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Our reference
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By email

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Dear Justine

Response to Minute 11

- 1 On 24 May 2023, the Independent Hearings Panel (**IHP**) hearing submissions on the Intensification Planning Instrument (**IPi**) variation to the Proposed District Plan (**PDP**) issued Minute 11. It requested a legal opinion from Selwyn District Council (**SDC**) on the following questions:

Does subdivision within the MRZ have to have a consent status that is never any more onerous than a 'controlled activity', or can it default to a 'harsher' activity status such as restricted discretionary, discretionary or non-complying.

If subdivision within the MRZ can have a 'harsher' activity status:

- Under what provisions of Schedule 3A or other sections of the RMS-EHS is that enabled; and
- Under what circumstances might that 'harsher' activity status legitimately be triggered.

- 2 We have also reviewed legal submissions filed on this issue, from the Trices Road Rezoning Group (dated 2 June 2023), and Yoursection Limited (dated 2 June 2023).

Summary

- 3 In summary, our views are that:

- 3.1 Under clause 3 of Schedule 3A of the Resource Management Act 1991 (**RMA**) subdivision must be a controlled activity where the subdivision is for the purpose of construction and use of a building which complies with the MDRS density standards or where it does not comply with one of the MDRS density standards (and therefore, defaults to restricted discretionary under clause 4 of Schedule 3A of the RMA).
- 3.2 Clause 7 of Schedule 3A of the RMA only limits subdivision activity status to controlled where it relates to a level of development permitted under Schedule 3A of the RMA. That is, where the MDRS density standards are met.
- 3.3 Clause 8 of Schedule 3A of the RMA does not deal with activity status. It only prevents subdivision provisions setting minimum lot size, shape size, or other size-related subdivision requirements in the situations set out in that clause (ie, where the MDRS density standards either will be breached (or further breached), or where each allotment cannot contain a permitted residential unit or where a vacant allotment is created).

- 4 Accordingly, subdivision in the MRZ can default to a 'harsher' activity status than controlled. For example, where:
- 4.1 The activity associated with the subdivision is outside the scope of clauses 3 and 7 of Schedule 3A of the RMA. That is, the subdivision is not for the purpose of the construction and use of residential units in accordance with clauses 2 and 4 of Schedule 3A of RMA, and the associated activity is not consistent with the level of development permitted under Schedule 3A, or
 - 4.2 A qualifying matter applies, or
 - 4.3 The associated activity is governed by standards that are not 'density standards' in Schedule 3A of the RMA. For example, where the construction and use of residential units triggers a restricted discretionary activity status because of a non-compliance with a non-density standard, the constraint on associated subdivision being a controlled activity in Schedule 3A of the RMA does not apply.
- 5 The reasons for these views are set out below. We acknowledge that this is a complex issue and can provide further comment if that would assist.

General context

- 6 The IPI provides for a new MRZ - Medium Density Residential Zone (**MRZ**).¹ In the notified version of the IPI, the MRZ includes objectives, policies and rules. It provides for residential activity and a residential unit as a permitted activity, subject to standards, which include the Schedule 3A density standards (**MDRS**). Qualifying matter types are set out in chapter 'HPW30 – Qualifying matters' (for example, heritage, notable trees, Ngā Wai areas and waterbody setbacks).
- 7 Subdivision is managed in a separate chapter, as a district wide matter, with some zone-specific rules, and some rules which apply to all zones. Under the notified version of the IPI, subdivision in the MRZ is a controlled activity under SUB-R1.5, subject to a range of requirements (for example, building square, road frontage width and wastewater disposal).

Requirements of the RMA in relation to subdivision

- 8 Under section 77G(1) of the RMA:
- Every relevant residential zone of a specified territorial authority must have the MDRS incorporated into that zone.
- 9 Schedule 3A of the RMA is then titled: 'MDRS to be incorporated by specified territorial authorities'.
- 10 Part 1 of Schedule 3A of the RMA sets out general requirements, including clauses 2, 3 and 4. Clause 3 provides for subdivision:

3 Subdivision as controlled activity

¹ The PDP also includes a chapter on Residential Zones (RESZ) generally, which includes the MDRZ. The RESZ includes objectives and policies, and matters of control or discretion (to avoid repetition in the various residential zones). The RESZ does not include any rules.

Subdivision requirements must (subject to section 106) provide for as a controlled activity the subdivision of land for the purpose of the construction and use of residential units in accordance with clauses 2 and 4.

