

Auckland Unitary Plan

Practice and Guidance note

Intensification Planning Instrument (IPI) Proposed Plan Change to the Auckland Unitary Plan

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1 Introduction

The Intensification Planning Instrument (IPI) Proposed Plan Change – Plan Change 78 (**Plan Change**) to the Auckland Unitary Plan (Operative in Part) (**AUP (OP)**) was notified on 18 August 2022. This plan change delivers on the requirements to give effect to Policies 3 and 4 of the government’s National Policy Statement on Urban Development 2020 (**NPS-UD**) and the amendments to the Resource Management Act 1991 (**RMA**) that require the Council to incorporate the Medium Density Residential Standards (defined in s2, RMA) into relevant residential zones.

This Practice and Guidance Note (**PGN**) addresses some of the key practice considerations in relevant residential zones over the first six to nine months following the notification of the plan change. This time period includes public notification of the plan change and the period of submissions.

The Plan Change introduces many practice considerations, some of which are complex – a result of several aspects of the legislation. This PGN does not address practice considerations that will evolve as the legal effect of provisions change later in the plan change process e.g., following the notification of decisions on submissions. A supplementary PGN may be issued later in the plan change process, to address changes to resource consent assessment considerations that will occur once decisions on submissions are notified.

For a quick, high-level summary of the implications of the plan change in terms of legal effect and weighting, please refer to the summary table in Attachment 1.

2 The Plan Change – In Brief

Proposed changes giving effect to the NPS-UD

The NPS-UD requires the council, through the AUP (OP), to enable buildings of at least six storeys within ‘walkable catchments’. While these walkable catchments vary in their extent, depending on a range of place-specific characteristics, the extent of the catchments are generally based on walkable distances of around 800m from rapid transit network stops, around 1,200m from the edge of the city centre zone, and around 800m from the edge of our 10 large metropolitan centre zones (Newmarket, Manukau, New Lynn, Sylvia Park, Botany, Papakura, Takapuna, Henderson, Albany and Westgate).

The Plan Change will do this through proposed rezoning of existing residential zoned land to the Terrace Housing and Apartment Buildings (THAB) zone. Along with this,

the plan change proposes to add to or amend a number of objectives, policies and standards.

The NPS-UD also requires the council to enable building heights and densities within and adjacent to our neighbourhood, local and town centres commensurate with the level of commercial activity and community services.

It also sets intensification requirements within centres themselves – within the City Centre and Metropolitan Centre zones.

Proposed changes giving effect to the MDRS

The council must also change the AUP (OP) to enable intensification in most other residential areas ('relevant residential zones') across the city, through applying the government's Medium Density Residential Standards (**MDRS**). For Auckland, 'relevant residential zones' are all residential zones with the exception of the Large Lot Zone and the Rural and Coastal Settlement Zone. Residential zones (Single House zone and Residential – Mixed Housing Suburban zone) in rural towns and villages are also excluded where the 2018 census recorded the population as less than 5,000, and the council does not intend the area to become part of an urban environment.

The MDRS comprise more than standards. They include rules, standards, objectives and policies relating to activity status, notification, subdivision and land use activity set out in Schedule 3A of the RMA.

Through the use of MDRS, council is required to enable medium-density housing across most of Auckland's suburbs. Three dwellings of up to three-storeys per site, including terrace housing and low-rise apartments, must be classified as permitted activities on most residential properties, subject to compliance with a number of new 'Density Standards' in the AUP (OP) – these are outlined in Attachment 2 and only relate to building height, height in relation to boundary, building setbacks, building coverage, outdoor living space (per unit), outlook space (per unit), windows to streets, and landscaped area for the construction of a building.

Sites and areas potentially exempt from changes under the NPS-UD and MDRS – 'Qualifying Matters'

Council may exempt some areas and properties from the full level of intensification anticipated by Policy 3 of the NPS-UD, including six-storey buildings in walkable catchments and up to 3 three-storey dwellings per site as a permitted activity in accordance with the MDRS, subject to them meeting certain criteria or displaying particular characteristics. Called 'Qualifying Matters', they are characteristics where intensification requirements may be modified to protect or recognise a particular feature or quality, such as protecting sites of heritage, cultural, special character or

ecological significance or to avoid development in areas with significant natural hazards or where there are certain infrastructure constraints. Most of these qualifying matters will be shown on the plan change maps as overlays and controls. However, not all qualifying matters can be depicted spatially – some qualifying matters are identified in the plan change text.

