Plan Change 14 – Kāinga Ora Homes and Communities
Supplementary submissions – 11 October 2023

Purpose

1.1. Kāinga Ora filed legal submissions last week. These additional submissions address matters raised in the legal submissions for the Council and the oral presentation of those submissions yesterday.

Scope of IPI process

2.1. In my submission, this IPI process must, pursuant to s 80E, RMA:

a. incorporate the MDRS provisions (including the objectives, policies, and standards); and

b. give effect to Policies 3 and 4 of the NPS-UD.

2.2. Those requirements are subject only to particular situations where the intensification outcomes of those provisions are limited by qualifying matters, which themselves are subject to very specific statutory constraints in terms of their identification and scope (particularly as regards "new" and "other" qualifying matters).

2.3. Equally, however, it is clear that MDRS represent a "baseline" for new development in appropriate areas (ie not affected by qualifying matters). The Amendment Act expressly allows councils to increase intensification beyond the MDRS (refer s 77H, Requirements in Schedule 3A may be modified to enable greater development), while the NPS-UD states that city centres must "realise as much development capacity as possible" (Policy 3(a)), "and in all cases [in metropolitan centre zones] building heights of at least 6 storeys" (Policy 3(b)), and "building heights of at least 6 storeys" within certain walkable catchments (Policy 3(c)).

2.4. Subject to the important caveat in para [3.1] below, this IPI is also a "plan change" in the normal RMA sense and must therefore give effect to a range of other instruments, including the full NPS-UD (eg, s 75(3)(a), RMA), and must be assessed against the orthodox tests in s 32, RMA. In other words, the provisions inserted by the Amendment Act are not a self-contained code.

2.5. The implementation section of the NPS-UD (Part 3) is instructive: it commences with the clear statement at 3.1 that:

> This part sets out a non-exhaustive list of things that local authorities must do to give effect to the objectives and policies of this National Policy Statement, but nothing in this part limits the general obligation under the Act to give effect to those objectives and policies.

2.6. The timing section of the NPS-UD (Part 4) requires that Tier 1, 2 and 3 authorities give effect to the NPS-UD provisions "as soon as practicable" and directs that Tier 1 authorities notify a plan change to give effect to policies 3 and 4 within 2 years of the implementation date, being 2 years from 20 August 2020.

2.7. I also draw attention to s 77S, which provides for the specific amendment to Policy 3(d) of the NPS-UD, and more importantly provides an expedited process for the

Minister to remove any inconsistency or otherwise clarify the relationship between the NPS-UD and the Amendment Act. This demonstrates a clear statutory intent that the Amendment Act is to implement the NPS-UD, and that if there are any legacy provisions of the NPS-UD that might impede the outcomes directed by the Amendment Act, then there is a statutory pathway to deal with those matters extremely quickly.

Relevance of broader plan change assessment and evaluation

3.1. While that broader assessment referred to in para [2.4] must be undertaken it is not permissible, in my submission, for that broader assessment to undermine or detract from the mandatory intensification objectives encapsulated by the MDRS provisions and by Policies 3 and 4 of the NPS-UD. In particular, it is not lawful for the Council to use these broader considerations to extend the ambit of countervailing factors beyond the very confined scope of s 80E, and the very restricted ability to constrain this additional development (ie through qualifying matters).

3.2. The legal submissions for the Council appear to argue that this broader "evaluative exercise" can be applied in a manner that further restricts the intensification outcomes. The submissions appear to go so far as to argue that Objective 1 of the NPS-UD – ie a well-functioning urban environment – can be applied in a way that restricts the intensification outcomes otherwise directed. Likewise, there is a suggestion that Part 2 of the RMA can be applied in a manner that would 'discount' the clearly directive effect of the NPS-UD as regards intensification.

3.3. That position simply cannot be correct and would run roughshod over the very clear statutory intent of the Amendment Act. The application of the above "evaluative process" to undermine a directive national policy statement bears a striking similarity to the "overall broad judgement approach" to the NZCPS that was so roundly rejected in the *New Zealand King Salmon* decision and repeated in numerous subsequent decisions, including the most recent *Ports of Otago* decision.

