

MEMORANDUM

TO Plan Change C Hearings Panel

FROM David Murphy, City Planning Manager
Nick Jessen, CR Law

DATE 21 October 2019

SUBJECT **SECOND RESPONSE TO COMMISSIONERS' MINUTE OF 13 SEPTEMBER 2019
DIRECTION 1 – VARIATION**

Introduction

1. This Memorandum has been prepared by David Murphy (Planning) with the assistance of Nicholas Jessen (legal) and addresses Direction 1 of the Commissioners' Minute 13 September 2019 which says:

In relation to our request for a variation to PC C to include rezoning of land on the western side of Te Wanaka Road, we direct that Council advise the details of the process it will follow to make a decision on this request and its estimate as to when the Council will decide whether or not to notify such a variation.

2. With utmost respect to the Commissioners and the views expressed in the Minute, the City Planning team will not recommend to the Council that it commence a variation process in relation to the remaining Race Training Zone (RTZ) land for reasons provided within this Memorandum. Accordingly, this memorandum does not respond to the direction given above with estimates on the process that it will follow (because the direction is premised upon the Council advancing the request for a variation).
 3. Instead, this Memorandum provides further information to the Commissioners concerning the Council's current work programme to advance the rezoning of land to the west of Te Wanaka Road in conjunction with the balance of land at Kakatangiata, and explains in further detail the reasons why the City Planning team is not prepared to take up the Commissioners' request. There are three principal reasons:
 - (a) There is in fact a great deal more certainty regarding the Plan Change process in respect of the balance of Kakatangiata than was able to be disclosed at the hearing. It is possible that with the disclosure of this information, the Commissioners may see a path forward.
 - (b) In light of the Plan Change program that the City Planning team is establishing and the timetables that are being worked to, it is considered that duplicating that by reallocating resources to a variation only addressing the RTZ would create efficiency issues and less than ideal planning outcomes.
 - (c) There are procedural difficulties and uncertainties associated with commencing a variation after submissions have been heard and interim views have been released.
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4. Importantly, we wish to be clear that this memorandum does not seek to challenge in any way the findings or comments expressed by Commissioners in respect of the impacts of the Plan Change on the RTZ land.
5. Finally, the Minute at 21(b) indicates that if a variation is not initiated, then consideration will need to be given to some deferment or timing conditions. The planning officers respectfully seek an indication as to whether this remains the view of the Commissioners, in light of the additional certainty provided by the disclosure of the further information and the work programme being undertaken by the City Planning team.
6. If it is the case that some deferment or timing conditions are considered necessary, then officers respectfully seek an opportunity to provide input on such provisions along with responses to the balance of Directions from the 13 September 2019 Minute. In short, timing conditions or sunset clauses to manage potential effects on the RTZ that fall away when the RTZ is rezoned residential would be preferred over deferment given the strong demand for land for housing as demonstrated in the Council's Housing and Business Needs Assessment.

The Further Information – Council Resolution

7. The further information is a resolution made by the Council in a Part 2 (Confidential) in June 2019, as follows:
 2. That \$125,000.00 per annum of unbudgeted expenditure be approved for 2019/20 and 2020/21 to resource a Council-led District Plan Change at Kakatangiata alongside the existing District Plan work programme.
8. The Chief Executive of the Council authorised the release of this resolution from Part 2 to Part 1 on Friday 27 September 2019.¹ The information was not publicly available at the hearing of Plan Change C. While the rezoning of the balance of Kakatangiata was identified by the Council's planning officers as the occasion when the balance of the RTZ land would be proposed for rezoning, it is acknowledged that further details of the proposed procedure was scarce at the time of the hearing, giving rise to concerns as to certainty of any future rezoning (See for example the Minute at Paragraph 20(d)).
9. The resolution, however, confirms the funding for the work programme for the Council's City Planning team to proceed with the rezoning of the entire balance of the Kakatangiata area, which includes the remaining area of RTZ land not addressed by Plan Change C. This is significant to the extent that it demonstrates with much more certainty the commitment of the Council to progressing with the rezoning of the land to the west of Te Wanaka Road as part of its rezoning and the wider Kakatangiata area. This information addresses one of the Commissioners concerns by responding to the lack of certainty.²
10. Indeed, it arguably provides a greater degree of certainty than could be provided by a commitment to a variation and a timetable, without confirmation of funding. The existing commitment to undertake a Plan Change for the balance of the Kakatangiata area would require all the same Schedule 1 procedures to be followed as would be required for a variation, but covering a broader scale of land and ensuring an integrated response.

¹ The Resolution is connected with a separate Resolution remaining in Part 2 concerning negotiations with another developer which are ongoing, the Resolutions in full cannot be made available.

