District Planning and Regulation Committee

Agenda

Tuesday 19 June 2018

1.00pm

Waimakariri District Council Chambers
215 High Street
Rangiora

Members:
Cr Dan Gordon (Chairperson)
Cr Neville Atkinson
Cr Wendy Doody
Cr John Meyer
Cr Sandra Stewart
Mayor David Ayers (ex officio)
The Chairman and Members
DISTRIBUTION PLANNING AND CONSCRIPTION COMMITTEE

A meeting of the DISTRICT PLANNING AND REGULATION COMMITTEE will be held in the COUNCIL CHAMBER, 215 HIGH STREET, RANGIORA, on TUESDAY 19 JUNE 2018 at 1.00PM.

Adrienne Smith
Committee Advisor

Recommendations in reports are not to be construed as Council policy until adopted by the Council

BUSINESS

1. APOLOGIES

2. CONFLICTS OF INTEREST

Conflicts of interest (if any) to be reported for minuting.

3. CONFIRMATION OF MINUTES

3.1 Minutes of a meeting of the District Planning and Regulation Committee held on 17 April 2018

RECOMMENDATION

THAT the District Planning and Regulation Committee:

(a) Confirms as a true and correct record the minutes of a meeting of the District Planning and Regulation Committee held on 17 April 2018.

4. MATTERS ARISING FROM THE MINUTES

5. DEPUTATION
6. REPORTS

6.1 Background to Notification Process – P Mulligan, 19 Jacksons Road, Ohoka – Matthew Bacon, (Planning Manager)

RECOMMENDATION

THAT the District Planning and Regulation Committee

(a) Receives report No. 180529058960

(b) Notes the recommendation in the s95 assessment of Stephanie Styles as set out in report No. (180529059149)

(c) Determines that full notification of RC165110 (P Mulligan, 19 Jacksons Road, Ohoka) occurs under s95A of the Resource Management Act 1991.

7. PORTFOLIO UPDATES

7.1 District Planning Development - Councillor Neville Atkinson

7.2 Regulation and Civil Defence – Councillor John Meyer

7.3 Business, Promotion and Town Centres – Councillor Dan Gordon

8. QUESTIONS

9. URGENT GENERAL BUSINESS
1. **APOLOGIES**

   Moved: Councillor Meyer    Seconded: Mayor Ayers

   An apology was received and sustained from W Doody for lateness.  
   CARRIED

2. **CONFLICTS OF INTEREST**

   Nil.

3. **CONFIRMATION OF MINUTES**

   3.1 **Minutes of a meeting of the District Planning and Regulation Committee held on 15 August 2017**

   Moved: Councillor Doody    Seconded: Councillor Atkinson

   THAT the District Planning and Regulation Committee:

   (a) Confirms as a true and correct record the minutes of a meeting of the District Planning and Regulation Committee held on 15 August 2017.

   CARRIED

4. **MATTERS ARISING FROM THE MINUTES**

   Nil.

5. **DEPUTATION**

   Peter Mulligan spoke to the Committee regarding his lodging of an application for land use consent. He tabled a handout showing a copy of the title and plan of the lots in question. The plan showed Lot 1 – Ohoka Homestead and Lots 2 and 3 which he owned.

   P Mulligan outlined a timeline, a consent application was lodged 20 April 2016. There was a planning report 2 June 2016 advising that considered effects of activity were less than minor and an application for two land use consents concerning Lots 2 and 3 were subject to
full notification. He was also advised Lot 3 was a non-complying activity and must be publicly notified. On 7 September 2016 Council sought a legal opinion on the matter from Adderley Head. P Mulligan advised staff he wished to address the Council regarding the application, and it was suggested he await the legal opinion. Following subsequent telephone discussions, P Mulligan requested on 21 November 2016 a copy of the legal opinion and a date to address the Council. He was advised that the Adderley Head opinion was in a peer review process and he would not receive a copy as it was privileged.

P Mulligan wished to ask the Committee:
1. Was the application for land use consent permitted?
2. If not permitted, was it a restricted discretionary activity?
3. If neither of the above, was it non-complying?

Mayor Ayers asked how long P Mulligan had owned the lots. P Mulligan advised that he had brought the Ohoka Homestead in 1974.

Mayor Ayers asked were Lots 2 and 3 linked as collectively they met the 4 hectare rule under the District Plan, however separately each one did not. P Mulligan confirmed that was the case and that Lots 2 and 3 were split by the driveway to the Ohoka Homestead. In a supplementary question D Ayers asked if P Mulligan had undertaken the subdivision and if at that time Lots 2 and 3 had encumbrance to build on one of those titles. P Mulligan replied yes, at that time it was only possible to build on one of the lots.

Mayor Ayers asked if P Mulligan was aware that other property owners in the district who wanted to build on rural lots less than 4 hectares went to public notification sometimes with success, sometimes not. P Mulligan replied in this case there was an exemption under the District Plan that any Lot between two dates did not need to comply with the 4 hectare rule.

Councillor Meyer asked if P Mulligan created the titles. P Mulligan replied yes, when he sold the Ohoka Homestead the purchaser did not want the whole lot of land.

Councillor Gordon asked why Lots 2 and 3 were not conjoined at the time and P Mulligan replied it was not possible due to the driveway strip.

Councillor Gordon asked if P Mulligan had sought the views of the Ohoka Homestead owners and if they objected or supported. P Mulligan replied they were not aware of his plans. In a supplementary question D Gordon asked for clarity in what P Mulligan wanted to do with the lots and P Mulligan replied he wanted to build on Lot 3 and sell Lot 2.

Councillor Gordon asked if there could be a staff report on the issue. There was further information including the legal opinions that the Committee had not seen and so were not aware of the full context. N Harrison commented it was a complex issue with two legal opinions.

Councillor Meyer expressed appreciation for P Mulligan attending the committee and advised staff would keep in touch.

6. REPORTS

6.1 Review of Local Alcohol Policy and Liquor Ban Bylaw – L Beckingsale (Policy Analyst)

L Beckingsale spoke to the report advising it was to request approval for public consultation regarding the review of the Local Alcohol Policy and Liquor Ban Bylaw 2007. She advised that Martin Bell (Corcoran French) was assisting with legal advice, with a legal opinion anticipated the following week, however it was expected there should be no significant changes. One of the changes made was in relation to Child Focused events to make sure the policy was correct and clear legally.

Senior Sergeant M Emery of the NZ Police was also present.
L Beckingsale noted that the research report further discussed police data – incidences which could potentially have alcohol as a component, in particular the location of particular incidents between the timeframe of 9pm and 3am. It was an educated guess these incidents were fuelled by alcohol and there was no causal link.

L Beckingsale advised that the Committee had three options regarding the bylaw. The first was to review the bylaw, the second was to revoke the bylaw and the third was to let the bylaw lapse (the least preferred option) as the public would not have the opportunity to express a view.

Councillor Atkinson noted that the option for recommendation was either approves the draft Alcohol Control Bylaw for public consultation or approves the revocation of the Liquor Ban Bylaw. He agreed with going out to the public but he wanted to ensure that consultation would be in such a way that information was provided so that the decision could go either way. Councillor Atkinson stated he did not want the same situation as had happened in the Representation Review where consultation had been in such a way that a proposed alternative could not be considered as it had not been consulted on. L Beckingsale acknowledged the comments and suggested there could be an option in the Statement of Proposal that the Bylaw could be revoked, however she would need to re-check the Act as to whether it could be revoked under this consultation or another process.

Councillor Doody referred to alcohol related crime and asked was it drug and alcohol related or strictly alcohol. L Beckingsale advised that for this purpose it was only alcohol as it was regarding the Local Alcohol Policy. In a supplementary question Councillor Doody asked if the Police could tell if it was strictly alcohol with no component of drug. L Beckingsale commented there was a cross over, talking to Wellington analysts the potentially alcohol related component was indicative rather than absolute. There may be drug influences and alcohol was a potential component of those crimes.

Councillor Gordon asked Senior Sergeant M Emery if he supported the draft Local Alcohol Policy and SS M Emery confirmed he supported it remaining in place with amendments. The Police would not like to see the Policy revoked. The fact that a number of offences were small was testament of the bylaw working. In a supplementary question Councillor Gordon asked if the Police sought any changes and M Emery replied possibly an extension to the area.

Councillor Gordon noted a legal opinion coming and asked staff what would happen if it suggested major changes. L Beckingsale advised it would be brought back to the Committee and the timeframe would be altered as the Policy could not go out to consultation without having been approved. Councillor Gordon suggested an amendment to the recommendation allowing minor changes to be approved by the Committee Chairperson.

