

Before the Independent Hearings Panel appointed by Selwyn District Council

In the Matter

of the Resource Management Act
1991 (**Act**)

And

In the Matter

of Variation 1 to the Selwyn District
Council District Plan Review

**Legal Submissions - Subdivision in MRZ
- Yoursection Limited (V1-0025)**

Amanda Dewar | Barrister

Address | PO Box 7, Christchurch 8140

Email | amanda@amandadewar.com

Phone | 021 242 9175

INTRODUCTION/ BACKGROUND

1. At the conclusion of Yoursection Limited's presentation at the Rolleston hearing the Hearings Panel invited me to provide further legal submissions in relation to the status of subdivision in the MRZ.
2. In particular the Panel has requested advice (confirmed in its Minute 11 requesting advice from the Council's Solicitor) about the allowable consent status for subdivision in the MRZ in light of the Resource Management (Enabling Housing Supply & Other Matters) Amendment Act 2021 (**Amendment Act**).
3. These submissions also **attach** the amended ODP narrative as per the Panel's directions to Ms Seaton. The attached narrative is as agreed between Ms Seaton and Ms Lewes.
4. I can also advise that Yoursection Ltd is agreeable to the north/eastern secondary road linkage moving slightly west on the ODP Plan if that is preferred by the Panel. This has been communicated to Ms Lewes as the Council will be undertaking the ODP plan amendments.

SUBDIVISION IN THE MRZ

5. Clause 3 of Schedule 3A provides that "*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*" (**MDRS Compliant Units**).
6. Clause 7 reinforces this by providing that "*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*".
7. Clause 8 provides further restrictions in relation to rules about subdivision (but without limiting the effect of clause 7) but this clause is not strictly relevant to the Panel's current query as the clause relates to "size related" subdivision requirements such as minimum lot and shape size whereas the suggested subdivision rule at issue relates to the limitation of MRZ development until certain intersection upgrades have occurred (set out in the Planning JWS) (**Intersection Upgrade Rule**).

8. Section 80E provides the directive to “incorporate the MDRS” which is a strong and exacting direction.
9. In my submission in light of these provisions it is clear that the consent status of subdivision must be a controlled activity for the construction and use of residential units that are either permitted by clause 2 of Schedule 3A or a restricted discretionary activity under clause 4 of the Schedule (MDRS Compliant Units) except where there are natural hazard issues. And further that any subdivision rules and standards must be consistent with the level of development permitted under other clauses of the MDRS.
10. Accordingly, in my submission it follows that the suggested Intersection Upgrade Rule is *ultra vires* the Amendment Act. It would not provide for subdivision for MDRS Compliant Units as a controlled activity which would instead default to a restricted discretionary activity (at least and until the stated upgrades have taken place) and as a result would not be consistent with the level of development permitted under other clauses of the MDRS.
11. However that is not necessarily the end of the matter because as you are aware Section 80E of the Amendment Act also provides for (relevantly) related provisions that support or are consequential on the MDRS.
12. My primary legal submissions and other Counsel have provided the background and legal principles associated with this type of IPI provision, so it is clear that:
 - (a) Every related provision must link back to the overarching gateway in Section 80E(1)(b) i.e. it must support or be consequential on the MDRS;
 - (b) The reason the related provisions were provided for at select committee stage was to remedy what was considered to be the overly narrow scope of an IPI and was intended to broaden what can be included;
 - (c) Practically, related provisions are required to make the Amendment Act work especially in the context of adding the MDRS into existing plans and proposed plans;

- (d) Where it is unclear whether a provision supports or is consequential to the MDRS it is important to consider the purpose of the Amendment Act that is to enable:
 - (i) the acceleration of the supply of housing; and
 - (ii) greater intensification; as well as
 - (iii) the reduction of “red tape” in relation to housing development with the aim of addressing issues about housing choice and affordability;
 - (e) However, care should be taken especially with provisions that seek to make MDRS Compliant Units less permissive as these can’t be seen to be provisions that support or are consequential on the MDRS.
13. Therefore although in my submission no subdivision Intersection Upgrade Rule is permissible in these circumstances, a land use equivalent provision is potentially possible provided it:
- (a) meets the ‘support or consequential test’, and
 - (b) can be justified in terms of relevant parts of Section 32AA:
 - (i) but bearing in mind that the requirements of Section 32AA need to be considered in the narrower context of an IPI; and
 - (ii) the MDRS stated objectives, policies and provisions are already settled through the operation of Section 80E(a)(i).
14. In my submission an Intersection Upgrade rule in these particular circumstances is unlikely to meet the support or consequential test as it:
- (a) would decelerate the supply MDRS Compliant Units by not making the land available for some time (especially taking into account Mr Wheelan’s evidence about the significant timing risk associated with such a rule); and hence
 - (b) there would be a reduction in the potential for Rolleston to provide for greater intensification; and

