

Before Kaipara District Council

In the Matter

of the Resource Management Act 1991 (**RMA**)

And

In the Matter

of an application for Private Plan Change 82
(**PC82**) by **MOONLIGHT HEIGHTS LIMITED** to
rezone 39.2 ha of land at Awakino Road,
Dargaville from Rural Zone to Residential Zone

Reply Submissions on behalf of Moonlight Heights Limited

Dated 21 September 2023

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Introduction

1. These reply submissions are filed on behalf of Moonlight Heights Limited (**MHL**), the Applicant for Private Plan Change 82 (**PC82**) to the Kaipara District Plan (**KDP**).
2. PC82 seeks to rezone 39.2ha of land at Awakino Road, Dargaville (**Site**) from Rural Zone to Residential Zone. As part of that process, MHL also proposes to apply a new Awakino Precinct over the Site. The Awakino Precinct contains bespoke provisions to protect ecological features, promote high quality urban design, and to provide open space and connectivity for future development outcomes. These fundamentals are unchanged.
3. However in light of various matters arising during the hearing, MHL has given further consideration to the precinct provisions subject to analysis and assessment by its expert consultants.
4. A revised package of precinct provisions was provided to Council for comment post hearing. A memorandum in response from Council dated 11 September 2023 prepared by Ms Buckingham (**Council Memo**) was received on 12 September 2023.
5. I do observe there is almost unanimous alignment between Council reporting officers and MHL expert consultants on all key matters, with only a couple of areas of disagreement.
6. Accompanying this reply are statements of evidence dated 15 September 2023 (**Reply Evidence**) from:
 - a. Ms McGrath.
 - b. Mr Kelly.
 - c. Mr Jull.
 - d. Mr Pierard.

- e. Mr Warden.
- 7. The Reply Evidence responds to matters arising and provides an evidential basis for amendments proposed to the Precinct Provisions and the Precinct Plan. I note as a matter of law, that all amendments made are within scope.
 - 8. Ms McGrath's Reply Evidence includes the following attachments:
 - a. Recommended Awakino Precinct Provisions (track changed).
 - b. Recommended Awakino Precinct Provisions (clean copy).
 - c. Revised Awakino Precinct Plan.
 - d. Street Cross – Sections.

Revised Precinct Plan and Provisions

- 9. The reasoning for the amendments made to the Precinct Provisions and Precinct Plan is addressed in the Reply Evidence.

Precinct Plan

- 10. The changes made to the Precinct Plan are summarised at [5] – [7] of Ms McGrath's Reply Evidence. Of note, amendments have been made (inter-alia) to address the following:
 - a. Ecological matters – descriptions in the legend have been adjusted to reflect appropriate KDP definitions and all existing indigenous vegetation is now identified in the Plan.
 - b. Transport – Road descriptions have been refined, alignment of the indicative primary loop road adjusted, and an indicative northern access identified (with the latter linking to revised proposed Awakino Road upgrade provisions).
 - c. Urban design – the name of the “green street” has been adjusted to clearly identify its primary amenity outcome (given otherwise the potential for confusion that it may be intended to primarily achieve

ecological outcomes), and a new “Sub–Area A” identified which protects steep slopes and existing wetlands, rivers, indigenous vegetation and archaeological features (linking to revised proposed precinct subdivision provisions).

Precinct Provisions

11. Ms McGrath’s Reply Evidence at [8] explains the recommended amendments to the Precinct provisions. The changes (inter-alia) address roading upgrade and access matters, noise attenuation, subdivision design and protection of steep areas located within Sub-Area A and specified cross sections for the Green Amenity Street.

12. Ms McGrath then comments on the following:

- a. Spatial extent of the proposed residential zone and precinct.¹
- b. Connections and protection of ecological features.²
- c. Provision of open space.³
- d. Green Amenity Street.⁴
- e. Reverse Sensitivity.⁵
- f. Cycle Connections C.⁶
- g. Slope.⁷
- h. Loop Road.⁸

¹ At [9] – [10].

² At [11] – [12].

³ At [13] – [17].

⁴ At [18] – [19].

