AUCKLAND COUNCIL REGULATORY RESPONSES TO PANEL'S QUESTIONS IN MINUTE 2 DATED 18SEPT26

Responses to Questions 15(a) to (d) – refer to Legal Memorandum_9Oct26

15(e) Do the parties consider that the Project constitutes an 'on-the-merits-exception' with reference to the above cases?

Council consider that the Project constitutes an 'on-the-merits-exception'. Please refer to the assessment in the Council planning memorandum prepared by Brooke Dales which states:

- I agree with the Applicant that the proposal will generate positive effects by increasing the delivery of infrastructure (enlarged data centre and solar farm facilities), supply of housing, delivering economic benefits, supporting climate change mitigation (noting the symbiotic relationship of the enlarged surf lagoon and the further data centre/solar farm capacity) and other matters including lifestyle and community benefits (recognising the unique nature of the ASPC that provides recreational and living opportunities centred around New Zealand's first surf lagoon). In terms of adverse effects (including the separate Council specialist memoranda), the Council's assessment confirmed that information gaps remain, with some requiring responses from the Applicant and the majority able to be addressed through agreed conditions as outlined in my tracked change version of conditions. Generally the majority of the specialists are of the opinion that, with this additional information (including directed changes to elements of the proposal, such as changes to landscaped buffers), they would be able to support the proposal.

- In my opinion the Stage 2 application remains as an out of sequence development in FUZ and is contrary to key objectives and policies of the RPS and the FUZ given that a comprehensive structure plan and plan change process has not been followed. However, under the Fast Track process this contrary finding is not fatal to the application. It is also important to recognise the context, in that this application builds on the approved Stage 1 project that is currently undergoing site preparation works. The Stage 2 application seeks to increase the delivery of infrastructure (enlarged data centres and solar farm), supply housing, deliver further economic benefits and further support climate change mitigation. The Stage 2 application also seeks to elevate and accentuate the unique nature of the ASPC in providing further recreational and living opportunities centred around New Zealand's first surf lagoon. The benefits of the recognised symbiotic relationship between surf lagoon, the data centre and the solar farm in Stage 1 will be expanded via the Stage 2 application via the increases to size/capacity of these facilities. All of these aspects are in addition to the benefits of the Stage 1 approval.

15(f) The Panel is aware that the Government intends to amend the law to provide different pathways for infrastructure-related costs to be recovered from FTAA consents. When this is enacted, please provide an assessment of the extent of those powers, the extent that they apply to the Project, what (if any) infrastructure would qualify for such a mechanism, and what condition(s) of consent or other measures would be appropriate to enable these to be collected by the Council in the event that consent was granted.

Council's Chief Advisor Growth Infrastructure Funding and Finance Brigid Duffield advises:

New Development Contributions powers for Fast-track projects

The recently enacted amendments to the development contributions regime provide councils with an additional mechanism to recover eligible growth-related capital infrastructure costs associated with certain Fast-track developments where those costs are not adequately reflected in an existing Development Contributions policy.

While the amended provisions may potentially apply to some growth-related capital costs associated with transport, stormwater, parks, community infrastructure and other eligible council infrastructure, they do not apply to water supply or wastewater infrastructure in Auckland. They also do not recover non-growth capital expenditure, operating expenditure, maintenance costs, renewal and replacement costs, wider service delivery costs or broader residual risks associated with development.

Potential application to the Project

The starting point is not whether a charging mechanism exists. The starting point is understanding the infrastructure and service implications of the Project and determining whether Auckland Council, would provide, fund, own, accept or accelerate any infrastructure or services in response to the Project.

Any infrastructure investment decisions would need to be considered alongside existing infrastructure priorities, planned investment programmes, affordability constraints, available budgets, cumulative infrastructure demands and other committed projects.

The council operates within constrained capital and operating expenditure budgets. Development contributions only recover the share of capital costs attributable to growth. They do not recover the share of capital costs to existing properties or the consequential operating costs of the investments. These costs would need to be funded by another mechanism.

The ability to apply DCs to recover some costs does not, by itself, relax the capital and operating budget constraints, create an obligation to provide infrastructure, alter planned infrastructure sequencing or reprioritise investment ahead of other priorities.

