SUBMISSION ON THE RESOURCE MANAGEMENT (ENABLING HOUSING SUPPLY AND OTHER MATTERS) AMENDMENT BILL

SUBMITTER DETAILS

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INTRODUCTION

1 This is a submission on the Resource Management (Enabling Housing Supply and Other Matters) Amendment Bill (**the Bill**). The Bill seeks to amend the Resource Management Act 1991 (**RMA**) to rapidly accelerate the supply of developable residential land where demand for housing is high.

2 The Environmental Defence Society Incorporated (**EDS**) is a not-for-profit, non-government national environmental organisation. It was established in 1971 with the objective of bringing together the disciplines of law, science, and planning in order to promote better environmental outcomes in resource management. It recently completed a multi-year year project looking at the future of the broader resource management system in New Zealand, which had (among other things) a focus on urban matters.

SUMMARY OF SUBMISSION

3 **EDS supports the policy intent of the Bill, which we see as the need to provide for density in existing urban areas**. This should prevent urban sprawl, which is generally detrimental to environmental wellbeing and should be controlled. However, this support is qualified.

4 At the highest level, we question the need for the Bill. We note that the National Policy Statement on Urban Development (**NPSUD**) is already driving an increase in development capacity. The NPSUD focuses on creating density closer to transport and existing infrastructure and services, and allows councils and others to plan and design in an integrated and nuanced way across an urban area as a whole. It will require all Tier 1 councils to enable buildings of at least six storeys within the walkable catchments of the city centre and metro areas; as well as in the vicinity of rapid transit stops and existing or planned public transport routes.[1]

5 Rather than creating a parallel process (the proposed Intensification Streamlined Planning Process (**ISPP**)), introducing blanket permitted activity standards for development, and creating additional complexity in the system by inserting a range of new provisions directly into the RMA (which for the

[1] Policy 3, NPSUD

most part would be more appropriate in national direction than primary legislation), a more appropriate approach would be to speed up the implementation of the existing NPSUD. Doing this through a national policy statement (**NPS**) – or, if required, national environmental standards (**NES**) – would be a more elegant solution than enacting a legislative amendment.

6 However, if the Bill proceeds, it should focus on its core legitimate concern. That is to overcome nimby objections to greater density/change in urban environments, and to provide more development capacity for housing. This should not be conflated with the removal of design controls or a weakening of the environmental safeguards around urban development. Those are very different things, and have important public interest elements. The Bill, at present, throws the urban design and environment baby out with the nimby bathwater.

7 Poor urban design can lead to cities that are both less liveable (eg in terms of design impacts on crime, social connection, mobility and the mental wellbeing of residents) and detrimental to the environment (eg in terms of the environmental and climate experience of residents from building orientation and sunlight, and in terms of macro-level environmental impacts on greenery and biodiversity). Urban design should not be reduced to things like the colour of buildings or their architectural style. How the urban fabric is designed is vital to how a city functions, its relationship with nature, and the wellbeing of those who use it.

8 Good urban design solutions become even more important with increased density. Here, the public and private spheres (and how they interact) need to be more carefully managed. The natural environment also needs to be more carefully woven into a dense urban fabric where space is constrained.

9 That may be particularly the case in areas with lower socio-economic indicators, where urban design can have marked positive or negative social impacts and where a free market may not have the right incentives to provide for it. Urban slums are not what we want to house our population. Synergies between the provision of land for housing, good urban design, and positive environmental outcomes should be the overall policy aim. We think that the Bill targets the first at the expense of the second and third.

10 More specifically, EDS is concerned that the application of blanket permitted activity standards to provide for dense development in residential areas, as currently provided in the Bill's medium density residential standards (**MDRSs**), does not encourage the many synergies that can and should be achieved by creating *well-designed* urban density. Although it should not *prevent* density, planning and consenting has an important role to play in determining what that density *looks like*. Blanket permitted activity status is therefore not the answer. Allowing a consenting process, in which achieving density is one strong policy, would be more appropriate.

11 More design considerations should therefore be included in the Bill's concept of "qualifying matters" which justify more stringent controls than contained in the MDRSs. These need not necessarily reduce the density of a development (eg units on a site), but would ensure that a dense development is designed well.

