



Briefing

Briefing 3: Advice on applying a medium density residential zone – exemptions and independent panel process			
Date:	21 April 2021	Security level:	In Confidence
Priority:	High	Report number:	BRF20/21030901 (HUD) 2021-B-07852 (MfE)

Action sought		
	Action sought	Deadline
Hon Dr Megan Woods Minister of Housing	Agree to the recommendations Note these decisions are required to enable officials to draft a Cabinet paper	27 April 2021
Hon David Parker Minister for the Environment		
Hon Nanaia Mahuta Minister of Local Government		
Hon Phil Twyford Associate Minister for the Environment		

Contact for discussion			
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Lesley Baddon	Director, MfE	021 173 8357	✓
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Jessica Ranger	Manager, HUD	§ 9(2)(a)	✓

Other agencies consulted
Treasury, Department of Internal Affairs

Minister's office to complete

<ul style="list-style-type: none"> a. Noted b. Seen c. Approved d. Needs change e. Not seen by Minister f. Overtaken by events g. Declined h. Referred to (specify) 	<p>Comments</p>
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Date returned to HUD:

Briefing

Briefing 3: Applying a medium density residential zone – exemptions and independent panel process

For: Hon Dr Megan Woods, Minister of Housing
Hon David Parker, Minister for the Environment
Hon Nanaia Mahuta, Minister of Local Government
Hon Phil Twyford, Associate Minister for the Environment

Date: 21 April 2021 **Security level:** In Confidence
Priority: Medium **Report number:** BRF20/21030901 (HUD)
2021-B-07852 (MfE)

Purpose

1. This paper provides further advice on a medium density residential zone in tier 1 urban environments.¹ It covers the process for applying the new zone, the nature and role of the independent panel, and exemptions from the new zone. It also seeks direction to resolve outstanding policy issues.

Executive summary

2. On 17 March Ministers Woods, Parker, Mahuta and Twyford met and directed officials to progress options to accelerate the upzoning of land for housing.
3. Ministers agreed to seek Cabinet approval to amend the Resource Management Act 1991 (RMA) to establish a medium density residential zone in tier 1 urban environments.
4. Ministers have made several high-level decisions on applying the zone. This includes:
 - a. the zone will reflect the enabling components of the Auckland Unitary Plan Mixed Housing Urban Zone, with changes to improve outcomes and plan structure
 - b. an independent panel will consider and decide on the new zone chapter and maps
 - c. that the new zone will apply to all existing and future residential zones unless the zones are more enabling or specified exemptions apply.
5. This briefing provides advice on the following matters:
 - a. the process for applying the new zone, including the nature and role of the independent panel
 - b. exemptions from the new zone
 - c. outstanding issues to be addressed prior to the Cabinet paper.

¹ As defined in the National Policy Statement on Urban Development to be Auckland, Hamilton, Tauranga, Wellington and Christchurch.

6. This proposal is being developed at speed and without testing. Advice in this paper may change following consultation with technical experts such as those in local government and iwi/Māori.

Recommended actions

7. It is recommended that you:

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|---|--------------------------------|
| <p>a. Note you agreed to seek Cabinet approval to amend the Resource Management Act 1991 to establish and incorporate a default minimum residential density zone in tier 1 urban environments (Auckland, Hamilton, Tauranga, Wellington, and Christchurch) into council plans</p> | <p><i>Noted</i></p> |
| <p>b. Agree the Minister for the Environment will appoint a current or former Environment Court judge as the convenor of the independent panels</p> | <p><i>Agree / Disagree</i></p> |
| <p>c. Agree the convenor of the independent panels will have flexibility to establish independent panels for each urban environment and tailor the panels' operations to meet council or regional needs</p> | <p><i>Agree / Disagree</i></p> |
| <p>d. Agree the panel convenor will appoint members with appropriate expertise in the Resource Management Act 1991, urban issues and te ao Māori</p> | <p><i>Agree / Disagree</i></p> |
| <p>e. Agree the panels:</p> <ul style="list-style-type: none"> i. will make recommendations to councils on how to make changes to the notified zone chapter and maps to respond to submissions and achieve the outcomes of the medium density residential zone ii. may work with the council to make the necessary changes to the notified zone chapter and maps | <p><i>Agree / Disagree</i></p> |
| <p>f. Agree legislation limits the scope, form, and length of written and oral submissions heard by the independent panel</p> | <p><i>Agree / Disagree</i></p> |
| <p>g. Agree that there is no opportunity to appeal the new zone, except judicial review of the process to implement the new zone or on a point of law</p> | <p><i>Agree / Disagree</i></p> |
| <p>h. Agree the relevant council or councils will act as the secretariat for the independent panel in their urban environment</p> | <p><i>Agree / Disagree</i></p> |
| <p>i. Agree exemptions from the application of the medium density residential zone mean areas subject to any of the following:</p> <ul style="list-style-type: none"> i. a matter of national importance as defined in section 6 of the Resource Management Act 1991 (RMA) ii. a matter required to give effect to a national policy statement iii. any matter required for the purpose of ensuring safe and efficient operation of nationally significant infrastructure | <p><i>Agree / Disagree</i></p> |

