



**MARLBOROUGH SOUNDS
RESOURCE MANAGEMENT PLAN**

Plan Change No. 13: Special Subdivision Rules

(Plan Change and section 32 analysis included)

**REPORT PREPARED TO FULFIL THE REQUIREMENTS OF
SECTION 32 OF THE
RESOURCE MANAGEMENT ACT 1991**

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Introduction

The Marlborough Sounds Resource Management Plan has a range of subdivision rules applying to each of the different zones. This includes special subdivision rules, which essentially allow non-compliance with allotment sizes but are normally assessed as discretionary activities, rather than non-complying. However, the status of such subdivisions was questioned during a resource consent hearing in July 2004 with the outcome that since that hearing, special subdivisions in the Rural One Zone have been assessed as non-complying activities. The need for a plan change became evident on investigating the alternative interpretation and the manner in which some of the Plan's provisions had been amended prior to the Plan becoming operative in February 2003.

Section 32 Requirements

In notifying any plan change to the Marlborough Sounds Resource Management Plan (the Plan), councils have a duty under section 32 of the Resource Management Act 1991 (the Act) to evaluate a number of matters. In preparing plans and changes to them, councils are required to consider the alternative ways to achieve the environmental outcomes being sought and have to consider a broad range of policies, objectives and methods. An analysis of the benefits and costs in deciding which provisions are the most efficient has to be carried out.

The specific elements of section 32 that are covered in this report are as follows:

- (3) *An evaluation must examine—*
 - (a) *the extent to which each objective is the most appropriate way to achieve the purpose of this Act; and*
 - (b) *whether, having regard to their efficiency and effectiveness, the policies, rules, or other methods are the most appropriate for achieving the objectives.*
- (4) *For the purposes of this examination, an evaluation must take into account—*
 - (a) *the benefits and costs of policies, rules, or other methods; and*
 - (b) *the risk of acting or not acting if there is uncertain or insufficient information about the subject matter of the policies, rules, or other methods.*

Councils are required then to:

- Determine the environmental issue.
- Evaluate the extent to which any new objective is the most appropriate way to achieve the purpose of the Act.
- Evaluate whether the policies, rules, or other methods are the most appropriate for achieving the objective.
- Explore different methods/ways of dealing with the issue.
- Evaluate the benefits and costs of the proposed policies, rules, or other methods.

- Examine the risk of acting or not acting if there is uncertain or insufficient information on the policies, rules, or other methods.
- Decide which method or methods is the most appropriate to achieve the purpose of the Act.

The Act also requires that a report be prepared that summarises the evaluation and gives reasons for that evaluation. This report fulfils that requirement (section 32(5)).

Part A: Resource Management Issue

The issue first became apparent at the hearing of a resource consent for the subdivision of land for rural residential size allotments in the Rural One Zone¹. The subdivision application sought to rely on one of the special subdivision rules - Rule 27.3.3.2 'Special Provision to Protect Large Lots'. The interpretation of the special subdivision rules was questioned in relation to what status of activity should be applied to these subdivisions i.e. discretionary or non-complying?

Because of the complexities surrounding the issue, a legal opinion was sought from the Council's solicitor's. That opinion will be referred to in this report.

The special subdivision rules that are listed in Rule 27.3.3 of the Marlborough Sounds Plan include provision for, amongst other things:

- the protection of significant environmental features;
- the creation of allotments of rural residential propositions with balance land being rendered non-complying for further subdivision;
- special purpose lots;
- boundary adjustments;
- integrated residential development; and
- utilities that do not comply with the standards.

The special subdivision rules are intended to allow non-compliance with allotment sizes specified in Table 27.3.1, which sets out the allotment standard for discretionary activities. Their purpose can be found in two specific policies in the Subdivision and Development Chapter 23 of Volume One.

Policy 1.3	Provide for the creation of allotments which protect the natural environment including bush, riparian lands, wetlands, headlands, heritage features, ridges and hazard areas, and archaeological and cultural heritage sites.
Policy 1.6	Provide opportunities to create special purpose allotments that protect the natural environment, in tandem with widening and diversifying opportunities for land use activities.

