

BEFORE THE ENVIRONMENT COURT  
I MUA I TE KOOTI TAIAO O AOTEAROA

Decision No. [2018] NZEnvC 008

IN THE MATTER of the Local Government (Auckland  
Transitional Provisions) Act 1010 (LGATPA)

AND the Resource Management Act 1991 (the  
RMA)

AND of four appeals pursuant to s 156(1) of the  
LGATPA

BETWEEN R ADAMS  
(ENV-2016-AKL-197)  
R & H DUNLOP FAMILY TRUSTS  
(ENV-2016-AKL-242)  
HOUSING CORPORATION OF NEW  
ZEALAND  
(ENV-2016-AKL-236)  
RYMAN HEALTHCARE LIMITED AND  
RETIREMENT VILLAGES ASSOCIATION  
OF NEW ZEALAND  
(ENV-2016-AKL-230)  
Appellants

AND AUCKLAND COUNCIL  
Respondent

Court: Environment Judge JA Smith  
Environment Commissioner ACE Leijnen  
Environment Commissioner SK Prime

Hearing: At Auckland on 22 and 23 January 2018

Appearances: MJL Dickey and RS Ward for Auckland Council  
CE Kirman and A Devine for Housing Corporation of New Zealand  
(Housing Corporation)  
R Adams for himself  
R Dunlop for the R & H Dunlop Family Trust (Dunlop)  
No appearance for Ryman Healthcare Limited and the Retirement  
Villages Association of New Zealand, abide decision of the Court  
No appearance for Knox Homes Trust Board (Knox Homes) (s 274  
party), abide decision of Court



Date of Decision: 01 FEB 2018

Date of Issue: 02 FEB 2018

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**DECISION OF THE ENVIRONMENT COURT**

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- A: The amended terms of Annexure **A**<sup>1</sup> hereto relating to Chapter H4, Residential Mixed Housing Suburban and Residential Mixed Housing Urban are adopted, subject to finalisation of the wording of assessment criteria H4.8.2 and H5.8.2.
- B: Potential improvements to the wording of these criteria are annexed hereto and marked **B**.<sup>2</sup> These are guidelines only.
- C: The Council is to re-draft assessment criteria in light of this decision, and circulate it to the other parties for comment within **ten (10)** working days. The parties are to provide their response within a further **ten (10)** working days. The Council is then to file its preferred provisions, identifying those which are now agreed and those on which there remains a difference and the extent of those differences and its preferred wording, within a further **ten (10)** working days. The Court will then conclude the final wording of these criteria.
- D: This does not appear to be an appropriate case for costs to be considered. Nevertheless, if any application is to be filed it is to be filed within **twenty (20)** working days, any reply **ten (10)** working days thereafter.



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<sup>1</sup> See pages 24-31

<sup>2</sup> See pages 32-42

## REASONS

### Introduction

[1] This appeal centres upon the permitted threshold for residential housing in the Mixed Housing Suburban (**MHS**) and Mixed Housing Urban (**MHU**) zones of the Auckland Unitary Plan.

[2] Along with the threshold limit for permitted residential activity are criteria for consideration of applications that exceed the permitted threshold.

[3] Mr Adams supports a threshold of four dwellings, but also raises a further issue relating to access to rear properties. There is an issue as to whether access width can be within the scope of the current appeal, and/or whether the Court has any jurisdiction to consider it given the terms of the LGATPA.

[4] Mr Dunlop seeks that the threshold be set at around six dwellings rather than the Council's now-proposed three. Both the Council and the Housing Corporation of New Zealand (**Housing Corporation**) raise issues as to whether this issue is reasonably and fairly raised in terms of the submission and/or the appeal. The impact of the LGATPA legislation may also bear upon this issue.

### Agreement reached

[5] The Council, Housing Corporation, Ryman Healthcare and Knox Homes Trust Board (**Knox Homes**) have signed a consent memorandum in these proceedings. The provisions subject to that memorandum are annexed as **A**. Knox Homes is a s 274 party to these proceedings, and has signed a memorandum of consent, essentially adopting the provisions annexed hereto and marked **A**. Ryman Healthcare (**Ryman**) and the Retirement Villages Association of New Zealand (**the Association**) are in a similar position and both sought leave to not appear in these proceedings and abide the decision of the Court. Accordingly, they support the position now promoted by the Council.

[6] The Housing Corporation is also a signatory to this consent memorandum, but does not accept a proposition by a Council witness, Mr Roberts, that under the decision version of the Unitary Plan Residential Capacity is not an issue for the Auckland region. This also relates to the issue of the National Policy Statement on Urban Development (**NPS-UDC**) to which reference was made by a number of witnesses. The tenor of the Housing



Corporation's experts' evidence is that, whilst they accept that three dwellings is better than the Council decision of two, they have some reservations as to whether three is better than four dwellings in enabling intensification in the Auckland region. As we will discuss in due course, some of this reservation relates to concerns around the modelling conducted.

[7] Finally, it was acknowledged by Mr Roberts that the wording of the criteria for assessment when the threshold is exceeded could be improved, especially in those parts that simply refer to a policy. At least one of those references is to an incorrect number, i.e. the reference to H4.4(1) should be to H4.3(1).

[8] Annexure A is the result of mediation between the parties, and during which Housing Corporation, Ryman, the Association, and Knox Homes and the Council reached agreement. The stated objective of this improved criteria wording was to clarify what Council officers would be considering in a restricted discretionary application, and provide more guidance to applicants as to the type of issues that would need to be addressed.

#### **Role of assessment criteria**

[9] Mr Roberts, the planner giving evidence for the Council, and Mr Riley, an urban designer, both acknowledged that the intent of the Restricted Discretionary criteria was not a checklist or set of rules, but guidance to both Council officers and parties as to the issues that were relevant. Both acknowledged that these matters would need to be applied in the round and in a holistic manner.

[10] Mr Adams and Mr Dunlop both were concerned that the past performance of Council indicated an almost slavish adherence to assessment criteria as if they were checklist rules. From the Court's perspective, it has been faced with many appeals where this attitude has been displayed by Council witnesses. It is clear that the provisions of the Unitary Plan at least are not intended to operate in this way. Ms Dickey and the Council officers acknowledged that this requires a better understanding by both Council officers and the public, as to the way in which the criteria would apply.

[11] This issue has some particular moment due to the fact that the decisions of the Council can no longer be appealed, at least in respect of controlled, restricted discretionary or discretionary activities relating to residential development (see s 120(1A)(c)). Nevertheless, provided this Court is satisfied that the assessment criteria



are clearly identified as such, and that their intention is to create matters for consideration rather than a checklist or rules, then the application of those provisions is a matter for the Council, and if necessary could be subject to action in the High Court.

[12] In this regard, we consider that there has been a real attempt made with these criteria to make clear their role in restricted discretionary applications. We consider that further clarity could be achieved, especially in respect of those matters that have the words "refer to" to make it clear that they are simply matters for consideration, not rules. In the same regard, words should be added to make it clear that the particular criteria must be relevant in the circumstances. This would further ensure against the possibility of Council officers considering that every criterion must be complied with.

[13] These are simple matters of drafting, and in our view can be addressed by a re-consideration of the wording around the criteria, with very minor changes being necessary.

[14] To this extent Mr Dunlop suggested several amendments, which are annexed hereto as C.<sup>3</sup> Most of those seem to be encapsulated by the wording now proposed, but the underlying concern that Mr Dunlop raised is the adoption of a criteria when it is not appropriate, ie a requirement for a front door from the road when the building is several metres downslope.

[15] For current purposes, we are satisfied that allowing time for the assessment criteria to be reviewed in light of this decision would sufficiently ensure that we can address these issues.

[16] We therefore proceed on the basis that the criteria are intended to be informative and for guidance, but are not rules; nor is every criteria to be complied with in every application. Their purpose is to provide flexibility in approach to achieving the various standards listed in the relevant sections. We proceed on the basis that the criteria can be resolved with minor wording changes.



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<sup>3</sup> See page 43-44

## Jurisdictional issues

[17] It is clear that the Dunlop submission related to subdivisional rights in relation to a 1,039m<sup>2</sup> section in St John's, Auckland with the ability to have at least two dwellings on the particular property. The Council decision re-zoned the land to MHS and, accordingly, the property will have the right, as a permitted threshold, to three dwellings as proposed by the Council, provided it meets the various constraints throughout the Plan.

[18] More particularly, in this regard it could not be said that the submission has been fully met simply by the change of zoning.

[19] Nevertheless, we agree that the issue now before the Court, in relation to the permitted threshold within either the MHU and MHS zone should be three or four, must have reasonably and fairly been raised in the original submission, and maintained in the appeal. In *Albany North Landowners & Ors v Auckland Council*<sup>4</sup> the High Court found that the orthodox approach to this issue was equally applicable to the LGATPA. It concluded the panel's reasonably foreseen logical consequence test accorded with the reasonably and fairly raised test orthodoxy, discussed in decisions such as *Countdown*,<sup>5</sup> and *Clearwater Resort Limited v Christchurch City Council*<sup>6</sup> and a series of other decisions.

[20] We conclude that the Dunlop submission and/or appeal did not fairly and reasonably raise this issue, nor is it a reasonably foreseen logical consequence of the submission, for the following reasons:

- The relevant Dunlop submission related to the subdivision of land. These provisions relate to the use of land, and subdivision is dealt with separately in other parts of the Plan.
- In respect of the subdivision provisions, the Council adopted the IHP recommendations, and therefore there is no basis for this Court to intervene under s 156.
- The primary concern of the relevant Dunlop submission related to the number of

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<sup>4</sup> [2017] NZHC 138.

<sup>5</sup> [1994] NZRMA 145 (HC).

