

IN THE KAIPARA DISTRICT COUNCIL

In the Matter of Private Plan Change Number 82

Between

Moonlight Heights Limited

Applicant

B J and N A Lowe & Others

Submitters in Opposition

Legal Submissions on behalf of B & N Lowe and Others

4 August 2023

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MAY IT PLEASE THE COMMISSIONERS:

INTRODUCTION

1. On 17 January 2023 Private Plan Change 82 (“PPC82”) promoted by Moonlight Heights Limited (the “Applicant”) was publicly notified. PPC82 seeks to rezone 39.2 hectares of land adjacent to Awakino Road, Dargaville from Rural Zone to Residential Zone. PPC82 affects land owned by multiple owners, with only c60% of the land owned by the Applicant (or associated parties) with the balance of the land being owned privately by third parties.
2. Mr and Mrs Lowe together with Mr Franicevich, as two of the affected private landowners, instructed Counsel in January 2023 once PPC82 was publicly notified. Prior to public notification Mr and Mrs Lowe and Mr Franicevich, as affected property owners, together with other members of this submitters group had not received any notice of the application.
3. On 9 March 2023 submissions on behalf of Mr and Mrs Lowe, with the support and endorsement of 23 other affected parties, were filed with Council.
4. The scope of the concerns of the parties was outlined in paragraph 7 of those submissions and may be summarised as follows:
 - a. Lack of sufficient due diligence and notification of measures (including details of financial commitment) to meet the reasonably foreseeable needs of future generations; and
 - b. Risks arising due to lack of sufficient infrastructure (and lack of evidence of available and sufficient financial capacity to provide necessary and sufficient infrastructure); and
 - c. Lack of sufficient and appropriate measures avoiding, remedying, or mitigating any adverse effects of activities on the environment, particular with respect to impact upon Council’s three waters infrastructure and the known effects of extreme weather events.
 - d. Potential financial risk to the community arising from actions that will be required to sufficiently and appropriately remedy or mitigate those adverse effects.

5. On 1 August 2023 a statement of evidence from Mr Lowe was filed which provided further context for the concerns that have been identified. Those may be summarised as follows:
 - a. Opposition to the Proposed Precinct Plan on the basis that the prescribed loop road is not feasibly achievable.
 - b. That the plan change area relies upon the inclusion of land outside of the ownership of the Applicant (as the developer) and therefore the scope of the plan is overstated.
 - c. Concern that projected growth and demand for Dargaville do not support the proposed development, impacting upon its feasibility, particularly when considered together with other current and foreseeable developments being promoted in the area.
 - d. Concern that if the objective of the plan change is to support Dargaville's growth and development then proposed urban density may be contrary to that objective.
 - e. Concern that developing of housing options does not necessarily equate to economic growth and viability.
 - f. Concern as to the known limitations of Council's infrastructure and the proposed reliance upon public connections.
 - g. Concern that past experience from developments in Dargaville and Kaipara needs to be heeded and learned from.
 - h. Concern as to Council's ability to make commitments to future actions in relation to infrastructural developments, particularly in light of ongoing legislative and regulatory change.
6. As Mr Lowe states in his evidence, those concerns are genuinely and sincerely held by multiple members of the community. Mr Lowe wishes it to be clearly understood, that the opposition to PPC82 is not an opposition to the aspirations of the Applicant (and perhaps more specifically Mr & Mrs Williamson), nor is it a form of obstinate attempt to retain a rural lifestyle as appears to be suggested by Council's planners.

7. The concerns outlined on behalf of these submitters stem from Council's own information about its assets and resources, from lived experience within this somewhat unique Rural community¹ and from a desire to not see Dargaville's well-being (and that of its rate payers) affected in a manner which has been witnessed in the past.

PRIVATE PLAN CHANGE: STATUTORY CONTEXT

Resource Management Act 1991

8. PPC82 has been initiated and progressed in accordance with the provisions of s73 and Part 2 of Schedule 1 of the Resource Management Act. There has obviously been some effort to follow the process. However, review and evaluation of all information provided continues to raise a multitude of questions and there simply are not the answers available.
9. Section 32(1) is quite clear about what the evaluation that must be undertaken and in particular at 32(1)(c) *must contain a level of detail that corresponds to the scale and significance of the environment, economic, social and cultural effects that are anticipated from the implementation of the proposal*. The scale of implementation of this proposal can be weighed against the Applicant's own promotion - a potential 348 houses to meet necessary demand and potential to meet 70% of Dargaville's anticipated growth over the next 30 years. It's a big pitch and consequently there is a reasonable expectation that it will deliver on the details to support it.
10. Unfortunately, PPC82 just doesn't have that. PPC82 has resulted in a significant degree of trepidation for those who have read past the hype and the bluster because there are real questions that arise:
 - a. There is uncertainty regarding the capacity and capability of essential infrastructure and very little identified practicable options for overcoming those;

¹ Dargaville is the primary urban centre on Northland's West Coast. It faces influences unique to those experienced by the centres on Northland's east coast and the Auckland - Bay of Islands corridor. Even within Kaipara District itself, as observed within the Infometrics Projections Report, the influences on Dargaville differ to those for Mangawhai.

