BERRYSIMONS
ENVIRONMENTAL LAW

2 May 2019

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Dear Charles

ROTOKAURI NORTH – APPROPRIATE PROCEDURE FOR PROCESSING OF GREEN SEED'S PRIVATE PLAN CHANGE REQUEST

1. INTRODUCTION

1.1 On behalf of Green Seed Consultants Limited ("Green Seed"), Mark Tollemache has requested our advice regarding the appropriate procedure for the processing of Green Seed's private plan change request ("PPC") to the Hamilton City Council ("HCC") for the Rotokauri North development. In particular, we have been asked to address:

(a) What avenues are legally available to HCC in terms of its initial decision on how the PPC should be dealt with;

(b) Which of those is the most appropriate avenue in the circumstances; and

(c) Assuming HCC decides to either accept or adopt the PPC request, whether the request can legally be progressed on a limited notified basis.

Context

1.2 Green Seed is a subsidiary of your umbrella development company, Ma Development Enterprises ("MADE"). Green Seed's Rotokauri North development will comprise a 1450-2000 dwelling residential community. The land to be developed consists of approximately 133.11ha in Rotokauri North, located on the edge of HCC's boundary with Waikato District. The PPC will relate to a further 7ha of additional landholdings in the Rotokauri North area to provide for an integrated planning outcome, establishing a PPC area of approximately 140ha (together, "the PPC area").

1.3 On 10 May 2018, HCC resolved to recommend that Green Seed's application to have the PPC area declared a Special Housing Area ("SHA") be approved in accordance with HCC's Hamilton Special Housing Area Policy, the Hamilton Housing Accord and the Housing Accords and Special Housing Areas Act 2013 ("HASHAA"). As at the date of this advice, HCC's recommendation to declare the land a SHA is still to be confirmed via gazette notice.

1.4 The PPC area is located within the Future Urban Zone ("FUZ") and within the existing Rotokauri Structure Plan ("RSP") area in the operative Hamilton City District Plan ("District Plan"). Accordingly, it will require rezoning before it can be developed for residential purposes. Green Seed has therefore prepared a request for a PPC to achieve that rezoning, which has recently been lodged with HCC.

1.5 We understand that Green Seed intends to provide our advice to Council officers in conjunction with lodging the request for the PPC in order to assist their assessment of the request and we have borne that in mind in drafting it. We are also happy to discuss this advice directly with HCC's legal counsel, Mr Muldowney.

Purpose and scope of advice

1.6 Against that background, the purpose of this advice is to address the correct legal approach to the issues outlined above. In doing so, our advice covers the following:

(a) Background and context (Section 3);

(b) Statutory framework and factors relevant to processing Green Seed's request for a PPC (Section 4);

(c) Risk of the PPC being rejected (Section 5);

(d) Ability for HCC to process the PPC as a resource consent (Section 6);

(e) Appropriateness of adopting or accepting the PPC (Section 7);

(f) Availability of the limited notification process (Section 8); and

(g) Conclusions (Section 9).

1.7 We provide a summary of our advice in Section 2.

2. SUMMARY

Accepting the PPC is the most appropriate processing avenue

2.1 Under clause 25 of Schedule 1 to the Resource Management Act 1991 ("RMA")[1], HCC is required to deal with the PPC request by either:

(a) Rejecting the request;

(b) Converting the request to a resource consent application;

(c) Adopting the request as a Council plan change, either in whole or in part; or

(d) Accepting the request as a PPC, either in whole or in part.

2.2 As regards the availability and appropriateness of each of those options for dealing with the PPC, our view is as follows.

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[1] Assuming that Green Seed fully responds to any further information requests under clause 23 of Schedule 1 to the RMA, so that HCC is not entitled to reject the PPC in accordance with clause 23(6) of Schedule 1 to the RMA. We also note that given the date on which the PPC was lodged, all references to the RMA in this advice are to the provisions as amended by the Resource Legislation Amendment Act 2017 ("2017 Amendment Act").

No ability to reject the PPC

2.3 Clause 25(4) of Schedule 1 to the RMA establishes limited circumstances in which PPC requests can be rejected, namely that:

(a) The request is frivolous or vexatious;

(b) The substance of the request has been considered within the last two years and has been given effect to, or rejected by, the local authority or the Environment Court;

(c) The PPC is not in accordance with sound resource management practice;

(d) The PPC request would make the relevant plan inconsistent with Part 5 of the RMA; and

(e) The plan to be changed by the PPC request has been operative for less than two years.

2.4 As to whether there is a valid basis for rejecting Green Seed's PPC request on the basis of those provisions and having reviewed the PPC documentation that has been lodged with HCC, our assessment is that:

(a) The PPC request is clearly not frivolous or vexatious.

(b) Although issues as to where Hamilton's growth should be accommodated were considered during the hearings and appeals on the District Plan, those hearings were completed in October 2014 and all appeals relating to the FUZ and RSP were resolved by October 2016. Further, the consideration of those wider strategic-growth issues only involved a high-level assessment as to the appropriate nature and form of urban growth within the Rotokauri North area, as required to determine the RSP. The PPC represents the next stage of implementing the RSP, rather than a reconsideration or attempt to overturn the decisions that were made in that regard. It is therefore unlikely that HCC could validly reject the PPC on the basis that the substance of the PPC has been considered within the last two years.

(c) It would not be appropriate for the Council to reject the PPC request as not being in accordance with sound resource management practice, given that:

(i) The PPC is supported by comprehensive expert assessments which demonstrate that Rotokauri North is an appropriate location for residential development, consistent with the policy directives of both the *Future Proof Strategy: Planning For Growth*, November 2017 ("Future Proof") and the District Plan.

(ii) As also outlined in the expert assessments that support the PPC, the Rotokauri North development will achieve the sustainable management purpose of the RMA.

(iii) The PPC does not seek to change plan provisions that are about to be superseded. While the PPC relates to land that has recently been subject to a structure planning exercise, the PPC does not seek to overturn or enable development that is inconsistent with the RSP. Rather, it is the next necessary step to implementing the RSP.

(iv) Green Seed is not seeking to rezone the land without providing the necessary infrastructure to service the proposed development. The expert reports accompanying the PPC demonstrate that the proposed development will be adequately served by infrastructure.

(d) Given that the District Plan, Future Proof and the RSP identify Rotokauri as being suitable for residential development of the nature Green Seed is proposing, the PPC does not make the District Plan inconsistent with Part 5 of the RMA (regarding the purpose and contents of planning instruments including district plans).

(e) Although the District Plan which Green Seed is seeking to change will have been fully operative for less than two years, the Council does not have an unfettered discretion to reject PPC requests on this ground but must exercise the discretion in a principled manner, consistent with sound resource management practice.

Inappropriate to deal with the PPC as a resource consent application

2.5 We understand that there has been no suggestion that HCC may deal with the PPC by converting it to a resource consent application.

2.6 In any event, we consider this would not be an appropriate or reasonable way of dealing with the PPC. This is on the basis that dealing with the PPC as a resource consent application would be contrary to good planning and resource management practice for the following reasons:

(a) Green Seed is proposing a large-scale urban development which will unavoidably have more than minor effects on the environment and is inconsistent with the objectives and policies of the PPC area's current zoning as FUZ.

(b) Proceeding with the development by way of a resource consent, without having the land rezoned for residential purposes, could potentially establish a precedent that may undermine the integrity of the District Plan.

(c) Green Seed has sought that the land be declared a SHA, so that it can utilise the consenting process under the HASHAA once its land is rezoned. As noted, HCC has resolved to accept this request. Determining that the PPC should instead be progressed as a resource consent under the RMA would be inconsistent with HCC's prior acceptance that the PPC area should be declared a SHA.

PPC request should be accepted

2.7 HCC is empowered to determine that it should deal with the PPC by either accepting or adopting it. In the present circumstances, we understand that Green Seed would prefer that PPC is adopted by HCC, on the basis that this process:

(a) Signals the Council's endorsement of and support for addressing the need for housing supply in Hamilton, via the Rotokauri North development; and

(b) Would result in the PPC being a "proposed plan" in terms of section 43AAC of the RMA. This in turn means that agencies considering applications for and submissions on Qualifying Developments ("QDs") under section 34 of the HASHAA are required to have regard to the PPC. By contrast, PPC requests that are simply accepted for processing are not included in the definition of a "proposed plan" for the purposes of the RMA. The ability to have regard to the PPC for the purposes of consenting processes under the HASHAA may therefore be less certain. It may also result in design outcomes advanced by the PPC being given considerably less weight than outdated outcomes expressed in the RSP.

2.8 However, we also understand that HCC's preference is that the PCC be accepted, rather than adopted. In our view, this avenue is also legally available to HCC, should it consider that option is more appropriate.

2.9 If HCC decides to deal with the PPC other than by adopting or accepting it (and in particular, if it tried to reject the PPC), this would be subject to challenge by way of appeal to the Environment Court.

The PPC can be processed on a limited notified basis

2.10 If the PPC is adopted, HCC is required[2] to notify the PPC in accordance with either clause 5 or 5A of Schedule 1 to the RMA within 4 months of the date on which it is adopted.

2.11 If the PPC is accepted, HCC is required[3] to process the PPC in accordance with Part 1 of Schedule 1 (which includes clauses 5 and 5A), with all necessary modifications and except as otherwise modified by the remaining sub-clauses of clause 29. In our view, none of these provisions preclude the ability to limited notify a PPC request that is accepted rather than adopted.

