BEFORE AN EXPERT CONSENTING PANEL

Under	the Covid-19 Recovery (Fast-track Consenting) Act 2020 (**FTCA**)
In the Matter	of an application to an expert consenting panel for resource consent by **OYSTER CAPITAL** for the Waihoehoe Precinct project located at Drury, South Auckland

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Memorandum of Counsel on behalf of Oyster Capital

Dated 19 April 2022

Jeremy Brabant

Barrister

Level 4, Vulcan Building Chambers

PO Box 1502, Shortland St

Auckland City

021 494 506

Email: jeremy@brabant.co.nz

May it Please the Panel

Introduction

1. This memorandum is presented on behalf of the Applicant, Oyster Capital (**Oyster**). It responds to a memorandum dated 22 March 2022 from Brookfields Lawyers which was lodged with the Expert Consenting Panel (**Panel**) as part of the comments on this Application from Auckland Council (**Council**) and Auckland Transport (**AT**).

2. The Brookfields memorandum addresses seven issues, which in summary are:

    a. The relevance of PPC50 (and PC48 and PC49)[1] to this Application;

    b. The section 104D test under the FTCA;

    c. Future Urban Zoning;

    d. Integration of land use/urbanisation with infrastructure;

    e. Existing environment;

    f. Implications of the Resource Management (Enabling Housing Supply and Other Matters) Amendment Act 2021; and

    g. Landscape/visual effects.

3. I respond to the issues raised below, albeit I address the existing environment in advance of discussing the s104D test.

Relevance of Private Plan Changes

4. The Panel will be aware that the Drury East Plan Changes were the subject of hearings in 2021. Decisions on these plan changes are currently awaited.

[1] Referred to for convenience as the Drury East Plan Changes.

5. The Brookfields Memorandum suggests that:

   a. The Drury East Plan Changes have "no relevance" to decision-making on the Fast Track Applications. [2]

   b. The Drury East Plan Changes have "no effect or relevance to the Panels' decision-making".[3]

   c. 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".[4]

6. The Brookfields Memorandum overstates the position and thus is incorrect in law.

7. I also observe that the Brookfields Memorandum at [2.4] selectively quotes from the Oyster Assessment of Environmental Effects (**AEE**)[5] in that the context of the quote is not given and preceding words omitted. Commencing with the context, the section of the AEE being referenced is specifically addressing whether the provisions of PPC 50 have operative standing and are therefore directly engaged when assessing the application against the provisions of the Auckland Unitary Plan.[6] Further, the AEE does record PPC 50 is relevant:

   "7.5 Auckland Unitary Plan (Operative in Part)

   …<u>while PC 50 is relevant to the proposal</u>, it is not operative and therefore does not have bearing on this application. Therefore, it is considered that with respect to all matters that this proposal can be assessed against the current AUP (OP) provisions only."

8. Returning to clause 31 of Schedule 6, with reference to the matters set out by

[2] At [2.2].
[3] At [2.6].
[4] at [2.10].
[5] Oyster AEE, at page 67.
[6] Thus, PPC 50 "does not have a bearing" in the context of provisions of the Auckland Unitary Plan.

Brookfields[7] I agree that a PPC accepted by the Council but not adopted is not a "proposed plan" for the purposes of clause 31(1)(c) of Schedule 6 to the FTCA and therefore cannot be considered under that clause. However, the Panel is able under clause 31 (1) (d) of Schedule 6 to consider "any other matter the panel considers relevant and reasonably necessary to determine the consent application".

9. "Other matters" you might consider would include:

    a. The completed structure planning process for Drury, which reflects and responds to the identification by both central and local government of Drury as a key node for future urbanisation.

    b. Various significant infrastructure projects (referred to during the Drury East Plan Changes and in this Application) in the Drury area, which have been consented or are underway. These include approval of the Drury Central Railway Station through the FTCA[8] and widening of the Southern Motorway between the Papakura and Drury Interchanges. In addition, I note a number of designations for local roading improvements in the Drury area are being pursued specifically in the context of anticipated and planned for urbanisation.

    c. The proposed zonings and precinct provisions under the Drury East Plan Changes which reflect and give effect to the Drury Structure Plan.

    d. The alignment of this Application with the Drury Structure Plan and PPC 50.

10. Oyster's position is that the Drury East Plan Changes are relevant to this Application and the Panel's assessment under clause 31 and 32.

11. The Brookfields Memorandum also suggests considering the Drury East Plan

[7] At [2.3] – [2.11].
[8] It is notable that the Expert Panel determining the Drury Central Rail Station project chose to have regard to the Drury East Plan Changes in its decision.

Changes is problematic because the outcome of these plan change processes is uncertain.[9] I accept that at the time of writing the outcome of the plan change process is not known. However, while the relief sought by Council and AT sought as a primary position that the Drury East Plan Changes be declined, that was expressly advanced in the context of timing (and related infrastructure concerns). There has not been any substantive attack on the outcomes anticipated by the Drury-Opāheke Structure Plan. From a strategic perspective there is no uncertainty as to the ultimate outcome for land subject to the structure plan – it will be urbanised.