Parts of the AUP (OP) affected by the plan change, and plan change process

The plan change affects district planning provisions only. It affects many of the chapters of the AUP (OP), particularly residential and precinct chapters.

Following the submission and further submissions period, hearings will be held by an independent hearings panel (**IHP**) in 2023. The IHP will make recommendations to the council in the second half of 2023 or early 2024. Where the council accepts the IHP recommendations, the provisions will become operative within the AUP (OP) on notification of the Council's decision. Where the council disagrees with and rejects the recommendations, the council will need to make an alternative recommendation, and provide the IHP recommendation, the council's reasons for rejection, and the alternative recommendation to the Minister for the Environment to make the final decision. The provisions will become operative within the AUP (OP) on notification of the Minister's decision.

More detailed information on the plan change's content and the plan change process can be found at www.aucklandcouncil.govt.nz/planchanges under [PC 78: Intensification](#).

3 Immediate Legal Effect of the MDRS Density Standards, and Infringements to them – 3 or less dwellings

The permitted activity Density Standards within the MDRS (refer Attachment 2) has immediate legal effect from the date that the plan change was notified – 18 August 2022, unless a proposed activity is for:

- 4 or more dwellings per site, and/or
- 3 or less dwellings per site and one or more of the proposed dwellings do not comply with one or more of the Density Standards, and/or
- a site that is subject to a qualifying matter (including Special Character Area Residential (SCAR) overlay), and/or
- a site that is in a 'new residential zone' i.e., a site in a greenfield area that is proposed to be rezoned to a relevant residential zone.

This means that for any proposal of three or less dwellings on a site not subject to a Qualifying Matter (refer to the Plan Change 78 maps and read the plan change text to identify qualifying matters), in a relevant residential zone, and complying with the MDRS, the MDRS Density Standards attain immediate legal effect while equivalent standards under the AUP (OP) that are inconsistent with the MDRS cease to have legal effect. The new MDRS Density Standards are treated as operative.

Any standards or rules in the AUP (OP) that are not superseded by the Density Standards of the MDRS continue to apply. This includes zone standards that are not a Density Standard (for example daylight or minimum dwelling size), and rules and standards in Auckland-Wide chapters such as E12 Land Disturbance – District and E27 – Transportation. In addition, all regional standards apply. This means that many proposed developments that comply with the MDRS Density Standards may still require resource consent approval for other reasons.

It is important to note what process needs to be followed if any of the MDRS Density Standards are infringed where three or less dwellings are proposed. When three or less dwellings do not comply with all of the density standards, all of the density standards cease to have immediate legal effect.

Any infringement of a MDRS Density Standard must be assessed against the equivalent AUP (OP) standard and associated AUP (OP) matters of discretion. This is because Section 86BA(1)(b) of the RMA outlines, as a pre-requisite for immediate legal effect of the MDRS Density Standards, that a “permitted” activity must comply with these standards.

For example, if a three-dwelling proposal on a site with an operative Residential - Mixed Housing Suburban (MHS) zoning infringed the MDRS building coverage Density Standard of 50%, with 52% proposed, then this standard would not attain immediate legal effect. The relevant standard would then be the AUP (OP) building coverage standard of 40% in the MHS zone, and the proposal would need to be assessed against the relevant objectives, policies and matters of discretion in the AUP (OP) MHS Zone Chapter. However, the permitted baseline of 50% building coverage under the MDRS Density Standards could, depending on the circumstances, be a relevant consideration in any notification decision and final determination.

4 The Permitted Baseline, the Receiving Environment and the Plan Change

Permitted Baseline

Sections 95 and 104 of the RMA provide the council with the discretion to consider the adverse effects of a proposal against those of a permitted activity and to disregard an adverse effect of the activity on the environment if the AUP (OP) (or a National Environmental Standard) permits an activity with that effect. This comparative baseline is known as the 'Permitted Baseline'.

The MDRS provide for up to three dwellings per site as a permitted activity, provided the full suite of MDRS Density Standards are complied with, including a maximum building height of 11m (3 storeys).

This permitted baseline will be a consideration for the activity of four or more dwellings and will be considered on a case-by-case basis. However, this permitted baseline is likely to be a useful assessment tool for some applications.

While the permitted baseline may be a relevant and useful assessment tool for some applications, it needs to be kept in mind that a number of more nuanced design and amenity considerations apply beyond the 'building envelope' type of considerations provided by the permitted baseline. This demands that a case-by-case assessment is always undertaken.