- b. The information presented resonates with an air of “desk top analysis”, missing critical on the ground issues (such as a house where a road is projected to traverse²); and
 - c. a somewhat laissez-faire approach to questions arising around economic and social growth of the nature of “don’t worry about where it will come from, build the houses they will come”³.
11. Combine this with a plan that references a “plan change area” which incorporates land outside of the ownership and control of the Applicant to achieve the plan’s objectives⁴ (not just for the purpose of the loop road but indeed the provision of the entire scope, scale and intent of the plan design), the balancing act required by s32 Resource Management Act becomes increasingly relevant.

National Policy Statements

12. Discussion of National Policy Statements such as NPS-HPL and NPS-UD are not pertinent to consideration of PPC82 but they do provide some contextually relevant considerations.
13. The plan change area does not fall within the scope of NPS-HPL. However land proximate to the plan change area does and may be impacted by the development if delivery of the objectives of PPC82 requires reliance upon that land to compensate for unavailability of private land within the plan change area. The land owned by the Applicant (including Mr & Mrs Williamson) includes land falling within the PPC82 precinct but also extending into land captured by the NPS-HPL⁵.
14. Council has, since the filing of submissions to PPC82, discounted the application of NPS-UD to Dargaville (with an acceptance that Dargaville will not grow into an urban centre to which NPS-UD will apply)⁶. As Mr Lowe observes in his statement of evidence, it is not projected that

² Mr Lowe’s Statement of Evidence, [12] - [17]

³ Mr Lowe’s Statement of Evidence, [32] - [41]

⁴ Mr Lowe’s Statement of Evidence, [3] - [5]

⁵ These areas are most accurately identified in Appendix Figures A1, A2 and A4 at pages 35-37 of the Detailed Site Investigation Report by NZ Environmental Management

⁶ Council Meeting 29 March 2023

Dargaville will metamorphosize into a centre for urban living and urban lifestyles⁷. Socially speaking, we will remain a rural community with a slow growing small population.

15. That context is relevant to the assessment of questions of growth, employment and social dynamics. However it is also relevant in consideration of Council's obligations under s 101 Local Government Act 2002 which requires local councils to manage revenues, expenses, assets, liabilities, investments and financial dealings "prudently and in a manner that promotes the current and future interests of the community".

Local Government Act 2002 Prescribed Plans: Interrelation of Council's Long-Term Plan and Infrastructure Strategy

16. That exercise is where Council has regard to its own plans which it is legislated to have regard to, including its Long-Term Plan ("LTP") and 30-Year Infrastructure Strategy⁸ (the "Strategy") together with the aspirations of the Spatial Plan. Those documents provide the framework for Council meeting its obligations under s101. However they also usefully provide us with scope and context to the questions that Council must address, particularly the costs and benefits and the risks of acting or not acting in relation to PPC82.
17. The Strategy's purpose is to identify significant infrastructure issues for the council over the 30-year period. Council's strategy is dated June 2021 and pages 4 and 8 graphically summarise Council's significant projects for the next 30 years. Page 15 graphically outlines the short to medium term significant project.
18. Although there is an acceptance of prolonged under investment in infrastructure⁹, the Strategy (and the supporting Strategic Asset Management Plans) and the LTP do not identify a commitment and projected available funding for the development of Dargaville's infrastructure in the coming years to overcome the shortcomings and failings in meeting its current requirements and then additionally looking to how that may be extended and developed.¹⁰

⁷ Mr Lowe's Statement of Evidence, [21] - [37]: reflects upon the projected realities that Dargaville will remain a rural town and the balancing social and economic aspects arising from that.

⁸ Section 101B Local Government Act 2002 requires local councils to have 30-year infrastructure strategies.

⁹ Kaipara Infrastructure Strategy, page 37

¹⁰ Paragraphs 45 - 48 of Mr Lowe's Statement of Evidence refer to the shortcomings and failings identified in the reports commissioned by Council from Awa Environmental Consultancy. Kaipara Infrastructure Strategy

19. To illustrate this, consider the opening introduction to the LTP and consider the balance of discussion regarding Dargaville's infrastructure and that of Mangawhai. The imbalance in the commitment to one over the other is striking. Balancing that against the findings from the reports from Awa Consulting and the proposed demand from multiple proposed developments (not just PPC82 but PPC 81, 4th Avenue, Duck Creek¹¹) the question remains, how will Council exercise their s101 obligations prudently.¹²
20. Ms Buckingham has observed in the Section 42 Report that funding has been resourced from depreciation in the current Annual Plan to initiate some work on the Dargaville Wastewater system but that is not without a cost. That must be weighed against the impact on this year's rates as recently released. Depreciation is now fully funded with an increase in rates as a consequence¹³.
21. Financially speaking, such stratagems are short-term band aid to the greater challenges Council is presented: Council acknowledges that the financial challenge will need innovative solutions to support sustainable development and Council's identified aspirations¹⁴. Unfortunately, there isn't a discussion in the information provided as to what those innovative solutions may be, save for bare promises that they will be found.
22. But there is also the larger issue that Council's ability to traverse these challenges (or at least make a commitment to try) is significantly impacted by the dynamic changes occurring in the National Legislative Framework.

