

## **Appendix D. Legal Effect Decision for Rural Zone Subdivision**

**IN THE ENVIRONMENT COURT  
AT CHRISTCHURCH  
I TE KŌTI TAIAO O AOTEAROA  
KI ŌTAUTAHI**

**Decision No. [2021] NZEnvC 142**

IN THE MATTER

of an application under s 86D of the  
Resource Management Act 1991

BY

WAIMAKARIRI DISTRICT COUNCIL

(ENV-2021-CHC-082)

Applicant

Court: Environment Judge J E Borthwick sitting alone under s 279  
of the Act

Hearing: On the papers

Last case event: Application lodged 14 July 2021

Date of Decision: 17 September 2021

Date of Issue: 17 September 2021

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**DECISION OF THE ENVIRONMENT COURT**

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- A: The application under s 86D of the Act is granted.
- B: Pursuant to s 86D of the Resource Management Act 1991 the following rules take immediate legal effect on the date that the proposed Waimakariri District Plan is notified:
- (a) GRUZ-R41 Residential Unit;
  - (b) GRUZ-R42 Minor Residential Unit;
  - (c) Definitions for ‘minor residential unit’ and ‘residential unit’; and
  - (d) SUB-R10 Subdivision in General Rural Zone.



WAIMAKARIRI DISTRICT COUNCIL

C: The subdivision and land use rules having immediate legal effect are set out in **Annexure A** attached to and forming part of this decision.

## REASONS

### Introduction

[1] Waimakariri District Council has applied for an order under s 86D of the Resource Management Act 1991 seeking that certain rules in the proposed Waimakariri District Plan have immediate legal effect within the proposed General Rural Zone from the date of notification of the proposed plan or immediately upon grant of the order, if the order is made after the proposed plan is notified.

[2] The application is supported by affidavits of:

- James Gordon, farm consultant and director of Macfarlane Rural Business, dated 13 July 2021 (productive potential of the proposed rural zone);
- Yvonne Pflüger, landscape planner employed by Boffa Miskell Ltd, dated 8 July 2021 (landscape and rural character);
- Jane Whyte, director of Response Planning Consultants Ltd, dated 13 July 2021 (planning); and
- Heike Downie, Principal Strategy Analyst – District Development for the Council, dated 12 July 2021 (subdivision pressure, consultation).

[3] The Council has identified rural subdivision and development as a key strategic issue<sup>1</sup> and says that since the District Plan was made operative there has been constant pressure for rural subdivision, particularly from 2018 onwards.<sup>2</sup>

[4] The Council intends notifying a proposed District Plan in September 2021

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<sup>1</sup> Affidavit of H Downie, affirmed 12 July 2021, at [30].

<sup>2</sup> Affidavit of H Downie, affirmed 12 July 2021, at [20].

with new provisions to protect rural productive potential and rural character and amenity. It is concerned that if the proposed rules do not have immediate legal effect, there may be a rush of subdivision and land use applications under the rules of the operative Plan and, were these to be granted, its strategic intention in proposing new rules will be undermined.<sup>3</sup>

[5] The Council explains that the operative Plan contains only one Rural Zone. Under the operative Plan, the minimum lot size for subdivision and residential development in the Rural Zone is 4 ha. Subdivision down to this size is a controlled activity. Construction of a Residential Unit (at this density) is permitted, as is a Minor Residential Unit. The 4 ha threshold has been operative since 2005.<sup>4</sup>

[6] The proposed plan would split the operative Rural Zone into two new rural zones: first, the proposed Rural Lifestyle Zone and second, the proposed Rural Zone.<sup>5</sup> In the proposed Rural Zone, the minimum lot size for subdivision and residential development (one residential unit and one minor residential unit), increases from 4 ha to 20 ha. Subdivision and residential development on land below 20 ha is proposed to be a non-complying activity.<sup>6</sup> The current 4 ha minimum lot size will be retained in that part of the operative Rural Zone which is now proposed to be the Rural Lifestyle Zone. In addition, some sub-20 ha development rights are retained through proposed “legacy” provisions in the proposed Rural Zone.<sup>7</sup>

[7] The rules which would have immediate legal effect (upon notification of the plan, which is proposed to be on or about 18 September 2021) are set out in **Annexure A**.

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<sup>3</sup> Affidavit of H Downie, affirmed 12 July 2021, at [19].

<sup>4</sup> Memorandum of counsel for the Waimakariri District Council, dated 14 July 2021, at [5].

<sup>5</sup> Memorandum of counsel for the Waimakariri District Council, dated 14 July 2021, at [6].

<sup>6</sup> Memorandum of counsel for the Waimakariri District Council, dated 14 July 2021, at [8].

<sup>7</sup> Memorandum of counsel for the Waimakariri District Council, dated 14 July 2021, at [9].

