SH22 in Drury West be development ready by 2022 (the first half of Decade One). This was well in advance of the land in Drury West Stage 2 (to the south of SH22) and in Opaheke Drury (Drury East), both of which are scheduled for development in the first half of Decade Two (2028-2032) under the FULSS.

Stage B2/current PPC request

- 2.8 The PPC has been specifically developed to be consistent with the Council's long term planning for the area, including as set out in the FULSS and DOSP. In that regard, we consider the Council's decision not to amend the FULSS as a result of the DOSP (despite having the opportunity to do so) represents timely and important confirmation that the FULSS is current and correct.
- 2.9 For that reason, the PPC adopts and largely relies on the technical reporting undertaken for the DOSP, as well as the existing zones from the AUP. Thus, the PPC ensures that the FULSS direction for the land be development ready by 2022 will be achieved, in a way that implements the DOSP. In other words, this PPC request seeks authorisation to give effect to the DOSP "on the ground", in a timely way and at no cost to the Council.
- 2.10 Further, it appears that this will be the only manner in which such an outcome will be achieved. In that regard, based on our previous experience with Council-led plan changes, we do not consider that it would be feasible for the Council to develop a plan change covering the Stage B2 land and complete Schedule 1 processes in time to have the land "development ready" by 2022. As KDL's work has demonstrated, for that to occur, the Council would need to have its plan change ready for notification (if not already notified) now – which it does not.
- 2.11 Over and above that, based on the criteria used by the Council to evaluate PPC6, which we agreed with, we consider that even if the FULSS had been or were to be reviewed, the land north of SH22 would remain part of 'Stage 1' to be development ready by 2022. This is primarily for reasons of:
- (a) Achieving contiguous urban zoning with land that already has a live zone and on which houses are already being built;

- (b) Connecting to and with the existing trunk infrastructure networks brought into Drury West by the existing Auranga zones; and
- (c) Making the most efficient use of Ministry of Education (“MoE”) investments in a primary and a secondary school site in Drury West, and investments made by MADE to improve and enhance public open spaces.

3. **RELEVANT LEGAL ISSUES**

3.1 For the purposes of this letter, it is only necessary for us to briefly address two legal issues, as follows:

- (a) KDL’s ability to make a PPC request when the AUP is still operative in part; and
- (b) The extent to which the PPC request complies with the requirements of the RMA and AUP.

Ability to make PPC request when AUP is operative in part

3.2 The AUP was made operative in part on 15 November 2016; it is not fully operative. The wording of Schedule 1 of the RMA is to the effect that requests for a PPC can only be made in respect of an operative planning instrument. Despite that, it is clear from relevant case law and our analysis that:

- (a) KDL is able to make a PPC request for the Stage B2 land, and the Council has jurisdiction to process it, despite the AUP not being fully operative; and
- (b) The Council is not entitled to reject the request on the grounds that the AUP is not fully operative.

3.3 This issue was previously addressed in detail with respect to PPC6, including in our legal opinion attached as Appendix B to PPC6 dated 15 May 2017 (**attached** again as **Appendix A**, for ease of reference). The same analysis and conclusions remain applicable to the present PPC request.

Compliance with RMA and AUP requirements

3.4 We have also reviewed the PPC request prepared by KDL’s consultant team in light of the requirements of:

- (a) Schedule 1 of the RMA; and
- (b) Chapter M, Appendix 1 – Structure Plan Guidelines (“SPG”) of the AUP.

3.5 We firmly consider that the PPC for Stage B2 meets these requirements by a significant margin. In summary, in accordance with Schedule 1 of the RMA, in addition to the Structure Plan Document that was included as Attachment 4 to PPC6 and the specialist reports for the Stage B2 land, the PPC request includes the following documents:

- (a) An explanation of the purpose and the reasons for the requested plan change;
- (b) An evaluation in accordance with section 32 of the RMA in respect of the objectives, policies and rules or other methods proposed; and

- (c) An evaluation of the anticipated environmental effects arising from the implementation of the plan change, in accordance with the provisions of Schedule 4 of the RMA.

3.6 As required by the SPG:

- (a) A comprehensive structure planning exercise has been undertaken as a precursor to and to support the PPC request. This includes the KDL Structure Plan Document provided for PPC6 (which also included and addressed the Stage B2 land), as well as the DOSP.
- (b) Both KDL's Structure Plan Document and the DOSP:
 - (i) Have taken into account all the relevant external documents identified in Section 1.3 of the SPG;
 - (ii) Identify and address the matters identified in Section 1.4 of the SPG, including those relating to urban growth and infrastructure; and
 - (iii) Are supported by a range of technical reports prepared by highly qualified experts, at a level appropriate to the scale of the Stage B2 land and the complexity of the issues raised by the structure planning process.

4. PROPOSED TIME FRAMES AND PROCESS FOR PROCESSING OF PPC REQUEST

Time frames for processing the PPC request

- 4.1 KDL wishes to work with and assist Council officers in order to have the PPC request progressed with urgency and, of fundamental importance, at least in parallel with, if not ahead of, plan changes for other land within Drury West and East. KDL's objective is to have the Council's decision on the PPC request by the end of 2020.
- 4.2 As noted, KDL's preference was to include the Stage B2 land in its original PPC request for Stage B1. At the Council's request, it did not do so, in order to give the Council time to undertake its own structure planning work for the wider Drury-Opaheke area.
- 4.3 Despite being ready to lodge the present PPC request at least six months ago, KDL has then further delayed doing so, again in compliance with specific requests from Council staff (including Penny Pirrit and John Duguid).
- 4.4 As is readily apparent, KDL has at all times acted in good faith and sought to partner with the Council with respect to its Auranga development. Having done so, it now finds itself in a commercially disadvantaged position to the extent that, rather than being the "first mover" in the Drury-Opaheke area as intended, it is now being overtaken by other landowners which, inconsistent with its approach towards KDL, the Council has allowed to progress plan change proposals for land which the FULSS indicates should not be ready for development until 2028 at the earliest. Given the good faith in which KDL has always acted vis-à-vis the Council, our client is understandably aggrieved by this state of affairs given its legitimate expectation that this would not be allowed to arise.

- 4.5 Thus, although KDL wishes to continue to work in good faith in partnership with the Council, it can no longer delay lodging its PPC request for the Stage B2 land, as the Council has requested.
- 4.6 In short, it cannot continue to sit back and be left behind, simply to allow other landowners to also have their land rezoned. Since it received approval for Stage A of its Auranga development, KDL has worked towards having the Stage B land development ready by 2022 and it must continue to do so, for the following reasons:
- (a) KDCL (in association with KDL) has solely funded the bulk infrastructure needed to service not only its own Stage A land, but also strategically unlock the remainder of both Drury West and East, as well as Drury South and Paerata. It now needs to maintain a regular supply of titles coming to market, in order to service the debt it was required to take on in order to provide that 'public good' infrastructure. As the supply of titles from both Stage A and Stage B1 will become exhausted, KDL needs to ensure that it can now continue to generate revenue from development within Stage B2.
 - (b) MoE has purchased sites for a primary school (Designation (5062) in the AUP) and secondary school in Drury West. MoE plans to have the primary school open by 2022. The high school is to be located on Jesmond Road within the Stage B1 land and is scheduled to open in 2023. The additional development in Stage B2 is necessary to support development of both schools. Given that these schools represent a critical component of the new community, it was necessary to have them "locked in" at an early stage of the development process.
 - (c) Both KDL's expert advice and its market feedback have demonstrated that that it is imperative that Auranga has a town centre as a focal point and to generate high value employment opportunities, if it is to establish as a "community with heart" in accordance with KDL's vision; otherwise, there is a significant risk that it will become another "dormitory suburb" with its inhabitants having to travel by private vehicle or public transport to work. This is fundamentally contrary to the entire philosophy underpinning the Auranga vision.
 - (d) A centre is also required to enable the community to meet its daily needs based around a centre as a focal point, as directed by the AUP's RPS framework for urban form.
- 4.7 In light of the above, KDL's position is that the present PPC request can and should be progressed at least in parallel with, if not in advance of, plan change requests for other land within Drury West and East. Further, having regard to the following, KDL position is that there is no impediment to that outcome being achieved for the following main reasons:
- (a) As noted, the Stage B2 land is zoned Future Urban and the FULSS requires the Stage B2 land to be development ready by 2022, both of which demonstrate and underpin the suitability of the land for precisely the type of urban development proposed. The land is also contiguous with the urban zonings and infrastructure connections provided by way of Stages A and B2.
 - (b) Development of the Stage B2 land will be serviced by (and is needed to support) the MoE funded and purchased school sites planned to open from 2021. No other area within Drury West or East can point to school sites

that have not only been identified but are in the advanced stages of planning.