12 EDS considers a number of more specific changes are required to the mechanics of the Bill:

- The relationship between the Bill and other nationally important environmental instruments, such as the New Zealand Coastal Policy Statement (**NZCPS**) and bespoke legislation for the Waitākere Ranges and the Hauraki Gulf, should be clarified. These should be specified as "qualifying matters" alongside NPSs.

- The need to *recognise and provide for* the matters in section 6 of the RMA, and the need to *give effect to* NPSs, should be the legal test when determining whether or not the default MDRSs should apply or whether more stringent controls are imposed through a consenting process. In other words, the default MDRSs should only apply where they can be justified under Part 2 and by giving effect to the full range of national direction.

- Careful consideration and clarification is required to determine what areas are deemed to be "residential" (and therefore subject to the default MDRSs) for the purpose of the Bill. The MDRSs will not be appropriate in all residential areas, and is it not clear that qualifying matters are broad enough at the moment to prevent poor outcomes (eg landscape and natural character concerns).

- It is important that a clear distinction continue to be drawn between district and regional controls. Regional controls should not be overridden by a permissive approach to urban development, and regional plans should not be subject to the ISPP.

13 More generally, we note that the Bill alone will not address the issue of increasing housing supply and affordability. While the Bill tackles some nimby issues, by removing some of the barriers to increasing density in currently low-density urban neighbourhoods, much more than that is needed to address the issue of housing affordability. Much of this lies beyond the power of the RMA to fix. The RMA should not be used as a scapegoat for housing unaffordability, especially if this is used to justify the removal of environmental safeguards.

14 We divide our submission into 5 sections: (1) the legal relationship between the MDRSs and other RMA instruments; (2) the importance of allowing consideration of urban design and environmental matters in developments; (3) where the MDRSs apply; (4) the need for the ISPP; and (5) the application of the Bill to regional instruments.

The legal relationship between the MDRSs, the NZCPS and bespoke legislation needs to be clarified

15 The first point relates to a need to clarify the legal relationship between the MDRSs and other national direction.

16 Proposed s 77G(b) of the Bill provides that a matter required to give effect to an NPS is a qualifying matter that justifies a territorial authority making the MDRSs less permissive. This is necessary to ensure national direction retains its integrity.

17 However, this clause needs to be amended to specifically include the NZCPS. The NZCPS performs the same kind of role as an NPS, but is not defined in the RMA as *being* an NPS. Thus, it may not be captured as a qualifying matter by the current drafting.

18 Proposed s 77G(b) also needs to be amended to encompass instruments that are "deemed" to be NPSs, such as the Hauraki Gulf Marine Park Act 2000[2] and the Waitākere Ranges Heritage Area Act 2008 (**WRHA**).[3] These Acts seek to protect the landscapes of the Hauraki Gulf and Waitākere Ranges respectively. While they are deemed to have the same *effect* as an NPS, they may not classify as a qualifying matter under cl 77G(b), as they were prepared under a different process to the RMA.[4]

[2] See section 9
[3] See section 10
[4] The RMA defines a national policy statement as being a statement issued under s 52, it is assumed that this definition will apply to the provisions of the Bill once subsumed in the RMA.

19 If these statutes do not constitute NPSs, they could still be qualifying matters under s 77G(h) (which provides for "any other matter" that would make the MDRSs "inappropriate"). To be a qualifying matter here, a more stringent test must be overcome, whereby the statutes would be balanced against the "national significance of urban development" and the development objectives of the NPSUD. Given that the purpose and objectives of the WRHA and Hauraki Gulf Marine Park Act ordinarily need to be "given effect to" in regional and district planning documents (which is why they are otherwise deemed to be NPSs), it is fundamentally inappropriate to replace that firm directive with a balancing approach skewed in favour of development. "Give effect to" means to implement. It is a "strong directive, creating a firm obligation on the part of those subject to it."[5]

