



Resource Management (Enabling Housing Supply and Other Matters) Amendment Bill 2021

22/11/2021

Submission on the Resource Management (Enabling Housing Supply and Other Matters) Amendment Bill

1 Introduction

- 1.1 The New Zealand Law Society | Te Kāhui Ture o Aotearoa (**Law Society**) welcomes the opportunity to comment on the Resource Management (Enabling Housing Supply and Other Matters) Amendment Bill (**Bill**). This submission has been prepared with input from the Law Society's Environmental Law Committee.
- 1.2 The Law Society's submission highlights a number of issues with the Bill that would benefit from clarification or further consideration. The most significant of these is the lack of a definition of "building standard". The uncertainty this creates potentially means that the intent of the Bill may not be achieved.
- 1.3 The Law Society does not wish to be heard but is available to assist officials on drafting and technical issues if that would be helpful to the Environment Select Committee.

2 Background

- 2.1 The intention of the Bill is to bring forward implementation of the National Policy Statement for Urban Development 2020 ("NPS-UD") regarding intensification of residential and non-residential development within urban environments. It does this by requiring tier 1 territorial authorities to use a special intensive streamlined planning process ("ISPP").
- 2.2 For districts with plan changes or plan reviews already underway, the relevant territorial authority is directed to withdraw any provisions of the proposed plan that:
 - (a) Seek to give effect to Policy 3 or 4 of the NPS-UD; and/or
 - (b) Propose changes to existing residential zones that do not incorporate the proposed levels of intensification; and/or
 - (c) Creating a new zone not incorporating the proposed levels of intensification,where the hearing for those proposed provisions or changes has not been completed by 20 February 2022.
- 2.3 The Bill specifies certain medium density residential standards. These are mostly "building standards", including height, height in relation to boundary, setbacks, building coverage, impervious areas, and provision for outdoor living space.
- 2.4 The principal effect of the proposed changes is on Tier 1 Urban Environments, but the Bill contains provisions to extend its ambit to include Tier 2 Urban Environments specified in regulations promulgated in proposed Section 80E.

3 Definitions

- 3.1 Two definitions in the Bill have difficulties.
- 3.2 First, clause 4 of the Bill seeks to amend section 2 of the RMA by including, among other definitions, a new definition of "residential unit". The proposed definition is similar to, but grammatically different from, the definition of residential unit in the National Planning Standards. There appears to be no reason for the difference, and the definition in the National Planning Standards is grammatically superior.

3.3 Second, the definition of “urban environment” in proposed section 77E appears to be fraught with uncertainty. The problems are with the phrase “part of a housing and labour market of at least 10,000 people”. It is unclear whether this is to be read as “housing and labour” or “housing or labour”. It is also unclear whether the labour market relates to resident workers, or includes people who come into the urban area from a different urban area to work. Other issues that should be clarified are: whether it is an FTE number of workers, and over what period of time the number of workers are assessed. It may be preferable to define urban environment by reference to a certain number of dwellings in a particular area.

Recommendation:

- (a) Amend the definition of “residential unit” to replicate the definition in the National Planning Standards.
- (b) Reconsider the definition of “urban environment”.

4 Lack of definition of “building standard”

- 4.1 Clause 15 of the Bill inserts into the RMA proposed new Schedule 3A. Schedule 3A sets out the medium density residential standards (**MDRS**) to be incorporated into district plans of Tier 1 territorial authorities.
- 4.2 Clause 2 of Schedule 3A provides that a relevant residential zone must allow the construction and use of 1, 2 or 3 residential units on each site as a permitted activity, so long as each residential unit complies with the building standards set out in Part 2 of the Schedule. Clause 2(3) provides a prohibition on territorial authorities including building standards additional to those set out in Part 2.
- 4.3 “Building standard” is not a defined phrase in the Resource Management Act 1991 (**RMA**), NPS-UD, National Planning Standards, or the Bill. It is not a recognised phrase in resource management or planning terminology. While the word “building” and the nature of the standards included in Part 2 might suggest that it means a standard that might affect the physical dimensions or layout of a residential unit, it could also mean any standard that relates to the construction and use of residential units. If the latter, there are a wide range of other standards which often trigger resource consent requirements that could be said to relate to the construction and use of residential units (and would therefore be prohibited). This would include standards relating to the site such as driveway location and width standards, or relating to hydraulic neutrality for the purposes of stormwater management.
- 4.4 It is assumed that other land uses such as vegetation clearance, earthworks, or consent under the National Environmental Standard for assessing and managing contaminants in soil to protect human health are not included, and therefore not prohibited under clause 2(3). However, this is not clear. Such a consent requirement, if discretionary activity status attaches, could result in the whole activity (including the construction of the residential unit) requiring assessment. This would defeat the purpose of the Bill.

Recommendation:

- (a) Include a new definition of “building standard” which clarifies the scope of the prohibition on incorporating additional building standards into a district plan.

