

13 September 2024

To

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Copy to

Matthew Bacon

From

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By Email

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Dear Peter

Hearing Stream 7B – Scope to introduce new qualifying matter and evaluative requirements

1. The Hearings Panel (**Panel**) on the proposed Waimakariri District Plan (**Proposed Plan**) has requested the following of you:

Please obtain and provide the Panel with legal advice as to whether the Council has scope to introduce a new Qualifying Matter that was not included in Variation 1 as notified? The evaluation you have undertaken relates to the inclusion of QMs to modify the MDRS when the IPI itself is notified, which must be set out in the s32 evaluation accompanying the IPI. The legal advice should also address whether your evaluation meets the relevant tests to be considered a site-specific matter across those parts of the District to which the MDRS apply.

2. In light of the Panel's request, you have asked for a legal response to the following questions:

- (a) Whether the Council has scope to introduce a new Qualifying Matter (**QM**) that was not included in Variation 1 as notified?
- (b) Whether your evaluation for a new QM in your section 42A report for Hearing Stream 7B dated 19 August 2024 (**s42A Report**) addresses the relevant tests to be considered a site-specific matter across those parts of the District to which the MDRS apply?

3. In summary, we consider that:

- (a) There is scope to introduce a new QM that was not included in notified Variation 1 pursuant to either:
 - (i) a submission requesting a new QM; or
 - (ii) clauses 99(2) and 101(5) of the first schedule to the RMA, if the Panel is satisfied that a new QM is related to a matter identified by the Panel or any other person during the hearing.
- (b) The s42A report (with its appendices and accompanying documents) addresses the relevant evaluative matters to be considered for a new sunlight and shading QM in sections 77L and

77J of the RMA for an "other" QM, as set out in the table accompanying this letter. The information provided can be considered as part of the Panel's evaluation of the QM on its merits alongside any other evidence before the Panel.

Scope to introduce a new QM

4. We previously provided the Council with advice on the scope of Variation 1 by letter dated 30 May 2023. At paragraphs 7 to 10 of that letter we outlined the relevant tests for determining whether submissions are within the scope of Variation 1. Our advice remains the same as set out in those paragraphs.
5. Applying our previous advice to the question of whether submitters have scope to request a new QM, we consider the answer is yes. In our opinion, a submission requesting a new QM that was not in notified Variation 1 is within scope of Variation 1 because it meets both limbs of the *Clearwater* test. In particular, requesting a new QM:
 - (a) represents relief that clearly falls within the ambit of Variation 1 by addressing the extent to which Variation 1 changes the pre-existing status quo. A new QM, by its very nature, represents relief that falls between:
 - (i) full incorporation of the medium density residential standards (**MDRS**) in every relevant residential zone that Variation 1 would otherwise provide for pursuant to section 77G(1) of the RMA; and/or
 - (ii) full implementation of the intensification requirements of policy 3 of the National Policy Statement on Urban Development 2020 (**NPS-UD**) that Variation 1 would otherwise provide for in residential zones and urban non-residential zones pursuant to sections 77G(2) and 77N(2) of the RMA;and the pre-existing status quo. That is because the nature of a QM is to provide for development that is less enabling than full MDRS and/or policy 3 intensification (see sections 77G(6), 77I, 77N(3)(b) and 77O RMA), without removing status quo development rights (which is a limitation recently confirmed by the High Court in *Waikanae*¹).
 - (b) does not constitute a "submissional side-wind" (as described in *Motor Machinists*) that would give rise to a real risk of persons potentially affected by a submission requesting new QM to have been denied an effective opportunity to participate in the decision-making process. Persons considering notified Variation 1 will appreciate the opportunity to lodge submissions in opposition to the intensification proposed in Variation 1, including requesting a QM to make intensification less enabling than that proposed.
6. Accordingly, there is scope to introduce a new QM that was not included in notified Variation 1 pursuant to a submission requesting the new QM.
7. However, even in the absence of a submission seeking a new QM, clauses 99(2) and 101(5) of the first schedule to the RMA provide scope for the Panel to introduce a new QM if the Panel is satisfied

¹ *Kapiti Coast District Council v Waikanae Land Company Limited and ors* [2024] NZHC 1654.

that a new QM is related to a matter identified by the Panel or any other person during the hearing. Accordingly, it is not strictly necessary for a submission requesting a new QM to exist for the Panel to recommend a new QM following a substantive evaluation of the evidence before the Panel.

Whether the s42A report addresses the relevant tests to be considered a site-specific matter across those parts of the District to which the MDRS apply?