## Grounds for the application

[8] The application is made on the following grounds (*inter alia*):

- (a) subdivision and residential development are placing pressure on rural land in the district;
- (b) the District Council has been reviewing the operative Plan since 2016;
- (c) the operative Plan provisions for subdivision and residential development in the Rural Zone in the operative Plan have caused Council and other persons concern for some time;
- (d) during the Plan review process, Council decided the existing minimum lot size in part of the operative Rural Zone and associated rules require amendment to:
  - (i) protect rural productive potential; and
  - (ii) protect rural character.
- (e) notwithstanding the proposed increased minimum lot size, there remains opportunity for development while submissions are being heard and decided.<sup>8</sup>

[9] The Council's application is founded on:

- (a) the strategic importance of the proposed Rules in retaining the essential rural qualities of productivity and character;
- (b) the finite and vulnerable nature of the rural land resource, with the effects of 4 ha subdivision being almost invariably irreversible;
- (c) historic pressure for 4 ha subdivision and residential development throughout virtually all the proposed Rural Zone, with demand increasing in recent times;
- (d) the order sought would serve to create a "pause" to allow submissions to be heard and decided in the current environment. If the rules are

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<sup>8</sup> Notice of Motion, dated 14 July 2021, at [3].

not approved in their present form, future applications will proceed under whatever minima are decided. In the meantime, the effectiveness and benefits of the increased minimum lot size will not be diluted by development.<sup>9</sup>

### **Section 86D Resource Management Act 1991**

[10] In accordance with s 86B(1) of the Act, rules in a proposed plan ordinarily have legal effect only once a decision on submissions is made and publicly notified under cl 10(4) Schedule 1. Decisions could be made up to two years after notification of the proposed plan.<sup>10</sup>

[11] Section 86D gives the court the power to order that a rule in a proposed plan or change has legal effect from some date other than the standard date, as follows:

#### **86D Environment Court may order rule to have legal effect from date other than standard date**

- (1) In this section, **rule** means a rule—
  - (a) in a proposed plan; and
  - (b) that is not a rule of a type described in section 86B(3)(a) to (e).
- (2) A local authority may apply before or after the proposed plan is publicly notified under clause 5 of Schedule 1 to the Environment Court for a rule to have legal effect from a date other than the date on which the decision on submissions relating to the rule is made and publicly notified under clause 10(4) of Schedule 1.
- (3) If the court grants the application, the order must specify the date from which the rule is to have legal effect, being a date no earlier than the later of—
  - (a) the date that the proposed plan is publicly notified; and
  - (b) the date of the court order.

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<sup>9</sup> Memorandum of counsel for the Waimakariri District Council, dated 14 July 2021, at [35].

<sup>10</sup> RMA, Schedule 1, cl 10(4)(a).

[12] There is no indication given in s 86D as to the matters the court ought to consider when determining such an application. This is not unlike other provisions in the Act (for example s 285), in which case the court's discretion is to be exercised on a principled basis bearing the purpose of the Act in mind.<sup>11</sup> In other words, there must be good reason for the court to depart from Parliament's intention expressed in s 86B of the Act that the rules in a plan have legal effect when the decision on submissions relating to the rule is made and publicly notified.<sup>12</sup>

[13] Often an application under s 86D arises in circumstances where the proposed plan introduces restrictions and there is a danger that there will be a "gold rush" of applications as people try to take advantage of the current rules of the operative district plan.

[14] In *re Thames-Coromandel District Council* the court noted the following themes from previous case law that may be relevant when assessing a s 86D application:<sup>13</sup>

- (a) the nature and effect of the proposed changes by reference to the status quo;
- (b) the basis upon which it can be said that immediate legal effect is necessary to achieve the sustainable management purpose of the Act;
- (c) the spatial extent of the area/s which are to become subject to the proposed changes and/or the approximate number of properties potentially affected;
- (d) consultation (if any) that has been undertaken in relation to the proposed changes;
- (e) whether the application should be limited or publicly notified, including consideration of potential prejudice.

[15] While these themes may provide the court with some guidance, as Judge

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<sup>11</sup> *Re New Plymouth District Council* [2010] NZEnvC 427, (2010) 16 ELRNZ 174 at [8].

<sup>12</sup> Subject to the exceptions stated in s 86D.

<sup>13</sup> *Re Thames-Coromandel District Council* [2013] NZEnvC 292, [2015] NZRMA 315 at [9].

Harland found, they fall short of being principles in themselves.<sup>14</sup>

[16] Counsel for the District Council added:<sup>15</sup>

- (a) whether the proposed changes are the outcome of detailed consideration by the Council under a wider process than just RMA considerations;
- (b) aspects of vulnerability – for example, scarcity of the resources at issue and any irreversible effects;
- (c) pressure on resources.

[17] Taken together, the above encompass procedural and substantive matters relevant to the exercise of the discretionary power under s 86D of the Act.

## **Discussion**

### ***Nature and effect of proposed changes***

[18] The operative Rural Zone rules currently provide for:

- (i) subdivision as a controlled activity subject to compliance with performance standards requiring (*inter alia*) a minimum lot size of 4 ha;
- (ii) one residential unit and one minor residential unit per 4 ha as a permitted activity;
- (iii) one residential unit and one minor residential unit on sites less than 4 ha if the site was created by a subdivision consent granted between 1 October 1991 and 24 February 2001;<sup>16</sup> and
- (iv) any subdivision and residential development which is not controlled

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<sup>14</sup> *Re Thames-Coromandel District Council* [2013] NZEnvC 292, [2015] NZRMA 315 at [10].