- (c) increase the red tape associated with the residential development of this land for MDRS Compliant Units; and therefore
 - (d) would increase the overall cost of housing; and
 - (e) would make the MDRS less permissive.
15. Furthermore, from a Section 32AA perspective, the rule is not the most appropriate way to achieve the objectives of the MDRS in circumstances where:
- (a) the Council has already committed to the intersection upgrades of these arterial v arterial intersections in its Long Term Plan;
 - (b) these upgrades will happen regardless of whether this land is developed or not;
 - (c) the development of the land includes traffic improvements that will in fact benefit management of the township's traffic through the construction of a CRETTS identified collector road (extension of Ed Hillary Drive) and another important road identified in the Rolleston Structure Plan (extension of Lady Isaac Drive) passing east-west through the land, and their proposed roundabout connections on Lincoln Rolleston Road at the western boundary;
 - (d) the development of the land will involve the payment of development contributions that will assist in enabling the Council with the timely execution of the intersection upgrades;
 - (e) other areas to be zoned MRZ as part of the Variation to the west of the land (and therefore part of the IPI and subject to Section 80E) do not include such a rule but will contribute traffic to the intersections suggested by Council officers which is not a consistent approach;
 - (f) an appropriately worded High Trip Generator rule requiring an ITA can ensure that the traffic effects of any development on the nearby and wider network can properly be considered and in light of the actual traffic environment at the time of the application which is a more efficient and effective rule in the Rolleston setting.

16. It is also important to consider the general common law principles associated with this type of provision that requires upgrades to roading infrastructure beyond the boundaries of the land, staging or delay before development can proceed¹.
17. In *Landco* which concerned a plan change for a range of urban activities including residential and business purposes, the Court held that that it is the responsibility of a developer to manage the traffic effects within a project site and in the immediate transport network. However it is not the responsibility of a developer *to resolve infrastructure problems outside its boundaries although they may be required to contribute, by way of financial contributions, to the cost of doing so*².
18. In *Landco* the Court acknowledged that population growth and hence pressure on traffic infrastructure would continue regardless of whether the plan change went ahead, and that ideally upgrades would happen before development occurred so as to be able to absorb the projected traffic. However the Court recognised that the “*world is not ideal*” with the result that the proposed housing would simply go elsewhere and almost certainly further away placing even greater demands on the roading network.
19. The Court in *Laidlaw College Inc*³ determined the extent and area around the site relevant to the traffic assessment. Here the applicant, citing *Landco*, sought to limit the area for assessment of adverse traffic effects to the road network immediately surrounding the appeal site.
20. Although the Court agreed in principle that an applicant is not required to resolve existing infrastructure problems beyond the site. However it found that it should not add significantly to them, and the question is one of degree, dependent on the facts of each case.
21. The Court held the focus must be on the effects arising from the proposal in the context of the environment to which it is sought to be located. The roading network immediately surrounding the proposed site will need to be considered, but equally, depending on the nature of the roading network and

¹ See for example *Landco Mt Wellington Ltd v Auckland City* A 35/2007

² *Ibid* para [10]

³ *Laidlaw College Inc v Auckland Council* [2011] NZEnvC 248

the potential for flow-on effects, wider consideration of the network may be appropriate ⁴.

22. The Court in *Laidlaw* found a close and important relationship of the roading network in question meant that the consideration of traffic effects arising from the proposal should encompass a wider area.
23. In my submission the traffic evidence does not show a close relationship of the land to the wider traffic network as a result of the rezoning or that the rezoning of the Yoursection land will significantly affect the performance of the intersections. As a consequence a wider consideration of the network is not justified, and neither is an Intersection Upgrade Rule.
24. Taking all of these matters into account, a land use equivalent Intersection Upgrade Rule would not be the most appropriate way to achieve the MDRS objectives and is not justified especially when the intersection upgrades are already planned for the future by the Council and the submitter will contribute to the upgrades through development contributions.

CONCLUSION

25. Subdivision for MDRS Compliant Units must be a controlled activity.
26. An Intersection Upgrade Rule having the effect of making MDRS Compliant Units restricted discretionary until certain intersection upgrades have taken place is ultra vires the Amendment Act.
27. However there is potential for a land use equivalent rule as a related provision where that supports or is consequential on the MDRS.
28. Although not unfettered, there is a broad discretion for related provisions under the Amendment and there must be sufficient flexibility to make an IPI workable in the context of existing and proposed plans and importantly to meet the purposes of the Amendment Act.
29. The purpose of the Amendment Act is to create IPIs that will put in place the MDRS and related provisions in order to accelerate the supply of housing, bring about greater intensification, reduce “red tape” and address housing choice and affordability issues;

⁴ Ibid para [38]

30. In my submission it would not meet the purpose of the Amendment Act or Section 32AA to zone land that is part of the urban environment to incorporate the MDRS but at the same time stymie that potential with other provisions. This is particularly so in the context of this land at Rolleston where:
- (a) planning for the intersection upgrades is well advanced through the Council's Long Term Plan; and
 - (b) the traffic contributing to their upgrade goes well beyond this land and adjoining land seeking to be zoned for MRZ;
 - (c) the development of this land will include two important east-west roads, including the CRETS collector road, that have long been signalled in transport plans for Rolleston and that will benefit the traffic environment of Rolleston.
31. If additional control is considered to be necessary then a suitably drafted High Trip Generator rule would be a more appropriate rule and better qualify as a related provision.



Amanda Dewar

Counsel for Yoursection Limited

2 June 2023