If infrastructure investment or a service response was ultimately considered, a range of further assessment and decision-making would be required before any commitment to fund, provide or support that response could be made. This would include determining:

- *the infrastructure and services required, and the appropriate response*
- *whether those infrastructure and services should be provided or funded, and by whom*
- *the timing of any infrastructure and service response*

- *the beneficiaries of that infrastructure and services*
- *the extent to which costs are attributable to growth*
- *the extent to which costs are recoverable through available funding and financing mechanisms*
- *the allocation of any residual costs, obligations and risks that cannot be recovered or transferred*
- *the affordability, funding implications and wider impacts on ratepayers, service levels and council investment priorities.*
- *Until these assessments are completed, it is not possible to determine whether any infrastructure response would proceed, the form it would take, or the extent to which any resulting costs could be recovered from development rather than falling to council, ratepayers or other parties.*
- *Accordingly, it is not currently possible to identify:*
- *what infrastructure associated with the Project may qualify for recovery*
- *the amount of any recoverable costs*
- *which funding mechanisms may ultimately be used*
- *whether amendments to Auckland Council's Development Contributions Policy would ultimately be pursued.*

At this stage, the amendments should be viewed as an additional cost recovery tool rather than a funding commitment. They do not remove the need to first determine the appropriate infrastructure and service response to the Project, whether Auckland Council is willing and able to provide or fund that response, how any investment would be prioritised alongside existing commitments and budget constraints, and who should ultimately bear the associated costs, obligations and risks.

Conditions of consent

Specific resource consent conditions are not considered necessary to enable the collection of Development Contributions. Development Contributions are imposed through the statutory mechanisms established under the Local Government Act and Auckland Council's Development Contributions Policy rather than through resource consent conditions.

The key issue is therefore not whether a mechanism exists to collect Development Contributions. The key issue is whether public infrastructure providers ultimately decide to provide, fund or accelerate infrastructure in response to the Project.

Any consent granted should not create an expectation that public infrastructure will be provided, funded or accelerated simply because a mechanism may exist to recover some associated costs through Development Contributions.

If the Panel considers it necessary, any condition should instead focus on ensuring that development does not proceed in reliance on assumed future public infrastructure provision. In particular, any consent granted should not create an expectation or obligation that Auckland Council will provide, fund or accelerate infrastructure to support the Project merely because a future cost recovery mechanism may be available.

Any infrastructure required to support the Project should continue to be addressed through separate infrastructure planning, servicing, funding and approval processes rather than through any assumption that infrastructure investment will occur because a theoretical cost recovery pathway exists.

17(a) The Applicant's position for Stage 1 was premised on the Project being neither urban nor rural in terms of the FUZ provisions in the AUP. The AEE for Stage 2 states that the Project is not rural but that it is not inconsistent with the FUZ provisions (see p.138). What is Auckland Council's position in terms of whether or not the Project is inconsistent with or contrary to the FUZ provisions?

Please refer to the specialist memorandum of Austin Fox (Council Policy Planning, and Governance) that provides a detailed assessment of the FUZ and confirms his opinion that the Project is contrary to the FUZ provisions. Planning Consultant Brooke Dales' planning memorandum references Mr Fox's assessment and confirms his opinion, while noting the differing assessment in the Application AEE FUZ at pages 137-140, that the Stage 2 application is an out of sequence development in FUZ, and is contrary to key objectives and policies of the RPS and the FUZ given that a comprehensive structure plan and plan change process has not been followed.

17(b) Can Auckland Council advise whether or not it has concerns with the Project's private water, wastewater and stormwater servicing, including any risk for Auckland Council should that private servicing fail?