2.12 Accordingly, we consider that the limited notification option is available for all PPC requests, whether the request is adopted or accepted. We note that, consistent with this conclusion, the Auckland Council has used the limited notification provisions for Plan Change 8 ("PC8"), which was a PPC that the Council accepted (not adopted)[4].

2.13 Under clause 5A(2) of Schedule 1 to the RMA, a local authority may give limited notification of a PPC if it is able to identify all the persons "directly affected" by the PPC. The only judicial guidance as to the meaning of "directly affected" in this context is that it should be applied on a case-by-case basis.

2.14 In the absence of any further guidance, we consider that it is appropriate to apply the following principles in determining who may be "directly affected" by Green Seed's PPC request:

(a) To determine the category of people "directly affected" by a PPC request, it is not appropriate to consider whether they are "affected persons" in respect of a resource consent application because the statutory tests are intentionally different.

(b) That said, it will still be relevant to consider the nature of the effects that may arise as a result of the PPC, in considering the extent of directly affected parties. For example, in making its notification decision on PC8, the Auckland Council considered all those who could potentially suffer amenity and / or traffic effects as a result of the proposed re-zoning to be "directly affected" parties[5].

(c) It is unlikely that all parties that will be directly affected by a PPC request can be identified, where a PPC covers areas accessed by, or includes rules that affect, the general public.

2.15 In the present circumstances, we consider that it is possible to identify all persons who may be "directly affected" by Green Seed's PPC request for the following main reasons:

(a) The PPC land is already zoned FUZ and subject to the RSP, both of which went through a robust submissions and hearing process in accordance with Schedule 1 to the RMA. This process has determined that the land is appropriate for urban development. Thus, the PPC relates to the specific methods for implementing this development, rather than being an opportunity to revisit the issue of whether the land can or should be used for residential purposes.

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2 Clause 25(2)(a)(i) of Schedule 1 to the RMA.
3 Clause 29(1) of Schedule 1 to the RMA.
4 PC8 (Private): King's College, Notification Assessment, Auckland Council, 24 November 2017.
5 Ibid.

(b) The PPC is supported by a comprehensive suite of expert assessments which outline the potential effects of the proposed re-zoning and how these are proposed to be addressed. Having regard to these reports, it is possible to identify the immediately adjacent landowners and other key stakeholders (for example, the New Zealand Transport Agency etc.) who may be directly affected by the PPC.

(c) The PPC land is already subject to the Rotokauri Integrated Catchment Management Plan ("RICMP") and is supported by a draft sub-catchment Integrated Catchment Management Plan ("ICMP") to implement specific stormwater solutions.

(d) The PPC does not:

(i) Apply to any publicly available land or areas; or

(ii) Include any rules that manage resources with communal value.

2.16 On that basis, we are confident that the persons who will be "directly affected" by the PPC is a readily identifiable category. We therefore consider that HCC planners can safely conclude the request can appropriately be processed on a limited notified basis.

2.17 The RMA does not contain any provisions for objecting to or appealing a local authority's decision regarding notification of a PPC request. Should Green Seed be unhappy with HCC's notification decision, the only legal avenue to challenge that decision is by way of application to the High Court for judicial review.

3. BACKGROUND AND CONTEXT

3.1 In 2007, HCC's Growth Model indicated that it was necessary for additional land to be brought forward to meet the City's ongoing development needs. Rotokauri, comprising approximately 1,000 hectares at Hamilton's north-west fringe, was identified as appropriate for future urban development at this time.

Rationale for the Rotokauri North development – the need for housing

3.2 In terms of the need for rapid expansion of housing in Hamilton, Hamilton's Housing Market and Economy Growth Indicator Report (March 2017) notes that:

(a) Over 2015 and 2016, Hamilton has experienced its strongest residential housing demand since reporting began, both in the volume of new dwellings and average sale prices;

(b) Housing affordability has deteriorated and Hamilton is now less affordable than it was during the last peak in 2007;

(c) Wages have not been growing at the same rate as house prices and the average house price for the 12 months to February 2017 had risen 17% compared with a year earlier; and

(d) Hamilton's average house price growth has exceeded that of the average growth for both Auckland and New Zealand respectively.

Suitability of the PPC area for urban development

3.3 HCC has prepared the RSP to guide the long-term development of the Rotokauri area. The RSP provides a high level and logical framework to guide subsequent development

of the PPC area. Green Seed is supplementing this with a more detailed master planning process to determine the final development pattern.

3.4 As recognised in the RSP, the PPC area has a number of attributes which make it ideal for residential development. Importantly, the PPC area exists in large enough parcels to allow investors to agglomerate it into an overall development area. As with MADE's flagship Auranga project in Auckland, this means MADE / Green Seed can lead and fund the provision of infrastructure, rather than having to wait for HCC to provide infrastructure trunk mains in the future.

3.5 A significant amount of work has already been undertaken by HCC to confirm the land is suitable for residential development. In particular, the RICMP has already proven the feasibility of the land to be urbanised.

3.6 The PPC area is currently in a mix of rural residential properties and medium to larger scale sites associated with pastoral and horticultural activities. Investors associated with Green Seed have secured or have options on approximately 133ha of the PPC area, which falls into distinctive hydrological catchments.

3.7 Utilising the work already undertaken for the RICMP, Green Seed has been investigating the feasibility of servicing the PPC area, to enable its development to be advanced ahead of the time frames identified in HCC's various strategic documents for Rotokauri. This investigation has included Green Seed purchasing land to enable stormwater to be managed (through securing the downstream sites) and for infrastructure and roading connections to be achieved (though securing sites with key road frontages).

3.8 The upshot is that:

(a) The PPC area can be serviced and developed in advance of HCC's programme, reducing costs to HCC and the community, while enabling much needed housing development to be brought forward; and

(b) The Rotokauri North development is not reliant on any funding from the Housing Infrastructure Fund nor on any other works being completed by third parties, which may cause delays in construction of the necessary infrastructure to deliver housing.

3.9 HCC sought public feedback on Green Seed's SHA application during a two-stage consultation process from November 2017 to January 2018. The New Zealand Transport Agency, Waikato-Tainui and the Ministry of Education all provided feedback which either supported the proposal or confirmed that there was no impediment to the PPC area being declared a SHA.

Provision of affordable housing

3.10 MADE / Green Seed is a strong advocate for the HASHAA's focus on housing supply and affordable housing. For Auranga, MADE has made a public commitment to deliver a range of housing opportunities and price points beyond the minimum statutory requirements. Auranga is delivering 25% of the housing product at a size of three bedrooms or less, and voluntarily providing a total of 15% of homes at the Auckland affordability standard. In short, MADE has demonstrated its track record of being able to deliver affordable housing through Auranga.

3.11 HCC has sought that SHAs achieve 10% affordable housing. For Green Seed's Rotokauri North development, this equates to up to 200 affordable homes.

Why a PPC request is required for the PPC area

3.12 Sections 61(1) and (2) of the HASHAA only provide for plan changes to be made under that legislation so that resource consent applications can be made for activities that

would otherwise be a prohibited activity under the relevant plan. The existence of prohibited activities is therefore a prerequisite to being able to apply to rezone the land for residential use under the HASHAA.

3.13 Despite HCC's recommendation that the PPC area be declared a SHA, the District Plan does not contain any prohibited activities.

3.14 Green Seed could lodge a series of QD applications under the HASHAA while the land is still zoned Future Urban. However, that approach is not considered appropriate, because residential development would be contrary to the policies and objectives of the FUZ, the purpose of which is to "control subdivision and land use, and...avoid fragmentation of the land", in order to preserve its potential for future urban development.

3.15 In any event, HCC would still need to introduce a "tidy up" plan change at some point, to give the PPC area a live urban zone. In addition, QD resource consents are limited to a one-year expiry under the HASHAA and given that it will take 10 to 15 years to complete the development of Rotokauri North, a longer-term planning approach is warranted.

3.16 On this basis, both HCC and Green Seed would prefer that a PPC be lodged and progressed concurrently with applications for QDs.

4. STATUTORY FRAMEWORK AND FACTORS RELEVANT TO PPC REQUEST

Requirements for requesting a PPC

4.1 Under clause 21 of Schedule 1 to the RMA, any person may lodge a request for a PPC. Clause 21 provides as follows:

> *"**21 Requests***
>
> *(1) Any person may request a change to a district plan or a regional plan (including a regional coastal plan).*
>
> *(2) Any person may request the preparation of a regional plan, other than a regional coastal plan.*
>
> *(3) Any Minister of the Crown or any territorial authority in the region may request a change to a policy statement.*
>
> *(3A) However, in relation to a policy statement or plan approved under Part 4 of this schedule, no request may be made to change the policy statement or plan earlier than 3 years after the date on which it becomes operative under clause 20 (as applied by section 80A(2)(a)).*
>
> *(4) Where a local authority proposes to prepare or change its policy statement or plan, the provisions of this Part shall not apply and the procedure set out in Part 1, 4, or 5 applies.*
>
> *(5) If a request for a plan change is made jointly with an application to exchange recreation reserve land (as permitted by section 65(4A) or 73(2A)), the application must be—*
>
> *(a) Processed, with the request for a plan change, in accordance with this Part, other than clauses 27 and 29(4) to (8); then*
>
> *(b) Decided under section 15AA of the Reserves Act 1977."*

4.2 Clause 22 of Schedule 1 to the RMA requires that a PPC request must:

(a) Be made to the appropriate local authority in writing.

(b) Explain the purpose of and reasons for the proposed change.

(c) Describe any anticipated environmental effects of the proposed change, taking into account clauses 6 and 7 of Schedule 4 to the RMA.

(d) Include an evaluation in accordance with section 32 of the RMA for the proposed change.