² see paragraph 20 (D).

11. The City Planning team has started the process to deliver a Plan Change concerning the balance of the Kakatangiata area to the point of public notification within 18 months.
12. The timeline of notifying within 18 months is within the period of expenditure authorised by the resolution and meets a commitment that has been provided to the owner of land within the "Plan Change B" area (Pioneer City West Ltd), which is a significant piece of land also within the Kakatangiata growth area to the east of Pioneer Highway.
13. If it was not for the existing resolution that is now able to be shared, the response to Direction 1 would have contained a full assessment of all the options to address effects on the RTZ (the Commissioners Concerns), including a variation to Plan Change C as an option. Instead, continuing with the Plan Change in light of the Resolution is the option.

Resourcing and efficiency issues

14. The Private Plan Change B process is also relevant background to a resourcing concern in respect of the variation request. The City Planning team is engaged in discussions with the Private Plan Change B applicant concerning the progress of the Plan Change, communicating the view that instead of resourcing the processing and hearing of one further part of Kakatangiata, resources are better directed to progress one comprehensive Plan Change to cover the balance of Kakatangiata as an integrated whole (including the remaining RTZ land).
15. While the Council and the Private Plan Change B applicant are progressing negotiations in good faith, it is presently uncertain whether Private Plan Change B will be progressed imminently, or kept on hold on the strength of Council's resolution and a commitment to notify the Kakatangiata plan change within 18 months.
16. The direction requesting a variation to Plan Change C to include the rezoning of land on the western side of Te Wanaka Road presents the same resourcing challenge. If the Council were to undertake a variation to Plan Change C, this would effectively be a distinct Plan Change project that would require a diversion of planning resources (financial and staffing) from that which has already been committed to the balance of Kakatangiata.
17. In a practical sense, the City Planning team face the prospect of leading or being involved in three contemporaneous Plan Change processes in respect of the Kakatangiata area, specifically;
 - (a) A variation to Plan Change C limited to the RTZ land;
 - (b) Private Plan Change B, limited to the Pioneer City West Ltd land; and
 - (c) A Kakatangiata Plan Change incorporating the balance.
18. Instead of this outcome (or some other variation at a broader scale), it is considered that the certainty provided for by the funding commitment and Kakatangiata work programme is sufficient to allow for that process to take its course while simultaneously enabling the development of Kikiwhenua via Plan Change C.

Procedural difficulties of varying Plan Change C.

19. Finally, there are concerns as to the suitability of a variation in circumstances where a hearing has been held on the Plan Change, and in respect of which interim comments and findings

have been given indicating that the land is generally suitable for residential development subject to resolution of the identified issues.

20. The operation of Clause 16B of Schedule 1 RMA provides that a variation “*shall be merged in and become part of the proposed ... plan as soon as the variation and the proposed ... plan are both at the same procedural stage.*” The exercise of ‘pausing’ for a merger of a variation with a principal plan change is dauntingly complex and arguably impossible where a principal plan change has already progressed through all essential plan change processes required by Schedule 1 and the only outstanding step is the preparation of a decision on submissions.
21. A variation at this stage to squarely address the land resource to the remaining RTZ land is effectively a ‘fresh’ plan change process. It can never ‘catch up’ to the principal Plan Change except at the point of Commissioner deliberations. It is arguable that a variation at this stage of the process is practically incapable of merging with the principal plan change.
22. The only apparent practical difference between a variation addressing the remaining RTZ land and the Kakatangiata Plan Change process is that the variation process would act as a de-facto deferment/delay of the Commissioners function of making decisions on submissions concerning Plan Change C.
23. Finally, it is acknowledged that the issue underlying the request for a variation are comments/ findings as to the impacts of Plan Change C on the remaining RTZ land, however because of the ‘pause until merged’ feature of a variation, this would have the consequence of the Commissioners substantially delaying a decision on submissions. Such a delay will have an impact on the rights of submitters in terms of procedural fairness and natural justice.
24. This is because delaying the Plan Change process now without releasing a decision prevents the exercise of any rights of appeal to the Environment Court under cl 14 of Schedule 1 which would arise upon notification of decisions. While it is certainly not unheard of for there to be procedural delays for various reasons in the Schedule One RMA process, the justification in this case may well be difficult for submitters to accept in circumstances where the Minute indicates approval in general terms of the case for the rezoning.
25. The preferable course would be for decisions to be made (thus realising submitter appeal rights) with appropriate provisions as determined on the evidence by Commissioners. Parties will then be provided with the statutory opportunity to exercise their appeal rights while the Council continues with the broader Kakatangiata Plan Change.



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