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Our reference
1413453

By email

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Dear Stephen

Plan Change 56 - limiting the MDRS building and density standards

Introduction and summary

1 You have asked for our advice on the approach to validly introducing limits on building height and density requirements of the MDRS where there is an applicable qualifying matter. This advice will be provided to the Independent Hearing Panel (**Panel**) appointed to hear the submissions on, and make recommendations on, Proposed Plan Change 56 (**PC56**). Specifically, you have asked for advice on:

1.1 The general approach to be taken to deciding on whether a provision is valid, particularly if it limits height and/or density to a level lower than that provided for in the operative plan.

1.2 Whether the above approach is different where:

(a) A restriction is imposed directly by a new or amended rule;

(b) A restriction is created by a more restrictive activity status; or

(c) A limitation created by a new amended objective, policy or matter of discretion being worded in a way that's less favourable to development;

1.3 Whether the following proposed provisions in PC56 are a valid use of the Intensification Streamlined Planning Process (**ISPP**):

(a) The proposed Residential Heritage Precinct, which applies to areas not identified in the operative plan as having heritage values. This imposes a new rule that limits building height to the level existing as at 20 August 2022, and the density per site to the number of dwellings that existed at 20 August 2022. See plan change amendments 171 to 177 inclusive. This potentially triggers a resource consent in circumstances that the operative plan would not have.

(b) The proposed new triggers for commercial activities in the Petone Commercial Activity Area and Suburban Mixed Use Activity Area that fall within the Medium or High Coastal Hazard Overlays. These trigger a resource consent for activities that would be occupied by more than 10 employees or any members of the public, in circumstances that the operative plan would not necessarily restrict. See plan change amendment 434.

1.4 Whether the recent Environment Court decision in *Waikanae Land Company Ltd v Heritage New Zealand Pouhere Taonga* [2023] NZEnvC 056 changes the approach to

be taken to the assessment of qualifying matters and the MDRS.[1] Specifically, whether, as a result of that decision, there are any concerns with the approach taken by the Council to the rule framework where there is an applicable qualifying matter.

2 In summary we consider that:

2.1 The approach to be taken when assessing the appropriate constraints to be imposed on the MDRS where there is an applicable qualifying matter requires assessment of the qualifying matter itself, and what level of constraint is necessary to accommodate the applicable qualifying matter (or matters). The constraint cannot go beyond what is necessary to accommodate the applicable qualifying matter. The constraint must be limited to a provision or provisions that modify the MDRS or the requirements of policy 3 of the National Policy Statement on Urban Development (**NPS-UD**). 'Necessary' should be assessed as something that is essential.

2.2 The assessment required in accordance with section 77J, section 77K and section 77L of the Resource Management Act 1991 (**RMA**) (as applicable) provides guidance as to how this is to occur and what matters need to be considered. The required evaluation must be undertaken before a modification can be validly included in the IPI.

2.3 The approach to assessment of what is an appropriate constraint is the same, regardless of the method used by the Council to modify the MDRS and the relevant building height or density requirements and the requirements of policy 3 of the NPS-UD to be less enabling of development. We consider that in assessing any limitation, the range of options suggested will likely need to be considered. Whether that limitation is imposed by way of a more restrictive activity status (ie requiring a consent where the MDRS would apply a permitted status, or requiring a discretionary or non-complying consent where the MDRS is not complied with), a new or amended rule which changes the applicable building height or density parameters, or a more restrictive policy direction to be considered where resource consent is required, will depend on the assessment of what is necessary to accommodate the applicable qualifying matter.

2.4 Where PC56 is seeking to modify the MDRS or policy 3 requirements where there is an applicable qualifying matter, that modification can be more restrictive than the comparative existing provision in the operative District Plan, provided the provision(s) is limited to a modification of the MDRS or policy (ie it does not limit additional activities not within scope of the MDRS or policy 3) and does not go beyond that scope. This is provided that the level of constraint is necessary to accommodate the appliable qualifying matter, and has been through the required assessment outlined above. There is no clear limit on constraining the MDRS or policy 3 elements of existing development rights in the ISPP process. The same assessment is required in terms of the extent to which the MDRS of policy 3 of the NPS-UD needs to be modified to accommodate the applicable qualify matter/s.