¹¹ Mr Lowe's Statement of Evidence, [29] - [30]

¹² The obvious answer is to look to developers to make a financial commitment to sustainable development of community infrastructure over - as briefly reflected upon at page 41 Kaipara Infrastructure. Similarly, following Auckland Council's example in 2021 with an increase in the rate of development contributions may assist with meeting the financial burdens (in 2021 Auckland increased development contributions from between \$11,000 and \$18,300, to a new price of \$84,900 per residence to meet increasing costs of delivering infrastructure).

¹³ See Rates Assessments 2023 - 2024: Public Explanation to Rate Payers

¹⁴ Kaipara Infrastructure Strategy, pages 40 - 41

PRIVATE PLAN CHANGE IN A DYNAMICALLY CHANGING LEGISLATIVE FRAMEWORK

Local Government's Changing Role in the Management and Strategic Direction of Three Water Assets

23. It is acknowledged by Council's Consultant Planner Ms Buckingham that *there are clearly issues needing to be worked through to deliver adequate three waters infrastructure servicing to the plan change area*¹⁵. Ms Buckingham extends upon this, stating:

To my mind (despite Rules 13.14.4 and 14.14.6), a residential zoning would not be the most appropriate, efficient or effective zoning for the site at this time if it is unlikely to be able to be service with potable water and for wastewater in the medium term and will be unable to be developed at an urban residential density. I consider that there needs to be some assurance of both technical and financial feasibility for servicing. For the former aspect, Mr Usmar has assessed that technically feasible options are available. In terms of the latter aspect, there remains some uncertainty on the timing and funding of the required servicing extensions/upgrades. However, Mr Usmar has conveyed KDC's commitment towards delivering trunk water and wastewater infrastructure upgrades to respond to and meet future demand in Dargaville should PPC82 be confirmed, while local upgrades can be funded by the developer.

24. Until recently Mr Usmar's conviction and commitment on Council's behalf may have been capable of reliance and sufficient assurance: if we were in the same legislative environment that has historically informed Council's decisions and there was a continuance of the status quo there could be some bare comfort taken from that. But we are in a period of dynamic legislative change and Council's ability to bind themselves to bare assurances must be debated.

The Status Quo

25. Council's purpose under s10(1)(b) LGA is to promote the social, economic, environmental and cultural well-being of communities, in the present and for the future. The "four well-beings" complement the similar objectives under the Resource Management Act 1991, of sustainable

¹⁵ Section 42 Report at [185]

management¹⁶. The four well-beings could also be described as a “quadruple bottom line” for sustainable development.

26. One of the principles to be observed by a local authority in performing its role includes:¹⁷

in taking a sustainable development approach ... to take into account—

“(i)the social, economic, and cultural well-being of people and communities; and

“(ii)the need to maintain and enhance the quality of the environment; and

“(iii)the reasonably foreseeable needs of future generations.”

27. However the purpose under s10 does not alone confer a power of general competence. The *purpose* of local government must be read together with the *role* of a local authority. The role of a local authority in s11 is to give effect to the purpose stated, and, separately, to perform duties and exercise rights conferred on the local authority under the LGA 2002 and any other enactment. But the times, they are a changing and it is legislatively anticipated that Council’s *role* in the delivery of three water services will be transformed.

Dynamic Change Taking the Commitment out of Council’s Hands

28. The scope and breadth of Council’s role as prescribed by the Local Government Act has been subject to dynamic change since 2020, most controversially in the domain of three waters infrastructure. The introduction of the Governments three waters legislative is already underway. The Water Services Entities Act 2022 providing for the transfer of assets and liabilities from local authorities to the new Water Service Entities(“WSEs”) has been enacted.

29. The Water Services Entities Act comes into force by 1 July 2024. Section 12 of that Act provides the objectives of each water services entity, being to:

a. *own and operate water services infrastructure, and deliver water services, in an efficient and financially sustainable manner:*

b. *protect and promote public health:*

¹⁶ Resource Management Act 1991, s5

¹⁷ [Local Government Act 2002, s 14\(1\)\(h\)](#)

- c. *protect and promote the environment:*
 - d. *support and enable planning processes, growth, and housing and urban development:*
 - e. *operate in accordance with best commercial and business practices:*
 - f. *act in the best interests of present and future consumers and communities:*
 - g. *deliver water services in a sustainable and resilient manner that seeks to—*
 - i. *mitigate the effects of climate change and natural hazards; and*
 - ii. *support and enable climate change adaptation*
30. We are already firmly in the Establishment Period as defined under the Water Services Entities Bill, with Schedule 1 providing the transition arrangements. The Northern WSE is projected to come into effect on 1 July 2024. It is to involve 14 members with 50:50 Council and iwi/hapū representatives, including four Auckland Council representatives, four Tāmaki Makaurau iwi/hapū representatives, one representative each from the Northern Councils and three iwi/hapū representatives from Te Tai Tokerau.
31. Under s30 of the Water Services Entities Bill, decisions made by a regional representative group of a WSE must be made—
- a. *by consensus if consensus can be reached by regional representatives taking all reasonably practicable steps to reach consensus in accordance with a procedure, and within a time frame, specified in the constitution; and*
 - b. *in any other case, by 75% of the regional representatives present and voting.*
32. No one representative of a WSE may bind the entity in terms of setting the entity’s strategic direction and performance expectations¹⁸. Council will no longer hold the mandate to make a commitment on behalf of delivery of infrastructure: that falls squarely within the purpose