<sup>6</sup> HC AP34/2.



dwellings that can be created on a particular site. That concern has been met in full with the Council decision that provided for two dwellings as a permitted threshold. The now proposed provisions at three dwellings will effectively be more generous, and an even greater number of dwellings is still to be considered as a Restricted Discretionary Activity (RDA) provided certain standards continue to be met. In substance, we therefore conclude that the objective of the submission has been met, and it could not be said that the submission was seeking permitted threshold for land use consent of six dwellings in any part of its original submission;

- This position is further reinforced by reference to the Dunlop Appeal, which states:

The Trust appeals this decision on the basis that allowing up to four dwellings per site as of right in the mixed-housing suburban zone will enable greater urban intensification and is therefore more consistent with the purpose of the zone, and in its relief at the threshold requiring resource consent be amended to five or more dwellings in the mixed housing-suburban zone reflect the recommendation of the hearing panel.

- Section 156(2) also contains the following:

... if the Council's alternative solution included elements of the Hearing Panel's recommendation, the right of appeal is limited to the effects of the differences between the alternative solution and recommendation.

[21] In light of all of those factors we are satisfied that the Dunlop appeal, at best seeks to maintain the Independent Hearing Panel (IHP) decision, but as a matter of fact there was no jurisdiction for Dunlop to appeal that decision.

[22] In practical terms this is of no particular moment, given that Mr Dunlop also gave evidence on behalf of Mr Adams, who does have an appeal within scope. This was acknowledged by the parties. Nevertheless, Mr Dunlop's evidence must be taken as supporting the IHP decision of four dwellings. We do not consider that the Court has any jurisdiction to consider a higher threshold than this figure.

#### **Mr Adams' appeal on access width**

[23] Mr Adams' appeal and submission address the permitted threshold. However, Mr Adams also sought to progress changes to the access width to rear lots in this appeal. He notes that the Unitary Plan requires minimum access width for rear lots of 3.5m. He tells us many developments occurred at a width of 3.05m, thus precluding many sites for development at permitted thresholds under this Plan.



[24] This issue can be addressed expeditiously. This Court can only hear an appeal where the IHP make a decision beyond scope, or the Council has not adopted the IHP recommendation.

[25] Neither pre-condition to this issue exists in this case, and accordingly the Court has no jurisdiction to consider the issue.

[26] Thus, although it was a matter of submission and appeal by Mr Adams, this Court has no jurisdiction to consider the issue given the constraints of the LGATPA, s 156. This means where no conflicting decision of the Council to an IHP occurred there can be no appeal to this Court.

### **The scope of the Court's decision**

[27] Provided the Court has jurisdiction founded upon a decision of a Council that did not adopt a recommendation of the IHP, then the Court may consider any outcome within range of that notified, decided by the IHP or the Council decision, or within the scope of an original submission supported by an appeal within scope.<sup>7</sup>

[28] There is no dispute that the appeals of Ryman, Housing Corporation and Adams raised the issue of the permitted threshold and associated criteria. All of those sought a higher threshold for permitted activity as part of their original submission, however on appeal all sought the reinstatement of the IHP threshold of four (and associated criteria wording).

[29] Given that the Council did not adopt the permitted threshold of four dwellings, but instead a permitted threshold of two, this Court has jurisdiction to consider the appeal under s 156. It is therefore limited to the range of appeals within scope, and the most restrictive provision adopted by the Council, in this case a threshold of two dwellings, and the more permissive threshold of four recommended by IHP.



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<sup>7</sup> Section 156, LGATPA.



[30] Given that the scope of the appeal relates to a figure between two and four dwellings before RDA consent is required, that has been the primary focus of the evidence.

### ***Restricted Discretionary activities***

[31] Beyond this, the wording of the criteria is intended to reflect a more nuanced approach to the imposition of development controls. We refer to the proposed consent provisions annexed hereto and marked **A**. It can be seen that, to meet a permitted threshold, the relevant standards listed there must be met.

[32] In addition to these, there is a plethora of other requirements that are derived either by general rules, ie earthworks, access, parking etc, precinct rules applying to particular areas or overlays. In relation to overlays, the Court on declaration recently has had cause to comment:<sup>8</sup>

[4] The AUP is a combined regional policy statement, regional plan and district plan of the Auckland region. It has a hierarchical policy framework, with the RPS "at the top", in the sense that the regional plan and the district plan components are to give effect to it (as the Resource Management Act 1991 (RMA) requires). The AUP broadly comprises six main types of provision: general rules, overlays, Auckland-wide provisions, zones, precincts and standards.

[5] ...

[6] The SCAR (as part of the Special Character Overlay Residential and Business zone [not relevant here] is one of no fewer than 27 overlays in the AUP. As the word suggests, overlays are spatially mapped in the AUP. They serve to recognise, manage and protect particular values and resources across the Auckland region. As such they can apply across parts of zones and precincts. The SCAR also includes objectives, policies and rules (including activity classifications and standard).

[7] The SHZ is one of the residential zones in the AUP. As is typical it comprises objectives, policies and rules (including activity classifications and standards) on the use, development and protection of land shown as single house zone on the AUP's zoning maps.

[33] From this, it is clear that within the residential zones, including the MHU and MHS, there are many other requirements which impinge on any permitted development beyond those development controls listed in H4.4.1 and H5.4.1 of Annexure A.



<sup>8</sup> *Auckland Council v London Pacific Family Trust & Ors*, [2017] NZEnvC 209, at paragraphs [4] ff.

[34] Furthermore, it is important to understand that on development within the various residential zones the construction of multi-housing development on a single site is almost inevitably related to subdivision of that land to support that development. As the Council officers told the Court, there are benefits in applying for both consents at the same time, in that certain criteria are considered as being addressed through the land use consent and reducing the application for subdivision to an RDA consent, non-notified.

[35] On any particular development involving creation of new units, a consent is therefore likely to be required to at least some aspect (at a minimum the subdivision). Given the number of overlays and rules, consent will be required for those aspects or particular standards that are not met in the case. The Council properly acknowledges that, in relation to the sampled period, the developments that they considered required a consent involved developments from single units through to multiple units well in excess of the threshold number of four in this case. Some related to non-compliance with other constraints beyond those in H4.4.1. and H5.4.1.

### ***Modelling***

[36] The Council was not able to give us any figures, either modelled or actual, as to the number of properties that were developed in multi-unit developments for two, three or four dwellings without any form of consent being required (beyond a building consent). Nor were we given any figures on the number that required only a consent for subdivision. Nevertheless, it was conceded by the experts, in light of Housing Corporation evidence to that effect, that there was the potential for a greater number of properties to require an RDA consent for land use if the threshold was three dwellings rather than four.

[37] Mr Lindenburg conceded that the current provisions were a significant improvement in moving from the threshold of two dwellings in the Council decision to three. However, he was not convinced, on the current evidence available, that the impact on developments of between three and four was minimal. Various estimates suggested that there was the potential impact on up to 4,000 dwellings.

[38] It is probably convenient for us now to discuss the question of modelling. At the hearing, the Council produced the initial Council report in relation to the National Policy Statement – Urban Development Capacity (**NPS-UDC**), just released that day. The NPS-UDC required a capacity feasibility study to be undertaken by December 2017. No party had a full opportunity to examine that report in detail. It would be fair to say that there



are a number of aspects of that report which give the Court concern, and could conflict with statements made by witnesses to the Court, both in respect to the methodology and capture of information, and the consequences in terms of feasibility.

[39] Dr Fairgray's evidence to the Court noted that the model did not factor in any consequence of the need to obtain a restricted discretionary or discretionary consent. It did consider non-complying or prohibited activities in its capacity calculation, but by the same token appears to have assumed that all other consents required would be granted. It therefore appears to have dealt with Plan constraints in a way that is not clear to the Court. Overlays, for example, appear to have been factored in, but the exact way in which this was done was not clear to us. Precinct rules appear to have been applied depending on the circumstances. Annexed hereto and marked D<sup>9</sup> is a copy of appendix E of the NPS-UDC report, which sets out the various assumptions in the modelling.

*Parameters for the plan in enabled capacity calculation*

[40] We need not evaluate the modelling further for the purpose of this hearing. We concur with the Housing Corporation that the development capacity of Auckland City has not been determined, at least in relation to MHU and MHS permitted thresholds, by the modelling that has been undertaken to date. As counsel noted in their final submissions:

***Capacity Modelling and Information***

2. The Council has never modelled the permitted threshold. The modelling proceeded on the basis outlined to Commissioner Leijnen by Dr Fairgray:
  - a. First, a three-dimensional model was prepared which took into account land size, height and height in relation to boundary among other controls and put those into an envelope from which of dwelling numbers could be calculated: that is plan enabled capacity.
  - b. The second part of the capacity estimates is an analysis of feasibility. This analysis is more tangible. It looks at the factors a commercial developer would consider in determining commercial feasibility: that is feasible capacity.
3. Given that the permitted threshold was never modelled, there is no need to model this proposed change.

[41] Dr Fairgray addresses the feasibility issue by looking at the difference in cost of getting a consent with not getting a consent, and assuming this to be in the region of \$2,000-\$5,000. What that assessment does not factor in is the risk of refusal of consent.

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<sup>9</sup> See pages 45ff.



If it was simply a matter of imposing conditions, this would be addressed by a controlled activity. Given that almost all of these multiple-dwelling activities are at least restricted discretionary or discretionary activities, the question is whether the study addresses the number of dwellings that can feasibly be obtained (in terms of the application of the plan provisions) within the Auckland Council area. For current purposes we have no evidence of any extensive investigation of this kind being undertaken.