- (c) Using the criteria developed by the Council to evaluate PPC6, no other plan change request (including one prepared by the Council) could be prepared in time and to the required standard, in order for the land to be development ready by 2022 as required by the FULSS. Thus, the only way for the land to be developed in that time frame other than through the present PPC request would be for the Council to apply far less rigour to its scrutiny of other landowners' plan changes than the requirements it has previously imposed on KDL. This would be fundamentally (and arguably procedurally) unfair.
 - (d) The Stage B2 land is not infrastructure constrained. To support development on that land in accordance with the current PPC request, all that is required is the rail station/rail upgrade, a link to that from SH22 and a pedestrian crossing across SH22. That is considerably less than any other plan change in the Drury/Opaheke area would require. The provision of such infrastructure can also be managed via plan provisions such as those proposed by MADE as part of this PPC request.
 - (e) As a related point, KDL's development is not dependent on any other infrastructure provision or improvements. KDL has either already paid for and built any other required infrastructure, or will do as part of its subdivision and development consents. This is in contrast to other potential rezoning requests within Drury West and East, which would all be dependent on major public infrastructure upgrades.
 - (f) In any event, in accordance with the FULSS, any capital expenditure required to be funded by the Council in order to support development of the Stage B2 land should already be included in and funded via the Council's long term plan as a function of the requirements of the Local Government Act 2002.
 - (g) KDL's PPC request is consistent with the DOSP and FULSS. It also relies on and adopts the 'default' AUP zones and instruments, rather than using KDL's preferred Drury 1 Precinct. KDL's position is that there is therefore no impediment to this PPC request being accepted in a timely manner, on the basis that:
 - (i) The appropriateness or robustness of KDL's proposal is self-evident.
 - (ii) There is no need for any extensive requests for further information (particularly on matters of detail that are more appropriately addressed via the resource consent process, as KDL experienced in the processing of PPC6).
- 4.8 To facilitate the prompt processing of the PPC request, KDL further considers that it would be appropriate for the Council to process the PPC request with limited notification, as now provided for in clause 5A of Schedule 1 of the RMA. As you will be aware, this processing avenue is available if the Council is satisfied that it is able to identify all of the persons who would be directly affected by the PPC request. Based on its experience with previous plan change requests both in Auckland and Hamilton (particularly the Rotokauri North PPC, which was recently limited notified), KDL's position is that it is possible to identify all directly affected parties. KDL is happy to work with the Council processing staff to that end.

Assessment of traffic effects

- 4.9 KDL's strongly held position is that, having regard to the FULSS, the traffic impact assessment for the current PPC request should be limited to assessing the traffic effects of development on the Stage B2 land in conjunction with:
- (a) The existing environment; and
 - (b) The traffic generated from other projects in the area that are already planned or which are also anticipated to occur within the first half of Decade One under the FULSS.
- 4.10 In other words, there is no scenario in which KDL should be required to assess the effects of traffic generated by development within Stage B2 of its land on the basis that land in Drury West Stage 2 or Drury Opaheke (as defined in the FULSS) has already been developed. Rather, we expect the Council to apply the FULSS even-handedly.
- 4.11 Thus, projects which the FULSS indicates are to be developed in the first half of Decade Two (2028-2032) should be required to assess their traffic effects as if the Drury West Stage 1 land has already been developed, but not the other way around, on the basis that land scheduled for release in the first decades of the FULSS should not be required to assess speculative future effects or provide upgrades to accommodate development of land scheduled for later release. To require otherwise would fundamentally defeat the purpose of the FULSS, which is to assist to manage and fund new infrastructure, including transport infrastructure.
- 4.12 In summary, having regard to the above factors, there is no need or justification for the processing of KDL's present PPC request to be delayed in order for further transport assessments to be undertaken, regardless of the status of any other PPC requests that may have been made for other land within the wider Drury-Opaheke area.

Time frames for processing the PPC request

- 4.13 As summarised in **Appendix A**, in accordance with clause 25 of the Schedule 1 of the RMA, the Council only has four options for how it deals with this PPC request:
- (a) Adopt the request as a Council-led plan change;
 - (b) Accept the request as a PPC;
 - (c) Treat the request as a resource consent application; or
 - (d) Reject the request.
- 4.14 The analysis and conclusions outlined in our opinion **attached as Appendix A** remain equally applicable to the present PPC, as they did to the PPC for the Stage B1 land. For the same reasons, we accordingly consider that the Council is not able to treat the request as a resource consent application or reject the request. Thus, the only procedural avenues lawfully available to the Council are to either adopt or accept the request.
- 4.15 Of those options, in our view it would be most appropriate for the PPC request to be accepted and processed as a PPC, as occurred for PPC6. This would enable the Council to:

- (a) Adopt a consistent approach to the manner in which it processes PPC requests; and
- (b) Focus its time and resources preparing a plan change for the remainder of the Drury West and East land (i.e. the Drury West Stage 2 and Drury/Opaheke land, as identified in the FULSS), to support the development being progressed in Stages A and B of the Auranga development.

5. CONCLUDING COMMENTS AND KDL'S REQUEST

5.1 The PPC request is the next key step required to enable the co-ordinated and timely development of Drury West. Once granted, the request will be followed by land use and regional resource consent applications to enable the development of the necessary infrastructure (including roads and open space) and construction of the first houses. Consistent with the FULSS, KDL intends to commence site preparation works for the B2 land in the 2021/22 earthwork season.

5.2 Accordingly, KDL requests that, having assessed the enclosed PPC documentation, the processing staff recommend that:

- (a) The Council accept the PPC request for Auranga B2 in accordance with clause 25(2)(b) of Schedule 1 of the RMA; and
- (b) The PPC request be limited notified in accordance with clause 5A of Schedule 1 of the RMA.

5.3 We trust the above is clear and sufficient for present purposes. Please make contact should you wish to discuss.

Yours sincerely



S J Berry
Partner

DDI: +64 9 909 7315
Mobile: +64 21 987 095
Email: simon@berrysimons.co.nz

APPENDIX A

BERRY SIMONS' OPINION, 15 MAY 2017



15 May 2017

Mr Charles Ma
Managing Director
Karaka and Drury Limited
Level 33, 23 Albert Street
Auckland Central
AUCKLAND 1010

Email: charles@auranga.co.nz

Dear Charles

AURANGA - AVAILABILITY OF THE PRIVATE PLAN CHANGE PROCESS FOR STAGE B1, DRURY WEST

1. INTRODUCTION

1.1 In February 2016, you sought our advice in relation to Stage B1 of the proposed development by Auranga Limited in Drury West and, in particular, confirmation that the private plan change process is available to authorise Auranga B1. We provided advice in draft that has been shared with some Council officers. We have now updated and finalised this report to accompany the private plan change ("PPC") by Karaka and Drury Limited ("KDL" or "Auranga") for Auranga B1 which we have analysed in some detail.

Context

- 1.2 To contextualise the question, on 8 August 2016, Auckland Council approved a plan change request by Karaka and Drury Consultant Limited ("KDCL"), on behalf of Auranga, to rezone 84.6 hectares of land in a special housing area ("SHA") at Bremner Road, Drury. This related to Stage A of Auranga's development in Drury West. It is under construction.
- 1.3 Auranga wishes to have the same planning framework put in place for Stage B1, being the next stage of its development. To achieve this, Auranga needs to request a PPC to the Auckland Unitary Plan ("AUP") under Schedule 1 of Resource Management Act 1991 ("RMA") because:

- (a) The Stage B1 land is currently zoned Future Urban under the AUP, meaning it cannot be developed for residential use without a further structure planning and plan change process¹; and
- (b) Auckland Council's Future Urban Land Supply Strategy ("FULSS") indicates it will not be undertaking its own structure planning and plan change process for this area until some time in the period between 2022-2027².

