

**UNDER** the Resource Management Act 1991

**AND**

**IN THE MATTER** Intensification Planning Instruments Plan Changes (IPI) and related Regional Policy Statement and Plan Changes to the Auckland Unitary Plan – Operative in Part (AUP-OP)

**AND**

**IN THE MATTER** Of a submission by Box Property Investments Ltd submission # 1302 on PC78

**TOPIC 012: Plan Change 78 – Qualifying Matters Infrastructure**

**MEMORANDUM REGARDING MATTERS ABLE TO BE DETERMINED**

**1 May 2023**

**INTRODUCTION**

1. Box Property Investments Ltd (“**BPIL**”) filed submission 1302 on PC 78. The primary issues in that submission are whether:
  - (a) the Water and/or Wastewater Constraints Control is lawful; and
  - (b) that control should apply to BPIL’s land.
2. BPIL owns 30 & 40 Sandspit Road and 2 & 4 Reydon Place, Cockle Bay / Howick (“**BPIL’s Land**”). That land is presently zoned Residential: Single House Zone (“**SHZ**”) and is proposed to be rezoned to Residential Mixed Housing Urban (“**MHU**”). BPIL has been seeking to develop its land since December 2016 and in late November 2019 made an application for an integrated residential development of approximately 54 units by direct referral to the Environment Court.
3. Before the Environment Court had heard the application the Resource Management (Enabling Housing Supply and Other Matters) Amendment Act 2021 (“**Enabling Housing Supply Amendment**”) was passed and took effect on 20 December 2021.
4. BPIL relied on the content of the Enabling Housing Supply Amendment and placed its direct referral application on hold. There was good reason to do so because BPIL’s Land was not subject to any relevant overlay or planning constraint. Auckland Council largely agreed with that assessment because none of the kinds of qualifying matters specified in the Enabling Housing Supply Amendment are listed as applying to BPIL’s Land.
5. BPIL was surprised that Auckland Council introduced its own ‘other’ qualifying matter for Water and/or Wastewater constraints. BPIL had already undertaken a detailed site-specific assessment with Watercare about the capacity of the water and wastewater network servicing its land as part of the direct referral application. In addition, it is not at all clear that the water and/or wastewater control is lawful.
6. The Minister for the Environment has referred BPIL’s proposed development to an expert consenting panel under the COVID-19 Recovery (Fast-track Consenting) Act 2020. The application of a qualifying matter and the consequential impact on the application of s77M

lets the provisions of the SHZ linger. That is likely to prejudice BPIL and make the fast-tracking application more complicated than it otherwise needs to be.

#### **MATTERS ARE SUFFICIENTLY DISCRETE TO DETERMINE SEPARATELY TO STORMWATER**

7. BPIL considers that the following topics are sufficiently discrete that they can be determined separately to stormwater:
  - (a) 012A Qualifying Matters - (Infrastructure) - Appropriateness of QMs; and<sup>1</sup>
  - (b) 012E Qualifying Matters (Infrastructure) - Water and wastewater constraints.
8. Potentially, for the reasons set out below, Water and Wastewater control could be determined by sub-topics, Auckland Metropolitan Area, Cockle Bay or BPIL's Land.
9. In a practical sense, water and wastewater control is discrete from stormwater because:
  - (a) The stormwater issues will primarily relate to the mapping of the extent of known stormwater paths and the appropriate depths / buffers for flood free habitable spaces and infrastructure constraints;
  - (b) Increased demand for water and wastewater is not proportional to stormwater effects, particularly where apartment typologies are proposed because no additional impervious areas are created by adding an additional level to an apartment building, even though a number of residential units will be; and
  - (c) The stormwater issues at stake do not appear to relate strongly to the % of impervious area. Once ground becomes waterlogged in a heavy rainstorm it operates like an impervious surface (and it is rainstorms like this that are the central focus for Auckland Council).
10. In a legal sense, water and wastewater control is discrete from stormwater because:
  - (a) S 17 of the Building Act 2004 ("**BA04**") requires that all building work must comply with the Building Code to the extent required by [that] Act, whether or not a building consent is required in respect of that building work.
  - (b) S 40 of the BA04 provides that:

*A person must not carry out any building work except in accordance with a building consent.*

*A person commits an offence if the person fails to comply with this section.*
  - (c) In terms of the Building Code:
    - (i) Clause G12.2 essentially requires that Buildings provided with kitchens and bathrooms must have safe and adequate water supplies;

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<sup>1</sup> Note, it is accepted that there might be some justification for linking the combined sewer network control to decisions on stormwater, but even then further connections to the combined sewer network require approval by Watercare, see paragraph 10.

- (ii) G13.2 essentially requires that Buildings provided with kitchens and bathrooms must have an adequate plumbing and drainage system; and
- (iii) G13.3.3 requires that where a sewer connection is available, the drainage system shall be connected to the sewer, and the connection shall be made in a manner that avoids damage to the sewer and is to the approval of the network utility operator.
- (d) A council cannot bind a utility operator by way of consent condition<sup>2</sup> and neither can a district plan rule. The existence or absence of the plan provisions cannot influence whether Watercare allows a connection to its network. The extent of stormwater capacity in the network is not a relevant consideration to that decision.

## CONCLUSION

11. BPIL opposes the pause proposed by Auckland Council, as wholesale pause to the process:
  - (a) is not what the Minister envisaged, there is no suggestion in the Minister's letter dated 6 April 2023 that the whole plan change should be put on hold;
  - (b) is not consistent with the purpose of the Enabling Housing Supply Amendment;
  - (c) is not consistent with s21 of the Resource Management Act 1991; and
  - (d) will unnecessarily defer a wide range of discrete matters until 2024, resulting in unnecessary pressure and rushed decision-making (which is one of the main criticisms of the Auckland Unitary Plan process and a main feature pointed to when there appears to be a gap in in the provisions of the AUP).
12. Even if the panel is not minded to continue with hearing the water and wastewater control for all of Auckland or even Cockle Bay, the panel should continue with BPIL's submission as:
  - (a) BPIL has relied on the timing specified by the legislation;
  - (b) Watercare has assessed that there is significant wastewater and water capacity, sufficient to service BPIL's Land with more than 4 dwellings per site and the Mixed Housing Urban zone H5.8.1(2)(c) provides the consent authority with discretion over infrastructure and servicing;
  - (c) BPIL would be unduly prejudiced by the stormwater delay;
  - (d) the stormwater delay is unrelated to the qualifying matter; and
  - (e) stormwater capacity will be a matter that will inevitably be considered in relation to its fast-track proposal.<sup>3</sup> Even under H5 R- Mixed Housing Urban zone, H5.8.1(2)(c) infrastructure and servicing is a relevant consideration.

1 May 2023



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<sup>2</sup> *Waitakere City Council V Estate Homes Limited* - SC 73/2005

<sup>3</sup> E.g. see Botanic Riverhead Minute 7 and Waimarie Street.