BEFORE THE HEARING PANEL

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of Proposed Private Plan Change 13 to the Operative Hamilton City District Plan

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LEGAL SUBMISSIONS ON BEHALF OF HAMILTON CITY COUNCIL

Dated 8 September 2023

LACHLAN MULDOWNEY
BARRISTER

P +64 7 834 4336 **M** +64 21 471 490
Office Panama Square, 14 Garden Place, Hamilton
Postal PO Box 9169, Waikato Mail Centre, Hamilton 3240
www.lachlanmuldowney.co.nz

MAY IT PLEASE THE PANEL

INTRODUCTION

1. These legal submissions are provided on behalf of Hamilton City Council (**HCC**) in response to the request from the Independent Hearing Panel at paragraph 4 of Panel Direction #2 dated 4 September 2023.

2. The Panel has requested that HCC address matters relating to the MDRS as raised in legal submissions on behalf of Chartwell Investments Limited dated 21 August 2023 which were presented at the hearing of Private Plan Change 13 (**PC13**) to the Hamilton City Operative District Plan (**ODP**). It is noted that supplementary legal submissions dated 25 August 2023 addressing this same issue were also filed on behalf of Chartwell Investments Limited. These submissions address both sets of submissions.

3. The central legal contention of the legal submissions for Chartwell Investments Limited is that MDRS is not required to be incorporated into PC13 and the Resource Management (Enabling Housing Supply and Other Matters) Amendment Act 2021 (**RM Amendment Act**) has no bearing on PC13.[1]

4. For the reasons set out below, Chartwell Investments Limited is wrong.

LEGAL ANALYSIS

Critical dates

5. For the purposes of this analysis, the following dates are critical:

[1] Chartwell submissions dated 25 August 2023; para 72

a) The RM Amendment Act came into force on 20 December 2021, and its commencement date was 21 December 2021 (**commencement date**).[2]

b) Plan Change 12 (**PC12**) was publicly notified on 19 August 2022;

c) The private plan change request for PC13 was lodged with HCC on 22 September 2022;

d) HCC accepted PC13 under clause 25 of Schedule 1 to the RMA on 23 November 2022; and

e) PC13 was publicly notified on 15 February 2023.

RM Amendment Act

6. The RM Amendment Act introduced amendments to the RMA which made it mandatory for specified territorial authorities such as HCC to increase residential densities by incorporating certain requirements, conditions and permissions, known as medium density residential standards (**MDRS**) in all relevant residential zones.[3]

7. When HCC changes the ODP for the first time to incorporate the MDRS, it must use a new planning pathway known as the intensification streamlined planning process (**ISPP**) and the plan change itself is called an intensification planning instrument (**IPI**).[4] PC12 is HCC's IPI.

8. The RMA recognises that the IPI will not be the only plan change to the ODP. There will be other plan changes, both council-led and private plan changes, that are in existence at the commencement date of the RM

[2] Clause 32, Part 5 Schedule 12 RMA
[3] Section 77G(1) RMA
[4] Section 77G(3) RMA

Amendment Act, and new plan changes which are lodged and notified after commencement date.

9. Part 5 of Schedule 12 to the RMA sets out the transitional provisions which address the timing and integration issues arising.

10. Clause 33 of Schedule 12 addresses the situation where a specified territorial authority has notified a proposed district plan before the commencement date. Clause 34 addresses plan changes for residential zones which are notified before the commencement date. Clause 35 addresses private plan change requests where the request was made to a specified territorial authority before the IPI was notified.

11. These are the only transitional provisions which address the integration between the IPI and other plan change processes. While these provisions may address three of the potential scenarios, none of these scenarios apply to PC13. PC13 is a private plan change, where the plan change request, the HCC acceptance, and notification occurred after the IPI was notified.[5]

12. The common theme running through the transitional provisions is that each clause seeks to ensure that plan change processes outside of the IPI are brought into line with the IPI and its MDRS requirements via a variation, or via the IPI itself.

13. Clause 35, while not applicable, is relevant. It deals with a private plan change which is notified *before* notification of the IPI, and enables it to proceed even if it does not incorporate MDRS, on the basis that the IPI can incorporate the MDRS for the new proposed residential zone. Clause 35 enables this 'catch up' to occur via the IPI which is notified later, and expressly notes:[6]

[5] See para 5 above
[6] Clause 35(2) 12th Schedule RMA

> (2) Despite clause 25(4A) of Schedule 1, a specified territorial authority may accept or adopt the request and incorporate the MDRS for the new residential zone through the IPI.