4.3 The Council may request further information and commission reports in respect of the plan change request and modify the request (with the applicant's permission) as a result[6].

Council's options for dealing with PPC request

4.4 Under clause 25 of Schedule 1 to the RMA, HCC has 30 working days after receiving the necessary information to consider the PPC request and how it should be dealt with. In that regard, the Council can decide to:

(a) Adopt the request as a Council plan change, either in whole or in part[7];

(b) Accept the request as a PPC, either in whole or in part[8];

(c) Convert the request to a resource consent application; or

(d) Reject the request.

4.5 These are HCC's only options for dealing with the PPC and it must decide to use one of them. In the circumstances, Green Seed's preference is that the PPC be adopted by HCC and processed as a Council-initiated plan change, for the reasons outlined in Section 7 below. However, in our view HCC is also legally able to accept the PPC request, if it considers that more appropriate.

4.6 The Council's ability to reject a PPC request is limited to the grounds set out in clause 25(4) of Schedule 1 to the RMA, which states:

> *"(4) The local authority may reject the request in whole or in part, but only on the grounds that—*
>
> *(a) The request or part of the request is frivolous or vexatious; or*
>
> *(b) Within the last 2 years, the substance of the request or part of the request—*
>
> *(i) Has been considered and given effect to, or rejected by, the local authority or the Environment Court; or*
>
> *(ii) Has been given effect to by regulations made under section 360A; or*

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6 Clauses 23 and 24 of Schedule 1 to the RMA.

7 This implies the Council generally supports the proposal and recognises the extensive work that has already been undertaken by the applicant. It also means Council would become responsible for the processing costs. However, the Council then gains complete control of the process and could theoretically modify or withdraw the request at a later stage without the applicant having any say in the matter.

8 This means that the Council agrees that the PPC can proceed to notification. It remains a PPC with Council administering the legal process and the applicant generally bearing the costs. However, there may be some agreement (or Council policy) about cost sharing where the plan change request includes an element of public benefit / interest.

(c) The request or part of the request is not in accordance with sound resource management practice; or

(d) The request or part of the request would make the policy statement or plan inconsistent with Part 5; or

(e) In the case of a proposed change to a policy statement or plan, the policy statement or plan has been operative for less than 2 years."

4.7 If HCC rejects the PPC request on any of the grounds included in clause 25(4) of Schedule 1 to the RMA, Green Seed has the right to appeal that decision to the Environment Court under clause 27(1A)(d) of Schedule 1 to the RMA.

Criteria for determining PPC requests

4.8 If the PPC is adopted by HCC, then in accordance with clause 25(2)(a) of Schedule 1 to the RMA:

(a) HCC must notify the request in accordance with clause 5 or 5A of Schedule 1 to the RMA within 4 months of the request being adopted;

(b) The provisions of Part 1 or 4 of Schedule 1 to the RMA must apply; and

(c) The request has legal effect once notified.

4.9 If the PPC is accepted under clause 25(2)(b) of Schedule 1 to the RMA, the procedure under clause 29 of Schedule 1 to the RMA applies, which (as relevant) states:

*"**29 Procedure under this Part***

(1) Except as provided in subclauses (1A) to (9), Part 1, with all necessary modifications, shall apply to any plan or change requested under this Part and accepted under clause 25(2)(b).

(1A) Any person may make a submission but, if the person is a trade competitor of the person who made the request, the person's right to make a submission is limited by subclause (1B).

(1B) A trade competitor of the person who made the request may make a submission only if directly affected by an effect of the plan or change that—

(a) Adversely affects the environment; and

(b) Does not relate to trade competition or the effects of trade competition.

..."

4.10 In either case, the PPC would be determined having regard to the matters outlined in sections 31, 32 and 72 to 76 of the RMA, to the extent these are relevant to the PPC[9]. In summary, these include whether the PPC:

(a) Accords with HCC's functions under section 31 of the RMA and will assist HCC in carrying out those functions so as to achieve the RMA's purpose;

(b) Accords with any regulations (including national environmental standards);

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[9] As confirmed in *Colonial Vineyard Limited v Marlborough District Council* [2014] NZEnvC 55 (EC), at paragraph 17.

(c) Gives effect to any relevant national or regional policy statement (where those are operative);

(d) Has regard to:

(i) Other higher order planning documents;

(ii) Management plans and strategies under other Acts; and

(iii) The actual and potential effects of activities on the environment;

(e) Is the most appropriate way to achieve the District Plan's objectives, by identifying other reasonably practicable options for achieving those objectives and summarising the reasons for deciding on the provisions (including zoning) sought by the PPC; and

(f) Contains a level of detail that corresponds to the scale and significance of the environmental, economic, social and cultural effects that are anticipated from implementing the PPC.

4.11 Clauses 10 and 29(4) of Schedule 1 to the RMA respectively provide that after considering the PPC and undertaking a further evaluation of the PPC in accordance with section 32AA of the RMA, HCC:

(a) May decline or approve the PPC and may make modifications if approving the PPC; and

(b) Must give reasons for its decision.

5. RISK OF PPC BEING REJECTED UNDER CLAUSE 25(4)

5.1 There is a presumption that PPC requests which have "more than minimal planning worth" should be accepted for processing so that they may be determined on their merits[10]. As the High Court noted in *Malory Corporation Limited v Rodney District Council,* this means that[11]:

> *"...unless one of the limited rejection grounds in clause 25(4) exists, the request must proceed to public notification, submissions, and a hearing in accordance with the well-established procedures of the Act."*

5.2 As noted, the grounds for rejecting a PPC in clause 25(4) of Schedule 1 to the RMA are relatively limited. We address each of those grounds as follows.

Clause 25(4)(a) - Is the PPC "frivolous or vexatious"?

5.3 Having reviewed the final PPC documents, we do not consider Council can reject the PPC on the basis that it is frivolous or vexatious[12]. The PPC is a comprehensive document that is fully supported by a suite of technical reports prepared by independent experts at significant expense. The PPC has also been carefully drafted to be appropriate for the PPC area, as well as consistent with the existing District Plan provisions, Future Proof and the application to declare the PPC area a SHA, which HCC has supported.

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10 See for example *Countdown Properties (Northlands) Ltd v Dunedin City Council* [1994] NZRMA 145 (HC), at paragraph 169.

11 [2010] NZRMA 392 (HC), at paragraph 65.

12 Clause 25(4)(a).

Clause 25(4)(b) – Has the substance of the PPC request been considered in the last two years?

5.4 The Council may reject the PPC request under clause 25(4)(b) of Schedule 1 if the substance of the PPC has been considered within the last two years.

5.5 The proper application of clause 25(4)(b) was considered by the Environment Court in *Malory Corporation*, where it held that[13]:

> *"...cl 25(4) is not focused on the procedure adopted, but rather upon the substance. The very use of the word substance in (b) demonstrates to us that the intention of the Act is that where the subject matter has been considered by the council or the Court within two years, then the council may reject the application. The appeal process forms a proper check to ensure that such a limitation is not abused."*

5.6 In that case, the Court placed significant weight on the fact that a comprehensive structure plan process had been undertaken within the preceding two years, which specifically considered the applicant's proposal, along with other proposals for the relevant area. In that regard, the Court accepted[14] that the Council did not reject the request simply because it was inconsistent with their conclusions as to the appropriate growth for the area, but because the substance of the matter had been considered by the Council in detail in a process which parallels the public and participatory process envisaged for a plan change[15].

Analysis – Rotokauri North

5.7 In our view, there is a strong argument that HCC would not have a robust basis for rejecting Green Seed's PPC on the grounds that the substance of the request has been considered in the last two years. In that regard, decisions regarding the scope and location of FUZ land under the District Plan were made in 2014 and appeals regarding those provisions (as well as the RSP) were resolved prior to November 2016.

5.8 It is accepted that issues as to Hamilton's growth and the appropriate location of this were extensively canvassed and the subject of detailed consideration in the District Plan process and the development of the RSP.

5.9 However, that assessment has only extended to considering whether the area should be identified as a greenfields location appropriate for future urban development (and it has been accepted that it should). To date there has not been any detailed consideration of, or decisions made regarding, the nature and form of future urban growth at Rotokauri North.

5.10 Further, Green Seed is not seeking to implement a proposal that is inconsistent with or which will undermine the RSP (for example, by seeking to extend the area that is zoned FUZ). To the contrary, its PPC simply represents the next stage of implementing that structure plan.

Clause 25(4)(c) – Does the PPC accord with sound resource management practice?

5.11 In *Hall v Rodney District Council*[16], the (then) Planning Tribunal considered the factors that may indicate that a plan change request is not consistent with the statutory purpose of the RMA, as follows[17]:

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13 [2010] NZRMA 1 (EC), at paragraph 39.
14 And this was subsequently upheld by the High Court on appeal.
15 Supra Note 13, at paragraph 40.
16 [1995] NZRMA 537 (PT).
17 Ibid, at page 12.