Law - Environment

12. I engage with the "environment" in advance of considering the s104D tests, because a proper understanding of the environment is critical to correctly assessing these matters under section 104 D (and consequently by reference to section 104).

13. The Panel seeks comments on (inter alia)[10] the existing and future environment against which the Application should be assessed.

14. The "environment" embraces not only the existing environment, but also the future state of the environment as it might be modified by permitted activities and by resource consents which have been granted where it appears likely[11] that those consents will be implemented.[12] Thus I agree with paragraph [6.2] of the Brookfields Memorandum. I also generally concur with paragraph [6.3] of that memorandum.

15. The receiving environment does not include effects of resource consents that may be sought in the future, as that is the realm of speculation.

16. Having said that, it is also important that case law has established a consent authority should not consider a future environment that is artificial – there is

[9] At [2.9 (c)-(d)]. The
[10] Minute 1, 28 February 2022, at [5].
[11] Likely means "more likely than not".
[12] *Queenstown Lakes District Council v Hawthorn Ltd* [2006] NZRMA 424 at [79].

a need for a "real world analysis" when determining what the environment is.[13] In this matter a real-world analysis is important in the context of assessing rural character and amenity for the FUZ applying to the Site and surrounds. There are two respects in which this obligation is engaged.

17. The first consideration is to ensure, by reference to the current character and amenity of the Site and surrounds, that a clear-eyed analysis is undertaken avoiding an approach which assumes an idealised hypothetical rural production character and amenity for the environment which is not present in reality. The assessments on behalf of Oyster identify:

    a. *Landuse (general)* - significant infrastructural elements and a relatively high level of rural residential settlement, but pastoral landuse, cropping, horticulture and lifestyle development continue to be the predominant uses in the local and wider area.[14]

    b. *Landuse (site)* - includes low intensive pastoral grazing and rural residential/lifestyle development. In the south-eastern part of the site (the main portion of the site subject of this application) there is a small commercial operation (health and fitness) and a light industrial (metal forging) operation.[15] Combined, the dwellings, businesses and rural ancillary buildings collectively generate a relatively high intensity of built development in the southern part of the site.

    c. *Landscape Character* – the rural character is strongly influenced by the proximity to greater metropolitan Auckland, the significant infrastructure, widespread rural residential settlement and lifestyle development, and the extensive tracts of formerly rural land currently being transformed for urban use. Consequently, although variable, depending on the location, rural amenity values associated

[13] *Queenstown Central Ltd v Queenstown Lakes District Council* [2013] NZHC 815 at [85], adopted by *Speargrass Holdings Ltd v Queenstown Lakes District Council* [2018] NZHC 1009 at [64].
[14] Application, Landscape and Visual Assessment, Appendix 29, at [2.11].
[15] Appendix 29, at [2.19].

with the Drury lowlands in the vicinity of the subject site are moderate at best, and there is a general impression that the wider area is in a general state of transition.[16]

d. Even though the site and local area currently exhibit semirural characteristics, neither display a high degree of 'ruralness'.[17] There are relatively low landscape values and sensitivity associated with the site and local area. The site is a relatively degraded, modified, rural lifestyle environment that lacks any significant landscape features, and exhibits generally relatively low-moderate visual amenity.[18]

18. Accordingly, considered correctly in context, the proposal will result in the loss of remaining rural character – but that existing character rates low on the "ruralness" scale (and thus the loss is of comparatively less import). Nor if this proposal were not granted consent is there any real-world likelihood of that existing rural character and amenity remaining in the long term and 'improving', because there is a clear commitment to urbanisation of the land in question.

19. The final sentence of my paragraph above foreshadows a second consideration from the perspective of a real-world analysis, which I accept is somewhat more challenging from a legal perspective. Unsurprisingly, clearly signalled future urbanisation adds complexity to the real-world analysis required. The origin of the real-world analysis terminology is a case (*Queenstown Central* – already referred to) which itself had to engage with subject land that was squarely identified for future urban development.

20. In *Queenstown Central*, the High Court found that the existence of objectives and policies in the operative plan identifying the subject land for urban development (and a context which included a plan change to rezone the land for development) meant that it was appropriate for the "future environment"

[16] Appendix 29, at [2.14].
[17] Appendix 29, at [5.12]
[18] Appendix 29, at [5.13].

to take into account the fact that the land would inevitably be urbanised.[19]

21. In this matter some similarities apply in that the operative plan identifies the land for urbanisation and development and there is an associated structure plan which illustrates that outcome with obvious and significant change for the future environment.

22. Future urbanisation which is not permitted or presently consented may not come within the parameters of the "environment" as identified in *Hawthorn* - but *Queenstown Central* suggests taking account of such a consideration might expressly inform your assessment of the environment. Even if you do not go that far, taking account of the squarely signalled future urbanisation certainly comes within the ambit of matters the Panel may consider relevant and reasonably necessary to determine the consent application.[20] Those matters provide context to the assessment of effects on and changes to the environment.

