

BEFORE AN EXPERT CONSENTING PANEL

UNDER the COVID-19 Recovery (Fast-track Consenting) Act
2020

IN THE MATTER of an application by **Kiwi Property Holdings No. 2
Limited** for resource consents in relation to the **Drury
Centre Precinct**

**MEMORANDUM OF COUNSEL FOR KIWI PROPERTY HOLDINGS NO.2
LIMITED IN RESPONSE TO MEMORANDUM DATED 16 MARCH 2022 ON
BEHALF OF AUCKLAND COUNCIL AND AUCKLAND TRANSPORT**

“COMMENTS MEMORANDUM”

19 April 2022

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MEMORANDUM OF COUNSEL ON BEHALF OF THE APPLICANT

May it please the Panel

INTRODUCTION

1. This memorandum ("**Comments Memorandum**") responds to the memorandum dated 16 March 2022 from Brookfields Lawyers submitted as part of the comments from both Auckland Council and Auckland Transport ("**the Council Memorandum**").
2. A further memorandum ("**RFI Memorandum**") will be filed on behalf of Kiwi contemporaneously with the Comments Memorandum, in response to the Request for Further Information issued by the Expert Consenting Panel on 8 March 2022.
3. The issues addressed in the Council Memorandum are structured as follows and will be discussed in turn:
 - 3.1 Whether Private Plan Changes 48-50 regarding Drury have any legal relevance to the Panel's decision making on Kiwi's Fast Track Application ("**the Application**") (Section 2 of the Council Memorandum).
 - 3.2 The relevance and application of the section 104D RMA gateway test under the Covid-19 Recovery (Fast Track Consenting) Act 2020 ("**FTA**") (Section 3 of the Council Memorandum).
 - 3.3 The relationship between the Fast Track Application and the Future Urban Zone provisions in the Auckland Unitary Plan ("**AUP**") (Section 4 of the Council Memorandum).
 - 3.4 Matters relating to the integration of land use / urbanisation with transport infrastructure and the financing and funding solution for infrastructure upgrades required (Section 5 of the Council Memorandum).
 - 3.5 The "*existing environment*" against which the Application should be assessed and the relevance of the concurrent fast track applications by Fulton Hogan Land Development Limited ("**Fulton Hogan**") and Oyster Capital ("**Oyster**") (Section 6 of the Council Memorandum).

3.6 Sundry matters raised in Sections 7 and 8 of the Council Memorandum.

4. The issues raised in the Council Memorandum and supporting material reflect those raised by Auckland Council in its capacity as submitter on PC48, but not in its capacity as regulator (where it has engaged external experts who recommend approval of the plan change).

SECTION 2 COUNCIL MEMORANDUM - RELEVANCE OF PPC48-50

5. The Council Memorandum argues in para 2.2 that, because PC48 has been accepted by Council but not adopted, it is not a “*proposed plan*” for the purposes of clause 31(1)(c) of Schedule 6 to the FTA and that, accordingly, it has (emphasis added) “*no relevance to decision-making on the Fast Track Applications*”. At para 2.10 the Council Memo claims that, “*it is not permissible for the Panels to have regard to possible future live urban zonings and precinct provisions under clause 31 of Schedule 6 to the FTA.*”
6. Kiwi disagrees. It is accepted that PC48, as a private plan change, is not a “*proposed plan*” and hence is not to be considered under clause 31(1)(c) of Schedule 6. However, clause 31(1)(d) of Schedule 6 enables you to consider, “*any other matter the panel considers relevant and reasonably necessary to determine the consent application.*”
7. Kiwi submits that there are a range of matters that are open to you for consideration in terms of clause 31(1)(d) of Schedule 6 and that it is appropriate for you to consider given the circumstances that relate to Drury. They include:
 - 7.1 The identification by central and local government of Drury as a key node for future urbanisation, for example in:
 - (a) The Ministry of Housing and Urban Development’s Urban Growth Agenda identifies Drury as one of five *priority growth and investment areas for Auckland*.
 - (b) The Government Policy Statement on Housing and Urban Development (September 2021) which records Drury’s identification as one of two ‘*Priority greenfield growth*

*areas for priority focus and investment within the Urban Growth Partnership.*¹.

- (c) The Hamilton - Auckland Corridor Plan & Implementation Programme which identifies Drury as a “*priority development area*” with the objective to “*support the development of this significant and strategic growth node through new partnerships and applying new tools*”².

7.2 The fact that the Council has undertaken and completed a structure planning process for Drury (the Drury Structure Plan), and that the Application is consistent with the Drury Structure Plan - In that regard:

- (a) Structure planning is identified in the AUP³ as the mechanism through which FUZ areas are ultimately to be urbanised. It provides the basis for any plan changes that would be initiated by Council in Drury.
- (b) Since the AUP was made operative Council has notified only one public plan change introducing urban zones for FUZ land, being PC5-Whenuapai which was notified on 21 September 2017 (4½ years ago) but with respect to which Council: is yet to complete the first instance hearing; put the plan change on hold pending introduction of a variation scheduled for 2021; and has in an internal memorandum dated 20 January 2022 raised the possibility that the plan change may be withdrawn or put on hold as a consequence of the passage of the RM (Enabling Housing Supply and Other Matters) Amendment Act 2021.
- (c) Accordingly, Kiwi has little confidence that the Council will take any steps to modify the AUP to incorporate the Drury Structure Plan, particularly given the attitude of Council and Auckland Transport to the funding of supporting

¹ At page 40.

² <https://futureproof.org.nz/assets/FutureProof/H2A/Final-H2A-Plan-November-2020.pdf>

³ See, for example, Policy B2.2.2(3) of the AUP RPS; the FUZ zone description; and Appendix 1 Structure plan guidelines.

infrastructure (i.e.: the expectation of those parties as expressed in their comments on the Application that financing and funding arrangements for all foreseeable infrastructure need to be in place prior to land being zoned for urban purposes⁴).

7.3 The fact that significant infrastructure projects variously are proposed, have been approved or are underway at and in the vicinity of Drury Centre – These include:

- (a) The widening of the Southern Motorway between the Papakura and Drury Interchanges (funding and consents approved).
- (b) Improvements to the Drury interchange (funding and consents approved).
- (c) The approval of the Drury Central Railway Station through the FTA.
- (d) Electrification of the NIMT to Pukekohe (under construction).
- (e) Designations for local roading improvements including to Waihoehoe Road and to the intersection of Great South Road and Waihoehoe Road (awaiting decisions on NoR's).
- (f) Extensions to bulk water supply and wastewater truck services (under construction).

7.4 Central Government has committed funding amounting to \$2.7 billion as part of NZUP South Auckland package for investment in new train stations, delivery of a smaller scale northern section of Mill Road and investment in Drury transport upgrades that support releasing additional housing and connectivity with the stations.

⁴ See for example: Auckland Transport Comments at paragraphs 20 – 23 and 101; Brookfields Memo at 5.6 and 5.23; Transport Planning Memo (Andrew Prosser) at para 4.6-4.7; Planning Memorandum at pages 17-18, 21, 25; Auckland Council Comments at pages 11-12 Funding and Financing Memo (Bridget Duffield) at H-I; 11.6.

