MINISTRY OF BUSINESS, INNOVATION & EMPLOYMENT
HĪKINA WHAKATUTUKI

BRIEFING

Further advice on the UDA's approach to offer back obligations for former Māori freehold land

Date:	31 August 2018	**Priority:**	Medium
Security classification:	In Confidence	**Tracking number:**	0389 18-19

Action sought		
	Action sought	**Deadline**
Hon Phil Twyford **Minister of Housing and Urban Development**	**Forward** this briefing to Ministers Mahuta, Davis, Little, Sage, Parker and Jones **Discuss** these options with Ministers at your 5 September meeting	5 September 2018
Hon Jenny Salesa **Associate Minister of Housing and Urban Development**	For your information	N/A

Contact for telephone discussion (if required)				
Name	**Position**	**Telephone**		**1st contact**
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The following departments/agencies have been consulted
Ministry of Justice, Te Puni Kōkiri, Land Information New Zealand

Minister's office to complete:

- ☐ Approved
- ☐ Noted
- ☐ Seen
- ☐ See Minister's Notes
- ☐ Declined
- ☐ Needs change
- ☐ Overtaken by Events
- ☐ Withdrawn

Comments

BRIEFING

Further advice on the urban development legislation's approach to offer back obligations for former Māori freehold land

Date:	31 August 2018	**Priority:**	Medium
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Purpose

You are meeting Ministers Davis, Little, Parker, Mahuta, Jones and Sage on 5 September to discuss the approach in the urban development legislation to offer back obligations that apply to former Māori freehold land that is now Crown land.

This briefing provides further advice and additional options for your discussion at this meeting.

Executive summary

1. When public land is no longer required for a public work, the land must be offered to the person from whom it was acquired or to their successor. This is known as the 'offer back obligation'. Cabinet has agreed that offer back obligations will not apply to most categories of land transfers under the urban development legislation [CAB-18-MIN-0399]. This is critical to enable the development model of the UDA.

2. This decision means that former owners (and their successors) of former Māori freehold land now held by the UDA would not be offered the opportunity to purchase back land before it is transferred out of public ownership. (Any rights of first refusal would continue to apply).

3. On 26 July you met Ministers Davis, Little, Mahuta and Sage to discuss options that would recognise the rights and interests of former owners. On Wednesday 5 September you are meeting Ministers Davis, Little, Parker, Mahuta, Jones and Sage for further discussion.

4. This briefing recommends a process for the UDA to engage with Māori who have connections to former Māori freehold land in a UDA development area. The UDA would approach members of the hapū associated with the land. It would aim to understand their aspirations for housing and urban development. The parties could agree a range of outcomes, including Māori being involved as development partners, or other ways of recognising connections to the land.

5. The briefing then outlines two options to recognise the rights and interests of former owners. These options would only apply to the transfer of land held by the UDA. The status quo will continue to apply to land held by other parts of the Crown and territorial authorities.

6. Ministers' preferred option will determine the extent to which the urban development legislation recognises the rights of former owners or prioritises the UDA's ability to determine development outcomes and undertake developments at pace.

7. Option 1 is to require sign off from the Minister for Māori Development on the sale/transfer of any former Māori freehold land out of public ownership. The Minister's sign off provides a check on the appropriateness of such land ending up in private ownership. We propose that the urban development legislation provide guidance on factors that the Minister would consider in making decisions.

8. Option 1 would allow the UDA to have control of a development project's outcomes, without it being subject to lengthy delays or uncertainty. MBIE recommends this option. MOJ and TPK support this option.

9. Option 2 is to reinstate sections 40 and 41 of the Public Works Act 1981 in situations where former Māori freehold land would pass out of public ownership. Under these sections, the chief executive of LINZ may either:

   a. offer the land back to former owners under section 40, or

   b. apply to the Māori Land Court to convert the land to Māori freehold land.

10. Option 2 carries the least risk from a Treaty of Waitangi perspective, but would mean that the UDA couldn't impose conditions on the transfer to secure development outcomes. MOJ, TPK and LINZ support this option.

11. Both options are illustrated with worked examples (Annex 1) and compared according to criteria (Annex 2).

Recommended action

The Ministry of Business, Innovation and Employment recommends that you:

a **forward** this briefing to Ministers Davis, Little, Parker, Mahuta, Jones and Sage

Agree / Disagree

b **agree** to the process for the UDA to engage with Māori who have connections to former Māori freehold land in a UDA development area

Agree / Disagree

c **agree** to include one of the following options in the Māori interests Cabinet paper:

   a. Option 1 – The Minister for Māori Development must sign off the transfer of former Māori freehold land into private ownership

      [MBIE, MOJ and TPK support this option]

      Agree / Disagree

   b. Option 2 – Reinstate sections 40 and 41 of the Public Works Act 1981 for former Māori freehold land that would be transferred into private ownership

      [MOJ, TPK and LINZ support this option]

      Agree / Disagree

Di Anorpong
Manager, Urban Development Policy
Housing and Urban Branch, MBIE
31 / 8 / 18

Hon Phil Twyford
Minister of Housing and Urban Development
..... / ..... / .....