¹⁸ Water Services Entities Bill s28

and directive of the Northern WSE. It will be for that entity to determine and commit to specific developments, specific time frames, specific investments or otherwise.¹⁹

33. Ms Buckingham’s iteration of “Council’s commitment” to provision of three waters infrastructure and promised delivery of feasible options as a legitimate response to concerns rings hollow in the climate of legislative change places control, commitment and, most importantly, strategic financial direction outside of Council’s mandate.

34. As observed by Mallon J in *Timaru District Council v Minister of Local Government*²⁰:

The proposals are directed to a new model for delivering Three Waters services in response to what is regarded to be a significant Three Waters infrastructure challenge. It is intended that legislation will provide for the transfer of assets and liabilities from local authorities to the new WSEs. It is clear that the Government intends different governance arrangements. It is also clear that it has made amendments to proposals to seek to provide a degree of community engagement and community influence albeit not what currently exists under the LGA. It has proposed a funding package but has deliberately decided that this is not intended to compensate local councils for the value of the infrastructure assets. It has made those decisions reflecting that the Three Waters assets will remain in public ownership (albeit a different kind of public ownership) for the benefit of all communities and reflecting the significant costs that will be involved in the future to have appropriate Three Waters infrastructure assets in the next 30 years.

35. Mallon J conclusion to her judgment is an apt summary of the scope of the implications in these circumstances:

it is undoubtedly the case that the Three Waters reforms will alter the role that local government has historically held in the provision of Three Waters services and this has major significance for our communities.

¹⁹ This is accepted in the Section 42 Report, at [172], [176]

²⁰ [2023] NZHC 244 [21 February 2023] at [179]

PPC82: OPPOSITION AND CONCERNS

(1) PPC82 Precinct Map: Loop Road

Practical Constraints

36. Mr Lowe has identified that the indicative loop road, which forms the foundation to much of the spatial planning within the PPC82 Precinct, traverses over private property owned by Mr and Mrs Lowe²¹. Mr Lowe confirms that the property is not available to form the loop road as it has already been significantly developed by Mr and Mrs Lowe.
37. Mr and Mrs Lowe do not have subdivision aspirations on their property and have designed and built their home accordingly. Suggested development opportunity²², if required to comply with the requirements of PPC82, would necessitate them to significantly (and detrimentally) revise their current property development²³ - in short the demolition of their home.
38. Consequently Mr and Mrs Lowe are naturally resistant to the proposition of a plan change that applies residential zoning (and consequential negative effects) with a prescribed precinct map with legal effect provide for future infrastructural development through their home (with the consequential negative effects).²⁴

Observations from Section 42 Report: Implications if Loop Road Is Unable to Be Formed

39. Ms Buckingham has reported that the Urban Design Assessment assesses effects on specific properties adjacent to where the loop road is proposed²⁵. She reports *“In particular, the southern loop road connection onto Awakino Road is located between two existing residential properties (133 and 137 Awakino Road). That parcel of land is already classified as Road Reserve (RMU13) within the KDP. The assessment identifies potential adverse privacy and amenity effect on these sites from the loop road. If finds that appropriate boundary treatment, including replacement fencing, would assist in mitigating these effects and transitioning these properties to a typical condition for residential street corners.”*

²¹ Mr Lowe’s Statement of Evidence, [12] - [17]

²² Section 42 Report, [271]

²³ Mr Lowe’s Statement of Evidence [15]

²⁴ Mr Lowe’s Statement of Evidence [17]

²⁵ S42 Report, [192] - [194]

40. Critically however, Ms Buckingham and the Applicant's Urban Design Assessment has completely failed to assess the effect on the property accessed by 135 Awakino Road via the permitted vehicle crossing across RMU13, being Mr and Mrs Lowe's property²⁶. Mr Lowe has identified his property via photographs and drone footage and observes the significant infrastructure (including an architecturally designed home) that appears to have been completely disregarded as part of the Applicant's Urban Assessment and Ms Buckingham's s42 assessment.
41. It is perhaps this lack of assessment (for whatever reason) that has resulted in Ms Buckingham's struggle to grapple with the implications of reliance upon the use of privately owned property for the proposed loop road and the Plan's Urban Design.
42. As Ms Buckingham identifies²⁷ *"as assessed by Mr Marshall and the Applicant's urban design assessment, the position of the indicative loop road is considered to be an appropriate layout to promote connectivity and the desired block structure. If it was unable to be fully provided, it would potentially diminish the achievement of some of the design aspirations for the precinct."* [emphasis added].
43. The Urban Design report and consequently the s42 Report relies on the site's proximity and connectivity as a fundamental element of the design. In the absence of the loop road as per the Precinct Map, there will critically be only one access point onto Awakino Road, which moves the residential development further away from the services and amenities of Dargaville (approx. 220m further), and less connected to existing urban Dargaville. This distance makes the site less walking/cycling friendly (active transport) and therefore future residents will be more reliant on private vehicles.
44. Ms Buckingham does go on to say that the majority of the loop road is on the land owned by the Applicant but that is an effete statement - if the loop road is incapable of being formed because a relevant part of it (i.e. the second connection with Awakino Road) is unavailable due to crossing land outside of the ownership of the Applicant/Developer, it does not matter if 80% or 10% falls on land belonging to the Applicant. The essential part - that which enables the

