

To: Tony Clow

Client Ref: 461241-1895

From: Kate Stubbing and Jemma Hollis

Date: 18 April 2023

re: **PROPOSED PLAN CHANGE 92 – ZONING QUESTIONS**

1. In our meeting on 27 March 2023 you asked two questions arising from submissions received on proposed plan change 92 (**PC92**) which Council is required to progress in accordance with the Resource Management (Enabling Housing Supply and Other Matters) Amendment Act 2021 (**Amendment Act**). We note that we have provided earlier advice in relation to a number of aspects of Council's requirements to implement the Amendment Act and the National Policy Statement on Urban Development 2020 (**NPS-UD**).
2. We address the questions below.

QUESTION RELATING TO INTRODUCTION OF NEW ZONES

3. You have asked if the introduction of new Industrial, Rural-Residential and Natural Open Space zoned land through PC92 are related provisions which "support or are consequential" on the medium density residential standards (**MDRS**) or NPS-UD policies, for the purposes of s 80E RMA (Meaning of intensification planning instrument (**IPI**)).

PC92 zonings and background

4. All affected land in Ōmokoroa is currently zoned Future Urban.
5. The Industrial zone proposed in PC92 runs parallel to SH2, and joins up with an existing piece of Industrial zoned land on the eastern side of Ōmokoroa Road. The proposed Industrial zone is to replace (in part) previously zoned Industrial land which was located near the Town Centre, but subsequent to its zoning has been used for residential purposes, and is now proposed to be rezoned through PC92 as Medium Density Residential zone (**MDRZ**) to reflect its actual use. The PC92 s 32 report notes the provision of this new industrial land "is essential to provide employment opportunities to the area" (60) as well as a SH2 buffer, and in line with the live, work, learn, and play philosophy of the SmartGrowth principles (119).
6. The proposed Rural-Residential zones flank the Industrial and MDRZ land either side of the Ōmokoroa Peninsula. The s 32 report notes the proposed Rural-Residential zone as being generally not suited for more intensive residential activities but can provide variety to the living opportunities (141) and a transition between the residential zoning and the Natural Open Space Zone which provides the interface with the coastline (166).
7. The proposed Natural Open Space zone is described in the s 32 report as being the "green lungs" to the urbanisation, zoned to "provide appropriate identification and direction to the areas of constrained land and considering their role in supporting the urbanisation of the area primarily through having a storm water management function, coastal interface role and potential public recreation capabilities" (125). It is noted as having "very limited development opportunities" (130) and being necessary to "support the urbanisation" (137 and 142).
8. The PC92 form of urban development in Ōmokoroa has resulted from consultation with the community and the developed and assessment of a series of options which have been refined over a number of years (s 32 report at 118). An early 2007 structure plan shows Rural-

Residential and Public Reserve areas in substantially similar locations to those shown for PC92, as well as some Industrial zoned land along the SH2 boundary (s 32 report at 120).

Amendment Act provisions background and implementation

9. The Amendment Act is new legislation which has not yet been tested. There is no case law on the s 80E meaning of “support” or “consequential”, or equivalent usage of these terms in the RMA. Considering the plain and ordinary meaning of these terms, and based on the justification provided in the s 32 report, in our opinion the new zonings provide support for the MDRS and would therefore fall within the scope of an IPI in s80E. There may also be an argument the relocation of the industrial zoning is “consequential” on the new MDRZ. Section 80E provides that an IPI may include related provisions including zones.
10. As originally drafted in the version of the Bill introduced to Parliament, the scope of change an IPI could implement was narrow, being limited to a change to a plan to incorporate the MDRS, give effect to policies 3, 4 or 5 of the NPS-UD, and amend financial contribution provisions.¹
11. In its report, the Select Committee considered that the scope of IPI’s was too narrow, and recommend broadening it so the IPI could be used to change provisions in plans (including objectives, policies, rules, standards, and zones) that are consequential and complementary to the MDRS and NPS-UD intensification policies.²
12. The Select Committee noted the importance of enabling non-residential activities in residential zones including industrial activities, and that they were advised that the NPS-UD provides sufficient provision for this (such as objective 1 regarding well-functioning urban environments and policy 1(c) regarding accessibility).³
13. MfE’s Departmental Report on the Bill considered the Committee recommendations and submissions. They considered the inefficiency of multiple plan processes and the need for comprehensive planning as being driving factors in broadening the scope of the IPI definition (whilst noting it is not expected to replace a full plan review process):

Several submitters ...provided feedback that the scope of the ISPP is too narrow, and it would be beneficial to include other changes. Broadening the scope will allow councils to develop more comprehensive plans and remove other provisions that limit intensification. It will also remove the need to carry out multiple plan change processes in some cases – although we do not recommend expanding the scope as much as some submitters requested (e.g. full plan reviews would not be able to go through the ISPP as appeals are still appropriate for things such as significant natural areas).⁴

Councils should be able to rewrite zoning frameworks to improve drafting and to implement the national planning standards. The ISPP has not been designed for full plan reviews. We do not think it is appropriate for the ISPP to be used for this purpose, particularly as there are likely to be matters where it would not be appropriate to have no appeal rights (e.g. significant natural areas). However, we acknowledge that some full plan reviews are underway and having multiple plan processes is inefficient.⁵

14. Related provisions that support the MDRS / NPS-UD policies include the matters listed in 80E (2), but are specifically not limited to these, in our view reflecting Parliament’s intention

¹ s 80G(1)(b), Amendment Bill 83-1, introduced 19 Oct 2021.

² Amendment Bill 83-1, Report of the Environment Committee, December 2021, at 4 and 7.

³ At 19.

⁴ Departmental Report on the Amendment Bill, MfE, at 13.

