



MEMORANDUM

To: Hamish Firth and Mark Benjamin, Mount Hobson Group
From: Simon Berry and Taylor Doyle
Date: 14 November 2023
Copy: James Kirkpatrick Jnr and Aoife Mac Sharry, James Kirkpatrick Group Limited
Subject: **Proposed development at 538 Karangahape Road, Auckland – applicability of PC78 and weighting of planning provisions**

1. INTRODUCTION

1.1 You have sought our advice in relation to legal issues relevant to the proposal by James Kirkpatrick Group Limited ("JKGL") to establish an office building on a site at 538 Karangahape Road ("Site"; "K Road") via an application for resource consent to the Auckland Council ("AC" or "Council").

Immediate context

1.2 The proposal will provide public frontage (retail and/or restaurants etc.), and a mix of spaces (office and/or commercial spaces etc.) and includes building heights at its highest point of up to 45 metres above mean street level ("MSL") on K Road.

1.3 The Site is located in the Business City Centre Zone ("BCCZ") in which the General Height Controls in the Auckland Unitary Plan - Operative Plan ("AUP") allow for maximum 15 metres height (above MSL) at the Site. Given that constraint, the design of the JKGL proposal has been based on changes to the City Centre Zone provisions that have been introduced into the AUP by Plan Change 78 ("PC 78") ("CCZ78").

1.4 JKGL representatives have presented the proposal to the AC Urban Design Panel which has expressed support subject to resolution of some limited detailed design matters to take account of the specific K road requirements and policy thrust of the AUP. However, the proposal still substantially exceeds the operative BCCZ provisions in terms of height and floor area ratio ("FAR").

1.5 The upshot is that the ability for AC officers (and ultimately decision-makers) to be able to consider / place some weight on the more enabling CCZ provisions introduced by PC 78 becomes important in gaining support for JKGL's proposal on its merits. The ability for AC officers to do so has been queried by AC officers. In

that regard, the notes of a pre-application meeting regarding the proposal held on 8 June 2023 records that:¹

"i) Council noted that we would assess the application on the current AUP(OP) and give no weight to PC 78 because PC 78 is still subject to change/confirmation."

(Emphasis ours.)

Procedural background

1.6 Our understanding of the procedural background relevant to JKGL's current proposal (as explained by MHG and JKGL) is set out below:

- (a) In December 2020, JKGL lodged a resource consent application for partial demolition of the existing building on the Site and construction of a new six-level building. AC granted approval for JKGL's application in April 2021 and JKGL commenced design workshops to develop the approved plans into an achievable design.
- (b) In October 2021, JKGL lodged a building consent application for demolition and separate consents were lodged for the substructure, superstructure, and façade. The building consent application for demolition was granted in December 2021. At this stage, a number of further information requests were received from AC regarding the building design.
- (c) During this time, key statutory changes were introduced, namely:
 - (i) The promulgation of the National Policy Statement on Urban Development 2020 ("NPS-UD") in August 2020 which sought to implement a requirement that AC, within two years, notify a plan change to amend the AUP to enable building heights and density of urban form to realise "*as much development capacity as possible*;" and
 - (ii) The Resource Management (Enabling Housing Supply and Other Matters) Amendment Act 2021 ("RMA-EHS"), which became law in December 2021, introduced the Intensification Streamlined Planning Process to speed up the implementation of the NPS-UD intensification provisions.
- (d) This became relevant to JKGL for the following key reasons:
 - (i) By July 2022 it had become evident to JKGL that its consented application would be a financially marginal and unsustainable development of the Site because of a doubling of building costs from the original estimate and an increase of one year to the original construction timeframe.
 - (ii) In August 2022, PC 78, the intensification planning instrument ("IPI") which would give effect to the intensification policies of the NPS-UD, was notified. PC 78 introduced significant changes to the planning provisions applicable to the Site, including removal of the 3:1 Floor Area Ratio limit and an increase of the height limit to 35 metres.