Councillor Blackie referred to the harassment and abduction statistics in the Waimakariri, noting that they were above the National average, and asked how that fitted with the advice given by the Police when abolishing the Community Constable position which was that the crime rate was low. SS M Emery advised it was not a matter he was informed on, as he was new to the Waimakariri Rural area and could not comment. In a supplementary question Councillor Blackie asked why explosives and firearms offences were more than twice the national average and SS M Emery explained it was due to the rural nature of the District.

Councillor Atkinson reiterated his concern to make sure that both bases were covered in consultation to ensure an in-depth discussion both ways. N Harrison suggested that the Summary of Information could clearly cover the amendment of revocation of the bylaw. L Beckingsale added that it could also be covered in the Statement of Proposal to make clear both options were available.
THAT the District Planning and Regulation Committee

(a) Receives report No. 180405036425.

(b) Approves the draft Local Alcohol Policy for public consultation in accordance with Section 83 of the Local Government Act 2002 subject to minor amendments as approved by the Chair.

(c) Approves the replacement of the Liquor Ban Bylaw with the draft Alcohol Control Bylaw for public consultation in accordance with Section 83 of the Local Government Act 2002.

(d) Approves the form of the Summary of Information as included in the attachment, in accordance with Section 83AA of the Local Government Act 2002.

(e) Notes the submissions on the policy and the bylaw will open on 11 May 2018 and close on 8 June 2018.

(f) Notes that consultation will be in the form of public notices and advertisements in local newspapers, with information available at Council Service Centres and Libraries and on the Council’s website and social media pages. Information will be sent to all licensees, the Medical Officer of Health and New Zealand Police.

CARRIED

Mayor Ayers commented that during public consultation people could submit on revoking the bylaw and that the wording did not need to change, it was standard procedure for public consultation. The Council was fully empowered to make changes because of consultation and he reflected on the Dudley Park Aquatic Centre as an example of that.

Councillor Atkinson stated he wanted to ensure the revocation option was available. He commented many bylaws were created for good reasons at the time but were nonsensical. With no disrespect, he believed that the Police toolbox was heavy, at the cost of the Council, and whilst the Police administered the bylaw it was the Council that bore the associated cost. Councillor Atkinson rhetorically asked if that was the job of the Council and he wanted to allow that conversation teased out by having a look at both sides.

Councillor Gordon supported the comments of Councillor Atkinson, stating clarity around what was being consulted on with the public was required, which is the reason for the discussion around the recommendation. He stated they had the support of the Police on this and they wanted it in their toolbox.

7. MATTER REFERRED FROM THE REGENERATION STEERING GROUP MEETING OF 9 APRIL 2018

7.1 Regeneration Areas – District Plan matters – T Ellis (Development Planning Manager) and M Flanagan (District Regeneration – Landscape Planner)

M Flanagan spoke to the report noting that its purpose was to seek approval to undertake any District Plan changes as part of the Waimakariri Red Zone Recovery Plan (Recovery Plan) through the District Plan review process. M Flanagan advised that the Council had two options for District Plan changes necessary to implement the Recovery Plan. Option 1, plan changes via the Greater Christchurch Regeneration Act (GCR Act) and Option 2, plan changes via the Resource Management Act (through the District Plan Review process).
M Flanagan advised that the current District Plan zones were not considered a significant impediment to the implementation of the Recovery Plan. In addition, plan changes made through the District Plan Review process would take into account additional research, allow greater consistency and mean resources would not be taken away from the District Plan Review.

Mayor Ayers asked what would happen in the situation where someone wanted to establish a business in the mixed use area in the interim. M Flanagan said that could be accommodated in the RMA process and if it was a significant development the Council could look at advancing a plan change through the GCR Act. T Ellis reiterated that if someone approached the Council wanting to locate a business in the mixed use zone they would not be turned away and the proposal would be considered.

Moved Councillor Atkinson         Seconded: Councillor Gordon

THAT the District Planning and Regulation Committee:

(a) Receives report No. 180307023913.

(b) Approves the retention of the existing Waimakariri District Plan zones for the implementation of the agreed land uses in the Waimakariri Residential Red Zone Recovery Plan until they are replaced by those in the Reviewed Waimakariri District Plan.

(c) Approves any changes to District Plan zones in the Regeneration Areas, affecting the reserve, rural, private lease, or private residential land uses, being advanced via the District Plan Review.

(d) Notes that the zoning approach for the mixed-use business areas will be considered through Kaiapoi Town Centre Plan refresh currently underway (Kaiapoi 2028).

(e) Notes that should consent be required for interim use of the regeneration areas referred to in (c) above, this would proceed via resource consent processes consistent with current practice.

CARRIED

Councillor Atkinson commented that the staff response to the Mayor’s question had answered his questions and he accepted the approach. He reiterated that the GCR Act was for a purpose.

Mayor Ayers commented that it was important that any proposal from outside could move quickly. Private plan changes could take a long time and he would not like to see roadblocks to moving forward and the possibility of losing opportunities. He assumed the regulatory working party would be involved at an early stage.

8. PORTFOLIO UPDATES

8.1 District Planning Development

Councillor Atkinson commented that the LTP consultation process had been successful with a good number of submissions. He congratulated the communications staff on their communication with everyone.

8.2 Regulation and Civil Defence

Councillor Meyer commented that while ‘we as a group work hard, staff work harder’.
8.3 **Business, Promotion and Town Centres**

Councillor Gordon noted that it had been a busy period in business promotion and town centres. In particular working with Kaiapoi-Tuahiwi Community Board and Kaiapoi Promotions Association (KPA) regarding a review of the annual Christmas Parade and reconnections with businesses in the community which would be undertaken with staff and with ENC support.

A meeting had been held the previous week with all Town Promotions groups discussing setting up Service Level Agreements, better reporting and managing expectations. In addition, there had been discussion around electric vehicle charging stations and Christmas flags. The CE of Mainpower had advised there was a high cost to putting up decorative flags on power poles.

Councillor Gordon advised he was having regular meetings with S Hart (Business & Centres Manager) who had a good understanding on issues in the town centres.

S Stewart asked what did the review of the Kaiapoi Carnival and Christmas Parade by staff and ENC mean, and was there going to be a Christmas Parade in Kaiapoi this year. Councillor Gordon replied that was the expectation, concerns had been raised by colleagues and members of the community. Staff would work alongside to support the outcome. KPA was currently in the process of confirming a new coordinator.

9. **QUESTIONS**

Nil.

10. **URGENT GENERAL BUSINESS**

Nil.

There being no further business, the meeting closed at 2.01pm.

CONFIRMED

__________________________
Chairperson

__________________________
Date

Following the meeting a public excluded briefing was held. G Wilson (Building WOFs and Earthquake Prone Buildings) presented information in relation to earthquake prone buildings.
1. SUMMARY

1.1 This report presents a summary of the notification process for resource consent RC165110 (P Mulligan, 19 Jacksons Road, Ohoka) and requests that the Committee confirm the delegation process to make a decision on notification of the resource consent under s95 of the Resource Management Act 1991 (the Act).

1.2 The report is supported by a recommendation from an independent planning consultant appointed by the Council to make a recommendation on notification of the resource consent application. This report, prepared by Ms Stephanie Styles, concludes that notification under s95A of the Act is appropriate (full notification).

1.3 The Committee has the option to confirm to make the notification decision itself as delegated by Council, or to appoint an independent planning consultant to make the notification decision.

Attachments:

i. s95A Resource Management Act 1991 report by Stephanie Styles, Boffa Miskell (TRIM)
ii. Draft Legal Opinion – Adderley Head (161011104390)
iii. Legal Opinion Peer Review – Cavell Leitch (180418042229)

2. RECOMMENDATION

THAT the District Planning and Regulation Committee:

(a) Receives report No. 180529058960

(b) Notes the recommendation in the s95 assessment of Stephanie Styles as set out in report No. (180529059149)

(c) Determines that full notification of RC165110 (P Mulligan, 19 Jacksons Road, Ohoka) occurs under s95A of the Resource Management Act 1991.
3. **BACKGROUND**

3.1 In 2016 subdivision and land use consents were lodged by P Mulligan to separate Lots 2 and 3, retain the existing dwelling on Lot 2 (with 3.5370 ha of associated land), and erect a new dwelling on Lot 3 (with 1.0720 ha of associated land).