3 We provide our reasons for these conclusions below. We have not assessed whether the proposed qualifying matters are validly qualifying matters, or whether the modifications of the MDRS and policy 3 parameters are necessary, and instead considered only the extent to

[1] The decision in *Waikanae Land Company Limited v Heritage New Zealand Pouhere Taonga* [2023] NZEnvC 56 was issued on 30 March 2023, being after the completion of the Council's section 42A reports on PC56.

which the MDRS and the relevant building height or density requirements can be validity modified where there is an applicable qualifying matter.

Background

4 Plan Change 56 is Hutt City Council's Intensification Planning Instrument (**IPI**), which is seeking to utilise the Intensification Streamlined Planning Process (**ISPP**) to incorporate the MDRS and give effect to policies 3 and 4 of the National Policy Statement on Urban Development as required by sections 77F to 77T and Schedule 3A of the RMA.

5 Through its IPI, the Council is proposing to limit development (ie, be less enabling of development than the MDRS, building height and density standards or policy 3 provides for) in those parts of the district that are subject to a qualifying matter. The Council is limiting development in respect of qualifying matters that are both new and those that already exist in the Operative District Plan.

Statutory framework

6 In respect of relevant residential zones, section 77I of the RMA provides that the Council may make the MDRS and the relevant building height or density requirements under policy 3 of the NPS-UD less enabling of development in relation to an area only to the extent necessary to accommodate one or more qualifying matters.

7 Where the qualifying matter is a new area that the Council wishes to treat as a qualifying matter, section 77J(3) of the RMA provides the relevant requirements for the Council's section 32 evaluation report, which are in addition to the standard requirements of section 32:

> (3) The evaluation report must, in relation to the proposed amendment to accommodate a qualifying matter,—
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> (a) demonstrate why the territorial authority considers—
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> (i) that the area is subject to a qualifying matter; and
>
> (ii) that the qualifying matter is incompatible with the level of development permitted by the MDRS (as specified in Schedule 3A) or as provided for by policy 3 for that area; and
>
> (b) assess the impact that limiting development capacity, building height, or density (as relevant) will have on the provision of development capacity; and
>
> (c) assess the costs and broader impacts of imposing those limits.

8 Section 77J(4) of the RMA then provides further requirements, which include in (d):

> A description of how modifications to the MDRS as applied to the relevant residential zones are limited only to those modifications necessary to accommodate qualifying matters and, in particular, how

they apply to any spatial layers relating to overlays, precincts, specific controls, and development areas, including:

(i) any operative district plan spatial layers; and

(ii) any new spatial lawyers proposed for the district plan.

9 Section 77K of the RMA provides an alternative process for existing qualifying matters. It applies when the Council is considering existing qualifying matters and requires, instead of undertaking the evaluation process in section 77J of the RMA, that the Council do all the following things:

(a) identify by location (for example, by mapping) where an existing qualifying matter applies:

(b) specify the alternative density standards proposed for those areas identified under paragraph (a):

(c) identify in the report prepared under section 32 why the territorial authority considers that 1 or more existing qualifying matters apply to those areas identified under paragraph (a):

(d) describe in general terms for a typical site in those areas identified under paragraph (a) the level of development that would be prevented by accommodating the qualifying matter, in comparison with the level of development that would have been permitted by the MDRS and policy 3:

(e) notify the existing qualifying matters in the IPI.

10 Finally, in respect of assessing the application of qualifying matters, section 77L applies to qualifying matters where the Council is seeking to rely on the catch-all qualifying matter category in section 77I(j) of the RMA. That additional assessment required by section 77L for those qualifying matters is as follows:

A matter is not a qualifying matter under section 77I(j) in relation to an area unless the evaluation report referred to in section 32 also—

(a) identifies the specific characteristic that makes the level of development provided by the MDRS (as specified in Schedule 3A or as provided for by policy 3) inappropriate in the area; and

(b) justifies why that characteristic makes that level of development inappropriate in light of the national significance of urban development and the objectives of the NPS-UD; and

(c) includes a site-specific analysis that—

(i) identifies the site to which the matter relates; and

(ii) evaluates the specific characteristic on a site-specific basis to determine the geographic area where intensification needs to be compatible with the specific matter; and

(iii) evaluates an appropriate range of options to achieve the greatest heights and densities permitted by the MDRS (as specified in Schedule 3A) or as provided for by policy 3 while managing the specific characteristics.

11 In respect of urban non-residential zones, section 77O of the RMA provides that the Council may modify the requirements of policy 3 of the NPS-UD to be less enabling of development only to the extent necessary to accommodate one or more qualifying matter.