23. I also say that Drury presents a particular case where taking account of future urbanisation in determining the environment is appropriate, because in addition to the FUZ zoning the following elements (inter alia) are engaged which in combination distinguish this area from other FUZ areas in Auckland:

    a. Significant infrastructure in place - centre of the site is located 600m away from the confluence of Great South Road, the North Island Main Trunk line ("**NIMT**") and State Highway 1 and 800m from the planned Drury Central Railway Station.

    b. Significant planned and funded infrastructure, including extending electrification of the railway to Pukekohe[21] and a consented new train station for Drury Centre to be completed by early 2025.[22]

    c. A Structure Plan for Drury-Opāheke endorsed by Council in August

[19] *Queenstown Central*, at [85].
[20] Clause 31(1)(d) of Schedule 6 to the FTCA.
[21] Works underway, to be completed by the second half of 2024.
[22] https://www.kiwirail.co.nz/media/approval-for-two-stations-in-southern-auckland/

2019.

d. Surrounding urbanisation underway:

i. Drury 1 precinct: a live zoned area at the northern end of Drury west currently being developed by MADE Group;

ii. Drury 2 precinct: the area to the south of the Drury 1 precinct recently rezoned from Future Urban to Town Centre and a mix of residential zones, as part of Plan Change 51; and

iii. Drury South precinct: the area to the south of Drury east that is currently being developed as an industrial and mixed-use area by Drury South Limited, a subsidiary of Stevenson Group.

Section 104D test

24. As experienced practitioners the Panel will be familiar with sections 104 and 104D.

25. The Brookfields Memorandum concludes that section 104D operates in the usual way in the context of the FTCA.[23] I agree.

Effects Gateway

26. There is a difference of opinion between the witnesses for Council and AT, (who consider the Application does not pass this gateway) and the AEE and associated specialist reports in support of the Application which conclude that the gateway is passed (see AEE section 12.3.1).

27. With respect to the effects gateway (section 104D(1)(a)) I note that there is not a requirement that every single effect be minor or less than minor. The Environment Court has addressed this as follows (emphasis added):[24]

[23] At [3.5] – [3.7].
[24] *SKP Inc & Onr v Auckland Council* [2018] NZEnvC 081.

[48] As to the "effects" gateway we may take into account aspects of mitigation and outcomes of imposing conditions of consent.

[49] As will be seen from our later analysis of effects on the environment, there are some which individually can be described as more than minor, for instance in connection with visual amenity from certain properties, but the **law is that the evaluation under this provision is to be undertaken on a "holistic basis, looking over the entire application and a range of effects", not individual effects**.

[50] The **evaluation under subsection 1 (b) is again, not an approach focussed on each relevant provision, but rather something more of a holistic approach.** As has been observed in many other decisions, it is usually found that there are sets of objectives and policies running either way, and it is only if there is an important set to which the application is contrary, that the consent authority might conclude that this gateway is not passed.

28. The position with respect to section 104D(1)(b) is similar (as referenced in paragraph 50 of the *SKP* case quoted above). A conclusion on whether a proposal is repugnant to relevant objectives and policies must be reached in the context of consideration of the objectives and policies as a whole.[25]

29. The Brookfields Memorandum also references the *SKP* decision noted above. I agree that it is possible (in relatively rare circumstances) for a single effect or category of effect to determine whether the gateway is passed. However, completing the quote from paragraph [139] of *Calveley*[26] and providing the full context is helpful:

> [139] We have considered the activities' adverse effects as a whole, in light of the mitigating influence of the proposed consent conditions (and in this case, also of the proposal's subdivision design): *Bethwaite; Stokes.* We find that those adverse effects are more than minor. That is because of the unacceptable danger that we find ROW 1 would pose for its intended users, in the event that we were to grant consent to the additional lots and dwellings sought for the Upper Part of the Site. **That danger overwhelms the proposal's positive ecological effects and acceptable (and we find,**

[25] *Fonterra Co-Operative Group Ltd v Manawatu-Wanganui Regional Council* [2013] NZEnvC 250.

[26] Set out in part in the Brookfields Memorandum at [3.12].

minor) landscape and visual effects. [emphasis added]

30. The context for the finding that the danger "overwhelms" other effects is summarised at [147] of *Calveley* where the Court stated that the deficiencies with ROW 1 were so significant they posed a very high risk of severe, potentially fatal, crashes and while it was a singular failing it went to the heart of the proposal because it's deficiencies could not be resolved through consent conditions (because physical changes necessary to solve the issue would require additional land use consents beyond scope).

31. Thus, while it is correct that a single category of effect might "overwhelm" other effects, unsurprisingly for a singular failing to do so it is likely that it would need to be an effect of high significance which went to the heart of the proposal.

32. With respect to this Application the analysis and assessments on behalf of Oyster demonstrate that there is not a single adverse effect or category of effect of such significance, going to the heart of the proposal, that 'overwhelm' other effects. Rather, the position is that evaluated on a holistic basis, looking over the entire application and a range of effects, this gateway is passed.

33. Consequent on the above, I say Council and AT are incorrect when they assert that effects are more than minor with respect to landscape and visual interface effects, transport effects, roading infrastructure and servicing, and proposed streamworks. These matters are addressed in the responses to comments received prepared by Oyster's expert consultants.