- iv. an area subject to a designation or heritage order, but only in relation to the land subject to the designation or heritage order
- v. a matter necessary to implement, or ensure consistency with, iwi participation legislation
- j. **Note** more detailed policy work is required to define the exemption for areas subject to significant effects of climate change *Noted*
- k. **Agree** that the application of the zone in areas with special character provisions focus on the removal of provisions that restrict height and density, while allowing some controls to ensure the protection of unscheduled historic heritage *Agree / Disagree*
- l. **Agree** to establish a reference group with staff from tier 1 councils to test draft policy *Agree / Disagree*
- m. **Agree** the Minister for the Environment is provided the power to apply this mechanism to other urban areas via an Order in Council, subject to consideration of criteria outlined in legislation *Agree / Disagree*
- n. **Note** that the advice in this briefing may change following engagement with technical experts including local government and iwi/Māori. *Noted*

Minister Parker only:


- o. **Agree** to officials approaching persons with expertise in te Ao Māori, in an appropriate forum, to consult on this proposal. *Agree / Disagree*


 Jessica Ranger
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 Kāinga – Ministry of Housing and
 Urban Development**

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Hon Dr Megan Woods
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..... / /


 Lesley Baddon
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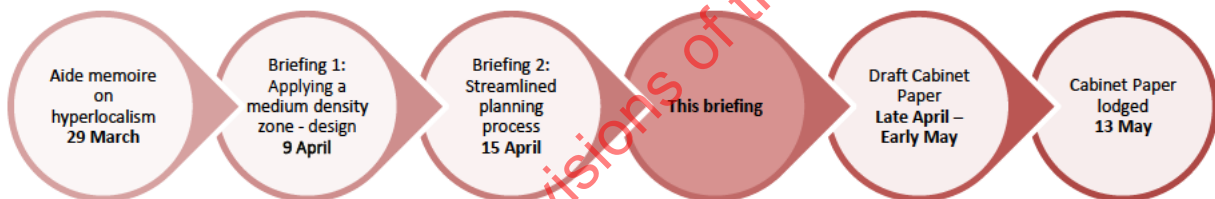
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Background

8. In February 2021, Ministers Woods, Parker, Mahuta and Twyford asked officials to consider options for accelerating the upzoning land for housing. Te Tūāpapa Kura Kāinga – Ministry of Housing and Urban Development (HUD) and Ministry for the Environment (MfE) officials provided a briefing [BRF20/21030895 (HUD) 2021-B-07699 (MfE)] addressing these issues on 12 March.
9. Ministers met on 17 March to discuss the paper and agreed to progress options for:
 - a. enabling a targeted form of hyperlocalism (aide memoire provided on 29 March [BRF20/21030903 (HUD) 2021-B-07804 (MfE)])
 - b. applying a minimum density residential zone in tier 1 urban environments (Auckland, Wellington, Tauranga, Hamilton, and Christchurch) (briefing provided on 9 April [BRF2021030900 (HUD) 2021-B-07777 (MfE)])
 - c. amending the Streamlined Planning Process (SPP) to bring forward implementation of the National Policy Statement on Urban Development (NPS-UD) (briefing provided on 15 April [BRF20/21030902 (HUD) 2021-B-07819 (MfE)]).
10. This briefing provides further advice on applying a medium density residential zone. Diagram 1 below shows where this briefing sits in the timeline of policy development for this work.