⁵ At [20] – [22].

⁶ At [23] – [24].

⁷ At [25] – [26].

⁸ At [27] – [28].

i. Awakino Road Upgrading.⁹

13. With respect to these matters, they were largely addressed in my opening submissions and those submissions remain apposite. I enlarge on some of those matters below in the context of matters arising.
14. The extent of the proposed residential zone and precinct essentially arose as a consideration in the context of two aspects – first, whether the proposed zone and precinct adequately responded to areas of more sensitivity on the site (for example steeper areas, ecological features and so on), and second whether the zone and precinct should apply to land not within MHL’s control.
15. With respect to the first aspect, the amendments proposed to the precinct provisions and precinct plan have responded to areas of more sensitivity on the site. Those changes, explained in the Reply Evidence of Ms McGrath, are supported by the Reply Evidence of Mr Warden. With these changes the extent of the zone and precinct is in my submission appropriate.
16. Turning to the second aspect, it remains the case as a matter of law that a plan change may be sought over land not under the control of an Applicant.¹⁰ There are in my submission resource management considerations which favour the adoption of the zoning and precinct extent proposed by MHL. Acknowledging concerns raised by submitters, and the potential for development of the plan change area in stages, the amendments described in the Reply Evidence of Ms McGrath include a shift in the indicative alignment of the southern access,¹¹ and an improved package of provisions relating to internal roading and the Awakino Road upgrading which squarely engages with the potential for southern portions of the plan change area to be developed separately and potentially later in time.

⁹ At [29] – [31].

¹⁰ Refer my opening submissions at [121] – [122].

¹¹ Albeit I maintain my observation as expressed in opening and during the hearing that an indicative road alignment ultimately has no implication for the owner of the land in question.

17. Ecological features were the subject of questions from Commissioners largely in the context of whether all relevant features had been identified on the precinct plan and appropriately provided for through precinct provisions. Those concerns have been directly responded to. Happily the response identified by MHL's consultants is both cohesive and effective. Control and effective restriction of development within an area specifically identified on the precinct plan (Sub-Area A) pulls together a range of desired outcomes – the area identified includes all ecological features of significance and the archaeological feature, it protects steeper slopes, and as a consequence also aids in avoiding development in areas which would require much more significant earthworks (which would raise the prospect of more significant visual effects if such earthworks were required).
18. The Council Memo briefly addresses ecological considerations and properly acknowledges that Council does not have any expert input which opposes the amendments proposed by MHL. Subsequently the Council Memo identifies that various changes are accepted from a planning perspective whilst other amendments are ones which the Council reporting planner takes no position on. In my submission you can and should rely upon the expert advice before you on behalf of MHL.
19. The green street (as it was originally labelled) was the subject of questioning regarding its ecological contribution and a possible connection to wetlands. As identified during the hearing and discussed further in the Reply Evidence of Ms McGrath and Mr Pierard,¹² the original appellation chosen was perhaps unfortunate to the extent that it might be interpreted as an intention that the street fulfil an ecological function. The revised moniker for the street (Green Amenity Street) makes clear its key amenity function.¹³ Clarity in this regard is assisted by provision of proposed cross sections to ensure the outcome is understood and achieved. There will still be a degree of general ecological benefit arising from street planting, but that outcome is secondary.

¹² Reply Evidence of Pierard, at [4].

¹³ Notwithstanding its somewhat unfortunate fossil fuel acronym.