Objectives and Policies Gateway

34. The Panel will be familiar with this test also. It is well established that "contrary to" means "repugnant to".

35. I have already referred to the Environment Court's *Fonterra Co-operative Group* decision. In addition to emphasising the need to address relevant objectives and policies as a whole, it also rightly points out that where objectives and policies seek to achieve certain effects outcomes, conclusions

reached as to the effects of the proposal will be relevant.[27]

36. The Brookfields Memorandum sets out paragraph [74] from the *Akaroa Civic Trust* decision.[28] I agree that passage is helpful.

37. In a similar vein, the obligation to appraise objectives and policies as a whole was addressed by the Environment Court in *Saddle Views*:[29]

> [80] … A key question here is whether a proposal has to be generally relevant not contrary to the objectives and policies of a plan, or whether it must be not contrary to any objective and policy. The former has been understood to be the correct legal position for most of the life of the RMA. There has been a suggestion that two decisions called *Queenstown Central Limited v Queenstown Lakes District Council* throw doubt upon that.
>
> …
>
> [81] … In both decisions, the High Court seems to be suggesting that being contrary to one objective in a proposed plan entails that the second threshold test is failed.
>
> [82] Counsel agreed that this approach by the High Court is inconsistent with the previous approach of the Court of Appeal. For example in *Dye v Auckland Regional Council* the Court of Appeal stated:
>
> "… The view which the Court took was open to it on a fair appraisal of the objectives and policies read as a whole and, in reaching its view, the Court committed no error of law."

38. The approach above has been applied in numerous other Environment Court cases.[30] Every case stands or falls on its own merits, and therefore outcomes in other cases are not transferable. Each case requires a "contextual analysis of the relevant Plan provisions".[31] However, I briefly refer to the section 104 D

[27] In other words, if it is determined that the effects are appropriate, then it follows that the objectives and policies have been satisfactorily achieved.
[28] *Akaroa Civic Trust v Christchurch City Council* [2010] NZEnvC 110.
[29] *Saddle Views Estate Ltd v Dunedin City Council* [2014] NZEnvC 243 at [80] – [82].
[30] For example: *Calveley v Kaipara District Council* [2014] NZEnvC 182, *Man O'War Station Limited v Auckland City Council* [2010] NZEnvC 248.
[31] *Calveley*, at [142].

outcome of some of these cases as it is instructive to the extent that it illustrates the application of the principle referred to above:

a. In *Akaroa*,[32] although ultimately consent was declined in the context of specific matters addressed in the context of section 104, in the context of the section 104D assessment the proposal was held to be contrary to the "central objective" of the transitional district plan, and contrary to "some of the most important policies" in the relevant section of the proposed district plan, but nonetheless was not found to be contrary to the objectives and policies of the proposed district plan as a whole – and therefore the Court determined the proposal "squeezes through the second gateway".

b. In *Man O'War*,[33] the approach adopted in *Akaroa* was approved. Although there were adverse findings from an effects perspective with respect to natural character of the coastal environment and outstanding natural landscapes, the Court accepted that when the relevant plans were read as a whole issues of visual amenity or perceived natural character were not so overwhelmingly important as to outweigh the other considerations. Accordingly, again on the basis that objectives and policies were considered as a whole, the second gateway was passed.

c. In *Calveley*,[34] where ultimately consent was granted in part, although the proposal was found to be contrary to a particular policy the Court found the policy in question was one amongst several others intended to have some influence in the mix of matters in any particular factual context rather than having a particular dominant influence. Thus, when considered in the round the gateway was passed.

39. Before moving from caselaw to assessment, I note by way of caution that the Brookfields Memorandum refers at [3.18] to the *Queenstown Central* decision

[32] *Akaroa*, at [76] – [77].
[33] *Man O'War*, at [124] – [126].
[34] *Calveley*, at [140] – [144].

and specifically by way of footnote to paragraph [37].[35] The last sentence of paragraph [37] in *Queenstown Central* is precisely what led to the Environment Court's observations in *Saddle Views* I have set out above – which reemphasise there must be fair appraisal of the objectives and policies read as a whole as required by the Court of Appeal (in *Dye*).

40. The AEE lodged with respect to this matter contains a full assessment of the proposal against the relevant objectives and policies in the AUP.[36] That assessment determines that:[37]

> "…the proposed development is not contrary to the relevant AUP (OP) objectives and policies."

41. Oyster's expert team has considered in detail the analysis prepared by Ms Bedggood, Ms Haarhof and Ms Smith and confirmed that their conclusions have not altered.

42. In my submission the FUZ provisions do not on a balanced reading of the AUP attract a primacy or have a particular dominant influence when considered in the round. In that respect it is important not to conflate a specific focus on the FUZ provisions arising out of the factual circumstances in play in this matter with the task of a fair appraisal of the objectives and policies read as a whole. While the FUZ provisions may have an elevated focus placed on them in comments and submissions because they are the provisions most in contention as between Council/AT and the Applicant, that should not be confused with those provisions having a special overwhelmingly important status.

Future Urban Zoning

43. There is agreement that the proposal involves urbanisation. The Brookfields Memorandum goes on to address the legal framework by reference to FUZ provisions, case law and precedent/plan integrity issues.

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[35] Q*ueenstown Central Ltd v Queenstown Lakes District Council* [2013] NZHC 817, at [37].
[36] Appendix 8, and a summary at section 11.3.
[37] At 11.3.2.