<sup>15</sup> With reference to: *re Thames-Coromandel District Council* [2013] NZEnvC 292; *re Palmerston North City Council* [2015] NZEnvC 27; *Environmental Defence Society Inc v Mackenzie District Council* [2016] NZEnvC 253; *re Dunedin City Council* [2015] NZEnvC 165.

<sup>16</sup> Status of this activity is not noted.



or permitted (respectively), is non-complying.<sup>17</sup>

[19] The Council is proposing:

- (a) two rural zones (rather than one), being;
  - (i) proposed Rural Lifestyle Zone; and
  - (ii) proposed Rural Zone; and
- (b) in the proposed Rural Zone, an increase in the minimum lot size for (controlled) subdivision and (permitted) residential development from 4 ha to 20 ha.<sup>18</sup>

[20] If the rules cannot be achieved, the activity will require resource consent as a non-complying activity.<sup>19</sup>

[21] Ms Whyte provided a table comparing activity status of land use activities and subdivision under the operative Rural Zone rules and the proposed Rural Zone rules which is attached as **Annexure B**. She explained that in recognition that there are a number of existing properties between 4-20 ha within the proposed Rural Zone, legacy provisions have been included in the proposed plan provisions. The legacy provisions recognise the following circumstances:

- (a) an existing site between 4-20 ha with no residential unit or minor residential unit – the legacy provisions allow, as a permitted activity, one residential unit and one minor residential unit on the site;
- (b) an existing site between 4-20 ha with a residential unit but no minor residential unit – the legacy provisions allow, as a permitted activity, one minor residential unit on the site;
- (c) a lot between 4-20 ha created on a subdivision approved prior to the notification of the proposed plan but for which a certificate of title

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<sup>17</sup> Notice of Motion, dated 14 July 2021, at [3(e)].

<sup>18</sup> Notice of Motion, dated 14 July 2021, at [3(f)].

<sup>19</sup> Affidavit of J Whyte, affirmed 13 July 2021, at [68].

- has yet to be issued – the legacy provisions allow, as a permitted activity, one residential unit and one minor residential unit on the lot;
- (d) an existing title less than 4 ha which was created by a subdivision consent approved between 1 October 1991 and 24 February 2001 (inclusive of both dates) – the legacy provisions allow, as a permitted activity, one residential unit and one minor residential unit on the site.<sup>20</sup>

[22] A comparison of regulations in the operative Rural Zone and the proposed Rural Zone shows that (other than for existing lots 7.99 ha or below) the development opportunities for residential units, minor residential units and subdivision are reduced. While the legacy provisions go some way to ameliorating the impact of the change, there is a decrease in the potential to develop residential units over that provided in the operative Rural Zone.<sup>21</sup>

***Spatial extent of area subject to proposed changes***

[23] Ms Whyte explains that the operative Rural Zone covers a large area of the Waimakariri District, about 98% of the total land in the district. It covers all areas, other than towns, settlements or rural residential areas.<sup>22</sup> By areal extent, the proposed Rural Zone comprises 68% of the Waimakariri District.<sup>23</sup> The proposed Rural Zone is home to, approximately, 12% of the district's population.<sup>24</sup> Ms Downie estimated that about 6% of the district's total number of households are in the proposed Rural Zone, on lots sized greater than 8 ha, and these could be considered most affected by the change to 20 ha minimum lot size.<sup>25</sup>

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<sup>20</sup> Affidavit of J Whyte, affirmed 13 July 2021, at [45].

<sup>21</sup> Affidavit of J Whyte, affirmed 13 July 2021, at [46].

<sup>22</sup> Affidavit of J Whyte, affirmed 13 July 2021, at [21].

<sup>23</sup> Memorandum of counsel for the Waimakariri District Council, dated 14 July 2021, at [11(a)], affidavit of H Downie, affirmed 12 July 2021, at [15(b)].

<sup>24</sup> Memorandum of counsel for the Waimakariri District Council, dated 14 July 2021, at [11(b)], affidavit of H Downie, affirmed 12 July 2021, at [52].

<sup>25</sup> Affidavit of H Downie, affirmed 12 July 2021, at [26] and [91].

[24] As noted above, there will be legacy provisions that allow some development in the new proposed Rural Zone on sub-20 ha lots. Ms Downie records a number of subdivisions which have been granted consent but have not yet been implemented create the potential for 221 lots between 4 ha and 7.99 ha over both proposed Rural Zones. Additionally, there are 315 lots between 4 ha to 7.99 ha that are created but vacant, which are relatively evenly spread across both proposed Rural Zones.<sup>26</sup> They provide 536 opportunities for living on lots this size in both of the proposed Rural Zones, even if the immediate legal effect order was obtained.<sup>27</sup>

[25] Ms Downie said that the Council is satisfied that people who want a 4 ha block will have an opportunity to attain one over the next couple of years because of the stock that is not yet developed, between the two proposed Rural Zones.<sup>28</sup>

### ***Extent of consultation***

[26] The future of the rural area of the district has been a key consultation topic for about five years. The issue of rural land and density of subdivision has generated considerable community discussion and feedback.<sup>29</sup>

[27] Ms Downie described the Council's plan preparation work and opportunities for community involvement thus far.