14. This reference (within clause 35) to clause 25(4A) of Schedule 1 is important, because clause 25(4A) prohibits HCC from accepting a private plan change that did not incorporate MDRS. Clause 25(4A) was introduced by the RM Amendment Act and requires that:

> (4A) A specified territorial authority must not accept or adopt a request if it does not incorporate the MDRS as required by section 77G(1).

15. The restriction in clause 25(4A) is clear and unequivocal. It is a statutory prohibition against a territorial authority accepting or adopting a private plan change request that does not incorporate the MDRS.

16. By using the words 'despite clause 25(4A)', Clause 35(2) creates a carve out of the prohibition in clause 25(4A) of the First Schedule to the RMA. It allows a territorial authority to accept a private plan change that does not include MDRS, presumably because the IPI, which will be notified later, can include MDRS provisions that can be imposed across the private plan change provisions, thereby varying it. In effect, the catch up can be completed.

17. But what about a private plan change that is requested *after* the IPI was notified, like PC13? The answer is clause 35 does not apply and PC13 is simply caught by the prohibition set out in clause 25(4A); namely HCC must not accept it if it does not incorporate the MDRS as required by s77G(1).

18. The next issue to determine is what are the requirements of s 77G(1). That section provides:

> (1) Every relevant residential zone of a specified territorial authority must have the MDRS incorporated into that zone.

19. Again, this section is a clear and unequivocal directive, and without qualification. The only issue it raises is what constitutes a 'relevant residential zone'. This is a defined term under s 2 of the RMA as follows:

> relevant residential zone—
> (a) means all residential zones; but
> (b) does not include—
> (i) a large lot residential zone:
> (ii) an area predominantly urban in character that the 2018 census recorded as having a resident population of less than 5,000, unless a local authority intends the area to become part of an urban environment:
> (iii) an offshore island:
> (iv) to avoid doubt, a settlement zone

20. None of the exclusions in the definition are relevant to PC13. So for present purposes, the definition establishes that a relevant residential zone means 'all residential zones'.

21. Applying that definition to the combined requirements of clause 25(4A) and s77G(1); HCC must not accept proposed PC13 if it does not incorporate the MDRS into all residential zones.

22. At this juncture it is worth referring to the Chartwell Investments Limited position. It says that these prohibitions and mandatory requirements do not apply to PC 13 because:[7]

a) The existing zoning of the site is Major Facilities, and that is not a relevant residential zone;

b) The Panel is not the IPI;

c) PC13 is not an ISPP process; and therefore

d) The obligations in s77G do not apply.

[7] Submissions dated 25 August 2023 para 9.

23. This approach is misconceived. First, the *existing* zoning of the land is irrelevant. The relevant zoning is what is proposed by PC13. Chartwell Investments Limited place great emphasis on the fact that the Major Facilities Zone is not a relevant residential zone. That is not in dispute. This would be relevant if PC13 was promoting a change to the Major Facilities Zone rules to enable residential land uses but maintain that zoning – clearly s 77G would not apply to that retained underlying zone. But PC 13 is not seeking to retain the underlying zoning, it is seeking to fully replace it with a residential zone.

24. But even under a scenario where the plan change seeks to rezone land, it makes no sense for a plan change to existing residential zoned land that seeks to introduce amended residential provisions to be caught by the prohibition in clause 25(4A), but for a similar residential plan change changing an existing non-residential zoning to residential to not have to incorporate MDRS. No statutory purpose is served by this false distinction. The existing underlying zoning is not relevant, what is relevant is the proposal, and where that proposal seeks a residential zoning, it must incorporate MDRS. Under the Chartwell Investments Limited approach, the first example (existing zoning non-residential) is forced to complete the plan change without MDRS, and then presumably seek a further plan change or variation to update it to incorporate MDRS, while the second example (existing zoning residential) can incorporate MDRS from the outset.

25. There is no reason why parliament would impose a mandatory MDRS requirement (clause 25(4A)) on private plan changes that seek to introduce new residential provisions to an existing residential zone, but exclude the MDRS requirement on the same proposal where it seeks to rezone non-residential land.

26. For completeness on this point about what constitutes a relevant residential zone, it is noted that the RM Amendment Act also contains a

definition for a 'new residential zone'; being an area proposed to become a relevant residential zone that is not shown in a district plan as a residential zone.[8] While it might be argued that based on that definition, a new residential zone proposed in a plan change is not yet a relevant residential zone and therefore s77G(1) does not apply, this interpretation would make certain provisions in the RM Amendment Act meaningless. For example, transitional provision clause 35 expressly relates to 'new residential zones', and carves out the prohibition in clause 25(4A). But if a new residential zone is not a relevant residential zone for the purposes of s77G(1), the carve out is redundant. Equally, there is simply no point to the prohibition in clause 25(4A) for any private plan change for a new residential zone, if the new residential zone is not deemed a relevant residential zone under s77G(1).