> *"It is our understanding of the law...that on a privately promoted plan change a judgment needs to be made whether the most appropriate means of achieving the statutory purpose is by the proposed change or by some other method such as on a forthcoming review. A relevant consideration in making that judgment is that the Resource Management Act provides (as the former regime did not) for privately initiated plan changes, so a general attitude of refusing such changes on the basis of a forthcoming review could frustrate the opportunity that Parliament has deliberately made. Other relevant considerations are relative efficiency and effectiveness (see 32(1)(c)); extent of implications for a wider area, possible prejudice to other interests and the need for general review. That is not necessarily an exhaustive list, nor with those considerations necessarily be relevant in every case."*

5.12 In some limited circumstances, the timing of a PPC request may mean that to process it would be inconsistent with sound resource management practice. The Environment Court in *Malory Corporation* considered that procedural or timing issues may give rise to issues about whether a proposal represents "sound resource management practice". The Court said in this regard[18]:

> *"We have come to the conclusion that cl 25 clearly contemplates that plan changes should represent sound resource management practice in terms not only of substance, but also in terms of timing. This essentially is a matter of discretion and degree."*

5.13 However, on appeal the High Court, did not go so far, stating[19]:

> *"In general terms I think it is drawing a long bow to hold that a timing issue (assuming a request's timing is not frivolous or vexatious) will result in an otherwise unobjectionable proposal offending."*

5.14 Nevertheless, in that case, the High Court considered that the Environment Court was correct to find that the timing of the PPC request did not represent sound resource management practice, in particular because:

(a) The PPC request sought to change an operative plan that was shortly to be superseded; and

(b) As outlined above, it also related to an area that had recently been the subject of a detailed structure planning process.

5.15 It has also been held (in the context of resolving plan references) that[20]:

> *"It is bad resource management practice and contrary to the purpose of the Resource Management Act – to promote the sustainable management of natural and physical resources – 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."*

Analysis – Rotokauri North

5.16 Having reviewed the final PPC documents and proposed plan provisions, we are firmly of the view that the PPC request for Rotokauri North accords with (and promotes) sound resource management practice. In that regard, the PPC:

(a) Is supported by a suite of comprehensive expert assessments, which demonstrate:

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18 Supra Note 13, at paragraph 67.
19 Supra Note 11, at paragraph 98.
20 *Foreworld Developments Limited v Napier City Council* W008/2005 (EC), at paragraph 15.

(i) Why Rotokauri North is an appropriate location for the proposed residential development, consistent with the policy directives from the District Plan and Future Proof;

(ii) How the proposed development will achieve the sustainable management purpose of the RMA; and

(iii) That the proposed development can be appropriately serviced by all relevant infrastructure, which will be developer led and funded.

(b) Is not seeking to alter plan provisions that are due to be superseded.

5.17 While the PPC relates to land that has recently been subject to a structure planning exercise, the PPC does not seek to overturn or enable development that is inconsistent with the RSP. Rather, it is the next necessary step to implementing the RSP.

5.18 On that basis, we do not consider that HCC would have a valid or credible basis for rejecting the PPC request on the grounds that it would not be in accordance with sound resource management practice and that any decision by HCC to do so on that basis would be vulnerable to legal challenge.

Clause 25(4)(d) - Would the PPC result in the District Plan being inconsistent with Part 5 of the RMA?

5.19 We do not consider that the PPC would result in the District Plan being inconsistent with Part 5 of the RMA[21] (regarding the purpose and contents of planning instruments including district plans). That is on the basis that that the District Plan, RSP and Future Proof all indicate that Rotokauri North has been identified as being suitable for residential development, as Green Seed is proposing. Indeed, the PPC has been carefully drafted in light of this legal requirement to have precisely the opposite effect.

5.20 Further, the PPC request clearly demonstrates how it will meet the relevant criteria from Part 5 of the RMA and sections 72 to 76 of the RMA in particular.

Clause 25(4)(e) – Has the District Plan been operative for less than two years?

5.21 Although the Council is empowered to reject a plan change request if the plan has been operative for less than two years[22], that power is not unfettered.

5.22 The Environment Court considered the scope of the Council's power to reject a PPC request under clause 25(4)(e) in *Kerikeri Falls Investments Limited v Far North District Council*[23]. The Council argued that it had an unfettered statutory power under clause 25(4)(e) to reject PPC requests on the basis that the relevant planning instrument has been operative for less than two years. In this regard, the Council said that time should be given for the new plan to "settle in" and this would help the Council identify unforeseen implementation issues.

5.23 The Court disagreed with this approach, stating[24]:

> *"[38] "We agree with the submissions of counsel for the appellants that the 2 years in clause 24(4)(e) is a maximum, and the discretion to reject a request is not an unfettered one.*
>
> ...

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21 Clause 25(4)(d).
22 Clause 25(4)(e).
23 [2010] NZRMA 425.
24 Ibid, at paragraphs 38 and 42.

[42] We agree that the grounds in sub-clause (4), apart from (e) are very narrow, and that there is no sensible basis for holding that (e) suddenly introduces powers of a wide and unrestricted kind."

5.24 Ultimately, the Court held that the decision to accept or reject the plan change in circumstances where the plan has been operative for less than two years must be undertaken on a principled basis consistent with sound resource management practice and the purpose of the RMA.

Analysis – Rotokauri North

5.25 The District Plan has been fully operative for less than two years, having been made operative on 18 October 2017. We nevertheless consider that Green Seed's PPC faces only minimal (if any) risk of rejection on this basis.

5.26 Having regard to the applicable *Kerikeri Falls* criteria, this is for the following reasons:

(a) The Council is required to accept plan changes which have "more than minimal" planning worth and in our view, the PPC request satisfies that test by a considerable margin.

(b) For the reasons outlined above, we consider that there is a robust basis for being satisfied that the PPC request accords with sound resource management practice and will promote the purpose of the RMA.

5.27 In light of the above, we do not consider that HCC will have credible or valid grounds for rejecting the PPC request on the basis that the request has been made within two years of the District Plan becoming operative and that any decision to reject the PPC on that basis would be vulnerable to legal challenge.

6. ABILITY FOR HCC TO PROCESS THE PPC AS A RESOURCE CONSENT UNDER CLAUSE 25(3)

6.1 Mark Tollemache has advised that there has been no suggestion that HCC might convert the PPC request to a resource consent application and we do not consider it would be appropriate or reasonable to do so. However, we address that issue briefly for completeness.

6.2 In our view, dealing with the PPC as a resource consent application would be contrary to good planning and resource management practice for the following reasons.

6.3 First, Green Seed is proposing a large-scale urban development, of approximately 1450-2000 dwellings, which would take between 10 to 15 years to complete. Such a proposal will unavoidably have more than minor effects on the environment. It would be inconsistent with the objectives and policies of its land's current zoning as FUZ, the purpose of which is described in clause 14.1(a) of the District Plan as follows:

"The Future Urban Zone provides potential urban development areas for Hamilton's long term growth. It controls subdivision and land use, and seeks to avoid fragmentation of the land. Fragmentation and inappropriate land uses can make future conversion of land to urban use difficult...Urban growth is controlled by the preparation of structure plans, which determine if urbanisation is appropriate, its form, any necessary phasing and infrastructure requirements and land use controls."

6.4 Consistent with that purpose, the objectives for the FUZ include the following:

"Objective 14.2.1

Subdivision, activities and development are compatible with the existing rural character and amenity, which is:

i. Open pasture.

ii. Pockets of vegetation.

iii. Low-density development.

iv. Predominantly farming activities.

Objective 14.2.2

Subdivision, activities and development does not compromise future urban use or the potential of land to be used for farming activities."

6.5 Second, proceeding with the development by way of a resource consent, without having the land rezoned for residential purposes, could potentially establish a precedent which results in the integrity of the District Plan being undermined.

6.6 Third, Green Seed has sought that the land be declared a SHA, so that it can utilise the consenting process under the HASHAA once its land is rezoned. As noted, HCC has resolved to accept this request. Determining that the PPC should instead be progressed as a resource consent under the RMA would be inconsistent with HCC's prior acceptance that the PPC area should be declared a SHA.

6.7 On the basis of the above, we consider that it would be inappropriate and unreasonable for HCC to determine that it should deal with the PPC by progressing it as a resource consent application, rather than a PPC.

7. APPROPRIATENESS OF ACCEPTING OR ADOPTING THE PPC UNDER CLAUSE 25(2)

7.1 In dealing with the PPC, we consider that HCC is legally entitled to accept or adopt the PPC. We understand that Green Seed's preference is for the PPC to be adopted, for the following reasons.

7.2 First, HCC's adoption of the PPC would clearly signal the Council's endorsement of and support for projects (such as Rotokauri North) which address the need for housing in Hamilton. HCC has already publicly expressed this view, both in media reports[25] and by unanimously voting that the PPC area should be declared a SHA. Having HCC extend this support by adopting the PPC would:

(a) Be consistent with HCC's previous decision to have the PPC area declared a SHA;

(b) Further signal the strength of its commitment to addressing the need for housing in Hamilton;

(c) Acknowledge that Green Seed has proposed a District Plan objective, policy and rule for affordable housing, an approach unprecedented in Hamilton; and

(d) Assist the Hearings Panel when it subsequently comes to determine the PPC on its merits.

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25 For example, "Homes for Rotokauri: Fast-track housing proposal clears another hurdle", Stuff article, 13 May 2018.

7.3 Second, HCC's adoption of the PPC would have the effect of bringing the PPC within the definition of a "proposed plan" in section 43AAC of the RMA whereas a PPC that has only been accepted for processing does not.

7.4 The significance of this distinction is that agencies considering applications for and submissions on QDs under section 34 of the HASHAA are required to "have regard to" a proposed plan (as defined in the RMA) as the third priority in the list of five matters that are relevant to their discretion under that section. Section 34 of the HASHAA provides as follows:

> *"34 Consideration of applications*
>
> *(1) An authorised agency, when considering an application for a resource consent under this Act and any submissions received on that application, must have regard to the following matters, giving weight to them (greater to lesser) in the order listed:*
>
> *(a) The purpose of this Act:*
>
> *(b) The matters in Part 2 of the Resource Management Act 1991:*
>
> *(c) Any relevant proposed plan:*
>
> *(d) The other matters that would arise for consideration under—*
>
> *(i) Sections 104 to 104F of the Resource Management Act 1991, were the application being assessed under that Act..."*
>
> (Emphasis ours.)