### ***District Development Strategy***

[28] In 2016, the Council began work on preparing a District Development Strategy ('DDS') to guide the direction of anticipated residential and business growth over the next 30 years. There were several community engagement steps,

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<sup>26</sup> Affidavit of H Downie, affirmed 12 July 2021, at [50].

<sup>27</sup> Affidavit of H Downie, affirmed 12 July 2021, at [22] and [50].

<sup>28</sup> Affidavit of H Downie, affirmed 12 July 2021, at [53].

<sup>29</sup> Memorandum of counsel for the Waimakariri District Council, dated 14 July 2021, at [36], affidavit of H Downie, affirmed 12 July 2021, at [57] – [83].

including the opportunity for submissions and focus group meetings. The DDS focused on seven key themes pertinent to growth, one of which was “Rural Area and Small Settlements”.<sup>30</sup>

[29] In May 2017, the draft DDS was released for public submissions for five weeks. It proposed a reduction in lifestyle development from the status quo, by way of options for increasing rural development minimum lot size.<sup>31</sup> Eighty eight submissions were received and a hearing was held in August 2017.<sup>32</sup>

#### *District Plan Review*

[30] The Council began its district plan review in 2016, which also involved several community engagement steps.<sup>33</sup> During 2016 the operative Plan was assessed for effectiveness and a report was produced on the rural environment, which concluded that a review of the minimum standard for rural subdivision was needed.<sup>34</sup>

[31] In 2017, the Council released a paper on rural issues and options.<sup>35</sup> The consultation process inviting feedback was advertised in local newspapers, on the Council’s website and on social media. Thirty-one submitters addressed rural topics in their feedback.<sup>36</sup>

[32] In early 2019, the Council released a public engagement document to test proposed district plan directions. This introduced key chapter topics and provided a high-level summary overview of what each proposed chapter would entail, current issues, and what changes Council was considering.<sup>37</sup> The document stated

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<sup>30</sup> Affidavit of H Downie, affirmed 12 July 2021, at [60]–[61].

<sup>31</sup> Affidavit of H Downie, affirmed 12 July 2021, at [67].

<sup>32</sup> Affidavit of H Downie, affirmed 12 July 2021, at [68].

<sup>33</sup> Affidavit of H Downie, affirmed 12 July 2021, at [75].

<sup>34</sup> Affidavit of H Downie, affirmed 12 July 2021, at [76].

<sup>35</sup> Affidavit of H Downie, affirmed 12 July 2021, at [77].

<sup>36</sup> Affidavit of H Downie, affirmed 12 July 2021, at [78].

<sup>37</sup> Affidavit of H Downie, affirmed 12 July 2021, at [79].

an intention to ensure rural areas are mainly for farming (primary production) and that housing density and subdivision are managed to ensure land continues to be available for a range of farming (and supporting) activities, and to maintain rural character.<sup>38</sup> The consultation generated 267 response points from 95 respondents. Rural density was a key topic of interest.<sup>39</sup>

[33] In December 2019, the Council undertook targeted stakeholder discussions with industry groups and individual farmers.<sup>40</sup>

[34] Ms Downie said that throughout the district plan review, the District Council has sought feedback from iwi authority Ngāi Tūāhuriri Rūnanga to ensure proposed provisions for the rural area address matters of particular relevance to tāngata whenua.<sup>41</sup>

***Necessary to achieve the purpose of the Act?***

[35] Council's evidence sets out data on historic 4 ha subdivision activity in the area covered by the Proposed Rural Zone. While subdivision activity fluctuated over the years,<sup>42</sup> in the period between 2017 and 2020, there was an upward trend in the creation of 4 ha to 7.99 ha lots.<sup>43</sup> In recent months, the Council has received 181% more applications for rural lot subdivisions compared to the same period the year prior, with 121% more 4 ha to 7.99 ha lots sought in these applications.<sup>44</sup> There appears to be subdivision pressure for lots sized 4 ha to 7.99 ha both clustered around some existing settlements and also sporadically across the

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<sup>38</sup> Affidavit of H Downie, affirmed 12 July 2021, at [80].

<sup>39</sup> Affidavit of H Downie, affirmed 12 July 2021, at [81].

<sup>40</sup> Affidavit of H Downie, affirmed 12 July 2021, at [82].

<sup>41</sup> Affidavit of H Downie, affirmed 12 July 2021, at [83].

<sup>42</sup> Memorandum of counsel for the Waimakariri District Council, dated 14 July 2021, at [12].