Diagram 1: Timeline of policy development



Ministers have made high level policy decisions on the application of the new zone

11. Ministers have agreed to seek Cabinet approval to amend the Resource Management Act 1991 (RMA) to provide for a medium density residential zone in tier 1 urban environments [BRF 20/21030900 (HUD) 2021-B-07777 (MfE) refers]. Policy decisions have been made on the following matters:
 - a. The content of the new zone will be set out in statutory criteria reflecting the enabling components of the Auckland Unitary Plan Mixed Housing Urban Zone, with changes to improve outcomes and plan structure.
 - b. There will be a new process for councils to follow to incorporate the zone into their district plans, with councils having discretion to provide for local circumstances and to allow for more enabling outcomes.
 - c. An independent panel will consider and decide on the new zone chapter and maps.
 - d. The new zone will apply to all existing and future residential zones unless the zones are more enabling or specified exemptions apply.
12. In previous briefings we have referred to a 'minimum density residential zone'. We will now refer to the zone as a 'medium density residential zone'. Taking a holistic view of the zone framework – from rural zones to city centre zones – the new zone we are introducing is a medium density residential zone. However, the zone will form a default minimum in tier 1 urban environments. This name is consistent with the name and zone description already provided for in the national planning standards. The level of development enabled by the zone also aligns with the BRANZ definition of 'medium density'.

Further policy decisions on the application of the new zone are required

13. Further policy decisions are needed for the Cabinet paper. This briefing provides advice on the following matters:
- the process for applying the new zone, including the nature and role of the independent panel
 - exemptions from the new zone
 - Māori participation
 - Applying the zone in tier 2 and tier 3 urban environments.

A new process for applying the medium density residential zone

14. The table below sets out the stages for establishing the new zone. Note that all timeframes in this briefing are indicative. Further work is required to test these and ensure they are feasible, while enabling fast delivery.

	Description	Timeframe
Stage 1	<p>Councils:</p> <ul style="list-style-type: none"> integrate the medium density residential zone requirements into their district plan by preparing a new zone chapter and maps prepare a short report providing evidence and rationale for decisions (including exemptions) engage with iwi authorities as they prepare the new zone chapter and maps 	8 weeks
Stage 2	<p>Councils:</p> <ul style="list-style-type: none"> publicly notify new zone chapter and maps receive submissions prepare summary of the themes of submissions received 	4 weeks (submissions – 2 weeks and summary – 2 weeks)
Stage 3	<p>Independent panel:</p> <ul style="list-style-type: none"> hears oral submissions is provided with evidence (including full submissions, summary of submissions, council evaluation report) 	2 to 3 weeks
Stage 4	<p>Independent panel:</p> <ul style="list-style-type: none"> makes recommendations to councils on the proposed zone 	2 weeks
Stage 5	<p>Councils</p> <ul style="list-style-type: none"> incorporate the independent panel's recommendations may work with the independent panel to ensure good outcomes <p>Independent panel:</p> <ul style="list-style-type: none"> approves new zone chapter and maps, which then becomes operative. 	2 weeks

Stage 1 – Local authorities integrate the new zone into their district plans

15. As previously agreed, councils will have limited discretion about how they integrate the new zone into their planning documents. This will enable the provisions to be integrated more quickly into district plans, while still enabling some tailoring to local context.
16. Councils will be responsible for identifying and mapping the areas to be exempt from the medium density residential zone. Exemptions are discussed in more detail below.
17. Councils will prepare a limited evaluation report setting out how the zone chapter and maps give effect to the criteria in the legislation and achieve the purpose of the medium density residential zone. This will enable the public and the independent panel to assess how the council has considered the exemptions and the evidence behind this.

Stage 2 – Councils publicly notify new zone, and receive and summarise submissions

18. Councils publicly notify the new draft zone chapter and maps, and evaluation report. They will receive public submissions for a period of two weeks.
19. We propose limiting the scope of public submissions to:
 - a. how the council has given effect to the outcomes of the zone
 - b. integration with other plan chapters
 - c. application of exemptions
 - d. the quality of the council's evidence provided to support their decisions.
20. Limiting the scope of submissions is appropriate given the directive nature of the new zone, and the limited discretion councils have to apply the zone. The panel's discretion will also be limited, so it would not be possible for them to address submissions on matters outside their discretion.
21. Conversely, a wide scope would inappropriately signal to submitters the potential impact of their submissions. In addition, analysing substantive written submissions in a short timeframe would not be practical.
22. The council will then provide the independent panel with:
 - a. the new zone chapter and maps as publicly notified
 - b. all public submissions received
 - c. a summary of public submissions document
 - d. the evaluation report
 - e. suggested responses to submissions (if available).

Stage 3 – The independent panel will hear submissions on the council's proposed changes alongside evidence provided by council

23. The independent panel will hear oral submissions from the public on the notified zone chapter and maps. Oral hearings serve a number of purposes including:
 - a. recognising that some people communicate better orally than in writing
 - b. allowing decision makers to clarify and test points raised in the written submissions with the submitters.
24. The independent panel will determine whether the council has correctly mapped the zone to the areas identified by the legislation, including areas to be exempted. It will consider whether the new chapter of plan provisions is sufficiently enabling to achieve the intended medium density outcome.