20. Reasons have also been given as to why a direct connection to the wetlands from the green amenity street is not appropriate.
21. With respect to reverse sensitivity, in my submission the revised provisions advanced by MHL appropriately engage with this issue. The evidence put forward by Mr Ibbotson adopted a conservative approach. As Ms McGrath identifies in her Reply Evidence the provisions require in addition to boundary planting, solid barriers and cooling and ventilation methods to manage temperature of habitable rooms with windows and doors closed. These responses will also mitigate and manage potential odour effects. In my submission the proposed further amendment to Rule 13.10.8A suggested in the Council Memo regarding reverse sensitivity is not required.
22. Turning to transport matters, I say Ms McGrath is correct in her view that making provision for a link to possible future Cycle Connection C is inappropriate. The connection sits outside the plan change area, is entirely speculative, has no funding, is located on private property with no legal right to establish the connection currently in place, and would require works on the plan change site which would conflict with steep slopes and wetland areas which are now proposed to be protected in Sub- Area A.
23. That brings me to the only substantive area of disagreement as between Council and MHL – being the extent of any required Awakino Road upgrading and as a related matter the appropriate wording of precinct provisions to secure the desired outcome.
24. Commencing with the physical works, the Reply Evidence of Mr Kelly identifies and summarises the difference of opinion at [7] – [10]. Leaving the somewhat lesser issue of when a “primary standard” pedestrian crossing is required to one side, fundamentally the remaining area of difference is:
- a. The need for a shared path on the eastern side of Awakino Road from the southernmost access point onto Awakino Road to Kauri Court.

- b. A requirement to urbanise Awakino Road between 10 metres south of Paratai Place and Kauri Court.

- 25. During the course of the hearing Mr Marshall has stepped back from his original proposed extent of shared path required. Nonetheless he maintains that it should extend to Kauri Court.
- 26. The evidence in chief of behalf of MHL identified why the extent of shared path and urbanisation of Awakino Road as sought by Council officers was unnecessary.¹⁴ That evidence remains relevant as do my opening legal submissions with respect to this issue.¹⁵
- 27. Fundamentally what Council officers seek remains (as summarised by Mr Kelly at [11] of his Reply Evidence) inappropriate, being physical works not required as a result of effects which will be generated by development enabled by this plan change.
- 28. In addition, Mr Jull has calculated the approximate costs of the additional work sought by Council officers. This is set out in his Reply Evidence and is relevant to your assessment of costs and benefits. Mr Jull estimates the cost of the shared user path and urbanisation of Awakino Road from 10m South of Paratai Place to Kauri Court to be in the order of \$1.17 million¹⁶. That is a very significant cost, and I note includes assumptions which include that any design could work around existing power poles – if that were not the case then the position would be materially worse. This cost would lie on top of all of the other significant infrastructure costs which MHL is committed to, and I am advised would make the viability of the project tenuous.
- 29. The benefit of constructing an orphan section of shared path which does not link to any other such infrastructure and for which no material need has been demonstrated, does not justify the outsized cost.

¹⁴ EIC Kelly, at [29] – [30].

¹⁵ Opening legal submissions at [82] – [87].

¹⁶ Reply Evidence of Jull, at [9].

30. In my submission the evidence is clear and persuasive that MHL's position with respect to road upgrading is the correct one. The Reply Evidence of Mr Kelly¹⁷ and Ms McGrath¹⁸ illustrates why the carefully revised provisions advanced by MHL appropriately provide for road upgrading, with comprehensive triggers relating to different staging to ensure that road upgrades are properly calibrated to development on site and consequent demand generated. These provisions include making provision for an appropriate pedestrian crossing outcome. It is also worth emphasising that the overall works package proposed by MHL through the precinct provisions is a significant one which will result in a major upgrade to the road and betterment for the broader community.
31. The difference in opinion as to wording with respect to transport upgrades is essentially an output of the difference in opinion as to physical works required. The proposition as advanced in the Council Memo in that regard is not accepted. Rather I direct you to the wording prepared by Ms McGrath and say those provisions are the most appropriate.

Financial Contributions

32. The Memorandum of Counsel for KDC dated 11 August 2023 identified that financial contributions for reserves have been previously applied by Council for construction of a shared use path. I do not advance any legal position to the contrary but observe that if this course of action is available on the basis that activity on a shared use path constitutes a recreational activity, then I do not regard as material the end destination of that path (the Memorandum of Counsel noted in the Mangawhai example that the path provided access to the coast).
33. Accordingly, it would seem open to Council to apply any financial contribution for reserves in the context of development on the plan change site to construction of shared use paths if it saw fit to do so. Such an

¹⁷ At [13] – [15].

¹⁸ At [29] – [31].

outcome illustrates additional benefits to the community which will arise from rezoning of the subject land and subsequent development of it.