1 AC Pre-Application Consenting Memo dated 20 June 2023.

- (iii) The Minister for the Environment had directed that decisions on PC 78 needed to be notified by 31 March 2024².
- (e) In light of these various matters, JKGL decided in December 2022 to undertake a redesign of its proposal in light of the amendments introduced by PC 78.
- (f) JKGL considered that the timing of the final decision to be made on PC 78 (March 2024) set an achievable timeframe for JKGL's new design team to design a new building for the site and lodge a resource consent application.
- (g) However, following the severe weather events in Auckland at the beginning of 2023, a one-year extension on the March 2024 PC 78 decision notification date was sought by AC, and subsequently approved by the Minister in April 2023, to provide AC more time to review and respond to flooding and hazard matters affecting the intensification allowed by the proposed plan change.
- (h) By this point, JKGL had commenced progress with its design of a new building in line with PC 78 in light of the NPS-UD's clear direction that the future City Centre context will enable significant intensification, and because the proposed CCZ78 changes substantially increase the development potential of JKGL's application Site. JKGL therefore consulted with MHG regarding its next steps.

Advice sought and definition of key issues

- 1.7 In light of the above, MHG and JKGL considered it necessary to obtain legal advice in relation to the weight to be accorded to the proposed CCZ78 provisions in the consideration of JKGL's resource consent application. You have therefore sought our advice in relation to two key questions i.e., whether:
- (a) AC officers are entitled / legally required to consider the CCZ78 provisions. That is a binary issue; the answer is either 'yes' or 'no'.
 - (b) If the answer is 'yes', what weight should be accorded to the CCZ78 provisions which in turn raises issues in relation to the scope of relief sought in relation to CCZ78 and relevant case law?

Purpose and scope of memorandum

- 1.8 Against that background, the purpose of this memorandum is to address those two key issues. In doing so, the following sections address:
- (a) Whether AC officers are entitled to disregard the CCZ78 (Section 3).
 - (b) Legal principles relevant to the weight to be accorded to competing plan provisions (Section 4).
 - (c) The planning context - background to and purpose of PC 78 (Section 5).
 - (d) The status of the CCZ78 provisions in light of submissions relating to CCZ78 height controls and FAR (Section 6).
 - (e) The weighting to be accorded to BCCZ provisions versus the CCZ78 provisions in light of (b) – (d) (Section 7).

² The Resource Management (Direction for the Intensification Streamlined Planning Process to Auckland Council) Notice 2022

- (f) Our conclusions (Section 8).
- 1.9 Our advice is summarised in Section 2.
- 2. **EXECUTIVE SUMMARY**
- 2.1 Our detailed analysis follows. At the outset, our advice can be summarised as follows.

The CCZ78 provisions are required to be considered in assessing the JKGL application

- 2.2 PC 78 was notified on 18 August 2022. It was promulgated to enable AC to “give effect to” the intensification policies (Policies 3 and 5) of the NPS-UD as required by section 77N of the Resource Management Act 1991 (“RMA”).
- 2.3 Section 104 (1)(b)(vi) of the RMA requires that consent authorities, in considering a resource consent application, must “*have regard to ... any relevant provisions of a plan or proposed plan*”.
- 2.4 PC 78 is a “proposed plan” which falls within the definition of that term in section 43AAC of the RMA.
- 2.5 On that basis, AC processing officers are **legally required** to consider the CCZ78 provisions in assessing the JKGL application for K Road.
- 2.6 Similarly, the CCZ78 provisions are relevant to the determination of the merits of the application in due course. To the extent that the minute of the 8 June 2023 meeting may have implied that PC 78 can be completely ignored, that is incorrect - failing to do so would constitute an error of law.
- 2.7 However, the pre-application meeting minutes reflected an intention by AC officers to place “no weight” on the CCZ78 provisions. Having concluded that AC is required to consider the CCZ78 provisions, the issue therefore becomes one of how much weight should be accorded to those provisions as compared with the operative provisions of the AUP. That is a more nuanced issue.

Assessing the weight to be accorded to the CCZ78 provisions

- 2.8 The legal principles relevant to assessing the weight to be accorded to a proposed plan (change) essentially relate to:
 - (a) The extent to which it has proceeded through the objection and appeal process.
 - (b) The extent to which a new measure might implement a coherent pattern of objectives and policies in a plan. More weight can be accorded to proposed plan provisions where there has been a significant shift in Council policy and the new provisions promote the purpose of the RMA.
 - (c) Each case needs to be determined on a case-by-case basis, having regard to all the circumstances.
- 2.9 Although the rules of PC 78 have no legal effect until they are determined, all other aspects of the CCZ78 provisions in terms of objectives, policies, etc., including the procedural background, can be referred to in assessing the weight that should be accorded to those provisions.
- 2.10 A number of factors need to be considered in this context.