Another application of the permitted baseline will be where one or more of the MDRS density standards are breached for proposals involving three or less dwellings. While reasons for consent will revert to the operative rules in this scenario, and the application will need to be assessed against the operative provisions, the permitted baseline formed by a three dwelling proposal complying with all MDRS density standards may be a relevant consideration.

Receiving Environment

Unlike the Permitted Baseline, the characteristics of the receiving environment that a proposed activity is considered within is a mandatory requirement in resource consent assessments.

For the purposes of assessing resource consent applications, the receiving environment comprises:

- a. The environment as it physically exists in reality at the time the resource consent application is being assessed. This is best determined by visiting the subject site, and observing the surrounds;

- b. That physical reality as amended by future development that has been authorised by an approved resource consent where it is likely that the consent will be implemented;
- c. That physical reality as amended by potential development that can occur as of right (i.e., as a permitted activity not requiring resource consent approval).

Points b and c may change the Receiving Environment context significantly. Point c in particular could create a Receiving Environment 'picture' that is different to the existing physical reality in many locations, given the enabling nature of the MDRS Density Standards. However, this will depend on the circumstances. For example, where recent (i.e., within 5 years) development of neighbouring sites has been to a scale of two storeys, it is generally unlikely that redevelopment of those sites will occur, in at least the short to medium term, to the scale and intensity anticipated as a permitted activity under the MDRS standards.

5 Assessing applications for four or more dwellings– Section 104 considerations under the Plan Change incorporating the MDRS

The MDRS Density Standards incorporated in the plan change for the activity of four or more dwellings per site do not attain immediate legal effect. However, where the AUP (OP) objectives and policies are inconsistent with the MDRS mandatory objectives and policies, the latter have legal effect, and the former are treated as inoperative for the purposes of such an application.

This has most impact where a zone change in the plan change is proposed under the MDRS requirements, from either Residential - Single House Zone (SHZ) or MHS, to MHU (or Terraced Housing and Apartment Buildings Zone (THAB)). This is due to the fact that the MDRS objectives and policies (which are incorporated in to the MHU and THAB zones through the plan change) talk to a planned built character that includes three storey buildings, which is significantly different to the planned built character contemplated by the operative objectives and policies for the SHZ and MHS zones.

This means that the following objectives and policies in operative SHZ and MHS zones will be treated as inoperative, where sites in these zones have a proposed zoning of MHU or THAB through the plan change and no qualifying matters apply:

SHZ:

- *Objective H.3.2(2):*

Development is in keeping with the neighbourhood's existing or planned suburban built character of predominantly one to two storeys buildings.

- *Policy H.3.3(1)*

Require an intensity of development that is compatible with either the existing suburban built character where this is to be maintained or the planned suburban built character of predominantly one to two storey dwellings.

MHS:

- *Objective H.4.2(2):*

Development is in keeping with the neighbourhood's planned suburban built character of predominantly two storey buildings, in a variety of forms (attached and detached)

- *Policy H.4.3(2)*

Achieve the planned suburban built character of predominantly two storey buildings, in a variety of forms by:

(a) limiting the height, bulk and form of development;

(b) managing the design and appearance of multiple-unit residential development; and

(c) requiring sufficient setbacks and landscaped areas.

Consideration of applications will instead be against the following MDRS objective and policy which the equivalent AUP (OP) objective and policy are inconsistent with:

Objective 2

(b) a relevant residential zone provides for a variety of housing types and sizes that respond to—

(i) housing needs and demand; and

(ii) the neighbourhood's planned urban built character, including 3-storey buildings.

Policy 1

(a) enable a variety of housing types with a mix of densities within the zone, including 3-storey attached and detached dwellings, and low-rise apartments:

However, a number of operative objectives and policies, that are not inconsistent with the MDRS mandatory objectives and policies, will still need to be considered in the assessment of applications for four or more dwellings. Furthermore, in addition to operative objectives and policies, relevant restricted discretionary activity matters in the AUP (OP) will also need to be considered.

Scenario

An application is lodged for a proposed development comprising 8 three-storey townhouses. The operative zone is MHS, and the proposed zoning under the plan change is MHU. No qualifying matters apply to the site in the plan change.

In this scenario, the application will need to be assessed against Objective 2 and Policy 1 of the MDRS, while Objective H.4.2(2) and Policy H.4.3(2) of the MHS zone will not be considered as they will be treated as inoperative. This provides a somewhat different policy framework for the assessment of planned built character, however it is important to note that building height is only one element of that character.

However, the balance of objectives and policies in the MHS zone – which are not inconsistent with any of the MDRS mandatory objectives and policies – will need to be considered in the assessment of the application.

