



Briefing

Further delegated policy decisions on the proposal to bring forward and strengthen the National Policy Statement on Urban Development			
Date:	27 August 2021	Security level:	In Confidence
Priority:	High	Report number:	HUD tracking #: BRF21/22081079 MfE tracking #: BRF-355

Action sought		
	Action sought	Deadline
Hon Dr Megan Woods Minister of Housing	Agree to the recommendations.	2 September 2020
Hon David Parker Minister for the Environment		
CC: Hon Nanaia Mahuta Minister of Local Government	Note the contents of this briefing.	
CC: Hon Phil Twyford Associate Minister for the Environment		

Contact for discussion			
Name	Position	Telephone	1 st contact
Lesley Baddon	Director, Ministry for the Environment	021 738 357	
Rebecca Lloyd	Manager, Ministry for the Environment	022 013 6139	✓
Brad Ward	Deputy Chief Executive, Ministry of Housing and Urban Development	s 9(2)(a)	
Jessica Ranger	Manager, Ministry of Housing and Urban Development	s 9(2)(a)	✓

Other agencies consulted
[Names]

Minister's office to complete

<input type="checkbox"/> Noted <input type="checkbox"/> Seen <input type="checkbox"/> Approved <input type="checkbox"/> Needs change <input type="checkbox"/> Not seen by Minister <input type="checkbox"/> Overtaken by events <input type="checkbox"/> Declined <input type="checkbox"/> Referred to (specify) _____
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Comments

Date returned to HUD:



Briefing

Further delegated policy decisions on the proposal to bring forward and strengthen the National Policy Statement on Urban Development

For: Hon Dr Megan Woods, Minister of Housing

Hon David Parker, Minister for the Environment

CC: Hon Nanaia Mahuta, Minister of Local Government

Hon Phil Twyford, Associate Minister for the Environment

Date: 27 August 2021

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Purpose

1. This briefing seeks agreement on further delegated policy decisions relating to the proposals to bring forward and strengthen the National Policy Statement on Urban Development (NPS-UD). These decisions will enable us to refine drafting of the Bill to amend the Resource Management Act 1991 (RMA) with the Parliamentary Counsel Office (PCO).

Background

2. On 31 May 2021, Cabinet agreed to the proposals in the Cabinet paper *Bringing forward and strengthening the National Policy Statement on Urban Development* [CAB-21-MIN-0188]. Cabinet delegated some decisions to the Minister of Housing and the Minister for the Environment and authorised them to clarify and develop policy and process matters relating to the proposals.
3. We have previously provided advice on a set of delegated policy decisions (HUD: BRF20/21060984, MfE: BRF-89 refers) relating to: the intensification streamlined planning process (ISPP); the content of the medium density residential standards¹ (MDRS); legal effect of the MDRS; and criteria for applying the MDRS to tier 2 urban environments.
4. This paper seeks:
 - a. further policy decisions on matters within your delegation including on notification dates for tier 2 council plan changes, financial contributions for permitted activities, enabling councils to use the ISPP to change financial contributions policies and transitional provisions (Table 1)
 - b. to enable a change to the NPS-UD to correct a minor error in the definition of planning decision (Table 2)
 - c. a decision from the Minister for the Environment to amend the RMA to fix an error relating to a repealed clause on subdivision (Table 3)

¹ Referred to in that advice as the 'medium density residential zone'.

- d. to provide an update on where drafting has been improved to ensure the workability of the Bill (Table 4).
5. There may be further drafting improvements as work on the Bill continues.

Recommended actions

6. Recommendations and matters to note are set out in Annex 1: Tables of recommendations and matters to note.



Jessica Ranger
**Manager, Te Tūāpapa Kura Kāinga –
Ministry of Housing and Urban
Development**

27 August 2021

Hon Dr Megan Woods
Minister of Housing

..... / /



Rebecca Lloyd
**Manager, Urban and Infrastructure,
Ministry for the Environment**

27 August 2021

Hon David Parker
Minister for the Environment

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Annex 1 – Tables of recommendations and matters to note