²⁶ Mr Lowe's Statement of Evidence, [16]

²⁷ S42 Report, [288]

looping connection with Awakino Road - is unavailable. Consequentially the Urban Design aspirations must be affected.

45. This is accepted as Ms Buckingham does go on to observe that under proposed rule 13.13A(11)(b), if two road intersections are unable to be provided with Awakino Road, the subdivision becomes a discretionary activity.

Observations from Applicant's Evidence

46. The Applicant's expert evidence in relation to transport is presented by Peter Kelly. Mr Kelly observes²⁸ "*the proposal includes a structure plan which provides an indicative road layout, allowing the area to be suitably serviced via new public road connections onto Awakino Road*".

47. However, when responding to submissions regarding the proposed loop road, Mr Kelly observes²⁹:

It is noted that the Structure Plan is intended to be indicative only and the final positioning of the road network is subject to detailed design and land availability. A significant proportion of the Loop Road is already within land owned by the applicant and there is the opportunity to provide alternate roading connections within the site to achieve a similar outcome, with the potential to connect in the future should land become available. All enabling infrastructure to support any subsequent subdivision will be placed within land fully controlled by the applicant, or within land over which legal rights have been granted.

48. This statement begs the question why a proposed Precinct Map which achieves the Applicants objectives without recourse to privately owned property was not presented as supporting the Urban Design and the proposed plan. Contrary to s32 no information has been provided identifying the other reasonably practicable options for achieving the plans objectives if the loop road (and associated connectivity and open spaces implications)³⁰ which Mr Kelly suggests could be achieved if provided exclusively within land owned by the Applicant

²⁸ Mr Kelly's Statement of Evidence, [17]

²⁹ Mr Kelly's Statement of Evidence, [43]

³⁰ S42 Report,[210]

49. If it is indeed the intention to form the entire loop Road (and the consequent interconnected design for the interconnected green street and neighbourhood park) within land which is fully controlled by the applicant:
- a. there will be consequential implications on the Urban Design due to the reduced land available to achieve the proposed objectives (as Mr Lowe identifies, land fully controlled by the applicant is only 60% of the plan change area³¹); and
 - b. Traffic assessments completed on the basis of the Urban Design and proposed layout presented are likely to be affected.
50. Mr Kelly's suggestion of the required two-connections to Awakino Road via land over which legal rights "have been granted" must be subject to some debate: Mr and Mrs Lowe's land provides access to 2 of 3 options and Mr Franicevich's property provides the third³². Connection via any of these options has not had legal rights granted and connection via Mr Franicevich's land also poses difficulties due to topography and wetland.
51. Consequentially, in the absence of some form of agreement (and consequential compensation) with Mr and Mrs Lowe, the loop road will have only the one road intersection with Awakino Road and the subdivision becomes a discretionary activity.

(2) Plan Change Area Not within Control and Ownership of Applicant (as Developer)

Practical Constraints

52. The Applicant has failed to bring along on this process a commitment from other property owners within the plan change area to the proposed development. Approximately 40% of the land forming the plan change area and relied upon in terms of assessing the viability of the proposal is outside of the applicant's control and the two largest of those owners are Mr and Mrs Lowe and Mr Franicevich.
53. Without these landowners being willing & therefore their land is excluded from the development, the proposed plan change design becomes harder to implement (e.g. economic

³¹ Mr Lowe's Statement of Evidence, Paragraph 4

³² Mr Lowe's Statement of Evidence, Appendix BJL3

viability when nearly half the land area is excluded either through private property ownership or required environmental buffers) and does not achieve the urban design outcomes the Applicant is claiming.

Observations from Section 42 Report: Impact on Private Land Owners Other than the Applicant

54. Ms Buckingham acknowledges that a significant portion of the plan change land has landowners currently in opposition to the plan change³³.

Exiting Rights

55. Within her Section 42 Report³⁴ Ms Buckingham observes that the proposed zoning change will not remove the right for existing rural activities to continue within the plan change area. Whilst that is not incorrect, it is not a fulsome response to the concerns raised.
56. The nature of the legal right of the private property owners fundamentally changes from being a permitted activity (and therefore capable of being undertaken by right, the burden of proof resting with the challenger to those activities) to an activity subject to existing use rights (capable of being undertaken if the right to do so is established, the burden of proof resting with the party undertaking the activity).
57. In an environment where dense urban housing is being introduced to rural surrounds, it places additional burdens on those affected property owners who are, to all extents and purposes being used as the buffer zone.
58. Ms Buckingham does accept that the change in zone will affect the ability to undertake new or expanded rural activities on the land. This is where the burden of proof becomes relevant. A complaint by an urban resident that activity is beyond the scope of what is understood to be existing right places the burden on the property owner to establish their existing rights. For properties such as Mr & Mrs Lowe and Mr Franicevich, who undertake agricultural activities including sheep, equine, cattle and other activities, this burden brings potential economic constraint for which there is no benefit from the development.