44. Fundamentally Council's position is that urbanisation must be avoided until a specific planning process is completed (being rezoning). The Brookfields Memorandum places emphasis on the directive language in objective H18.2(4) and policies H18.3(4) and (6) and regards the process (rezoning) as the core focus. In my submission, the Brookfields Memorandum focus on plan change process obscures the real purpose of the FUZ which is to prevent development that would compromise future urbanisation.

45. Brookfields also say[38] "until the zoning pattern and any associated provisions (e.g. precinct provisions) are settled and known, any resource consents granted now for substantial urban development must give rise to the risk of future urban development and urban form being compromised prematurely, and/or lead to results that potentially 'cut across' the outcome of ongoing planning processes." This proposition introduces "risk" as an additional metric (not referred to in the relevant objective or policy) and assumes "substantial" development ahead of rezoning inevitably poses a difficulty. If that were so, then development as proposed would be a prohibited activity.

Relevant FUZ provisions

Chapter B2 RPS Provisions

46. The Brookfields memorandum refers to RPS Policy B2.2.2(3) and Policy B2.2.2(8).

47. Policy B2.2.2(3) is an enabling policy for rezoning, not a directive policy. Structure planning is complete. The rezoning process is already well underway. It is also not a process hindered by this resource consent application.

48. Policy B2.2.2(8) is not offended either. Rural use is enabled in the relevant AUP provisions. The rural uses are subject to a theoretical limitation that they not hinder or prevent the future urban use of the land. This application does not change the uses enabled in the FUZ zone. The latter part of the policy

[38] Brookfields Memorandum, at [4.35].

illustrates the focus on protecting the ability of the land to be used for urban purposes in the future.

49. Most of the RPS objectives and policies are pitched at a high level - with a focus on urban form. Considered in the round (looking beyond only those which reference land zoned future urban) Oyster says this proposal responds successfully to them. Even with a singular focus, this proposal delivers urban form in line with strategic urban outcomes envisaged for the land in question.

50. I note that with respect to the RPS provisions that a plan must give effect to both any relevant national policy statement and the regional policy statement. Given that the Unitary Plan is relatively new, and the subject of an extensive planning process, in my submission it is safe to assume that the Unitary Plan provisions accord with these legal requirements.

51. Therefore, a conclusion that this proposal is deserving of consent by reference to the lower order plan provisions in essence means that it is also deserving of consent by reference to the RPS.

Chapter H18 – FUZ - Case Law

52. The FUZ is a transitional zone. The provisions of the zone are discussed in *Albert Road.* [39]

53. At paragraph [29] of *Albert Road*, the Court set out determinative issues (this was in the context of the Court rapidly reaching the conclusion that the effects of the proposal were no more than minor). They were as follows:

    a. Is the proposal contrary to or materially inconsistent with the Unitary Plan's objectives and policies?

    b. Would granting the consent give rise to undesirable precedent effects or plan integrity issues?

    c. Do the answers to the above questions mean that the proposal

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

should be declined consent, notwithstanding its minor adverse effects on the environment, so as to achieve the RMA's purpose?

54. In *Albert Road* the Court identifies at [60] – [64] the relevant statutory interpretation principles. Those principles apply here.

55. The FUZ objectives and policies of most relevance are referenced by the Court at paragraphs [77] – [78].

56. In my view the following observations/findings by the Court are of interest in the context of this matter:

    a. The Court specifically noted that the zone description for the FUZ recorded that it is a "transitional" zone;[40]

    b. The FUZ is "undoubtedly a holding zone";[41] and

    c. Despite the zone description suggesting a strict approach of avoiding nonrural or urban activities, the Court found otherwise. The discussion at paragraphs [100] – [106] is helpful.

57. The Court identified that a plain reading of H18.1 Zone description would suggest a strict approach of avoiding nonrural urban activities.[42] However after considering the zone rules, the Court concluded that <u>it is not correct to characterise the FUZ as only providing for activities that are "rural in nature</u>".[43] The Court stated:

[40] At [78].
[41] At [98].
[42] *Albert Road*, at [100].
[43] *Albert Road*, at [105].

> [112] 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 H18.4.1 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.

58. Oyster's approach reflects the findings on matters of interpretation and principle above. In that sense the suggestion in the Brookfields Memorandum that the *Albert Road* case is "factually distinguishable"[44] is arguably disingenuous (and certainly unhelpful) – the findings on matters of interpretation and principle are directly applicable here irrespective of the difference in scale as between the propositions being considered.

59. The Court held that the objectives and policies "allow a degree of flexibility that invites a scrutiny of the evidence as to what, if any, material effect any particular [proposal] would have… this calls for informed judgement as to the nature and scope of the effects of the [proposal] in issue".[45]

60. I do accept that as a non-complying activity the proposal will be subject to close scrutiny. Furthermore, it is trite that "things do not begin and end with effects". If effects were the only relevant issue, then consent would have been granted to the *Albert Road* proposal in a substantially shorter judgement.

[44] At [4.19].
[45] At [134].

Analysis of FUZ Issues

61. The key issue then relates to proper interpretation of relevant Unitary Plan objectives and policies, notably understanding there is a degree of flexibility, following which conclusions as to the nature and scope of effects are relevant.