27. Accordingly, the proper interpretation of s77G(1) is to consider the proposed residential zone in PC13 as the 'relevant residential zone'.

28. Next, addressing the Chartwell Investment Limited remaining points, despite the implication, there is no suggestion from HCC or any other party that the current Panel is the IPI, and that PC13 is an ISPP and therefore the requirements of s 77G do not apply. This point implies that the requirements set out in s77G(1) are applicable only to an IPI and an ISPP, and therefore have no relevance to a private plan change. This is incorrect.

29. Section 77G imposes two primary obligations on specified territorial authorities; one, ensure every relevant residential zone incorporates MDRS[9], and two, ensure every residential zone in an urban environment gives effect to policy 3 or 5 of the NPS-USD.[10] The remaining parts of s77G set out how the territorial authority must achieve these outcomes.

[8] Section 2 RMA
[9] Section 77G(1) RMA
[10] Section 77G(2) RMA

Subsection (3) requires that when changing the ODP *for the first time*, the IPI and ISPP must be used. The remaining subsections of s77G address the implementation requirements, but there is no suggestion that the two primary requirements of s 77G(1) and(2) are to be met via the IPI and ISPP only. Indeed, if that was the case, there would be no reason for clause 25(4A) – which relates to private plan changes- to refer to s77G at all.

30. Accordingly, delivering on the requirements of 77G(1) is not confined to the IPI and the ISPP alone. The Panel on PC13 acts under delegated authority of HCC, and regardless of the fact it is a private plan change, the Panel performs a decision making function, and plan making function as if it were HCC. It is clear to all that the Panel on PC13 does not perform the IPI functions under s77G(3), but it is nevertheless required to perform HCCs overarching functions under s77G(1) and (2) in the context of a private plan change to introduce a new residential zone, such as PC13.

31. Finally, it warrants noting that the RM Amendment Act is no model of statutory drafting. It contains numerous inconsistencies, anomalies and gaps. The failure to squarely address the PC13 scenario in the transitional provisions is but one. The Legislation Act 2019 guides the interpretation of statutes such as the RMA and RM Amendment Act. Section 10 deals with how to ascertain the meaning of legislation and provides:

> 10(1) The meaning of legislation must be ascertained from its text and in the light of its purpose and its context.

32. The above analysis gives the relevant sections and clauses within the RM Amendment Act their plain meaning, and stepping back to consider the purpose and context of the RM Amendment Act, this interpretation is consistent with that context and purpose, which was described in the

Ministry for the Environment's RM Amendment 'Fact Sheet' in the following terms:[11]

> It is designed to increase housing supply in Aotearoa New Zealand's main urban areas by speeding up implementation of the National Policy Statement on Urban Development and enabling more medium- density homes through the Medium Density Residential Standards.
>
> The RMA-EHS will remove barriers to development to allow for a wider variety of housing in Auckland, Hamilton, Tauranga, Wellington, Christchurch and Rotorua. Specified territorial authorities will achieve more housing choices in their districts by implementing the National Policy Statement on Urban Development and incorporating the Medium Density Residential Standards into their district plans.

33. Allowing a private plan change for a new residential zone to proceed without incorporating MDRS is fundamentally at odds with this context and purpose. Accordingly, when faced with contrasting legal interpretations of the RM Amendment Act, the Panel can be assured that the approach recommended by HCC in these submissions is consistent with parliament's intent.

MDRS in the context of PC13

34. Based on the above analysis the following legal framework applies to the Panel's decision making on PC13:

    a) The orthodox plan making framework of *Colonial Vineyard Limited v Marlborough District Council*[12] applies;

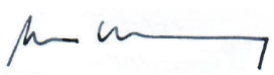
    b) This must be supplemented by the requirements of s 77G of the RMA, and in particular s 77G(1) which requires that any residential zoning that the Panel imposes must have the MDRS incorporated into that zone;

[11] MfE 2020 Fact Sheet- Understanding the Resource Management (Enabling Housing Supply and Other Matters) Amendment Act 2021.
[12] [2014] NZEnvC 55

c) In giving effect to S77G(1) if there are to be modifications to the MDRS then they must be justified as a 'Qualifying Matter' under s77I;

d) In respect of PC13 that Qualifying Matter is most likely to involve the interface between residential and industrial zones, and the risk of reverse sensitivity, which would be categorised as 'any other matter' under s 77I(j), in which case the evaluation requirements of s 77L are engaged.