Background to and purpose of PC 78

- 2.11 The NPS-UD contains intensification policies, most relevantly Policy 3(a), which requires that regional policy statements and district plans enable, in city centre zones, building heights and density of urban form to realise as much development capacity as possible.
- 2.12 As a listed Tier 1 territorial authority under the NPS-UD, AC is required to promulgate a plan change to give effect to the intensification policies of the NPS-UD using an IPI.
- 2.13 PC 78 was promulgated to enable AC to “give effect to” the intensification policies in the NPS-UD. The PC 78 Section 32 City Centre Report (“Section 32 Report”) recommended that AC could best implement Policy 3(a) of the NPS-UD by removing FARs and increasing general height controls to 72.5 metres (except where a qualifying matter applies).
- 2.14 In light of the principles outlined above, there is a sound basis to support the proposition that the CCZ78 provisions are entitled to be accorded significant weight insofar as they reflect a deliberate (and compulsory) policy shift away from the operative AUP provisions given that they have been drafted by AC to provide for more intensification in the CCZ as required by the RMA-EHS, including allowing increased building heights and the removal of FAR limits.

MHG analysis of submissions and further submissions on PC 78

- 2.15 MHG interrogated the submissions on PC 78 to determine the extent to which it is subject to challenge, that being a key issue in assessing weight.
- 2.16 MHG’s analysis demonstrates that, of the 27 submissions identified as relevant to the specific CCZ provisions (K Road / FAR and Height), no submissions seek a reduction in height affecting the Site, with close to all of the identified relevant submissions appearing to be generally supportive of more intensification and higher height limits in the City Centre and therefore support the position that they are consistent with the nature of the development proposed on the Site.
- 2.17 MHG’s initial interrogation of the further submissions to the submissions identified as relevant appears to indicate that there are unlikely to be any further submissions that would seriously detract from this argument.

Advice

- 2.18 Having regard to these principles and MHG’s analysis, we consider that a strong argument exists that significant weight is required to be accorded to the CCZ78 provisions. Our opinion is based on the following propositions:
 - (a) The CCZ78 provisions were developed by AC as a deliberate move away from the existing planning regime and were conceived and drafted to implement the policy direction relating to intensification contained in Policy 3 of the NPS-UD.
 - (b) Although the submissions have not been tested via hearings, etc., the scope of the changes that AC can make to CCZ78 as a result of the relief sought in submissions is already defined and is unlikely to alter significantly (despite the jurisdiction the Independent Hearings Panel (“IHP”) has to recommend amendments that are outside the scope of relief sought).
 - (c) With the exception of one submission that seeks to retain the existing FAR control, no submissions seek reduced height limits or a reduced FAR.

- (d) On that basis, we consider that:
 - (i) The increased height limit of 35 metres and the removal of the FAR controls relevant to JKGL’s proposal are highly likely to end up becoming operative in due course. (However, the setback provisions are all subject to challenge.)
 - (ii) The CCZ78 provisions are entitled to at least as much weight as the operative AUP provisions in regard to the removal of the FAR limits and the height limit in particular.

2.19 In brief summary, we consider that:

- (a) JKGL can assert that AC officers are legally required to consider the CCZ78 provisions in assessing the K Road application; and
- (b) There is a strong basis for JKGL to argue that the CCZ78 provisions need to be accorded significant weight.

3. **AC OFFICERS / DECISION MAKERS ARE LEGALLY REQUIRED TO CONSIDER CCZ78 PROVISIONS – SECTION 104(1)(B)(VI)**

3.1 This section addresses the requirements of the RMA in terms of the planning instruments that are required to be considered in the context of assessing resource consent applications and, specifically, whether AC officers (and ultimately AC independent decision makers) are legally entitled to ignore CCZ78.