7.5 The proposed urban zonings and precinct provisions under PCs 48-50:

- (a) Kiwi, Fulton Hogan and Oyster have worked cooperatively for a number of years and have recognise the benefits of a comprehensive and complementary approach to development on their respective landholdings. They collectively provided Council with information and proposals to Council through the structure planning process.
- (b) PCs 48-50 have all been designed to be consistent with and to give effect to the Drury Structure Plan. Development proposals were amended prior to and following notification of PCs 48–52 to ensure that consistency, including in Kiwi’s case alterations to reflect the location of the Drury Central Railway Station ultimately settled upon by KiwiRail and Council.
- (c) Kiwi’s preference would have been for the Council to introduce a public plan change for the Drury Metropolitan Centre but it became apparent through the structure planning process that this was unlikely to occur in a timely fashion and that landowners would need to drive the planning process if development was to occur on the southern periphery of the city.⁵

7.6 The consistency of the Application with the Drury Structure Plan and PC 48 - The Project was designed after confirmation of the Drury Structure Plan and following the drafting of PC 48. It is a core principle of the Application that the Project will give effect to those higher order planning documents.⁶

⁵ Note that in the Expert Panel decision upholding the Farringdon South East and Farringdon South West developments, the Panel considered it was appropriate to have regard to the Living Zone rules which the proposals were designed to accord with, notwithstanding that the site was the located within the Rural Zone.

⁶ Note that in the Expert Panel decision upholding the Wooing Tree Estate development, the Panel consider it was appropriate to have regard to the Cromwell Spatial Framework Plan which identified the need for additional growth areas and the site as appropriate for medium and high intensity residential development (refer: para 371).

- 7.7 The fact that the Minister has approved the Application for processing under FTA – While the Panel needs to be separately satisfied regarding the relationship between the Project and the purpose of the FTA, the Application’s status as a referred project is a matter than can be considered. The purpose (section 4 FTA) is, “*to urgently promote employment to support New Zealand’s recovery from the economic and social impacts of Covid 19 and to support the certainty of ongoing investment across New Zealand, while continuing to promote the sustainable management of natural and physical resources.*” In the context of the public health emergency and adverse economic conditions that gave rise to the FTA, and the limited time period for which the fast track mechanism will be available, this is a distinguishing factor for all applications that are referred to the fast track process under FTA which is relevant when considering precedent issues⁷.
8. While the Council Memorandum disregards clause 31(1)(d) of Schedule 6 in terms of the broader planning context and history relating to the Application while, at para 6.7(b), it does ask you to rely on it when having regard to the cumulative implications of the Drury Centre and Drury East fast track resource consent applications.
9. It is noted for completeness that the Expert Panel that approved the Drury Central Rail Station project elected to have regard to PCs 48-50 in its decision.⁸

SECTION 3 COUNCIL MEMORANDUM - RELEVANCE AND APPLICATION OF THE SECTION 104D GATEWAY TESTS

10. Kiwi agrees that the threshold test in section 104D RMA is relevant to your assessment of the Application. That is why it was addressed in the supporting material.
11. Section 104D(1) RMA provides that:

⁷ Due to the altered statutory framework under which applications are assessed.

⁸ The Expert Panel decision on the Drury Train Stations considered PCs 48-50 to: be “*highly relevant*”; to be an “*other matter reasonably necessary for consideration under both s104(1)(c) and s171(1)(d) of the RMA*”; and to be matters that “*can (and should) be considered*” (at [29]). The stage at which the plan change is at will of course go to the weight that should be placed upon it.

“Despite any decision made for the purpose of notification in relation to adverse effects, a consent authority may grant a resource consent for a non-complying activity only if it is satisfied that either—

(a) the *adverse effects* of the activity on the environment (other than any effect to which section 104(3)(a)(ii) applies) *will be minor*; or

(b) *the application is for an activity that will not be contrary to the objectives and policies of [the AUP]*”

12. Kiwi will therefore need to satisfy the Panel that the Application passes at least one of these thresholds.

Section 104D(1)(a) – Adverse Effects

13. Paragraphs 3.9 – 3.13 of the Council Memorandum address the first limb of section 104D(1) regarding adverse effects. There is a difference of opinion between the witnesses for Council and Auckland Transport, who consider the Application fails this limb; and the AEE in support of the Application which concludes that the limb is passed (see section 12.3.1). It is for the Panel to determine whether the Project passes the gateway.

14. In that context, the following is noted:

14.1 A change to the environment is not necessarily an adverse effect. In this case the Application involves urban development in a currently rural zoned environment. That represents a change visually and in terms of rural character but one that is consistent with the outcome anticipated for the land and wider area by the Drury Structure Plan and PC48. That outcome is itself consistent with the urban use of the land that is the ultimate intention of the interim Future Urban Zoning.

14.2 When considering adverse effects on the environment, regard is to be had to the mitigation measures that will be adopted. In this case that includes measures to reduce potential visual, traffic, stormwater, ecological and other effects.

14.3 While the FUZ provisions enable a range of rural activities, that is to minimise the prospect of incoming activities compromising the long-term urban development of land. It is not to preserve visual

amenity or to retain rural landscape character as, in the long-term, urbanisation of the land will result in the loss of those characteristics in any event. In that context, an activity that is consistent with and gives effect to the anticipated form of urban development (as exemplified by the Drury Structure Plan) will not generate an adverse environmental effect, notwithstanding the extent of change it embodies. Nor will such development lead to adverse ecological effects as those matters were addressed directly through the structure planning process.

Section 104D(1)(b) – Objectives and Policies

15. Paragraphs 3.14 – 3.19 of the Council Memorandum address the second limb of section 104D(1) regarding objectives and policies and the principles that apply to such an assessment.
16. In that regard Kiwi agrees that:
 - 16.1 It is the policies of the AUP (as opposed to PC 48) that are relevant under this section⁹.
 - 16.2 “*Contrary to*” for the purposes of section 104D(1)(b) means that a proposal must be, “... *opposed in nature, different to or opposite... repugnant and antagonistic*”¹⁰. Mere inconsistency or a failure to give effect to objectives and policies does not render a proposal “*contrary to*” those provisions.
 - 16.3 What is required is a “*fair appraisal of the objectives and policies read as a whole*”¹¹ (emphasis added). That is, a proposal that is contrary to one or more provisions may not be contrary to the objectives and policies when read as a whole.
 - 16.4 That the assessment required is well summarised as follows in *Akaroa Civic Trust v Christchurch City Council*.¹²

⁹ As stated at paragraph 3.14 of the Council Memorandum.

¹⁰ *NZ Rail v Marlborough DC* [1994] NZRMA 70 (HC) at [11]. See paragraph 3.15 of the Council Memorandum.

¹¹ *Dye v Auckland Regional Council* [2002] 1 NZLR 337 (CA) at [25]. See paragraph 3.16 of the Council Memorandum.

¹² *Akaroa Civic Trust v Christchurch City Council* [2010] NZENV 110 at [74]. See paragraph 3.17 of the Council Memorandum.

