

Christchurch City Council

Legal Services Unit

MEMORANDUM

Legal Privilege Applies

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Date: 26 OCTOBER 2018

From: BRENT PIZZEY (Associate General Counsel, Legal Services) LEX12590

To: BRENDAN ANTISS (General Manager, Strategy & Transformation)

LEGAL ANALYSIS OF PROPOSED NEW RULE 5.4.6.1 P2

Purpose of memo

1. At the Council meeting on 15 October 2018 the Council requested legal advice on proposed new rule 5.4.6.1 P2.

Summary of Advice

2. Proposed new rule 5.4.6.1 P2 is lawful and enforceable if it is clear, certain, and inserted into the District Plan by a lawful process.
3. The proposed new rule is sufficiently clear and certain.
4. The proposed process for the rule to be inserted into the District Plan is a lawful one.

Background and Context

5. Council staff have recommended a proposed new policy to the Council, being
 - b. In the High Flood Hazard Management Areas:
 - i. provide for development for a residential unit on residentially zoned land where the flooding risk is predominantly influenced by sea-level rise and where appropriate mitigation can be provided that protects people's safety, well-being and property from unacceptable risk; and
 - ii. in all other cases, aAvoid subdivision, use or development in the High Flood Hazard Management Area where it will increase the potential risk to people's safety, well-being and property.

6. Legal advice to the Council has described the interpretation and application of that policy when resource consent is required for new dwellings and extensions (Brookfields' legal advice to the Council by letters dated 26 September and 12 October 2018).
7. Council staff have also recommended a proposed new permitted activity rule to implement the objectives and policies of the District Plan. That permitted activity rule is:

5.4.6.1 Permitted activities

Activity	Activity specific standards
P1	...
P2	<p>The replacement and repair of residential units existing as at 4 September 2010 on sites in the Residential Unit Overlay identified in Appendix 5.8.2.</p> <p>a. The ground floor area of the replaced or repaired residential unit is not greater than the ground floor area of the residential unit that existed as at 4 September 2010.</p> <p>b. The replaced or repaired residential unit is located in the same or similar position on the site as the residential unit that existed as at 4 September 2010.</p>
P3- P9	...

8. The context of that proposed additional permitted activity rule is relevant. The existing rule 5.4.6.1 P1, determined by the IHP, provides that the replacement and repair of buildings in the HFHMA (not just in the RUO) is a permitted activity, if:
 - (a) The ground floor area of the replaced or repaired building is not greater than the ground floor area of the *existing* building.
 - (b) The replaced or repaired building is located in a position on the site that is no lower than the *existing* building.
9. As a result of that permitted activity rule, people do not need resource consent to replace a house anywhere in the HFHMA that was in existence when the rule took legal effect in the Replacement District Plan process (provided that they comply with minimum floor level rules). I understand from Council staff that there are over 2,000 houses in the HFHMA that can be replaced on that basis.
10. That current rule 5.4.6.1 P1 does not permit replacement of a dwelling that was demolished between the time of the earthquakes and rule 5.4.6.1 P1 taking legal effect, as that house is not an "*existing*" building.
11. Council staff estimate that in the RUO there are up to 32 bare sections on which the demolished house is in that category.

Lawfulness of the rule

12. Rules in District Plans must be certain and clear.
13. The proposed wording of this rule is, in my opinion, sufficiently certain and clear.
14. Rules in District Plans must be made by a lawful process.
15. The statutory process for changes to a District Plan under the Resource Management Act, and those which applied to making the current District Plan under the Canterbury Earthquake (Christchurch Replacement District Plan) Order 2014 (OiC), do not apply to this proposed rule.
16. The staff report to the Council meeting of 15 October 2018 accurately described the proposed process by which the Minister will determine whether to insert that rule in the District Plan under the Greater Christchurch Regeneration Act. If the process followed the Minister is the one set out in that Act, and if the Minister reasonably considers the matters that the Act requires the Minister to consider, then the process will be a lawful one.
17. For the sake of completeness, however, I note that the IHP in the Replacement District Plan process determined that a rule that permitted replacement of over 2,000 “existing” houses throughout the HFHMA, where there is an existing hazard, was consistent with the statutory framework for its decisions, including relevant objectives and policies of the District Plan and all other relevant statutory considerations.
18. The proposed new permitted activity rule extends that by up to an additional 32 dwellings, on sites where there is not an existing flood risk but will be when there is sea level rise that affects the site. It is reasonable to consider that the proposed new rule would also be appropriate when weighed against the provisions of the RMA and OiC under which IHP decisions were made.

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