3.2 Throughout the processing of the applications, a question on the applicability of the definition of the term 'site' was raised in the context of the use of the 'grandfather clause' exception which enables an allowance for a dwelling on a site created in the period of transition between the former Plan and the current Plan. This exemption recognised that some sites had been created specifically for the purpose of residential development at a scale that would no longer be permitted under the new Plan, and the rule provided a transition period for development to proceed.

3.3 In order to resolve this question a legal opinion was sought from Adderley Head solicitors. This draft legal opinion, attached as appendix 'ii' concluded that the use of the grandfather clause exemption was available to the applicant.

3.4 In reviewing this draft opinion staff considered that it raised a number of questions with regards to the applicability of the opinion in the context of the understanding of the original purpose of the 'grandfather clause', to address a rural subdivision where titles had been issued prior to the implementation of the then new District Plan. This peer review, completed by Cavell Leitch and attached as Appendix 'iii' concludes that the use of the 'grandfather clause' is not available to the applicant, and concludes that the activity is a non-complying activity.

3.5 Following the Cavell Leitch legal opinion, Mr Mulligan withdrew the request for subdivision consent and requested that processing of the required land use consents for the new dwelling and the retention of the existing dwelling continue.

3.6 Following this withdrawal of the subdivision consent application, staff engaged an independent planning consultant to review both opinions and provide a notification recommendation on the land use consent applications. Planning Consultant Stephanie Styles has reviewed the application and has formed a preliminary view that notification would be required, as summarised below:

> "my view (having considered the proposal and issues as set out above but not having undertaken a full analysis under s95 of the RMA) is that the adverse effects of the proposal would be more than minor and thus public notification of this application would be appropriate under sections 95A-95E of the Act"

3.7 This recommendation has been reviewed by staff and is supported; however, the recommendation has not been adopted following a request from the applicant, to address the Committee.

3.8 Mr Mulligan addressed the Committee at the April 2018 and the Committee has requested this report.

4. **ISSUES AND OPTIONS**

4.1. There are two options available to the Committee:

   (1) To make a decision on the notification of the application as delegated by the Council; or,
(2) To appoint an independent planning commissioner to make a decision on the application.

4.2 Both options require the decision maker to make a decision in accordance with section 95 of the Act. The report of Ms Styles sets out the notification process and provides a recommendation that the consent is subject to a full notification process.

4.3 Option (1) would effectively allow the decision on notification to be made ‘in house’ and have the advantage of reducing the time taken to make a recommendation on the process that the application will follow. The eventual decision on the application is a separate decision that is assessed under the requirements of Section 104 of the Act; and requires consideration of a number of other matters including (but not limited to) any cumulative effects, precedent effects, or any other matter deemed appropriate by the decision maker.

4.4 Option (2) would require Council to engage an independent Planning Consultant with a commissioner accreditation to make a decision on notification. Option (2) has the disadvantage of additional time and cost to make the decision; with a further consideration of the reasonableness of passing this cost on to the applicant.

4.5 The recommendation from staff is to confirm Option (1). The reason for this recommendation reflects the need to process the application as efficiently as possible, and the fact that a qualified and experienced independent Planning Consultant has made a recommendation to the Council.

4.6 The Management Team have reviewed this report and support the recommendations.

5. COMMUNITY VIEWS

5.1. Groups and Organisations

Council staff have received an email from Dr Robert Beulink one of the neighbours adjacent to the proposed development. He has expressed a desire to submit in opposition to the proposal if the land use consents are notified. This email has been recorded on the file, but is not able to form part of the notification assessment under s95 of the Act.

5.2. Wider Community

As the notification process has not been determined, no community input in decision making is able to occur prior to the notification decision (unless undertaken by the applicant).

6. IMPLICATIONS AND RISKS

6.1. Financial Implications

Processing of the land use consents is cost recoverable. If Option (2) is chosen, consideration will need to be given to the reasonableness of passing the additional Commissioner cost on to the applicant, given the Council has the capacity and delegations available to make a decision internally.

6.2. Community Implications

There are no specific community implications to the decision making process, given the assessment required under s95 of the Act.

6.3. Risk Management
Any decision made under s95 of the Act is able to be appealed to the High Court for a judicial review of the decision. The notification recommendation has been prepared by a suitably qualified resource management practitioner, and all of the options available to the Committee require the decision to be made by a person delegated by the Council.

6.4. Health and Safety

There are no health and safety considerations.

7. CONTEXT

7.1. Policy

This is not a matter of significance in terms of the Council’s Significance and Engagement Policy.

7.2. Legislation

Section 95 of the Resource Management Act 1991 sets out the notification process for resource consent applications.

7.3. Community Outcomes

There are wide ranging opportunities for people to contribute to the decision making that affects our District

- The Council makes information about its plans and activities readily available.
- The Council takes account of the views across the community including mana whenua.
- The Council makes known its views on significant proposals by others affecting the District’s wellbeing.
- Opportunities for collaboration and partnerships are actively pursued.

7.4. Delegations

The Committee is delegated to make notification decisions in accordance with the Resource Management Act 1991 under S-DM 1016.
Attention: Nick Harrison and Matt Bacon
Company: Waimakariri District Council
Date: 12 December 2017
From: Stephanie Styles
Message Ref: Review of resource consent application for 19 Jacksons Road, Ohoka
Project No: C17154

Thank you for asking me to review the application for land use consent for the erection of a new dwelling and the retention of an existing dwelling, each on a block of land less than 4ha in area, at 19 Jacksons Road, Ohoka. I have reviewed the file, correspondence, legal opinions and the District Plan in detail. The following forms a summary of my opinion on this matter.

The property that is subject to the application is located at 19 Jacksons Road, Ohoka and is zoned Rural in the Waimakariri District Plan. The property was subject to a subdivision consent in 1999 which subdivided Lot 3 DP62367 into 3 lots: Lot 1 (containing Ohoka Homestead) and Lots 2 and 3 which were held together in one certificate of title. Subsequently a new dwelling was erected on Lot 2.

The current application seeks to separate Lots 2 and 3, retain the existing dwelling on Lot 2 (with 3.5370 ha of associated land), and erect a new dwelling on Lot 3 (with 1.0720 ha of associated land). The application originally sought also to subdivide the two lots but that aspect of the application was subsequently withdrawn and only land use consent is sought.

The application contends that the proposal is a permitted activity subject to exemption 31.1.2.2 to the District Plan, relating to rule 31.1.1.1. These provisions state:

31.1.1.1 In the Rural Zone any dwellinghouse shall be on a site which has a minimum area of 4ha.

31.1.2.2 Any dwellinghouse erected on a site or an allotment, that was created by subdivision and was on a subdivision plan that was issued with a subdivision consent between 1 October 1991 and 24 February 2001 (inclusive of both dates) is exempt from complying with Rules 31.1.1.1, 31.1.1.4 and 31.1.1.5, provided that all dwellinghouses maintain a setback from internal boundaries of not less than 10m.

To understand the application of this rule and exemption requires detailed consideration of the complexities of the definitions of the District Plan (and the Resource Management Act) and a legal comprehension of the situation with the certificate of title. Having worked through the definitions and legal advice, I agree with the advice from Cavell Leitch and consider that the exemption to rule 31.1.2.2 does not apply. My understanding is, Lots 2 and 3 together make up one 'site' and are not individual 'sites' as they are held together in one certificate of title and cannot be separated without consent. Thus, the proposal is for two dwellings on one 'site' not two dwellings on two 'sites'.

Although rule 31.1.1.1 does not apply, and given the definition of 'site', I consider that rule 31.1.1.3 does apply as the proposal is for two dwellings on one 'site'. That rule states:
31.1.1.3 In the Rural Zone, where there is more than one dwellinghouse on a site, it shall be able to be shown that:

a. each dwelling can be contained within its own delineated area and there is no overlap between delineated areas;

b. Rules 32.1.1.1 (areas and dimensions), 32.1.1.3 (provision for a building platform and sewage disposal area), 32.1.1.30 and 32.1.1.31 (common vehicle crossing for multiple lots), 32.1.1.58 and 32.1.1.59 (energy supply to the allotment) and 32.1.1.64 (stormwater connection to public drain) can be complied with as though any delineated area was an allotment;

c. Rules 30.6.1.2 (access to seven or more sites) and 31.1.1.15 (setbacks for structures) and 31.10.1.1 (glare) can be complied with as though any delineated area was a site;

d. any delineated area, other than one that encompasses an existing habitable dwellinghouse, can be connected to a reticulated potable water supply; and

e. no esplanade reserve or esplanade strip would be required to be created or set aside in accordance with Chapter 33: Esplanades: Locations and Circumstances – Rules if any delineated area was created by subdivision.