62. Core to the approach adopted by Oyster is that properly understood (as identified by the Court in *Albert Road*), the ultimate caveat on development is whether the realisation of urbanisation is compromised. That is because the overarching intent is to enable and deliver integrated development. A proper assessment of the objectives and policies in the FUZ is that they are intended to enable and facilitate appropriate urban development in the long-term – as opposed to interpreting the provisions as being primarily focused on prevention of development in the short term.

63. At its heart, the difference between Council and Oyster reflects Council's position that the objectives and policies immutably require the plan changes currently underway to be completed first, whereas Oyster say the proposed development in line with the structure plan delivers the very urbanisation which is intended.

64. Turning to the objectives, H18.2(3) aligns with the ultimate caveat identified by the Court in *Albert Road*. Further, I say that Objective (3):

    a. engages with the long-term outcome the land subject and thus engages with the fundamental purpose of the zone and the use to which the land will ultimately be put.

    b. effectively acknowledges that there is a spectrum of effects from subdivision, use or development, and it is only those forms of development which compromise future urban development which are of concern.

65. Oyster says by reference to the above (as already discussed in this submission) that the proposal is not a form of premature subdivision use or development that will compromise future urban development on the land. The proposal is delivering a portion of the future urban development which the structure plan

process has identified is appropriate for Drury.

66. In contrast to Objective (3), Objectives (1), (2) and (4) are focused on the short term. I agree that the proposed development before you is inconsistent with those objectives in the context of it progressing prior to rezoning. However, if the intent and purpose of these objectives read as a whole is to achieve appropriate integrated urban development, then if you find the proposed development consistent with the Structure Plan delivers an appropriate urbanised outcome it cannot be said that the proposal is contrary to the objectives as a package. In my submission the proposed development is appropriate in the context of the broader development strategy set for Drury, noting the development is consistent with:

    a. Various policy planning documents prepared by/agreed between Council and Government which identified Drury as a key focus for future development;

    b. The infrastructure improvements (including roading) identified for Drury, and in the process of being implemented;

    c. The Drury Structure Plan; and

    d. The PPC 50 provisions and the integrated form of development provided for in the associated Drury East Plan Changes.

67. I add that if the "avoid" terminology in Objective (4) was intended to be a cast iron prohibition on urbanisation prior to rezoning, then it would follow that such urbanisation would be a prohibited activity. It is not.

68. Policies H18.3(1)-(6) are engaged. I commence by observing that if the Brookfields Memorandum was correct when it suggests that the "strong and directive" language in Objectives H18.2(4) and Policies H18.3(4) and (6) means that urbanisation must be "prevented"[46] then one would expect those policies which give effect to Objective (4) would firmly close the door on <u>all</u>

[46] At [4.33].

urbanisation. That is not the case (as identified in *Albert Road*).

69. Policies H18.3(1) and (2) are enabling. The Oyster proposal does not advance use, development or activities which rely on these policies – but neither is it contrary to them.

70. Policy (3) requires the maintenance of rural character and amenity (effectively during the interim period prior to rezoning). This submission has already addressed the "environment" and referenced the landscape and character assessment undertaken on behalf of Oyster. The proposal before you is not consistent with this policy. I do say that the interim nature of the policy has relevance when considering the objectives and policies as a whole.

71. I observe above that Policy (4) does not prevent urbanisation. The avoid terminology in the policy is expressly conditional – to be contrary to Policy (4) the activity in question would need to result in both fragmentation of land and compromise of future urban development. Oyster says this application does neither. In that regard the subdivision outcomes sought are inherent in the delivery of future urban development which strategic planning documents envisage for the land.

72. In a similar vein, with respect to Policy (5) more than one dwelling will be established on the parent site[47] - that is an outcome inherent in the delivery of future urban development which strategic planning documents envisage for the land.

73. Policy (6) sets out a list of effects avoided. Like Policy (4) the avoid terminology in the policy is expressly conditional. These effects are assessed in detail in the Application lodged by Oyster, and they are not repeated here. The wording of Policy (6) is an example of a scenario where objectives and policies seek to achieve certain effects outcomes, and therefore conclusions reached as to the effects of the proposal will be relevant. If you find that the proposal as advanced will not result in one or more of the effects listed in Policy (6) – which I say is the correct conclusion – then the proposal will not

[47] The subdivision proposed will result ultimately in no more than one dwelling per site.

be contrary to Policy (6).

74. The potential effects of the proposal are addressed in the evidence/reports on behalf of Oyster.

75. The application is for an activity which aligns with and delivers on the Structure Plan outcomes.

Objectives and Policies Summary

76. The biggest hurdle for this application to surmount relates to objectives and policies, both in terms of passing the second gateway of section 104D, and by reference to the assessment required pursuant to section 104.

77. To refine this observation, it is objectives and policies from the FUZ which are the subject of particular close scrutiny.

78. I commence by noting what is required is engagement with the detail rather than simplistic focus.

79. A deeper dive into the FUZ planning provisions reveals the main "evil" which the plan is seeking to avoid is development which limits or compromises future options.