<sup>43</sup> Memorandum of counsel for the Waimakariri District Council, dated 14 July 2021, at [12], affidavit of H Downie, affirmed 12 July 2021, at [41] and [42], Tables 2 and 3 and Figures 2 & 3.

<sup>44</sup> Affidavit of H Downie, affirmed 12 July 2021, at [25] and [88]. 104 subdivision applications were filed compared with 37 applications for the same period the year prior.

proposed Rural Zone.<sup>45</sup>

[36] It is Ms Downie’s opinion, based on recent subdivision data, that it is plausible that without the rules having immediate legal effect, an additional approximately 320 to 390 4 ha to 7.99 ha lots could be created over the next two-year period.<sup>46</sup> Ms Downie says this projection could be considered conservative, as Council believes property owners may be more likely to subdivide “while they still can” once notification occurs.<sup>47</sup>

[37] The Council’s analysis of data and trends, expert reports and consultation has led it to conclude that the 4 ha threshold has not provided effective protection of rural productive capacity and/or rural character and amenity.<sup>48</sup> The Council has witnessed sustained pressure for lifestyle (4 ha) subdivision and development over many years, including a marked increase in the last five years or so.<sup>49</sup>

#### *Rural Character and Amenity*

[38] Ms Pflüger’s evidence addresses consequences of 4 ha subdivision and/or development generally and in the proposed Rural Zone, from a rural character and rural amenity perspective.<sup>50</sup> She considers that the current 4 ha subdivision standard is resulting in sporadic fragmentation of the proposed Rural Zone. It is her view that in places where subdivision to a 4 ha density has been most prevalent within the proposed Rural Zone, the rural character of the landscape is at risk of being lost altogether.<sup>51</sup> Some areas of the proposed Rural Zone have not been modified to the same extent and maintain a distinctive rural character with a predominant openness and lack of residential dwellings. The prospect of small-

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<sup>45</sup> Affidavit of H Downie, affirmed 12 July 2021, at [44] and Exhibit B.

<sup>46</sup> Affidavit of H Downie, affirmed 12 July 2021, at [23] and [48].

<sup>47</sup> Affidavit of H Downie, affirmed 12 July 2021, at [23].

<sup>48</sup> Memorandum of counsel for the Waimakariri District Council, dated 14 July 2021, at [15].

<sup>49</sup> Memorandum of counsel for the Waimakariri District Council, dated 14 July 2021, at [15].

<sup>50</sup> Affidavit of Y Pflüger, affirmed 8 July 2021, at [7].

<sup>51</sup> Affidavit of Y Pflüger, affirmed 8 July 2021, at [9].

lot subdivisions would pose a risk to these more sensitive landscape character areas that generally have a lower ability to absorb change.<sup>52</sup> Overall, Ms Pflüger says that there are different levels of amenity found within the various character areas she describes and different rural landscape attributes that would be protected through a 20 ha subdivision standard, but not protected at 4 ha.<sup>53</sup>

### *Rural Production Land*

[39] Mr Gordon's affidavit addressed pressures on rural production land in the Waimakariri district. He explains that the Waimakariri district has significant areas of flat, highly productive land, large areas of which have a land use capability classification of LUC 1-3.<sup>54</sup> Much of the recent growth in smaller rural lots has been in areas containing deeper soils.<sup>55</sup> Over time loss of this land reduces agricultural versatility and diversification, with some rural production unable to be efficiently transferred to other classes of land.<sup>56</sup> Once this land is subdivided and developed for lifestyle properties, the effect on productive potential is almost invariably irreversible.<sup>57</sup>

[40] Mr Gordon considered the minimum productive land areas for different primary production systems.<sup>58</sup> His opinion is that small lifestyle properties (less than 8 ha) are not usually capable of sustaining many rural production systems and will generally negatively impact on the rural production per hectare.<sup>59</sup> On the other hand an increase in minimum lot size to 20 ha will generally provide sufficient size for land to be farmed in a manner that will maintain production and profitability

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<sup>52</sup> Affidavit of Y Pflüger, affirmed 8 July 2021, at [10].

<sup>53</sup> Affidavit of Y Pflüger, affirmed 8 July 2021, at [68].

<sup>54</sup> Affidavit of J Gordon, affirmed 13 July 2021, at [14],[18]. Land with this classification is regarded as the most highly productive land in New Zealand.

<sup>55</sup> Affidavit of J Gordon, affirmed 13 July 2021, at [27]-[28].

<sup>56</sup> Affidavit of J Gordon, affirmed 13 July 2021, at [63].

<sup>57</sup> Affidavit of J Gordon, affirmed 13 July 2021, at [18].

<sup>58</sup> Affidavit of J Gordon, affirmed 13 July 2021, at [50].