This rule requires compliance with the underlying 4ha rule (via rule 32.1.1.1) and does not enable any exemption to that rule. As each parcel of land involved in this application is less than 4ha in area, the rule is not met and the application is a non-complying activity. In addition, the application does not meet minimum site dimensions (rule 32.1.1.1) or nominate a building platform or sewage disposal area (rule 32.1.1.3). It is assumed all other elements of this rule are or could be met.

In addition, I consider it is necessary to also consider rule 21.8.2 which states:

21.8.2 Any erection of a dwelling and/or subdivision of land, except for designation purposes, that does not meet the existing or required density of the zone is a non-complying activity.

This rule requires compliance with the base site area rule of 4ha per dwelling for the rural zone (rules 31.1.1.1 and 32.1.1.1 Table 32.1) and rule 21.8.2 provides no exemption to this requirement (and no link to exemption 31.1.2.2). Again, the proposal is a non-complying activity under this rule.

The two key rules therefore are 32.1.1.3 and 21.8.2. The site area rule (32.1.1.3) requires each dwelling to have at least 4ha of land to protect the rural zone character and productivity, and gives effect to the objectives and policies of the District Plan for the rural zones. This is a principal rule within the District Plan and should be given considerable weight. The exemption to the rule was included to enable an allowance for sites created in the period of transition between the former Plan and the current Plan. This exemption recognised that some sites had been created specifically for the purpose of residential development at a scale that would no longer be permitted under the new Plan, and the rule provided a transition period for development to proceed.

This situation does not apply to the present proposal as Lot 3 was not subdivided for the purpose of supporting residential development, but was formed to create the minimum area of land together with Lot 2, to enable the development of one compliant house. If Lot 3 was intended to be separately developed for another residence, then the subdivision consent at that time would have been dealt with differently and the lots would be held under different titles and not amalgamated. Even had such a different approach been taken there is no guarantee that the subdivision consent would have been granted on those terms.

In addition, rule 21.8.2 was incorporated into the plan at the time of the Land Use Recovery Plan\footnote{The Recovery Strategy was the key reference document that guided and coordinated the programmes of work required by the CER Act, including the Land Use Recovery Plan (LURP). Although the Recovery Strategy has now been revoked by s146 of the Greater Christchurch Regeneration Act 2016, recovery plans promulgated under its auspices remain in effect. Section 60(2) of the Greater Christchurch Regeneration Act 2016 states "Any person exercising powers or performing functions under the Resource Management} and to reinforce the link with the expectations of the Canterbury Regional Policy Statement which provides strong
direction on the protection of rural areas from urban development. Urban development includes residences on less than 4ha of land. This proposal would not give effect to the intent of the Regional Policy Statement for the rural area of Canterbury.

On the basis of this analysis, it is my opinion that rules 32.1.1.3 and 21.8.2 apply and the application would be a non-complying activity.

Given:

- the potential for impacts on neighbours from an unanticipated additional dwelling,
- the extent of non-compliance with the minimum site areas (Lot 3 is only a quarter of the size expected in the rural zone),
- the potential for precedent arguments to be raised,
- the potential impact on the rural character from an integrity of the plan perspective,
- the objectives and policies of the District Plan seek protection of rural areas and low residential density, and
- the very clear direction given by the Canterbury Regional Policy Statement against urban development in rural zones;

my view (having considered the proposal and issues as set out above but not having undertaken a full analysis under s95 of the RMA) is that the adverse effects of the proposal would be more than minor and thus public notification of this application would be appropriate under sections 95A-95E of the Act. I also am of the view that it would be difficult for the application to pass either of the threshold tests under section 104D of the Act.

I understand that you will be sharing this opinion with Mr Mulligan to enable him to confirm if he wishes to proceed with the application. I await your instructions on whether to proceed with preparation of a formal report in relation to sections 95A-95E of the Resource Management Act.
522-September October 2016

Attention: John Cook
Waimakariri District Council
PO Box 1005
Rangiora 7440

Email: john.cook@wmk.govt.nz

Dear John

**LEGAL INTERPRETATION OF RULE 31.1.2.2**

1 You have asked us to provide a legal opinion on the interpretation of Rule 31.1.2.2 of the Waimakariri District Plan (the Plan), which provides an exemption to the usual rules for dwelling density in the rural zone.

2 In particular, you have asked whether the proposed activities described in the land use application (the proposal) by Mr Mulligan (the applicant) satisfies the requirements of this exemption. This is important because if the exemption is satisfied then two dwellinghouses on undersized lots would be authorised as a permitted activity.

3 In summary, we consider that the proposal does satisfy the exemption and that the existing dwellinghouse on Lot 2 DP 81869 and the erection of a new dwelling on Lot 3 DP 81869 are permitted activities pursuant to Rule 31.1.2.2 of the Plan (subject to complying with all other relevant permitted activity standards).

4 Notwithstanding the fact that we consider the proposal does satisfy the exemption, we consider that the Council may nonetheless at its discretion decline the application to cancel the amalgamation condition relating to DP 81869 if it considers that this would be appropriate in the circumstances of this case.

**Scope of this Advice**

5 This advice will consider the following:

- the background and context;
- approach to Rule 31.1.2.2;
- interpretation of Rule 31.1.2.2;
- the surrounding provisions and objectives and policies;
- the background to Plan Variation 6;
- any other relevant rules;
- recent Court of Appeal case; and
- other considerations.
Consideration of these matters will allow us to determine the meaning of Rule 31.1.2.2; and therefore whether the proposal satisfies the requirements of the exemption.

Background and Context

The applicant has applied for a resource consent relating to the property at 19 Jacksons Road, held in CB47B/271, legally described as Lot 2-3 DP 81869.

The proposal is to establish a new dwelling on the existing Lot 3 DP 81869 (being 1.0720 ha) and retain the existing dwelling on Lot 2 DP 81869 (3.5370 ha).

Rule 31.1.1.1 of the Plan requires that in the Rural Zone any dwellinghouse shall be on a site which has a minimum area of 4ha. If an activity does not comply with this rule then it is a non-complying activity.

The applicant seeks to rely on an exemption in the Plan which would authorise the proposal as a permitted activity.

Rule 31.1.2.2 provides an exemption to Rule 31.1.1.1 stating:

Any dwellinghouse erected on a site or an allotment, that was created by subdivision and was on a subdivision plan that was issued with a subdivision consent between 1 October 1991 and 24 February 2001 (inclusive of both dates) is exempt from complying with Rules 31.1.1.1, 31.1.1.4 and 31.1.1.5, provided that all dwellinghouses maintain a setback from internal boundaries of not less than 10m.

If this exemption is satisfied then Lot 2 DP 81869 (Lot 2) and Lot 3 DP 81869 (Lot 3) would not need to comply with the 4 ha minimum area requirement at Rule 31.1.1.1 and a dwellinghouse could be lawfully established on these sites, subject to complying with all other relevant permitted activity standards.

Approach to Rule 31.1.2.2

We understand the Council view is that the exemption does not apply to the proposal because the Council considers that both Lots 2 and 3 collectively constitute a "site".

We accept that this is consistent with the usual approach to a subdivision and land use resource consent application, which is to consider all of the land relevant to the proposal seeking consent as a "site".

However, in this case the particular words used in the exemption Rule require that we consider the land upon which the dwellinghouse is to be erected. Consequently we consider that Lot 2 and Lot 3 need to be considered separately as the proposed land use activity is to erect a new dwellinghouse on Lot 3 and to retain the dwellinghouse on Lot 2.

In practical terms, this means we are actually asking two questions within the proposal:

a) Does retaining an existing dwellinghouse on Lot 2 satisfy the requirements of Rule 31.1.2.2?

b) Does establishing a new dwellinghouse on Lot 3 satisfy the requirements of Rule 31.1.2.2?
Interpreting Rule 31.1.2.2

Chapter 31 of the Plan contains rules relating to Health, Safety and Wellbeing. This includes rules relating to the preservation of rural amenity as sought by Rule 31.1.1.1, which prescribes the minimum lot size in the rural zone with a dwellinghouse.

In order for the proposal to benefit from the exemption in Rule 31.1.2.2; both Lot 2 and Lot 3 must satisfy the exemption as specified in the Plan.

Plain and Ordinary Meaning

We will first consider the literal interpretation of the words used to give them their plain and ordinary meaning. We consider the exemption at Rule 31.1.2.2 has four requirements:

a) Any dwellinghouse erected
b) on a site or an allotment,
c) that was created by subdivision and was on a subdivision plan that was issued with a subdivision consent between 1 October 1991 and 24 February 2001 (inclusive of both dates)
d) all dwellinghouses maintain a setback from internal boundaries of not less than 10m.

