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Leon Da-Silva
Bentley Studios Limited / Beach Haven Road Apartments Ltd

C/- Barker & Associates
by email

Attention: Rachel Morgan

Dear Rachel

96 Beach Haven Road and 13 Cresta Avenue, Beach Haven – Private Plan Change Request – Timeframes and Intensification Requirements

1. I refer to our recent discussions in relation to Bentley Studios Limited (**BSL**) private plan change application (**Application**) in relation to land at 96 Beach Haven Road and 13 Cresta Avenue, Beach Haven (**Site**).

2. I understand that the Application was placed "on hold" in October 2021 largely in response to Auckland Council's (**Council**) imminent notification of an intensification plan change – that plan change ultimately being known as Proposed Plan Change 78[1] (**PC78**). At the time it appeared that the Application would be rapidly overtaken by the PC78 process. In the event, that has not proved to be the case due to a range of intervening factors affecting the progress of PC78.

3. You have confirmed that BSL wish to advance the plan change. I provide advice in that regard.

[1] Being the mandatory intensification planning instrument to implement the Medium Density Development Standards required by the Resource Management (Enabling Housing Supply and Other Matters) Amendment Act 2021.

Executive Summary

4. With respect to the issues addressed below:

   (a) The Application may be 'restarted'. A waiver of time may be needed with respect to Council's timeframe for determining whether the Application is to be accepted.

   (b) There is a requirement for the Application to incorporate the MDRS, otherwise Council have no jurisdiction to accept it.

   (c) The Application should be altered to apply MHU (as amended by PC78) across the entirety of the site.

   (d) A question may arise as to how this alteration is made within the context of the current 'paused' process. This should be discussed with Council.

Context

5. The Application has been "on hold" since October 2021. There is a question as to whether BSL proceeds with the Application in its current form (by reference to MDRS requirements – I discuss this further below).

6. You have advised the following chronology of relevant events:

   (a) Application lodged April 2021.

   (b) Further information requests satisfied August 2021.

   (c) Council notification report prepared October 2021.

   (d) RMA Amendment Bill introduced October 2021.

   (e) Application placed on hold October 2021.

   (f) RMA Amendment Act enacted December 2021.

   (g) PC 78 notified 18 August 2022.

(h) Council's decision to extend the PC78 decision timeframe by 12 months issued April 2023.

7. By reference to the chronology above, I note at the time of writing the majority of PC78 topics remain on hold.

8. You have also advised that the Application has not been accepted for processing under cl 25(2), Schedule 1. That position changes the previous advice I had prepared.

9. Two issues arise – one is process related regarding timing, and the second jurisdictional relating to the transitional provisions arising out of the Amendment Act and MDRS/PC78.

Issues to Address

Issue 1: 'Restart' of the application

10. The Application has been lodged but has not yet been subject to a decision under cl 25, Schedule 1. The issue of acceptance (or adoption) has to be resolved.

Analysis of Private Plan Change Timeframes

11. As you are aware, applications for private plan changes under the RMA are made under Schedule 1, cl 21. Once lodged with the relevant local authority, Schedule 1 requires Council to undertake various processing actions in accordance with prescribed timeframes.

12. Schedule 1, cl 25(1) provides:

> (1) A local authority shall, within 30 working days of—
>
> (a) Receiving a request under clause 21; or
>
> (b) Receiving all required information or any report which was commissioned under clause 23; or
>
> (c) Modifying the request under clause 24—
>
> whichever is the latest, decide under which of subclauses (2), (3), and (4), or a combination of subclauses (2) and (4), the request shall be dealt with.

13. The subclauses referred to in cl 25(1) describe Council's discretion to adopt the request, to accept the request, or to reject the request on limited grounds.

14. You have advised that the Application has not been accepted by Council. For the purposes of this advice I will assume that the timeframe engaged is that in cl 25(1)(b) being 30 working days from the cl 23 requests being satisfied which you advise was August 2021. Assuming a RFI response date of the end of August, 30 working days would have expired in early October

2021. In other words, I assume acceptance (or not) should have occurred in early October. You have advised that October was when the Application as placed 'on hold' – I do not know whether this timing directly responded to the 30 day timeframe, or whether that timeframe had expired?

15. Because the Application has not been the subject of consideration under cl 25, there was no requirement for Council to go on to notify the Application under cl 26.