Policy 6, NPS-UD, and relevance of "amenity"

4.1. In my submission, Policy 6 was intended to stop people arguing that current amenity values and current planning provisions should prevent or discourage the intensification outcomes directed by the NPS-UD.

4.2. That is exactly why, I submit, the phrase refers to the urban built form *anticipated* by those RMA planning documents that *have given effect to* the NPS-UD; as opposed to the urban built form anticipated by the *current* RMA planning documents. The whole point about a change in mindset is that you must do things differently to how they have been done in the past.

4.3. This issue further illustrates why particular care should be taken in any use of existing planning provisions (ie CRPS, or current district plan provisions), when undertaking the broader "evaluation and assessment process" referred to in Council's legal submissions. (As noted earlier, while I agree that broader plan change evaluation process is required, it cannot be undertaken in a manner that restricts or de-intensifies the outcomes anticipated by Policies 3 and 4, and MDRS.)

4.4. The inappropriateness of using existing planning documents to set future expectations is highlighted by clause 3.36 which directs that "Every tier 1 territorial authority must ensure that the development outcomes for zones in its tier 1 urban environments are consistent with the outcomes required by Policy 3."

4.5. Consistent with that express direction, in my submission Policy 6 is relevant to PC14. On a purposive interpretation, for the first RMA planning document 'out of the blocks' the reference in Policy 6(a) to "those RMA planning documents that have given effect to [the NPS-UD]" needs to be read as a reference to "the planned urban built form anticipated by the NPS-UD." A similar interpretation must be taken to Policy 6(b).

***Waikanae* decision**

5.1. In my submission, the underlying rationale for the *Waikane* decision is based on the fact that the IPI process is a bespoke process. It is an expedited process with a very targeted objective of responding to a national imperative of urgently enabling intensification of housing. In recognition of that national objective and the urgency, the process has limited appeal rights – there is no merits appeal to the Environment Court available to submitters. It would be perverse, in my submission, if that expedited process could be utilised to process plan changes that had the effect of taking away rights otherwise conferred by an existing district plan, especially in circumstances where there is no rights of a merits appeal.

5.2. I stress that I am not submitting that there can be no new qualifying matters; rather what I am submitting is that it is only lawful for the qualifying matters to restrict the extent of proposed *new intensification* (including MDRS). So, where a proposed new flood hazard overlay is proposed as part of this IPI, that new overlay can only control the new development intensity enabled by PC14, but it cannot legally affect the underlying, existing, development potential. (In those circumstances there would need to be a two-tiered rule structure.)

5.3. Finally, it is somewhat trite to observe that if, in the context of an IPI, a council identifies a matter that should result in controls in respect of *all development* (eg a previously unknown significant flood risk) which was the example given in the Kapiti Coast IPI decision quoted by the Council's legal submissions), then a council is quite able to commence a separate Schedule 1 process to address that risk for *all development*. There is no barrier in the Amendment Act that would prevent a council doing so, including, if the risk needed to be urgently addressed, through a simultaneous parallel process.

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Qualifying Matters: Non-Residential

STARTING POSITION

Section 77N: duty of specified territorial authorities to give effect to Policy 3 or 5 in non-residential zones:

- When implementing an IPI a specified territorial authority must ensure that the provisions in its district plan for each non-residential zone give effect to the changes required by policy 3 or 5.

Does a Section 77O qualifying matter apply?

- No → Policy 3 of the NPS-UD given effect to in the non-residential zones of the area through the IPI
- Yes → Is it a listed qualifying matter? (any matter contained in Section 77O(a) – (i))
  - Yes
  - No

Key

- Listed qualifying matter pathways
- New qualifying matter pathway
- Common pathway

Different coloured boxes identify common elements in the requirements under sections 77N – R.