80. In this case, relevant to these objectives and policies, in my submission:

    a. The nature of the proposal and the characteristics of the environment mean that the proposal will not compromise future urban development – rather it will deliver what is intended;

    b. The Site already hosts a limited number of consented activities which are not rural;

    c. It is unlikely that new rural activities of any significance would establish on or surrounding the Site given the type of activity already in place, and the FUZ and Structure Plan commitment that the area will transition to an operative urban zone.

81. The development proposed has no material implications for any structure

plan exercise because that is already completed.

82. With respect to the Site's capacity to be used and developed for rural activities, that capacity is limited in any event, and a real-world assessment suggests that no meaningful rural production activity is likely.

83. Future urban development of the wider Auckland region or of the FUZ in proximity to the Site will not be compromised by the proposed activity taking place. Indeed, the proposal aligns with strategic planning outcomes intended for this broader canvas.

84. As addressed in evidence/reports on behalf of Oyster, due to its location and the manner in which the activity will be carried out, the proposal does not present a potential reverse sensitivity risk.

85. Overall, there is a case to say that those Objectives and Policies directed at the long-term ultimate use of the land are ones of more significance in the context of a proposal which avoids compromising future urban outcomes (and thus avoids the "evil" which the more short-term Objectives and Policies are concerned to address). In addition:

    a. The essence of the FUZ objectives and policies is to enable identified land to be urbanised in a planned, integrated and consistent manner;

    b. The Drury Structure Plan process addresses that ultimate outcome;

    c. The Application is consistent with both the Structure Plan and the PPC50 provisions; and

    d. In the circumstances none of the adverse effects that the policy framework is endeavouring to avoid or manage will arise in this case.

Precedent/Plan Integrity

86. The Brookfields Memorandum speaks to precedent and plan integrity

concerns. In response, I say the starting point is:

a. The granting of a resource consent has no precedent effect in the strict sense.[48] It is obviously necessary to have consistency in the application of legal principles and all resource management applications must be decided in accordance with a correct understanding of those principles.

b. In factual terms, however, no two applications are ever likely to be the same albeit one may be similar to another. The most that can be said is that the granting of consent may well have an influence on how another application should be dealt with. The extent of that influence will depend on the extent of the similarities.

c. Linking the question of effects of granting consent to this application to future applications of a like nature is a misapplication of the law as explained by the Court of Appeal in *Dye*.

d. It was made clear in *Rodney District Council v Gould*[49] that it is not necessary for a proposed non-complying activity to be truly unique before planning integrity ceases to be a potentially important factor;

e. In *Blueskin* the Court found that:[50]

> [48] Only in clear cases, involving an irreconcilable clash with the important provisions, when read overall, of the District Plan and a clear proposition that there will be materially indistinguishable and equally clashing further applications to follow, will it be that Plan integrity will be imperilled to the point of dictating that the instant application should be declined.

87. In this case Oyster submits there is no irreconcilable clash with the important provisions of the Unitary Plan (when read overall) by reference to the particular details of this proposal and the environment properly understood. There is a reasoned and appropriate basis upon which this proposal can be

[48] *Dye v Auckland Regional Council* [2002] 1 NZLR 337 at [32].
[49] [2006] NZRMA 217.
[50] At [48].

consented in advance of live zoning of FUZ land.

88. In my submission this proposal is outside the generality of cases. In the context of addressing clause 31 (1) (d) of Schedule 6 above, I referred to a range of factors as relevant other matters which also have relevance as distinguishing characteristics of this proposal. In addition to the site's location and characteristics, in summary these include:

    a. The national and regional planning context;

    b. The proposed development's consistency with the Drury Structure Plan and PPC 50;

    c. The well-advanced Drury East Plan Changes;

    d. The integration between Oyster's proposed development and those advanced by Kiwi and Fulton Hogan; and

    e. The Minister's decision to refer the proposed development to a fast track process under the FTCA, which has a purpose to urgently advance development and employment opportunities.

89. For these reasons "the precedent concern" identified by Council is significantly overstated. This is not a case where granting the application would give rise to "materially indistinguishable and equally clashing further applications" that could generate precedent effects.

90. From a plan integrity perspective many of the factors identified above are relevant. At a fundamental level, the proposed development is consistent with the Drury Structure Plan, and it delivers urban development ultimately anticipated by the Structure Plan and the transitional zone. The distinguishing characteristics engaged here provide a principled basis for a decision to approve the proposed development and thereby answer any concerns about plan integrity.

Integration of land use/urbanisation with infrastructure

91. An argument is advanced in Part 5 of the Brookfields Memorandum that the proposed development should be declined consent on the basis that direct adverse transport effects will arise which are not satisfactorily addressed by transport projects proposed by Oyster, and further there is a need for additional transport infrastructure which is unfunded.

92. In many respects Council's position set out in this matter is a recycled version of that advanced during the Drury East Plan Change hearings.

93. While Oyster is required to demonstrate that the effects of its proposal on the transport network are mitigated, an applicant for resource consent does not bear responsibility to solve wider infrastructure (traffic) problems. In that regard I refer to *Landco Mt Wellington Limited v Auckland City Council*[51]. In *Landco* the Court considered proposed residential development in what is now known as Stonefields (located at Mt Wellington in Auckland) and the potential for adverse effects on the roading network arising from traffic which would be generated.