³³ S42 Report, [229]

³⁴ S42 Report, [271]

Financial Impacts without Compensation

59. Ms Buckingham acknowledges rates in the plan change area “*are likely to increase*”. It is more accurate to say that rates in the plan change area will increase but it is not possible to provide any comfort as to how much that will be.
60. Ms Buckingham however seeks to suggest that the value of land and development potential will be higher. Mr Lowe responds to this proposition at his paragraph 17 and rejects the Applicant’s proposition that “*the Applicant’s urban design enable adjacent landowners’ efficient and logical development opportunities*”³⁵. Ms Buckingham rightly acknowledges that it could be negative for landowners depending upon their future aspirations.
61. Mr & Mrs Lowe’s aspirations of operating their property with rural activities together with their long-term economic well-being will be significantly negatively affected with no corresponding benefit. Mr Franecivich faces similar problems and his land arguably has topographical issues that would bring challenges to complying with development requirements under PPC82. Again this means increased rates and constraints are shouldered with no corresponding benefit.

Legal Considerations: Rights of Private Property Owners Adversely Affected

62. It is accepted that the proposed plan change to rezone the plan change land is not in itself a taking of private land. However, there are nuances in this set of circumstances that require reflection.
63. It is submitted in this case, in the instance of a private plan change application for the purpose of advancing development aspirations, the inclusion of neighbours privately owned land in planned support of achieving those aspirations without consultation or consent, there must be consideration to the impact on those property owners’ rights³⁶.
64. The implications when private property is taken for public purposes was recognised by the Supreme Court in *Waikare City Council v Estate Homes Limited*.³⁷ The case concerned consent to a subdivision that was subject to the provision of a local road to be vested in the

³⁵ S42 Report, [156]

³⁶ In accordance with s78 Local Government Act 2002

³⁷ *Waikare City Council v Estate Homes Ltd* [2006] NZSC 112, [2007] 2 NZLR 149.

Council. The Court of Appeal had referred to a general principle of statutory interpretation that³⁸:

... Subject to inconsistent legislation and compliance with the general law, it is the right of every person to use his assets as he pleases and to be compensated if they are expropriated for public purposes. ...

65. The Supreme Court said that this was a common law presumption that only applied if there was “actually a taking”.³⁹ This required an “absence of choice” which was not present when, as in the case before it, the property holder could choose not to transfer its land if it regarded the conditions of the subdivision consent unacceptable⁴⁰. It is submitted in the circumstances of PPC82, private landowners such as Mr and Mrs Lowe have not been affording the opportunity to choose⁴¹.
66. As Mr Lowe observes “*our property will become a very expensively rated property which will be virtually unsaleable to anyone other than developers. We will be harnessed with significantly higher annual rates which will compromise our well-being and we will be hamstrung in our ability to sell, move on, or otherwise develop our property with absolutely no benefit from the proposed Moonlight Heights development whatsoever.*”⁴²
67. It is submitted that the effect is such a significant interference with Mr and Mrs Lowe’s private property rights as to amount to a “constructive taking” that falls short of actual acquisition.
68. In making that submission Counsel has been assisted by reflections upon some of the standard incidents of ownership set out in A M Honoré’s essay on “Ownership” as recently referenced by Mallon J in *Timaru District Council v Minister of Local Government*.⁴³ As Her Honour, those incidents include:

³⁸ *Estate Homes Ltd v Waitakere City Council* [2006] 2 NZLR 619 (CA) at [128] referred to at [43] of *Waikakere City Council v Estate Homes Ltd*, above, at [43].

³⁹ At [46].

⁴⁰ At [52].

⁴¹ Mr Lowe’s Statement of Evidence, [5]

⁴² Mr Lowe’s Statement of Evidence, [17]

⁴³ [2023] NZHC 244 [21 February 2023] at [141]

- a. the right to use and enjoyment of the thing owned, which includes “*the exclusive ability to prevent others from interfering with such assets*”;
- b. the right to possess (that is the right to have physical control of a thing and to remain in control);
- c. the right to manage (that is, the right to decide how and by whom the thing owned shall be used);
- d. the right to capital (that is, the power to alienate the thing by sale, mortgage, gift or other mode and the liberty to consume, waste or destroy the whole or any part of it);
- e. the right to security. As Her Honour explained, Honoré explains this as:

... that he should be able to look forward to remaining owner indefinitely if he so chooses and he remains solvent. ... Legally, this is in effect an immunity from expropriation, based on rules which provide that, apart from bankruptcy and execution for debt, the transmission is consensual.