The question

- 1.4 In accordance with Schedule 1 of the RMA, requests for a PPC can only be made in respect of an operative planning instrument. The AUP was made operative in part on 15 November 2016. The key issue that arise are:
- (a) Whether PPC requests can be made in respect of a planning instrument that is operative in part; and
 - (b) If so, whether:
 - (i) The provisions of the AUP relating to Stage B1 are operative, so that Auranga can make a PPC request for that development now; and
 - (ii) Any legal / process risks associated with that approach (particularly in respect of Council's ability to reject the PPC request) can be satisfactorily addressed.

The answer

- 1.5 Our detailed comments follow. At the outset, our key conclusions based on the detailed analysis contained in this report in relation to these issues are that:
- (a) Auranga is able to make a PPC request for the Stage B1 land, prior to the AUP becoming fully operative;
 - (b) The Auckland Council is not entitled to reject the request on the grounds that the AUP is not fully operative; and
 - (c) There is no basis upon which the Council could validly reject the PPC having regard to:
 - (i) The grounds for rejecting a PPC under Clause 25(4) of Schedule 1 to the RMA; or
 - (ii) Any of the Auckland Council Planning Committee's criteria dated 28 April 2017.
 - (d) Any Council decision to reject the PPC would be vulnerable to legal challenge.

¹ In accordance with Chapter H18 of the AUP. In particular, the description for the Future Urban zone states that "Land...cannot be used for urban activities until the site is re-zoned for urban purposes".

² At page 11.

Purpose and scope of report

- 1.6 Against that background, the purpose of this report is to address those issues and recommend the way forward. In doing so, our advice addresses the following matters:
- (a) Background and context (Section 3);
 - (b) Planning framework for the PPC request (Section 4);
 - (c) Statutory framework and factors relevant to PPC request (Section 5);
 - (d) Scope for requesting a PPC – whether that procedure is available for Stage B1 (Section 6);
 - (e) Likelihood of PPC request being rejected and strategy for addressing those (Section 7);and
 - (f) Conclusions (Section 8).

2. EXECUTIVE SUMMARY AND RECOMMENDATIONS

Background and context

- 2.1 Auranga proposes to undertake a substantial residential development in Drury West (around Karaka), on the inner reaches of the Manukau Harbour. This area has been identified as appropriate for future urban development in the Auckland Plan ("AP"), AUP and the FULSS. The majority of the Drury West land (other than that for Stage A of Auranga's development) is accordingly zoned Future Urban under the AUP.
- 2.2 Auranga's key objective is to have an appropriate "live" planning framework in place for the first stages of its Drury West development, so that it can begin establishing these as soon as possible. It has already obtained authorisations for Stage A and now wishes to proceed with Stage B1. Auranga proposes that Stage B1 should be subject to the same package of controls and zones as provided for in the Drury 1 precinct that applies to Stage A.
- 2.3 The FULSS currently indicates that Council will not be undertaking its own structure planning process for the wider Drury West area (and beyond) until 2022-2027. Council is currently undertaking a review of the FULSS, as part of which it proposes to bring forward the timing for development of Drury West Stage 1 (i.e. north of State Highway 22) to 2018-2022. However, this is subject to a notation that Drury West Stage 1 is to be "development ready" by 2022.
- 2.4 To enable Stage B1 to proceed before then, Auranga must therefore make a PPC request under clause 21 of Schedule 1 of the RMA. Ian Munro advises the PPC request would be made on the basis that it represents a "win-win" outcome, where Auranga can proceed with further stages of its Drury West development, while still providing for Council to undertake its own structure planning exercise for the wider Auckland South / Drury area in its own timeframe.

Planning framework for the PPC request

- 2.5 The AUP has been made operative in part as of 15 November 2016, excluding those provisions which are subject to appeals (or judicial review proceedings) to the Environment Court or High Court. The Future Urban zoning of the Stage B1 land is not subject to challenge and is therefore operative. The rules applying to the Future Urban zone are also not subject to appeal.
- 2.6 Two properties included in Stage B1, namely 321 and 329 Bremner Road, were previously were subject to an appeal by the Independent Maori Statutory Board ("IMSB") in relation to the Sites and Places of Value to Mana Whenua management layer. This appeal has now been resolved (without that management layer not being reinstated).
- 2.7 The Drury 1 Precinct, which is proposed to be extended to cover the Stage B1 land, is not subject to appeal and is operative as of 8 August 2016.

Is the PPC procedure available given the status of the AUP?

- 2.8 Under clause 21 of Schedule 1 of the RMA, PPC requests can only be made in respect of an operative planning instrument. The AUP is not fully operative; it has been made operative in part. The issue therefore arises as to whether Auranga is able to make a PPC request for Stage B1 or whether the AUP needs to be fully operative (i.e. all appeals resolved) before doing so.
- 2.9 Based on our analysis of the relevant statutory framework and case law, our view is that:
 - (a) It is lawful for Auranga to make a PPC request for the Stage B1 land prior to the AUP becoming operative, given the provisions it will be seeking to amend (i.e. the Future Urban zoning of the Stage B1 land and the Drury 1 Precinct) are operative; and
 - (b) If there were any doubt in that regard (which we do not consider to be the case), Auckland Council would not be entitled to reject the request on the grounds that the AUP is not fully operative.

Is there a valid basis for the PPC request to be rejected?

- 2.10 Clause 25(4) of Schedule 1 to the RMA establishes limited circumstances in which PPC requests can be rejected, namely that:
 - (a) The request is frivolous or vexatious;
 - (b) The substance of the request has been considered within the last two years;
 - (c) The PPC is not in accordance with sound resource management practice;
 - (d) The PPC request would make the plan inconsistent with Part 5 of the RMA; and
 - (e) The plan to be changed by the PPC request has been operative for less than two years.

2.11 As to whether there is a valid basis for rejecting KDL's PPC request on the basis of those provisions, our assessment is that:

- (a) The PPC request is clearly not frivolous or vexatious;
- (b) Although issues as to where Auckland's growth should be accommodated were extensively canvassed during the AUP process, there has not to date been any detailed consideration of or decisions made regarding the nature and form of urban growth at Drury West (outside of Stage A). It is therefore unlikely that Auckland Council could validly reject the PPC request on the basis that the substance of the request has been considered within the last two years.
- (c) It would not be appropriate for the Council to reject the PPC request as not being in accordance with sound resource management practice, given that:
 - (i) The PPC request is supported by comprehensive expert assessments which demonstrates that:
 - Drury West is an appropriate location for the proposed residential development, consistent with the policy directives from the AP, AUP and FULSS; and
 - The proposed development will achieve sustainable management purpose the RMA.
 - (ii) The PPC request does not seek to change plan provisions that were about to be superseded, or relate to land which has recently been (or will shortly be) the subject of a detailed structure planning exercise. (Even under the FULSS review, Drury West Stage 1 is not anticipated to be "development ready" until 2022).
 - (iii) Auranga is not seeking to rezone the land without providing the necessary infrastructure to service the proposed development. The expert reports accompanying the PPC demonstrate that infrastructure provision for at least 3000 houses is being provided with Stage A (which in itself would yield approximately 1350 houses).
- (d) Given that the AP, AUP and FULSS indicate that Drury West has been identified as being suitable for residential development of the nature Auranga is proposing, the PPC does not make the AUP inconsistent with Part 5 of the RMA (regarding the purpose and contents of planning instruments including district plans).
- (e) Although the AUP which KDL is seeking to change will have been operative for less than two years, the Council does not have an unfettered discretion to reject PPC requests on this ground but must exercise the discretion in a principled manner, consistent with sound resource management practice.