3.2 Section 104 of the RMA governs the consideration of resource consent applications. It states:

- (1) *When considering an application for a resource consent and any submissions received, the consent authority must, subject to Part 2, have regard to–*
 - (a) *any actual and potential effects on the environment of allowing the activity; and*
 - (ab) *...; and*
 - (b) *any relevant provisions of–*
 - ...
 - (vi) a plan or proposed plan; and*
 - (c) *any other matter the consent authority considers relevant and reasonably necessary to determine the application.”*

3.3 The term “proposed plan” is defined in section 43AAC of the RMA as follows:

- (1) *In this Act, unless the context otherwise requires, **proposed plan**–*
 - (a) *means a proposed plan, a variation to a proposed plan or change, or a change to a plan proposed by a local authority that has been notified under clause 5 of Schedule 1 ..., but has not become operative in terms of clause 20 of that schedule; and...*

- 3.4 PC 78 is a “proposed plan” in terms of this definition, thus legally requiring AC to consider the CCZ78 provisions in the context of resource consent applications in accordance with section 104(1)(b)(vi) of the RMA.
- 3.5 On that basis, we consider that it would represent an error of law if AC were to disregard PC 78 on the basis that it is early in the statutory process – section 104(1)(b)(vi) gives them no choice but to consider it.
- 3.6 From that point, the issue becomes one of what weight should be accorded to those provisions. We turn to that issue now.

4. **LEGAL PRINCIPLES RELEVANT TO THE WEIGHTING OF COMPETING PLAN PROVISIONS**

- 4.1 The RMA creates an unusual context in which two potentially inconsistent plans may need to be considered in the context of resource consent applications. However, the RMA does not:
- (a) Contain any provisions which distinguish between the weight to be accorded to the operative and proposed planning provisions.
 - (b) Provide any guidance as to how that weighting exercise should be conducted.³
- 4.2 This section considers the legal principles that can be derived from case law in terms of the weight that should be accorded to competing plans, as a precursor to applying those principles in the context of submissions and further submissions on CCZ78, which are addressed in the next section.

Relevant legal principles

- 4.3 The legal principles relevant to the weighting to be accorded to the provisions of competing operative and proposed plans have been enunciated in two leading decisions of the High Court.
- 4.4 The starting point is that the issue of relative weighting will be strongly influenced by the plan provisions in light of the factual context.⁴ As noted in *Knowles v Queenstown Lakes District Council*:⁵

“... the extent to which weight is to be given to a proposed plan depends on context and is to be assessed by the consent authority on a case-by-case basis.”

(Emphasis ours.)

- 4.5 Beyond that, the essential principles relevant to the weighting exercise, established in *Keystone Ridge Limited v Auckland City Council*⁶ were neatly summarised in the *Knowles* decision as follows:⁷

3 *Knowles v Queenstown Lakes District Council* [2019] NZHC 3227 at [6.6] (“*Knowles*”).

4 *Mapara Valley Preservation Society v Taupo District Council* EnvC AA083/07, 1 October 2007 at [40] (“*Mapara Valley*”).

5 *Knowles*, above n 3 at [6.7]. See also *Keystone Ridge v Auckland City Council*, AP24/01, 3 April 2000 (HC).

6 AP24/01, 3 April 2000 (HC).

7 *Knowles*, above n 3 at [6.6].

"The Act does not accord proposed plans equal importance with operative plans, rather the importance of the proposed plan will depend on the extent to which it has proceeded through the objection and appeal process.

The extent to which the provisions of a proposed plan are relevant should be considered on a case-by-case basis and might include:

- (i) the extent (if any) to which the proposed measure might have been exposed to testing and independent decision-making;
 - (ii) circumstances of injustice;
 - (iii) the extent to which a new measure, or the absence of one, might implement a coherent pattern of objectives and policies in a plan.
- *In assessing the weight to be accorded to the provisions of a proposed plan each case should be considered on its merits. Where there had been a significant shift in Council policy and the new provisions are in accord with Part II, the Court may give more weight to the proposed plan."*

(Emphasis ours.)

- 4.6 In light of the above principles, the issues most relevant to the weight to be accorded to the CCZ78 provisions context of the JKGL K Road project are considered below.

Progress of the measure through the First Schedule process

- 4.7 Unsurprisingly, the cases make clear that the weight to be accorded to new provisions increases as it progresses through the First Schedule process.⁸
- 4.8 However, and importantly in this context, in *Mapara Valley Preservation Society v Taupo District Council*⁹, the Environment Court expressed the view that while a proposed plan variation was at a relatively early stage in the process - with submissions and further submissions yet to heard, as is the case in relation to the K Road - this is not "necessarily determinative".¹⁰

Whether the proposed provisions represent a shift in Council policy

- 4.9 In *Mapara*, the Court noted that because the variation in that case was aimed at implementing a coherent strategy of objectives and policies and, in particular, represented a significant shift in Council policy, the fact that the proposed variations were at an early stage of the First Schedule process does not outweigh the other factors requiring that it be accorded substantial weight.¹¹ The Court stated:¹²

8 *Queenstown Central Ltd v Queenstown Lakes District Council* [2013] NZRMA 239.