1 | Ewen Street and M O'Brien at the head of Kenepuru Sound (U040446)

Question over interpretation of the rules

The question of interpretation that arose during the hearing of the resource consent application relates specifically to Rule 27.3.3.2 'Special Provision to Protect Large Lots'.

The special provision to protect large lots rule is first referred to in Table 27.3.1 where the minimum and maximum allotment areas are set out – see below. There is some ambiguity with this particular provision in that it is not specific to a particular rural zone. The Council's interpretation is that the following entry in Table 27.3.1 is meant to apply to the Rural One Zone.

27.3.1 Allotment Standards (Discretionary Subdivision Activities)

...

Rural - To create a title for a single dwelling unit under Rule 27.3.3.2 below.	Front and Rear WO	3,000	15 metre diameter circle	NA	Maximum lot area 4,000 m ² . Lot to accommodate 40 metre diameter circle. Access requirements apply; Refer 27.3.2.
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The rule refers to Rule 27.3.3.2 where more detail is included about how such subdivisions will be considered. The rule essentially provides for the subdivision of rural land for a number of lots of rural residential size proportions, with the balance land being rendered with non-complying activity status for future subdivision.

27.3.3.2 Special Provision to Protect Large Lots

- 27.3.3.2.1** The Council may consent to a subdivision for the creation of residential lots to protect the integrity of lots in excess of 150 hectares. The creation of such lots must be in accordance with the formula expressed in Rule 27.3.3.2.4.
- 27.3.3.2.2** Any subdivision undertaken in terms of this rule will render the subdivision potential of the balance area a Non Complying Activity and this status shall be the subject of a consent notice on the title of that portion.
- 27.3.3.2.3** Subdivisions may be staged in accordance with Assessment Criteria 27.2.4.5.7 and the Council may consider extending the time to give effect to the consent to five years maximum for subdivision proposals of 10 lots and over. However, in these circumstances, if the consent is not given effect to within the five years provided, a new application will be required for any further subdivision to complete the available lot entitlement prescribed in Rule 27.3.3.2.4.

27.3.3.2.4

Subdivision of Lots (hectares)	No of Residential Lots
150 - 200 hectares	4
201 - 250	5
251 - 300	6
301 - 350	8
351 - 400	10
401 - 500	12
501 - 600	14
600 +	15

27.3.3.2.5 All residential lots are to comply with Rules 27.2.3.3, 27.2.4, 27.2.5, 27.3.1 and 27.3.2 above.

The issue is whether this rule can be applied to the Rural One Zone, given that under Rule 27.3 'Discretionary Activities', the list of bullet points only refers to the Rural Zone Two, as set out below:

27.3 Discretionary Activities

Available in the:

- **Rural Zone Two;**
- **Sounds Residential Zone;**
- **Urban Residential Zone;**
- **Town Commercial Zone;**
- **Subdivision listed as a Controlled Activity where any part of the subdivision is within 20m of a high voltage transmission line (110 kV or greater); and**
- **Rural Township (allotment standards for Controlled Subdivision Activities apply).**

(The Rural One Zone occupies substantial areas within the Marlborough Sounds proper while the Rural Two Zone occupies more of the hinterland area.)

Restriction of special subdivisions to the Rural Two Zone

There is some question over the status of the bullet point for the Rural Two Zone in Rule 27.3. This is because when decisions on submissions to the Plan were released, the bullet point simply read 'Rural' i.e. it did not have either 'One' or 'Two' beside it. Research on how and why the rule appears on the Plan as it does, has not found any conclusive evidence to say whether it was the Council's intention to prevent the special lot subdivision rule from applying to the Rural One Zone. This is mainly because there is no specific submission that sought this outcome.

It appears as though the change to include the 'Two' has resulted from a consequential amendment to the Plan to amend perceived errors. This is evident from the 'Two' being included in the bullet point rule through the provisions of clause 16(2) of the First Schedule of the Act. This clause provides for the

Council to amend a proposed plan without further formality to alter any information, where such an alteration is of minor effect, or to correct any minor errors.