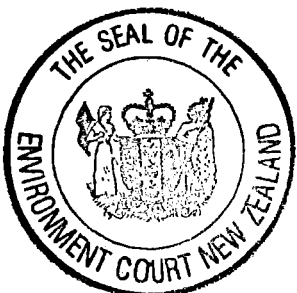
[42] The NPS report is new, but seems to be a continuation of modelling put before the IHP. For current purposes, there appears to be a capacity figure suggested within the MHS and MHU zones of an additional 140,000 homes, being a mixture of infill development and re-development. Whether that capacity has changed from the previous plan is a moot point. As we understand it, almost all re-development activities were either restricted discretionary or discretionary under the previous plan. Nevertheless, we are not addressing the change between the various plans, but simply the impact of this permitted threshold on intensification.

[43] On the evidence before us, it was accepted there might be a reduction of up to 4,000 dwelling units based upon individuals opting to develop three as a permitted activity rather than four as an RDA activity.

#### **The assessment criteria and treatment of the application**

[44] On the face of it, therefore, it could be argued that there is no benefit to increased housing capacity from the adoption of a three-dwelling threshold over four, and therefore it does not give effect to the NPS-UDC in increasing capacity, or the objectives and policies of this Plan which are firmly based around intensification being provided. However, when one actually looks at the assessment criteria and the method by which it has been adopted, there are several notable features:

- (a) the matters of assessment are focussed around maintaining amenity (particularly for the street and public areas) while providing for intensification;
- (b) the activity makes compliance with a number of critical standards, particularly site coverage and impervious surfaces, a matter for flexible approach rather than strict adherence;
- (c) these restricted discretionary activities are generally considered on a non-notified basis;



(d) the assessment criteria are relatively clear in their focus (and will be clearer as a result of re-drafting).

[45] On balance, in considering these provisions we believe that there is likely to be a countervailing group of persons who may elect to develop four (or more) dwellings rather than three because of the ability to have non-compliance with several critical standards, particularly site coverage and impermeability, addressed on a more flexible basis than by strict adherence with the development rules.

[46] Unfortunately, we have no specific evidence as to the effect. Just as the estimate of up to 4,000 dwellings can be no more than a guesstimate, in light of the lack of any actual modelled information, so too is our evaluation of this countervailing outcome. In the end, we believe that the balancing of these two particular effects could be so close that the outcome could be regarded as trivial. We conclude that there is the potential, as the plan provisions become more established and the actions of the Council more predictable, for RDA consent for four or more dwellings to be seen as preferable to strict compliance with the development controls.

[47] That outcome will turn upon the conduct of the Council in dealing with relevant applications and giving uniform and predictable outcomes. We see this outcome, if it was achieved, as more beneficial, long term, for intensification within the city. It would ensure that it is more likely to give a considered approach to amenity and streetscape issues than strict adherence with the development controls.

[48] Ms Dickey made the point that the Unitary Plan was at an early stage, and its move away from a density rule to these more nuanced rules would take time to settle in. In the circumstances, we conclude that the potential for better outcomes in terms of the objectives and policies of the Plan should be given an opportunity to bed in.

[49] At the current time the three dwelling threshold may have the potential for better outcomes in the long term if the criteria are properly applied. Whether that potential is achieved remains to be seen.



## Council conduct

[50] Both Mr Dunlop and Mr Adams were concerned at the Council's application of criteria. Mr Adams showed us an example dwelling with the public footpath close to and above above the kitchen area, with clear views into the home.

[51] Ms Dickey stated that new approaches to consenting were being adopted by Council, and Mr Roberts showed new arrangement documents. In the recent declaration *Auckland Council v London Pacific Family Trust & Ors*,<sup>10</sup> the Court addressed the application of SCAR amenity features. Although in relation to an overlay, the decision is enlightening:

[44] ... [Mr Galbraith] submitted that the Council's interpretation was contrary to s 9(3) RMA and to General Rule C11 (which functions to reflect s 9(3)). He argued that treating SCAR standards as cancelling out SHZ standards would give rise to significant amenity and other effects for neighbours. ...

[45] Given this significant 'gap', acknowledged in the Council's own evidence, he submitted it is strange that the Council was building its case on 'inference' to effectively negate express rules in the AUP. He submitted that this is a "step too far", invalid in terms of statutory interpretation principles, and wrong constitutionally. ... On the matter of constitutional impropriety, Mr Galbraith noted particular concern about the Council's Practice Note, in effect to misguide its officers and independent commissioners to take a narrow, restrictive and unsound approach to the relationship of Overlays to the zones.

[46] He submitted that it was appropriate and workable to simply apply all relevant rules and undertake an integrated assessment as the AUP says and plainly intends.

...

[64] ... The fact that Overlays, such as the SCAR, implement higher order RPS objectives (or, in some cases, ss 6 and/or 6 RMA ones) does not inevitably mean that SCAR rules must be treated as cancelling out SHZ ones. For one thing, to achieve special character outcomes does not dictate that all other considerations, such as amenity value ones, must fall away. Indeed the relevant SHZ objective and policies show that special character and amenity values can be inter-related.

...

[66] What became more apparent from Court questioning of counsel is that the Council has based its interpretation on what it terms 'cues' (meaning inferences) rather than on anything stated in any part of the AUP or related background documents. That is also the position for its reference to the intentions of the IHP. The same can be said for the theories advanced in the Council's affidavit evidence about these matters.

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<sup>10</sup> See 5 above.

[70] As such, we do not agree that applying an integrated management approach would give rise to any untoward or unacceptable consequences. For instance, even in cases where SCAR values as identified in the various statements in the Appendix would be best advanced by specifying a higher building height or a smaller front or side yard clearance and so forth, that does not dictate a need to put aside competing amenity value considerations. Rather, it is in the essence of an experienced consent authority's task to consider those competing considerations on the evidence and in light of directions given by objectives, policies and other provisions, to come up with a sound and informed outcome.

[52] While the facts are very different, they do show an example where Council have applied provisions completely incorrectly, based on inferences. We acknowledge the same potential for the Council or its officers to apply criteria as immutable rules and defeat the purpose of the threshold.

### Section 32

[53] In considering the most appropriate provisions for the Plan, the Court is guided by the various legal tests that have been set out in cases such as *Colonial Vineyard v Marlborough District Council*<sup>11</sup> and can be summarised as follows:

- (a) whether the provisions:
  - (i) accord and assist the Council in carrying out its functions and achieve the purpose of the RMA (s 74(1));
  - (ii) accord with Part 2 of the RMA (s 74(1)(b));
  - (iii) give effect to the regional policy statement (s 75(3)(c));
  - (iv) give effect to a national policy statement (s 75(3)(a));
  - (v) have regard to the actual or potential effects on the environment, including, in particular, any adverse effect (s 76(3));
  - (vi) are the most appropriate method for achieving the objectives and policies of the AUP, having regard to their efficiency and effectiveness and taking into account:
    - 1. the benefits and costs of the proposed policies and methods, including Rule 32, 3A; and
    - 2. the risk of acting or not acting if there is uncertain or insufficient information about the subject matter of the policies, rules or other methods (s 32(4)).

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<sup>11</sup> [204] NZEnvC 55, at paragraph [17].



[54] It is common ground that the NPSUDC is relevant under subsection (iv) listed. We deal with each in turn.

***The Council carrying out its functions and purpose of the Act (s 74(1))***

[55] We conclude either provision would assist the Council in this regard, and nothing particularly turns upon whether the threshold is three or four dwellings in terms of Council functions. This is supported by the three decisions to date by the relevant authorities.

***Accord with Part 2 of the RMA (s 74(1)(b))***

[56] We conclude either provision would accord with Part 2, and the question in this case is essentially which is more appropriate or better. Given the current evidence the Court must make an evaluation of these matters with uncertain and insufficient information.

***Give effect to a regional policy statement (s 75(3)(c))***

[57] There is no dispute that the policy statement is focussed around achieving intensification. Nevertheless, it seeks to do so while maintaining amenity levels. The question is how those objectives can be given best effect to.

[58] Again, there is nothing that we can see that would make either provision inconsistent with the policy statement. Given that the Council and IHP both adopted thresholds within this range, we must conclude that either provision would be appropriate in that regard.

***Give effect to a national policy statement (s 75(3)(a))***

[59] The NPD-UDC must be given effect to, and this requires feasible capacity for intensification. That is the area in which the modelling is, in our view, still uncertain and insufficient, at least at this micro level. The modelling does not clarify the impact of the planning rules in respect of either developer behaviour or outcomes. Nevertheless, we acknowledge Dr Fairgray's position that this is extremely difficult, if not impossible, to model such behaviours as it is subject to a myriad of factors.





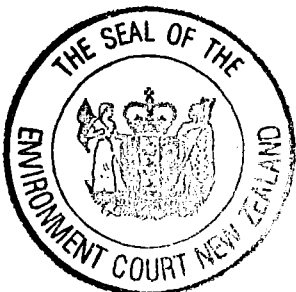
[60] It is clear that people do not always behave in an economically rational way. There are many examples of properties that have not been developed, even under previous planning regimes, to anywhere near the economic level of development that would be anticipated. It is unclear to what extent land banking and staged release of property to the market has been factored into the calculations as to yields over periods of time.

[61] Nevertheless, Mr Lindenburg acknowledged in his evidence that, based on the information currently available, he considered that the permitted threshold of three would give effect to the NPSUDC, as would four. We agree.