9 EnvC AA083/07.

10 *Mapara Valley*, above n 4 at [47].

11 *Mapara Valley*, above n 4 at [48].

12 *Mapara Valley*, above n 4 at [50].

"We acknowledge that the position might change and that the Variations are still going through the process of determination of their final form. However, that does not, in our view, outweigh the other factors requiring that the Variations be given substantial weight."

(Emphasis ours.)

The extent to which the proposed provisions are subject to challenge

- 4.10 The extent to which proposed provisions are subject to challenge is relevant in assessing the weight to be accorded to proposed provisions. In *Pooley v Whangarei District Council*¹³, the proposed plan had reached the stage where appeals against the Council's decisions on submissions were being processed by the Environment Court.¹⁴ In that case, as the rules relevant to the application had not been "significantly altered" since the promulgation of the proposed plan, the Environment Court held:¹⁵

"Given that there is little challenge to relevant aspects of the proposed plan, it deserves more weight than the provisions of the transitional plan."

(Emphasis ours.)

- 4.11 To extrapolate, the less challenge that there has been to the key metrics relevant to the K Road project – maximum height and FAR – the greater the weight that can be placed on them. We consider this issue in detail in Section 6 below.

Scope of IHP's jurisdiction in relation to PC 78

- 4.12 In considering the issue of weighting, it is noted that the jurisdiction of the IHP to make recommendations to AC is not limited to the scope of submissions made on an IPI, i.e., PC 78. Section 99(2) states:

"99 Independent hearings panel must make recommendations to territorial authority on intensification planning instrument

(1) ...

(2) The recommendations made by an independent hearings panel –

(a) must be related to a matter identified by the panel or any other person during the hearing; but

(b) are not limited to being within the scope of submissions made on the IPI."

(Emphasis ours.)

- 4.13 The upshot is that the PC 78 IHP will have the power to do what it considers appropriate in terms of its recommendations to AC on the PC 78 provisions. This may seem to suggest that the IHP could make recommendations for more flexible parameters in terms of height, GFA, setbacks, etc. This could be factored into the weighting argument in relation to aspects of the K Road development that do not comply with existing AUP standards.

13 EnvC A114/03.

14 *Pooley v Whangarei District Council* EnvC A114/03 at [20] ("*Pooley*").

15 *Pooley*, above n 14 at [22].

4.14 Having said that, it would be unusual for the IHP to make recommendations that do not fall broadly within the scope of the submissions lodged despite that the fact that section 99(2) provides scope for the IHP to recommend provisions that are not specifically requested but which will end up producing the best planning result.

5. **PLANNING CONTEXT – THE BACKGROUND TO PC 78 AND THE CCZ78 PROVISIONS**

5.1 This section addresses factors relevant to assessing the weight to be accorded to the CCZ78 provisions by reference to the legal principles outlined above.

Genesis and purpose of Plan Change 78 – the NPS-UD and the RMA-EHS

5.2 The NPS-UD was promulgated in 2020 and “sets out the objectives and policies for planning for well-functioning urban environments” under the RMA and aims to achieve significantly greater intensification of development by directing changes to planning instruments to achieve the NPS-UD objectives.

5.3 PC 78 was promulgated to enable AC to “give effect to” the intensification policies (Policies 3 and 4) of the NPS-UD as required by section 77N of the RMA as amended by the RMA-EHS which came into force December 2021 for the purpose of:

- (a) Increasing housing supply in New Zealand’s main urban areas by enabling more medium-density homes through the MDRS; and
- (b) Accelerating the implementation of the NPS-UD. It is this aspect of the RMA-EHS that is relevant to the K Road Project.

The NPS-UD

5.4 As a Tier 1 urban environment, AC is required to ensure that the AUP enable Policies 3 and 4 in regard to intensification:

“Policy 3: In relation to tier 1 urban environments, regional policy statements and district plans enable:

(a) in city centre zones, building heights and density of urban form to realise as much development capacity as possible, to maximise benefits of intensification; and

(b) ...