We will look at each in turn to determine whether this exemption is satisfied.

Any dwellinghouse erected

Dwellinghouse is defined in the Plan as

any habitable structure, occupied or intended to be occupied in part or in whole as a residence and, includes one additional physically separated dwellinghouse that is no more than 75 square metres in gross floor area and is located within 30 metres of the primary dwellinghouse. For the purposes of this definition there shall be only one kitchen facility under any individual roof structure.¹

The applicant resides in the existing dwellinghouse and this meets the definition of dwellinghouse. The applicant states in a letter dated 27 April 2016 that the proposed dwellinghouse is essentially a replica of the existing dwellinghouse, with a similar floor plan and floor area. For all intents and purposes, the existing dwelling and the proposed dwelling can be defined as dwellinghouses.

The meaning of the word “erected” however is not as straightforward. We note that the rule does not use the word “existing” to qualify whether the dwellinghouse must have already been established in order for the exemption to apply. Rather, the wording of the rule is ambiguous regarding whether it contemplates dwellinghouses that are yet to be erected, or if it only applies to dwellinghouses that are already erected.

The dwellinghouse on Lot 2 is already erected and does satisfy the requirement “any dwellinghouse erected”, however we consider that it is not clear whether the

¹ Waimakariri District Plan, Chapter 1: Definitions, p 9.
word "erected" can be extended to cover the proposed dwelling that is yet to be erected on Lot 3. We will discuss this matter further below.

on a site or an allotment

2325 This phrase means that the exemption applies to both categories of land parcel. In other words, if Lot 2 and Lot 3 can be considered separately as either an allotment or as a site based on the plan definitions, then the proposal will qualify for this element of the exemption.

Allotment

2426 Allotment is defined in the Plan as "having the same meaning as section 218(2) and (3) Resource Management Act 1991, except for the purposes of this Plan for land being considered for subdivision consent any area of land defined by boundaries shown on a subdivision consent application shall be considered to be an allotment, including: ...."

2527 Sections 218(2) and (3) of the Act provide as follows:

(2) In this Act, the term allotment means—

(a) any parcel of land under the Land Transfer Act 1952 that is a continuous area and whose boundaries are shown separately on a survey plan, whether or not—

(i) the subdivision shown on the survey plan has been allowed, or subdivision approval has been granted, under another Act; or

(ii) a subdivision consent for the subdivision shown on the survey plan has been granted under this Act; or

(b) any parcel of land or building or part of a building that is shown or identified separately—

(i) on a survey plan; or

(3) For the purposes of subsection (2), an allotment that is—

(a) subject to the Land Transfer Act 1952 and is comprised in 1 certificate of title or for which 1 certificate of title could be issued under that Act; or

(b) not subject to that Act and was acquired by its owner under 1 instrument of conveyance—

shall be deemed to be a continuous area of land notwithstanding that part of it is physically separated from any other part by a road or in any other manner whatsoever, unless the division of the allotment into such parts has been allowed by a subdivision consent granted under this Act or by a subdivisional approval under any former enactment relating to the subdivision of land.

28 Pursuant to s218(2)(a), we consider that Lot 2 is an allotment and that Lot 3 is an allotment. This section considers an allotment is any parcel of land under the Land Transfer Act 1952 that is a continuous area and whose boundaries are shown separately on a survey plan (my emphasis added). Both Lot 2 and Lot 3 are parcels of land, of continuous area, with both lots delineated on a survey plan (DP 81869).

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2 Note, this is discussed in the Plan Variation 6 document. The narrative states that both terms are used to avoid confusion in order to “cover both those areas for which a title has been issued and those allotments which don’t yet have legal title”.

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Page 4
Therefore both lots meet the definition in the Plan and can be considered as allotments under Rule 31.1.2.2.

Site

29 Site is defined in the Plan as:

a. an area of land which is:
   i. comprised in a single allotment, or other legally defined parcel of land and held in a single certificate of title, or
   ii. comprised in a single allotment or legally defined parcel of land for which a separate certificate of title could be issued without further consent of the Council being in any case the smaller of land area i or ii; or

b. an area of land which is comprised of two or more adjoining legally defined parcels of land held together in one certificate of title in such a way that the lots cannot be dealt with separately without prior consent of the Council.

30 We understand that the Council does not consider that Lots 2 and 3 meet the definition provided in (b) as the two parcels of land are not adjoining. Adjoining land is defined in the Plan as “adjoining other land, notwithstanding that it is separated from the other land only by a road, railway, drain, waterway or river.”

31 Lots 2 and 3 are separated by an access leg and therefore we agree with the Council’s view that Lots 2 and 3 do not meet the situations referred to in the Plan definition for “adjoining”.

32 However, as explained earlier we do not think that Lot 2 and Lot 3 should be considered together when evaluating the proposal against the exemption rule.

33 This is because the wording of the exemption rule as it relates to the land use application requires that we consider each lot separately in order to determine whether the exemption is satisfied. This means we need to consider on their individual merits whether Lot 2 and Lot 3 can satisfy the requirements of the exemption rule.

34 In our opinion, we consider that the relevant part of the definition is in (a)(i). We have already established that Lot 2 is an allotment and that Lot 3 is an allotment. In addition to this, (a)(i) requires that the single allotment be held in a single certificate of title (my emphasis added).

Is Lot 2 a site? Is Lot 3 a site?

35 We consider that Lot 2 is held in a single certificate of title. In other words Lot 2 is a single allotment encompassed in CB47B/271, which is a single certificate of title.

36 We also consider that Lot 3 is held in a single certificate of title. In other words Lot 2 is encompassed in CB47B/271, which is a single certificate of title.

Site or allotment?

37 For the above reasons, we consider that the proposal satisfies the definition of allotment and the definition of site, and satisfies this requirement of the Rule.
As we have established that Lots 2 and Lot 3 meet the definition of “allotment”, it is not necessary to consider whether they meet the definition of “site”. This is because the exemption requires that they be either an allotment or a site. If you would like us to consider whether Lot 2 and Lot 3 can also be considered a site, then we can provide our view on this at your request.

that was created by subdivision and was on a subdivision plan that was issued with a subdivision consent between 1 October 1991 and 24 February 2001 (inclusive of both dates)

Lots 2 and 3 DP 81869 were created as a result of a subdivision of Lot 3 DP 62367. This subdivision consent was granted in 1998 and the subdivision plan was approved by the Waimakariri District Council on 13 July 1999. This is within the prescribed time period, and therefore satisfies this requirement of the Rule.

provided that all dwellinghouses maintain a setback from internal boundaries of not less than 10m.

The applicant states in the original application and reiterates in a plan attached to a letter dated 27 April 2016 that the setback from internal boundaries is greater than 10m, and in many instances the dwellinghouses are setback 30m from internal boundaries. Therefore the proposal satisfies this requirement of the Rule.

Conclusion on Plain and Ordinary Meaning

Taking all of this into consideration, we have concluded that when looking at the plain and ordinary meaning of the words in Rule 31.1.2.2, then the proposal satisfies the latter three requirements, and may satisfy the first requirement.

The area of ambiguity regarding the first requirement relates to the word “erected”. The issue arising is whether this applies only to dwellinghouses that are already erected, or whether the exemption extends to include dwellinghouses to be erected in the future. In order to understand the intended meaning of “erected” we have considered the rule in the context of the objectives and policies of the Plan.

Objectives and Policies of the Plan

The Objectives and Policies relating to Health, Safety and Wellbeing seek to maintain the amenity values of all zones in the District. Objective 12.1.1 seeks to maintain amenity values and a quality of environment appropriate for different parts of the District, and in particular Policy 12.1.1.5 seeks to maintain the amenity values of the Rural Zone by ensuring that “the land is not dominated by dwellinghouses”.

There is a clear focus on controlling the density of dwellinghouses and the separation of dwellinghouses. The position of dwellinghouses in the rural zone can affect the amenity values and quality of a rural setting, and in order to maintain a reasonable level of privacy the Plan employs setback controls.

The explanation for Policy 12.1.1.5 goes on to say that “the Council would not anticipate the establishment of dwellinghouses on lots smaller than four hectares. . . .or within 20 metres of a property boundary.”

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3 As noted in Mr Cook’s letter dated 26 July 2016.
Objective 14.1.1 seeks to maintain and enhance the rural character of the Rural Zone, which is characterised by, among other things, "separation between dwellinghouses to maintain privacy and a sense of openness".