2.12 Auckland Council is not be entitled to reject the request on the grounds that the AUP is not fully operative.

2.13 We note that if Auckland Council rejects the PPC request on any of the above grounds, KDL has the right to challenge this decision by way of appeal to the Environment Court.

3. **BACKGROUND AND CONTEXT**

Rationale and objectives for Auranga's Drury West development

3.1 Demand for housing in Auckland is currently exceeding supply, resulting in housing affordability (and other) issues. This issue is recognised and addressed in a number of relevant planning instruments (both statutory and non-statutory) as follows:

(a) The AP identifies that Auckland is facing a housing crisis, given a persistent under-supply of housing, a lack of housing choice and declining housing affordability. The AP anticipates that an additional 13,000 homes need to be constructed annually over the next 30 years to provide for our growing housing demand³.

(b) Drury West it is identified on Figure D1 of the AP as "Greenfields areas for investigation" to provide further areas for growth. Clause 125 of the AP identifies there is capacity for around 60,000 dwellings in the development pipeline (greenfield land).

(c) Auckland Council's FULSS identifies that just over 2,100ha of land at Drury (including Drury West) will need to be developed over the next 30 years to accommodate Auckland's predicted growth⁴.

(d) The AUP contains specific policies regarding Auckland's urban growth⁵ and applies a Future Urban zone to greenfield land that has been identified as necessary (and suitable) to provide for this growth, including Drury West. The Future Urban zone is intended to be a transitional zone, in which land may be used for a range of general rural activities but cannot be used for urban activities until it is rezoned for urban purposes.

3.2 In response to this housing shortfall and the opportunity it creates, Auranga wishes to establish a comprehensively planned, quality residential development at Drury West (around Karaka), on the inner reaches of the Manukau Harbour. Auranga's vision is to create not just quality homes, but neighbourhoods with a real sense of connection and community.

3.3 Auranga's key objectives for its Drury West development are to:

(a) Put an appropriate planning framework in place that enables residential development (i.e. replace the current Future Urban zone with "live" zoning).

(b) Ensure the provisions of the live zoning will result in quality residential development that accords with its vision for the Drury West area.

³ At page 270, clause 609.

⁴ At page 25.

⁵ Chapter B2: Urban Growth and Form.

- (c) Begin establishing the first elements of this development as soon as possible.

3.4 To achieve these objectives, Auranga:

- (a) Has purchased land and entered into agreements with a number of landowners in the Drury West area; and
- (b) Is undertaking its development in stages. The first two of these are Stages A and B1, which it is progressing as follows.

Approval of Stage A

3.5 Stage A covers an area of 84.6ha in Bremner Road, Drury, and was declared a SHA under the Housing Accords and Special Housing Areas Act 2013 ("HASHAA") in July 2015. This land was zoned Future Urban in the AUP as originally notified.

3.6 In May 2016, KDCL applied under HASHAA for:

- (a) A variation to the (then) proposed AUP, known as Plan Variation 15 ("PV15"), to:
 - (i) Rezone the SHA from Future Urban to a mix of Mixed Housing Suburban, Mixed Housing Urban, Terraced Housing and Apartment Building and Local Centre zones to facilitate and support residential development on that land; and
 - (ii) Introduce a specific Precinct for the SHA which amends some of the default development controls that would otherwise apply under the live zoning, so that those better relate to the Drury West area and reflect Auranga's vision for the development.
- (b) An associated qualifying development subdivision and related works at 132 Bremner Road, Drury, comprising 51 residential lots with associated reserves, drainage reserves, access lots, roads and a balance lot.

3.7 KDCL's applications were granted by Council on 8 August 2016. In accordance with section 73 of HASHAA, PV15 is now operative and has been incorporated into the AUP as the Drury 1 Precinct.

Auranga objectives and context for Stage B1

3.8 Stage B1 comprises two separate pieces of land (of approximately 83ha in total) to the west of Stage A. Auranga's key objectives for Stage B1 are to:

- (a) Put the same planning framework in place for Stage B1 as applies for Stage A; in other words, this is to be an extension / broadening out of the existing Drury 1 Precinct, which is proposed to have the same package of controls and zones; and
- (b) Secure this planning framework by the end of 2017.

3.9 However, as noted, the remainder of the Drury West area is zoned Future Urban under the AUP. This means it cannot be developed without further structure planning and plan change processes.

- 3.10 The FULSS indicates that Council will not be undertaking these processes for the wider Drury West area (outside of Stage A) until some time in the period between 2022-2027. The reasons given for this timing are that⁶:
- (a) Development in Drury West will require further investment in wastewater and transport infrastructure solutions, which will require time to be planned and constructed.
 - (b) Electrification of the rail link between Papakura and Pukekohe (which is to occur after 2022) will be critical to realise the potential of rail to the area.
 - (c) This timing will allow the wider Drury West area to leverage off the development of Stage A, market demand for the area and the potential to achieve quality outcomes from the rail extension.
- 3.11 Auckland Council is currently reviewing the FULSS and as a result of this review, may bring forward the timing of its proposed structure planning and plan change processes for Drury West Stage 1 (i.e. north of State Highway 22) to 2018-2022. However, this is subject to a notation that Drury West Stage 1 is to be "development ready" by 2022. While Council has received public feedback regarding the FULSS review, it has not made any decisions in this regard and there is currently no certainty as to its outcome.
- 3.12 In the absence of any Council decisions regarding the FULSS review, Auranga must proceed on the basis of the indicative timing for Drury West provided in the FULSS, as adopted by Council. In any event, it is clear that the FULSS review would not result in Council commencing and completing its own planning processes for Drury West during 2017, as Auranga requires.
- 3.13 The upshot is that the only procedural option open to Auranga to progress (and complete) Stage B1 this year is for Auranga to request a PPC to the AUP under clause 21 of Schedule 1 to the RMA. Consistent with PV15, this request would seek to:
- (a) Rezone the Stage B1 land from Future Urban to a mix of Mixed Housing Suburban and Mixed Housing Urban to facilitate and support residential development on that land; and
 - (b) Insert a Precinct Plan for Stage B1 within the Drury 1 Precinct and make minor text amendments to the Drury 1 Precinct.
- 3.14 To support the PPC request, Auranga has prepared four comparison structure plans for the wider Drury West area. One of these represents Auranga's preferred plan for development of the area and another is based on Council's current proposals, as outlined in the FULSS. The intention of preparing these structure plans is to show that, in every scenario, the land use outcome and key roads for the Stage B1 land do not change. Proceeding with Stage B1 will therefore not predetermine the outcome of Council's eventual structure planning exercise for the wider Drury West area and beyond. Rather, the real debate in that process will be about the number and location of additional centres, new train stations, etc., south of Drury West.

⁶ At pages 25-26.

- 3.15 Auranga is therefore making its PPC request on the basis that it requires Stage B1 as a “stop gap” between completing Stage A and the time when, on a medium case scenario (under the FULSS), the Council's plan of action is likely to result in live zones for the wider Drury West area. In other words, Auranga is constructively proposing a “win-win” outcome where it can proceed with further stages of its development, while still providing scope for the Council to undertake structure planning for Auckland South / Drury in its own time frame.

Existing and proposed development in Auckland South / Drury

- 3.16 There are a number of existing (or under construction) and approved developments in the South Auckland / Drury area which also provide relevant context to Auranga’s Drury West development. These include:
- (a) “The Southern Initiative”, being one of two key initiatives that the AP identifies Council will undertake to “deliver the greatest positive outcomes for Aucklanders and New Zealand”. The Initiative seeks to improve educational achievement, economic development, job growth, infrastructure, housing and social conditions over a wide area of South Auckland (from Mangere / Otara to Papakura). Drury West lies just outside of (but adjacent to) the Southern Initiative area.
 - (b) The existing 300ha SHA at Wesley, to the south of Drury West.
 - (c) Approximately 1,843ha of future urban areas at Hingaia (310ha to the north of Drury West) and Paerata and Pukekohe (collectively 1,533ha, to the south of Drury West).
- 3.17 One of the key factors influencing how the wider Drury West area develops will be how it “fits” within these surrounding developments and the overall infrastructure solutions (for transport, water supply, wastewater and stormwater) that are proposed to be put in place to collectively service them⁷.