“... in all but the simplest cases the second gateway test is very difficult to apply because most district plans have a plethora of objectives and policies. We consider that if a proposal is to be stopped at the second gateway it must be contrary to the relevant objectives and policies as a whole. We accept immediately that this is not a numbers game; at the extremes it is conceivable that a proposal may achieve only one policy in the district plan and be contrary to many others. The proposal may be so strong in terms of that policy that it outweighs all the others if that is [the] intent of [the] plan as a whole. Conversely, a proposal may be consistent with and achieve all bar one of the relevant objectives and policies in the district plan. But if it is contrary to a policy which is, when the plan is read as a whole, very important in central to the proposal before the consent authority, it may be open to the consent authority to find a proposal as contrary to the objectives and policies under section 104D. We add that it is rare for a consent authority, or the Court, to base its decision either way, on a single objective or policy. The usual position is that there are sets of objectives and policies either way, and only if there is an important set to which the application is contrary, can a local authority rightly conclude that the second gateway is not past.”

16.5 It is important to carry out a “contextual analysis” of the relevant plan provisions.¹³ Kiwi says that includes an analysis of the relationship between objectives and policies in the FUZ and consideration of the underlying purpose of that zone, which Kiwi considers is to facilitate appropriate urban development in the long-term and not simply to prevent development occurring.

17. The Project is assessed against the FUZ objectives and policies in the following section.

SECTION 4 COUNCIL MEMORANDUM - ASSESSMENT AGAINST FUTURE URBAN ZONE PROVISIONS

18. Part 4 of the Council Memorandum raises a series of matters regarding the proposal including:

18.1 An analysis of the Project in terms of the RPS (Part B2) and FUZ objectives and policies, which the Council argues are of prime importance.

18.2 Caselaw regarding the FUZ provisions.

¹³ See paragraph 3.18 of the Council Memorandum.

18.3 Precedent / plan integrity.

Assessment Against RPS Objectives and Policies

19. Paragraphs 4.8-4.11 of the Council Memorandum comment on Parts B2.2.2(3) and (8) of the AUP which are two of the Regional Policy Statement policies regarding “*Development capacity and supply of land for urban development*”. The policies read:

“(3) Enable rezoning of future urban zoned land for urbanisation following structure planning and plan change processes in accordance with Appendix 1 Structure Plan guidelines.

“(8) Enable the use of land zoned future urban within the Rural Urban Boundary or other land zoned future urban for rural activities until urban zonings are applied, provided that the subdivision, use and development does not hinder or prevent the future urban use of the land.”

20. Policy (3) anticipates the rezoning of FUZ land once structure planning and plan change processes have been carried out. The structure planning process has been completed in Drury but Council has not yet commenced a public plan change process. For reasons discussed in paragraph 7.2(b) above, Kiwi has no confidence that Council will introduce public plan changes for Drury, notwithstanding the completion of the Drury Structure Plan. Hence Kiwi has sought PC 48. Given that the Application is consistent with the Drury Structure Plan, it is not contrary to Policy (3). Instead, alongside PC 48, the Application is an alternative method of realising the intent of Policy (3).
21. Policy (8) is an enabling policy. While the Application does not involve rural activities, and hence does not give effect to the policy, it will not “*hinder or prevent future urban use of the land*” because the proposed development is entirely consistent with the Council’s intended future urban use of the land as expressed in the Drury Structure Plan. Accordingly, the Application is not contrary to Policy (8).

Assessment Against FUZ Objectives and Policies

Preliminary Comments re Intent / Purpose of FUZ

22. At para 4.29 the Council Memorandum states, “the intent of the FUZ objectives and policies in Chapter H18 is clear. Reflecting the transitional nature of the zone, ongoing rural use is enabled while

avoiding urbanisation until land is rezoned for urban purposes.” The Council Memorandum goes on to emphasise the “strong directive language” with reference to the King Salmon Supreme Court decision¹⁴. The relevance of the King Salmon decision will be addressed in the RFI Memorandum¹⁵.

23. Kiwi agrees with the Council Memorandum¹⁶ that the *intent* of the objectives and policies is critical to your assessment. That is consistent with the contextual analysis and need to consider the objectives and policies as a whole, identified in paragraphs 16.3 - 16.5 above. Kiwi says, however, that determining the intent of the provisions involves consideration of the purpose of the FUZ - what is the outcome that the AUP ultimately envisages for land that is zoned FUZ?

23.1 The FUZ zone description reads (emphasis added):

“The Future Urban Zone is applied to greenfield land that has been identified as suitable for urbanisation. The Future Urban Zone is a transitional zone. Land may be used for a range of general rural activities that cannot be used for urban activities until the site is rezoned for urban purposes. Refer to Chapter B Regional Policy Statement and Appendix 1 Structure plan guidelines when preparing structure plans and plan changes to rezoned sites for urban activities.”

23.2 That description does not directly express the “*intent*” or “*purpose*” of the zone, although it does inform an understanding in that regard. It is clear from the zone description that the FUZ land will ultimately be urbanised. The structure planning process identifies how that urbanisation will occur and the plan change process will then give effect to the structure plans.

23.3 It is in this broader longer term context that the FUZ objectives and policies need to be considered. Given that the FUZ land is ultimately intended to be urbanised, urban activities cannot be inherently problematic provided they do not compromise the manner in which that urbanisation will occur. Where, as in this case, urban activities are proposed that are in accordance with

¹⁴ Council Memorandum paras 4.31-4.33.

¹⁵ See RFI Memorandum paragraphs 11-28.

¹⁶ The Council Memorandum at para 3.16-3.17.

the outcome of a structure planning process (and consistent with the plan changes that are giving effect to that structure planning), then the intent of the zone relating to long-term urbanisation is not challenged but is, instead, facilitated.

The FUZ Objectives

24. Part H18.2 FUZ Objectives read:

(1) Land is used and developed to achieve the objectives of the Rural – Rural Production Zone until it has been rezoned for urban purposes.

(2) Rural activities and services are provided for to support the rural community until the land is rezoned for urban purposes.

3) Future urban development is not compromised by premature subdivision, use or development.

(4) Urbanisation on sites zoned Future Urban Zone is avoided until the sites have been rezoned for urban purposes.

25. As canvassed in the AEE, these objectives need to be read as whole and with regard to the intent of the zone, as discussed above. Kiwi's analysis of the provisions is as follows:

25.1 Kiwi considers that there is a very significant difference between Objective (3), which is a genuine objective in substance; and Objectives (1), (2) and (4) which are much more constrained in scope.

25.2 Objectives H18.2(1), (2) and (4) variously provide for specified land uses or preclude urbanisation until "*the land is rezoned for urban purposes*". In that regard:

(a) Any activity that departs from the identified activities or that amounts to urbanisation will on its face be inconsistent with those objectives. The Project would not give effect to objectives H18.2(1), (2) or (4) because it is of a scale and nature that reflects urban development and the land will, therefore, not be used or developed for rural activities and services or achieve the objectives of the Rural Production Zone.