12 Section 77P(3) of the RMA then mirrors section 77J(3) in respect of the required assessment, with amendments reflecting that the level of development being limited is that set out in policy 3 and not the MDRS as well.

Interpretation and application

13 While the provisions set out above primarily relate to whether a matter is an appropriate qualifying matter, there are parts of each assessment that directly address the questions asked by the Council and will inform the answer to those questions. For example:

13.1 under section 77J(3)(ii) of the RMA, the Council is required to assess the extent to which the qualifying matter is *incompatible* with the level of development permitted by the MDRS, or as provided for by policy 3, *assess the impact of limiting development* capacity/building height or density, and *assess the costs and broader impacts of imposing those limits*; and

13.2 under section 77J(4) of the RMA, the assessment is required to provide a description *of how the modifications to the MDRS are limited to only those necessary* to accommodate qualifying matters.

14 As to what is meant by the word 'necessary', there is no case law that directly applies or interprets that word in respect of the sections applicable to IPIs. The word 'necessary' has however been considered in several cases in the RMA context, particularly in respect of notices of requirement and the need to consider whether the work and designation are reasonably necessary for achieving the objectives of the requiring authority. In that context, the Environment Court has considered:[2]

> In paragraph [section 171] (c), the meaning of the word necessary falls between expedient or desirable on the one hand, and essential on the other, and the epithet reasonably qualifies it to allow some tolerance.

15 This approach was endorsed by the High Court on appeal, where it stated:[3]

[2] *Re Queenstown Airport Corp Ltd* [2012] NZEnvC 206, at [51].
[3] *Queenstown Airport Corporation Ltd v Queenstown Lakes District Council* [2013] NZHC 2347, at [94] – [95].

> [94] The Environment Court adopted what might be called the orthodox threshold test of reasonably necessary namely:
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> In paragraph (c), the meaning of the word necessary falls between expedient or desirable on the one hand, and essential on the other, and the epithet reasonably qualifies it to allow some tolerance.
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> [95] The inbuilt flexibility of this definition enables the Environment Court to apply a threshold assessment that is proportionate to the circumstances of the particular case. This is mandated by the broad thrust of the RMA to achieve sustainable management and the inherently polycentric nature of the assessments undertaken by the Environment Court. Provided therefore that the Environment Court was satisfied that the works were clearly justified, there was no error of law in applying this orthodoxy.

16 It is also acknowledged that the terms 'reasonably necessary' and 'essential' have previously been used interchangeably by the Court of Appeal,[4] and the High Court.[5]

17 We consider that when considering whether modifications proposed to the MDRS are limited to only those necessary to accommodate qualifying matters, the definition of necessary could be assessed as being a modification that falls between something that is expedient or desirable and something that is essential. However, as the case law commentary above comments on the meaning of necessary, it is in the context of it being *reasonably* necessary. Therefore, we consider that for the purposes of the requirements of section 77I and section 77O of the RMA, and the applicable assessment requirement, a modification to the MDRS must be assessed to be essential in order to enable the modification.

18 In that light, it is considered that the starting point is the MDRS or policy 3 of the NPS-UD and reduction from that level through a modification must be to the least extent necessary to accommodate the matter. Any more than that, the extent of the modification would no longer be necessary or valid. This will require a case by case assessment of the qualifying matter and its application within the district.

19 Whether a proposed modification of the MDRS or height or density controls is *necessary* to accommodate a qualifying matter will depend on the qualifying matter and the area affected by that qualifying matter. The MDRS or height or density controls could be modified through:

19.1 an additional policy (which would only apply where a consent is already required under the MDRS, unless a new standard or activity status is also applied),

19.2 a more stringent height or density control standard or standards (be it a new or an amended standard) which sets a different development parameter or parameters for permitted activities, or

19.3 an additional standard responding to that qualifying matter, provided it is a parameter that addresses one or more of the 9 density standard matters contained in Schedule 3A to the RMA.

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[4] Refer to *Minister of Land Information v Seaton* [2012] NZCA 234, at [24].
[5] As above n 2.

20 Whether a more stringent activity status for any intensification, or a certain level of intensification or type of intensification, is necessary is therefore factually dependent and will need to be assessed and considered by the Panel. It is important however to restate that the ability to be less enabling of development where there is an applicable qualifying matter is limited to modification of the MDRS or policy 3 of the NPS-UD. It does not provide an ability to change the regulatory framework otherwise applying to other activities.