16. As a consequence of the above, it appears the Application was not considered within the 30 working day timeframe required by cl 25(1).

17. There is no express provision in cl 25 as to what follows if an application is not accepted within the specified timeframe. For example, there is no subclause deeming the application to be withdrawn or abandoned. Presumably it follows that a failure to adhere to the statutory timeframe for acceptance means the Application cannot continue to be processed.

18. Notwithstanding that conclusion, there is the potential to seek a waiver to the cl 25(1) timeframe.[2] Therefore there is a pathway to progress by reference to this consideration.

19. I would add that the plan change was put 'on hold'. I am unaware of whether any express provision was relied upon to take this step, or whether the Council was simply requested to cease processing it. As far as I am aware there is no express provision in relation to plan changes governing placing an application on suspension. Thus, the acceptance timeframe was not specifically suspended through application any particular provision of the Act. Having said that, I see no obstacle in law to a request to cease processing for a period of time being made – the issue is simply that any statutory timeframes may not be halted as a matter of law.

20. Here a request to place the Application on hold was made. Council accepted that. As noted above, no process has been initiated by Council under Schedule 1, cl 28(2). In my view the Application may proceed, but there is uncertainty about whether the 30-day timeframe for consideration/acceptance has expired (and therefore a waiver of time is needed), or if that timeframe was halted during the suspension. This will need to be discussed with Council.

[2] Refer cl 1(2), Schedule 1 which provides that where any time limit is set in this Schedule, a local authority may extend it under section 37.

Ability to Waive the Timeframe

21. Given the uncertainty about whether placing the Application on hold has the effect of suspending the engagement of the 30-day timeframe for acceptance, a conservative response would be to apply for a waiver of time.

22. There is a general ability for Council to extend a statutory time period specified in the RMA, even if the period has expired.

23. Section 37 provides:

> (1) A consent authority or local authority may, in any particular case,—
>
> (a) extend a time period specified in this Act or in regulations, whether or not the time period has expired; or
>
> (b) waive a failure to comply with a requirement under this Act, regulations, or a plan for the time or method of service of documents.
>
> [[(1A) However, a consent authority must not, under subsection (1), waive or extend a time period for the purpose of providing more time for a pre-request aquaculture agreement to be negotiated under section 186ZM of the Fisheries Act 1996.]]
>
> (2) If a person is required to provide information under this Act, regulations, or a plan and the information is inaccurate or omitted, or a procedural requirement is omitted, the consent authority or local authority may—
>
> (a) waive compliance with the requirement; or
>
> (b) direct that the omission or inaccuracy be rectified on such terms as the consent authority or local authority thinks fit.]
>
> Section 37 was based on s 167 Town and Country Planning Act 1977.

24. There are some limitations to the extension of a time period,[3] however those are not engaged here. Thus, there is an ability for BSL to apply to Council for the extension of the statutory time period for considering the Application under Schedule 1, cl 25(1).

25. If an application to extend that time period is made (which can occur even if the time period has expired), then the Council must consider the requirements set out in s 37A. While I do not propose to repeat those requirements in detail, I note that council must take into account:

(a) The interests of any person it considers to be directly affected by the extension; and

(b) The interests of the community in achieving adequate assessment of the effects of the proposal; and

(c) Its duty under s 21 to avoid unnecessary delay.

[3] For example, the power only applies to councils and the Environment Court cannot use it to extend the period for lodging submissions on a consent application; it cannot be used to extend the lapse period on a resource consent; it cannot be used to extend the 2-year timeframe within which a decision on a plan change must be made.

26. While the above must be considered by Council (i.e. the onus does not rest with an applicant to prove the grounds can be satisfied), they provide important context as to what matters will underlie Council's decision on the extension application.

27. The extension to the time period will be retrospective. To that end, I note that s 37A(2)(b) states that a time exceeding twice the maximum time period specified in the RMA (here, a time exceeding 60 working days) can only be extended under s 37 if the applicant agrees (which BSL would).

28. For completeness I note that case law has confirmed that there is no appeal for a council's decision on a waiver or time extension application made under s 37.[4]

Issue 2: In light of PC78, can the Application be pursued in its current form or is it required to implement the Medium Density Residential Standards as required by s 77G(1) of the RMA?