- (b) Each of those objectives endeavours to stop activities *until* land is rezoned for urban purposes. They have a short-term focus, dealing with the interim timeframe until there is clarity as to the form of urban development that will occur on the land. There is nothing innate to the land (e.g.: in terms of ecological or cultural values) which means that urban development should never occur on it. To the contrary, the application of the FUZ implies that the land is suitable for future urbanisation.
- (c) None of these three objectives explain *why* such activities are precluded or provide any guidance as to the use to which the land will ultimately be put.

25.3 Objective (4) uses the verb “*avoid*” and paragraphs 4.31-4.33 of the Council Memorandum refer to *King Salmon* in that context. Kiwi notes:

- (a) There are significant differences between the text of the “*avoid*” policies in the NZCPS that were addressed in *King Salmon* and the FUZ objectives and policies being addressed in this case. The relevant NZCPS policies are concerned to avoid *effects* arising. Objective (4) simply seeks to “*avoid*” activities. That is a much blunter approach, which ignores the fact that activities may not generate adverse effects.
- (b) If Objective (4) were to be given effect in the FUZ zone provisions in isolation, the logical response would have been to make “*urbanisation*” a prohibited activity. That was not done, however, which suggests that the rules give effect to the Objectives and Policies as a whole, including Objective (3) discussed below.

25.4 Objective (3) is very different in nature. It reads, “Future urban development is not compromised by premature subdivision, use or development”. In that regard:

- (a) This objective does address the use to which the land will ultimately be put, being *future urban development*. It also

explains the purpose of the zone, being to avoid future urban development being *compromised* in the interim. None of the other objectives address either of these matters.

- (b) While some forms of development will compromise future urban development, other forms of development may not do so and instead may facilitate or be consistent with such future urban development. In most cases it will not be possible to identify the form of future urban development that will ultimately arise. In this case, however, the Council has completed its structure planning process which, is given effect by PC48 and with which the Project is consistent.
- (c) In the circumstances, Kiwi says that:
 - (i) The Project will not compromise the form of future urban development that the Council has identified is appropriate for Drury;
 - (ii) The Project is, instead, a form of development that is consistent with the anticipated future urban of development and which will be complementary to the AUP provisions that will ultimately be in place; and
 - (iii) Accordingly, the Project is not a form of premature subdivision, use or development that will compromise future urban development on the land.

25.5 In practice, Objectives (1), (2) and (4) are not long-term objectives for the land subject to the FUZ but simply policies or methods of preventing development in the interim that would compromise the future use of land for an urban purpose (being the matter addressed in Objective (3)). They preclude certain activities from occurring in the interim but do not identify the purpose of doing so. The FUZ rules give effect to Objectives (1), (2) and (4) by providing for a very limited range of activities, and

by requiring non-complying consent for activities that go beyond the bounds set in the Objectives.

25.6 The core purpose (i.e.: the underlying “*objective*”) of these provisions is to *enable* the future development of the land but in a form that is integrated with a broader development strategy. In Drury, that strategy has been settled at a high level through the Council’s structure plan, which PC48 and the Application are consistent with. The Project is urban in form but it is also consistent with:

- (a) The policy planning documents agreed between Council and the Government which identify Drury as a key focus for future development;
- (b) The Drury Structure Plan;
- (c) Kiwi’s masterplan for the wider area;
- (d) The PC 48 provisions and the form of development anticipated in PC’s 48, 49 and 50; and
- (e) The roading and other infrastructure improvements identified for Drury in the future.

25.7 In summary:

- (a) Objective (3) is the only objective that identifies a long-term goal for the land subject to the FUZ, being its future urban development.
- (b) The three other objectives are all supportive of Objective (3) during the interim period pending use of the land for coherent, integrated urban development;
- (c) It is apparent from Objective (3) that the purpose of the FUZ is to avoid incompatible development on the land in the interim; and
- (d) The Application is not incompatible with and not contrary to Objective (3) because it is entirely consistent with the

Drury Structure Plan and with PC48, which itself gives effect to that structure plan.

The FUZ Policies

26. Part H18.3 FUZ Policies is quoted below (emphasis added), with commentary.

27. Policies (1) and (2):

“(1) Provide for use and development which supports the policies of the Rural – Rural Production Zone unless that use and development is inconsistent with policies H18.3(2) to (6).

(2) Enable activities that are reliant on the quality of the soil or require a rural location to operate or which provide for the day to day needs of the local rural community.”

Comment: Policies (1) and (2) enable a range of activities but do not constrain other activities. These policies feed into the FUZ rules. None of the enabled activities form part of the Application package. While the Application does not rely on the policies, neither is it contrary to them, which is the matter to be considered under section 104D.

28. Policy (3):

“(3) Require subdivision, use and development to maintain and complement rural character and amenity.”

Comment: The use of the verb “require” in Policy (3) does impliedly impose constraints on forms of subdivision, use and development that do not maintain and complement rural character and amenity. Again, this policy is carried through into the FUZ rules. It is similar to Objectives (1), (2) and (4) in that it addresses the interim period until urban development takes place, being the purpose to which Council has determined the land should ultimately be put. The Application does not maintain rural character so is not consistent with the policy.

29. Policy (4):

“(4) Avoid subdivision that will result in the fragmentation of land and compromise future urban development.”

Comment:

This policy is concerned to avoid subdivision but only where it has the consequences specified in the policy, most relevantly in this case that it would compromise future urban development. That wording is consistent with the focus of Objective (3).

In order to be contrary to this policy an activity would need both to result in fragmentation of land and to compromise future urban development. The Application does neither.

First, the subdivision proposed in the Application provides for large lots that will facilitate and enable comprehensive urban residential and commercial development. That form of subdivision will not fragment the land in terms of future development. Instead, it enhances its development possibilities.

Secondly, the Application is consistent with both the Drury Structure Plan and PC48, so is consistent with anticipated future urban development.

30. Policy (5):

“(5) Prevent the establishment of more than one dwelling on a site except for the provision for minor dwellings and workers’ accommodation.”

Comment:

The Application does not include consent for the construction of dwellings so is not contrary to this policy. It does involve the development of super lots that could subsequently be developed for residential purposes. That will require a separate consent, however. In any event, the form of development proposed is consistent with the Drury Structure Plan and PC 48.

Policy (5) is similar in form to Objectives (1), (2) and (4) and Policies (1), (2) and (3) in that it addresses the interim period until urban development takes place (being the purpose to which Council has determined the land should ultimately be put) and is essentially one method for giving effect to the key Objective (3).

31. Policy (6):

“(6) Avoid subdivision, use and development of land that may result in one or more of the following:

- (a) structures and buildings of a scale and form that will hinder or prevent future urban development;*
- (b) compromise the efficient and effective operation of the local and wider transport network;*
- (c) require significant upgrades, provisions or extension to the wastewater, water supply, or stormwater networks or other infrastructure;*
- (d) inhibit the efficient provision of infrastructure;*
- (e) give rise to reverse sensitivity effects when urban development occurs;*
- (f) give rise to reverse sensitivity effects in relation to existing rural activities or infrastructure; or*
- (g) undermine the form or nature of future urban development.”*

Comment: The Application contains a detailed analysis of both Policy (4) and Policy (6) which it is not proposed to repeat.