7.5 Accordingly, if HCC adopts the PPC, it becomes a matter which must be given particular weight in considering QD applications. By contrast, PPC requests that are accepted for processing fall to be considered as an "other matter" under section 34(1)(d) of the HASHAA and thus may be accorded less weight in the subsequent QD process.

7.6 Given the PPC will be subject to robust consideration via submissions and hearing whichever route is adopted, we consider that it is appropriate to ensure that the final provisions can be given as much weight as possible in the QD process and this will occur if HCC adopts, rather than accepts, the PPC.

7.7 Adopting the PPC also means that the PPC rules will have legal effect from the date of public notification, in accordance with clause 25(2)(a)(iii) of Schedule 1 to the RMA. By contrast, it is arguable that the rules of a PPC which is accepted can only have legal effect once they are operative.

7.8 However, we understand that HCC's preference is that the PCC be accepted, rather than adopted. In our view, this avenue is also legally available to HCC, should it consider that option is more appropriate.

7.9 If HCC decides to deal with the PPC other than by adopting or accepting it (and in particular, if it tried to reject the PPC), this would be subject to challenge by way of appeal to the Environment Court.

8. AVAILABILITY OF LIMITED NOTIFICATION PROCESS

8.1 Clause 25(2)(a)(i) of Schedule 1 to the RMA provides that where a PPC is adopted:

(a) The provisions of Part 1 or 4 of Schedule 1 to the RMA apply; and

(b) The local authority is required to either publicly or limited notify the PPC within 4 months, in accordance with either clause 5 or 5A of Schedule 1 to the RMA.

8.2 If the PPC is accepted, the PPC must be processed in accordance with Part 1 of Schedule 1 (which includes clauses 5 and 5A)[26], with all necessary modifications and except as modified by the remaining sub-clauses of clause 29. Limited notification is therefore also available for PPC that are accepted, unless that is precluded by clauses 29(1A) to (9) of Schedule 1 to the RMA. In our view, none of these provisions preclude the ability to limited notify a PPC request that is accepted rather than adopted.

8.3 We therefore consider that limited notification is a potentially available option for all PPC requests, whether the request is adopted or accepted.

8.4 Under clause 5A(2) of Schedule 1 to the RMA, a local authority may give limited notification of a PPC if it is able to identify all the persons "directly affected" by the PPC. The term was (deliberately) not defined when the limited notification provisions were introduced into Schedule 1 to the RMA by the 2017 Amendment Act. Given the provisions only came into force in April 2017, there is also not yet any judicial guidance on those specific provisions.

8.5 However, the phrase "directly affected" is used elsewhere in the RMA[27]. It is also used in related legislation[28] and has been the subject of judicial consideration in this context.

8.6 The leading case in this regard is *Ngatiwai Trust Board v New Zealand Historic Places Trust (Pouhere Taonga)*[29], in which the High Court held that the words 'directly affected' "apply to the particular circumstances of each case". This guidance was acknowledged in the report from the Local Government and Environment Committee which considered the Resource Legislation Amendment Bill 2015 ("the Bill"), which stated[30]:

> *"We do not consider it appropriate to specify in this legislation a definition of "directly affected", as we consider that this would be inhibiting. Additionally, this term is already present in clause 5 of Schedule 1 and has so far been interpreted by practitioners on a case-by-case basis. The High Court has also previously determined that the most suitable approach is on a case-by-case basis."*

8.7 Applying the *Ngatiwai Trust Board* decision in the context of a heritage designation, the High Court accepted that persons who could be said to be "directly affected" by a decision could include[31]:

(a) Any person with a proprietorial interest in land;

(b) Tangata whenua who are linked to a site through their ancestry; and

(c) Certain other persons without a proprietorial interest in land, who nonetheless have an attachment or connection to the land to sufficiently differentiate them from the public at large.

8.8 Persons without a direct proprietorial interest who have been, or could be, considered directly affected include:

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26 Clause 29(1) of Schedule 1 to the RMA.
27 See for example sections 37A and 317 of the RMA and clause 5 of Schedule 1 to the RMA.
28 See for example sections 45 and 59 of the Heritage New Zealand Pouhere Taonga Act 2014.
29 [1998] NZRMA 1 (HC), at page 13.
30 Report from the Local Government and Environment Committee on the Resource Legislation Amendment Bill, at page 28.
31 *Campaign for a Better City v New Zealand Historic Places Trust (Pouhere Taonga)* [2004] NZRMA 493 (HC), at paragraph 25.

(a) Children or grandchildren with a parent or grandparent buried on the affected land, in the context of a heritage designation[32]; and

(b) Persons who had submitted on similar issues in the proposed District Plan (which the variation intended to alter), in the context of a variation to a District Plan[33].

8.9 In light of the above and the absence of any further guidance, we consider that the following principles can be applied to determining whether it is possible to identify all persons who may be "directly affected" by Green Seed's PPC request:

(a) To determine who is "directly affected" by a PPC request, it is not appropriate for a council to apply the same test it uses to determine whether there are any "affected persons" in respect of a resource consent application, because the statutory tests and relevant context are different. If Parliament had meant the same test to be applied in both circumstances, it would have said so. It did not. In other words, the scope of parties who may be "directly affected" by a PPC request is potentially wider than those who may be considered "affected persons" in respect of a resource consent application (which is limited to where the adverse effects on the person will be "minor or more than minor", but not less than minor).

(b) That said, it will still be relevant to consider the nature of the effects that may arise as a result of the PPC, in considering the extent of directly affected parties. For example, in making its notification decision on PC8, the Auckland Council considered all those who could potentially suffer amenity and / or traffic effects as a result of the proposed re-zoning to be "directly affected" parties[34].

(c) It is unlikely that all parties that will be directly affected by a PPC request can be identified, where the PPC covers areas accessed by, or includes rules that affect, the general public. Thus, limited notification is likely to be unavailable (and inappropriate) where the PPC:

(i) Applies to publicly available areas, such as parks or the coastal marine area; or

(ii) Includes rules that manage resources (such as indigenous vegetation or historic heritage) with communal value.

8.10 In light of the above, we consider that it would be possible to identify all persons who may be "directly affected" by Green Seed's PPC request, so that the request should appropriately be processed on a limited notified basis, for the following reasons:

(a) The PPC land is already zoned FUZ and subject to the RSP, both of which went through a robust submissions and hearing process in accordance with Schedule 1 to the RMA. This process has determined that the land is appropriate for urban development. Thus, the PPC relates to the specific methods for implementing this development, rather than being an opportunity to revisit the issue of whether the land can or should be used for residential purposes.

(b) The PPC is supported by a comprehensive suite of expert assessments which outline the potential effects of the proposed re-zoning and how these are proposed to be addressed. Having regard to these reports, it is possible to identify the immediately adjacent landowners and other key stakeholders (for

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32 Ibid.

33 *Protect Pauanui Incorporated v Thames Coromandel District Council* [2013] NZHC (HC) 1944, at paragraph 44.

34 Supra Note 4.

example, the New Zealand Transport Agency etc.) who may be directly affected by the PPC.

(c) The PPC land is already subject to the RICMP and is supported by a draft sub-catchment ICMP to implement specific stormwater solutions.

(d) The PPC does not:

(i) Apply to any publicly available land or areas; or

(ii) Include any rules that manage resources with communal value.

8.11 The RMA does not contain any provisions for objecting to or appealing a local authority's decision regarding notification of a PPC request. Should Green Seed be dissatisfied with HCC's notification decision, its only option would be to challenge this by way of judicial review to the High Court.

9. CONCLUSIONS

9.1 For the reasons outlined in detail above, we consider that:

(a) The only avenues open to HCC are to adopt or accept the PPC. If HCC decides to deal with the PPC in any way (in particular, if it tried to reject the PPC), this would be subject to challenge by way of appeal to the Environment Court.

(b) As all persons directly affected by the proposed change are able to be identified, the PPC can be progressed on a limited notified basis, pursuant to clause 5A of Schedule 1 to the RMA.

(c) If HCC determined not to progress the PPC on a limited notified basis, Green Seed's only option would be to challenge this decision by way of judicial review to the High Court.

9.2 We trust the above is clear and sufficient for present purposes. Please make contact if you wish to discuss any aspect of the above.

Yours sincerely

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BERRYSIMONS
ENVIRONMENTAL LAW

1 May 2019

Green Seed Consultants Limited
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For: Charles Ma
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BY EMAIL

Dear Charles

ROTOKAURI NORTH PRIVATE PLAN CHANGE - IMPLICATIONS OF THE ROTOKAURI STRUCTURE PLAN

1. INTRODUCTION

1.1 We write further to our recent correspondence with your various expert consultants regarding Green Seed Consultant Limited's ("GSCL") private plan change request at Rotokauri North ("PPC"). The PPC relates to an area of approximately 140 hectares, known as Rotokauri North.

1.2 The existing Rotokauri Structure Plan ("RSP") is included in the operative Hamilton City District Plan ("HCDP"). As it applies to the Rotokauri North land, the RSP includes two future reserve areas of approximately 10 hectares each. We have been advised that the Hamilton City Council ("the Council") wishes to set these areas aside for sports parks ("the Sports Park Land") which will serve a district-wide function, not only the needs of the future Rotokauri North community.