20 That said, a generous interpretation of the Bill based on its intent *might* see these frameworks recognised as NPSs and therefore as qualifying matters under s 77G(b). However, even if that broader interpretation were taken, the provisions in the WRHA might still be inappropriately weakened. This is because the Bill codifies the NPSUD policies within the RMA itself (it essentially becomes part of primary legislation, not just an NPS), and the WRHA specifies that "if a conflict arises between this Act and the RMA, the RMA prevails".[6] In its current form, the operative provisions of the WRHA requiring decision-makers to give effect to the purpose of the Act when preparing or reviewing planning instruments may well be in conflict with the statutorily incorporated policies in the NPSUD. The latter policies would therefore prevail, weakening the direction to give effect to the WRHA.[7]

21 It is therefore vital that the Bill (potentially through consequential amendments to the other statutes) clarifies that the Hauraki Gulf Marine Park Act and the WRHA are NPSs when it comes to identifying "qualifying matters" under s 77G(b), which justify more stringent controls than the default MDRSs.

Given the limited ability to apply less permissive MDRSs, s 77G(b) must be amended to clarify that national direction, or legislation, that does not meet the definition of an NPS but has the same effect is captured as a qualifying matter.

22 Amendment is also needed when it comes to the more general legal relationship between the Bill and NPSs other than the NPSUD. In particular, the Bill needs to have a clearer legal test as to when a qualifying matter will allow (and, indeed, *require*) councils to impose less permissive controls.

23 Proposed s 77H of the Bill requires territorial authorities seeking to make an allowance for a qualifying matter to prepare an evaluation report. This report must demonstrate why a particular area is subject to a qualifying matter (eg an NPS), and justify why that qualifying matter is incompatible with the high level of development permitted by the MDRS.

24 In itself this drafting does not give the MDRSs legal primacy over national direction. If more stringent controls can be justified, then they will proceed. However, the tenor of ss 77G-77I is still of concern. The onus is put on councils to justify strongly why less permissive standards are needed. There is a specific requirement to assess the impact of any further controls on development capacity, as well as the costs and broader impacts of those controls, but no mention of assessing the benefits of those controls for achieving the broader purpose of the RMA. This makes it less of a cost-benefit analysis than simply a cost analysis (where costs are measured only in terms of lost development).

[5] Environmental Defence Society Inc v New Zealand King Salmon Company Ltd [2014] NZSC 38 at [91]
[6] Section 9, Waitakere Ranges Heritage Area Act

25 Moreover, under proposed s 77H(2)(d) the section 32 report process is geared towards assessing whether any controls on development are "consistent" with the development outcomes provided in Schedule 3A.[8] This creates a significant tension with section 32 itself, which requires that a council "examine the extent to which the objectives of the proposal being evaluated are the most appropriate way to achieve the purpose of this *Act*". What if a section 32 report finds that controls are important to achieve the purpose of the Act (embodied in section 6 matters or national direction), but that they are inconsistent with the development outcomes of the NPSUD? The provision requires councils to explain *how* controls are consistent with urban development, but in doing so does not seem to contemplate controls that are *not* consistent with those imperatives (even if they are necessary to give effect to section 6 matters).

26 Essentially, the starting point and assumption in the Bill is that blanket development freedom (aside from the minimal controls in the MDRSs) amounts to "sustainable management" across all residential areas, which in our view cannot simply be assumed. When it comes to environmental matters, such an assumption is neither in the spirit of the RMA nor the precautionary approach. Above all else, we must remember that the RMA is an environmental statute.

27 The starting point should be that the matters of national importance in section 6 of the RMA are to be "recognised and provided for" and matters in national policy statements "given effect to". Urban development should be provided for, and the MDRSs applied unchanged, only where it can be categorically shown that they achieve those things. This will not undermine the intent of the Bill, because neither section 6 matters nor national direction provide support for nimbyism or fundamentally oppose urban density. What they *do* require is that density is done within environmental limits.

28 In the same vein, it is also anomalous that the Bill states that councils "may" make the MDRSs less permissive if required to reflect section 6 matters or to give effect to environmentally focused national direction. The direction should be that they "must" do so, given that is the clear legal obligation of councils under the RMA.

29 The legal test here should be flipped on its head: whether applying the default MDRSs in the Bill can be justified against the matters of national importance in section 6 RMA and the environmental bottom lines contained other NPSs, not whether controls under section 6 and other NPSs can be justified in light of the benefits of urban development.