This objective is supported by several policies that aim to:

- Avoid subdivision and/or dwellinghouse development that results in any loss of rural character (Policy 14.1.1.1)
- Maintain the continued domination of the Rural Zones by intensive and extensive agricultural, pastoral and horticultural land use activities (Policy 14.1.1.2)

These objectives and policies recognise and reflect the community’s concern relating to potential loss of amenity in the rural zone.

Unfortunately the provisions do not provide any guidance or aid in interpreting whether the exemption should apply to future dwellinghouses or existing dwellinghouses. In fact, there is no mention at all in the objectives and policies of an exemption that would allow any dwellinghouse on a lot smaller than 4ha in any circumstances. We therefore consider these provisions offer no assistance in the interpretation of the Rule itself.

Background of Plan Variation 6

Ideally rules are supported by the words used in the objectives and policies in the Plan and their accompanying explanations. However this is not always the case. Due to the apparent inconsistency between Rule 31.1.2.2 and the objectives and policies in the Plan, we asked for and were provided with background information relating to Plan Variation 6 to better understand how the rule came into being.

In 1999 the District was undergoing a Plan review and several submissions were received with regard to the proposed plan requiring a larger lot size and minimum dimension standards for the erection or relocation of a dwellinghouse. The Council responded to these submissions with Proposed Variation 6 – Provision of Exemption For Compliance with Site Area and Dimensions for Existing Lots "Grandfather Clause" (Variation 6).

Variation 6 and accompanying explanation documents should be considered as they provide context and detail around both the reason for the exemption and the meaning of the Rule, and whether future dwellinghouses were contemplated when the rule was drafted.

Variation 6 proposed to exempt certain existing sites or approved allotments from having to comply with the plan standards that would (now) restrict the erection or relocation of dwellinghouses for sites of certain areas and dimensions and applied to both rural and residential areas.

The explanation associated with Variation 6 explained that the proposed exemption was “a means of giving effect to an expectation of landowners and developers that when the future erection of a dwellinghouse was either implicitly or explicitly associated with the granting of a subdivision consent, the dwellinghouse should be classed as a permitted activity” (my emphasis added).

The full title of Variation 6 is also clear that the exemption considers future dwellings: (my emphasis added)
Erection and relocation of a dwellinghouse to be exempt from complying with the minimum dimension and sizes of allotments of the Proposed District Plan, where the dwelling is to be sited on an allotment that is part of a subdivision for which consent has been granted since October 1991.

Therefore, taking account of the words in the explanation and in the title itself, we consider that the intention of Variation 6 was that the exemption should apply to future erection of dwellinghouses on sites or allotments that satisfy the other requirements of the Rule.

Do any other Rules Apply?

We note that Rule 21.8.2 in the Plan states:

Any erection of a dwelling and/or subdivision of land, except for designation purposes, that does not meet the existing or required density of the zone is a non-complying activity.

This Rule was inserted through the Land Use Recovery Plan and supports Objective 14.5.1 and Policy 14.5.1 that were inserted at the same time. These seek to facilitate the rebuild and recovery of Christchurch post-earthquake by directing future development to existing urban areas, priority areas and identified rural residential development areas.

The requirement for any development to comply with the existing or required density of an area is achieved through Rule 31.1.1.1, which restricts the size of lots on which a dwellinghouse can be erected. This in turn, brings us back to the exemption contained in Rule 31.1.2.2, and the same analysis as to whether the proposal can satisfy this exemption.

Therefore, we do not consider that this rule provides any additional aid or restrictions to the proposal beyond those that are discussed in this letter.

Recent Court of Appeal Case

You have asked us to consider North Canterbury Clay Target Association Inc v Waimakariri District Council (Clay Target). This is a recent Court of Appeal case that considered two questions:

- Does rule 31.11.1.2 of the Waimakariri District Plan require compliance with specified noise limits at the notional boundary of any dwellinghouse in the Rural Zone in existence from time to time, notwithstanding that the dwellinghouse was not in existence at the time the permitted activity was established?
- Where a certificate of compliance (CoC) has been issued under s 139 of the Resource Management Act, is the holder of the certificate subject to a continuing obligation to abide by the noise limitations specified in rule 31.11.1.2, notwithstanding the changing surrounding physical environment?

This is an interesting case insofar as it pertains to a future dwellinghouse in the context of a CoC certificate, however we do not consider that it is relevant to the current proposal.

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4 [2016] NZCA 305.
62. *Clay Target* is specific to ongoing compliance for noise restrictions and whether a person holding a CoC is subject to an ongoing obligation to comply with the noise requirements in the Plan, notwithstanding the fact that there was a change in the receiving environment after the CoC was granted. This change in the environment was the erection of dwellinghouses that were not erected at the time the CoC was issued.

63. We do not consider that there is any similarity with the current proposal. This current proposal does not involve noise restrictions, nor does it involve a certificate of compliance. In the present case, we are considering a land use consent application that does not comply with a planning rule, and further whether the proposal can satisfy the requirements of an exemption rule.

64. The best that can be said about *Clay Target* is that it demonstrates that the Plan is future looking and anticipates a changing physical environment. However, we consider that this principle is at such a broad level that it is unable to be relied upon when interpreting Rule 31.1.2.2.

**Other considerations – cancellation of the amalgamation condition**

4965. Although we have not been asked to consider the application to remove the amalgamation condition pursuant to section 241(3) RMA, we would nevertheless like to draw your attention to the fact that the Council does have discretion over whether to cancel the amalgamation condition recorded on CB47B/271.

4966. The 1984 subdivision consent was granted subject to a condition that Lot 2 and Lot 3 be amalgamated.⁵ When an amalgamation condition has been complied with, the separate parcels of land included in the certificate of title cannot be disposed of or be held under separate certificates of title except with the express approval of the Council.⁶ The amalgamation condition can be cancelled at any time by the Council, and this is what has been requested by the applicant in this case under s241(3) RMA.

5067. A relevant consideration is that section 220(1)(b)(iii) states that land can be amalgamated "...for any purpose specified in a district plan or necessary to comply with any requirement of the district plan" (my emphasis added).

5168. We interpret this to mean that the amalgamation condition was included in order for the original subdivision consent application to comply with the Plan, which may have related to the lot size of Lots 2 and 3, and the (now existing) dwellinghouse.

5269. In this case the exemption Rule is being applied to Lots that are subject to an amalgamation covenant. Our understanding of Variation 6 is that erection of an additional dwelling in these circumstances does not appear to have been intended by the exemption Rule.

5370. This is supported by the cost/benefit analysis accompanying Variation 6 that notes the "potential environmental costs if a lot was created under the Transitional Plan and a dwelling was not considered appropriate, but, no condition is in place to ensure that outcome" (my emphasis added).

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⁵ Pursuant to s220(1)(b)(iii) RMA
⁶ Section 241(2)(a) RMA
We consider that an amalgamation condition is potentially a type of condition referred to above that would prevent a dwellinghouse that was not considered appropriate.

Further, in our view the Council should also consider whether cancelling the amalgamation condition would be consistent with the objectives and policies of the Rural Zone, particularly when the outcome would enable the establishment of an additional dwelling on an undersized lot.

In our view these are relevant considerations for Council to take into account in when determining whether to grant the request to cancel the amalgamation condition affecting CB47B/271.

Deciding whether to cancel the amalgamation condition is at the discretion of the territorial authority and we consider that this is an available mechanism if the Council wishes to retain Lot 2 and Lot 3 in one title.

Conclusion

Taking all of this into consideration, it is our conclusion that the proposal does satisfy the exemption provided for in Rule 31.1.2.2 and accordingly the land use proposal is a permitted activity under the Plan (subject to compliance with all other relevant permitted activity standards).

We also consider that the Council has a wide discretion with respect to determination of the application to cancel the amalgamation condition affecting CB47B/271. We have drawn attention to several considerations that we consider are available and relevant for Council to take into account.

Please let us know if you have any questions as we would be happy to discuss this matter further.