Table 1: Recommendations on further delegated policy decisions

Policy decision	Rationale	Recommended actions	Ministers' decision
Clarifying notification dates for tier 2 council plan changes	<p>Cabinet agreed [CAB-21-MIN-0188] that tier 2 councils could be required to use the Intensification Streamlined Planning Process (ISPP) to implement the intensification policies of the NPS-UD and the MDRS via an Order in Council (OIC) if certain criteria were met. Officials will provide you with advice and data in early September on which tier 2 councils are experiencing acute housing shortages and could be required to use the ISPP to implement their intensification plan changes and the MDRS. This will enable an OIC to be in place with sufficient time for the council to prepare plan changes to meet the NPS-UD notification date of August 2020. We consider that five months is the shortest amount of time in which councils could do this. Guidance and support will be provided to these councils.</p> <p>There may be some circumstances where Ministers decide a housing shortage has become more acute and additional tier 2 councils need to implement the MDRS using the ISPP after August 2022. In these circumstances, we recommend having the OIC set the notification date and a direction set out a workable process including timeframes.</p>	<p>Agree that if a tier 2 council is required to use the intensification streamlined planning process to implement the MDRS and they do not have at least 5 months to meet the August 2022 notification date:</p> <ol style="list-style-type: none"> the OIC sets the notification date the direction sets out a workable process including timeframes. 	<i>Agree/disagree</i>
Financial contributions for permitted activities and enabling councils to use the ISPP to change their financial contributions policies	<p>To assist councils to fund infrastructure to support the implementation of the MDRS, we recommend amending the RMA to make it clear that councils can charge financial contributions for activities that do not require resource consent (permitted activities).</p> <p>It is not common practice to charge financial contributions for permitted activities. However, case law² has clarified that financial contributions can be charged for permitted activities.</p> <p>The MDRS will make a large number of additional activities permitted. We want councils to be clear they can charge financial contributions for the activities permitted by the MDRS and making this explicit in the Bill will achieve this.</p> <p>We also recommend enabling councils to include amendments to their financial contributions policies within the ISPP. These changes would not be subject to appeal.</p>	<p>Agree that the Bill:</p> <ol style="list-style-type: none"> clarifies that financial contributions can be charged for permitted activities enables councils to use the intensification streamlined planning process to change financial contributions policies. 	<i>Agree/disagree</i>
Transitional provisions to provide clarity on when plan changes need to be withdrawn	<p>Councils are currently working to prepare plan changes (and variations³) to implement the NPS-UD intensification provisions. Councils are likely to adjust this work once these policy proposals are announced. However, there is a minor risk that a council may notify a plan change to give effect to the NPS-UD intensification provisions or to make changes to a zone that would be subject to the MDRS before or after the policy proposals are announced.</p> <p>The RMA allows councils to withdraw a plan change through clause 8D of Schedule 1. However, we recommend specifying that any such plan change be withdrawn to provide clarity and certainty.</p>	<p>Agree the Bill require notified plan changes (or variations) be withdrawn where the plan change (or variation):</p> <ol style="list-style-type: none"> intends to give effect to the National Policy Statement on Urban Development intensification provisions proposes changes to a residential zone subject to the medium density residential standards creates a new residential zone. 	<i>Agree/disagree</i>

² *Carterton District Council v McCarron and Butler* [2013] District Court Masterton

³ Variations is a plan change prepared by a council to a proposed plan.

Table 2: Enabling a change to the NPS-UD to correct a minor error

Policy decision	Rationale	Recommended actions	Ministers' decision
Enabling a change to the NPS-UD definition of planning decision	<p>On 15 June 2021, the Environment Court released an oral decision⁴ on preliminary questions about the relevance of the NPS-UD to proposed private plan change 21 to the Auckland Unitary Plan. The private plan change was to enable expansion and intensification of development of a private hospital in Epsom.</p> <p>This decision drew attention to an issue with the NPS-UD definition of 'planning decision'. The definition of planning decision includes one form of private plan change (adopted), but could be interpreted as excluding another form of private plan change (accepted).</p> <p>Under the RMA if a council adopts a private plan change, it continues through the process as if it was a council-initiated plan change. With adopted plan changes, councils will generally bear the cost of managing the plan change from the date that it is adopted.</p> <p>If the council accepts a private plan change (but does not adopt it) the council administers the legal process, and the costs are generally borne by the applicant.</p> <p>Amending the definition of planning decision to make it clear that the NPS-UD applies to both forms of private plan change will better reflect the policy intent of the NPS-UD.</p>	<p>Agree that the Bill enables a change to the definition of planning decision in the National Policy Statement on Urban Development to make it clear that it applies to both private plan changes adopted and accepted by a council.</p>	<p><i>Agree/disagree</i></p>