30 This direction should be reflected not only when *councils* are applying the MDRSs (in preparing changes to their district plans), but also at later points of decision-making in the plan change process. Currently, it is not clear in the Bill whether providing for qualifying matters is a mandatory consideration when (1) an Independent Hearings Panel (**IHP**) is considering its recommendations, or (2) when the Minister is making his or her decision (ie in the event the council rejects the IHP's recommendations).

31 The IHP and Minister should be *obliged* to identify and make recommendations/decisions on any relevant qualifying matters even if a council has not done so; they are gatekeepers of an environmentally oriented Act, not champions of unfettered urban development.

32 Proposed s 77I is also of concern. This allows for "any other matter" to be a qualifying matter and therefore justify more stringent controls than the MDRSs only if the more difficult test in s 77I is met.

[8] "a description of how the provisions of the district plan are consistent with the development outcomes…" arguably does not allow for the possibility of a description that admits provisions are *not* consistent with development outcomes, even if they are justified with reference to other national direction.

Essentially, this means that outcomes important to sustainable management that are not contained in section 6 or national direction[9] must be justified against the importance of urban development. At best, this means that considerations such as landscape, climate change and the efficient use of resources (including land) are *balanced* against development imperatives. At worst, it might mean that such things are actually *subordinated* to development, given that the Bill requires them to be *justified* against the development objectives of the NPSUD. An alarming possibility is that the matters in section 5 of the RMA – its core purpose – would be qualifying matters only if they could be justified against the national benefits of urban development, since they are not qualifying matters under section 6 and may not be entirely reflected in our current package of national direction.

The obligation to "recognise and provide for" section 6 matters, and "give effect" to matters in NPS is paramount. Urban development in the form of the permissive MDRSs should only be provided subject to these, and other, qualifying matters. Proposed sections 77H and 77I need to be amended to reflect that.

33 Although it is not something that can be done through this Bill, we also emphasise the importance of progressing the proposed NPS on Indigenous Biodiversity (**NPSIB**) in urban environments. Given the limited ability for councils to include more stringent controls than those in the default MDRSs, the urgent promulgation of the NPSIB is crucial to protect urban environmental outcomes (eg the protection of urban biodiversity, tree cover and green space). Indeed, urban environments are one specific focus of the NPSIB, so the Bill's uncompromising approach to facilitating development should not exist in isolation of it. To put it simply: if achieving environmental outcomes in urban development is to be tied to the need to give effect to national direction, rather than broader council functions under the RMA for biodiversity, then the absence of the NPSIB is a significant gap.[10]

The importance of urban design controls

34 The second substantive point we raise is the insufficient recognition of urban design controls in the Bill, which are essentially precluded by the application of blanket permitted activity standards for residential development. Good urban design is important for both social (eg social connection, mental wellbeing and design impacts) and environmental (eg the creation of resilient, biodiverse cities) reasons.

35 The MDRSs incorporated by Schedule 3A of the Bill would enable the construction and use of up to 3 residential units per site as a permitted activity, provided the relevant building standards are complied with. These standards lack the nuance required for liveable, environmentally friendly cities and rely on the market to provide them.

36 The Bill's legitimate policy driver is encouraging the provision of more development-ready urban land supply for residential purposes, to improve housing supply. This involves increased urban density, rather than urban sprawl. While density is important for the future of our cities, it is also a relatively targeted driver. The Bill should resist cracking a nut with a sledgehammer: in pursuit of increasing density, we should not completely restrict councils' ability to shape and design urban environments.

37 If all development controls (bar the bare minimum contained in the Bill) are removed, the Bill risks creating urban slums. This is particularly so as market will tend to provide the cheapest design solutions that "look" good to purchasers but will not necessarily provide the best solutions for communities or the environment.

[9] Or the limited range of other things contained in the Bill, such as natural hazards.
[10] Section 6 matters are also qualifying matters, but these lack the specificity and urban focus of an NPS.

38 Good urban design becomes more important with increased density. Done well it can achieve social outcomes relating to mobility, connection, energy efficiency, education, a sense of place and belonging, crime reduction and mental wellbeing. These are legitimate policy objectives and should not be conflated with "nimbyism" (ie preventing density or building height in existing urban environments because existing residents do not want it).