Yours faithfully

ADDERLEY HEAD

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Our ref: MR-120457-9-25-V2

Although it does not appear that s241(3) has been considered by the Courts, there is a similar provision at s240(4) which provides the territorial authority can cancel a covenant against transfer of allotments imposed as a condition under s220(1)(b) that has been discussed in caselaw. In relation to cancellation of a covenant the Court found that it did not have jurisdiction relating to the removal of the covenant, and that s240(4) makes it clear that the removal of a covenant is a matter for the discretion of a territorial authority. We consider that the wording of s241(3) is similar to the wording of s240(4) and that this statement would likely also relate to the cancellation of an amalgamation condition under s241(2).
8 March 2017

Waimakariri District Council
Attention: Victoria Caseley and Paul Waiting

By email only (victoria@wmk.govt.nz/paul.waiting@wmk.govt.nz)

Dear Victoria and Paul

**Peer review – Advice re exemption under Rule 31.1.2.2 of the Waimakariri District Plan**

1. We have been asked to provide a peer review of the Adderley Head letter dated 12 October 2016 (**Letter**) on the interpretation of the exemption found in Rule 31.1.2.2 (**exemption**) of the Waimakariri District Plan (**Plan**). We note that this letter follows a draft provide on 1 November 2016.

2. Rule 31.1.2.2 provides:

   31.1.2.2 Any dwellinghouse erected on a site or an allotment, that was created by subdivision and was on a subdivision plan that was issued with a subdivision consent between 1 October 1991 and 24 February 2001 (inclusive of both dates) is exempt from complying with Rules 31.1.1.1, 31.1.1.4 and 31.1.1.5, provided that all dwellinghouses maintain a setback from internal boundaries of not less than 10m.

3. The minimum lot size in the Rural Zone on which a dwellinghouse can be erected is set by Rule 31.1.1.1, which provides:

   31.1.1.1 In the Rural Zone any dwellinghouse shall be on a site which has a minimum area of 4ha.

4. The original advice was provided following an application to subdivide and then erect a house on the resulting Lot 3 at 19 Jacksons Road, Ohoka currently held under certificate of title CB47B/271(**the application**).

5. As a peer review we have not again set out all the background but indicate that while the background given in the Letter is generally comprehensive, it does not touch on the purpose of the exemption and what lead to its inclusion in the Plan to begin with. It is our understanding that the exemption was drafted to address a rural subdivision where titles had been issued prior to the implementation of the then new District Plan. The new District Plan rules meant that the building of dwellinghouses on those
newly titled lots would be non-compliant with the minimum lot sizes in the District Plan.

6. In that situation the properties each: a) had individual unique titles, b) was an allotment and c) therefore, contained a single site in accordance with the definition in the Plan.

7. In contrast, the application involves: a) only one title that was struck for Lot 2-3, b) Lot 2 and Lot 3 are each an allotment, but c) Lot 2 and Lot 3 are held together on the title as a single site under the definition of “site” in the Plan. This difference is relevant to our conclusions below.

Summary

8. Based on our review and the discussion below, it is our opinion that:

8.1. On its face the exemption applies, as we have an allotment created between the relevant dates.

8.2. However the two ‘allotments’ remain contained on one certificate of title, therefore the ‘site’ (as defined in the Plan) is Lot 2-3.

8.3. Rule 31.1.1.3, which is not subject to the exemption, applies where 2 (or more) dwellinghouses are contained on one site. Where that is intended the plan requirement is that there be a delineated area of at least 4ha in the Rural Zone.

8.4. As a result, and for the exemption to apply and permit the erection of a further dwelling, each allotment needs to have its own certificate of title, which would also make it a site under the Plan.

8.5. Rule 31.1.1.3 would not then apply (there would only be 1 dwellinghouse per site) and the exemption would allow for the house to be erected.

8.6. Accordingly, to benefit from the exemption, the amalgamation must be cancelled (i.e. the allotments subdivided) as first step.

8.7. There remains the question “would the exemption still apply?” since the cancellation of the amalgamation condition would be occurring outside the specified timeframe. We think it would (if the cancellation was approved), as the allotment (Lot 3) was created between the prescribed dates despite the cancellation of the amalgamation occurring later.

8.8. In addition, as regards the subdivision:

8.8.1. A decision cancelling the amalgamation is effectively a subdivision decision. Therefore the process to reach such a decision should be similar, if not the same.

8.8.2. The Council has a broad discretion on whether to approve the cancellation of the amalgamation that created Lot 2-3 CT CB47B/271.
8.8.3. In determining whether to approve the cancellation of amalgamation (or a new subdivision of Lot 2-3), the Council may reasonably turn its mind to the Objectives and Policies of the Plan, in particular whether it would be consistent with the Council’s policy that rurally zoned lots under 4ha are to be avoided.

8.8.4. In order for any decision the Council makes on cancellation/subdivision to be defendable, that decision must be reasonable.

**Allotments and sites**

9. The property at 19 Jackson Road is held on a single title (CT CB47B/271) and contains Lot 2-3. Separate titles have never been struck for Lot 2 or Lot 3.

10. The Letter concludes that Lot 2 and Lot 3 are both Allotments and Sites and as such fit within the exemption.

11. We agree that they are separate Allotments, however we have reached a different conclusion about whether they are also separate Sites.

12. The Plan defines a *Site* as:

   Site means:
   
   a. an area of land which is:
      
      i. comprised in a single allotment, or other legally defined parcel of land and held in a single certificate of title, or
      
      ii. comprised in a single allotment or legally defined parcel of land for which a separate certificate of title could be issued without further consent of the Council being in any case the smaller of land area i or ii
   
   b. an area of land which is comprised of two or more adjoining legally defined parcels of land held together in one certificate of title in such a way that the lots cannot be dealt with separately without prior consent of the Council; or ...

   [underlining added]

13. The Letter concludes, based on a.i. above, that Lot 2 and Lot 3 are each on a single certificate of title, albeit the same title, so they are each a Site.

14. We disagree and consider that the interpretation of a Site under a.i. requires that a separate title is needed for an allotment before it can also be a Site. This is what is meant by “held in a single certificate of title”.

15. Our interpretation finds support in the consistency of the use of terms, where the definition refers to a "single" allotment and “a separate certificate of title” in a.ii. In addition, we think a.ii. makes it clear with its reference to the “smaller of land area” that it is referring to the smaller area contained in its own certificate of title.

16. This reinforced in part b. of the definition, which describes the situation in this case and makes the holding “together” of the parcels of land in one certificate of title, the key determinant of it being a site.
17. In this instance there is a single certificate of title for Lot 2-3, so, notwithstanding their apparent separation on the deposited plan, the amalgamation means that, together, they are one site.

Our interpretation

18. There are two requirements that must be met for the exemption to apply, they are:

18.1. The subdivision that created the allotment had to occur between 1 October 1991 and 24 February 2001 inclusive; and

18.2. The allotment on which the dwellinghouse is to be located must be contained on its own separate certificate of title (meaning it will also qualify as a site under the plan).

19. The need for a separate certificate of title stems from the influence of Rule 31.1.1.3, which we discuss next and the fact that a dwelling house already exists on the site.

Rule 31.1.1.3

20. The key reason for our divergence with the opinion in the Letter is the definition of site and a related issue that the Letter does not discuss: the implication of Rule 31.1.1.3.

21. Because the exemption does not include (or rather exclude) Rule 31.1.1.3, compliance with the Rule is required where applicable. Relevantly the Rule states:

31.1.1.3 In the Rural Zone, where there is more than one dwellinghouse on a site, it shall be able to be shown that:

... 

b. Rules 32.1.1.1 (areas and dimensions), 32.1.1.3 (provision for a building platform and sewage disposal area), 32.1.1.29 and 32.1.1.30 (common vehicle crossing for multiple lots), 32.1.1.57 and 32.1.1.58 (energy supply to the allotment) and 32.1.1.63 (stormwater connection to public drain) can be complied with as though any delineated area was an allotment.

...

22. A Delineated Area is defined in the Plan as:

Delineated Area means an area of land within a site and shown by defined boundaries, legal or otherwise, which encompasses a proposed building platform for a dwellinghouse or an existing dwellinghouse.

23. In the present case we consider that Rule 31.1.1.3 applies as both allotments form one site.

24. Lot 3 is an “an area of land” and “within a site” (CT CB47B/271) and has “defined boundaries legal or otherwise” (it is shown on the deposited plan attached to the title) and “encompasses a proposed building platform for a dwellinghouse or an existing dwellinghouse” (the application makes this clear that the dwellinghouse will be built “approximately in the centre of Lot 3”). Therefore, we consider that Lot 3 is a delineated area.
25. However, Rule 31.1.1.3.b. provides that the rule must be “...complied with as though any delineated area was an allotment...”, essentially, for the purposes of Rule 32.1.1.1 et seq, which do not speak of sites but allotments. Therefore, the applicant must show that Lot 3 complies with the stated rules, including in particular the minimum allotment sizes set out in Table 32.1.