That analysis states: *“These provisions seek to avoid subdivision and the fragmentation of land [that] would compromise future urban development. In our view, the proposal does not compromise future urban development of the land. This is because the proposal comprises an urban development pattern in a manner contemplated under the AUP and the Council’s Structure Plan, particularly with respect to land use and the planning for a new metropolitan centre at this location.”* The Application then analyses each of items (a) to (g) of Policy (6) in turn.

Critically, while this policy uses the verb “avoid”, it limits subdivision, use and development only when it will have specified characteristics or consequences. That requires a detailed evaluation of the potential effects of any development. Importantly, items (a), (e) and (g) refer explicitly to the relationship between the proposed development and the future urban development that ultimately will occur on the land. In addition, item (d) promotes the efficient provision of infrastructure, a matter that is relevant in the context of such future urban development. While these matters might commonly militate against the grant of consent to an urban activity of the scale proposed, in this case the consistency between the Project and the Council’s intentions for urban development, expressed in the Drury Structure Plan, means that you can have confidence that, far from inhibiting or compromising future urban development, the Project will be consistent with and facilitate the envisaged urban form.

Assessment under section 104D(1)(b) RMA

32. Kiwi considers that a “fair appraisal of the objectives and policies read as a whole” and having regard to a “contextual analysis” of the provisions involves:
- 32.1 Recognition that Objectives (1), (2) and (4) need to be read in the context of Objective (3) which, along with the FUZ description, informs the purpose of the zone and the intent of its provisions, being to act as a transitional zone pending the future urbanisation of land.
 - 32.2 Recognition that Objective (3) and Policies (4) and (6) invite consideration of the form and content of the Project in the context of the Council’s expectations for future urban development as expressed in the Drury Structure Plan (and as embodied in PC 48).
 - 32.3 Having regard to the unusual circumstances apply to the Project, given that it has been designed to be consistent with and give effect to the Drury Structure Plan.
33. Kiwi considers that the Council’s approach to the FUZ objectives and policies wrongly disregards those factors and proceeds as if the Council had not undertaken the Drury Structure Plan and that there is no clarity as to the form of development that will ultimately occur at Drury.
34. In terms of the passage from *Akaroa Civic Trust* quoted above, Kiwi says that this is a case in which Objective (3) and Policies (4) and (6) are notable because they address the urban use to which the FUZ land will ultimately be put. Those provisions are particularly relevant in the context of a resource consent application that involves urban activities designed to be consistent with the Council’s stated intent for the land, as expressed in the Drury Structure Plan. This is a case, therefore, in which those provisions should be considered to be particularly strong and important, to the extent that they outweigh the other objectives and policies which have a much more limited focus on the interim period before urbanisation occurs.
35. In summary Kiwi notes that:

- 35.1 The thrust of the package of FUZ objectives and policies is to enable the FUZ land ultimately to be urbanised in a planned and consistent manner;
 - 35.2 The Council has undertaken much of that high level planning through the Drury Structure Plan process;
 - 35.3 The Application is consistent with both the Structure Plan and the PC48 provisions; and
 - 35.4 In the circumstances none of the adverse effects that the policy framework is endeavouring to avoid or manage will arise in this case.
36. It is in that context that the Application AEE concludes that, “Overall, while we acknowledge that the proposal does not give effect to all the relevant objectives and policies of the FUZ, we consider that the proposal is consistent with the themes embodied in those provisions collectively, being to prevent development that would compromise future urbanisation. That is because the proposal is fully aligned with the anticipated form of urban development for the land and wider area.”

Assessment under clause 31 of Schedule 6 FTA

37. If you conclude that the Application passes the gateway test under section 104D RMA you will assess it in terms of the matters listed in clause 31 of Schedule 6 FTA. The following paragraphs consider the Project in terms of that clause, with particular reference to the objectives and policies of the AUP.
38. Clause 31(1) of Schedule 6 reads:

“31 Matters to which panel must have regard

(1) When considering a consent application in relation to a referred project and any comments received in response to an invitation given under section 17(3), a panel must, subject to Part 2 of the Resource Management Act 1991 and the purpose of this Act, have regard to—

- (a) any actual and potential effects on the environment of allowing the activity; and*
- (b) any measure proposed or agreed to by the consent applicant to ensure positive effects on the environment to offset or*

compensate for any adverse effects that will or may result from allowing the activity; and
(c) any relevant provisions of any of the documents listed in clause 29(2); and
(d) any other matter the panel considers relevant and reasonably necessary to determine the consent application.”

39. The documents listed in clause 29(2) are:
- a. *A national environmental standard:*
 - b. *Other regulations made under the Resource Management Act 1991:*
 - c. *A national policy statement:*
 - d. *A New Zealand coastal policy statement:*
 - e. *A regional policy statement or proposed regional policy statement:*
 - f. *A plan or proposed plan:*
 - g. *A planning document recognised by a relevant iwi authority and lodged with a local authority.*
40. The active wording in the chapeau to both clause 31(1) Schedule 6 FTA and section 104 RMA is, “*have regard to*”. Whereas lower order planning instruments (such as district plan rules) must “*give effect to*” (meaning implement) higher order provisions (being the matter addressed by the Supreme Court in *Environmental Defence Society Inc v The New Zealand King Salmon Co Limited*¹⁷), consent authorities have more flexibility when assessing resource consent applications. There will be circumstances where a proposal will not “*give effect to*” objectives and policies but consent nevertheless can be granted because other factors outweigh those matters, to which the consent authority only has to have regard. These issues are the subject of ongoing judicial consideration, which is discussed at paragraphs 12 - 28 of the RFI Memorandum. Caselaw has held that “*have regard to*” means a decision maker should “*give genuine attention and thought to the matters set out in s104 ... but they must not necessarily be accepted*”¹⁸
41. With regard to clause 31(1)(a), the “*effects on the environment*” are dealt with in detail in the reports submitted with the Application. The development will result in a very different environment from that enabled under the FUZ but Kiwi says that the changes will not generate more

¹⁷ *Environmental Defence Society Inc v The New Zealand King Salmon Co Limited* [2014] NZSC 38; [2014] 1 NZLR 593

¹⁸ *Royal Forest and Bird Protection Society of NZ Inc v NZTA* [2021] NZHC 390 at [83]

than minor adverse effects in the context of the urbanisation that is ultimately to take place on the land.

42. Clause 31(1)(c) refers to the planning documents listed at clause 29(2) (see above). This essentially equates to the list of matters at section 104(b) RMA. As noted above, the case law requires the AUP objectives and policies to be considered as a whole. In addition, these matters are to be considered in the context of all the other matters identified in clause 31.
43. Clause 31(1)(d) has been discussed above and Kiwi says that the matters listed in paragraph 7 all warrant your attention in terms of this section.