39 It is therefore important to have clarity as to what is being aimed for. Having some form of consenting process where design elements are considered (and where developers are therefore given strong incentives to incorporate them from the outset) – even if activity status is controlled or restricted discretionary – is not necessarily inappropriate, provided it ensures that the desired density is still achieved.

Good urban design is required to design liveable cities. These things should not be disregarded in the quest for increased density. A consenting process where design elements are considered is appropriate, and is compatible with (and vital to) increased density.

40 It is also important that urban policy connects the parallel policy processes for freshwater quality and biodiversity, environmental matters over which local authorities have jurisdiction. These aspects must be considered when designing environmentally friendly cities, including at the scale of individual developments.

41 Density is not incompatible with good environmental outcomes, if designed well. The Bill needs to enable the use of controls to ensure that density is not achieved at the expense of environmental protection. These controls (such as indigenous planting, carbon neutrality, onsite water treatment measures, stormwater control, building orientation to support passive heating and minimising impacts on reticulated infrastructure) are important, but can be extremely hard to retrofit if not thought about from the outset of development. The environmentally focused and pan-urban RMA, not the site and building focused Building Act, is the appropriate place to achieve most of these things.

42 The enhancement of biodiversity is also particularly important in degraded areas. The policy imperative in these areas should not be to protect what we have, but to improve it. Requirements for enhancement therefore need to reflected in permitted standards or conditions of consent. Just because a site is covered in concrete and devoid of vegetation does not mean it should be remain so when redeveloped. The RMA should be about creating such opportunities and synergies by piggybacking on the strong demand for urban renewal and change, not a constant slippery slide to mediocrity through mitigating new adverse effects.

43 Similarly, freshwater quality can be impacted by urban design choices (especially stormwater runoff). This is not just about the proportion of permeable surfaces (to control flooding as a hazard), but also about things like planting and landscaping (eg rain gardens) to filter contaminants. All these are important environmental design considerations.

Good urban design is also important for environmental reasons. Urban policy should not be developed in a silo. Consideration of other environmental matters, such as freshwater quality and biodiversity, is important. This requires a consenting process or more rigorous permitted activity standards for dense developments.

Application of the MDRSs

44 Determination of where MDRSs apply is also an important factor. EDS considers that careful consideration, and clarification, is required to determine which areas are deemed "residential" for the purpose of the Bill.

45 The Bill requires the application of MDSRs in all relevant residential zones in tier 1 urban environments. An urban environment is defined in cl 77E as:

> *any area of land (regardless of size, and irrespective of territorial authority or statistical boundaries) that –*
>
> - *is, or is intended by the relevant territorial authority to be, predominately urban in character; and*
> - *is, or is intended by the relevant territorial authority to be, part of the housing and labour market of at least 10,000 people.*

46 An urban non-residential zone is defined in the negative as '*any zone in an urban environment that is not a residential zone'*.

47 The distinction as to whether or not a zone is residential or not is therefore critical for determining whether the highly permissive MDRSs in the Bill must, by default, apply. However, the application of the MDRSs, including their implications for density, bulk and setbacks, may not be suitable in all residential zones. More nuance is required in determining which urban areas should be subject to the presumption that the MDRS will apply.

48 As drafted, the MDRSs will be required to be imposed in some smaller rural and coastal environments that are currently zoned residential. Intensification of these areas would be inappropriate not only because of the character of the place (including the landscape and natural character), but also the size and infrastructure constraints of the area (councils may be expected to provide supporting infrastructure on an ad hoc basis). By way of example, the areas zoned residential on Waiheke Island (ie the Western end) would *prima facie* need to apply the MDRSs. Such a permissive approach to development would be inappropriate, but it may be difficult to justify more stringent standards on the grounds of there being a qualifying matter.

Blanket application of the MDRSs across all urban residential zones will likely result in inappropriate intensification and challenges with infrastructure provision. More nuance is required when defining what is residential for the purpose of the Bill.

The Intensification Streamlined Planning Process

49 We have two main points to make about the ISPP. First, we do not consider it to be necessary given the existing streamlined planning process in the RMA and second, if adopted, it should not be used for decisions as to the rezoning of greenfields land.