[62] In the circumstances, based upon the current information that we have available, it is unlikely that this threshold would be the determining factor in intensification yield within Auckland for several reasons:

- (a) the MHS and MHU are not the highest intensity zones anticipated;
- (b) any change in rules is likely to be monitored over a period of time and adjustments made. The effectiveness of the threshold is therefore a matter that will be subject to review, depending on the outcomes of various processes, including the improvements of processing by the Council;
- (c) as time goes on, the success of the modelling in relation to actual outcomes will be able to be tested and the model adjusted;
- (d) there is the prospect that this model will be improved in time, and its assumptions ground-tested against actual outcomes.

[63] Overall, on the basis of information available, we are satisfied that either threshold of three or four would give effect to the NPS UDC. However, as we will discuss in a moment, we consider that the lack of particular information in relation to the impacts of the planning outcomes for restricted discretionary and discretionary activities does create uncertainty, and there is insufficient information at the current time.



***The actual or potential effects on the environment, including in particular any adverse effect (s 76(3))***

[64] Clearly, the purpose of plan intervention is to address any potential adverse effects of intensification, particularly on amenity and residual effects from the public realm. Some level of effects is clearly anticipated, and the question again becomes to reach a reasonable balance between these.

[65] Again, there is little evidence to address whether three or four dwelling developments will better meet, reduce or mitigate any adverse effects of such residential intensification.

[66] With the average size of lot described as being between approximately 600m<sup>2</sup> and 800m<sup>2</sup>, we can understand how generic development standards might come into play in a consenting sense for three dwellings on a smaller lot size. In the end, the evidence pointed to significant interference in the 'as of right' threshold already, as the majority of developments require a consent. There could be clear advantages when the threshold kicks in due to the relaxation of some key generic standards and a nuanced approach to maximise potential, while importantly addressing the relevant potential effects on the environment.

***Appropriateness for achieving the objectives and policies of the AUP, regarding efficiency and effectiveness, including benefits and costs***

[67] We accept that the ability to achieve better outcomes is a potential benefit of an RDA process. The certainty of that outcome is less clear, and there is no evidence before us which would establish that intervention by Council officers necessarily achieves better amenity outcomes. Nevertheless, there is at least the potential for the process to do so, and to lead to a change in the approach of developers and their architects in their designing process. That benefit is to be measured over the potential cost of people seeking to utilise the permitted activity threshold. In the end, we consider that these benefits and costs are relatively marginal and make little distinction between a threshold of three or four. Certainly, on the basis of current evidence, there is no evidence to establish that one is clearly better, in terms of benefits and costs, than the other.



### **Risk of acting or not acting**

[68] We therefore turn to the issue of risk acting or not acting where we have insufficient information. In this regard, Ms Dickey noted that the removal of the density provisions represented a significant change in approach within the Auckland region. The outcome of that change is unclear. From our perspective, the degree of change is also very uncertain given the multiple overlay approach now adopted.

[69] Nevertheless, Ms Dickey suggests that we should proceed cautiously. In our view, that submission is reinforced by the lack of clear information as to the impacts of either threshold. In the end we are not satisfied that there is sufficient information as to whether a threshold of three or four will be more appropriate in giving effect to the objectives and policies of the plans, or the NPSUDC. Both can give effect to such provisions, and each may be more appropriate depending on particular circumstances.

[70] We conclude that the key unknown is how the council would apply the RDA provisions. Usually, we would be satisfied that the right of appeal would adequately protect any misuse of those criteria as if they were rules. Unfortunately, recent changes to the RMA have now precluded appeals in relation to residential activities unless they are non-complying (s120(1A)(c)).

[71] Residential activity is defined under 95A (6) to involve:

... a consent associated with the construction, alteration or use of one or more dwelling houses on land under the District Plan is intended to be solely or principally for residential purposes.

[72] Clearly, this would include all of the residential land within the MHU and MHS zones. Thus, there is no ability for this Court to review or supervise application of the Council of the criteria in particular cases. This would leave only the remedy of review to the High Court by applicants dissatisfied with the application of the criteria.

[73] We note that, in any event, appeals in relation to residential subdivision, which are also restricted discretionary, are also precluded by virtue of s 120(1A)(b) unless that is non-complying also. Accordingly, we can have no surety that the intended application of the assessment criteria provisions will achieve the outcomes intended. Given the lack of appeal rights and the 'one size fits all' nature of the threshold, we would have been minded to adopt a higher threshold, to at least ensure that up to four dwellings could be included on larger sites.



[74] The NPS-UDC provisions, in particular PA1 and PA2, recognise that social, economic and cultural wellbeing should be taken into account (PA3), although there is no explicit policy that identifies amenity as a key issue. Nevertheless, the NPS-UDC statement introduction itself states:

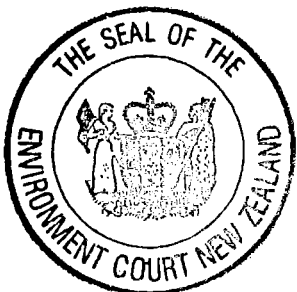
This national policy statement does not anticipate development occurring with disregard to its effect. Local authorities will still need to consider a range of matters in deciding where and how development is to occur, including the direction provided by this National Policy Statement.

[75] In the end, we must conclude that there is insufficient information to satisfy us that either the three- or four-dwelling threshold justifies us acting or not acting in the particular circumstances. There is the potential for greater benefit if the assessment criteria are correctly applied, but the lack of any overview (by way of appeal) and the lack of any clear evidence as to the benefits or detriments means that any views are largely evaluative.

#### **How should the Court proceed?**

[76] Having applied all of the relevant criteria, including the NPS-UDC, there is still some doubt as to which is the more appropriate provision. In the end, we have concluded that we should adopt a permitted threshold of three for the following reasons:

- (a) there is the potential for the proper application of the criteria and its consistent application to lead to a higher level of confidence by developers in outcomes through the RDA process;
- (b) there is the potential for such proper application of those principles to result in better amenity outcomes, particularly as experienced from the public realm, negating significant concerns generated in respect of developments in Auckland to date as voiced by persons such as Mr Dunlop and Mr Adams;
- (c) a cautious approach should be adopted to changing the regime in Auckland from density to number of dwellings;
- (d) the new regime, based on a threshold, means the same number of houses can be placed as of right on a 400m<sup>2</sup> site as a 1,400m<sup>2</sup> site, adopting a threshold of four would mean that, in extremis, four dwellings might be established on a 400-600m<sup>2</sup> site, with something in the order of a 100-200m<sup>2</sup> footprint;



(e) we acknowledge that expectations on intensification in Auckland have been conditioned over many decades by what is permitted. The density standard in former Auckland plans reinforced that view. We accept that intensification in Auckland is now subject to many more controls than the permitted threshold. Nevertheless, a high threshold may still influence owners or developers to assume the multitude of other controls are irrelevant or simply addressed. We conclude that using a higher threshold may create or reinforce unreasonable expectations in some sections of the public.

[77] Even a three-dwelling development is likely to trigger one or more of the development controls or other overlays. We acknowledge, however, that it is most unlikely that such a small site would be developed with four houses in any event due to other constraints in the development standards. Nevertheless, in the range between 600m<sup>2</sup> and 800m<sup>2</sup> there is the potential for four houses to be sited, complying with the development standards and other constraints, in suburban and urban areas where this might result in poor amenity outcomes.

[78] Although a three-dwelling threshold would have an effect on larger properties, it is most likely that those would be subdivided to a significantly greater level than four in any event. Thus, it is for properties between 400m<sup>2</sup> and, say, 1,200m<sup>2</sup>, that the threshold issue is most likely to be applicable. In those cases, we conclude that a more conservative approach may lead to better outcomes for amenity, depending on the application of the criteria by Council.

[79] We should not assume that the Council will continue previous approaches. In particular, we agree with Ms Dickey that approaches adopted during the transitional period where both former operative (transitional plans) and notified AUP provisions were applying cannot be used as a guide to officer approach under the new AUP. In such circumstances, we have concluded that we should give the benefit of the doubt to the Council and anticipate that they will properly apply the criteria in the way intended by the plan. This is rather than the Court relying on former approaches, a number of which were outlined by both Mr Dunlop and Mr Adams.

[80] Finally, the matter comes down to a very finely balanced decision and the three-unit threshold was what was originally notified by the Council. Of course there are parties who did not make a submission on that threshold, and thus appear to have a relatively high degree of acknowledgement of that development level. The improvement to the



assessment criteria has the potential to minimise impacts of particular developments, and potentially to assist with intensification throughout the city. Whether that proves to be the case is a matter of application by Council officers rather than plan provisions themselves.

### **Overall outcome**

[81] In the circumstances of the case the purposes of the Act are better met by adopting the permitted threshold of three dwellings as agreed by some parties in mediation. This agreement is set out in "A" attached. The assessment criteria would benefit from further clarification. We consider that work to be relatively minor, and mainly focussed around various references to policies. Nevertheless, we have attached as Appendix B a suggested wording that might further clarify the guidance and the role of these criteria being considered as appropriate to the individual case and in the round. We have included in the MHS part of B more detail around the architecture of the plan to assist the reader understand the complexity of the interwoven objectives, policies, standards and assessment criteria.

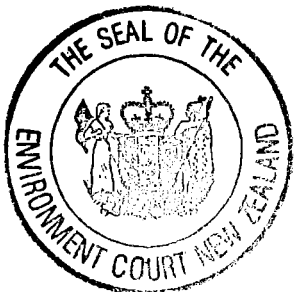
### **Outcome and costs**

[82] Given our conclusion as to the density, the only issue that remains to be resolved is the final wording of the criteria. We give a brief opportunity for the parties to address that matter and the Court will then issue a final decision.

[83] The Council is to provide its proposed final wording provisions to the parties within **ten working days**. The parties are to respond to the Council within **ten working days** as to the provisions they accept, and in respect of the provisions they dispute they are to identify:

- (a) their preferred wording; and
- (b) the reasons for their preferred wording.