Caselaw regarding the FUZ provisions

44. The Council Memorandum discusses *Albert Road Investments v Auckland Council*¹⁹ at paragraphs 4.18 – 4.22. In that regard:
 - 44.1 The passages quoted in the Council Memorandum repeatedly speak of the urbanisation that the FUZ is intended ultimately to enable, referring to: “*the intended processes of structure planning and rezoning for urban purposes*”; the potential to “*compromise the PAUP’S intentions for urbanisation*”; and “*the primary importance of enabling the delivery of the PAUP’s urbanisation intentions, expressly as expressed in the objectives and policies.*” Those comments relate most obviously to Objective (3) and Policies (4) and (6) which refer to future urbanisation. The Court’s reference to the “primary importance of enabling the delivery of the PAUP’s urbanisation intentions” reinforces the importance (or primary role) of Objective (3), as it is the only objective that addresses the purpose of FUZ and, in doing so, puts the constraints set out in the other objectives in context.
 - 44.2 There is a similar focus on the *purpose* of provisions in paragraph [109] of the *Albert Road* decision where, in assessing the subdivision proposal as a non-complying activity under Rule

¹⁹ *Albert Road Investments Ltd v Auckland Council* [2018] NZEnvC 102.

E39.4.3(A29), the Court records that it needs to look at, “*what the related objectives and policies seek to achieve through that activity status*”.

44.3 Then in paragraphs [110] and [111], the Court records the Council’s planner’s opinion that, “*by requiring subdivision to be assessed as a NC activity the AUP provides a clear signal that the plan change process is the appropriate method for determining how land should be developed*”. The Court then concludes that the planner’s statement, “*overstates the intended restriction on development prior to subdivision, structure planning and plan change to an urban zoning*”. Kiwi considers that the Council Memorandum repeats that overstatement.

44.4 The Court states at paragraph [112] that: “*In essence, therefore, we find as follows:*

(a) the FU zone does not intend to put a freeze on the capacity to use and develop land pending structure planning and urban rezoning. It allows some tolerance for land development.

(b) the ultimate caveat on land use change and development is that it is not to compromise the realisation of urbanisation as envisaged by the PAUP, including in terms of quality compact urban form.

(c) the position is similar for NC subdivision. The assignment of NC activity classification to subdivision (including a two-lot subdivision), signals the importance of closely scrutinising the subdivision by reference to the applicable objectives and policies. Its more stringent classification than the various activities in r H 18.4.1 reflects the greater potential for subdivision to compromise the PAUP’s intentions for urbanisation. However, the FU zone does not put a freeze on subdivision. Rather, it anticipates subdivision applications but on the basis that they are closely scrutinised for compatibility with those intentions, as reflected in the objectives and policies”.

44.5 In summary, the *Albert Road Investments* decision reinforces the relevance of the broader *purpose* of the FUZ regarding future urbanisation, which is expressed most clearly in Objective (3) and Policies (4) and (6).

44.6 For completeness, it is recorded that the Court concluded:

- (a) At paragraph [150] that granting the non-complying consent would not set an undesirable precedent or raise plan integrity issues because the proposal reflected an appropriate basis upon which a non-complying subdivision can be consented in advance of structure planning and live zoning of FUZ land; and
 - (b) At paragraph [161] that the fact that the proposal was not contrary to or inconsistent with the objectives and policies was a “*strong indicator*” that the proposal is an eligible exception.
45. At paragraph 4.23 of the Council Memorandum, reference is made to the discussion of AUP Rule A1.7.5 regarding activity status in the High Court decision in *Royal Forest and Bird Protection Society of NZ Inc v NZTA*²⁰.
- 45.1 Kiwi does not consider that the non-complying activity status of urban development in the FUZ is wrong. It says, however, that consent can be granted to the Project because it is consistent with the long term intent of the FUZ provisions in relation to urbanisation.
- 45.2 That approach is analogous to the outcome of the *RFBPS* case, where the High Court upheld the grant of consent to NZTA’s East West Link despite its status as a non-complying activity and the extent to which the proposal would generate adverse effects in coastal areas subject to the “*avoid*” policies in the NZCPS.²¹

Precedent / plan integrity

46. At paragraphs 4.25 - 4.28 and 4.41 - 4.43, the Council Memorandum discusses caselaw regarding precedent and plan integrity and the assessment of Council witnesses in that regard.
47. As noted in the RFI Memorandum²², you have a discretion regarding issues of precedent and plan integrity. Those are not matters that you

²⁰ *Royal Forest and Bird Protection Society of NZ Inc v NZTA* [2021] NZHC 390

²¹ *Royal Forest and Bird Protection Society of NZ Inc v NZTA* [2021] NZHC 390 at [69].

²² At paragraph 43.

are required to take into account and Kiwi submits that in the circumstances relating to this case, it is appropriate for you to disregard issues of precedent and plan integrity.

48. In any event, Kiwi submits that there are a large number of factors relating to the Application that are highly unusual if not unique and which can give you confidence that granting consent to the Project will not create a precedent that others will be easily able to follow. They include the factors discussed in detail by Barker & Associates²³ relating to:

48.1 The site's location and characteristics;

48.2 The national and regional planning context;

48.3 The Project's consistency with the Drury Structure Plan;

48.4 The Project's consistency with PC 48;

48.5 The Project's integration with the Fulton Hogan and Oyster fast track proposals; and

48.6 The Minister's decision to refer the Application to a fast track process and the differences between the RMA and FTA processes and legal tests (including the requirement in clause 31 Schedule 6 FTA for your assessment to be "*subject to ... the purpose*" of FTA). .

49. Kiwi submits that there is no risk of the integrity of the AUP being compromised given that the Project is entirely consistent with the Drury Structure Plan. The Drury Structure Plan represents the Council's formal and public position regarding the form and content of urban development that is intended to occur at Drury. The FUZ is a transitional zoning pending implementation of the Council's vision for urban development at Drury, so a form of development that is consistent with that vision will not compromise the integrity of the AUP as a whole.

50. Paragraph 4.43 of the Council Memorandum claims that, "*a failure to require the process envisaged by the AUP to be followed (i.e. structure*

²³ Kiwi Response to Comments dated 19 April 2022, Attachment 1 Planning Response at section 2.4. See also paragraphs 43-48 of the RFI Memorandum.

planning followed by a plan change) would raise serious concerns about the integrity and consistent administration of the AUP.” In that regard:

- 50.1 It is concerning to Kiwi that the Council Memorandum effectively ignores the existence of the Drury Structure Plan, the extent to which it reflects a settled planning philosophy for Drury, and the implications that may have for future development.
- 50.2 Council and Drury landowners (including Kiwi, Fulton Hogan and Oyster) put a great deal of time and effort into developing the Drury Structure Plan. Council has taken no steps to give effect to that Structure Plan through a public plan change so PCs 48-50 have been sought to incorporate the outcomes of the Structure Planning process into the AUP.
- 50.3 As an aside, the only public plan change to the AUP that has been initiated by Auckland Council that enables urbanisation of FUZ land is PC5-Whenuapai which was notified almost 5 years ago and is still awaiting completion of its first instance hearing. In that context, Kiwi has no confidence that Council would have introduced a Drury plan change in the absence of the private plan change requests or taken any steps to urbanise that land²⁴. That concern is exacerbated by the Council's extremely conservative approach to the funding of infrastructure addressed in the following section of this memorandum.
- 50.4 This passage is another example of the Council's overstatement of *“the intended restriction on development prior to subdivision, structure planning and plan change to an urban zoning”* referred to in paragraph [111] of the *Albert Road Investment* case quoted at paragraph 44 above.