8. Sections 77J, 77K and 77L (in relation to residential zones) and sections 77P, 77Q and 77R (in relation to non-residential zones) of the RMA set out the requirements for the evaluation of QMs. These requirements differ for QMs that are:
 - (a) existing QMs that are operative in the relevant district plan when the IPI is notified;²
 - (b) new QMs, being those not in the operative plan;³
 - (c) other QMs under sections 77I(j) or 77O(j) which must be subject to an additional site-specific evaluation required by sections 77L or 77R.
9. We have understood the Panel's query relates to the evaluation in your s42A Report of submitter requests for a new sunlight and shading QM, being an "other" QM for relevant residential zones.
10. Section 77I(j) of the RMA expressly anticipates that a QM for making the MDRS less enabling of development in relevant residential zones need not be limited to those types of QMs specified in section 77I(a) to 77I(i), but could be any "other" matter that makes the higher density provided by the MDRS inappropriate in an "area". In our view:
 - (a) an "other" matter could encompass matters of sunlight and shading;
 - (b) an "area" could encompass a large area, for example, an area covering all relevant residential zones in Waimakariri.
11. In addition to the matters in set out in section 32, the RMA requires that an evaluation of an "other" QM for residential zones includes the following:
 - (a) demonstrate why the territorial authority considers that:
 - (i) the area is subject to a QM (s77J(3)(a)(i)); and
 - (ii) that the QM is incompatible with the level of development permitted by the MDRS or as provides by policy 3 for that area (s77J(3)(a)(ii));
 - (b) assess the impact that limiting development capacity, building height, or density (as relevant) will have on the provision of development capacity (s77J(3)(b));
 - (c) assess the costs and broader impacts of imposing those limits (s77J(3)(c));
 - (d) a description of how the provisions of the district plan allow the same or greater level of development than the MDRS, and how modifications to the MDRS are limited to those

² Sections 77K and 77Q RMA.

³ Sections 77J and 77P RMA.

modifications necessary to accommodate the QM, and in particular, how they apply to any spatial layers (s77J(4));

- (e) identify the specific characteristic that makes the level of development provided by the MDRS or as provided for by policy 3 inappropriate in the area (s77L(a));
 - (f) 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 (s77L(b)); and
 - (g) include a site-specific analysis that—
 - (i) identifies the site to which the matter relates (s77L(c)(i)); and
 - (ii) evaluates the specific characteristic on a site-specific basis to determine the geographic area where intensification needs to be compatible with the specific matter (s77L(c)(ii)); and
 - (iii) evaluates an appropriate range of options to achieve the greatest heights and densities permitted by the MDRS or as provided for by policy 3 while managing the specific characteristics (s77L(c)(iii)).
12. While the Panel's query appears to be limited to whether the s42A Report addresses the evaluative requirements for a "site-specific" analysis for an "other" QM as outlined in paragraph 11(g) above, we comment on whether the s42A Report addresses the evaluative requirements for an "other" QM as set out in paragraphs 11(a) to 11(g) above.
13. **Attached** to this letter is a table identifying where each of the above evaluative criteria has been addressed for the sunlight and shading QM in the s42A Report with its various appendices and accompanying documents including:
- (a) Appendix E: Sunlight and shading assessment;
 - (b) Appendix F: Shading Study Interpretation Report by McIndoe Urban;
 - (c) Appendix G: IPI Residential Sunlight and Shading QM Capacity Assessment memorandum by Rodney Yeoman; and
 - (d) Evidence of Graeme Robert McIndoe, Urban Design, dated 19 August 2024.
14. The matters set out in sections 77J and 77L as outlined above are not "tests" per se, but rather they are matters that an evaluation should address, and what the Panel should consider and evaluate on the evidence when considering the substantive merits of a QM. While the s42A Report with its appendices and accompanying documents provides an evaluation of the proposed sunlight and shading QM that addresses sections 77J and 77L as outlined in the **attached** table, it is ultimately a matter for the Panel to undertake a merits evaluation to consider what is most appropriate, having regard to the recommendations and evaluation provided in the s42A Report and all other evidence before it (including evidence provided by submitters).

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Concluding comments

15. We trust the above advice is of assistance.

Yours faithfully
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Table identifying where the evaluative criteria for an "other" QM has been addressed in the s42A Report (including appendices)