Dated 8 September 2023



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L F Muldowney / S K Thomas
Counsel for Hamilton City Council

Appendix A – Key RMA provisions

Section 77G of the RMA

77G Duty of specified territorial authorities to incorporate MDRS and give effect to policy 3 or 5 in residential zones

(1) Every relevant residential zone of a specified territorial authority must have the MDRS incorporated into that zone.

(2) Every residential zone in an urban environment of a specified territorial authority must give effect to policy 3 or policy 5, as the case requires, in that zone.

(3) When changing its district plan for the first time to incorporate the MDRS and to give effect to policy 3 or policy 5, as the case requires, and to meet its obligations in section 80F, a specified territorial authority must use an IPI and the ISPP.

(4) In carrying out its functions under this section, a specified territorial authority may create new residential zones or amend existing residential zones.

(5) A specified territorial authority—

(a) must include the objectives and policies set out in clause 6 of Schedule 3A:

(b) may include objectives and policies in addition to those set out in clause 6 of Schedule 3A, to—

(i) provide for matters of discretion to support the MDRS; and

(ii) link to the incorporated density standards to reflect how the territorial authority has chosen to modify the MDRS in accordance with section 77H.

(6) 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.

(7) To avoid doubt, existing provisions in a district plan that allow the same or a greater level of development than the MDRS do not need to be amended or removed from the district plan.

(8)The requirement in subsection (1) to incorporate the MDRS into a relevant residential zone applies irrespective of any inconsistent objective or policy in a regional policy statement.

Clause 25 of the 1st Schedule to the RMA

25 Local authority to consider request

(1) A local authority shall, within 30 working days of—

(a) receiving a request under clause 21; or

(b) receiving all required information or any report which was commissioned under clause 23; or

(c) modifying the request under clause 24—

whichever is the latest, decide under which of subclauses (2), (3), and (4), or a combination of subclauses (2) and (4), the request shall be dealt with.

(1A) The local authority must have particular regard to the evaluation report prepared for the proposed plan or change in accordance with clause 22(1)—

(a) when making a decision under subclause (1); and

(b) when dealing with the request under subclause (2), (3), or (4).

(2) The local authority may either—

(a) adopt the request, or part of the request, as if it were a proposed policy statement or plan made by the local authority itself and, if it does so,—

(i) the request must be notified in accordance with clause 5 or 5A within 4 months of the local authority adopting the request; and

(ii) the provisions of Part 1 or 4 must apply; and

(iii) the request has legal effect once publicly notified; or

(b) accept the request, in whole or in part, and proceed to notify the request, or part of the request, under clause 26.

(2AA) However, if a direction is applied for under section 80C, the period between the date of that application and the date when the application is declined under clause 77(1) must not be included in the calculation of the 4-month period specified by subclause (2)(a)(i).

(2A) Subclause (2)(a)(iii) is subject to section 86B.

(3) The local authority may decide to deal with the request as if it were an application for a resource consent and the provisions of Part 6 shall apply accordingly.

(4)The local authority may reject the request in whole or in part, but only on the grounds that—

(a) the request or part of the request is frivolous or vexatious; or

(b) within the last 2 years, the substance of the request or part of the request—

(i) has been considered and given effect to, or rejected by, the local authority or the Environment Court; or

(ii) has been given effect to by regulations made under section 360A; or

(c) the request or part of the request is not in accordance with sound resource management practice; or

(d) the request or part of the request would make the policy statement or plan inconsistent with Part 5; or

(e) in the case of a proposed change to a policy statement or plan, the policy statement or plan has been operative for less than 2 years.

(4A) A specified territorial authority must not accept or adopt a request if it does not incorporate the MDRS as required by section 77G(1).

(5) The local authority shall notify the person who made the request, within 10 working days, of its decision under this clause, and the reasons for that decision, including the decision on notification.

Clause 35 to the 12th Schedule to the RMA

35 Some private plan change requests may rely on IPI to incorporate MDRS

(1) This clause applies to any plan change request to change a district plan—

(a) that is made to a specified territorial authority under clause 21 of Schedule 1 before the specified territorial authority has notified its IPI in accordance with section 80F; and

(b) to which clause 34 does not apply; and

(c) that requests the creation of a new residential zone that proposes to adopt all the zone provisions of a relevant residential zone but does not amend the provisions in the relevant residential zone.

(2) Despite clause 25(4A) of Schedule 1, a specified territorial authority may accept or adopt the request and incorporate the MDRS for the new residential zone through the IPI.

(3) A specified territorial authority may decline the request under clause 25(4) of Schedule 1 or apply the rest of clause 25 of that schedule, as the case requires.