69. The Urban Design for the development together with the plan change area relies upon privately owned land outside of the ownership of the Applicant to feasibly achieve the objectives it promotes as being attainable. The Applicant has promulgated the proposal for the development, including promoting the benefits of the use of the entire plan change area. In doing so they have impacted upon the incidents of ownership of those private landowners. If that privately owned land is not available, the feasibility of the plans objectives must be in question.

Can the Plan Be Amended or Redesigned to Overcome the Issue

70. If, as suggested in the Applicant’s expert evidence, the proposed development can be completed within land within the control and ownership of the Applicant without a need for use of property outside of the Applicant’s ownership then it is submitted the mutual objectives of all parties can realistically be achieved whilst complimenting Council’s spatial plan.

71. It is submitted that the plan change area is capable of being amended to exclude Mr and Mrs Lowe's property and Mr Franicevich's land from the plan change area. They would form part of the rural land contiguous to the proposed development area but will not defeat the objectives and aspirations of the Applicant and Council. PPC82's precinct plan and design will require adjustment but as alluded to by the Applicant's evidence, that will occur in any event.

(3) Projected Growth Does Not Necessitate Dense Urban Development

Infometrics - Projected Growth Informs Economic Decisions

72. In his statement of evidence Mr Lowe has reflected upon the Applicant's proposition that PPC82 provides "desperately needed" residential housing options. Relying upon the projections for growth provided to Council by Infometrics, Mr Lowe has drawn to the Commissioners' attention that the promoted "need" is not established on a true analysis of those projections⁴⁴.

Observations from Section 42 Report

73. Ms Buckingham accepts in her report that there is not the suggested desperate demand for this particular development to meet a need for housing. Ms Buckingham states "*I would not agree that the plan change's residential capacity of 300+ dwellings is 'desperately' required to meet demand in the short term.*"⁴⁵
74. Ms Buckingham however suggests it is prudent to plan ahead for residential growth and reflects again on the spatial plan. Mr Lowe however reflects upon the other known developments within the Dargaville Region⁴⁶. Rather than providing development to meet demand for housing, Mr Lowe observes that what is effectively being provided is choice and suggests that reflection is required as to how these development spaces relate to one another⁴⁷ in terms of choice, demand and avoiding a multitude of directly competitive developments.

⁴⁴ Mr Lowe's Statement of Evidence, [21] - [41]

⁴⁵ S42 Report, [269]

⁴⁶ Mr Lowe's Statement of Evidence, [26] - [31]

⁴⁷ Mr Lowe's Statement of Evidence, [32] - [37]

75. In what appears to be an acceptance of the provision of choice Ms Buckingham⁴⁸ refers to the plan giving flexibility to deliver dwelling in a range of site sizes and typologies to meet market demand. However, this is a contradictory statement however to paragraph 195 where she states *“I have some concerns that the ability to subdivide to 2,500m2 site sizes if the size are un-serviced could result in the entire precinct becoming large lots if this is more attractive proposition Would be an inefficient use of flat land I close proximity to the town centre.....It would not deliver well upon the purported plan change benefit of providing greatly needed residential capacity in Dargaville.”*
76. It is submitted that, in terms of the question of market choice, market demand and the meeting of either there is insufficient detail as to the proposed nature and scope of the development to be able to state categorically that the objective of meeting market demand can or will be met.⁴⁹ The community’s previous experience of aspirational developments being promoted and commenced and then taking decades to complete or fail to complete due to financial constraints is something that must be relevant avoided.
77. Reflecting upon the reduced land available for the development and in light of a multiplicity of proposed developments, it is important that the feasibility of PPC82 in meeting demand not be overstated.

(4) Council Infrastructure

Known Incapacity of Council’s Assets

78. In relation to wastewater and water supply, Mr Lowe’s statement has outlined the key findings from Awa Environmental’s commissioned investigation into the capacity of Council’s infrastructural assets. It is submitted those findings speak for themselves:
- a. the WWTP was found to lack capacity for treating current and estimated future wastewater flows;
 - b. the Dargaville WWTP to theoretically be under capacity to treat current dry weather flows

⁴⁸ S42 Report, [270]

⁴⁹ Mr Lowe’s Statement of Evidence, [35] - [37]

- c. a series of short-to-medium term developments required to continue to meet current demand
 - d. the Water Supply network has insufficient capacity to service the proposed development.
79. In relation to stormwater Mr Lowe's statement also provides photo and video evidence of stormwater events earlier in the year. It is submitted that the concerns regarding achieving hydroneutrality (i.e. avoiding down stream impacts) are significant for those members of the community who already suffer the consequences of Dargaville's aged and inadequate stormwater solutions.
80. Ms Buckingham acknowledges that it is currently unclear how the development enabled under the proposed plan change with increased impervious surfaces will adequately mitigate downstream effects.⁵⁰ Her only response is to suggest there is sufficient space to implement a wide range of possible stormwater solutions to address downstream effects.
81. It is noted that Mr Usmar has reported that the stormwater quality and quantity provisions proposed under PPC82 provide acceptable mitigation of effects but do not have site-specific technical basis to ensure fit for purpose and cost-effective assets are vested in Council at development stage. This unfortunately reiterates the importance of considered development which provides for deliberation beyond the immediate aspirational goals of PPC82 and prudently considers the needs of the wider community.
82. For residents such as Bevan and Liz Jones at Grey Street (whose land is recorded in the photographs) solutions for direction of stormwater from the higher placed precincts (including Awakino Road) is vital. Impact on our residents living on the lower laying land from inadequate and inefficient historic stormwater management must not be further exacerbated by a lack of adequate knowledge and real solutions now.