Yes, the Council has these concerns. For further details, please refer to the following Council specialists' memoranda:

- Stormwater (Martin Meyer)
- Water and Wastewater (Patrick O'Riordan)
- Healthy Waters (Hillary Johnston)
- Watercare Services Limited (Anna Jennings)
- Growth Infrastructure Funding (Brigid Duffield)
- Auckland Council Transport (Memo 1 Overall: Liam Burkhart & Emilee Scarborough and Memo 2 Stormwater: Shannon Bridge)
- Planning (Brooke Dales)

Council's Chief Advisor Growth Infrastructure Funding and Finance Brigid Duffield further advises:

> *Auckland Council's concerns are less about the initial design and operation of the proposed infrastructure and more about whether the broader servicing model can continue to function effectively over the long term.*
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> *A key concern is that New Zealand's current water services framework is largely designed around* ***publicly owned and publicly accountable water service providers****. While private water and wastewater infrastructure is permitted and subject to drinking water, environmental and consenting requirements, there is no equivalent regulatory framework specifically designed for large-scale private utilities operating as long-term providers of essential services.*
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> *As a result, there is considerably less certainty regarding:*
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> - *long-term governance and accountability*
> - *financial sustainability and lifecycle funding*
> - *customer protection and pricing oversight*

- *ownership changes and succession arrangements*
- *operator failure and replacement pathways*
- *service continuity arrangements*
- *intervention pathways if a provider experiences financial or operational distress*
- *responsibility for costs if a scheme fails.*

The consequence is that even where infrastructure may initially comply with technical and regulatory requirements, there may be limited assurance that governance, funding, capability and accountability will remain effective over the life of the development.
Auckland Council can continue to review additional information and proposed safeguards as they are provided. However, many of the key risks arise from the wider regulatory and institutional setting rather than the technical design of the infrastructure itself.
Consequently, there are limits to the degree of certainty that can be achieved unless the applicant can demonstrate robust and enduring arrangements addressing governance, financial sustainability, stewardship, service continuity and failure management.
There is also a concern that if a large-scale private servicing arrangement were to experience significant governance failure, financial distress, operational failure or service interruption, there remains a possibility that public entities would face pressure to intervene because water and wastewater services are essential services with direct implications for public health and environmental outcomes.
While public ownership or takeover would not be automatic, there remains a residual ***tail risk*** *of future public-sector exposure. In practice, there may be legal, practical, political or public-health pressures for intervention where a community's essential services are at risk. The current framework does not provide a complete, pre-agreed pathway for service continuity, operator replacement, transfer of responsibility or recovery of intervention costs.*
Stormwater raises related but somewhat different considerations. Many of the same long-term considerations may arise where critical stormwater infrastructure remains privately owned and operated, including questions regarding ownership, maintenance, renewal, stewardship, future liability and continuity of service.

17(c) Does Auckland Council consider this private infrastructure adequate to support the Project?

Please refer to the Council specialists' memoranda. In short, the Council assessments consider that, subject to the further information requested, the proposed private infrastructure will be adequate to support the Project, noting that planned connections to public infrastructure is preferred.

Council's Chief Advisor Growth Infrastructure Funding and Finance Brigid Duffield further advises:

It is not possible to currently conclude that the proposed private infrastructure is adequate to support the Project.

This should not be interpreted as a conclusion that the infrastructure is inadequate. Rather, there is not sufficient certainty regarding the long-term servicing model and the arrangements that would need to remain effective throughout the life of the development. Demonstrating that infrastructure can be technically designed, constructed and operated is materially different from demonstrating that it can continue to be governed, funded, maintained, renewed and operated successfully over several decades.
Before the adequacy and long-term sustainability of the proposed servicing model could be confirmed, confidence would be required regarding matters such as:

- *governance and ownership arrangements*
- *operational capability*
- *maintenance and renewal funding*
- *service continuity arrangements*
- *operator replacement mechanisms*
- *monitoring and oversight arrangements*
- *financial resilience*
- *long-term stewardship responsibilities.*

Many of the key risks arise not from the technical infrastructure itself, but from the broader servicing model and regulatory environment within which it operates.
While New Zealand has established frameworks relating to drinking water quality, environmental performance and consenting requirements, the wider regulatory framework is largely designed around publicly owned and publicly accountable water service providers. There is currently no equivalent framework specifically designed to provide enduring assurance for large-scale private water and wastewater utilities/providers operating over the long term.