In addition, the assessment will also need to consider proposed objectives and policies in the plan change applying to the MHU zone, which are additional to the mandatory MDRS objectives and policies.

Note – in this scenario, only the operative rules and standards are applicable to the application, as the MDRS density standards do not have immediate legal effect for the activity of four or more dwellings per site.

6 Assessing applications – Section 104(1)(b) considerations and weighting under the plan change giving effect to the NPS-UD and incorporating MDRS

The context for assessing applications on sites that are proposed to be rezoned to give effect to the NPS-UD - for example new THAB sites within walkable catchments to give effect to Policy 3(c) of the NPS-UD - is different to the scenarios involving the MDRS changes.

An important difference is that unlike the MDRS mandatory objectives and policies, proposed objectives and policies in the Plan Change that give effect to the NPS-UD do not have the effect of overriding inconsistent AUP (OP) objectives and policies. However, these proposed objectives and policies have legal effect and need to be considered in the assessment of an application, pursuant to Section 104(1)(b)(vi) of the RMA.

For applications that are consistent with relevant AUP (OP) objectives and policies, there will be no need to undertake a weighting exercise. By being consistent with relevant AUP (OP) objectives and policies, it can generally be assumed that the

relevant *proposed* objectives and policies will be satisfied, as the Plan Change is liberalising provisions.

However, practice challenges will arise where a proposed development is significantly more intensive than what the AUP (OP) provisions contemplate. An example of this might be where a six-storey apartment building is proposed on a site with an operative MHS zoning and a proposed THAB zoning (to give effect to NPS-UD requirements). In such scenarios, the proposal may be consistent with the policy shift in the relevant proposed provisions, but inconsistent with the relevant AUP (OP) provisions. In these scenarios, a weighting exercise will need to be undertaken to inform the final recommendation and decision as the outcomes of the assessment under the AUP (OP) and IPI is likely to end in different conclusions.

Such weighting assessments will need to be taken on a case-by-case basis.

It is important to remember that the NPS-UD is a relevant s104(1)(b) matter and the relevant provisions of a national policy statement must be had regard to. Hence whilst new objective and policies introduced via the IPI may have little weight, relevant NPS-UD objectives and policies themselves are operative and hence must be considered in the overall s104 assessment. The Environment Court has confirmed that the objectives and policies of the NPS-UD that refer to 'planning decisions' may be relevant in the assessment of applications. These are Objectives 2, 5, and 7, and Policies 1 and 6 (for Policy 6 only sub-clauses (c) and (e) would apply).

Note that as relevant provisions of the NPS-UD must be considered in the s104 assessment, and, the NPS-UD gives effect to Part 2 of the RMA, there is unlikely to be anything in Part 2 that would assist the planner's assessment, and a Part 2 assessment is not needed.

7 Assessing Applications – Section 95 considerations

As per assessments under Section 104, the assessment of applications under Section 95 may present challenges with regard to significant divergence between AUP (OP) and proposed objectives and policies.

While the key considerations under section 95 relate to the adverse effects generated by a proposal, the High Court decision in *Tasti Products Ltd v Auckland Council* [2017] NZRMA 22 and subsequent case law, including *Ennor v Auckland Council* [2019] NZRMA 150 and *Kawau Island Action Incorporated Society v Auckland Council* [2018] NZHC 3306 established that the objectives and policies of a plan, and a proposed plan, have a key role in informing the context for the assessment of adverse effects.

Unlike assessments under Section 104, a weighting exercise between AUP (OP) and proposed provisions cannot be undertaken as part of an assessment under Section 95.

As per Section 104 assessment considerations, a MDRS-derived permitted baseline is formed by three dwellings complying with all MDRS Density Standards and may be applied, in the Council's discretion. Furthermore, the full suite of MDRS density standards and objectives and policies provide a framework within which to consider adverse effects on persons and the environment, along with the remaining relevant operative AUP (OP) provisions.

Note that the notification preclusions under the MDRS do not attain immediate legal effect from 18 August 2002 (when the plan change was publicly notified).

8 Applications lodged before 18 August 2022

Resource Consent processing

Some applications which have been lodged prior to 18 August 2022 and infringing the following AUP (OP) standards may no longer incur infringements and not require resource consent approval for those infringements on or after 18 August 2022:

- a. Building Height
- b. Height in Relation to Boundary
- c. Setbacks (yards)
- d. Building Coverage
- e. Outdoor Living Space
- f. Outlook space
- g. Landscaped Area

With any applications still being processed as at 18 August 2022, where relevant the applicant / agent should provide an updated assessment of the proposal against the Plan Change. This can be requested via s92 (either a stop the clock one or non-stop the clock if required) however in many cases additional information from the applicant may not be required. As far as possible, reporting planners should be conscious of these changes and either return applications that no longer have infringements or ensure that in the final reasons for consent, reasons for consent originally applied for and no longer valid are not reflected in the final decision.