Submitters in opposition

34. There is limited additional legal commentary necessary – the analysis by the experts engaged by MHL, supported for the most part by specialist Council officer comment, establishes the general appropriateness of PC82 including with reference to issues raised by submitters.
35. Substantial legal submissions were lodged on behalf of B & N Lowe and others. These submissions were unsupported by expert evidence.
36. My opening submission noted that a range of matters arising in the submitters legal submission had been addressed in a thematic way and had been engaged with by MHL's expert consultants (and Council officers) in the context of planning considerations and potential effects on the environment.
37. My opening provided a specific response with respect to the relevance of ownership of land subject to a plan change, postulated effects on rates, and the relevance of potential changes to the legislative framework.
38. The evidence from Mr Lowe did not raise any new or unexpected matters sitting outside the range of appropriate considerations engaged with by MHL and its experts. Mr Lowe confirmed his primary concern was the indicative road shown overlaid on the location of his dwelling. As already addressed before the Commissioners, the road is indicative and there is no ability in law for it to proceed without Mr Lowe's (or any successor in title's) approval. That position would only change if Council elected to pursue a notice of requirement/designation process, which is a different consideration altogether. Furthermore as already identified in this reply, MHL has altered the alignment of the indicative road in the revised Precinct plan to avoid the dwelling in question.

39. The oral submissions presented by Ms Smith spoke to a range of matters generally aligned with the lodged legal submissions and the core concerns of Mr Lowe. I comment on matters raised below.
40. Concerns about “loss of their home” and the absence of consultation and/or consent are misconceived. Development on the Lowes land cannot occur unless they agree to it, or they have sold to another party who subsequently decides they are amenable to development.
41. It is also relevant to point out that it is a long-standing principle of planning law that existing private property rights may be diminished or affected by environmental regulation. The RMA enables constraints to be placed on the existing rights of private landowners to advance the greater good of the community and the environment.¹⁹ The question is not whether such regulation can be imposed but whether it should be imposed having regard to the greater good of the community and the environment.
42. In the landmark *Falkner* case the High Court held that the concept of sustainable management takes priority over private property rights.²⁰
43. The Environment Court in *New Zealand Suncern Construction Ltd v Auckland City Council* said:²¹
- “It is inherent in the nature of district plans that they impose some restraint, without compensation, on the freedom to use and develop land as the owners and occupiers might prefer.”
44. MHL’s position, contrary to criticisms levied by the Lowes, is that it has considered all land affected, and all potential effects.
45. Turning to effects, and whether there is a risk that demand for housing may not arise in the volume anticipated, those effects will be suitably managed

¹⁹ Berry J, Vella J. RMLA Property Rights Roadshow 2010, Planning controls and property rights – striking the balance. July 2010

²⁰ *Falkner v Gisborne District Council* [1995] 3 NZLR 622 at p632, [1995] NZRMA 462 “The Act is simply not about the vindication of personal property rights, but about the sustainable management of resources”.

²¹ [1996] NZRMA 411 at p24 (appeal dismissed in the High Court: [1997] NZRMA 419).

in accordance with a comprehensive package of provisions and any risk is borne by the developer not the community given that appropriate infrastructure outcomes are secured (road upgrades are required, and infrastructure capacity is otherwise available, with any slower than expected development simply resulting in existing capacity going unused).

46. I note also the evidence of Mr Heath that projected growth based on assessed demand drivers with attempts made to closely match enabled development with those figures, does not reflect modern best practice. Rather it is preferable to provide additional capacity, so long as effects are suitably managed, and infrastructure and servicing in particular have solutions either in the form of available capacity or through management of development by way of triggers and matters of control to enable infrastructure considerations to be addressed over time.
47. In this case, as I spoke to during the hearing, there is both available capacity and a commitment by Council to resolve potential infrastructure deficits over time.²² Suitable triggers and matters of control are in place with respect to infrastructure and servicing. In addition it is clear that in a smaller community such as this, it would be inefficient and unrealistic for investment to be made in additional infrastructure capacity well in advance of need. More closely matching infrastructure provision with actual growth is both desirable and achievable in the context of a smaller centre with relatively slow growth. It is also the case that the growth enabled will improve community infrastructure by reference to roading and contribute more broadly to future infrastructure through reserve contributions and rates.
48. References to other asserted subdivisions and availability of unsold lots is of no relevance to this matter. A number of the other “subdivisions” referred to were proposed not consented. To the extent that another consented subdivision may have some lots available for sale, that has no bearing on the appropriateness of this proposal nor is it evidence that there is no demand for residential sites. Frankly it may simply reflect the fact