4. PLANNING FRAMEWORK FOR THE PPC REQUEST

- 4.1 As noted, Auranga needs to progress Stage B1 by requesting a PPC to the AUP under clause 21 of Schedule 1 of the RMA. Two issues arise in this regard:
- (a) The status of the AUP; and
 - (b) The status and scope of appeals on the AUP.

Status of the AUP

- 4.2 The AUP has been prepared in accordance with the Local Government (Auckland Transitional Provisions) Act 2010 (“LGATPA”), which established an Independent Hearings Panel (“IHP”) charged with hearing submissions on the AUP and making recommendations on the proposed provisions to Council. The legislation also prescribed the rights of appeal available from Council’s decisions on the IHP recommendations, which were more limited than those under the standard Schedule 1 process.

⁷ As indicated for example in both Auckland Transport’s *Supporting Growth: Delivering Transport Networks* strategy document and Watercare’s *Asset Management Plan 2016 to 2013*.

4.3 Given the date on which Council released its decisions on the IHP's recommendations, the majority of appeals on the AUP⁸ had to be filed by 16 September 2016. Despite the restrictions on appeal rights under the LGATPA, a significant number of provisions have been appealed (or challenged by judicial review) to the Environment Court and High Court. We address the scope and status of those appeals as relevant to Stage B1 below.

4.4 Those provisions which were not subject to appeal have now become operative in accordance with section 160 of the LGATPA and clause 20 of Schedule 1 of the RMA, which respectively provide as follows:

"160 Auckland Council to notify when plan operative

The Auckland Council must notify the date on which the plan, or each part of the plan, as the case may be, will become operative in accordance with clause 20 of Schedule 1 of the RMA."

...

"20 Operative date

(1) Subject to sub-clause (2), an approved policy statement or plan shall become an operative policy statement or plan on a date which is to be publicly notified.

(2) The local authority shall publicly notify the date on which the policy statement or plan becomes operative at least 5 working days before the date on which it becomes operative."

4.5 In this regard, Auckland Council gave notice in the New Zealand Herald on 8 November 2016 that the AUP would become "operative in Part" on 15 November 2016. The subsequent public notice was as follows:

"15 November 2016 – Auckland Unitary Plan becomes operative in part

At its meeting on Thursday, 29 September 2016, the Auckland Council resolved to make parts of the Proposed Auckland Unitary Plan 'operative in part' and requested that the Chief Executive complete, as soon as practicable, the necessary statutory steps to publicly notify the Auckland Unitary Plan (Operative in Part).

Pursuant to section 160 of the Local Government (Auckland Transitional Provisions) Act 2010 (LGATPA) and clause 20 of Schedule 1 of the Resource Management Act 1991 (RMA), the Auckland Council hereby gives notice that the Proposed Auckland Unitary Plan shall become 'Operative in Part' on Tuesday, 15 November 2016.

The Auckland Unitary Plan Operative in part is the first combined plan for the Auckland region and is made up of a Regional Policy Statement, Regional Plan (including a Regional Coastal Plan) and a District Plan.

Exclusions

⁸ Other than those relating to the Regional Coastal Plan provisions, designations and heritage orders, in accordance with sections 156 and 157 of the LGATPA.

The Auckland Unitary Plan Operative in part has been annotated to identify those provisions of the Proposed Auckland Unitary Plan which are excluded from operative approval under section 160 of the LGATPA and clause 20 of Schedule 1 of the RMA, namely:

- (a) *Those provisions that remain subject to Environment Court and High Court appeals under the LGATPA; and*
- (b) *The Regional Coastal Plan component of the Proposed Auckland Unitary Plan (due to the separate requirement for the Minister of Conservation's approval of that part of the Plan under section 152(3)(b) of the LGATPA and clause 18(3) of Schedule 1 of the RMA).*

Note also that the Auckland District Plan: Hauraki Gulf Islands Section continues to apply in full to the Hauraki Gulf Islands."

(Emphasis ours.)

- 4.6 To the extent the AUP provisions are operative (whether they be maps, overlays, rules, etc.) in accordance with that public notice, the AUP is now a "plan" and the relevant legacy plan(s) have been superseded and can be disregarded.

Status and scope of appeals

Appeals on zoning of Stage B1 land

- 4.7 For the reasons outlined above, the extent to which the AUP is now operative depends on the nature and scope of appeals that were lodged. The important point as far as the Stage B1 land and Auranga's proposed PPC request is that the Future Urban zoning of the Stage B1 land is not subject to any appeals which challenge the appropriateness of that zoning. It is therefore operative.
- 4.8 Two properties included in Stage B1, being 321 and 329 Bremner Road, were previously shown in the AUP maps as being subject to appeals which seek the reinstatement of management layers. This related to the High Court appeal lodged by the IMSB, which sought reinstatement of the Sites and Places of Value to Mana Whenua management layer that was included in the AUP as notified.
- 4.9 As notified, the AUP included a Site of Value to Mana Whenua at 269 Bremner Road. The Site also extended over a limited part of the adjacent sites at 321 and 329 Bremner Road, both of which are included in the Stage B1 land⁹.
- 4.10 The IHP recommended this management layer be deleted and Auckland Council accepted that recommendation. The IMSB's appeal sought that the High Court reinstate:
- "...the provisions (objectives, policies, methods and rules) of the PAUP in relation to Sites and Places of Value to Mana Whenua".*
- 4.11 On 7 March 2017, the High Court issued its decision rejecting the IMSB's appeal and the IMSB has not sought leave to appeal that decision. To the extent that this appeal raised any issues regarding the operative status of the zoning for

⁹ This is because Sites and Places of Significance to Mana Whenua were shown on the planning maps by drawing a circles with a 50m radius around the actual site.

321 and 329 Bremner Road (and we do not consider it did), it has now been resolved and those properties are no longer subject to any appeals.

Appeals on zone and other AUP Regional and District Plan provisions

- 4.12 Auranga is not seeking to amend any other existing provisions from the AUP by way of the PPC request. Rather, the PPC requests that a precinct plan for Stage B1 (Precinct Plan 2) be introduced into the Drury 1 Precinct and makes minor text amendments to the Drury 1 Precinct. As you are aware, the Drury 1 Precinct amends some of the default development controls that would otherwise apply under the live zoning, so that those better relate to the Drury West area and reflect Auranga's vision for the development.
- 4.13 It is therefore not necessary for us to consider the extent to which any other Regional or District Plan provisions from the AUP (such as any of the Auckland-wide or underlying zoning provisions) are subject to appeal and therefore not operative. However, we note for completeness that the rules of the Future Urban zone which applies to the Stage B1 land are not subject to appeal.

Appeals on the Regional Policy Statement

- 4.14 The AUP has been prepared as a combined planning document in accordance with section 80 of the RMA, to meet the requirements of a regional policy statement ("RPS"), regional plan, regional coastal plan and district plan. As such, the AUP incorporates the Auckland RPS (Chapter B of the AUP). Aspects of the RPS (including Chapter B2 – Urban Growth and Form) are subject to appeal.
- 4.15 In our view such appeals are not relevant to Auranga's PPC request and it is not necessary for us to consider the extent to which the RPS provisions are subject to appeal, for the following reasons:
- (a) While the AUP is a combined planning document, Council is required to clearly identify the provisions that are the RPS, regional coastal plan and district plan and the various parts of the AUP are deemed to have been separately prepared and approved by Council as the relevant policy statement and plans for the region¹⁰. Although collated in one document for administrative efficiency, the AUP is therefore not "one" plan but several discrete plans and must be applied as such.
 - (b) Auranga is not seeking to amend any provisions of the RPS by way of the PPC request (and indeed is not legally able to do so, given the statutory framework relevant to PPC requests which we address in the following section).