1.3 We understand the Council considers that the inclusion of the Sports Park Land in the RSP means that GSCL is required to provide this area to the Council as part of the PPC, without any entitlement to compensation.

1.4 We further understand that GSCL is not opposed to the provision of sports parks / open spaces within Rotokauri North, if the Council deems them necessary. However, it considers that the location of the open spaces must be properly integrated into a logical plan for development of opens spaces within the city, rather than being determined by the fact the Sports Park Land has been shown (without any context) on the RSP maps. GSCL also considers it must be properly and fairly compensated by the Council for any sports park / open space land that is provided within the PPC area.

Purpose and scope of advice

1.5 Against that background, the purpose of this advice is to set out our analysis of whether the Council can legally require GSCL to set aside the Sports Park Land for the wider community, without providing compensation.

1.6 To that end, this advice addresses the following:

(a) Background and issue arising (Section 3);

(b) Council's interpretation of the RSP (Section 4);

(c) Regulatory framework regarding the provision of reserves (Section 5);

(d) Assessment of whether GSCL's land can be rezoned for public purposes and acquired by the Council without compensation (Section 6); and

(e) Concluding comments (Section 7).

1.7 We provide a summary of our advice in Section 2.

1.8 We understand that you intend to provide this advice to the Council to assist with the processing of the PPC request. This advice has been drafted for that purpose. We are happy to discuss any aspect of this advice directly with Council and / or its legal advisors, if that would assist.

2. EXECUTIVE SUMMARY

2.1 The Council has advised that, as part of its Rotokauri North PPC application, GSCL is required set the Sports Park Land aside and transfer ownership of the same to the Council, free of charge. This is on the basis that the RSP illustrates the Sports Park Land as "future reserve" and despite the fact that the Council has not to date demonstrated the need or justification for sports parks of the size proposed.

2.2 We do not agree that Council's analysis or position is correct. To the contrary and having regard to the assessment provided below, our view is as follows:

(a) Council is incorrect that including the Sports Park Land in the RSP means it has already been rezoned for open space purposes or designated for reserve purposes. The notation for the Sports Park Land in the RSP simply indicates a possible future land use outcome that is subject to subsequent plan changes and / or subdivision applications. The correct position is that the Sports Park Land is currently zoned Future Urban ("FUZ") and can only be rezoned for open space purposes via the PPC or other Schedule 1 process.

(b) GSCL is not legally required to provide for or show the Sports Park Land in the RNSP, which will supersede the RSP.

(c) GSCL would be able to challenge any proposed rezoning of the Sports Park Land through a submission on the relevant plan change, in accordance with section 85 of the Resource Management Act 1991 ("RMA"). It would also be notified of and able to lodge a submission on any notice of requirement to designate the land for reserve purposes under section 168A of the RMA.

(d) Irrespective of the Sports Park Land's current zoning or designation, the Council does not currently own the land. If it wishes to acquire the land, even by agreement, GSCL is entitled to be compensated for the acquisition in accordance with the relevant provisions of the RMA (in particular section 86(3)) and the Public Works Act 1981 ("PWA").

(e) We understand that the Council does not have any provision in its current Long Term Plan ("LTP") to purchase the Sports Park Land. Accordingly, providing for this land in the PPC and RNSP would be setting up expectations that are inconsistent with Council's current strategy and financial arrangements.

3. BACKGROUND AND ISSUE ARISING

The PPC area and proposal

3.1 The majority of Rotokauri North is currently zoned FUZ and not due to be released for development until post-2028, in accordance with the Council's *Future Proof Strategy: Planning For Growth*, November 2017. However, there is already an urgent need for additional housing in Hamilton City.

3.2 The PPC proposes to rezone the Rotokauri North area to predominantly Medium Density Residential Zone. It anticipates that all additional infrastructure required to support residential development in Rotokauri North will be provided by GSCL, such that development may take place ahead of the Council's current schedule.

Issue arising

3.3 The Rotokauri North area is subject to the RSP. Figure 3.6.3a of the RSP shows the Sports Park Land, which is marked as "Future Reserve". The RSP describes the sports parks as including sports fields suitable for senior grade play, junior fields and training areas, and an area that serves a Neighbourhood Park function. However, the Sports Park Land is privately owned by GSCL, which (in accordance with the PPC) wishes to develop this area to provide residential housing.

3.4 The Council has advised that it interprets the provisions of the RSP, including depiction of future reserve areas, as enforceable requirements of the HCDP. It therefore considers (and has requested) that GSCL provide the Sports Park Land to the Council free of charge. Further, this is additional to and does not reduce GSCL's liability for development contributions or financial contributions (particularly as the RSP does not include any provisions relating to reserve acquisitions).

3.5 GSCL does not agree with the Council's interpretation of the RSP. It considers that if the Council wishes to ensure the Sports Park Land is used as provided for in the RSP, it should have to purchase the land from GSCL at market value and formally rezone it.

3.6 Further, even if Council's interpretation of the RSP were correct, GSCL is proposing a new Structure Plan specific to the Rotokauri North area ("RNSP") as part of the PPC. This will supersede the RSP and there is no obligation for the PPC or RNSP to give effect to the RSP or its contents. GSCL therefore also considers that the PPC, its proposed zoning and the RNSP are a further impediment to the Council being able to acquire the Sports Park Land without compensation.

3.7 Finally, we understand that the Council has confirmed that there is currently no budget allocated in its LTP to acquire the Sports Park Land. Even if GSCL were required to show the Sports Park Land on the RNSP (which is not accepted), this would be setting up an expectation which is inconsistent with the Council's current budget / strategy.

3.8 GSCL has accordingly requested us to provide an opinion to clarify the status of the Sports Park Land and whether legally, this has been (or can be) acquired by the Council without compensation, as the Council has requested.

4. COUNCIL'S INTERPRETATION OF THE RSP

4.1 We consider that the Council's interpretation of the RSP relies on the following four propositions:

(a) Depiction of the Sports Park Land in the RSP is effectively equivalent to an open space zoning or possibly a designation for open space purposes;

(b) The PPC and the RNSP must therefore include provision for Sports Park Land as per the operative RSP;

(c) The Council is accordingly entitled to take ownership of the Sports Park Land without going through a rezoning and potentially designation process; and

(d) This means that the owners of the Sports Park Land have no opportunity (and are not entitled) to challenge or be compensated for the Council's proposed acquisition of that land.

4.2 We set out our analysis of these propositions in Section 6 below. Before doing so, we outline the relevant regulatory framework.

5. REGULATORY FRAMEWORK REGARDING THE PROVISION OF RESERVES

Legislative framework

Resource Management Act 1991

5.1 There are no provisions in the RMA which empower the Council to rezone private land without going through the Schedule 1 process or providing affected landowners with adequate compensation. To the contrary, section 85 of the RMA makes it clear that landowners can challenge proposed plan provisions on the basis that they would render any interest in land incapable of reasonable use and place an unreasonable burden on that landowner, as follows:

> *"**85 Environment Court may give directions in respect of land subject to controls***
>
> *(1) An interest in land shall be deemed not to be taken or injuriously affected by reason of any provision in a plan unless otherwise provided for in this Act.*
>
> *(2) Notwithstanding subsection (1), any person having an interest in land to which any provision or proposed provision of a plan or proposed plan applies, and who considers that the provision or proposed provision would render that interest in land incapable of reasonable use, may challenge that provision or proposed provision on those grounds—*
>
> *(a) in a submission made under Schedule 1 in respect of a proposed plan or change to a plan; or*
>
> *(b) in an application to change a plan made under clause 21 of Schedule 1.*
>
> *(3) Subsection (3A) applies in the following cases:*
>
> *(a) on an application to the Environment Court to change a plan under clause 21 of Schedule 1:*
>
> *(b) on an appeal to the Environment Court in relation to a provision of a proposed plan or change to a plan.*
>
> *(3A) The Environment Court, if it is satisfied that the grounds set out in subsection (3B) are met, may,—*
>
> *(a) in the case of a plan or proposed plan (other than a regional coastal plan or proposed regional coastal plan), direct the local authority to do whichever of the following the local authority considers appropriate:*
>
> *(i) modify, delete, or replace the provision in the plan or proposed plan in the manner directed by the court:*

(ii) *acquire all or part of the estate or interest in the land under the Public Works Act 1981, as long as—*

(A) *the person with an estate or interest in the land or part of it agrees; and*

(B) *the requirements of subsection (3D) are met; and*

...

(3B) *The grounds are that the provision or proposed provision of a plan or proposed plan—*

(a) *makes any land incapable of reasonable use; and*

(b) *places an unfair and unreasonable burden on any person who has an interest in the land."*

[Our emphasis]

5.2 Also relevant is section 86 of the RMA, in accordance with which the Council has the power to acquire the Sports Park Land by agreement with GSCL under the PWA. Section 86 of the RMA states:

"86 Power to acquire land

(1) *In addition to any power it may have to acquire land for any public work which it is authorised to undertake, a regional council or territorial authority may, while its plan is operative, acquire by agreement under the Public Works Act 1981 any land (including any interest in land) in its region or district, if, in accordance with the plan, the regional council or territorial authority considers it necessary or expedient to do so for any of the following purposes:*

(a) *terminating or preventing any non-complying or prohibited activity in relation to that land:*

(b) *facilitating activity in relation to that land that is in accordance with the objectives and policies of the plan.*

(2) *Except as provided in sections 85(3A)(a)(ii), 185, and 198, nothing in any plan shall impose on any regional council or territorial authority any obligation to acquire any land.*

(3) *Every person having any interest in land taken for any purpose authorised by subsection (1) shall be entitled to all compensation which that person would be entitled to if the land had been acquired for a public work under the Public Works Act 1981."*

[Our emphasis]

5.3 Importantly, there is also no provision in the RMA (including within the Schedule 1 process under which the PPC is being prepared) which would require the PPC or RNSP to give effect to the RSP or its contents.