5 Limitations on scope of ISPP

Clause 80G – Limitations on intensification planning instruments and ISPP

- 5.1 Proposed Section 80G limits the required intensification planning instrument to incorporating the medium density residential standards, incorporating other intensification policies into plans, and incorporating reviewed financial contributions.
- 5.2 The limitation is presumably the basis for the removal of usual appeal rights from the ISPP.
- 5.3 Nonetheless, these limitations are likely to prove problematic given the range of District Plan provisions already in place or in the process of being amended to implement the NPS-UD.
- 5.4 For example, where a territorial authority has not yet notified provisions to give effect to the NPS-UD, any provisions it proposes to notify which do not relate to the three matters listed in proposed section 80G will have to be included in an additional plan change or variation, progressing at a different pace and with a different process than the ISPP. Matters that might be included in a separate plan change include, for example, provisions implementing the principles of the Treaty of Waitangi (Objective 5), seeking integration with infrastructure planning and funding decisions (Objective 6), or supporting reductions in greenhouse gas emissions and resilience to the current and future effects of climate change (Objective 8).
- 5.5 For a territorial authority which will be also implementing a district plan review around the same time, it will be required to embark on two separate processes which will introduce confusion for submitters.
- 5.6 It is likely that having dual processes to implement the NPS-UD, following separate procedures and subject to different procedural rules, will be inefficient.
- 5.7 For territorial authorities that have already notified Plan Reviews (the Law Society is aware that at least two Tier 1 Councils have commenced hearings on comprehensive Plan Reviews (Porirua and Selwyn)), their position is likely to be even more complex because plans written consistently with the National Planning Standards will contain limitations on both residential and non-residential development that are contained in district-wide overlays.
- 5.8 It is unclear if the intention is that such overlays be withdrawn and reconsidered against the proposed tests in section 77G-77I (in relation to residential development) and sections 77L-77N (in relation to non-residential development).
- 5.9 An example of such a district-wide limitation is provisions that identify and protect significant natural areas. Such provisions seek to implement, ultimately, the direction in section 6(c) of the RMA that decision-makers recognise and provide for the protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna.
- 5.10 Proposed clause 8(b) of schedule 3A refers to relevant engineering standards, however this term is not defined, and it is unclear whether it extends to include district-wide overlays of this kind, or whether it refers more to relevant codes of practice or New Zealand Standards.
- 5.11 If the intention is that such overlays be applied differently in urban areas, compared to non-urban areas, this should be made clear.

Recommendation:

- (a) Consider broadening the ambit of the IPSS to include implementation of the varied NPS-UD or simultaneous implementation of a district plan review.

- (b) Clarify whether the legislative instruction in proposed sections 77G and 77L is intended to apply to district-wide overlays;
- (c) Clarify what is meant by “engineering standards” in clause 8(b) of schedule 3A.

6 Application of MDRS to greenfield areas

6.1 The limitations on the ISPP also have the potential to preclude the application of the Medium Density Residential Standards to greenfield areas. Any substantial area of greenfield urban development will require a range of planning provisions to give effect to Objective 1 of the NPS-UD (ensuring well-functioning urban environments that enable all people and communities to provide for their social, economic, and cultural wellbeing, and for their health and safety, now and into the future). Such matters include the design and implementation of transport networks, provision of other infrastructure (schools are an obvious example) and open space. Such matters could not be considered in the ISPP because of the narrow definition of what is able to be included in that process. The result would be to effectively preclude application of the Bill to greenfield areas. Assuming that is not the intention, the Law Society suggests that consideration be given to expanding the scope of the ISPP to include the entire range of provisions necessary and desirable to provide for greenfield areas of urban expansion.

Recommendation:

- (a) Expand the scope of the ISPP to provide for consideration of ancillary Plan provisions where greenfield urban development areas are proposed.

7 Clause 77O – Amendment of NPS-UD

7.1 Clause 77O amends Policy 3 of the NPS-UD, and then provides for the Minister to make any changes in three specified areas, one of which is the definition of “planning decision” in the NPS-UD. In making amendments, the Minister is not required to follow the existing consultation requirements.

7.2 No justification is given for departing from existing consultation obligations on Ministers where changes to the NPS-UD are proposed. It is recommended that the obligation to consult on changes be retained, or that the foreshadowed changes be made through this Bill. In respect of the identification of the definition of “planning decision”, this may be aimed at reversing the effect of the Environment Court’s decision in *Eden-Epsom Residential Protection Society Incorporated v Auckland Council* [2021] NZEnvC 82. It would be more transparent for the proposed amendment to be expressed in the Bill, where it could be subject to comment.

Recommendation:

- (a) Retain the consultation obligations provided for in the RMA when the Minister amends the NPS-UD under the Bill.

8 Clause 77P and 77Q – Financial Contributions

8.1 These provisions appear to extend beyond amendments to financial contribution policies relating to incorporation of the MDRS and implementation of the NPS-UD. They would authorise a territorial authority to levy new financial contributions without any rights of appeal (i.e., by using the new ISPP process). Because the terms of these clauses are broad,

financial contributions introduced under this clause could extend to matters well beyond housing or any intensification objectives under the Bill.

Recommendation:

- (a) Clarify that the power to introduce new financial contributions for permitted activities is limited to the construction and use of residential units under the MDRS.

9 Proposed new clauses 99(2)(a), 100(3)(b) and 101(5) of Schedule 1 – recommendations beyond scope of submissions

9.1 Clause 14 inserts a new Part 6 into Schedule 1 of the RMA. Proposed new clauses 99(2)(a), 100(3)(b) and 101(5) authorise a hearings panel to make recommendations that are outside the scope of submissions, and a territorial authority to accept such a recommendation. This is a significant departure from the usual approach, which has principles of natural justice as its justification. It is suggested that Parliament consider whether there is justification for taking this approach and, if so, what parameters or additional procedural protections should be put in place.

Recommendation:

- (a) Consider whether there is any justification for taking this approach and, if so, what parameters or additional procedural protections should be put in place.



Arti Chand
Vice President
22 November 2021