5. STATUTORY FRAMEWORK AND FACTORS RELEVANT TO PPC REQUEST

- 5.1 The LGATPA specifically provides that once the AUP is operative¹¹, the plan is to be changed in accordance with clauses 21 to 29 of Schedule 1 of the RMA¹². As relevant to Stage B1, the statutory framework those provisions establish is as follows.

¹⁰ Sections 80(8) and 80(9) of the RMA.

¹¹ Which in accordance with section 116(3) of the LGATPA, has the same meaning as under the RMA.

¹² Section 117(2) of the LGATPA.

Requirements for requesting a PPC

5.2 Under clause 21 of Part 2 of Schedule 1 of the RMA, any person may lodge a request for a PPC. Clause 21 is as follows:

"21 Requests

- (1) Any person may request a change to a district plan or a regional plan (including a regional coastal plan).*
- (2) Any person may request the preparation of a regional plan, other than a regional coastal plan.*
- (3) Any Minister of the Crown or any territorial authority in the region may request a change to a ... policy statement.*
- (4) Where a local authority proposes to prepare or change its policy statement or plan, the provisions of this Part shall not apply and the procedure set out in Part I shall apply."*

5.3 A PPC request may be made only in respect of an operative District Plan¹³. That is clear from the text of the clause and associated definitions. The term "District Plan" is defined in section 43AA of the RMA as follows:

"District Plan—

- (a) Means an operative plan approved by a territorial authority under Schedule 1; and*
- (b) Includes all operative changes to the plan (whether arising from a review or otherwise)."*

5.4 The term "operative" is defined in section 43AA of the RMA as follows:

"Operative, in relation to a policy statement or plan, or a provision of a policy statement or plan, means that the policy statement, plan, or provision—

- (a) Has become operative—*
 - (i) In terms of clause 20 of Schedule 1; or*
 - (ii) Under section 86F; and*
- (b) Has not ceased to be operative."*

5.5 As such, clause 21 of Schedule 1 of the RMA and its associated definitions make clear that a PPC request can be made in respect of a plan (or plan provisions) that has been declared operative under clause 20 of Schedule 1 of the RMA.

5.6 Clause 22 of Schedule 1 of the RMA requires that a PPC request must:

- (a) Be in writing.
- (b) Explain the purpose of and reasons for the change.

¹³ *Prospectus Nominees v Queenstown Lakes District Council* [1996] 2 ELRNZ 262 (PT).

- (c) Describe any anticipated environmental effects of the proposed change, taking into account the matters listed in Schedule 4 of the RMA.
 - (d) Include an evaluation in accordance with section 32 of the RMA for the proposed change.
- 5.7 The Council may request further information and commission reports in respect of the plan change request and modify the request (with the applicant's permission) as a result¹⁴.

Council's options for dealing with PPC request

- 5.8 Under clause 25 of Schedule 1 of the RMA, the Council has 30 working days after receiving the necessary information to consider the request and how it should be dealt with. In that regard, the Council can decide to:
- (a) Adopt the request as a Council plan change, either in whole or in part¹⁵;
 - (b) Accept the request as a PPC, either in whole or in part¹⁶;
 - (c) Convert the request to a resource consent application; or
 - (d) Reject the request.
- 5.9 Auranga's preference is to have the PPC request accepted by Council rather than have it adopted and processed as a Council-initiated plan change. However, that is a call for the Council to make.
- 5.10 The Council's ability to reject a PPC request is limited to the grounds set out in clause 25(4) of Schedule 1 of the RMA which states:

"(4) The local authority may reject the request in whole or in part, but only on the grounds that—

- (a) The request or part of the request is frivolous or vexatious; or*
- (b) Within the last 2 years, the substance of the request or part of the request—*
 - (i) Has been considered and given effect to, or rejected by, the local authority or the Environment Court; or*
 - (ii) Has been given effect to by regulations made under section 360A; or*

¹⁴ Clauses 23 and 24 of Schedule 1 of the RMA.

¹⁵ This implies the Council generally supports the proposal and recognises the extensive work that has already been undertaken by the applicant. It also means Council would become responsible for the processing costs. However, the Council then gains complete control of the process and could modify or withdraw the request at a later stage without the applicant having any say in the matter.

¹⁶ This means that the Council agrees that the PPC can proceed to notification. It remains a PPC with Council administering the legal process and the applicant generally bearing the costs. However, there may be some agreement (or Council policy) about cost sharing where there the plan change request includes an element of public benefit / interest.

- (c) *The request or part of the request is not in accordance with sound resource management practice; or*
- (d) *The request or part of the request would make the policy statement or plan inconsistent with Part 5; or*
- (e) *In the case of a proposed change to a policy statement or plan, the policy statement or plan has been operative for less than 2 years."*

5.11 If Council rejects the PPC request on any of the grounds included in clause 25(4) of Schedule 1 of the RMA, Auranga has the right to appeal that decision to the Environment Court under clause 27(1A)(d) of Schedule 1 of the RMA.

Criteria for determining PPC requests

5.12 In accordance with clause 29 of Schedule 1 of the RMA, Part 1 that Schedule applies to a PPC which is accepted (rather than adopted) by the Council under clause 25(2)(b) of the Schedule. In this case, the PPC would be determined having regard to the matters outlined in sections 31, 32 and 72 to 76 of the RMA, to the extent these are relevant to the PPC¹⁷. In summary, these include whether the PPC:

- (a) Accords with and will assist Council in carrying out its functions under section 31 of the RMA so as to achieve the RMA's purpose.
- (b) Accords with any regulations (including national environmental standards).
- (c) Gives effect to any relevant national policy statement and the RPS provisions of the AUP (where those are operative).
- (d) Has regard to:
 - (i) Other higher order planning documents;
 - (ii) Management plans and strategies under other Acts, including the Auckland Plan; and
 - (iii) The actual and potential effects of activities on the environment.
- (e) Is the most appropriate way to achieve the AUP's objectives, by identifying other reasonably practicable options for achieving the objectives and summarising the reasons for deciding on the provisions (including zoning) sought by the PPC.
- (f) Contains a level of detail that corresponds to the scale and significance of the environmental, economic, social and cultural effects that are anticipated from implementing the PPC.

¹⁷ As confirmed in *Colonial Vineyard Limited v Marlborough District Council* [2014] NZEnvC 55 (EC), at paragraph 17.

5.13 Clause 29(4) of Schedule 1 of the RMA provides that after considering the PPC and undertaking a further evaluation of the PPC in accordance with section 32AA of the RMA, the Council:

- (a) May decline or approve the PPC and may make modifications if approving the PPC; and
- (b) Must give reasons for its decision.

6. **SCOPE FOR REQUESTING A PPC – IS THAT PROCEDURE AVAILABLE?**

6.1 In accordance with the statutory framework outlined above, a request for a PPC can only be made in respect of an operative planning instrument. The AUP is not fully operative; it has been made operative in part. The key issue which arises is whether it is lawful for the Council to accept a PPC request for Stage B1 in this context or whether Auranga needs to wait for the AUP to be made fully operative before doing so.

Relevant case law

6.2 The Courts have held that PPC requests can only be made in respect of operative plans. This issue was specifically considered by way of declaratory proceedings in *Prospectus Nominees*¹⁸, where the (then) Planning Tribunal stated:

"It is clear from the terms of the plan change requested by Prospectus Nominees that it sought to change the then proposed district plan. Section 73(2) of the Resource Management Act provides that a person may request a territorial authority to change a district plan. The definitions in s2(1) of the terms "district plan" and "change" refer to an approved and operative plan.

We therefore hold...that the provision for privately requested changes to district plans relates to operative district plans, not to proposed district plans. It follows that Prospectus Nominees' request for a plan change was premature."¹⁹

6.3 That said, the Environment Court has accepted that PPC requests can be made in respect of a partly operative plan and progressed immediately where the PPC request relates to those parts of the plan that are operative. For example, *Kerikeri Falls Investments Limited v Far North District Council*²⁰ concerned a PPC request to a partly operative district plan, where the zoning and zone rules of the land subject to the request had recently been made operative. The PPC request sought to rezone the land to a special zone that would provide for residential development, with its own set of objectives, policies, methods of implementation and rules.