As a result, there are inherent limitations on the degree of certainty that can be achieved regarding matters such as financial sustainability, governance capability, customer protection, service continuity, operator failure, succession arrangements and long-term stewardship. These issues arise from the wider regulatory setting rather than the technical design of the proposed infrastructure and cannot necessarily be resolved through infrastructure design, consent conditions or operational requirements alone.
Accordingly, the concern is less about whether infrastructure can initially operate and more about whether the overall servicing model remains sustainable through changes in ownership, governance, operation, funding and future circumstances.

17(d) Are there any unfunded infrastructure costs of the Project that might be borne by Auckland Council? If so, what are those costs?

Council's Chief Advisor Growth Infrastructure Funding and Finance Brigid Duffield further advises:

The extent of any unfunded infrastructure costs that may ultimately arise from the Project cannot currently be identified or quantified. Before such an assessment can be undertaken, it would first be necessary to determine:

- *the infrastructure and services required to support the Project*

- *whether Auckland Council, Auckland Transport, Watercare or other infrastructure providers intend to provide, fund, own, accept or accelerate any such infrastructure or services*
- *the timing of any infrastructure and service response*
- *the extent to which costs are attributable to growth*
- *the beneficiaries of any infrastructure or services provided*
- *the extent to which costs are recoverable through available funding and financing mechanisms*
- *the allocation of any residual costs, obligations and risks that cannot be recovered.*

Those matters have not yet been assessed or determined.
Importantly, potential costs are not limited to growth-related capital expenditure. Depending on the infrastructure and service response ultimately adopted, costs may include non-growth capital expenditure, operational and service delivery costs, maintenance, renewal and replacement obligations, transport and stormwater infrastructure, public transport services, parks, open space and community facilities, network integration costs, intervention and remediation costs, and other long-term financial and operational risks associated with servicing growth.

While private water and wastewater infrastructure may reduce or defer the need for some public water and wastewater investment, it does not remove demand for transport, stormwater, public transport, parks, community facilities and other public infrastructure and services. Private water, wastewater and stormwater infrastructure may also create future costs and risks even where no immediate public investment is required, including costs associated with oversight, service continuity, remediation, network integration, regulatory intervention, asset transfer or long-term system failure.

The Project may also contribute to cumulative infrastructure demands and service pressures when considered alongside existing, approved and future development. However, the existence of infrastructure demand does not determine whether public entities will respond to that demand, when any response may occur, or who will bear the associated costs. Those remain separate infrastructure, servicing, funding and policy decisions.

As the detailed infrastructure planning, servicing, funding and policy analysis necessary to understand the Project's cumulative implications has not been undertaken, it is not yet possible to determine what infrastructure and services may ultimately be required, whether public entities would provide, fund, own, accept or accelerate that infrastructure, or the extent to which any resulting costs, obligations and risks may fall on developers, future residents, Auckland Council, Watercare, transport agencies, ratepayers or other beneficiaries.

17(e) Can Auckland Council advise whether or not it agrees with the Applicant's economic analysis that Stage 2 of the Project generates regionally significant benefits?

Please refer to the economics specialist review memorandum. Mr Rodney Yeoman considers that the proposal is likely to produce a net positive economic outcome and, when assessed as an integrated development, generate benefits that are significant at the Auckland regional level and thus supports the proposal on economic grounds. Mr Yeoman broadly agrees that the surf park and its associated tourism activities would be unique within both the Auckland region and New Zealand, creating a niche attraction for domestic and international visitors, but notes that most of the activity responsible for these tourism benefits is already enabled under the Stage 1 consent. Mr Yeoman concludes that the integrated proposal is likely to generate regionally significant economic benefits and that these benefits are likely to exceed its costs.

However, Mr Yeoman's assessment states that further information is required to establish the incremental benefits attributable specifically to Stage 2, the extent of transfer and displacement effects, and the scale and significance of the proposal's ongoing operational activities. Mr Yeoman further recommends that the application would be more complete if the applicant quantified the costs and compared them to the benefits of the proposal through a cost–benefit analysis enabling decision-makers to have greater confidence that all relevant impacts have been systematically identified and assessed, and that the proposal would deliver a positive outcome for the region.