CHOOSE PROCESS

Section 77Q alternative process:
For existing qualifying matters only:

- Identify location of an existing qualifying matter area
- \+
- Specify alternative density standards proposed in the area
- \+
- Identify in Section 32 report why the authority considers the qualifying matter(s) apply
- \+
- Describe generally how much development would be prevented by the qualifying matter in comparison to the level enabled by Policy 3
- \+
- Notify the matter in the IPI

OR

Section 77P evaluation report:
For qualifying matters, the report must include:

- The territorial authority must demonstrate why it considers an area subject to a qualifying matter
- \+
- The territorial authority must demonstrate why the authority considers that the qualifying matter is incompatible with the level of development provided for by Policy 3
- \+
- The territorial authority must assess the impact of limiting development capacity, building height, or density on the provision of development capacity
- \+
- The territorial authority must assess the costs and broader impacts of imposing limits

AND

Section 77R further evaluation:
In the Section 32 report for a new qualifying matter, it must:

- Identify the specific characteristic that makes development under Policy 3 inappropriate
- \+
- Justify why that characteristic is inappropriate in light of the national significance of urban development and the objectives of the NPS-UD
- \+
- Site-specific analysis that:
  - identifies the site in question
  - evaluates the specific characteristics on a site-specific basis to determine the geographic area where intensification needs to be compatible with the specific matter
  - evaluates an appropriate range of options to give effect to achieve the greatest heights and densities provided for in Policy 3 while managing the specific characteristics

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Qualifying Matters: Residential

STARTING POSITION

Section 77G: duty of specified territorial authorities to incorporate MDRS and incorporate Policy 3 or 5 in residential zones:

- every relevant residential zone must have MDRS incorporated and give effect to Policy 3 or 5 as applicable, in that zone
- MDRS are the new residential baseline, apart from qualifying matter exceptions

Does a Section 77I qualifying matter apply?

No → MDRS and Policy 3 of the NPS-UD incorporated into the residential zones of the area as per Schedule 3A of the RMA

Yes

Is it a listed qualifying matter? (any matter contained in Section 77I(a) – (i))

Yes

No (77I(j))

Key

- Listed qualifying matter pathways
- New qualifying matter pathway
- Common pathway

Different coloured boxes identify common elements in the requirements under sections 77J – L.

CHOOSE PROCESS

Section 77K alternative process

For an existing qualifying matter only, report must:

- Identify location of an existing qualifying matter area

+

- Specify alternative density standards proposed in the area

+

- Identify in Section 32 report why the authority considers the qualifying matter(s) apply

+

- Describe generally how much development would be prevented by the qualifying matter in comparison to the MDRS and Policy 3

+

- Notify the matter in the IPI

OR

Section 77J evaluation report

For qualifying matters, the report must include:

- The territorial authority must demonstrate why it considers an area subject to a qualifying matter

+

- The territorial authority must demonstrate why the authority considers that the qualifying matter is incompatible with the level of development under the MDRS / Policy 3

+

- The territorial authority must assess the impact of limiting development capacity, building height, or density on the provision of development capacity

+

- The territorial authority must assess the costs and broader impacts of imposing limits

For implementation of the MDRS the report must include:

- Descriptions of district plan provisions allowing the same level or greater development than the MDRS

+

- Descriptions of how modifications to MDRS are limited to those necessary for qualifying matters and how they apply to spatial layers in the plan – operative and proposed

AND

Section 77L further evaluation

In the Section 32 report for a new qualifying matter, it must:

- Identify the specific characteristic that makes development under the MDRS / Policy 3 inappropriate

+

- Justify 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

+

- Site-specific analysis that:
  - identifies the site in question
  - evaluates the specific characteristics on a site-specific basis to determine the geographic area where intensification needs to be compatible with the qualifying matter
  - Evaluates an appropriate range of options to give effect to achieve the greatest heights and densities permitted by MDRS provided for by Policy 3 while **managing** the specific characteristics as much of the MDRS / Policy 3 as possible

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