¹⁸ Supra Note 13.

¹⁹ The relevant definitions ("district plan", "operative", etc.) from the RMA have subsequently been amended, they remain to the same effect as those considered in *Prospectus Nominees*, as outlined above.

²⁰ [2010] NZRMA 425 (EC).

- 6.4 The Court determined that the Council had no basis for rejecting the request under clause 25(4) of Schedule 1 of the RMA and directed that the Council accept the request and proceed to notify it within two months²¹.
- 6.5 Importantly, the Court has also held that even where a PPC request relates to a proposed (rather than operative) district plan, the Council is not able to reject the request on this basis. On that point, the Court in *Prospective Nominees* noted that²²:

"However, the grounds on which a territorial authority can reject a plan change are specifically limited by clause 25 of the first schedule to the Resource Management Act. There is a list of possible grounds of rejection in subclause (4) of clause 25. That the status of the district plan to be changed is proposed rather than operative is not one of them. Therefore the District Council was not free to reject the request for the plan change."

(Emphasis ours.)

- 6.6 The Court therefore held that the Council was correct to notify the plan change and then place it on hold until after the proposed plan had become operative.

Application to Stage B1

- 6.7 In our view, Stage B1 is on all fours with the circumstances in *Kerikeri Falls* in which the Environment Court accepted a PPC was available and appropriate in that:
- (a) The AUP has recently been made operative in part.
 - (b) The Future Urban zoning and rules for the Future Urban zone which apply to the Stage B1 land are operative. The Drury 1 Precinct which currently applies to the Stage A land (and which Auranga would be seeking to amend) is also operative.
 - (c) Auranga is seeking to introduce live zonings and extend the provisions of the existing Drury 1 Precinct (by inserting a precinct plan for Stage B1, being Precinct Plan 2, and making minor text amendments to the Drury 1 Precinct) to enable residential development of the Stage B1 land.

Key conclusion

- 6.8 On this basis and having regard to the relevant statutory framework, we consider that Auranga is able to make a PPC request for the Stage B1 land prior to the AUP becoming fully operative. Even if there were any doubt in that regard (which we do not accept), the Council would not be entitled to reject the request on the basis that the AUP is not fully operative.

7. LIKELIHOOD OF PLAN CHANGE REQUEST BEING REJECTED UNDER CLAUSE 25(4)

- 7.1 Although we consider that the Council has no jurisdiction to reject a PPC for Stage B1 on the basis that the AUP is only operative in part, it is necessary to

21 Ibid, at paragraph 48.

22 Supra Note 13.

consider whether that (or other timing issues) may provide grounds for the request to otherwise be rejected under clause 25(4) of Schedule 1 of the RMA. We turn to that issue now.

- 7.2 We do not consider Council can reject the PPC request on the basis that:
- (a) It is frivolous or vexatious²³; or
 - (b) It would result in the AUP being consistent with Part 5 of the RMA²⁴.
- 7.3 In our view, the PPC that we have reviewed could in no way be seen as frivolous or vexatious. It is a comprehensive document that is fully supported by a suite of technical reports prepared by independent experts at significant expense and has been carefully drafted to emulate provisions for the adjacent area and to supplement and improve existing AUP provisions.
- 7.4 As regards consistency with Part 5, it is our view that:
- (a) The PPC will not make the AUP inconsistent with Part 5 of the RMA (regarding the purpose and contents of planning instruments including district plans), given that the AP, AUP and FULSS all indicate that Drury West has been identified as being suitable for residential development as Auranga is proposing. Indeed, it has been carefully drafted in light of this legal requirement to have precisely the opposite effect.
 - (b) The PPC request clearly demonstrates how it will meet the relevant criteria from Part 5 of the RMA and sections 72 to 76 of the RMA in particular.
- 7.5 We address the remaining three criteria from clause 25(4) of Schedule 1 of the RMA as follows.

Relevant case law and analysis per Auranga B1

- 7.6 There is a presumption that PPC requests which have "more than minimal planning worth" should be accepted for processing so that they may be determined on their merits²⁵. As the High Court noted in *Malory Corporation Limited v Rodney District Council*, this means that²⁶:

"...unless one of the limited rejection grounds in clause 25(4) exists, the request must proceed to public notification, submissions, and a hearing in accordance with the well-established procedures of the Act."

- 7.7 As noted, the grounds for rejection in clause 25(4) of Schedule 1 of the RMA are relatively limited and encompass some circumstances relating to the timing of the PPC request, as set out below.

²³ Clause 25(4)(a).

²⁴ Clause 25(4)(d).

²⁵ See for example *Countdown Properties (Northlands) Ltd v Dunedin City Council* [1994] NZRMA 145 (HC), at paragraph 169.

²⁶ [2010] NZRMA 392 (HC), at paragraph 65.

Clause 25(4)(b): Substance of request previously considered in the last two years

- 7.8 The Council may reject the PPC request under clause 25(4)(b) of Schedule 1 if the substance of the PPC has been considered within the last two years.
- 7.9 The proper application of clause 25(4)(b) was considered by the Environment Court in *Malory Corporation*, where it held that²⁷:

"...cl 25(4) is not focused on the procedure adopted, but rather upon the substance. The very use of the word substance in (b) demonstrates to us that the intention of the Act is that where the subject matter has been considered by the council or the Court within two years, then the council may reject the application. The appeal process forms a proper check to ensure that such a limitation is not abused."

- 7.10 In that case, the Court placed significant weight on the fact that a comprehensive structure plan process had been undertaken within the preceding two years, which specifically considered the applicant's proposal, along with other proposals for the relevant area. In that regard, the Court accepted²⁸ that the Council did not reject the request simply because it was inconsistent with their conclusions as to the appropriate growth for the area, but because the substance of the matter had been considered by the Council in detail in a process which parallels the public and participatory process envisaged for a plan change²⁹.

Analysis - Auranga B1

- 7.11 In our view, there is a strong basis for arguing that the Auckland Council does not have a robust basis for rejecting the PPC request for Stage B1 on the grounds that the substance of the request has been considered in the last two years. It is accepted that issues as to Auckland's growth and the appropriate location of this were extensively canvassed and the subject of detailed consideration in the AUP process.
- 7.12 However, with respect to Drury West, that assessment has only extended to considering whether the area should be identified as a greenfields location appropriate for future urban development (and it has been accepted that it should). As currently indicated in the FULSS (and FULSS refresh), while Auckland Council is intending to undertake a comprehensive structure planning exercise for the wider Drury West area (outside of Stage A), this will not be completed until at least 2022. To date there has not been any detailed consideration (outside of Stage A) of, or decisions made regarding, the nature and form of future urban growth at Drury West.
- 7.13 For completeness, we note that issues relating to Stage B1 were not raised or considered in any form in the context of Stage A / PV15.

²⁷ [2010] NZRMA 1 (EC), at paragraph 39.

²⁸ And this was subsequently upheld by the High Court on appeal.

²⁹ Supra Note 26, at paragraph 40.

Clause 25(4)(c): Not in accordance with sound resource management practice

- 7.14 In *Hall v Rodney District Council*³⁰ the (then) Planning Tribunal considered the factors that may indicate that a plan change request is not consistent with the statutory purpose of the RMA, as follows³¹:

"It is our understanding of the law...that on a privately promoted plan change a judgment needs to be made whether the most appropriate means of achieving the statutory purpose is by the proposed change or by some other method such as on a forthcoming review. A relevant consideration in making that judgment is that the Resource Management Act provides (as the former regime did not) for privately initiated plan changes, so a general attitude of refusing such changes on the basis of a forthcoming review could frustrate the opportunity that Parliament has deliberately made. Other relevant considerations are relative efficiency and effectiveness (see 32(1)(c)); extent of implications for a wider area, possible prejudice to other interests and the need for general review. That is not necessarily an exhaustive list, nor with those considerations necessarily be relevant in every case."

