

Attachment C

Options available to the council

Statutory Context: Resource Management Act 1991

1. Any person may request a change to a district plan, a regional plan or a regional coastal plan¹. The procedure for private plan change requests is set out in Part 2 of Schedule 1, RMA. The process council follows as a plan-maker is adapted², and procedural steps added³ including the opportunity to request information.
2. The applicant is required to include the information set out in clause 22, which states that:
 - a request made under clause 21 shall be made to the appropriate local authority in writing and explain the purpose of, and reasons for, the proposed plan or change to a policy statement or plan and contain an evaluation under Section 32 of the RMA for any objectives, policies, rules, or other methods proposed; and
 - where environmental effects are anticipated, the request shall describe those effects taking into account clauses 6 and 9 of Schedule 4, in such detail as corresponds with the scale and significance of the actual or potential environmental effects anticipated from the implementation of the change, policy, statement or plan.
3. Additional information has been received from the applicant following a formal request for further information under clause 23 of Schedule 1. The council staff who have evaluated the request consider that the Applicant has provided sufficient information to enable the request to be considered.
4. Under clause 25 after receiving the request, receiving all required information, and modifying the request (where relevant), the local authority is required to make a decision to either:
 - (1) Adopt the request, in whole or in part, as if it were a proposed plan made by the council, which must then be processed in accordance with the provisions of Part 1 of Schedule 1 (clause 25(2)(a)); or
 - (2) Accept the request, in whole or in part, which then triggers a requirement to notify the request, or part of the request, under clause 25 (clause 25(2)(b)); or
 - (3) Decide to deal with the request as if it were an application for a resource consent (clause 25(3)); or
 - (4) Reject the request in whole or in part, in reliance on one (or more) of the limited grounds set out in clause 25(4).
5. Having regard to the principles established by the relevant case law, the consideration of private plan change requests under clause 25 involves a "threshold test" and a coarse assessment of the merits of the private plan change

¹ Clause 21, Schedule 1, Resource Management Act 1991.

² Part 1 Schedule 1 applies, as modified by clause 29 Part 2 Schedule 1, Resource Management Act 1991.

³ Part 2 Schedule 1 Resource Management Act 1991.

request - noting that if the request is accepted or adopted the full merits assessment will be undertaken when the private plan change is determined.

Option 1: Adopt the request, or part of the request, as if it were a proposed plan change made by the council itself

6. Council can decide to adopt the request, or part of the request. Council would then process it as though it were a council-initiated plan change. The Applicant has not requested that council adopt the private plan change request and, as the community need for the plan change proposed has not been specifically identified by council it is considered more appropriate that it follow a privately-led process. If the council adopted the request, or part of the request, it would not be able to significantly modify the plan change (as that would mean that the plan change council advanced was no longer the plan change which it adopted).
7. It is therefore recommended that the private plan change request is not adopted for the following reasons:
 - a) the request does not address a currently recognised gap in the AUP or change provisions that apply locally or across the Auckland region;
 - b) the request is a site-specific proposal that is likely to be of most immediate or direct benefit to the Applicant, rather than the wider public.

Option 2 – Reject the request, in whole or in part

8. Council has the power to reject a private plan change request, in whole or in part, in reliance on one (or more) of the limited grounds set out in clause 25(4) of Schedule 1 of the RMA. If the private plan change request is rejected by the council, the Applicant has the ability to appeal that decision to the Environment Court under clause 27 of Schedule 1.
9. The grounds for rejection under clause 25(4) are as follows:
 - a) the request or part of the request is frivolous or vexatious; or
 - b) within the last two 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
 - 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 two years.

Is the request frivolous or vexatious?

10. Frivolous means not having any serious purpose or value. Vexatious means denoting an action or the bringer of an action that is brought without sufficient grounds for winning, purely to cause annoyance.
11. The plan change introduces a zoning previously proposed by Council.
12. The Applicant is not acting in bad faith by lodging a private plan change request.
13. It is therefore concluded that the council cannot reject the private plan change request on the basis that it is frivolous or vexatious.

