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Sent by Email

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Dear Natasha

## 41-43 Bringham Creek Road - Private Plan Change: removal of precinct provisions

### *Introduction*

1. 41-43 Bringham Creek Road JV (“**BCRJV**”) has made a private plan change request to rezone land at 41-43 Bringham Creek Road (“**PPC**” and “**Site**”). The request seeks that the land be rezoned from Future Urban Zone to Residential – Mixed Housing Urban Zone under the Auckland Unitary Plan (Operative in Part) (“**MHUZ**” and “**AUP**”).
2. The PPC has been subject of a number of requests for information, and was due to be considered by the Council’s Planning Committee at its 4 August 2022 meeting, however, its consideration has been deferred. The decision that is required of the Council is whether, pursuant to clause 25 of Schedule 1 of the Resource Management Act 1991 (“**RMA**”) the PPC should be accepted, adopted or rejected. If accepted or adopted by the Council, the PPC will be publicly notified for submissions, and proceed through the Schedule 1 submissions and hearing process.

### *Legal issue – precinct provisions*

3. As lodged, the PPC did not request that a “precinct” be applied to the Site in addition to the MHUZ. The application of a precinct was assessed as an alternative, reasonably practicable option within the section 32 assessment in support of the PPC. However, the section 32 analysis undertaken by BCRJV concluded that application of the MHUZ without any site-specific precinct provisions was the most appropriate approach.
4. Notwithstanding that conclusion, we understand that a simple set of site-specific precinct provisions were offered by BCRJV in response to a request for further information by the Council. The precinct provisions were intended to provide certainty about the timing and delivery of certain infrastructure upgrades necessary for substantive urban development of the site. BCRJV’s position remained that such issues were capable of resolution at the consent stage without the need for any site-specific precinct provisions. However, we understand the approach was adopted as a pragmatic means to address Council officers’ preference for greater detail and/or certainty to be provided at the plan change stage.
5. Subsequently, we have become aware of the Council’s position is that the application of precinct provisions in any form would comprise an “amendment” to the underlying MHUZ, for the purposes

of clause 35 of Schedule 12 of the RMA. Clause 35 was inserted by the Resource Management (Enabling Housing Supply and Other Matters) Amendment Act 2021. It provides as follows:

**35 Some private plan change requests may rely on IPI to incorporate MDRS**

- (1) *This clause applies to any plan change request to change a district plan—*
- (a) *that is made to a specified territorial authority under clause 21 of Schedule 1 before the territorial authority has notified its IPI in accordance with section 80F; and*
  - (b) *to which clause 34 does not apply; and*
  - (c) *that requests the creation of a new residential zone that proposes to adopt all the zone provisions of a relevant residential zone but does not amend the provisions in the relevant residential zone.*
- (2) *Despite clause 25(4A) of Schedule 1, a specified territorial authority may accept or adopt the request and incorporate the MDRS for the new residential zone through the IPI.*
- (3) *A specified territorial authority may decline the request under clause 25(4) of Schedule 1 or apply the rest of clause 25 of that schedule, as the case requires.*

6. The PPC has been made prior to the Council notifying its “Intensification Planning Instrument” plan change (“IPI”), which we understand will shortly be notified on 18 August 2022. Clause 34 does not apply to the PPC, and as originally lodged requested the application of the MHUZ (a relevant residential zone) without amendment.

7. In offering precinct provisions in response to the Council’s request for information, BCRJV was of the opinion that those provisions were in addition to and would not “amend” the provisions of the MHUZ which would otherwise apply in their entirety to any future application to redevelop the Site. However, the Council has now confirmed its contrary opinion, as noted above. This is of crucial importance, as the PPC would otherwise be subject to clause 25(4A) of Schedule 1 of the RMA, which provides as follows:

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

8. Accordingly, while as lodged the Council would have a discretion pursuant to clause 35 of Schedule 12 to accept or adopt the PPC, if the PPC amends the MHUZ then Council **must** reject it.

**Requests for information**

9. As noted above, BCRJV offered precinct provisions to satisfy Council officers’ requests for additional information in relation to the PPC. Further information requests in relation to private plan changes are provided for in clause 23 of Schedule 1 of the RMA, and includes requests for information:

*... necessary to enable the local authority to better understand—*

- (a) *The nature of the request in respect of the effect it will have on the environment, including taking into account the provisions of Schedule 4; or*
- (b) *The ways in which any adverse effects may be mitigated; or*
- (c) *The benefits and costs, the efficiency and effectiveness, and any possible alternatives to the request; or*
- (d) *The nature of any consultation undertaken or required to be undertaken—*

*if such information is appropriate to the scale and significance of the actual or potential environmental effects anticipated from the implementation of the change or plan.*

10. The applicant for private plan change (in this case BCRJV) is entitled to decline to provide further information requested by the Council. However, if it does so, then pursuant to clause 25(6) the Council may reject the request or decide not to approve the plan change requested "*if it considers that it has insufficient information to enable it to consider or approve the request*". Importantly, clause 25(6) is a procedural and not a substantive clause. The Council is not required to be satisfied of the substantive appropriateness of the PPC, and may in fact oppose it. What is required is that Council has the appropriate level of information for it to understand the PPC and in particular those matters set out in clause 23(1)(a)-(d) (quoted above). Note: we are not suggesting that BCRJV "refuse" the information request – see below.
11. We are aware that in the context of several other private plan change applications in Auckland, the Council has addressed uncertainty as to funding and timing of infrastructure upgrades by lodging a submission and participating in the hearing process, with a separate team of consultants to those assisting the Council in its regulatory capacity. Presumably, that approach would also be available to the Council in the present case.

**Way forward – retraction of response to further information request**

12. In light of the above, we recommend that BCRJV:
  - (a) Retract its response to the Council's further information request, insofar as it proposes the application of precinct provisions to the Site as part of the PPC;
  - (b) Substitute an alternative response to that further information request, which sets out in the absence of precinct provisions, how adverse effects of the PPC may be mitigated. As we understand it, in addition to MHUZ, SMAF1 and Auckland-wide provisions of the Unitary Plan, Watercare and AT have sufficient authority to refuse connections and/or EPA approvals where infrastructure matters have not been appropriately resolved. Any remaining concerns can be resolved through the submissions and hearings process as necessary; and
  - (c) In the event that the Council has "modified" the request for the PPC to include the precinct provisions, ask that the Council modify the request under clause 24 of Schedule 1, to delete the request for application of precinct provisions.
13. In our opinion, if BCRJV proceeds on the basis set out above, it is clear that the Council will have sufficient information pursuant to clause 23, to make its decision to accept, adopt or reject the PPC pursuant to clause 25 of Schedule 1. We are not aware of any basis for the Council to assert that any of the grounds in clause 25(4) of Schedule 1 would apply. Accordingly, the Council should at a minimum accept the PPC for notification. As noted above, any outstanding concerns it may have can be addressed in the usual manner, through the Schedule 1 submissions and hearing process. The Council can participate in that process fully both in its capacity as regulator and, if necessary, as a submitter.

Yours faithfully  
**ELLIS GOULD**



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