RMA section	Evaluative criteria	References to evaluation in s42A Report (including appendices)
s77J(3)(a)(i)	Demonstrate why the territorial authority considers that the area is subject to a QM.	<ul style="list-style-type: none"> S42A Report, including in particular paragraphs 169 to 171 and the first row of 6.3.3 section 77J evaluation table. S42A Report, Appendix F: Shading Study Interpretation Report by McIndoe Urban.
s77J(3)(a)(ii)	Demonstrate why the territorial authority considers that the QM is incompatible with the level of development permitted by the MDRS or as provides by policy 3 for that area.	<ul style="list-style-type: none"> S42A Report, including in particular paragraphs 169 to 182 and the first row of 6.3.3 section 77J evaluation table. S42A Report, Appendix F: Shading Study Interpretation Report by McIndoe Urban. Evidence of Graeme Robert McIndoe, Urban Design, dated 19 August 2024.
s77J(3)(b)	Assess the impact that limiting development capacity, building height, or density (as relevant) will have on the provision of development capacity.	<ul style="list-style-type: none"> S42A Report, including in particular paragraphs 172 to 182 and the second row of 6.3.3 section 77J evaluation table. S42A Report Appendix E: Sunlight and shading assessment. S42A Report, Appendix F: Shading Study Interpretation Report by McIndoe Urban. S42A Report, Appendix G: IPI Residential Sunlight and Shading QM Capacity Assessment memorandum by Rodney Yeoman. Evidence of Graeme Robert McIndoe, Urban Design, dated 19 August 2024.
s77J(3)(c)	Assess the costs and broader impacts of imposing those limits.	<ul style="list-style-type: none"> S42A Report, including in particular paragraphs 172 to 182 and the second row of 6.3.3 section 77J evaluation table. S42A Report Appendix E: Sunlight and shading assessment.

RMA section	Evaluative criteria	References to evaluation in s42A Report (including appendices)
		<ul style="list-style-type: none"> • S42A Report, Appendix F: Shading Study Interpretation Report by McIndoe Urban. • S42A Report, Appendix G: IPI Residential Sunlight and Shading QM Capacity Assessment memorandum by Rodney Yeoman. • Evidence of Graeme Robert McIndoe, Urban Design, dated 19 August 2024.
s77J(4)	A description of how the provisions of the district plan allow the same or greater level of development than the MDRS, and how modifications to the MDRS are limited to those modifications necessary to accommodate the QM, and in particular, how they apply to any spatial layers.	<ul style="list-style-type: none"> • S42A Report, including in particular paragraphs 181 to 190 and the third row of 6.3.3 section 77J evaluation table. • S42A Report Appendix E: Sunlight and shading assessment. • S42A Report, Appendix F: Shading Study Interpretation Report by McIndoe Urban. • Evidence of Graeme Robert McIndoe, Urban Design, dated 19 August 2024.
s77L(a)	Identify the specific characteristic that makes the level of development provided by the MDRS or as provided for by policy 3 inappropriate in the area.	<ul style="list-style-type: none"> • S42A Report, particularly at paragraphs 183 to 186.
s77L(b)	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.	<ul style="list-style-type: none"> • S42A Report, particularly at paragraphs 183 to 186.
s77L(c)(i)	Include a site-specific analysis that identifies the site to which the matter relates.	<ul style="list-style-type: none"> • S42A Report, particularly at paragraphs 168 to 171. Every site within a relevant residential zone in the District was tested as part of the sunlight and shading assessment (see in particular paragraph 171). • S42A Report Appendix E: Sunlight and shading assessment.

RMA section	Evaluative criteria	References to evaluation in s42A Report (including appendices)
		<ul style="list-style-type: none"> • S42A Report, Appendix F: Shading Study Interpretation Report by McIndoe Urban. • Evidence of Graeme Robert McIndoe, Urban Design, dated 19 August 2024.
s77L(c)(ii)	<p>Include a site-specific analysis that evaluates the specific characteristic on a site-specific basis to determine the geographic area where intensification needs to be compatible with the specific matter.</p>	<ul style="list-style-type: none"> • S42A Report, at paragraphs 168 to 171. Every site within a relevant residential zone in the District was tested as part of the sunlight and shading assessment (see in particular paragraph 171). • S42A Report Appendix E: Sunlight and shading assessment. • S42A Report, Appendix F: Shading Study Interpretation Report by McIndoe Urban. • Evidence of Graeme Robert McIndoe, Urban Design, dated 19 August 2024.
s77L(c)(iii)	<p>Include a site-specific analysis that evaluates an appropriate range of options to achieve the greatest heights and densities permitted by the MDRS or as provided for by policy 3 while managing the specific characteristics.</p>	<ul style="list-style-type: none"> • S42A Report, at paragraphs 168 to 171. Every site within a relevant residential zone in the District was tested as part of the sunlight and shading assessment (see in particular paragraph 171). • S42A Report Appendix E: Sunlight and shading assessment. • S42A Report, Appendix F: Shading Study Interpretation Report by McIndoe Urban. • S42A Report, Appendix G: IPI Residential Sunlight and Shading QM Capacity Assessment memorandum by Rodney Yeoman. • Evidence of Graeme Robert McIndoe, Urban Design, dated 19 August 2024.