(c) building heights of at least 6 storeys within at least a walkable catchment of the following: i. existing and planned rapid transit stops

ii. the edge of city centre zones

(d) ...

“Policy 4: Regional policy statements and district plans applying to tier 1 urban environments modify the relevant building height or density requirements under Policy 3 only to the extent necessary (as specified in subpart 6) to accommodate a qualifying matter in that area.”

(Emphasis ours).

The RMA-EHS

- 5.5 The RMA-EHS requires territorial authorities to prepare and notify a plan change that gives effect to the intensification policies of the NPS-UD. In that regard, section 77N provides that 'Tier 1 councils' are required to give effect to Policy 3 or Policy 5 of the NPS-UD in non-residential areas:¹⁶

"77N Duty of specified territorial authorities to give effect to policy 3 or policy 5 in non-residential zones.

(1) When changing its district plan for the first time to give effect to policy 3 or policy 5, and to meet its obligations under section 80F, a specified territorial authority must use an IPI and the ISPP.

(2) In carrying out its functions under subsection (1), the territorial authority must ensure that the provisions in its district plan for each urban non-residential zone within the authority's urban environment give effect to the changes required by policy 3 or policy 5, as the case requires.

(3) ..."

- 5.6 The RMA-EHS introduced the concept of an IPI which, as far as relevant, is defined section 80E of the RMA-EHS, which states:

(1) In this Act, intensification planning instrument or IPI means a change to a district plan or a variation to a proposed district plan—

a. that must—

i. incorporate the MDRS; and

ii. give effect to,—

A. in the case of a tier 1 territorial authority, policies 3 and 4 of the NPS-UD; ..."

- 5.7 As such, PC 78 was prepared by AC as an IPI in terms of the RMA-EHS, designed to implement the MDRS and the intensification policies of the NPS-UD.

Section 32 City Centre Report

- 5.8 The section 32 City Centre Report ("Section 32 Report") for PC 78 provides a helpful understanding of the background to the Policy 3 intensification provisions relevant to the CCZ, including AC's rationale for its proposed changes and discusses how AC is implementing Policy 3(a) of the NPS-UD in the City Centre, including the implications of applying QMs for urban non-residential zones.¹⁷
- 5.9 The Ministry for the Environment ("MfE") has issued guidance regarding how to implement Policy 3(a) which was considered by AC in the Section 32 Report relevant to PC 78. It stated:¹⁸

16 This is dependent on whether the specified territorial authority is a tier 1 authority (Policy 3), or a tier 2 or tier 3 authority (Policy 5).

17 Qualifying matters for urban non-residential zones are provided in section 770 RMA.

18 PC 78 Section 32 City Centre Report, page 15.

"As much as possible' means removing unnecessary and unreasonable barriers to accommodate the maximum amount of development capacity that can be realised.

...

In practice this may mean:

- no maximum building heights or maximum gross floor area (GFA) standards in city centre zones or large parts of city centre zones.
- *development standards that may limit building height and density, where there is evidence that doing so will contribute to a well-functioning urban environment and achieving the objectives of the NPS-UD as a whole."*

(Emphasis ours.)

- 5.10 In light of MfE's guidance, AC considered that it would not be appropriate to have 'unlimited' height controls (other than special height controls) in the CCZ on the basis that it would cause significant adverse effects; however, they also took the view that it would be inappropriate to retain all of the operative provisions as-is.¹⁹
- 5.11 The Section 32 Report therefore recommended that the CCZ78 provisions implement Policy 3(a) requirements by removing FAR controls and increasing general height controls to 72.5 metres (except where a QM applies).²⁰
- 5.12 In light of all of the above, we consider that there is a strong basis for arguing that the CCZ78 provisions were intended to represent a significant policy shift from the operative AUP provisions in order to implement Policy 3(a) of the NPS-UD as required by the RMA-EHS, by allowing for more intensification, including allowing increased building heights and FAR, in the City Centre.

Objectives and policies

- 5.13 The CCZ78 provisions contain new objectives and policies as well as amendments to existing objectives and policies in Chapter H8 – Business – City Centre zone. The key relevant changes include:²¹

Objective 13 (new):

"(13) Building heights are enabled to realise as much development capacity as possible, unless qualifying matters apply which modify the relevant building height and/or density of urban form."

(Emphasis ours).

Policy 30A (new):

"(30A) In identified locations, modify building height and/or density of urban form to provide for qualifying matters."