Other relevant legislative provisions

5.4 For completeness, we note that the Rotokauri North area is currently in the process of being gazetted as a Special Housing Area pursuant to the Housing Accords and Special Housing Areas Act 2013 ("HASHAA"). However, the HASHAA provisions do not impact on the status of the Sports Park Land or Council's ability to require GSCL to provide that

land for public purposes free of charge. They are therefore not relevant to or considered further for the purpose of this advice.

5.5 Similarly, subdivision and development of Rotokauri North would trigger an obligation on the developer to provide development contributions or financial contributions under the HCDP. However, development and financial contributions are not triggered by the PPC and are not considered further for the purposes of this advice. We also note that the area of the Sports Park Land greatly exceeds the amount of land that could be required by the Council as either a development or financial contribution, given that it is intended to serve as district-wide function (and given its location on the edge of the Council's boundary, arguably even a regional function) well beyond the demand created by GSCL's development.

Planning framework

The HCDP

5.6 The HCDP became operative on 18 October 2017. Appendix 17 of the HCDP contains the associated planning maps. Maps 13A and 14A illustrate the Rotokauri North area, including the Sports Park Land, and show that it is currently zoned FUZ. The purpose of the FUZ is to provide urban development areas for Hamilton's long term growth. It does this by controlling subdivision and land use to avoid fragmentation of the land.

5.7 Chapter 15 of the HCDP sets out the provisions applicable to Hamilton's Open Space Zones. It includes five open space zones including a Sport and Recreation Zone. However, the Sports Park Land is currently zoned FUZ and is not subject to any designation as public reserve. Therefore, the Chapter 15 provisions are not relevant.

Provision for Structure Plans in the HCDP

5.8 Chapter 3 of the HCDP sets out the principles, objectives, and policies that are generally applicable to Structure Plans. It also incorporates four individual Structure Plans including the RSP. Chapter 3 relevantly describes the purpose of the Structure Plans as follows:

> *"**3.1 Purpose***
>
> *...*
>
> *b) A Structure Plan illustrates the proposed layout of a future development area.*
>
> *c) The preparation of a Structure Plan is one of the first steps in advancing the development of new urban areas. It illustrates land uses such as residential, commercial, industrial and public open space. Structure plans usually contain broad servicing details such as transport configuration and may include other important key infrastructure features such as Three Waters networks. The level of detail can vary and may also show information such as housing density.*
>
> *d) The purpose of a Structure Plan is to plan for the future in an integrated manner by:*
>
> *i. Outlining a vision for the future.*
>
> *ii. Setting out where growth can be accommodated and setting out a future land use pattern.*
>
> *iii. Providing for staging of development.*

iv. Guiding infrastructure planning including transport corridors, Three Waters, community facilities and public open space.

v. Identifying the financial feasibility of the development from a Council, Infrastructure provider and landowner perspective.

...

f) The maps or plans are at a high level of information and do not typically go into such detail as individual lot boundaries or the physical form of buildings and structures. Although a Structure Plan indicates future land uses, the rules that control the development of the land are contained in the District Plan zone chapters.

g) Currently prepared Structure Plans are incorporated into the District Plan. Future Structure Plans should also be incorporated into the District Plan, either through a variation or plan change."

[Our emphasis]

5.9 It is clear from the above provisions that the Structure Plans are a planning tool which is intended to guide future development by providing a high-level outline of Hamilton's development priorities and vision for the future. While the current Structure Plans (including the RSP) are included in the HCDP, they do not contain finalised rules or zoning. This is particularly clear from provision 3.1(f), which confirms that the "the rules that control the development of the land are contained in the District Plan zone chapters". In the case of the Sports Park Land, the applicable rules are set out in the FUZ provisions.

Status of Structure Plans

5.10 The intended approach to the Structure Plan provisions is clarified by a number of other HCDP provisions. Chapter 2 of the HCDP (Strategic Framework) includes Policy 2.2.2b:

"Any development that is within an identified growth area is to be undertaken in general accordance with an approved Structure Plan."

[Our emphasis]

5.11 Chapter 3 sets out the principles applicable to Structure Plans, which include the following:

"3.2 Principles

To provide consistency across the City, Structure Plans should adopt the following principles where appropriate:

a) Outline planning outcomes for each Structure Plan area, for example:

...

iv. Reserves (the location of these may be fixed or indicative depending on context).

...

b) Include indicative maps that illustrate the broad planning outcomes sought."

5.12 Objective 3.3.1 and the associated policies address greenfield development within Structure Plan areas:

> *"**Objective 3.3.1:** Optimised, long-term, positive environmental, economic, social and cultural effects of greenfield development.*
>
> ***Policy 3.3.1a:** Development should be in general accordance with the relevant Structure Plan."*
>
> *[Our emphasis]*

5.13 The above provisions of the HCDP again confirm that the Structure Plan provisions and maps are intended to provide a high-level, indicative guide to future development, and do not constitute district plan rules or zoning with current effect. The term "in general accordance" indicates the approach that Councils and developers should take to the Structure Plan provisions.

5.14 Principle 3.2(a)(iv) contemplates that some reserve locations may be fixed within a Structure Plan. However, the absence of any policy or rules in the RSP that confirms the location of the Sports Park Land is fixed means that those spaces must be treated as being indicative. In any event, even if the location of the Sports Park Land was considered to be fixed in accordance with the RSP, this does not also mean that the land has been zoned for open spaces or designated for reserve purposes. It also does not relieve the Council from need to purchase that land from its current owner at market price, if it wishes to acquire it for that purpose.

The Hamilton City Open Space Plan

5.15 HCDP's Objective 3.3.7 and the associated policies address public open spaces which are identified in a Structure Plan, as follows:

> *"**Objective 3.3.7:** A range of well-connected, functional public open spaces.*
>
> ***Policy 3.3.7a:** The location and size of public open spaces is provided in accordance with Council's Open Space Plan.*
>
> ***Explanation:***
>
> *Public open space is usually indicative on Structure Plan maps, and exact sizes and locations will be determined at the time of subdivision consent. The Hamilton City Open Space Plan, September 2013 sets out a 50-year strategic direction for Hamilton's parks and open spaces. The Open Space Plan presents a series of goals, priorities and an action plan that responds to the needs, challenges and opportunities facing Hamilton's open spaces."*
>
> *[Our emphasis]*

5.16 Hamilton City's Open Space Plan is a strategic planning document that was published in September 2013. It is not incorporated into the HCDP, although it is referred to, including in Policy 3.3.7a above. The Open Space Plan includes Map 1 which identifies the Sports Park Land as "Possible Future Reserves". This clarifies that the status of the land has not been confirmed.

5.17 Further, as with the RSP, the Open Space Plan only seeks to confirm the location and type of open spaces across Hamilton. The process of acquiring and paying for necessary open space land is not addressed within, and is separate from, the Plan.

The RSP

5.18 The current RSP is set out in Chapter 3 of the HCDP. Figure 3.6.3a (Rotokauri Catchment Boundaries) shows the Sports Park Land, which is labelled "Future Reserves".

5.19 However, there is no express mention of the Sports Park Land in the RSP, and no relevant objectives and policies. The only reference to sports parks is in the RSP's description of the Structure Plan Components, as follows:

> *"**3.6.2.5 Open Space Network***
>
> *a) The open space network develops and connects existing natural features. The Rotokauri open space network comprises:*
>
> *...*
>
> *ii. Sports parks – each will provide sports fields suitable for senior grade play, junior fields and training areas, and an area that serves a Neighbourhood Park function."*

5.20 The status of the Structure Plan maps is clarified by provision 3.6(b), which states:

> *"In addition to a Structure Plan map indicating the eventual pattern of development within Rotokauri, there are maps indicating the nature and extent of the proposed transportation hierarchy, proposed reserve and open space network, staging plans and a Concept Plan illustrating the relationship between land uses within the suburban centre and future commercial/community focal point."*
>
> *[Our emphasis]*

5.21 The above provision confirms that the RSP maps are indicative only, and that the reserves and open spaces they show are aspirational proposals or goals on behalf of the Council which have yet to be finalised. As noted, the Council evidently chose not to take up any opportunity it may have given itself to specify that open spaces on the RSP were in fixed locations.

The 2007 RSP

5.22 The RSP does not state the mechanism by which the privately-owned areas indicated as "Future Reserve" are to receive an open space zoning once Rotokauri is live-zoned. However, this is addressed in the RSP's predecessor, the Rotokauri Structure Plan 2007, which states:

> *"Sports Parks – These are required to provide for formal active recreation at a level to meet the current standard of provision within the city. Each will provide sports fields suitable for senior grade play, junior fields and training areas and an area that serves a Neighbourhood Park function. Whilst they will primarily serve the local population, they will also form part of the city wide network of sporting facilities. They are located so as to be accessible to their catchment and contribute to the legibility and amenity of the area. It is anticipated that Council will use the designation process to determine precise boundaries to proposed sports parks."*
>
> *[Our emphasis]*

5.23 The above provision demonstrates that even the Council originally expected that a designation and acquisition under the PWA would be necessary to transfer the Sports Park Land into public ownership, following rezoning. The fact that this express mention of the designation process was not carried over into the current RSP does nothing to change the legal position in this regard.

5.24 As noted, there is also no requirement within the relevant planning framework to include the Sports Park Land within the PPC or RNSP, simply because it is included in the RSP.