25. The council will be responsible for providing support to the independent panel. This would include an officer being present at hearings to provide clarification on the notified zone chapter and maps and the district plan, give evidence, speak to submissions, and provide any other relevant information.

Stage 4 – The independent panel will make recommendations on the application of the criteria and the zone

26. The independent panel will make final recommendations to the relevant council on the proposed changes, following the hearings process and consideration of any additional evidence raised through the written and oral submissions.
27. The recommendations can include any changes to the council's proposed zone. The independent panel is limited in the scope of its recommendations to:
 - a. those matters needed to ensure the statutory criteria for the new zone are met
 - b. whether the specified exemptions are justifiable
 - c. any matters to make the zone more enabling and capable of achieving the intended outcomes of a medium density zone
 - d. any matter raised during public submissions that would improve the usability and/or make the zone more enabling.
28. The independent panel will then provide council with a report detailing its recommendations, suggested changes to give effect to the recommendations, and reasons for accepting or rejecting matters raised in public submissions.

Stage 5 – Council incorporates changes, new zone chapter and maps become operative

29. The council then incorporates the necessary changes into the zone chapter and maps. The council may work with the panel during this process. The independent panel determines if the revised zone chapter and maps achieve the purpose of the medium density residential zone as set out in legislation.
30. This process is based on the model used for the Auckland Unitary Plan's Independent Hearing Panel. It will replace the requirement to use a Schedule 1 of the RMA plan change process. After final approval, the decision will be released publicly and the new zone chapter and maps will become fully operative.
31. We recommend there be no appeal rights beyond judicial review on process and points of law. Appeal rights are discussed in further below.

The independent panel will have a national convenor, who determines the membership of regional panels

32. The independent panels will be convened by a current or former judge appointed by the Minister for the Environment. Additional panel members will be appointed by the convenor. This model is similar to that for the fast-track consenting legislation. Collectively, independent panel members will need to have relevant expertise on matters including the RMA, te ao Māori and urban issues.
33. The convenor will determine the best panel composition for each proposed council or urban environment. This could include having a regional sub-panel covering a single urban area made up of several councils. The convenor will be responsible for deciding the panel's composition for each hearing session and setting the rules and procedures for the hearings. The convenor will need to be supported and resourced by central government.

Central government will fund the panel's direct costs

34. There are a range of administrative costs associated with this proposal, particularly:
 - a. costs for councils to undertake the plan making process
 - b. costs incurred by the panel including members' fees, administrative support and expert advice.

35. Costs for councils to undertake the plan making process should be borne by councils as this is an existing function. If the timing for implementing the medium density residential zone is well signalled and well communicated, councils have sufficient time to budget accordingly and manage any impacts on other plan making work programmes, including NPS-UD implementation.
36. Although councils usually pay for the costs associated with an independent hearings panel when making plan changes, we propose that central government fund the panel's direct costs in this case. Councils will not have budgeted for these costs in their current long-term plans or annual plans. Requiring them to pay for the panel may slow down the implementation of the zone.
37. We will provide more detail on costings and the appropriate funding vehicle in the draft Cabinet paper. Our initial view is the costs associated with the independent panel may be similar to those for the Expert Consenting Panel established under the fast-track consenting legislation. There was \$6 million allocated in Budget 2020 for two years of operation. However, as this process is quicker and will be completed in a shorter period, it is possible costs will be lower.

Exempting certain areas from the zone's application

38. We propose exempting areas where applying the medium density residential zone would impact the following:
 - a. a matter of national importance that decision-makers are required to recognise and provide for under section 6 of the RMA²
 - b. a matter required to give effect to a National Policy Statement under the RMA
 - c. any matter required for the purpose of ensuring the safe or efficient operation of nationally significant infrastructure³
 - d. an area subject to a designation or heritage order, but only in relation to the land that is subject to the designation or heritage order
 - e. a matter necessary to implement or ensure consistency with iwi participation legislation.
39. Council identification of exemptions, and the overall reach of the zone, should be based on information already used by councils. This will simplify the task of determining where the exemptions apply. Councils should draw on existing information such as that contained in:
 - a. district plans (e.g. existing zoning, overlays, historic heritage sites and areas, infrastructure corridors, and areas subject to natural hazards)
 - b. non-statutory maps (e.g. spatial map layers)
 - c. independent reports
 - d. information held by the relevant regional council (in the case of district councils).