²² This was confirmed by Mr Usmar in response to questions from Commissioners.

that the unsold lots in question (assuming they exist) are undesirable or overpriced.

49. As for criticisms that the proposal would result in an isolated community at the end of Awakino Road, with no corner shop, or bus or taxi available, I say that a real-world assessment would acknowledge that Dargaville is not large enough to support multiple local centres. The reality is this site is situated within 2 km of the CBD, which is relatively close. Commercial activity is also permitted in the residential zone albeit perhaps unlikely to establish – but it does remain a possibility. As for bus or taxi services, these are only likely to become viable in Dargaville if the town grows and the population increases (something this rezoning will assist).
50. Criticism regarding the asserted lack of protection or acknowledgement of sensitive areas on the site, including wetlands and steeper areas, have been addressed through the amendments to the Precinct provisions and Precinct plan already discussed in this reply.
51. Other expressed concerns about urban design, road layout, the green street, stormwater and infrastructure provision have all been addressed by expert consultants and appropriately engaged with through the provisions proposed by MHL.
52. I also observe in the context of concern expressed by Mr Lowe and his neighbour about their land being included within the plan change, that Awakino Road itself and the various amenities and services accessed by it and proximate to it (for example schools and the hospital) represent a community resource and an outcome of community investment. That is one of the reasons why strategic planning documents have identified the subject site as an area where residential expansion should occur. In that context strategic planning is not predicated on the views of an individual owner at a singular point in time.
53. Finally, concerns about flooding or potential overland flow have been addressed through expert analysis. Particular outcomes of development will be subject to assessment and consenting, with a range of avoidance and mitigation strategies possible.

Questions from Commissioners

54. The thematic responses above and the amendments made by MHL to precinct provisions and the precinct plan have addressed issues raised by Commissioners. That includes questions regarding sloped land, protection of features, better identification of features on the precinct plan, clarity and additional guidance with respect to the green street, transport and footpath works and appropriate triggers, and improvements to precinct provisions and the precinct plan.

Conclusion

55. Consequent on my reply submissions above, MHL maintains its view that the rezoning proposed is appropriate (subject to the amendments to the Precinct Plan and Precinct Provisions proposed post hearing). Thus, I repeat my concluding submission in opening that:
- a. The PC82 Precinct provisions appropriately give effect to all applicable higher order planning instruments (including all national policy statements and national environmental standards, and regional policy statements), and are not inconsistent with any directive objectives, policies or constraints from such higher order instruments. The rules which will apply will appropriately implement the policies.
 - b. In terms of s 32 of the RMA, PC82 is the most appropriate means of achieving the purpose of the RMA, and the proposed provisions are the most appropriate ways to achieve the objectives of the KDP.
 - c. Approving PC82 would result in amendments to the KDP that accord with the Council's functions under s 31 of the RMA.
 - d. Approving PC82 would be consistent with and promote sustainable management of resources, as required by s 5 of the RMA, because:
 - i. Potential adverse effects are appropriately avoided, remedied or mitigated;

- ii. The amended PC82 Precinct provisions will enable efficient use of land on the Site and its natural and physical resources, which can be undertaken in a manner that maintains or enhances the environmental and ecological values of the Site;
- iii. PC82 will enable communities to provide for their social, economic, and cultural wellbeing and for their health and safety; and
- iv. Development of land subject to the Awakino Precinct can be undertaken in a manner that will ensure amenity values and the quality of the environment can be maintained or enhanced.

Jeremy Brabant

Counsel for Moonlight Heights Limited

Dated 21 September 2023