The one exception to this is the 'Windows to Street' MDRS Density Standard, which has no equivalent AUP (OP) standard. For this standard, from 18 August 2022, reporting planners assessing existing lodged applications for three or less dwellings will need to check for compliance with this standard.

Building Consent Planning Checks

Similar considerations also apply where planning checks on building consent applications are undertaken on or after 18 August 2022. Plans submitted in building consent applications may have annotations of AUP (OP) standards which are superseded by the MDRS density standards, assuming no qualifying matters apply on a site and three or less dwellings are proposed.

Usually this will not be an issue with any material impact given the MDRS density standards are more liberal than the standards in the AUP (OP). Sometimes staff undertaking planning checks may establish that a building proposal that would otherwise have required resource consent approval prior to 18 August 2022 (and therefore required the application of a Section 37 certificate notice on the building consent application) will not require resource consent approval when a planning check against the MDRS density standards is undertaken.

Attachment 1: Legal effect, operative status and weighting upon notification of the IPI

The plan change has two key components to it – those giving effect to the NPS-UD, and those giving effect to the MDRS. The table below summarises the provisions that apply to a development for dwellings on a site in relevant residential zones under various scenarios.

Scenario	IPI changes incorporating the MDRS	IPI changes not related to the MDRS that give effect to the NPS-UD
Relevant residential zone (MHU or THAB Zone), no qualifying matter and complies with MDRS (3 dwellings or less)	MDRS objectives, policies, rules and standards have legal effect, are treated as operative and replace the equivalent AUP provisions in the existing AUP SHZ, MHS, MHU and THAB zones (see ss 77M and 86BA).	New IPI rules, standards and matters of control/discretion have no legal effect (ss 86B and 86BA). IPI objectives and policies have legal effect. Dominant weight likely to AUP.
Relevant residential zone (MHU or THAB Zone), has a qualifying matter, and complies with MDRS (3 or less dwellings)	MDRS standards have no legal effect (s 86BA(1)(c)). MDRS objectives, policies have no legal effect (s77M(4)).	All AUP (OP) provisions remain operative. New IPI rules, standards and matters of control/discretion have no legal effect (ss 86B and 86BA). IPI objectives and policies have legal effect but likely to be given less weight than the operative objectives and policies (including those amended by the MDRS).
Relevant residential zone (MHU or THAB Zone), no qualifying matter and does not	MDRS standards do not have legal effect (s86BA(1)).	All AUP (OP) provisions remain operative.

<p>comply with MDRS e.g., 4 or more dwellings or non-compliance with one or more MDRS density standards.</p>	<p>MDRS objectives and policies have legal effect and are treated as operative and replace equivalent inconsistent operative objectives and policies (s77M).</p>	<p>New IPI rules, standards and matters of control/discretion have no legal effect (ss 86B and 86BA).</p> <p>IPI objectives and policies have legal effect but likely to be given less weight than the operative objectives and policies (including those amended by the MDRS).</p>
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**Attachment 2: Comparison of AUP (OP) and IPI Plan Change Standards
(Only available after 18 August)**

Attachment 3: Flow Chart on MDRS legal effect

Legal effect status and consideration of applications infringing MDRS Density Standards

If 3 or less dwelling per site proposed:

Requirements as set out in s86BA(1):
(1) A rule in a proposed plan has immediate legal effect if the rule meets all of the following criteria:
(a) the rule is in an IPI prepared using the ISPP:
(b) the rule authorises as a permitted activity a residential unit in a relevant residential zone in accordance with the density standards set out in [Part 2](#) of Schedule 3A:
(c) the rule does not apply to either of the following areas:
(i) a new residential zone:
(ii) a qualifying matter area.

Does the activity of the construction and use of up to 3 dwellings per site comply with the density standards?

Yes
(i.e. **none** of the MDRS density standards infringed)

No
(i.e. any **one** of the MDRS density standards is infringed)

MDRS legal effect for 3 or less dwelling per site proposals:

- Considered a Permitted activity;
- MDRS rules has **immediate** legal effect.

- Considered an RD activity, s86BA(1)(b) not met;
- MDRS rules has **no immediate** legal effect;
- **Operative AUP (OP) standards** will be relevant in assessment.