SECTION 5 COUNCIL MEMORANDUM - FUNDING AND FINANCING OF INFRASTRUCTURE

51. Part 5 of the Council Memorandum essentially argues that the Project should be declined consent because it generates a need for infrastructure that is unfunded.

²⁴ See RFI Memorandum paragraph 9.

52. Barker & Associates have discussed the infrastructure that is required for the Project and recorded the extent to which that is funded or is to be implemented by Kiwi, Fulton Hogan and Oyster²⁵. In summary, Kiwi says that all the infrastructure required to support the Project is either under construction, has consents in place, has funding in place or will be developed by it. Appropriate conditions of consent are proposed where development beyond a specified level requires implementation of additional items of infrastructure. There is no obligation on Council or Auckland Transport that arises as a consequence of the grant of consent to the Application.
53. At paragraphs 5.12-5.24 of the Council Memorandum, reference is made to four cases that address infrastructure funding issues. There is an important distinction between the cases cited in the Council Memorandum and the circumstances at Drury. In each of the cases cited where a rezoning or resource consent proposal was declined, the proponent had not been prepared to mitigate adverse effects generated directly by their proposal whereas Kiwi is proposing to provide the necessary infrastructure. By way of illustration:
- 53.1 *Coleman v Tasman DC*²⁶ related to resource consent application to subdivide a rural block. The applicant was not prepared to fund an upgrade of the unsealed road to address adverse effects that would be generated by additional traffic, and the Council did not have funding available to do so. Consent was declined because of that issue and concerns regarding cumulative effects.
- 53.2 *Bell v Central Otago*²⁷ related to a private plan change for rural residential development on an unsealed rural road. The applicant was not prepared to seal the road, notwithstanding the adverse effects on amenity that would be generated by the additional traffic. The plan change was declined.
- 53.3 *Foreworld Developments Limited v Napier CC*²⁸ concerned relief sought in respect of a proposed district plan seeking urban

²⁵ Kiwi Response to Comments dated 19 April 2022, Appendix A, Row 10.

²⁶ *Coleman v Tasman DC* [1999] NZRMA 39.

²⁷ *Bell v Central Otago* C4/97.

²⁸ *Foreworld Developments Limited v Napier CC* W08/2005.

zoning of an historic seaside settlement at Bay View, Napier:

- (a) The appellants wanted the Council to provide something close to full suburban servicing standards in terms of roading, stormwater and wastewater. Without that servicing, the up-zoning sought was unrealistic. The Council was not a position to provide such servicing and the appeal was declined.
- (b) The Court stated²⁹ that, “it is bad resource management practice and contrary to the purpose of the Resource Management Act ... 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.”

53.4 The circumstances at Drury are quite different from those that applied in Bay View:

- (a) Drury has been identified as a strategically important growth node for Auckland and has been the subject of a Structure Plan process with which PCs 48-50 are largely consistent. No such status applied to Bay View.
- (b) The level of infrastructure that is required for the long-term urbanisation of Drury has been identified and key aspects of it are either under construction or subject to applications for planning approvals. At Bay View, the council had elected to defer indefinitely the infrastructure that would have been required.
- (c) PCs 48-50 incorporate mechanisms for implementing local infrastructure and addressing concerns regarding adverse effects. There is no suggestion in *Foreworld* that the appellants were prepared to commit their own resources towards the provision of infrastructure.

²⁹ *Foreworld* para [15].

- 53.5 In *Norsho Bulc Limited v Auckland Council*,³⁰ a resource consent application was sought for a managed fill operation in a rural location. In that case the applicant did undertake to seal the affected rural road. The main issue of contention between Council and the applicant related to a review condition concerning upgrading works on the road. The Court granted consent without that condition but in doing so referred to the conclusion in the *Foreworld* decision that it is open to a council to refuse a plan change on the grounds that it would cause unnecessary expense to the ratepayers. The Court went on to say³¹, however: “*But these propositions all arise out of proposals, whether in the form of plan changes or applications for resource consent, where the need for new or further infrastructure was acknowledged as a direct consequence of allowing new development. In the **Coleman** case, which related to a subdivision proposal, the Environment Court’s assessment of the overall proposal concluded that it sent all the wrong signals to the community and entailed much more than the direct effects of the subdivision itself.*”
54. None of the caselaw discussed above precludes a decision by you to grant consent to the Application.
55. The need to see infrastructural issues in context is a matter that the Environment Court addressed in *Landco Mt Wellington Limited v Auckland City Council*³² where it was asked to consider the potential adverse effects on the roading network created by the additional traffic generated by residential development at the former Mt Wellington Quarry (now “*Stonefields*”). The Court commented as follows on the respective roles of councils and applicants at paragraphs 9 to 12 and at paragraph 18 (emphasis added):

“That Auckland City has major and seemingly ever increasing traffic problems comes as news to no one. Proposed solutions seem to come and go, being discarded as inadequate, unworkable or unaffordable, while the volume of cars and trucks on the roading network continues to grow.

³⁰ *Norsho Bulc Limited v Auckland Council* [2017] NZEnvC109.

³¹ *Norsho* para [94].

³² Et Ct decision A35/2007.

We need to begin this part of our decision by stating three clear premises. First, this appeal is not the opportunity to solve the traffic problems of Auckland City or even just the Tamaki Edge. The proposal stands or falls on its own merits, and its proponents are not required to resolve infrastructure problems outside its boundaries although they may be required to contribute, by way of financial contributions, to the cost of doing so.

Secondly, Auckland's population growth seems inexorable, and will occur over the projected timeframe, whether or not this proposal goes ahead. We understand those who say that we should not approve this proposal until the wider traffic infrastructure, already under pressure, has been upgraded sufficiently to absorb its projected output. In an ideal world that might be a viable course of action, but the world is not ideal. If 6,000 people cannot be housed in Stonefields, the simple consequence will be that they will go elsewhere, almost certainly further away from the hubs of employment, education and recreation the City provides. They will have to travel further and for longer, placing even greater demands on the roading network and other transport infrastructure. That factor is no doubt one of those which led to the Stonefields site being identified as priority 1 for residential growth.

Thirdly, the evidence from the traffic engineers is that, as embodied in the Auckland Regional Land Transport Strategy 2005, it is accepted as no longer possible to continue to provide road space to vehicles, sufficient for congestion free movement. The corollary is that the region needs to introduce measures that reduce demand for travel, particularly by private vehicles. To that end, they regard congestion as, partly, an educative and motivating process to encourage non-car travel." (paras 9 - 12)

"We are certainly not sanguine about the traffic situation, but then nobody is. The best that can be said about it is that the expert evidence is that the traffic effects within and immediately surrounding Stonefields can be managed effectively. It is for the Council and the other roading and transport organisations to manage the wider network, and public transport, to cope with the present loads and future growth, wherever in the region that might occur." (para 18)

56. The principles expressed in that decision are applicable to the current case:
- 56.1 It is for Council and infrastructure providers to address any existing shortfalls in wastewater or other network capacity. Proponents of development proposals may be required to contribute to the cost of those measures, but they cannot be required to solve the problems.
- 56.2 It is no answer to the issue for Council simply to oppose applications for resource consent which, if granted, would help

address critical shortages of land for housing and commercial activities. That approach will exacerbate the supply problem over time.