19 PC 78 Section 32 City Centre Report, page 48.

20 PC 78 Section 32 City Centre Report, page 48.

21 PC 78 Chapter H8 - Business - City Centre Zone, pages 3, 4 and 7.

Height controls and FAR standards

- 5.14 The CCZ78 provisions would allow significant increases to the general height controls for the CCZ which will provide for heights of up to 72.5 metres except for where special height controls or other QMs apply.²²
- 5.15 Under PC 78, the Site and wider area contained within the I206 Karangahape Road Precinct is identified as being subject to a general height control of 35 metres. This 35 metre limit is already in place for the majority of the K Road Precinct from the Edinburgh / Howe Street intersection all the way to the eastern end of K Road.
- 5.16 Also relevant is the proposed removal of the FAR standards from the CCZ78 provisions, which currently manage site intensity and the scale of development in the city centre. This includes removal of the FAR bonus standards, which, inter alia, allows the transfer of heritage bonus floor space between sites and buildings.
- 5.17 Because the CCZ78 provisions propose greater height controls and/or development capacities, AC has considered that the gross floor area controls and associated bonus provisions (including the transfer of heritage floor space) are no longer needed.²³ The rationale for removal of the FAR standards is further described in the AC information sheet regarding the CCZ78:²⁴

"Removing these standards will provide developers with more flexibility in building design but still within the constraints of other standards such as tower dimensions and set back controls."

Setback provisions

- 5.18 In terms of setback requirements for this Site, CCZ78 introduces new setback requirements on all boundaries. For the road frontages, these setbacks are based on the street width and then require a 6-metre setback above a height commensurate with the street width.
- 5.19 In this case, K Road is approximately 27 metres wide, Gundry Street is 20 metres and Abbey Street is 15 metres. Parts of the building above these heights on the relevant frontage require a 6-metre setback. In addition, there is a 6-metre setback from side boundaries (with other sites) above a height of 32.5 metres.
- 5.20 The existing AUP provisions do not require any setbacks in this particular part of the precinct, although we understand that the rest of the K Road Precinct has a setback requirement along frontages on K Road and other key streets. This setback is 6 metres above a 14-metre frontage height. The building must also be contained within a recession plane from this 14-metre frontage height of either 30 degrees where located on the northern side of K Road, or 45 degrees where located south of K Road.

6. STATUS OF CCZ78 PROVISIONS IN LIGHT OF SUBMISSIONS RELATING TO CCZ78 HEIGHT CONTROLS AND FAR

- 6.1 PC 78 was notified on 18 August 2022. The period for submissions and for further submissions for PC 78 closed on 17 March 2023. The 'Summary of Decisions Requested document' ("SDR") was notified on 12 December 2022. The SDR summarises each of the 2,398 submissions lodged in relation to PC 78.

22 PC 78 Chapter H8 - Business- City Centre Zone, Map H8.11.3, page 80.

23 Auckland Council PC 78 Information Sheet #10, The City Centre Zone, August 2022, pages 2-3.

24 Auckland Council PC 78 Information Sheet #10, The City Centre Zone, August 2022, page 3.

MHG analysis of submissions on PC 78

6.2 In order to clarify the extent to which these principles support the position that significant weighting is to be accorded to CCZ78 provisions, we refer to MHG's analysis of submissions on PC 78 which seek changes to PC 78 with particular relevance to the City Centre zone and issues of height, GFA and the K Road area generally. MHG's report dated 18 July 2023 ("MHG memo") is **attached**. This section relies on that analysis.

6.3 MHG's review and analysis of the SDR took as its starting point submissions which have been coded as either being relevant to the City Centre Zone or to Heritage matters, and then refined these submissions to those which specifically related matters of height or GFA controls or to the K Road area.

6.4 The MHG memo provides a useful understanding of:²⁵

"...the level of support or opposition to the Council's proposed City Centre height limits within PC 78 (and specifically for the K Road area)."

6.5 The important point to note is that of the 27 submissions identified as relevant in the MHG memo, none seek a reduction in height affecting the Site, with close to all of the identified relevant submissions appearing to be generally supportive of more intensification and higher height limits in the City Centre and therefore enabling us to argue that they are consistent with the nature of the development proposed on the Site.