- 7.15 In some limited circumstances, the timing of a PPC request may mean that to process it would be inconsistent with sound resource management practice. The Environment Court in *Malory Corporation* considered that procedural or timing issues may give rise to issues about whether a proposal represents "sound resource management practice". The Court said in this regard³²:

"We have come to the conclusion that cl 25 clearly contemplates that plan changes should represent sound resource management practice in terms not only of substance, but also in terms of timing. This essentially is a matter of discretion and degree."

- 7.16 However, on appeal the High Court, did not go so far, stating³³:

"In general terms I think it is drawing a long bow to hold that a timing issue (assuming a request's timing is not frivolous or vexatious) will result in an otherwise unobjectionable proposal offending."

- 7.17 Nevertheless, in that case, the High Court considered that the Environment Court was correct to find that the timing of the PPC request did not represent sound resource management practice, in particular because:

- (a) The PPC request sought to change an operative plan that was shortly to be superseded; and
- (b) As outlined above, it also related to an area that had recently been the subject of a detailed structure planning process.

- 7.18 It has also been held (in the context of resolving plan references) that³⁴:

³⁰ [1995] NZRMA 537 (PT).

³¹ Ibid, at page 12.

³² Supra Note 26, at paragraph 67.

³³ Supra Note 25, at paragraph 98.

³⁴ *Foreworld Developments Limited v Napier City Council* W008/2005 (EC), at paragraph 15.

"It is bad resource management practice and contrary to the purpose of the Resource Management Act – to promote the sustainable management of natural and physical resources – to zone land for an activity when the infrastructure necessary to allow that activity to occur without adverse effects on the environment does not exist and there is no commitment to provide it."

Analysis - Auranga B1

- 7.19 Having reviewed the PPC and proposed plan provisions, we are firmly of the view that the PPC request for Stage B1 accords with (and promotes) sound resource management practice. In that regard, the PPC request:
- (a) Is supported by a suite of comprehensive expert assessments, which demonstrate:
 - (i) Why Drury West is an appropriate location for the proposed residential development, consistent with the policy directives from the AP, AUP and FULSS and that the proposed development will achieve the sustainable management purpose of the RMA; and
 - (ii) That the proposed development can be appropriately serviced by all relevant infrastructure, is entirely consistent with the proposed structure planning for the wider Auckland South / Drury area and will not compromise same.
 - (b) Is not seeking to alter plan provisions that are due to be superseded.
 - (c) Do not relate to an area that had recently been, or will shortly be, the subject of a detailed structure planning process (noting that even under the FULSS review, Drury West Stage 1 is not anticipated to be "development ready" until 2022).
- 7.20 On that basis, we do not consider that the Council would have a valid or credible basis for rejecting the PPC request on the grounds that it would not be in accordance with sound resource management practice and that any decision to do so on that basis would be vulnerable to legal challenge.

Clause 25(4)(e): Plan operative for less than two years

- 7.21 Under clause 25(4)(e) of Schedule 1 of the RMA, the Council may reject a plan change request where the plan has been operative for less than two years. However, that power is not unfettered.
- 7.22 The Environment Court considered the scope of the Council's power to reject a PPC request under clause 25(4)(e) in *Kerikeri Falls*³⁵. The Council argued that it had an unfettered statutory power under clause 25(4)(e) to reject PPC requests on the basis that the relevant planning instrument has been operative for less than two years. In this regard, the Council said that time should be given for the new plan to "settle in" and this would help the Council identify unforeseen implementation issues.

³⁵

Supra Note 19.

7.23 The Court disagreed with this approach, stating³⁶:

"[38] *We agree with the submissions of counsel for the appellants that the 2 years in clause 24(4)(e) is a maximum, and the discretion to reject a request is not an unfettered one.*

...

[42] *We agree that the grounds in sub-clause (4), apart from (e) are very narrow, and that there is no sensible basis for holding that (e) suddenly introduces powers of a wide and unrestricted kind.*"

7.24 Ultimately, the Court held that the decision to accept or reject the plan change in circumstances where the plan has been operative for less than two years must be undertaken on a principled basis consistent with sound resource management practice and the purpose of the RMA.

7.25 On 28 March 2017, Auckland Council's Planning Committee adopted the following criteria to be used by Council staff to determine the appropriateness of any PPCs requested during the two years post 15 November 2016 (when the AUP was made operative in part):

- (a) Any matter specified in clause 25 of Schedule 1 of the RMA.
- (b) Whether the outcomes of any plan change:
 - (i) Align with the Future Urban Land Supply Strategy; and
 - (ii) Give effect to the Auckland Plan; and
 - (iii) Follow Appendix 1 – Structure Plan Guidelines of the AUP for any structure planning related plan change; and
 - (iv) Give effect to the environmental outcomes expected and effectiveness of the AUP.

Analysis - Auranga B1

7.26 The AUP has been operative for less than two years. We nevertheless consider that the Auranga PPC faces only minimal (if any) risk of rejection on this basis. We set out our reasoning below.

7.27 Having regard to the applicable *Kerikeri Falls* criteria, we note that:

- (a) The Council is required to accept plan changes which have "more than minimal" planning worth and in our view, the PPC request satisfies that test by a considerable margin.
- (b) For the reasons outlined above, we consider that there is a robust basis for being satisfied that the PPC request accords with sound resource management practice and will promote the purpose of the RMA.

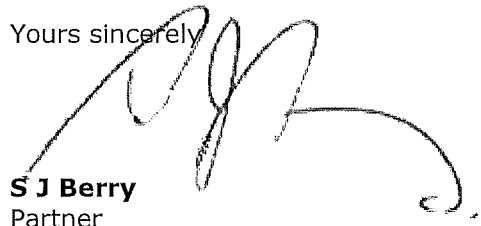
³⁶ Ibid, at paragraphs 38 and 42.

- 7.28 As regards the first limb of Planning Committee's criteria dated 28 April 2017, clause 25 of Schedule 1 of the RMA has been addressed in detail above.
- 7.29 As regards the second limb of the 28 April criteria, we consider that there can be no doubt that the outcomes of the Auranga PPC satisfy those requirements for the following main reasons:
- (a) For the reasons outlined above, Drury West is an appropriate location for the proposed residential development, consistent with the policy directives from the AP, AUP and FULSS;
 - (b) The structure planning exercise for the PPC has meticulously followed Structure Plan Guidelines in the AUP, which is demonstrated in one of the annexures in the Auranga Structure Plan for the PPC; and
 - (c) Again, for the reasons outlined above and in the PPC documents, will give effect to the environmental outcomes expected and effectiveness of the AUP.
- 7.30 In light of the above, we do not consider that Council will have a credible or valid grounds for rejecting the PPC request on the basis that the request has been made within two years of the AUP becoming operative and that any decision to reject the PPC on that basis would be vulnerable to legal challenge.

8. CONCLUSIONS

- 8.1 For the reasons outlined above, we consider that there is no legal impediment to Auranga making a PPC request to authorise the Stage B1 development. Given the indications in the FULSS that Council will not otherwise be completing any master planning exercise for Drury West until 2022 at the earliest, this will enable Auranga to achieve its objective of establishing Stage B1 as soon as possible.
- 8.2 In summary:
- (a) Auranga is able to make a PPC request for the Stage B1 land, prior to the AUP becoming fully operative;
 - (b) The Auckland Council is not entitled to reject the request on the grounds that the AUP is not fully operative; and
 - (c) There is no basis upon which the Council could validly reject the PPC having regard to:
 - (i) The grounds for rejecting a PPC under Clause 25(4) of Schedule 1 to the RMA; or
 - (ii) Any of the Auckland Council Planning Committee's criteria dated 28 April 2017.
 - (d) Any Council decision to reject the PPC would be vulnerable to legal challenge.
- 8.3 We trust the above is clear and sufficient for present purposes. Please make contact if you wish to discuss any aspect of the above.

Yours sincerely

A handwritten signature in black ink, appearing to be 'S J Berry', written over the text 'Yours sincerely'.

S J Berry
Partner

DDI: +64 9 909 7315

Mobile: +64 21 987 095

Email: simon@berrysimons.co.nz