[84] The Council is to consider those views, and within a further **ten working days** provide to the Court:



- (a) its proposed provisions;
- (b) those provisions that are disputed;
- (c) the versions suggested by the parties; and
- (d) its reasons for adopting its preferred wording.

[85] The Court will then consider the final wording of the provisions and issue a decision thereafter.

[86] As to costs, this does not appear to be an appropriate case for costs. Nevertheless, if any party wishes to file an application for costs they are to do so within **20 working days** and any reply is to be filed within 10 working days (a total of **30 working days**). This coincides with the time for filing Council's comments with the Court.

For the court:



  
JA Smith  
Environment Judge

1. Amend Chapter H4 Residential Mixed Housing Suburban Zone of the Auckland Unitary Plan (Operative in Part) as follows:

**H4. Residential – Mixed Housing Suburban Zone**

**H4.1. Zone description**

...

Up to three ~~two~~ dwellings are permitted as of right subject to compliance with the standards. This is to ensure a quality outcome for adjoining sites and the neighbourhood, as well as residents within the development site.

Resource consent is required for ~~three~~ four or more dwellings and for other specified buildings in order to:

...

**Table H4.4.1 Activity table**

|      |   |    |   |
|------|---|----|---|
| (A3) | Up to <del>two</del> <u>three</u> dwellings per site    | P  | Standard H4.6.4 Building height; Standard H4.6.5 Height in relation to boundary; Standard H4.6.6 Alternative height in relation to boundary; Standard H4.6.7 Yards; Standard H5.6.8 Maximum impervious areas; Standard H4.6.9 Building coverage; Standard H4.6.10 Landscaped area; Standard H4.6.11 Outlook space; Standard H4.6.12 Daylight; Standard H4.6.13 Outdoor living space; Standard H4.6.14 Front, side and rear fences and walls |
| (A4) | <del>Three</del> <u>Four</u> or more dwellings per site | RD | Standard H4.6.4 Building height; Standard H4.6.5 Height in relation to boundary; Standard H4.6.6 Alternative height in relation to boundary; Standard H4.6.7 Yards  |





#### H4.5 Notification

(1) Any application for resource consent for the following activities will be considered without public or limited notification or the need to obtain the written approval from affected parties unless the Council decides that special circumstances exist under section 95A(4) of the Resource Management Act 1991:

- (a) ~~three~~ four or more dwellings per site that comply with all of the standards listed in Table H4.4.1 Activity table

...

#### H4.8. Assessment – restricted discretionary activities

##### H4.8.1 Matters of discretion

The Council will restrict its discretion to all of the following matters when assessing a restricted discretionary activity resource consent application:

...

- (2) for ~~three~~ four or more dwellings on a site:

- (a) the effects on the neighbourhood character, residential amenity...

##### H4.8.2 Assessment criteria

The Council will consider the relevant assessment criteria below for restricted discretionary activities:

...

- (2) for ~~three~~ four or more dwellings on a site:

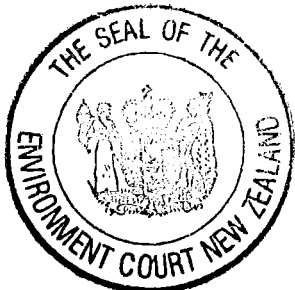
- (a) the extent to which or whether the development achieves the purpose outlined in the following standards or what alternatives are provided that result in the same or better outcome:



- (i) Standard H4.6.8 Maximum impervious areas;
  - (ii) Standard H4.6.9 Building Coverage;
  - (iii) Standard H4.6.10 Landscaped area;
  - (iv) Standard H4.6.11 Outlook space;
  - (v) Standard H4.6.12 Daylight;
  - (vi) Standard H4.6.13 Outdoor living space;
  - (vii) Standard H4.6.14 Front, side and rear fences and walls; and
  - (viii) Standard H4.6.15 Minimum dwelling size
- (b) refer to Policy H4.4(1);
- (c) refer to Policy H4.3(2);
- (d) ~~refer to Policy H4.3(3);~~ The extent to which development achieves attractive and safe streets and public open space by:
- (i) providing doors, windows and balconies facing the street and public open space
  - (ii) minimising tall, visually impermeable fences
  - (iii) designing large scale development (generally more than 15 dwellings) to provide for variations in building form or façade design as viewed from streets and public open spaces.
  - (iv) optimising front yard landscaping
  - (v) providing safe pedestrian access to buildings from the street
  - (vi) minimising the visual dominance of garage doors, walkways or staircases to upper level dwellings, and carparking within buildings as viewed from streets or public open spaces



- (e) refer to Policy H4.3(4);
- (f) refer to Policy H4.3(5); The extent to which dwellings:
  - (i) Orientate and locate windows to optimise privacy and encourage natural cross ventilation within the dwelling
  - (ii) Optimise sunlight and daylight access based on orientation, function, window design and location, and depth of the dwelling floor space
  - (iii) Provide the necessary storage and waste collection and recycling facilities in locations conveniently accessible.
- (g) refer to Policy H4.3(6); The extent to which outdoor living space:
  - (i) Provides for access to sunlight
  - (ii) Provides privacy between the outdoor living space of adjacent dwellings on the same site and between outdoor living space and the street.
  - (iii) When provided at ground level, is located on generally flat land or is otherwise functional
- (h) refer to Policy H4.3(7); and
- (i) infrastructure and servicing:
  - (i) Whether there is adequate capacity in the existing stormwater and public reticulated water supply and wastewater network to service the proposed development.
  - (ii) Where adequate network capacity is not available, whether adequate mitigation is proposed.



2. Amend Chapter H5 Residential Mixed Housing Urban Zone of the Auckland Unitary Plan (Operative in Part) as follows:

**H5. Residential – Mixed Housing Urban Zone**

**H5.1. Zone description**

...

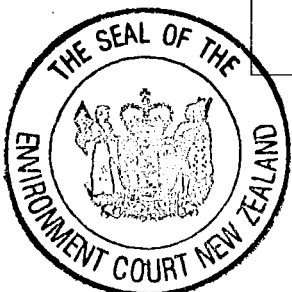
Up to three ~~two~~ dwellings are permitted as of right subject to compliance with the standards. This is to ensure a quality outcome for adjoining sites and the neighbourhood, as well as residents within the development site.

Resource consent is required for ~~three~~ four or more dwellings and for other specified buildings in order to:

...

**Table H5.4.1 Activity table**

|      |   |    |  |
|------|---|----|--|
| (A3) | Up to <del>two</del> <u>three</u> dwellings per site    | P  | Standard H5.6.4 Building height; Standard H5.6.5 Height in relation to boundary; Standard H5.6.6 Alternative height in relation to boundary; Standard H5.6.7 Height in relation to boundary adjoining lower intensity zones; Standard H5.6.8 Yards; Standard H5.6.9 Maximum impervious areas; Standard H5.6.10 Building coverage; Standard H5.6.11 Landscaped area; Standard H5.6.12 Outlook space; Standard H5.6.13 Daylight; Standard H5.6.14 Outdoor living space; Standard H5.6.15 Front, side and rear fences and walls |
| (A4) | <del>Three</del> <u>Four</u> or more dwellings per site | RD | Standard H5.6.4 Building height; Standard H5.6.5 Height in relation to boundary; Standard H5.6.6 Alternative height in relation to boundary; Standard H5.6.7 Height in relation to boundary adjoining lower intensity zones; Standard H5.6.8 Yards   |



#### H4.5 Notification

(1) Any application for resource consent for the following activities will be considered without public or limited notification or the need to obtain the written approval from affected parties unless the Council decides that special circumstances exist under section 95A(4) of the Resource Management Act 1991:

- (a) ~~three~~ four or more dwellings per site that comply with all of the standards listed in Table H4.4.1 Activity table

...

#### H5.8. Assessment – restricted discretionary activities

##### H5.8.1 Matters of discretion

The Council will restrict its discretion to all of the following matters when assessing a restricted discretionary activity resource consent application:

...

(2) for ~~three~~ four or more dwellings per site:

- (a) the effects on the neighbourhood character, residential amenity...

##### H5.8.2 Assessment criteria

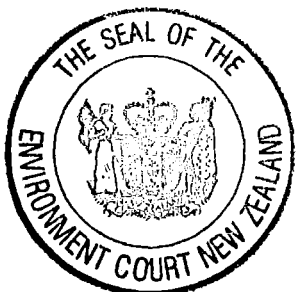
The Council will consider the relevant assessment criteria below for restricted discretionary activities:

...

(2) for ~~three~~ four or more dwellings on a site:



- (a) the extent to which or whether the development achieves the purpose outlined in the following standards or what alternatives are provided that result in the same or better outcome:
- (i) Standard H5.6.9 Maximum impervious areas;
  - (ii) Standard H5.6.10 Building Coverage;
  - (iii) Standard H5.6.11 Landscaped area;
  - (iv) Standard H5.6.12 Outlook space;
  - (v) Standard H5.6.13 Daylight;
  - (vi) Standard H5.6.14 Outdoor living space;
  - (vii) Standard H5.6.15 Front, side and rear fences and walls;  
and
  - (viii) Standard H5.6.16 Minimum dwelling size
- (b) refer to Policy H5.3(1)
- (c) refer to Policy H5.3(2);
- (d) ~~refer to Policy H5.3(3)~~ The extent to which development achieves attractive and safe streets and public open space by:
- (i) providing doors, windows and balconies facing the street and public open space
  - (ii) minimising tall, visually impermeable fences
  - (iii) designing large scale development (generally more than 15 dwellings) to provide for variations in building form or façade design as viewed from streets and public open spaces.