6.6 The only opposing submission worthy of attention is that lodged by the General Trust Board of the Diocese of Auckland. Its submission does not seek to reduce height limits but supports retention of the FAR, which would limit potential building scale. The MHG memo notes:²⁶

"Submission #1089 by The General Trust Board of the Diocese of Auckland is focused on reinstating the floor area ratios and associated bonus provisions with a particular focus on being able to retain and utilise heritage bonus floor space that it is obtained. This submission is not considered to be seeking lower height limits in the City Centre although retention of a 3:1 floor area limit on the site would limit potential building scale."

(Emphasis ours.)

6.7 The MHG memo also identifies one submission that seeks to amend the height limit, but confirms that this submission does not seek reduction of the height limit for the Site:²⁷

"Submission #886 Nicholas Mckay supports intensification in the city centre but seeks for the height limits proposed to be amended. A diagram included with the submission appears to show a 50-metre height limit towards the western part of the CBD. It is inferred that this submission does not seek to reduce the height limit proposed by Council for 538 Karangahape Road."

(Emphasis ours.)

25 MHG memo, page 1.

26 MHG memo, page 2.

27 MHG memo, page 2.

6.8 In light of their analysis of relevant submissions, MHG concluded that:

"Based on the analysis of submissions carried out, there appears to be limited specific submissions which seek to reduce the City Centre zone height limits proposed by the Council within PC78.

There are some submissions which seek to amend the height limits (e.g #886) and to retain floor area controls (e.g., #1089) but these are limited and by no means indicate a strong community desire to retain the 15m height limit for the land at 538 Karangahape Road."

(Emphasis ours.)

6.9 The upshot of the above is that the final provisions that emerge from the PC 78 process will almost certainly include increased height controls. There is no indication that a height of less than 35 metres would be specifically sought for this Site by submitters.

6.10 The date for a decision to be made on PC 78 was originally scheduled for March 2024, but has now been extended for one year, meaning a decision on PC 78 is to be made in March 2025. Unless PC 78 is withdrawn²⁸, we consider that there is a strong argument that the 35-metre height limit will, in the fullness of time, be the relevant control.

7. THE WEIGHTING OF CCZ78 PROVISIONS IN LIGHT OF THE ABOVE

7.1 In light of the principles outlined above and MHG's analysis, we consider that although the CCZ78 provisions are at an early stage in the Schedule 1 process, those provisions are entitled to be accorded significant weight. That is on the basis of the following factors:

- (a) The CCZ78 provisions represent a significant move away from the existing planning regime and were developed by AC officers in order to "give effect to" the NPS-UD.
- (b) The work underpinning the PC 78 / CCZ78 provisions was all undertaken by the AC, including a comprehensive Section 32 report, and must be presumed to have its imprimatur as signifying a shift in policy, i.e., the 'latest word'.
- (c) Although the submissions have not been tested via hearings, etc., the scope of the changes sought in submissions is already known and is unlikely to be significantly altered in terms of heights or reintroduction of the FAR controls, despite the IHP's broad powers to recommend provisions beyond the scope / different to the relief sought by submissions.
- (d) The relief sought by other submitters does not seek lower height limits or a reduced FAR, so that we can say that the height and FAR controls relevant to JKGL's proposal are highly likely to come to fruition in the fullness of time.

7.2 We are satisfied for the purpose of JKGL considering the application under section 104 of the RMA that the CCZ78 provisions are to be accorded significant weight. We consider this is well-supported by legal authority, credible and sound.

28 We note that this would require amendment to the RMA, due to the restrictions of section 80G(1)(c).

8. **CONCLUSION**

8.1 This opinion has addressed two issues:

(a) Whether AC officers are legally required to consider the CCZ78 provisions in making its decision on the JKGL application.

(b) If so, what weight should be accorded to them?

8.2 Re (a), we consider that AC processing officers are legally required by section 104(1)(b)(vi) of the RMA to consider the CCZ78 provisions in assessing the JKGL application for K Road. Failing to do so would constitute an error of law.

8.3 Re (b), we are satisfied that for the purpose of considering whether to grant consent to the application that there is a strong basis for asserting that PC 78 needs to be accorded significant weight, at least as much weight of the current provisions of the AUP, if not more.

8.4 We trust that the above is clear and sufficient for present purposes. If you have any questions, please do not hesitate to contact us.

8.5

Simon Berry / Taylor Doyle

14 November 2023