21 This is consistent with the recent Environment Court decision in *Waikanae Land Holding Ltd*. In that decision, the Environment Court found that the inclusion of a new site of significance within the applicable schedule of the Kāpiti Coast District Plan was *ultra vires* as it went beyond what could be achieved through an IPI or ISPP. The issue for the Court is focused on the fact that due to the scheduling of that residentially zoned site, activities other than the activities subject to the MDRS or policy 3 (ie not just residential units) were constrained when they previously had not been. The activities in that case included earthworks, fencing, cultivation and planting, which the Court considered to be associated with a residential activity. That, in the Court's view, went beyond modifying the 9 density standards set out in the MDRS to be less enabling of development (which are, for the construction and use of residential units or buildings, the number of units per site, height, height in relation to boundary, setbacks, building coverage, outdoor living space (per unit), outlook space (per unit), windows to street and landscape areas):[6]

> For the reasons we have endeavoured to articulate we find that the purpose of the IPI process inserted into RMA by the EHAA was to impose on Residential zoned land more permissive standards for permitted activities addressing the nine matters identified in the definition section and Schedule 3A. Changing the status of activities which are permitted on the Site in the manner identified in para 55 of WLC's submissions goes well beyond just making the MDRS and relevant building height or density requirements less enabling as contemplated by s 77I. By including the Site in Schedule 9, PC2 "disenables" or removes the rights which WLC presently has under the District Plan to undertake various activities identified in para 55 as permitted activities at all, by changing the status of activities commonly associated with residential development from permitted to either restricted discretionary or non-complying.

22 In light of that decision, we consider that PC56's general approach to amending the appliable underlying zoning throughout the district to medium or high density residential in residential areas, and one of the three commercial areas in non-residential urban areas in respect of the NPS-UD policy 3 requirements, with qualifying matters then being overlaid is appropriate. Where there is an applicable qualifying matter, the default density and height standards are amended by rules, with two specific examples considered below in the final section of this advice. We consider this to be consistent with the legislative provisions and the recent decision, even where the standards are now more restrictive than the comparative standards in the Operative District Plan.

23 Where there may be issues with the provisions of PC56 is if the qualifying matter provisions do more than modify the MDRS or the NPS-UD requirements. For example, if rules have been incorporated through PC56 that do more than just regulate the construction and use of residential units or buildings, or subdivision, in residential areas, or place constraints on those residential and subdivision activities for parameters beyond the 9 density standards included

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[6] *Waikanae Land Holdings Ltd* at [31].

in Schedule 3A to the RMA (ie, frontage controls), this may create issues. It is where new controls have been added, which regulate activities beyond those otherwise sought to be authorised by the MDRS or policy 3, or that regulate activities covered by the MDRS that do not relate to the MDRS density standards, that the Council may face issues. Whether any of the provisions proposed through PC56, or amendments sought through submissions, fall into this category will need to be assessed by the Council reporting officers and the Panel.

Specific examples

24 You have raised concerns with two specific examples where the proposed modification to the MDRS or height or density controls will result in a more stringent framework than that which applies under the Operative District Plan. The two examples you have provided are in respect of the proposed Residential Heritage Precinct and the new triggers for commercial activities in the Petone Commercial Activity Area and Suburban Mixed Use Activity Area that fall within the Medium or High Coastal Hazard Overlays.

25 As set out above, the required level of intensification (under section 77G for relevant residential areas or section 77N for urban non-residential zones) is the starting point. The assumption is that this is providing for more intensification than the Operative District Plan would in respect of the two examples provided.

26 From there, given there is an applicable qualifying matter, if the Council wants to modify the specified density requirements, the Council needs to provide an evaluation of that qualifying matter, including as set out above consideration of how that qualifying matter will be accommodated, the impacts on intensification, the costs associated with that and the necessity test for the proposed modification of the MDRS or policy 3. Once the Council has determined that a modification is necessary to accommodate the qualifying matter, that is the most it could limit the intensification. If that is more limiting than what the Operative District Plan is, then that, in our view is not relevant to the question of necessity.

27 However, the Council could, in those situations, choose to provide for a greater level of intensification than the reduction necessary to accommodate the qualifying matter. In doing so, the Council would be acknowledging that such an approach would not be accommodating the qualifying matter to the necessary extent and that approach may therefore not be appropriate.

Yours sincerely

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