- 56.3 In this case, the infrastructure needed to cater for the Project will be provided.

SECTION 6 COUNCIL MEMORANDUM - EXISTING ENVIRONMENT / RELATIONSHIP BETWEEN REFERRED PROJECTS

Caselaw

57. Kiwi acknowledges that the “*environment*” in terms of which effects are to be assessed is described in *Queenstown Lakes DC v Hawthorn Estate Limited*³³.
58. In *Queenstown Central Limited v Queenstown Lakes District Council*³⁴ (and a number of subsequent cases) the High Court expanded on that matter and noted that the RMA as a whole calls for a “*real world*” approach to identification of what is the “*future environment*”, avoiding assumptions that would create an artificial future environment. This issue was addressed by AT in the context of Drury East as part of the recent hearing on AT’s notices of requirement for the Drury Arterial Network where (different) counsel for AT stated:³⁵

“...considering the largely rural environment as it exists today will not be a true reflection of the real world situation in which the transport corridor will operate. It is well established in case law that the “environment” in an RMA sense is the existing environment plus elements of the future environment such as permitted activities under the relevant plans and resource consents that have or are likely to be implemented. Case law also confirms that a real world approach to the future environment requires consideration of that environment as signalled by operative objectives and policies of a district plan³⁶. Most sections of the Projects will take place within Future Urban

³³ *Queenstown Lakes District Council v Hawthorn Estate Ltd* [2006] NZRMA 424 (CA), at [84].

³⁴ *Queenstown Central Limited v Queenstown Lakes District Council* [2013] NZHC 815. See also: *Save Kapiti Inc v New Zealand Transport Agency* [2013] NZHC 2104. *Royal Forest & Bird Protection Soc of New Zealand Inc v Buller DC* [2013] NZHC 1324, [2013] NZRMA 275 and *Royal Forest & Bird Protection Soc of New Zealand Inc v Buller DC* [2013] NZHC 1346, [2013] NZRMA 293; *Shotover Park Ltd v Queenstown Lakes DC* [2013] NZHC 1712

³⁵ Opening legal submissions of counsel for Waka Kotahi and Auckland Transport for the Drury Arterials Notices of Requirement dated 8 December 2021, available at <https://www.aucklandcouncil.govt.nz/have-your-say/hearings/find-hearing/Pages/Hearing-documents.aspx?HearingId=485>

³⁶ See *Saddle Views Estate Ltd v Dunedin City Council* [2014] NZEnvC 243

Zone areas, with the objectives and policies for this zone clearly indicating an intention for the area to be urbanised in the future. The objectives and policies also seek to ensure that urban development of the FUZ is integrated with infrastructure.

Determining what is the appropriate environment to assess within areas that are currently rural but planned to be urbanised at some point in the future is complex. The changing environment needs to be reflected in any assessment of the receiving environment and subsequently, where the environment is likely to change between the time of assessment and the time effects are anticipated to be experienced, it is considered that a “real world” approach to defining the environment should be applied.”

This approach contrasts with that taken in the Council Memorandum, which makes no reference to the requirement for a “real world” assessment and appears to advocate for assessment of the effects of the proposal on the existing rural environment only (see, for example, the discussion regarding the assessment of landscape effects). Nor did the Council Memorandum make any substantive to the Council’s own structure planning process.

Clause 31(1)(d) Schedule 6 FTA

59. In any event, as noted in paragraph 6.7(b) of the Council Memorandum, clause 31(1)(d) of Schedule 6 to the FTA entitles you to have regard to, “any other matter the panel considers relevant and reasonably necessary to determine the consent application”. Kiwi has listed at paragraph 7 above matters that it says can appropriately be considered by you under clause 31(1)(d).
60. Those factors provide context for your assessment of the magnitude and significance of changes to the environment that will be generated by the Project, including whether those changes amount to more than minor adverse effects on the environment in terms of section 104D(1)(a):
 - 60.1 Whether a given change to the environment (e.g.: in terms of visual amenity or rural character) amounts to an adverse effect is a function of the context within which it occurs. Those contextual matters can include: the physical context (e.g.: the sensitivity of the environment to visual change); the size and nature of the viewing audience; expectations regarding the likelihood and nature of changes to the environment that are anticipated (e.g.: in this case through the transitional FUZ zoning combined with

the Drury Structure Plan); and the timeframe within such change is expected to occur.

60.2 Even if those contextual factors do not change the “*existing environment*” against which changes will be assessed, they will influence the judgment as to the nature and severity of any perceived adverse effect that flow from those changes. Accordingly, it is open to you to conclude that a change to the environment (e.g.: implementation of a development such as the Project) that might generate more than minor adverse effects in some locations and contexts will generate only minor adverse effects in the current circumstances.

SECTIONS 7 + 8 COUNCIL MEMORANDUM - RESIDUAL ISSUES

61. Part 7 of the Council Memorandum addresses the Resource Management (Enabling Housing Supply and Other Matters) Amendment Act 2021. Kiwi agrees that the Amendment Act has no immediate implications for the Application.

62. Part 8 of the Council Memorandum discusses landscape effects and argues that these must be considered to be more than minor. For completeness it is noted that:

62.1 Unlike ecological effects which can be assessed objectively because they represent a direct effect on organisms, whether and to what extent landscape effects arise is a function entirely of the response of humans to changes in a landscape.

62.2 Accordingly, whether a visual change represents an adverse effect is a consequence of context (as discussed in paragraph 14 above). In this case, the factors identified by Boffa Miskell in the Landscape and Visual Assessment for the Application are directly relevant to:

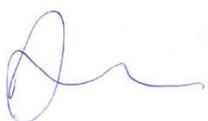
(a) Whether the changes to the landscape are likely to be perceived as adverse effects or simply as part of an ongoing transformation of Drury from a rural to an urban environment over time; and

- (b) If the changes are perceived to be adverse effects, the scale of those effects and in particular whether they are more than minor.

62.3 Kiwi considers that Council's approach to this issue reflects its, presumably deliberate, failure to acknowledge the exhaustive structure planning process that it has undertaken for Drury, the content of the Drury Structure Plan, the level of public involvement in that process, and the public acceptance of the outcome. That acceptance is exemplified by the very limited opposition to PC48, with regard to which:

- (a) The two primary opponents were Council and Auckland Transport.
- (b) With the exception of those parties, at the hearing submitters on PC48 were essentially concerned with matters of detail and, notably, no issues were raised in submissions or evidence (including by Council or Auckland Transport) regarding adverse visual or landscape effects, or in respect of the loss of rural character.

Dated 19 April 2022



Douglas Allan / Alex Devine

Counsel for Kiwi Property Holdings No. 2 Limited