Has the substance of the request been considered and been given effect, or rejected by the council within the last two years?

14. The substance of the request has not been considered and been given effect to or rejected by the council within the last two years. It is therefore concluded that the council cannot reject the request on this basis.

Has the substance of the request been given effect to by regulations made under section 360A?

15. Section 360A relates to regulations amending regional coastal plans pertaining to aquaculture activities. The site is not within the coastal marine area and does it involve aquaculture activities, and therefore section 360A regulations are not relevant.
16. It is therefore concluded that the council cannot reject the request on the basis that the substance of the request has been given effect to by regulations made under section 360A.

Is the request in accordance with sound resource management practice?

17. In a recent Environment Court decision *Orakei Point Trustee v Auckland Council* [2019] NZEnvC 117, the Court stated:

“[13] What *not in accordance with sound resource management practice* means has been discussed by both the Environment Court and High Court in cases such as *Malory Corporation Limited v Rodney District Council* (CIV-2009-404-005572, dated 17 May 2010), *Malory Corporation Limited v Rodney District Council* (*Malory Corporation Ltd v Rodney District Council* [2010] NZRMA 1 (ENC)) and *Kerikeri Falls Investments Limited v Far North District Council* (*KeriKeri Falls Investments Limited v Far North District Council*, Decision No. A068/2009)

[14] Priestley J said in *Malory Corporation Limited v Rodney District Council* (CIV-2009-404-005572, dated 17 May 2010, at 95) that the words *sound resource management practice* should, if they are to be given any coherent meaning, be tied to the Act's purpose and principles. He agreed with the Environment Court's observation that the words should be limited to only a coarse scale merits assessment, and that a private plan change which does not accord with the Act's purposes and principles will not cross the threshold for acceptance or adoption (CIV-2009-404-005572, dated 17 May 2010, at 95)

[15] Where there is doubt as to whether the threshold has been reached, the cautious approach would suggest that the matter go through to the public and

participatory process envisaged by a notified plan change (*Malory Corporation Ltd v Rodney District Council* [2010] NZRMA 1 (ENC), at para 22)."

18. Consideration of this ground should involve a coarse assessment of the merits of the private plan change request - "at a threshold level" - and take into account the RMA's purpose and principles – noting that a full merits assessment will be undertaken if the request is accepted.

19. The courts have also accepted that "sound resource management practice" can include issues of timing and process. For example, the Environment Court in *Malory Corporation v Rodney District Council* [2010] NZRMA 1 stated:

"[60] We conclude that the question of sound resource management practice goes well beyond questions of planning merit to include fundamental issues as to appropriate process, timing and the like. It can include non-planning matters such as engineering, cultural, and other issues."

20. The term 'sound resource management practice' is not defined in the RMA. However, relevant case law indicates Part 2 of the RMA provides an important starting point to developing criteria as to whether sound resource management practice has been followed. Other aspects are also relevant. The following matters may be relevant:

- (a) will the plan change undermine sustainable management of natural and physical resources?;
- (b) Will the plan change enable people and communities across the region to provide for their social, economic and cultural wellbeing?;
- (c) Section 32 is another important aspect of sound practice - is there sufficient justification of the proposed provisions, at a coarse level?;
- (d) the plan change preparation process and the nature and extent of consultation expected under Schedule 1 is important. Has best practice been followed?

21. Each of these matters is addressed further below.

22. A coarse-grained analysis indicates that the plan change in principle is an appropriate response to providing for urban development in an area that has been Identified for future urban development and is consistent with other live zoning in the same area.

23. Infrastructure capacity / timing/ upgrading constraints will need to be adequately addressed, including in the final plan change provisions. However the current coarse-grained analysis has not indicated any issue that would be significant enough to justify rejection of this private plan change request.

24. In any event, the zoning and provisions now proposed are subject to review through the plan change process. Most importantly, council accepting the plan change as currently proposed does not indicate that council agrees with all parts of the plan change content. Council itself, for instance, may make a submission on the plan change.