The Council's records show a clause 16 report being signed off to include the 'Two' under delegated authority in February 2002. However, while the change to include the 'Two' has been signed off under this authority, the legal opinion from the Council's solicitors has stated the alteration to include the 'Two' was not in accordance with a decision of the Council (or at least not one that can be found) and goes substantially beyond the ambit of Clause 16(2).

The difficulty now facing the Council is that the Plan is operative and there is no provision within the Act that enables the Council to reverse its decision made through the use of clause 16(2). This has been confirmed in the legal opinion.

Part B: Current Legislative Framework

Resource Management Act 1991

Purpose

The purpose of the Resource Management Act 1991 is to promote the sustainable management of natural and physical resources. Sustainable management means:

“managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural wellbeing and for their health and safety while—

- (a) Sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and*
- (b) Safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and*
- (c) Avoiding, remedying, or mitigating any adverse effects of activities on the environment.”*

In achieving the purpose of sustainable management, the Council must have regard to a number of principles set out in the Act. These include recognition and provision for a number of “matters of national importance” described in section 6 of the Act. The Council must also have particular regard to matters such as “amenity” and “heritage values”, “kaitiakitanga”, “quality of the environment”, and “ecosystem values” (section 7).

The Act enables the use and development of resources as long as such use does not adversely affect the environment in a way that impacts on the foreseeable needs of future generations, the life supporting capacity of ecosystems and other users or the environment. This is the concept of “sustainability” which the Act promotes as its overriding purpose.

Marlborough District Council Responsibilities

The Council is a unitary authority, that is, it has the functions, powers and duties under the Act of both a district council and a regional council. In terms of the control of subdivision, this is one of the methods the Council has in carrying out its district functions (section 31(1)).

New Zealand Coastal Policy Statement

The Council's responsibilities for managing the coastal environment are shared with the Minister of Conservation. The Minister is responsible for the preparation of a New Zealand Coastal Policy Statement that sets out a national framework for promoting sustainable management of the natural and physical resources in the coastal environment. A regional coastal plan prepared by the Council must not be inconsistent with the Coastal Policy Statement (Section 67(2)(c)).

The Coastal Policy Statement has a number of requirements regarding subdivision in the coastal environment, a number of which are particularly aimed at preserving natural character and at avoiding, remedying or mitigating the adverse effects of subdivision. The Plan has been developed within the ambit of these policies and it is not anticipated that the outcomes of this plan change will be inconsistent with the policies of the Coastal Policy Statement.

Marlborough Regional Policy Statement

The Marlborough Regional Policy Statement (MRPS) was made operative on 28 August 1995. It provides a community based vision and direction for the management of the natural and physical resources of Marlborough.

The MRPS identifies five regionally significant issues for Marlborough. These are:

- Protection of water ecosystems (which includes coastal water);
- Protection of land ecosystems;
- Enabling community wellbeing;
- Protection of visual features; and
- Control of waste.

The subsequent objectives, policies and methods developed to deal with these issues are broadly relevant in the Council's consideration of this subdivision issue. Specifically those relating to ensuring that subdivision in the coastal environment is located in appropriate areas.

Part C: Options considered for dealing with the issue

There are good reasons why the special subdivision rules can be interpreted as being discretionary - this becomes apparent when one looks at the whole rule framework. However, because of the Commissioner's decision on the resource consent application described above, including a reference in

that decision that the Plan (being the Marlborough Sounds Plan) needed to be changed, and in discussions with the Councils solicitors, a range of options were considered to see how the matter could be dealt with.

One option is to consider using the powers of the Environment Court through the enforcement order provisions. Firstly, the Act provides that a plan that is held out by a local authority as being operative, shall be deemed to have been prepared and approved in accordance with the First Schedule and is not able to be challenged except by an application for an enforcement order under section 316(3) – *section 83*. Section 314 sets out the scope of enforcement orders that can be made by the Court and one of these is where it determines that the requirements of the First Schedule have not been met – *section 314(1)(f)*.

Section 316 states that a local authority may lodge an application for an enforcement order under section 314(1)(f) at any time.