- 11 Clauses 2 and 4 state that:
 - 11.1 constructing or using a building is a permitted activity, if it complies with the MDRS in the District Plan (once incorporated, as required by section 77G of the RMA).
 - 11.2 constructing or using residential units is a restricted discretionary activity if they do not comply with the MDRS (once incorporated, as required by section 77G of the RMA).
- 12 In other words, under clause 3 of Schedule 3A of the RMA, subdivision is required to be a controlled activity where it is associated with the construction and use of the building which is permitted under clause 2 or requires a restricted discretionary activity consent under clause 4 of Schedule 3A to the RMA (ie, subdivision must be a controlled activity where the land use meets the MDRS requirements or where it does not comply with one of the MDRS requirements and defaults to a restricted discretionary activity).
- 13 In our view, clause 3 of Schedule 3A of the RMA is not a requirement that all subdivision associated with residential activity in the MRZ is a controlled activity. It has limitations. There is the specific limitation in the clause itself of when section 106 of the RMA applies (addressed further below) but also, our view is that this clause does not require a controlled activity status where a non MDRS is not complied with (ie, a standard that is not a Schedule 3A density standard).
- 14 Put another way, subdivision is only required to be a controlled activity for the purpose of the construction and use of residential units in accordance with clauses 2 and 4 of Schedule 3A of the RMA. That is, where the purpose of the subdivision is to allow for an activity which is either permitted medium density development, or restricted discretionary medium density development due to a breach of an MDRS. If the subdivision is not for that purpose, our view is that it is not caught by clause 3.
- 15 Clause 3 of Schedule 3A to the RMA is followed by clause 7, which also limits activity status for subdivision. It states:

7 General subdivision requirements

Any subdivision provisions (including rules and standards) must be consistent with the level of development permitted under the other clauses of this schedule and provide for subdivision applications as a controlled activity.

- 16 Like clause 3 of Schedule 3A of the RMA, clause 7 is also narrow in application. It only limits subdivision activity status where it relates to a level of development **permitted** under Schedule 3A of the RMA. That is, where the MDRS are met.
- 17 The controls on subdivision activity status through Schedule 3A of the RMA are clearly focussed on supporting and enabling implementation of medium density residential development that complies with the MDRS. The intention appears to be avoiding subdivision becoming a 'de facto' limitation on the medium density residential development provided for in Schedule 3A. However, the controls on subdivision under clause 7 are confined to enabling that level of development. Outside of that, there is no restriction under Schedule 3A to the RMA. The focus on subdivision associated with buildings that comply with the MDRS seems to also be what was anticipated by the Select Committee Final Report (p11):

Subdivision would be a controlled activity for: existing dwellings that meet the MDRS, new dwellings that are permitted under the MDRS, or dwellings that have been approved through a resource consent. We note that the bill does not change any of the existing plan provisions regarding subdivision, except to enable application of the MDRS.

- 18 Clause 8 of Schedule 3A of the RMA then provides additional restrictions on the aspects of subdivision that can be controlled, such as there can be no minimum lot size, shape size, or other size-related subdivision requirements where either:
- 18.1 there is an allotment with an existing residential unit, and the non-compliances with the MDRS are not increased (or land use consent has been granted), and no vacant allotments are created, or
 - 18.2 there is an allotment with no existing residential unit, but there is an accompanying land use consent application that will be determined concurrently, and it is practicable to construct a residential unit on each allotment that is a permitted activity and complies with the MDRS and no vacant allotments are created.
- 19 We consider that this is consistent the intention referred to above, to avoid a de facto limitation on medium density development through subdivision controls, by controlling the types of rules which can be put in place where there is a subdivision which supports a residential activity which is consistent with the MDRS (or at least does not increase the non-compliance with any of them). However, there is no restriction under clause 8 of Schedule 3A of the RMA on subdivision rules containing minimum lot sizes, etc, where the MDRS either will be breached (or further breached), or where each allotment cannot contain a permitted residential unit, or where a vacant allotment is created.
- 20 There is then a question of whether this sort of subdivision (where the MDRS either will be breached (or further breached), or where each allotment cannot contain a permitted residential unit or where a vacant allotment is created) can have a more onerous activity status than controlled activity status.
- 21 Clause 8 of Schedule 3A of the RMA does not deal with activity status. It only prevents subdivision provisions setting minimum lot size, shape size, or other size-related subdivision requirements in the situations set out (where the MDRS either will be breached (or further breached), or where each allotment cannot contain a permitted residential unit or where a vacant allotment is created). Given this, clause 8 does not in our view direct activity status. Activity status for subdivision is directed by clauses 3 and 7 of Schedule 3A of the RMA, but only in the specific circumstances set out in those clauses (where the construction and use of residential units complies with the MDRS or breaches the MDRS or where the level of development proposed is permitted under the Schedule 3A provisions).
- 22 As we have concluded that not all subdivision in the MRZ is required to have a controlled activity status, we now address the question of when can subdivision have a 'harsher' activity status legitimately applied.