94. Commentary in *Landco* relevant to the issue before you is set out at paragraphs [9] – [12] and at paragraph [18] (emphasis added):

> [9] 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.
>
> [10] 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.

[51] Environment Court decision A35/2007.

[11] 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.

[12] 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.

…

[18] 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.**

95. The principle set out above is not completely open-ended, to the extent that while the applicant is not required to resolve existing infrastructure problems "neither should it add significantly to them. The question is always one of degree depending on the facts of each case.".[52]

[52] *Laidlaw College Inc v Auckland Council* [2011] NZEnvC 248.

96. Oyster's position is that the transport assessments it has advanced establish the facts of this case and those facts support the grant of consent. The transport assessments on behalf of Oyster disagree with the report prepared on behalf of Council and AT by Mr Prosser. The outcome of caucusing on transport matters during the Drury East Plan Changes was that Mr Prosser's views represented an outlier. In my submission it remains the case that the better transport evidence before you is that on behalf of Oyster.

97. The Brookfields Memorandum refers to several cases at [5.13] – [5.22]. They are not particularly helpful. *Coleman*[53] and *Bell*[54] predate *Landco* and *Laidlaw* and are addressing a scenario where direct effects of the proposals were not being mitigated. *Foreworld*[55] involved the appellants seeking Council provide significant levels of servicing for roading, stormwater and wastewater for an ad hoc location.

98. The reference to *Norsho*[56] is rather odd. I appeared as one of the Counsel in that appeal and therefore know the case well. The matters addressed in *Norsho* are of limited assistance here.

99. The Brookfields Memorandum refers at [5.20] to paragraph [88] of *Norsho* - paragraph [88] is discussing road user charges. That is not of relevance. To the extent the paragraph is makes a broader comment in passing about whether the Court has any power to direct how Council spends public money, that is not a live issue in this matter.

100. It is true that the Court stated in *Norsho* that resource consent can be declined where the effects of the new activity would *"exceed the capacity of the site and the surrounding environment"*. That is essentially a conventional proposition as far as it goes – *Norsho* does not include observations which impose an approach different to that set out in *Landco* and *Laidlaw*.

101. Ultimately *Norsho* was resolved with respect to road upgrade matters on the

[53] *Coleman v Tasman District Council* [1999] NZRMA 39.
[54] *Bell v Central Otago District Council* C4/97.
[55] *Foreworld Developments Limited v Napier City Council* W08/2005.
[56] *Norsho Bulc Ltd v Auckland Council* (2017) 19 ELRNZ 774.

basis that although significant damage would be caused to the roads in question by the activity, the consent would be granted, and it was for Council/AT to deal with road upgrading through other options.

102. Drury is an important growth node for Auckland, identified as such in strategic planning documents. A structure plan process has been undertaken and a formal Structure Plan adopted. There has been extensive assessment of the infrastructure required to support development of Drury as a whole. This is not an ad hoc application. Against that backdrop, Oyster along with Kiwi Property and Fulton Hogan have carefully analysed the infrastructure requirements for the development proposed and as a group are satisfied that they have the resources and experience necessary to provide transport upgrades which appropriately service the development and mitigate adverse effects, and also make appropriate contributions to other required infrastructure upgrades.

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103. I agree with paragraphs [7.1] – [7.3] of the Brookfields Memorandum.

Landscape/Visual Effects

104. My submissions with respect to the proper assessment of "environment" touch upon the landscape/visual effects assessment.

105. I accept that temporary effects still come within the term "effect" as defined in the RMA. However, the scale, intensity, duration or frequency of any effect are factors relevant to an assessment of its significance.

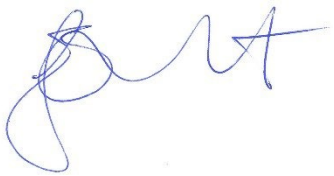
106. It is also the case that any assessment of whether landscape/visual effects are adverse is a subjective undertaking specifically tied to human experience of the effect and their response to landscape change. As already canvassed in this submission, change of itself is not inherently negative – thus, the context of that change is critical to any assessment. That context includes the extensive and public structure planning process for Drury, the clear

identification of Drury as a node for urbanisation, the commencement of infrastructure works in and surrounding Drury to enable further urbanisation, and the buildout of new urban areas in Drury West and Drury South.

107. In my submission there is no reasonable expectation that rural character and amenity (such as it is – recalling the assessment on behalf of Oyster identifies relatively low landscape values and sensitivity associated with the site and local area, with the site being a relatively degraded, modified, rural lifestyle environment that lacks any significant landscape features, and exhibits generally relatively low-moderate visual amenity) will endure. Against that backdrop I say the landscape and visual effects are expected and unremarkable.

Conclusion

108. I submit the proposal before you has a pathway through the gateway tests of section 104D and then section 104. That pathway is evident consequent on a proper and lawful identification of the environment against which effects must be assessed, a clearheaded and accurate identification of what those effects are, and then a balanced and comprehensive consideration of applicable Unitary Plan provisions.



Jeremy Brabant

Counsel for Oyster Capital

Dated 19 April 2022