² Section 6 includes: (a) the preservation of the natural character of the coastal environment, wetlands, and lakes and rivers and their margins, and the protection of them from inappropriate subdivision, use, and development; (b) the protection of outstanding natural features and landscapes from inappropriate subdivision, use, and development; (c) the protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna; (d) the maintenance and enhancement of public access to and along the coastal marine area, lakes, and rivers; (e) the relationship of Māori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga; (f) the protection of historic heritage from inappropriate subdivision, use, and development; (g) the protection of protected customary rights; and (h) the management of significant risks from natural hazards.

³ This could cover the following: state highways, national grid electricity transmission network, renewable energy generation facilities, gas transmission network, refinery pipeline, the rail network, defence areas, airports, and ports.

40. However, the quality of the information that each council has on these exemptions is variable. We will work with a local government reference group to determine where there might be limits to the information held by councils and identify how these might be managed.
41. The medium density residential zone should be largely based on existing and future residential zones. It will be able to exclude areas used for recreation, open spaces, or business land suitable for low density uses from the zone. These areas are unlikely to be part of an existing residential zone.
42. We note that we expect that the zone will not apply to areas zoned as rural residential (including large lifestyle lots), even though these can be considered to be residential zones. These are typically far from the centre of urban areas, with limited infrastructure provision.
43. We consider that areas subject to acute effects of climate change (for example, significant coastal erosion) should also be exempt from the application of the medium density residential zone. However, more detailed analysis is required to determine the effects that warrant exemption and how councils will determine spatially what areas to exempt.

Enabling greater density in areas with special character provisions and protecting historic heritage

44. Special character provisions are widely used by tier 1 councils, particularly Wellington and Auckland. These provisions are often in areas of highest demand, close to the city centre, jobs, and services. This reflects the growth of New Zealand's cities – with the older, more established areas closer to the central business district.
45. Special character areas are holding back housing supply in areas where people want to live. We consider it important to enable greater density of housing development in these areas.
46. The treatment of special character provisions is likely to be of high interest, particularly in those places where these provisions have been used to protect historic heritage, without councils going through and individually identifying which sites are heritage. This includes parts of Thorndon in Wellington and Mt Eden in Auckland.
47. Although heritage is protected under the section 6 exemption outlined above, the lack of site by site analysis by some councils will limit their ability to use this exemption.
48. We have considered several options relating to the treatment of special character areas:
 - a. a blanket removal of character provisions.
 - b. the removal of character provisions that restrict height and density, while allowing some controls to ensure the protection of unidentified heritage. For example, this could include demolition restrictions on buildings built before a certain date and the application of certain design controls.
 - c. a special process to transition some areas to heritage, with limited changes to character zones in the interim. This could take up to six months.
49. We recommend the second of these options. This option is most likely to successfully balance the need for a fast, efficient process that unlocks development capacity with the appropriate protection of historic heritage.
50. We will work with Ministry for Culture and Heritage and Heritage New Zealand Pouhere Taonga to further develop this option for the Cabinet paper.

Supporting Māori participation and aspirations

51. Officials recognise the importance of identifying and protecting Māori values and interests when applying the new zone. This includes enabling participation by Māori, identifying and protecting Māori values and interests in land, recognising Treaty of Waitangi settlements, and recognising and providing for their culture and traditions.

62. Designing a new process and criteria to establish a new zone could put decisions by decision-makers at risk of not achieving Part 2 of the RMA, if they are not given full discretion to determine the extent to which their decisions will meet Part 2. This is a matter we will address when drafting amendments to the legislation.
63. A decision-making process which requires the independent panel and council agreeing, as proposed in this paper, has the potential to result in collaborative decision-making or, alternatively, result in disagreement and the relevant council not implementing the panel's requested changes. This may require the Minister for the Environment to intervene using existing powers, such as initiating a plan change under section 25A of the RMA.
64. To ensure the new zone is quickly operative, it is recommended that there be no appeal rights beyond rights to access judicial review. Justification for removing appeal rights should be made carefully. The involvement of council and council officials, as well as allowing limited public submissions mitigates some of the curtailing of appeal rights. The outcomes, such as the zone generally enhancing property development rights rather than diminishing them may be sufficient justification. The setting of narrow decision-making parameters also makes extended appeals rights limited in their ability to effect change.

Next steps

65. We will provide you with a draft Cabinet paper on the proposed package of legislative changes in the week of 26 April. We will incorporate your feedback into the version for Ministerial and departmental consultation. This consultation will take place in late April and early May.
66. Currently it is expected the Cabinet paper will be lodged on 13 May. It will then be considered by DEV on 19 May and by Cabinet on 24 May.