<sup>59</sup> Affidavit of J Gordon, affirmed 13 July 2021, at [54].

and at the same time reduce the attractiveness of this land for lifestyle purposes.<sup>60</sup>

[41] A change in minimum lot size could reduce land values, as land subdivided for lifestyle purposes generally has a higher value per hectare. Mr Gordon notes the potential for the new subdivision rules to negatively impact land prices and decrease equity with consequential effects on rural investment and land development. On the other hand, lifestyle properties can have a land value exceeding the economic value of the land, effectively shutting out farmers from the market who are seeking to profitably expand and/or establish new farms.<sup>61</sup>

[42] Mr Gordon also addressed the impact of refusing this application. He said that should the minimum lot size of 4 ha be maintained for the next two years, but with farmers knowing that might change to 20 ha, there is a high likelihood that subdivision will escalate as landowners seek to protect their financial future.<sup>62</sup>

#### *Planning Instruments*

[43] Ms Whyte, giving planning evidence in support of the notice of motion, addressed the Canterbury Regional Policy Statement ('RPS') provisions on the rural environment, including primary production (Objective 5.2.1(e)). While the RPS enables development, it also seeks to ensure that any adverse effects of the same do not compromise or foreclose on the productivity of the region's soil resources (Policy 5.3.2) or upon the ability to make appropriate use of land for primary production (Policy 5.3.12). The salience of Mr Gordon's evidence is in that allowing for continued subdivision at 4 ha may not be giving effect to the RPS directions.<sup>63</sup>

[44] Ms Whyte also noted the draft National Policy Statement for Highly Productive Land. While this document is not operative, the draft identifies that

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<sup>60</sup> Affidavit of J Gordon, affirmed 13 July 2021, at [48].

<sup>61</sup> Affidavit of J Gordon, affirmed 13 July 2021, at [65]-[66].

<sup>62</sup> Affidavit of J Gordon, affirmed 13 July 2021, at [61].

<sup>63</sup> Affidavit of J Whyte, affirmed 13 July 2021, at [61].



maintaining the availability of land for primary production for future generations is an important resource management issue.<sup>64</sup>

[45] The Council says that because this is a change of some significance and because there is no existing regulatory mechanism that the Council could employ to slow down the rate of 4 ha subdivision or development, the Council has decided there is both need and sound reason for the rules to have legal effect immediately upon notification of the proposed plan.<sup>65</sup>

[46] Council submits the evidence shows that, in the main, the negative effects of 4 ha development are almost always irreversible.<sup>66</sup> It appears to the Council, and evidence was led to substantiate this claim, that a “gold rush” for 4 ha development is already underway.<sup>67</sup> There is no apparent reason to expect pressure for 4 ha development to subside.<sup>68</sup>

[47] The Council noted that life-supporting capacity of soil is also a pre-eminent issue in pt 2 of the RMA.<sup>69</sup> Rural character is also an important and integral component of the tapestry of pt 2, by dint of its contribution to the amenity values of the proposed Rural Zone.<sup>70</sup> It is submitted that pt 2 of the RMA also supports the legal submission that both the proposed rules and this application are of strategic importance.<sup>71</sup>

## **Findings**

[48] The notice of motion and supporting affidavits are thorough in their

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<sup>64</sup> Affidavit of J Whyte, affirmed 13 July 2021, at [53]-[55].

<sup>65</sup> Memorandum of counsel for the Waimakariri District Council, dated 14 July 2021, at [17].

<sup>66</sup> Memorandum of counsel for the Waimakariri District Council, dated 14 July 2021, at [42], affidavit of J Gordon, affirmed 13 July 2021, at [18].

<sup>67</sup> Memorandum of counsel for the Waimakariri District Council, dated 14 July 2021, at [46].

<sup>68</sup> Memorandum of counsel for the Waimakariri District Council, dated 14 July 2021, at [49].

<sup>69</sup> Memorandum of counsel for the Waimakariri District Council, dated 14 July 2021, at [37].

<sup>70</sup> Memorandum of counsel for the Waimakariri District Council, dated 14 July 2021, at [38].

<sup>71</sup> Memorandum of counsel for the Waimakariri District Council, dated 14 July 2021, at [37].

examination of the facts in support of the orders being made.

[49] The Council has engaged in extensive public consultation to inform its policy platform and the content of rules, with the public being afforded a number of ways to make their views on the use of the rural resource known. The notification of the proposed plan and the opportunity for the public to make submissions on its provisions provide an on-going pathway for the public's involvement in the proposed plan.

[50] The consequence of the orders is that the proposed rules will have immediate effect. The public have the right to contest the proposed rules by making submissions on the proposed plan, when it is notified. The dampening of current policy support for subdivisions below 20 ha post notification of the proposed plan is an opportunity cost for owners of rural land; in addition, there may be a negative effect on land equity. Further – in common with most plan changes – there will be additional cost in preparing and supporting applications for subdivision and land use consent, coupled with uncertainty around the outcome of the same.

[51] That said, the Council presents good reasons for identifying rural subdivision and development as a key strategic issue for the District. The evidence satisfies me that there is a case to answer as to whether the operative plan is giving effect to the RPS in respect of the productivity of the region's soil resources and the ability to use land for primary production. It is important to record that these outcomes under the RPS are elaborating upon the requirements of pt 2, s 7 of the Act to have particular regard to kaitiakitanga (s 7(a)), the ethic of stewardship (s 7(aa)) and the finite characteristics of natural and physical resources (s 7(g)). Given the above, I am satisfied that the purpose of the Act will be met if the notice of motion is granted.