⁵ At 25.

that this should be interpreted broadly. These related provisions specifically include those related to storm water management – being a purpose of the Natural Open Space proposed.

15. The scope of what an IPI can do was deliberately broadened from its initial narrow scope by MfE, in part to facilitate comprehensive planning and in recognition of the inefficiency of multiple plan processes. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] However, we consider that the deliberate broadening of scope supports the interpretation that new zones which support the MDRZ can be introduced through the IPI.
16. The proposed zonings are a key support for the MDRZ, and complementary to the MDRZ, and are essential to comprehensive planning of the Ōmokoroa peninsula. They provide:
- (a) Industrial Zone - employment opportunities and a buffer between SH2 and the MDR zone;
 - (b) Rural-Residential Zone - buffers and transitions between the MDR zone and Natural Open Space zone, a variety of urban form, and utilisation of land not suitable for more intensive residential development;
 - (c) Natural Open Space zone - storm water management, recreational opportunities and a buffer between other zones and the coast.
17. Ultimately, the zonings could be proposed through a separate plan change process. This would be an inefficient use of resources for both council and the community however, particularly given the years of collaboration and refinement for development of the Ōmokoroa peninsula, and a proliferation of plan change process that Parliament sought to avoid.
18. Under s 77N RMA, councils must notify an IPI using the intensification streamlined planning process. In carrying out this function, s 77N states that councils must ensure that existing district plan non-residential zone provisions give effect to NPS-UD policy 3, and councils “may create new urban non-residential zones or amend existing urban non-residential zones”.
19. This section indicates the Amendment Act explicitly contemplates the creation of new non-residential zones in the IPI. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
20. For completeness we have reviewed the equivalent plan changes for a number of councils.⁶ None of these plan changes appear to rezone land or to introduce other new zonings. We do not consider this assists in interpreting what was intended by the scope of an IPI under s80E but possibly reflects a more limited approach by other councils compared to the circumstances for Ōmokoroa where Council was well-progressed with planning for the future urban zone.

⁶ Christchurch City Council, Auckland Council, Hamilton City Council, Waipa District Council, and Waikato District Council.

NATURAL OPEN SPACE ZONING OF PRIVATE LAND

- 21. You have asked whether there is any legal issue or barrier to applying Natural Open Space zoning to privately owned land. We discussed this particularly in the context of the Bruning submission, and the potential of a challenge to the Natural Open Space zoning on this site.
- 22. The Environment Court has confirmed that there is no general legal principle requiring landowner agreement or that land be unsuitable for development to enable zoning of private land for open space purposes, and that there is nothing in the RMA to this effect.⁷
- 23. What is required is an evaluation in terms of s32 as to whether the proposed plan change provisions promote the purpose of the RMA and are the most appropriate provisions, taking into account all relevant considerations.⁸ “Most appropriate” means suitable, and the “most appropriate” method does not need to be the superior method.^{9,10}
- 24. Appendix 1 to the s 32 report assesses the most appropriate way the Natural Open Space zoning provisions can serve the statutory purpose of promoting natural and physical resources, and considers the costs and benefits of implementing a Natural Open Space zone as proposed.¹¹ The environmental, economic, social and cultural benefits of creation of a storm water management network and recreational activities area are balanced with the loss of marginally productive farmland which is unsuitable for land development, buildings and structures. Farming uses continue to be provided for but are noted as being likely to be replaced under the Natural Open Space zoning.
- 25. In terms of the status quo, Appendix 1 notes:

The existing zoning of Future Urban is a blanket zoning and does not appropriately address the zoning pattern being utilised for the urbanisation of Stage 3 Ōmokoroa.

- 26. Appendix 1 provides an analysis of PC92 in accordance with the s 32 requirements. Understanding particular submitter’s concerns and how their property is affected by the proposed Natural Open Space zone, and placing the analysis in the context of those concerns, will be necessary to inform the defence or adjustment of the s 32 analysis through the hearing process. For example, the Bruning submission states that an open space zoning is inappropriate on Future Urban Zoned farmland. This can be addressed by reference to the identification of Future Urban zoning as a temporary zoning, and the fact that farming is proposed to continue as a permitted activity under the Natural Open Space zone.¹²

- 27. [REDACTED]

⁷ *Golf (2012) Ltd v Thames-Coromandel District Council* [2019] NZEnvC 112 at [104].
⁸ *Eldamos Investments Ltd v Gisborne District Council*, EnvC Wellington W047/2005, 22 May 2005 at [128].
⁹ *Rational Transport Soc Inc v New Zealand Transport Agency* [2012] NZRMA 298 (HC) at [45].
¹⁰ We note that Sections 77J, 77K and 77L RMA contain requirements in addition to those outlined in s32 for implementing the MDRS in residential zones. As these concern qualifying matters we do not consider them relevant to the analysis of this question.
¹¹ At 9 and 66.
¹² Rule 24.3.1.a.
¹³ [REDACTED].

28.

[REDACTED]

Conclusion

29. In our opinion:

- (a) The introduction of new zones are “*related provisions*” including “*zones that support or are consequential on the MDRS*” and would therefore fall within the scope of an IPI under s80E. Based on the s32 assessment these new zones are a key support for the MDRZ, and complementary to the MDRZ, and are essential to comprehensive planning of the Ōmokoroa peninsula, and this can be addressed in a robust way through the s42A report.
- (b) There is no general legal principle requiring landowner agreement or that land be unsuitable for development for private land to be zoned for open space purposes, and there is nothing in the RMA to this effect. Proposed provisions must be assessed in terms of the s 32 RMA criteria as to whether the proposed plan change provisions promote the purpose of the RMA and are the most appropriate provisions.

30. Please let us know if you have any questions arising from this advice.