Known Constraints on Council's Infrastructure Response

83. Council acknowledges it already has a large and challenging capital expenditure programme and will be under pressure to complete it⁵¹. The LTP provides very limited scope for the

⁵⁰ S42 Report, [184]

⁵¹ Council LTP, Page 29

development and extension of the Dargaville infrastructure and is of course restrained by the Three Waters legislative changes discussed at [28] to [35] above.

Past Experience Should Inform Financial Considerations and Risk

84. Council is obviously alive to the financial risks arising when infrastructural development in an effort to match growth is mismatched. The experience of the Mangawhai Wastewater Systems is well documented in the multiple judgments in the protracted *Mangawhai Rate Payers and Residents Association Inc v Kaipara District Council* litigation⁵², is acknowledged in the LTP⁵³ and may be considered the biggest contributor to the poor state of infrastructure in Kaipara at this time.⁵⁴ Everyone is keen to avoid history repeating itself.

Observations from Section 42 Report: Implications of Reduced Area Available for Development

85. Ms Buckingham has agreed that there is currently a lack of committed funding for the infrastructural improvements required to service the plan change area and there is some uncertainty about how the improvements will be delivered.⁵⁵
86. Ms Buckingham also acknowledges that while there are matters needing to be resolved in relation to water supply and wastewater servicing, not all required funding commitments⁵⁶ have been made at this time but servicing solutions for the plan change area will be found.
87. I repeat my submissions at [28] to [35] above that assurances regarding Council's commitment to developing and funding feasible solutions must be balanced against Council's loss of their historical control of such matters.
88. The s42 Report's primary response to concerns regarding provision of sufficient and robust infrastructure, without compromising current delivery, is that final solutions will be relevant

⁵² [2016] NZSC 48, [2014] NZHC 1147

⁵³ KDC LTP Section 2, Financial Strategy, page 35

⁵⁴ The key objective of Kaipara District Council at the development of the last two Long Term Plans was to repay debt, as debt had climbed to \$83 million and was at its peak in 2011. This was being paid for by a population of 18,700 (rateable properties totalled 12,310) so the key challenge was to reduce risk through the reduction of debt. Service levels were kept at a base level and depreciation was not able to be funded for most assets. This meant that there was always going to be a backlog of renewals, as the Council had not accumulated sufficient funds to ensure its aging infrastructure could be repaired and renewed as necessary.

⁵⁵ S42 Report, [242]

⁵⁶ S42 Report, [250]

considerations at the resource consent/subdivision stage. Whilst it is accepted that is a typical approach, in the circumstances it seem inadequate.

Legal Concerns

89. Mr Lowe has indicated the currently proposed level of development in Dargaville (including PPC81, PPC82, 4th Avenue, Duck creek and others). Demands on Council's infrastructure is not isolated to PPC82's proposed development.

90. Sufficient development of the infrastructure in Dargaville to meet the concerns arising from the multitude of developments placing demand on it will require significant project development, payment for the which will have to be achieved over a number of rating years. That means that the development must be part of a long-term plan.

91. In respect of the resourcing and financing of sufficient infrastructure, it is submitted in the current circumstances Council's assurances based upon bare promises of commitment and finding the financial resources are insufficient. Such commitments are required to be formulated within the framework prescribed by the Local Government Act 2002 and in these circumstances, it has been acknowledged, they simply are not.

92. PPC82s declared reliance upon Council provided infrastructure systems⁵⁷ and Ms Buckingham's recommendation that all sites in PPC82 be connected to Council's reticulated systems, it is difficult to see how this reliance on Council's assets can be achieved without provision of appropriate funding within the LTP.

93. The alternative is to provide for solutions that see on site infrastructure funded independently by the developers - Ms Buckingham recommends against this course of action.

In summary

94. As Mr Lowe has stated:


Growth and development are vital to any community and as business owners and professional service providers in the region we endorse projects which promote those goals.....

⁵⁷ Sections 6.1.2 and 6.4 of the Development Plan

.....aspirational builds are the goal for many young professionals and we would endorse a development proposal which would see such vision actually achieved.

However, growth is not driven solely by the availability of house sites but by so many other factors (including the quality and scope of supporting services and employment opportunities). Our concern is development needs to be mindful of the requirements of the actual wider community it seeks to support.

We have genuine concerns as to the promotion of intensified urban development in the manner prescribed in PPC82....Those concerns include the demand on infrastructure and services and who will be left carrying the true cost.

A handwritten signature in black ink, appearing to read 'Emma L Smith', with a long horizontal line extending from the end of the signature.

.....
Emma L Smith
Counsel to B & N Lowe
4 August 2023