- (iv) optimising front yard landscaping
  - (v) providing safe pedestrian access to buildings from the street
  - (vi) minimising the visual dominance of garage doors, walkways or staircases to upper level dwellings, and carparking within buildings as viewed from streets or public open spaces
- (e) refer to Policy H5.3(4);
- (f) ~~refer to Policy H5.4(5)~~ The extent to which dwellings:
- (i) Orientate and locate windows to optimise privacy and encourage natural cross ventilation within the dwelling
  - (ii) Optimise sunlight and daylight access based on orientation, function, window design and location, and depth of the dwelling floor space
  - (iii) Provide the necessary storage and waste collection and recycling facilities in locations conveniently accessible.
- (g) ~~refer to Policy H5.3(6)~~ The extent to which outdoor living space:
- (i) Provides for access to sunlight
  - (ii) Provides privacy between the outdoor living space of adjacent dwellings on the same site and between outdoor living space and the street.
  - (iii) When provided at ground level, is located on generally flat land or is otherwise functional



**"B"**

1. Amend Chapter H4 Residential Mixed Housing Suburban Zone of the Auckland Unitary Plan (Operative in Part) as follows:<sup>12</sup>

**H4. Residential – Mixed Housing Suburban Zone****H4.1. Zone description**

The Residential – Mixed Housing Suburban Zone is the most widespread residential zone covering many established suburbs and some greenfields areas. Much of the existing development in the zone is characterised by one or two storey, mainly stand-alone buildings, set back from site boundaries with landscaped gardens.

The zone enables intensification, while retaining a suburban built character. Development within the zone will generally be two storey detached and attached housing in a variety of types and sizes to provide housing choice. The height of permitted buildings is the main difference between this zone and the Residential – Mixed Housing Urban Zone which generally provides for three storey predominately attached dwellings.

Up to ~~three~~ two dwellings are permitted as of right subject to compliance with the standards. This is to ensure a quality outcome for adjoining sites and the neighbourhood, as well as residents within the development site.

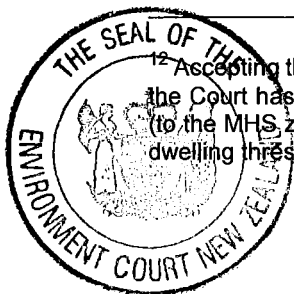
Resource consent is required for ~~three~~ four or more dwellings and for other specified buildings in order to:

- achieve the planned suburban built character of the zone;
- achieve attractive and safe streets and public open spaces;
- manage the effects of development on neighbouring sites, including visual amenity, privacy and access to daylight and sunlight; and
- achieve high quality on-site living environments.

The resource consent requirements enable the design and layout of the development to be assessed; recognising that the need to achieve a quality design is increasingly important as the scale of development increases.

**H4.2. Objectives**

- 1) Housing capacity, intensity and choice in the zone is increased.
- 2) Development is in keeping with the neighbourhood's planned suburban built character of predominantly two storey buildings, in a variety of forms (attached and detached). Development provides quality on-site residential amenity for residents and adjoining sites and the street.
- 3) Non-residential activities provide for the community's social, economic and cultural well-being, while being compatible with the scale and intensity of



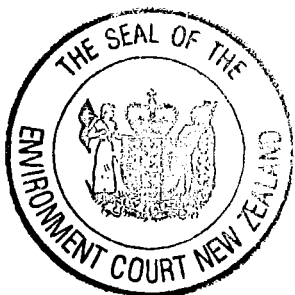
<sup>12</sup> Accepting that there may be some missed amendments to the version supplied to the court as a result of other appeals, the Court has added in the zone description, objectives and policies, the purpose of standards and the notification rule (to the MHS zone only) to assist readers in understanding the operation of the Plan when development above the three dwelling threshold for permitted activity is exceeded and the relevant assessment criteria for RDA apply.



development anticipated by the zone so as to contribute to the amenity of the neighbourhood.

#### H4.3. Policies

- 1) Enable a variety of housing types including integrated residential development such as retirement villages.
- 2) Achieve the planned suburban built character of predominantly two storey buildings, in a variety of forms by:
  - a) limiting the height, bulk and form of development;
  - b) managing the design and appearance of multiple-unit residential development; and
  - c) requiring sufficient setbacks and landscaped areas.
- 3) Encourage development to achieve attractive and safe streets and public open spaces including by:
  - a) providing for passive surveillance
  - b) optimising front yard landscaping
  - c) minimising visual dominance of garage doors
- 4) Require the height, bulk and location of development to maintain a reasonable standard of sunlight access and privacy and to minimise visual dominance effects to adjoining sites.
- 5) Require accommodation to be designed to:
  - a) provide privacy and outlook; and
  - b) be functional, have access to daylight and sunlight and provide the amenities necessary to meet the day-to-day needs of residents.
- 6) Encourage accommodation to have useable and accessible outdoor living space.
- 7) Restrict the maximum impervious area on a site in order to manage the amount of stormwater runoff generated by a development and ensure that adverse effects on water quality, quantity and amenity values are avoided or mitigated.
- 8) Enable more efficient use of larger sites by providing for integrated residential development.
- 9) Provide for non-residential activities that:
  - a) support the social and economic well-being of the community;
  - b) are in keeping with the with the scale and intensity of development anticipated within the zone;
  - c) avoid, remedy or mitigate adverse effects on residential amenity; and



- d) will not detract from the vitality of the Business – City Centre Zone, Business – Metro Centre Zone and Business – Town Centre Zone.

10) Recognise the functional and operational requirements of activities and development.

**H4.4. Activity table**

Table H4.4.1 Activity table specifies the activity status of land use and development activities in the Residential – Mixed Housing Suburban Zone pursuant to section 9(3) of the Resource Management Act 1991.

**Table H4.4.1 Activity table** (relevant extract)

|      |   |    |   |
|------|---|----|---|
| (A3) | Up to <del>two</del> <u>three</u> dwellings per site    | P  | Standard H4.6.4 Building height; Standard H4.6.5 Height in relation to boundary; Standard H4.6.6 Alternative height in relation to boundary; Standard H4.6.7 Yards; Standard H4.6.8 Maximum impervious areas; Standard H4.6.9 Building coverage; Standard H4.6.10 Landscaped area; Standard H4.6.11 Outlook space; Standard H4.6.12 Daylight; Standard H4.6.13 Outdoor living space; Standard H4.6.14 Front, side and rear fences and walls |
| (A4) | <del>Three</del> <u>Four</u> or more dwellings per site | RD | Standard H4.6.4 Building height; Standard H4.6.5 Height in relation to boundary; Standard H4.6.6 Alternative height in relation to boundary; Standard H4.6.7 Yards  |

**H4.5 Notification**

- 1) Any application for resource consent for the following activities will be considered without public or limited notification or the need to obtain the written approval from affected parties unless the Council decides that special circumstances exist under section 95A(4) of the Resource Management Act 1991:
  - a) ~~three~~ four or more dwellings per site that comply with all of the standards listed in Table H4.4.1 Activity table
  - b) an integrated residential development that complies with all of the standards listed in Table H4.4.1 Activity table;
  - c) New buildings and additions to buildings which do not comply with H4.6.5 Height in relation to boundary, but comply with Standard H4.6.6 Alternative height in relation to boundary.
  - d) development which does not comply with H4.6.14 (1a) Front, side and rear fences and walls; or
  - e) development which does not comply with Standard H4.6.15 Minimum dwelling size.



- 2) Any application for resource consent for an activity listed in Table H4.4.1 Activity table and which is not listed in H4.5(1) above will be subject to the normal tests for notification under the relevant sections of the Resource Management Act 1991.
- 3) When deciding who is an affected person in relation to any activity for the purposes of section 95E of the Resource Management Act 1991 the Council will give specific consideration to those persons listed in Rule C1.13(4).

**H4.6. Standards**

**H4.6.1. Activities listed in Table H4.4.1 Activity table.**

- 1) Activities and buildings containing activities listed in Table H4.4.1 Activity table must comply with the standards listed in the column in Table H4.4.1 called Standards to be complied with.

**H4.6.1. Home occupations**

.....

**H4.6.4. Building height**

Purpose: to manage the height of buildings to:

- achieve the planned suburban built character of predominantly one to two storeys;
- minimise visual dominance effects;
- maintain a reasonable standard of residential amenity for adjoining sites; and
- provide some flexibility to enable variety in roof forms.

.....

**H4.6.5. Height in relation to boundary**

Purpose: to manage the height and bulk of buildings at boundaries to maintain a reasonable level of sunlight access and minimise adverse visual dominance effects to immediate neighbours.

.....

**H4.6.6 Alternative height in relation to boundary**

Purpose: to enable the efficient use of the site by providing design flexibility where a building is located close to the street frontage, while maintaining a reasonable level of sunlight access and minimising overlooking and privacy effects to immediate neighbours.

.....

**H4.6.7 Yards**

Purpose:



- to maintain the suburban built character of the streetscape and provide sufficient space for landscaping within the front yard;
- to maintain a reasonable standard of residential amenity for adjoining sites;
- to ensure buildings are adequately set back from lakes, streams and the coastal edge to maintain water quality and provide protection from natural hazards; and
- to enable buildings and services on the site or adjoining sites to be adequately maintained.

.....

**H4.6.8 Maximum impervious area**

Purpose:

- to manage the amount of stormwater runoff generated by a development, particularly in relation to the capacity of the stormwater network and potential flood risks;
- to support the functioning of riparian yards, lakeside yards and coastal yards and water quality and ecology;
- to reinforce the building coverage and landscaped area standards; and
- to limit paved areas on a site to improve the site’s appearance and cumulatively maintain amenity values in a neighbourhood.

.....