26. Table 32.1 “Minimum Allotment Areas and Dimensions” notes the minimum allotment area for the Rural zone is 4ha.

27. Therefore, while Lot 3 is a delineated area, it is less than 4ha and as such cannot comply with Rule 32.1.1.1.

28. Applying this reasoning, under Rule 31.1.1.3, only 1 dwellinghouse can be erected on any 4ha site in the Rural Zone.

29. In this situation while Lot 3 was created by an earlier subdivision within the required period, it is not a site since it is not contained on a separate certificate of title. However, if the amalgamation condition was cancelled (effectively subdividing Lot 2-3) so that Lot 3 was contained on its own separate certificate of title, then both requirements noted above would be met and the exemption could fully apply.

30. But while lot 2-3 remains one site, Lot 3 cannot benefit from the exemption.

Cancellation of the amalgamation condition

31. What would the result be of cancelling the amalgamation condition? Specifically would cancellation mean Lot 2-3 is automatically subdivided? Or does a further consent need to be granted for subdivision of these lots to take place?

32. Cancellation of amalgamation falls under s241 of the RMA, which says:

(2) When a condition of the kind referred to in subsection (1), or a similar condition under the corresponding provision of any previous enactment, has been complied with,—

(a) the separate parcels of land included in the certificate of title in accordance with the condition shall not be capable of being disposed of individually, or of again being held under separate certificates of title, except with the approval of the territorial authority; and

(b) on the issue of the certificate of title, the Registrar-General of Land shall enter on the certificate of title a memorandum that the land is subject to this section.

(3) The territorial authority may at any time, whether before or after the survey plan has been deposited in the Land Registry Office or the Deeds Register Office, cancel, in whole or in part, any condition described in subsection (2). [emphasis added]

33. Accordingly, the Council has a discretion whether or not to cancel the condition requiring the amalgamation of Lot 2 and Lot 3 (as opposed to cancellation of the amalgamation itself).

34. If it decided to cancel the amalgamation condition, the Council would effectively be resurrecting the previous subdivision decision, minus the requirement to amalgamate.
35. However, because the Council's previous grant of consent was made subject to the amalgamation condition, without the condition the Council's decision on the original subdivision may have been different.

36. Therefore, in deciding whether to cancel the amalgamation condition the Council should also consider what the effects of that would now be. In determining those effects the Council can reasonably consider the Objectives and Policies of the plan.

37. There remains the question “does a further consent need to be granted for subdivision of these lots to take place?” if the cancellation of amalgamation is granted. This may be a moot point because the resulting allotments would both be under 4ha, so any application to subdivide Lot 2-3 would be a non-complying activity, and unlikely, in our opinion, to be granted as the Plan is clear that the minimum allotment size in the Rural Zone is 4ha1. What we are therefore saying, in agreement with the Letter, is that the same considerations that would apply to a subdivision application (and the information provided under such an application) apply equally to the consideration of the cancellation of an amalgamation condition.

Other matters
38. There are other matters raised in or as a result of the Letter which bear comment, as follows.

How the Objectives and Policies of the Plan assist in determining if the exemption applies
39. The purpose of an exemption to a plan is to allow for a situation that does not otherwise comply with that plan. Accordingly there is limited benefit in considering the Objectives and Policies in a plan in determining if an exemption applies.

40. Similarly, at paragraph 49 of the Adderley Head letter, there is a suggestion that rules (including the exemption under Rule 31.1.2.2) are ideally supported by the wording of the Objectives and Policies of the Plan. This is unlikely to be the case for an exemption, which as stated above, would fall outside of the Plan.

Subdivision
41. As the cancellation of the amalgamation condition is (or requires) subdivision, Chapter 32 of the Plan applies as follows:

32.1.1 Standards and Terms
   Allotment Areas and Dimensions
   32.1.1.1 All allotments shall comply with Table 32.1.

42. Table 32.1 sets out that the “Minimum Allotment Area” in the Rural Zone is 4ha.

43. Rule 32.4 outlines what is considered a Non-complying Activity under the Plan, and says:

32.4 Non-complying Activities
   32.4.1 Except where exempted under Rule 32.1.2, any subdivision that does not comply with Rules 32.1.1.1 to 32.1.1.27, 32.1.1.53 to 32.1.1.56 or 32.1.1.64

1 Table 32.1.
44. The only subdivision exemption in the rural zone of possible relevance is Rule 32.1.2.7:

32.1.2.7 Any allotment resulting from the amalgamation of certificates of title is exempt from complying with Rule 32.1.1 with the exception of Rule 32.1.1.79 (Esplanades).

45. It is notable that Lot 2-3 did not "result from the amalgamation of certificates of title" as Lot2 and Lot 3 have never been held under separate certificates of title. In any event the applicant would not be seeking an amalgamation but the cancellation of an amalgamation condition. Therefore, in our view, the exemption set out in Rule 32.1.2.7 cannot apply to the application.

46. Because no exemption applies and the subdivision of Lot2-3 into Lot 2 and Lot 3 would result in two lots that do not comply with the minimum lot sizes under 32.1.1.1, subdivision of Lot 2-3 would be a Non-complying Activity. Cancellation of an amalgamation condition does not have an activity status under the District Plan meaning that, if the Council’s approval were treated as a consent, at best, it would be a fully discretionary activity².

"Any dwellinghouse erected"

47. On the matter of the erection of a dwellinghouse, we consider that the wording of the exemption is sufficiently clear that it contemplates only the erection of a dwellinghouse that has not already taken place.

48. The point being that a dwellinghouse that has already been built does not need the exemption as it already exists and has either existing use rights (to some degree) or obtained consent prior to being built. Logically, when an application is made to build a dwelling, the process involved takes into account all the regulatory requirements and issues that may impact on the application.

49. In these circumstances a dwellinghouse was built on the land noted as Lot 2 on the certificate of title for Lot 2-3 CT CB47B/271. Further, that dwellinghouse was erected on a rural lot that complied with the Plan as it had an amalgamated size in excess of 4ha.

“Defendability” of the Councils position

50. We have been asked to comment on how defensible a Council decision to refuse approval for the cancellation would be if the applicant appealed or otherwise challenged that decision through the Courts.

51. The current application is for both subdivision and land use consents, and specifically requests that the Council agree to the cancellation of the amalgamation of Lot 2-3, as set out above the decision to cancel the amalgamation is, effectively, a subdivision

² It would be an "innominate" activity, however, section 127 of the RMA on the cancellation of conditions does not apply to the cancellation of amalgamation conditions.
decision. Therefore, in our view the same (or a similar) process for considering a “normal” subdivision should be followed when making that decision.

52. We note that Rule 32.1.1.1 (above) uses the word “shall” which is mandatory and does not suggest any ambiguity, rather it is directive and makes it clear that sub-4ha lots in the rural zone are generally to be avoided.

53. The objectives and policies make clear the desire to avoid the constraints on rural uses and character by (amongst other things) maintaining dwellinghouse separation. Defending the minimum lot size is a key tool to achieving that objective and its supporting policies.

54. It is our opinion that as long as the Council carefully considers the objectives and policies of the Plan and makes a decision that is reasonable and consistent with its previous application of those objectives and policies, then that decision should be capable of withstanding judicial scrutiny.

55. However, as with any litigation, risk remains and no absolute guarantee of success can be given.

Conclusion

56. For the reasons set out above, until such time as the Council agrees to cancel the amalgamation or to the subdivision of Lot 2-3 into Lot 2 and Lot 3 we disagree with the Letter that the exemption can be appropriately applied to Lot 2-3.

57. The Council has a broad discretion on whether to cancel the amalgamation, and in deciding whether to do so should bear in mind that it is also effectively a subdivision decision. Therefore that decision should be approached in the same manner as any other application for a subdivision, including consideration of the Objectives and Policies of the Plan, and the minimum lot sizes in the Rural Zone.

58. If the Council refused such an application, any challenge to that decision would need to cross a high bar, especially if the Council has exercised its discretion reasonably.

59. For completeness we note that we agree with Adderley Head that the Clay Target\(^3\) case does not provide any assistance when considering the Mulligan application.

60. Finally, as a number of issues have arisen in respect of Plan provisions, we think that the following may benefit from clarification through the District Plan Review process:

60.1. Whether the exemption in Rule 31.1.2.2 should continue;

60.2. To clarify what the purpose of Rule 31.1.1.3 is and if that purpose should continue; and

60.3. Revisit the use of the words “site” and “allotment” in Chapters 31 and 32 of the Plan as there appears to be some inconsistency in their application.

\(^3\) North Canterbury Clay Target Association Inc. v Waimakariri District Council [2016] NZCA 305
61. Please come back to us with your comments and any questions you might have.

Yours faithfully

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