***Whether the application should be limited or publicly notified including consideration of potential prejudice***

[52] Council submits that it is appropriate in the circumstances to proceed *ex parte*, as to notify the applications would invariably lead to substantial delay and may enable subdivision and development to take place in the interim, undermining the Council's intent and objectives for the Rural Zone.<sup>72</sup> Delay could also defeat the Parliamentary purpose in allowing councils to make applications under s 86D.<sup>73</sup>

[53] Council has widely consulted on the issues associated with the direction of the rural zone and a change in the minimum lot size in the Rural Zone since 2016. Consultation has not been limited to that required by the Act – it has gone much wider.<sup>74</sup> The consultation undertaken has provided a clear signal as to the Council's intended direction, and so the public has known, for some time that the regulatory environment was under review.<sup>75</sup> It is also evident that there is public knowledge of the proposed change through other means.<sup>76</sup> Naming a local surveying and planning firm, the Council says some consultants are encouraging their clients to apply for subdivision consents “while they can”. The Council does so to demonstrate the risks associated with not granting the orders sought, but also because this provides further comfort that rural landowners are not (or ought not) to be blind-sided by notification of the proposed rules.<sup>77</sup>

[54] The Council suggests that if the court has residual concerns about the application proceeding on a non-notified basis, these can be overcome by reserving leave to any person affected to apply to set the orders aside.<sup>78</sup>

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<sup>72</sup> Memorandum of counsel for the Waimakariri District Council, dated 14 July 2021, at [53(c)].

<sup>73</sup> Memorandum of counsel for the Waimakariri District Council, dated 14 July 2021, at [53(d)].

<sup>74</sup> Memorandum of counsel for the Waimakariri District Council, dated 14 July 2021, at [53(f)].

<sup>75</sup> Memorandum of counsel for the Waimakariri District Council, dated 14 July 2021, at [53(g)].

<sup>76</sup> Memorandum of counsel for the Waimakariri District Council, dated 14 July 2021, at [53(h)]. Affidavit of H Downie, affirmed 12 July 2021, at Exhibit J and K – details advertising through Facebook and a local newspaper by a consultancy of prospective changes to the Plan.

<sup>77</sup> Memorandum of counsel for the Waimakariri District Council, dated 14 July 2021, at [53(h)].

<sup>78</sup> Memorandum of counsel for the Waimakariri District Council, dated 14 July 2021, at [54],

[55] The evidence supports a finding, *prima facie*, that were the notice of motion notified, there would be a further ramping up of applications for subdivision and land use as has occurred in response to the Council's public consultation. Indeed, annexed to the affidavit of Ms H Downie, Principal Strategy Analyst for the District Council, is an email dated 24 May 2021 from the same surveying and planning firm enquiring whether there is any truth in the rumour that the District Council would apply to the Environment Court to make the orders effective immediately.<sup>79</sup>

[56] I am satisfied that the notice of motion can be granted *ex parte*. While land owners will be impacted by the rules having legal effect, the potential prejudice that might otherwise arise from a grant of orders *ex parte* has been buffered by the Council's extensive public consultation. Through its consultation the District Council has been signalling that it was considering a change to rural subdivision and land use policies.

### **Outcome**

[57] The application under s 86D of the Act is granted.

[58] Pursuant to s 86D of the Act the court orders that the following parts of the proposed Waimakariri District Plan take legal effect on the date that the proposed plan is notified:

- (i) GRUZ-R41 Residential Unit;
- (ii) GRUZ-R42 Minor Residential Unit;
- (iii) Definitions for 'minor residential unit' and 'residential unit'; and
- (iv) SUB-R10 Subdivision in General Rural Zone.

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referring to *re Dunedin City Council* [2015] NZEnvC 165 at [76].

<sup>79</sup> Affidavit of H Downie, affirmed 12 July 2021, Exhibit L.

[59] The subdivision and land use rules having immediate legal effect are set out in **Annexure A** attached to and forming part of this decision.

Jane S.



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**J E Borthwick**  
**Environment Judge**

**Annexure A<sup>80</sup>**  
**Immediate Legal Effect Provisions**

**GRUZ-R41 Residential Unit**

Activity status: NC

Where:

1. a residential unit is located on a site with a minimum net site area of less than 20 ha; or
2. the site of the residential unit is an allotment that existed prior to *[notification date of this District Plan]* with a minimum net site area of 4 ha or more but less than 20 ha and has more than one residential unit; or
3. the site is subject to a subdivision consent that was granted prior to *[notification date of this District Plan]*, with a minimum net site area of 4 ha or more but less than 20 ha and has not been issued with certification under Section 224 of the RMA, and has more than one residential unit; or
4. the site has a minimum net site area less than 4 ha and it is a site or an allotment that was created by subdivision and was on a subdivision consent between 1 October 1991 and 24 February 2001 (inclusive of both dates) and has more than one residential unit; or
5. where more than one residential unit is located on a site, it is contained within its own delineated area and the delineated area has a minimum net site area less than 20 ha.