**H4.6.9 Building coverage**

Purpose: to manage the extent of buildings on a site to achieve the planned suburban built character of buildings.

.....

**H4.6.10 Landscaped area**

Purpose:

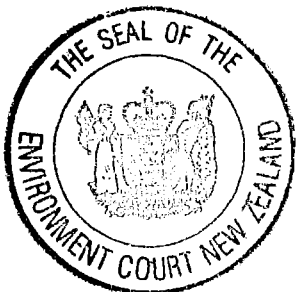
- to provide for quality living environments consistent with the planned suburban built character of buildings within a generally spacious setting; and
- to maintain the landscaped character of the streetscape within the zone.

.....

**HA.6.11 Outlook space**

Purpose:

- to ensure a reasonable standard of visual privacy between habitable rooms of different buildings, on the same or adjacent sites; and
- in combination with the daylight standard, manage visual dominance effects within a site by ensuring that habitable rooms have an outlook and sense of space.



.....

#### **H4.6.12 Daylight**

Purpose:

- to ensure adequate daylight for living areas and bedrooms in dwellings, supported residential care and boarding houses; and
- in combination with the outlook standard, manage visual dominance effects within a site by ensuring that habitable rooms have an outlook and sense of space.

.....

#### **H4.6.13. Outdoor living apace**

Purpose: to provide dwellings, supported residential care and boarding houses with outdoor living space that is of a functional size and dimension, has access to sunlight, and is directly accessible from the principal living room, dining room or kitchen and is separated from vehicle access and manoeuvring areas.

.....

#### **H4.6.14 Front, side and rear fences and walls**

Purpose: to enable fences and walls to be constructed on a front, side or rear boundary or within a front, side or rear yard to a height sufficient to:

- provide privacy or dwellings while enabling opportunities for passive surveillance of the street
- minimise visual dominance effects to immediate neighbours and the street.

.....

#### **H4.6.15 Minimum dwelling size**

Purpose: to ensure dwellings are functional and of a sufficient size to provide for the day to day needs of residents, based on the number of occupants the dwelling is designed to accommodate.

.....

#### **H4.7 Assessment – controlled activities**

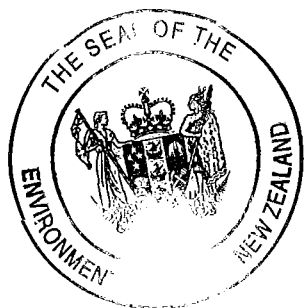
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#### **H4.8. Assessment – restricted discretionary activities**

##### **H4.8.1 Matters of discretion**

The Council will restrict its discretion to ~~all of~~ the following matters when assessing a restricted discretionary activity resource consent application:

- 1) for ~~three~~ four or more dwellings on a site:



- a) the effects on the neighbourhood character, residential amenity...

#### H4.8.2 Assessment criteria

The Council will consider the ~~relevant~~ assessment criteria below for restricted discretionary activities to the extent relevant to the proposal:

...

- 2) for ~~three~~ four or more dwellings on a site:

- a) the extent to which or whether the development achieves the purpose outlined in the following standards or what alternatives are provided that result in the same or better outcome:

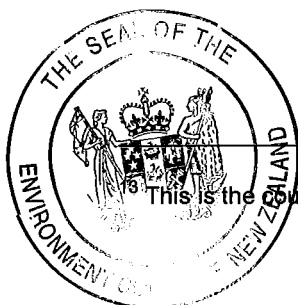
- (i) Standard H4.6.8 Maximum impervious areas;
- (ii) Standard H4.6.9 Building Coverage;
- (iii) Standard H4.6.10 Landscaped area;
- (iv) Standard H4.6.11 Outlook space;
- (v) Standard H4.6.12 Daylight;
- (vi) Standard H4.6.13 Outdoor living space;
- (vii) Standard H4.6.14 Front, side and rear fences and walls; and
- (viii) Standard H4.6.15 Minimum dwelling size

- b) ~~refer to Policy H4.3(1)~~; The extent to which the development contributes to a variety of housing types in the zone and is in keeping with the neighbourhood's planned suburban built character of predominantly two storey buildings (attached or detached) by limiting the height, bulk and form of the development and managing the design and appearance as well as providing sufficient setbacks and landscaped areas.<sup>13</sup>

- ~~e) refer to Policy H4.3(2)~~;

- d) ~~refer to Policy H4.3(3)~~; The extent to which development achieves attractive and safe streets and public open space by:

- (i) providing doors, windows and balconies facing the street and public open space
- (ii) minimising tall, visually impermeable fences
- (iii) designing large scale development (generally more than 15 dwellings) to provide for variations in building form or façade design as viewed from streets and public open spaces.
- (iv) optimising front yard landscaping



This is the Courts suggestion for a replacement criterion to reflect the outcomes sought from policies H4.3.(1) and (2).

- (v) providing safe pedestrian access to buildings from the street
- (vi) minimising the visual dominance of garage doors, walkways or staircases to upper level dwellings, and carparking within buildings as viewed from streets or public open spaces
- e) ~~refer to Policy H4.3(4);~~ The extent to which the height, bulk and location of the development maintains a reasonable standard of access to sunlight and privacy and minimises visual dominance to adjoining sites.<sup>14</sup>
- f) ~~refer to Policy H4.3(5);~~ The extent to which dwellings:
- (i) Orientate and locate windows to optimise privacy and encourage natural cross ventilation within the dwelling
- (ii) Optimise sunlight and daylight access based on orientation, function, window design and location, and depth of the dwelling floor space
- (iii) Provide the necessary storage and waste collection and recycling facilities in locations conveniently accessible.
- g) ~~refer to Policy H4.3(6);~~ The extent to which outdoor living space:
- (i) Provides for access to sunlight
- (ii) Provides privacy between the outdoor living space of adjacent dwellings on the same site and between outdoor living space and the street.
- (iii) When provided at ground level, is located on generally flat land or is otherwise functional.

2. Amend Chapter H5 Residential Mixed Housing Urban Zone of the Auckland Unitary Plan (Operative in Part) as follows:

**H5. Residential – Mixed Housing Urban Zone**

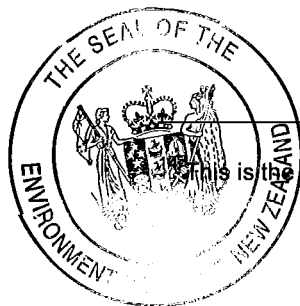
**H5.1. Zone description**

...

Up to ~~three~~ two dwellings are permitted as of right subject to compliance with the standards. This is to ensure a quality outcome for adjoining sites and the neighbourhood, as well as residents within the development site.

Resource consent is required for ~~three~~ four or more dwellings and for other specified buildings in order to:

...



... is the courts suggestion for a replacement criterion to reflect the outcomes sought from policies H4.3.(4).

Table H5.4.1 Activity table (relevant extract)

|      |   |    |  |
|------|---|----|--|
| (A3) | Up to <del>two</del> <u>three</u> dwellings per site    | P  | Standard H5.6.4 Building height; Standard H5.6.5 Height in relation to boundary; Standard H5.6.6 Alternative height in relation to boundary; Standard H5.6.7 Height in relation to boundary adjoining lower intensity zones; Standard H5.6.8 Yards; Standard H5.6.9 Maximum impervious areas; Standard H5.6.10 Building coverage; Standard H5.6.11 Landscaped area; Standard H5.6.12 Outlook space; Standard H5.6.13 Daylight; Standard H5.6.14 Outdoor living space; Standard H5.6.15 Front, side and rear fences and walls |
| (A4) | <del>Three</del> <u>Four</u> or more dwellings per site | RD | Standard H5.6.4 Building height; Standard H5.6.5 Height in relation to boundary; Standard H5.6.6 Alternative height in relation to boundary; Standard H5.6.7 Height in relation to boundary adjoining lower intensity zones; Standard H5.6.8 Yards   |

#### H4.5 Notification

- 1) Any application for resource consent for the following activities will be considered without public or limited notification or the need to obtain the written approval from affected parties unless the Council decides that special circumstances exist under section 95A(4) of the Resource Management Act 1991:
  - a) ~~three~~ four or more dwellings per site that comply with all of the standards listed in Table H4.4.1 Activity table

...

#### H5.8. Assessment – restricted discretionary activities

##### H5.8.1 Matters of discretion

The Council will restrict its discretion to all of the following matters when assessing a restricted discretionary activity resource consent application:

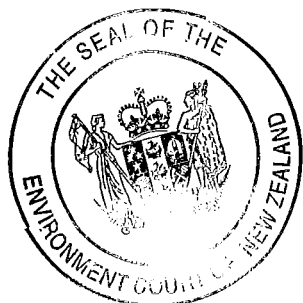
...

- 2) for ~~three~~ four or more dwellings per site:
  - a) the effects on the neighbourhood character, residential amenity...

##### H5.8.2 Assessment criteria

The Council will consider the ~~relevant~~ assessment criteria below for restricted discretionary activities to the extent relevant to the proposal:

...