The legal opinion states that the combined effect of these provisions is that the Council could make an application for an enforcement order for the Marlborough Sounds Plan, for example, directing compliance with Clause 16(2) which would remove the number 'Two' after the words 'Rural Zone' in Rule 27.3. That would still leave some ambiguity in the rule but arguably it would then apply in both Rural Zones. Additionally the Court could use its powers under section 292 to remedy a defect in a plan *'in any proceedings before it'*.

The powers of the Court in this regard are discretionary and the legal advice suggests that if there are any questions as to the need to exercise such powers, or as to whether or not all parties who might be affected by the exercise of the powers are involved in the proceedings, the Court could decline to exercise its jurisdiction.

The second more obvious option is to undertake a plan change in terms of the requirements of the First Schedule. The Council considered that this process, which involves the submission and hearing process, was more appropriate as it gives greater certainty in terms of process and potentially is quicker than applying to the Courts for a determination.

Part D: Evaluation under Section 32 Resource Management Act 1991

The Quality Planning website, which promotes best practice by sharing knowledge about policy and plan development under the Act, states that the section 32 process must be transparent and well documented, with all assumptions and decisions justified. This helps to ensure that:

- Good environmental outcomes are achieved, at the lowest practicable cost to individuals and the community.

- Plan provisions are targeted at achieving the purpose of the Act by the most appropriate methods.
- Councillors (as decision makers) have sound policy analysis on which to base their decisions about resource management issues.
- A sound basis is provided for re-assessing whether the chosen provisions are necessary and appropriate once they are in use and the environmental outcomes become apparent.

The Plan is an operative document that has been subject to an overall section 32 analysis. The subdivision rules have been founded upon the policies and methods of the MRPS and the Coastal Policy Statement. An error in the use of the clause 16 provisions of the First Schedule has led to doubt about how the special subdivision rules are to apply to the Rural One Zone. This has meant the rule has largely become ineffective and to do nothing will result in the rule continuing to be ineffective.

To do nothing will result in resource consent applicants having to have their applications in the Rural One Zone processed at a non-complying activity status rather than discretionary. This would result in different level of test being applied to an application unnecessarily.

Summary

Currently, the special subdivision Rule 27.3.3.2 'Special Provision to Protect Large Lots' is not working as it was originally intended to, nor as it has been administered over the past 9 years. This means that the effectiveness of the rule is in doubt and needs to be amended. While there may be wider or broader issues concerning subdivision generally in the Marlborough Sounds that need further consideration, this plan change is to return the Plan to a state for special subdivisions in the Rural One Zone that existed immediately prior to the Plan becoming operative. By amending Subdivision Rule 27.3, then there will be no doubt about which Rural Zone the special subdivision rules will apply to.

Appendix 1 - Proposed Plan Change 13

Schedule of Changes

The Marlborough Sounds Resource Management Plan is amended in accordance with the following schedule:

Volume Two

Subdivision

1. **Amend** the first bullet point in Rule 27.3 as follows:
 - Rural Zones ~~Two~~;
2. **Amend** Table 27.3.1 Allotment Standards (Discretionary Activities) as follows:

Zone	Allotment Type W = with sewerage Reticulation WO = without	Net Min Lot Area m ² see note ¹ below	Min Building Platform Shape Factor	Min Frontage metres see note ² below	Qualification
...					
Rural <u>One Zone</u> - To create a title for a single dwelling unit under Rule 27.3.3.2 below.	Front and Rear WO	3,000	15 metre diameter circle	NA	Maximum lot area 4,000 m ² . Lot to accommodate 40 metre diameter circle. Access requirements apply; Refer 27.3.2.

3. **Amend** Table 27.3.2 Standards for Access to Rear Lots (Discretionary Subdivision Activities) as follows:

Zone	No. Lots Served	Min Width (m) see note ³ below	Min Sealed Width (m)	Qualification
...				
Rural <u>One Zone</u> : Rule 27.3.3.2 - Special Provision to Protect Large Lots).	3 - 6	5	NA	Width allows passing.