**GRUZ-R42 Minor Residential Unit**

Activity status: NC

Where:

1. a minor residential unit is located on a site with a minimum net site area of less than 20 ha; or

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<sup>80</sup> Affidavit of J Whyte, affirmed 13 July 2021, at Exhibit A.

2. the site of the minor residential unit is an allotment that existed prior to *[notification date of this District Plan]* with a minimum net site area of 4 ha or more but less than 20 ha and has more than one minor residential unit; or
3. the site is subject to a subdivision consent that was granted prior to *[notification date of this District Plan]*, with a minimum net site area of 4 ha or more but less than 20 ha and has not been issued with certification under Section 224 of the RMA, and has more than one minor residential unit; or
4. the site has a minimum net site area less than 4 ha and it is a site or an allotment that was created by subdivision and was on a subdivision consent between 1 October 1991 and 24 February 2001 (inclusive of both dates) and has more than one minor residential unit; or
5. where more than one minor residential unit is located on a site it is contained within its own delineated area and the delineated area has a minimum net site area less than 20 ha.

### **Definitions**

**minor residential unit** – means a self-contained residential unit that is ancillary to the principal residential unit, and is held in common ownership with the principal residential unit on the same site.

**residential unit** – means a building(s) or part of a building that is used for a residential activity exclusively by one household, and must include sleeping, cooking, bathing and toilet facilities.

### **SUB-R10 Subdivision in General Rural Zone**

Activity status: NC

Where:

1. subdivision creates an allotment with a minimum allotment area less than 20 ha, except where a subdivision takes place to accommodate infrastructure.

Annexure B<sup>81</sup>

## Regulation Comparison Tables

<b>LAND USE ACTIVITY</b>	<b>ACTIVITY STATUS - OPERATIVE RURAL ZONE</b>	<b>ACTIVITY STATUS - PROPOSED RURAL ZONE</b>
Establish a Residential Unit on less than 4 ha	Non-complying unless: An existing lot created on a subdivision consent between 1 October 1991 and 24 February 2001 (inclusive of both dates)	Non-complying unless: An existing lot created on a subdivision consent between 1 October 1991 and 24 February 2001 (inclusive of both dates)
Establish a Minor Residential Unit on less than 4 ha	Non-complying unless: An existing lot created on a subdivision consent between 1 October 1991 and 24 February 2001 (inclusive of both dates)	Non-complying unless: An existing lot created on a subdivision consent between 1 October 1991 and 24 February 2001 (inclusive of both dates)
Establish a Residential Unit on a lot that is more than 4 ha but less than 20 ha	Permitted at a density of 1 residential unit per 4 ha	Non-complying unless: <ul style="list-style-type: none"> <li>• The lot was existing prior to the notification of the Proposed plan and has no existing residential unit;</li> <li>• The lot was created on a subdivision approved prior to the notification of the Proposed plan and has no existing residential unit</li> </ul>
Establish a Minor Residential Unit on a lot that is more than 4 ha but less than 20 ha	Permitted at a density of 1 residential unit per 4 ha	Non-complying unless: <ul style="list-style-type: none"> <li>• The lot was existing prior to the notification of the Proposed plan and has no existing residential unit</li> <li>• The lot was created on a subdivision approved prior to the notification of the Proposed plan and has no existing residential unit</li> </ul>
Establish a Residential Unit on a lot that is more than 20 ha	Permitted at a density of 1 residential unit per 4 ha	Permitted at a density of 1 residential unit per 20 ha
Establish a Minor Residential Unit on a lot that is more than 20 ha	Permitted at a density of 1 residential unit per 4 ha	Permitted at a density of 1 residential unit per 20 ha

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<sup>81</sup> Affidavit of J Whyte, affirmed 13 July 2021, at Exhibit G.



SUBDIVISION	ACTIVITY STATUS – OPERATIVE RURAL ZONE	ACTIVITY STATUS – PROPOSED RURAL ZONE
Subdivide a lot with a minimum lot size less than 4 ha	Non-complying	Non-complying
Subdivide a lot with a minimum lot size more than 4 ha but less than 20 ha	Controlled with a minimum lot size of 4 ha	Non-complying
Subdivide a lot with a minimum lot size more than 20 ha	Controlled with a minimum lot size of 4 ha	Controlled with a minimum lot size of 20 ha or more
Subdivide a lot in an Outstanding Natural Landscape with a minimum lot size more than 20 ha	Discretionary	Discretionary <sup>82</sup>
Subdivide a lot in an Outstanding Natural Landscape with a minimum lot size less than 20 ha	Discretionary	Non-complying




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<sup>82</sup> Aside from Rules GRUZ-R41, GRUZ-R42 and SUB-R10, the Proposed Plan provisions referred to are draft provisions, which are subject to consideration and approval by Waimakariri District Council.