- 2) for ~~three~~ four or more dwellings on a site:
- a) the extent to which or whether the development achieves the purpose outlined in the following standards or what alternatives are provided that result in the same or better outcome:
- (i) Standard H5.6.9 Maximum impervious areas;
  - (ii) Standard H5.6.10 Building Coverage;
  - (iii) Standard H5.6.11 Landscaped area;
  - (iv) Standard H5.6.12 Outlook space;
  - (v) Standard H5.6.13 Daylight;
  - (vi) Standard H5.6.14 Outdoor living space;
  - (vii) Standard H5.6.15 Front, side and rear fences and walls;  
and
  - (viii) Standard H5.6.16 Minimum dwelling size
- b) ~~refer to Policy H5.3(1)~~ The extent to which the development contributes to a variety of housing types in the zone and is in keeping with the neighbourhood's planned suburban built character of predominantly two storey buildings (attached or detached) by limiting the height, bulk and form of the development and managing the design and appearance as well as providing sufficient setbacks and landscaped areas.
- ~~e) refer to Policy H5.3(2);~~
- c) ~~refer to Policy H5.3(3)~~ The extent to which development achieves attractive and safe streets and public open space by:
- (i) providing doors, windows and balconies facing the street and public open space
  - (ii) minimising tall, visually impermeable fences
  - (iii) designing large scale development (generally more than 15 dwellings) to provide for variations in building form or façade design as viewed from streets and public open spaces.
  - (iv) optimising front yard landscaping
  - (v) providing safe pedestrian access to buildings from the street
  - (vi) minimising the visual dominance of garage doors, walkways or staircases to upper level dwellings, and carparking within buildings a viewed from streets or public open spaces
- d) ~~refer to Policy H5.3(4)~~ The extent to which the height, bulk and location of the development maintains a reasonable standard of access to sunlight and privacy and minimises visual dominance to adjoining sites;
- e) ~~refer to Policy H5.4(5)~~ The extent to which dwellings:
- (i) Orientate and locate windows to                      privacy and encourage natural cross



ventilation within the dwelling

(ii) Optimise sunlight and daylight access based on orientation, function, window design and location, and depth of the dwelling floor space

(iii) Provide the necessary storage and waste collection and recycling facilities



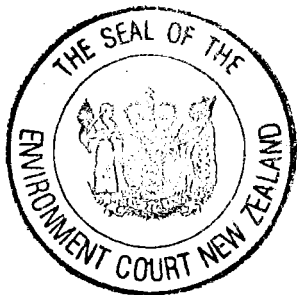
in locations conveniently accessible.

f) refer to Policy H5.3(6) The extent to which outdoor living space:

(i) Provides for access to sunlight

(ii) Provides privacy between the outdoor living space of adjacent dwellings on the same site and between outdoor living space and the street.

(iii) When provided at ground level, is located on generally flat land or is otherwise functional



## C

## Amended Provisions of the Unitary Plan

The Council will consider the relevant assessment criteria below for restricted discretionary activities:

- (2) for ~~three~~ four or more dwellings on a site
- (a) the extent to which or whether the development achieves the purpose outlined in the following standards or what alternatives are provided that result in the same or a better outcome:
- (i) Standard H5.6.9 Maximum impervious areas;
  - (ii) Standard H5.6.10 Building coverage;
  - (iii) Standard H5.6.11 Landscaped area;
  - (iv) Standard H5.6.12 Outlook space;
  - (v) Standard H5.6.13 Daylight;
  - (vi) Standard H5.6.14 Outdoor living space;
  - (vii) Standard H5.6.15 Front, side and rear fences and walls; and
  - (viii) Standard H5.6.16 Minimum dwelling size.
- (b) refer to Policy H5.3(1) (*enable higher densities*);
- (c) refer to Policy H5.3(2) (*character*)
- (d) The extent to which development achieves attractive and safe streets and public open space including by:
- (i) providing (when the floor level is higher) at least a balcony or door to areas for occupants to congregate and view the street and public open space.
  - (ii) minimising tall, visually impermeable fences
  - (iii) designing large scale development (generally more than 10 dwellings) to provide for variations in building or form or facade design as viewed from streets and public open spaces.
  - (iii) designing for: multi-street developments; developments over 10 dwellings; or for structures over 40m long, to ensure they have non-repetitive distinctive building form and facade finish as viewed from the street and public open spaces.



- (iv) optimising front yard landscaping
- (v) providing safe pedestrian access to buildings from the street
- (vi) minimising the visual dominance of garage doors, walkways or staircases to upper level dwellings, and carparking within buildings as viewed from streets or public open spaces
- (e) refer to Policy H5.3(4) (~~sunlight access, privacy and dominance~~ relationship to adjacent sites)
- (f) refer to Policy H5.3(5) (onsite amenity). The extent to which dwellings:
- are functional and optimal in the use of space within the dwelling
  - Orientate and locate windows to optimise natural cross ventilation and privacy and encourage natural cross ventilation within the dwelling
  - Optimise sunlight and daylight access based on orientation, function, window design and location and depth of the dwelling floor space
  - Provide the necessary waste collection and recycling facilities in locations conveniently accessible.
  - Provide sufficient secure and easily accessible internal storage for the intended number of occupants that the dwelling is designed to accommodate, including to accommodate a personal transport item such as a pushbike where no garage is provided. {This clause is to be applied also to H4. Mixed Housing Suburban Zone}
- (g) refer to Policy H5.3(6) (onsite amenity – outdoor living). The extent to which outdoor living space:
- Provides for access to sunlight
  - Provides privacy between the outdoor living space of adjacent dwellings on the same site and between outdoor living space and the street.
  - When provided at ground level is located on generally flat land or is otherwise functional when located at ground level



## Appendix E Plan enabled capacity calculation global assumption parameters

### Global residential capacity calculation assumption

| Assumption name                                   | Assumption value   | Description   | Components assumption used in     |
|---|--------------------|---|-----------------------------------|
| Minimum valid parcel size                         | 100m <sup>2</sup>  | There are many small parcels across the region; these can include the likes of small parcels adjoining larger ones, vehicle access ways, pedestrian accesses etc. Such parcels are considered too small to realise any form of capacity as such parcels that are smaller than 100m <sup>2</sup> were excluded from the modelling process. A further 'shape test' and some parcel attributable queries are also undertaken to remove access lots and the like with an area greater than the minimum valid parcel size. | All residential components        |
| Infill and vacant potential demarcation threshold | 2000m <sup>2</sup> | A threshold of 2,000m <sup>2</sup> was used as a demarcation point between infill and vacant potential. This allowed for the application of different densities on larger parcels. The 2000 m <sup>2</sup> demarcation threshold is consistent with previous studies  | Infill<br>Vacant<br>Redevelopment |
| Minimum building footprint area                   | 50 m <sup>2</sup>  | Buildings that are small, and therefore easily moved or removed should not be considered as a constraint to realising capacity; as such buildings that had a foot print that were smaller than 50 m <sup>2</sup> were excluded from the modelling process.  | All residential components        |



## D

| Assumption name                                    | Assumption value                     | Description   | Components assumption used in   |
|--|--------------------------------------|---|---|
| Minimum dimension for a building/dwelling platform | 11 m x 11 m<br>(120 m <sup>2</sup> ) | <p>The plan specifies that each new vacant site be capable of containing a rectangle of eight metres by 15 metres (total of 120 m<sup>2</sup>).</p> <p>Note: Due to the practicality of geospatial modelling, we use a representation of a regular polygon (a square) of the same area (roughly 11 metres by 11 metres). This may result in some candidate areas with 'narrow' platforms failing to qualify that may otherwise pass a manual assessment, potentially balanced by 'squat' dwelling platforms that do pass that shouldn't have.</p> | Infill  |
| Parcel area minimum filler                         | Varies, refer LUT                    | <p>Minimum size of the residential parcel to be assessed for infill type capacity.</p> <p>This is calculated as parcel area minimum plus the balance area minimum.</p> <p>However, under the PAUP this is always twice the minimum infill area, as both the infill candidate and the balance must meet the minimum parcel area requirements.</p>  | All residential components, but assumptions are zone specific. Refer LUT. |
| Parcel area minimum                                | Varies, refer LUT                    | Minimum size of the resultant residential parcel infill candidates  | Infill, but assumptions are zone specific, refer LUT                      |



## D

| Assumption name                     | Assumption value   | Description  | Components assumption used in                         |
|-------------------------------------|--|--|---|
| Parcel vehicle access width minimum | Varies, refer LUT, never less than minimum 2.5m formed carriageway | Minimum width between any existing building footprints (larger than the minimum building footprint area) and the parcel boundary, which would allow a vehicle to pass from the road to a non-frontage infill candidate.  | Infill, but assumptions are zone specific, Refer LUT  |
| Parcel building setback minimum     | Refer LUT  | <p>Minimum (average) distance from any existing building footprint (larger than the minimum building footprint area) that infill development candidate areas can occur.</p> <p>This effectively operates as a yard from existing building footprints to ensure the new boundary is set back an appropriate distance (obviously impacting on the area that is available). Where no yards are required this can be set to zero. Where yards vary by boundary, an 'average' is created.</p> | Infill, but assumptions are zone specific, Refer LUT. |





## D

## Global business land capacity assumptions

| Assumption name                        | Assumption value   | Description  | Components where assumption used                |
|--|--------------------|--|---|
| Minimum valid parcel size              | 100 m <sup>2</sup> | <p>There are many small parcels across the region; these can include the likes of small parcels adjoining larger ones, vehicle access ways, pedestrian accesses etc. Such parcels are considered too small to realise any form of capacity as such parcels that are smaller than 100 m<sup>2</sup> were excluded from the modelling process.</p> <p>Note: Additional spatial testing for removing slivers is also undertaken</p>   | <p>Vacant land</p> <p>Vacant potential land</p> |
| Minimum valid building footprint areas | 50 m <sup>2</sup>  | <p>Buildings that are small, and therefore easily moved or removed should not be considered as a constraint to realising capacity; as such buildings that had a footprint that were smaller than 50 m<sup>2</sup> were excluded from the modelling process.</p> <p>Note: Where building footprints cross parcel boundaries, they are clipped to the underlying parcel – small portions of large buildings that lay across parcel boundaries may therefore be removed from assessment</p> | <p>Vacant land</p> <p>Vacant potential land</p> |