Table 3 – Recommended action for the Minister for the Environment to enable a change to the RMA

Decision required	Rationale	Recommended actions	Minister's decision
Enabling a further minor and technical change to RMA section 224 Restrictions upon deposit of survey plan	<p>The Ministry for the Environment proposes a further minor and technical change to the RMA. This is a reference from one section of the Act (224 Restrictions upon deposit of survey plan) to another (11 Restrictions on subdivision of land), which is incorrect.</p> <p>Certification obtained under Section 224 of the RMA is the final step in certifying a subdivision, which enables Land Information New Zealand to issue new titles. It is therefore critically important to residential development that there are no legal problems with this part of the RMA.</p> <p>Section 11(1)(a) was replaced in 2020, and at that date the references to section 11 in section 224 should have been amended to refer to section 11(1)(a)(i) or (iii) instead of to section 11(1A)(b)(i) which has been repealed.</p> <p>We suggest that the current Bill be used to correct this omission. This aligns with the intent of the 2020 RMA amendments, and we do not consider consultation is needed.</p> <p>There are no policy implications of this correction being undertaken as part of this Bill, however there could be far-reaching implications for certification of new subdivisions if this is not corrected now.</p>	<p>For the Minister for the Environment</p> <p>Agree that the Bill amends RMA section 224 Restrictions upon deposit of survey plan to correct a reference to section 11(1)(a)(i) or (iii).</p>	<p><i>Agree/disagree</i></p>

⁴ *Eden-Epsom Residential Protection Society Incorporated v Auckland Council* [2021] NZEnvC 082

Table 4 – Update on where drafting has been improved to ensure the workability of the Bill

Policy decision	Rationale	Recommended actions
The MDRS will be the default minimum level of permitted development, including in areas that require further intensification	<p>CAB-21-Min-0188 noted the MDRZ will apply to all existing and future residential zones unless the zones are already more enabling.</p> <p>It is no longer necessary to include the wording ‘unless the zones are already more enabling’. Additional analysis found there are no current residential zones that are more enabling than the MDRS. Furthermore, in areas that require further intensification under the NPS-UD, the MDRS will be the default minimum level of permitted development. This will ensure that zoning standards in these areas (in addition to height) are at least as enabling as the MDRS.</p>	<p>Note the medium density residential standards will be the default minimum level of permitted development, including in areas that require further intensification.</p>
Allowing assessments against design guides in areas incorporating the MDRS	<p>Following previous advice (HUD: BRF20/21060984, MfE: BRF-89 refers) Ministers agreed to the MDRS preventing the use of design guides. However, we now consider that design guides will be useful in certain circumstances, and there are limited downsides to allowing their use</p> <p>This would be consistent with the other requirements in the MDRS. The Bill does not set out matters to which discretion is restricted when a consent exceeds the MDRS. This is because councils need flexibility, as a wide range of activities would be assessed as discretionary restricted activities in zones that incorporate the MDRS. These activities will range from four units at three storeys to much greater density at six storeys (and above). We believe design guides can play an important part in, for example, developing six storey buildings and consider we should not restrict their use.</p>	<p>Note the requirement in the medium density residential standards that prevents design guides from being a matter of discretion has been removed.</p>
Empowering the Minister for the Environment to make consequential changes	<p>Cabinet agreed [CAB-21-MIN-0188] to “empower the Minister of Housing and Minister for the Environment to make consequential changes to the NPS-UD, if necessary, to align with the intensification requirements of the MDRZ without using the usual process to amend nation policy statements”.</p> <p>Under the RMA, the Minister for the Environment is solely responsible for issuing national direction. For this reason, we recommend the Bill empowers the Minister for the Environment to make consequential amendments to the NPS-UD, but in consultation with the Minister of Housing. This will enable the housing and urban development portfolio perspective to be considered alongside that of the environment portfolio.</p>	<p>Note the Bill will empower the Minister for the Environment in consultation with the Minister of Housing to make changes to the National Policy Statement on Urban Development.</p>

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