Legal principles – Acquisition of private land for public purposes

5.25 The issue of local authorities attempting to acquire private land for public purposes through the rezoning process has been considered by the Court on several occasions. It is not necessary to traverse all of those cases in detail for the purposes of this advice. The Court's consistent approach is clearly encapsulated in the Environment Court decision of *Capital Coast Health v Wellington City Council* W101/98. Capital Coast Health Limited ("CCHL") appealed Wellington City Council's ("WCC") proposal to rezone land owned by CCHL from *Residential* to *Open Space B* in the (then) Wellington City Proposed District Plan.

5.26 Unlike the present case, WCC was not attempting to argue that the land in question had been (or should be) rezoned and transferred to WCC without compensation. However, CCHL considered WCC was attempting to "down-zone" the land in order to reduce its market value, which would reduce the compensation payable to CCHL if the land was acquired.

5.27 CCHL challenged the proposed rezoning on the basis that it would make the land incapable of reasonable use. In its interim decision, the Environment Court made the following findings:[1]

> *"164. Having regard to the Open Space policies and assessment criteria in the proposed plan which place emphasis on public enjoyment of the site's recreation potential, together with the clear intent of the zone to avoid structures and maximise open space, we accept Mr Thomas' conclusion that a private landowner would not be able to make reasonable use of Open Space zoned land. Therefore, Open Space B zoning is inappropriate for private land such as this which is perfectly capable of other uses.*
>
> *165. We agree with Mr Thomas too that it is not the role of private landowners to provide for general open space and the recreational needs of the community. There is a considerable body of case law to support that view."*
>
> *[Our emphasis]*

5.28 The Court rejected the Council's proposed Open Space zoning on the basis of the above. The Environment Court also noted that WCC's analysis of the proposed plan change under section 32 of the RMA had not looked at the issue of whether privately owned land should be zoned Open Space. This meant that WCC:[2]

> *"was in no position to analyse some of the threshold tests under its s.32 evaluation and consequently in no position to establish the effects of its Open Space proposal on the landowner."*

5.29 In its final decision (*Capital Coast Health Limited v Wellington City Council* W4/200), the Court also adopted (at paragraph 7) the following summary of the correct legal position that had been provided by the parties:

> ***"Open Space Zoning***
>
> *As a general principle private land should not be zoned for reserve purposes (however described and either expressly or effectively) unless:*

[1] *Capital Coast Health v Wellington City Council* W101/98, at 164 – 165.
[2] *Ibid*, at 163.

- *It is already reserved for such purposes; or*
- *The landowner agrees; or*
- *It is incapable of being used for other purposes.*

If the Council wishes to protect land for reserve purposes, then that purpose should be achieved by designation or acquisition.

However, this general principle is always subject to the provisions in Part 2 of the Act. Where particular land has such significance in terms of any of the factors listed in sections 6 and 7 of the Act that its use or development ought to be substantially limited or precluded, then land use controls which may have that effect may be appropriate regardless of the ownership of that land (but subject to sections 32 and 85)."

6. ANALYSIS – IS GSCL REQUIRED TO SET THE SPORTS PARK LAND ASIDE FOR PUBLIC PURPOSES?

6.1 Having regard to the above regulatory framework, we consider that GSCL is not required to set the Sports Park Land aside for public purposes (and certainly not without receiving adequate compensation from the Council), for the following reasons.

Sports Park Land has not yet been rezoned / designated for open space or reserve purposes

6.2 In our view, the fact the Sports Park Land has been included in the RSP does not mean it has yet been rezoned or designated for open space / reserve purposes. Such a rezoning and designation can only occur by way of the Schedule 1 process and in accordance with Part 8 of the RMA respectively.

6.3 In summary, the Sports Park Land is currently privately owned and zoned FUZ. It not subject to the provisions of the Open Space Zones under the HCDP or any designation for reserve purposes. The RSP map that the Council seeks to rely on constitutes an indicative guide only and is not a current and enforceable rule of the HCDP. As such, our strong view is that there is no basis for the Council to argue that GSCL is already required to set the Sports Park Land aside as public open space, let alone transfer ownership of the land to the Council without compensation, as it is trying to do.

GSCL not required to show Sports Park Land in RNSP

6.4 Importantly, there is no legal obligation on GSCL to provide for or identify land for sports park purposes (which serve a district wide benefit) within the RNSP, which (in accordance with the PPC) will replace the RSP with respect to the Rotokauri North land.

GSCL could object to any proposed rezoning or designation of Sports Park Land

6.5 As noted in *Capital Coast Health*:

(a) In general, private land should not be zoned for reserve purposes except under specific circumstances; and

(b) This change of use should be achieved by designation or acquisition, neither of which has yet occurred with respect to the Sports Park Land.

6.6 As such, in our view the Council must go through a rezoning and / or designation process, followed by acquisition, if it wishes to have the Sports Park Land set aside for open space purposes. In accordance with section 85 of the RMA, GSCL would be able to challenge any proposed plan provisions which sought to rezone the Sports Park Land for open space purposes on the basis that this:

(a) Makes its land incapable of reasonable use; and

(b) Places an unfair and unreasonable burden on it as a landowner.

6.7 While this is a high test, in the present case, we consider it is likely that such a challenge would be successful. In our view, the Council's interpretation of the RSP would have an even more onerous effect on GSCL than WCC's proposal did in *Capital Coast Health*, as it would preclude all uses of the Sports Park Land other than as a sports park. That is, it would certainly preclude development of the land for residential purposes, as proposed by GSCL. There is also no evidence that the Sports Park Land is of such significance in terms of any of the matters listed in sections 6 or 7 of the RMA that its use or development ought to be substantially limited or precluded, to meet the Act's sustainable management purpose.

6.8 We also note that the Council has not yet provided any evidence that it has properly analysed the costs and benefits of rezoning the Sports Park Land for open space purposes, as it is required to do in order to support any rezoning in accordance with section 32 of the RMA.

6.9 Similarly, GSCL would be notified and able to make a submission on any notice of requirement issued under section 168A of the RMA to designate the land for reserve purposes. Any such submission could raise a range of issues, including the appropriateness of designating the land as proposed and the compensation that would be payable to GSCL if that occurred.

Council does not currently own the Sports Park Land

6.10 Finally, even if it the inclusion of the Sports Park Land in the RSP was determined to be the equivalent to rezoning the land for open spaces purposes (which is not accepted), the Council does not currently own the land. GSCL does. It is clear that the Council cannot acquire an interest in the land (even by agreement with GSCL) without providing adequate compensation to GSCL.

6.11 In this regard, section 86(3) of the RMA makes the provision of such compensation mandatory, not discretionary, and does not provide any exceptions which GSCL could rely on in order to avoid that requirement. The Council would also still be required to acquire the land from GSCL at market value under the PWA if it designated the land for reserve purposes. While the designation process would be available under the RMA, there is no provision that would then enable the Council to acquire the land without providing adequate compensation. The PWA makes it clear that any land required for public purposes must be purchased either by agreement or compulsory acquisition under that Act.

Summary – GSCL not required to set aside Sports Park Land

6.12 In summary, our view is as follows:

(a) The inclusion of the Sports Park Land in the RSP is not equivalent to an open space zoning. The land is currently zoned FUZ and can only be rezoned for open space purposes via the PPC or other Schedule 1 process. The Sports Park Land is also not currently designated for reserve purposes. In our view, the inclusion of the Sports Park Land in the RSP indicates a future land use outcome to be worked through in subsequent plan changes or subdivision applications, not an ownership or compensatory one.

(b) GSCL is not legally required to provide for or show the Sports Park Land in the RNSP, which will supersede the RSP.

(c) GSCL would be entitled and have the opportunity to challenge any proposed rezoning of the Sports Park Land through a submission on the relevant plan

change, in accordance with section 85 of the RMA. It would also be notified of and able to lodge a submission on any notice of requirement to designate the land for reserve purposes under section 168A of the RMA.

(d) Even if it was considered that the Sports Park Land had already been rezoned for open space purposes or designated for reserve purposes as a result of the RSP, the Council does not currently own the land. If the Council wishes to acquire the land, even by agreement, GSCL is entitled to be compensated for the acquisition in accordance with the relevant provisions of the RMA (in particular section 86(3)) and the PWA.

(e) In any event, the Council does not have funding for the Sports Park Land within its current LTP. GSCL would therefore be setting up expectations that are inconsistent with the Council's current budget and strategy, if it provided for the Sports Park Land within the PPC.

7. CONCLUDING COMMENTS

7.1 The Council has advised that, as part of its Rotokauri North PPC application, GSCL is required set the Sports Park Land aside and transfer ownership of the same to the Council, free of charge. This is on the basis that the RSP illustrates the Sports Park Land as "future reserve".

7.2 For the reasons outlined above, our strong view is that the Council's interpretation of the RSP is not correct. We consider the correct legal position is that:

(a) The Sports Park Land is zoned FUZ, and the applicable provisions are found in the FUZ chapter of the HCDP. The land can only be rezoned via the PPC or other Schedule 1 process, through which GSCL would have the opportunity to object to the rezoning in accordance with section 85 of the RMA. GSCL would also be able to make a submission on any notice of requirement issued by the Council to designate the Sports Park Land for reserve purposes.

(b) Even if the land is rezoned and or / designated, the Council can only acquire an interest in the land by entering into an agreement with and providing compensation to GSCL.

7.3 We trust the above is clear and sufficient for present purposes. We are happy to discuss any aspect of this advice with your other advisors and / or the Council's representatives, as necessary.

Yours sincerely

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