Qualifying matters

- 23 There is a clear exception to the restriction on the activity status in Schedule 3A of the RMA for subdivision (which would normally be required to be controlled) where there is an applicable qualifying matter.
- 24 Section 77G(6) of the RMA states:

A specified territorial authority may make the requirements set out in Schedule 3A or policy 3 **less enabling of development** than provided for in that schedule or by policy 3, if authorised to do so under section 77I.

- 25 Section 77I of the RMA deals with qualifying matters and allows the MDRS to be made less enabling of development, to the extent necessary to accommodate the qualifying matter. Given this, under section 77G(6), if a qualifying matter applies, the Schedule 3A requirements can be made 'less enabling'.
- 26 Our view is that 'less enabling of development' must include the ability to impose a higher activity status than set out in MDRS in Schedule 3A of the RMA, both in relation to the construction and use of residential units and subdivision. The definition of 'MDRS' includes all requirements in Schedule 3A of the RMA.
- 27 Accordingly, if a qualifying matter applies (and the various tests for a qualifying matter are met), we consider that an activity status other than controlled could be applied to subdivision.

Other standards

- 28 It may be that there are other standards in the PDP or IPI which apply to a residential activity, which are not 'density standards' as defined in clause 1 of Schedule 3A of the RMA (such as noise, traffic, or earthworks), and which may be relevant to an activity associated with subdivision. It is clear that these other rules cannot directly relate to a MDRS (as set out in Schedule 3A), as under section 77I, these can only be altered where a qualifying matter applies. However, depending on the scope of the activity as a whole, there may be other non-density standards triggered.
- 29 If the construction and use of residential units triggers, say, a restricted discretionary activity status because of a non-compliance with one of those non-medium density standards, we consider that the constraint on associated subdivision being a controlled activity in Schedule 3A of the RMA does not apply. This is because of the narrow restrictions in clause 3 and clause 7 of Schedule 3A of the RMA. In our view, these restrictions only apply where the activity is either permitted because of compliance with the MDRS or it only doesn't comply with a MDRS. Outside these specific activities, subdivision activity status is not restricted by Schedule 3A of the RMA.
- 30 These other (non MDRS) may or may not be in the IPI, given the IPI is a focussed variation. If these provisions form part of the IPI, then section 80E applies. Section 80E states that an IPI must 'incorporate' MDRS but can also include 'related provisions' which 'support or are consequential on' the MDRS.
- 31 It is clear that the MDRS must be included in the PDP via the IPI. However, section 80E then provides for other provisions, which either 'support' or are 'consequential on' the MDRS. We consider that to be 'consequential on' means that there may be some degree of restriction on the MDRS, provided those provisions are clearly consequential on the MDRS. In *Wilson v Christchurch City Council*², the Environment Court considered what was meant by consequential alterations under section 290, and clause 10(2). The Court stated that:³

² ENC Christchurch C165/03, 16 December 2003
Environment Court, Christchurch

³ At [7]

The Concise Oxford Dictionary (9th edition) tells us that “consequential” means:

“1 following as a result or consequence. 2 resulting indirectly. 3 important; significant.”

Accordingly, what is required is that the provisions are in place as a consequence of incorporating MDRS in the PDP, and do not directly duplicate any MDRS, or deal with the same matter as a MDRS.Application to some specific examples

32 We have considered the above advice in the context of some specific examples of subdivision controls from the notified version of the IPI, being:

- 32.1 SUB-REQ9 Water. This standard requires that in the RESZ (which includes the MRZ), every site shall be supplied with a separate connection to a Council reticulated water supply, and where compliance is not achieved, the activity status is non-complying. Rule SUB-R1 for MRZ requires compliance with Sub-REQ9 to be a permitted activity.
- 32.2 SUB-REQ10 Wastewater Disposal. This requires that every site in the RESZ shall either be connected to a wastewater network or treatment and disposal system. Rule SUB-R1 for MRZ requires compliance with SUB-REQ9 to be a permitted activity.
- 32.3 SUB-REQ13 Development Areas provides for specific controls on subdivision within development areas, with generally a non-complying activity status when compliance is not achieved. Rule SUB-R1 for MRZ requires compliance with SUB-REQ9 to be a permitted activity.