25. A competent section 32 analysis has been provided with the application, with further information provided subsequent to council requests. At a coarse level sufficient justification has been given for the proposed provisions.

26. Iwi have been and can still be involved in commenting / submitting on the private plan change request.
27. Based on the above reasoning, it is considered that the plan change should not be rejected on the grounds that it is not in accordance with sound resource management practice.

Would the request or part of the request make the policy statement or plan inconsistent with Part 5 of the RMA?

28. Part 5 of the RMA sets out the role and purpose of planning documents created under the RMA, including that they must assist a local authority to give effect to the sustainable management purpose of the RMA. Regional and district plan provisions must give effect to the regional policy statement and higher order RMA documents, plus not be inconsistent with any (other) regional plan.
29. These matters have been addressed earlier in this report. It has been concluded that, on balance, the council should not reject the private plan change request on the basis that the substance of the request would make the AUP inconsistent with Part 5 of the RMA.

Has the plan to which the request relates been operative for less than two years?

30. The plan provisions of the AUP relevant to this request were made operative on 15 November 2016. The provisions have therefore been operative for more than two years.
31. It is therefore concluded that the council cannot reject the private plan change request on the basis that the relevant parts of the AUP have been operative for less than two years.
32. To conclude in relation to this Option it is considered there are no grounds under clause 25(4) to rely on to reject the private plan change request.

Option 3 – Decide to deal with the request as if it were an application for a resource consent

33. The council could decide to deal with the request as if it were an application for a resource consent and the provisions of Part 6 would then apply accordingly.
34. In this case, the request seeks to rezone land and introduce precinct provisions to manage subdivision, use and development. Rezoning cannot occur through a resource consent application.
35. It is therefore concluded that the council should not decide to deal with the request as if it were an application for resource consent.

Option 4 - Accept the private plan change request, in whole or in part

36. The council could accept the private plan change request, in whole or in part under clause 25 of Schedule 1, and proceed to notify the request, or part of the request under clause 26 of Schedule 1 of the RMA. The council would hold a hearing by independent commissioners to consider submissions, and a decision would be

made in relation to the private plan change request in accordance with Schedule 1 of the RMA. All associated costs (including notification and any hearing) would rest with the Applicant.

37. This option is the only remaining option available to the council for consideration. It is supported on the basis that the request does not meet the criteria for rejection under clause 25(4) of Schedule 1 to the RMA, having regard to relevant case law and it is more appropriate to accept the request for processing than to adopt it or treat it as a resource consent application, the reasons for which are outlined above. If the private plan change is accepted, the matters raised by the Applicant and the council can be considered on their merits during a public participatory planning process. If accepted, and notified, the plan change would not have legal effect until it is made operative by the council.

Conclusion: options assessment

38. To comply with RMA timeframes, council must now make a clause 25 decision to accept, adopt, treat as a resource consent or reject the private plan change request by the Applicants. If the private plan change request is accepted, the private plan change will be publicly notified for submissions. Any issues raised will be a matter for the independent commissioners to consider when making a substantive decision on the private plan change request, in terms of whether it should be approved, approved with modifications or declined.
39. The caselaw on clause 25 of Schedule 1 of the RMA provides that:
- where a private plan change request, on a coarse merits assessment, does not accord with the purpose and principles of the RMA, it will not cross the threshold for acceptance or adoption; but
 - where there is doubt as to whether the threshold has been reached, the cautious approach would suggest that the matter go through to the public and participatory process envisaged by a notified plan change.
40. In this case, on a coarse merits assessment, and based on the relevant case law, it is considered appropriate for the council to accept the private plan change request and for it to go through to the public participatory process (i.e. accepting the plan change for public notification and hearing). Accepting the private plan change request for processing would enable the more detailed benefits and costs of the plan change to be assessed.
41. Having carefully assessed the request against the relevant matters set out in the RMA and associated documents, it is recommended that council decide to accept the request and notify it for submissions.