50 The Bill introduces the ISPP as an alternative to the Schedule 1 process. It is intended that by requiring hearings on intensification planning instruments to be heard by an IHP, with limited rights of appeal for submitters, the implementation of the NPSUD will be fast-tracked.

51 While EDS generally supports a more streamlined approach to plan-making (such as that proposed by the Randerson Panel), the ISPP introduces yet another new streamlined planning track to the

RMA, adding a further layer of complexity. The outcomes sought by its introduction can be achieved by existing methods.

The ISPP introduces an additional layer of complexity. As the outcomes it seeks to achieve can be achieved by existing methods its inclusion is unnecessary.

52 That said, the ISPP, if it proceeds, should apply only to existing residential or urban areas to be intensified and should not be used for plan changes seeking to rezone non-urban land to urban land. The rezoning of non-urban land to urban land is likely to involve a broader and more complex range of competing policy considerations. As such, whether or not such land use change is appropriate should be determined by the Environment Court, if necessary, rather than by the Minister of the day (who has much stronger powers under the ISPP).

53 This is particularly important given the present development of the NPS for Highly Productive Land and the NPSIB, and the need to carefully reconcile many potentially conflicting policy priorities in accordance with the purpose of the Act, as well as with infrastructure decisions made in the context of a broader spatial plan (or Future Development Strategy).

54 At the very least, it needs to be made clear that decision-making by councils, an IHP and the Minister (in the event councils reject IHP recommendations) on greenfields rezoning should be done, using the ISPP, *in accordance with* Future Development Strategies, rather than being treated as a way to "override" them. We are not convinced that there is still a lack of residential development capacity provided for in such planning instruments, and therefore a need to ride roughshod over them.

55 Ignoring these other considerations, and enabling rezoning through a streamlined process with a dominant "more housing" policy, will result in sprawl and non-contiguous urban development that is both environmentally sub-optimal and inefficient from an infrastructure provision perspective. Random pockets of density led by the market is not conducive to a well-planned infrastructure rollout.

Given the broader range of policy considerations involved when determining whether an area should be rezoned as urban, use of the ISPP is not appropriate in this context. If it is retained, the ISPP should be used only for plan changes providing for increased density in an existing urban footprint.

Other matters

Application of the Bill to regional councils and regional plans

56 The permissive *regulatory* changes provided for in the Bill (the MDRSs) appear to apply only to territorial authorities and district plans, not regional councils or regional plans. Generally speaking this is good, as a permissive approach to intensification/development in terms of land use choices (denser residential development) should not require a similarly permissive approach when it comes to regional functions like sediment control from earthworks. The point of the Bill is overcoming nimby concerns and resistance to density, not to soften environmental protections. It should not be extended to regional functions.

57 It should also be made clear that the ISPP does not apply to regional plan changes or variations, which should proceed using the normal Schedule 1 process.

Codification of the NPSUD policies

58 Finally, we note that the Bill codifies quite specific parts of the NPSUD, and inserts into the RMA rules that would ordinarily be in an NES or district plan. This is particularly evident in the Proposed Schedule 3A. That is a very unusual approach from a legislative design perspective and is quite unique in terms of what is contained in the RMA. The provisions are anomalous.

59 EDS cautions that there may be unexpected ramifications of elevating some specific rules, activity statuses and controls to the legislative level. One example already highlighted is the WRHA, which states that, in the event of any conflict, the RMA prevails (but an NPS does not necessarily do so). Careful thought should be given to what other consequences may arise from this unorthodox approach.

60 As mentioned in our summary section earlier, enacting changes through a NPS or NES would be a more elegant solution than a legislative amendment, and would avoid such problems.

Conclusion

61 In conclusion, EDS does not see the justification for such a far-reaching Bill. It considers the changes would be better contained in national direction rather than primary legislation. However, in the event the Bill proceeds we have highlighted some key changes that need to be made, particularly the need to give primacy to environmental safeguards and the need to allow for good urban design considerations to inform how dense urban areas are planned and delivered.

62 We thank the Environment Select Committee for the opportunity to submit on the Bill. Addressing issues of housing supply is an important issue for Aotearoa, but this should not be provided for at the detriment of the environment.