33 Applying the principles set out above, our view is that:

- 33.1 If the associated residential land use is permitted under the MDRS, or only breaches a MDRS, and no other aspect of the activity requires consent, and no qualifying matter applies, then under clause 3 of Schedule 3A of the RMA, the activity status for subdivision must be controlled. This includes where any of the above three requirements (SUB-REQ 9, 10 and 13) are not met.
- 33.2 If a qualifying matter applies and there is an associated residential land use, a harsher activity status than controlled can apply to the subdivision activity. We do not understand that there are any relevant qualifying matters for the examples above.
- 33.3 If the associated residential land use breaches another standard (which is not a density standard), then the activity status for subdivision can be whatever the Panel determines is appropriate. This is because clauses 3 and 7 of Schedule 3A of the RMA only restrict subdivision activity status where the activity is just associated with a permitted (or restricted discretionary) MDRS activity.

34 We also understand that issues have arisen in relation to the following recommendation:⁴

.. that “a new rule requirement [is added] to delay development of the area[s] until Council undertakes the following intersection improvements:

⁴ [Joint Witness Statement \(V1-0025, V1-0084, V1-0093 & V1-0116\) - Transport 19 May 2023.pdf \(selwyn.govt.nz\)](#) at [6], [20] and [21]

- i. Selwyn Road/Lincoln Rolleston Road intersection is upgraded to a roundabout, which is currently programmed in the LTP for 2028/2029;
- ii. Selwyn Road/Weedons Road intersection is upgraded to a roundabout, which is currently programmed in the LTP for 2027/2028; and
- iii. Lowes Road/Levi Drive/Masefield intersection is upgraded to traffic signals, which is currently programmed in the LTP for 2025/2026."

MC confirmed that he would expect the same provisions to be applied to the Brendean Drive Rezoning Group (V1-0093) site.

...

... he considered that it would be appropriate to have a Rule that required an assessment of the three intersections to be carried out as part of any land use or subdivision application made at any of the four sites, to manage the uncertainty of the potential safety and efficiency effects at the three intersections. 21 As the relevant assessment matters were well-defined, MC considered that a Restricted Discretionary Activity status was appropriate for this

- 35 We understand from the above that the proposal is to include this as a control on subdivision (or possibly land use) associated with medium density residential development.
- 36 As with SUB-REQ 9, 10 and 13 above, if this is a subdivision standard and the residential activity associated with that subdivision is wholly permitted under MDRS, or only does not comply with a MDRS, we consider that the activity status for subdivision must be controlled.
- 37 If this is imposed as a land use standard, then the issue of the subdivision activity status falls away because clauses 3 and 7 of Schedule 3A of the RMA only restrict subdivision activity status where the activity is just associated with a permitted (or restricted discretionary) MDRS activity.
- 38 We consider that there can be provisions in the IPI which addresses the traffic generation activity, on the basis that such a rule is consequential on MDRS (if there is appropriate justification for that). In addition, Schedule 3A seeks a 'well-functioning urban environment' (Objective 1), achieving attractive and safe streets (Policy 3) and enable housing to be designed to meet the day-to-day needs of residents (Policy 4). Such a land use rule would presumably assist with achieving these outcomes (albeit this would require further assessment).

Section 106 of the RMA

- 39 Clause 3 of Schedule 3A of the RMA is 'subject to section 106'. Section 106 of the RMA allows subdivision consents to be declined (or granted subject to conditions) if SDC considers there is a significant risk of natural hazards, or sufficient provision has not been made for legal and physical access to each allotment. This is not an activity status issue. Section 106 of the RMA is simply an ability to decline a subdivision where certain situations arise, regardless of its activity status (and including where it is a controlled activity subdivision). Section 87A(2) of the RMA states that:

If an activity is described in this Act, regulations (including any national environmental standard), a plan, or a proposed plan as a controlled activity, a resource consent is required for the activity and—

- (a) the consent authority must grant a resource consent except if—
 - (i) section 106 applies; or...

Conclusion

40 Our conclusions are set out in our summary above.

Yours sincerely



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