29. Given my conclusion above, from a timing perspective BSL can advance the Application subject to the grant of an extension of time.

30. However, in light of the new statutory landscape since lodgement, there are some impediments to progressing the Application in its current form.

31. We had discussed whether the Application should advance the zoning as lodged or align with zoning outcomes sought by PC78. This question fundamentally focused on what zone should apply to the access leg off Cresta Avenue.

32. Because the Application was not accepted prior to relevant parts of the RMA Amendment Act coming into force, the real consideration is slightly different. There is now a requirement for the Application to incorporate the MDRS, otherwise Council have no jurisdiction to accept it.[5]

[4] *Sadd v Marlborough DC* C065/92.

[5] This limit on jurisdiction is subject to a specific discretionary exception in cl 35 of Schedule 12 – however that does not apply in this case.

Context

33. To recap, the Application seeks to rezone the Site from Residential Single House Zone (**SHZ**) to a mixture of (the operative versions of) Residential Mixed Housing Suburban Zone (**MHS**) and Residential Mixed Housing Urban Zone (**MHU**) as shown in Figure 1 below.

Figure 1: Proposed rezoning sought by the Application (Source: Section 32 Report dated 31 March 2021).

34. The split zoning provides a lower-density MHS outcome at the Cresta Avenue frontage along the access leg. The intention was to maintain a consistent zoning pattern whilst enabling higher density towards the rear of the Site.

35. The subsequently notified PC78 seeks to rezone the entirety of the Site and surrounds to MHU (as amended to respond to MDRS requirements) including the Cresta Avenue access portion.[6]

36. At the time of writing the relevant PC78 topics remain paused.

37. The RMA Amendment Act introduced new transitional provisions that are relevant to the processing of private plan changes. The provisions capture applications that were notified prior to the commencement date of the Amendment Act (e.g. cl 34), applications that were lodged prior to the notification of an intensification planning instrument (e.g. cl 35), and applications that prior to the commencement date of the Amendment were notified and the

[6] I also understand that PC78 introduces a water and wastewater servicing constraint (qualifying matter) over the Site. While the qualifying matter does not prevent a live MHU zoning on the Site, proposed development for more than one dwelling will require restricted discretionary resource consent.

subject of a decision under cl 10, Schedule 1 (e.g. cl 37). These are relevant to whether the Application should be amended.

Analysis

38. The RMA Amendment Act made significant amendments to the processing of private plan change applications.

39. Notably, new subclause (4A) was inserted into existing cl 25, Schedule 1.[7] Clause 25(4A) provides:

"A specified territorial authority must not accept or adopt a request if it does not incorporate the MDRS as required by section 77G(1)."

40. Section 77G(1) provides that every relevant residential zone of a specified territorial authority must have the MDRS incorporated into that zone.

41. As a general observation, cl 25(4A) can be fatal to new applications that are not otherwise able to be accepted (at Council's discretion) under cl 35(2), Schedule 12. That is because cl 25(4A) uses mandatory language which prevents Council from accepting (or adopting) a plan change request if it does not incorporate the MDRS.

42. This clause sits within Council's obligations to consider[8] a request for a private plan change made under cl 21. Because the Application has not been accepted (or adopted), cl 25(4A) is engaged here. Thus, the Application will be rejected at first instance if Council determines that it does not incorporate the MDRS.

Does the Application Incorporate the MDRS?

43. Clause 25(4A) requires Council to reject an application if it "does not incorporate" the MDRS.

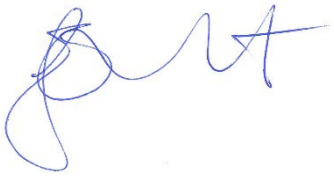
44. The term "incorporate" is not defined by the RMA. However, a plain reading of the term would suggest it has the meaning to "apply", "add", or "include". This interpretation is supported by the mandatory requirement in s 77G(1) of the RMA which requires Council to have the MDRS incorporated into every "relevant residential zone".

[7] Effective 21 December 2021.
[8] Under cl 25(1), Schedule 1.

45. The short answer is that the Application currently does not incorporate MDRS. It should apply MHU as provided for in PC78. It should not apply MHS as that zone does not incorporate MDRS.

46. In my view, you could not rely on cl 35, Schedule 12 as an alternative to amending the Application.

Yours faithfully



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