Background

12. Cabinet has already made decisions on land assembly powers for the urban development authority (UDA) [CAB-18-MIN-0399]. Cabinet noted that these decisions were subject to decisions to be made in the Cabinet paper on Māori interests in the UDA legislation.

13. This briefing seeks your decision on an outstanding matter for the Māori interests Cabinet paper: how to recognise the rights and interests of former owners (and their successors) of former Māori freehold land held by the UDA.

14. On 26 July you met Ministers Davis, Little, Mahuta and Sage to discuss this matter [0082 18-19 refers]. Ministers did not reach agreement at this meeting, and asked officials to provide further advice to inform their decisions.

15. You are meeting Ministers Davis, Little, Parker, Mahuta, Jones and Sage on Wednesday 5 September for further discussion. This briefing provides advice and additional options for consideration at this meeting.

16. Your decisions will be incorporated into the Māori interests Cabinet paper. We will provide you and Minister Davis (as co-signatories) a draft for comment in late September, prior to Ministerial consultation.

17. A summary of Ministers' previous decisions on matters relating to Māori interests is attached as Annex 3. Annex 4 provides an overview of the proposed approach to engagement with Māori through the UDA development process.

Context on former Māori freehold land and offer back obligations

'Former Māori freehold land' refers to two types of land that was previously owned by Māori

18. In this briefing, the term 'former Māori freehold land' refers to two types of land. The first type is land that was 'Māori freehold land' at the point it was acquired by the Crown or a territorial authority. In general, this land was once Māori customary land and became Māori freehold land when the Māori Land Court or the former Native Land Court allocated individual ownership shares to members of the collective group of Māori who held it.

19. The second type is land that was once Māori freehold land which was subsequently converted into 'general land owned by Māori'. This was given effect by the Māori Affairs Amendment Act 1967, which introduced compulsory conversion of Māori freehold land with four or fewer owners into general land. If this general land was subsequently acquired directly from the Māori owners for a public work, then it falls within our category of 'former Māori freehold land'.

20. The options in this briefing would apply to both types of former Māori freehold land. Such land would previously have been acquired by the Crown or a territorial authority, and subsequently provided to the UDA for a development project.

21. The land will have been acquired in a variety of circumstances – from good-faith agreement, agreements that were coerced, gifted land, to compulsory acquisition. For many land parcels, it will not be possible to know the exact circumstances of acquisition.

22. We don't have detailed information on the scale of former Māori freehold land in areas where the UDA will consider establishing development projects. However we do know that there appears to be none of this land in several potential large-scale projects that MBIE is currently looking at in Auckland, Tauranga and Wellington[1]. It is possible that further due diligence may uncover parcels of such land.

There are two avenues for former Māori freehold land to return to its former owners

23. Section 40 of the Public Works Act 1981 (PWA) provides that where the Crown or territorial authority holds land for a public work, and the land is no longer required for that public work or any other public work, the land must be offered back to the person from whom it was acquired or to their successor (unless certain exceptions apply). This is known as the 'offer back obligation'.

24. Offer back obligations apply even if the land was not acquired by agreement, not compulsory acquisition. However it is worth noting that the concept of 'willing seller' can be fraught in the context of some former Māori freehold land, given the context of its acquisition.

25. Section 41 of the PWA sets out a separate process for former Māori freehold land, in situations where this land was previously beneficially owned by more than four persons and not vested in trustees. In these circumstances, the chief executive of Land Information New Zealand (LINZ) may either:

    a. offer the land back under section 40 of the PWA, or

    b. apply to the Māori Land Court to convert the land to Māori freehold land (under section 134 of Te Ture Whenua Maori Act 1993 (TTWM).

26. This means that there are two possible avenues for former Māori freehold land to return to its former owners (or their successors) under the PWA. Option 2 below discusses the implications of this further.

There are exceptions to offer back obligations under the status quo

27. Under the status quo (ie prior to the urban development legislation coming into effect), there are already several exceptions to offer back obligations (made under both sections 40 and 41 of the PWA).

28. Any land or building held for 'State housing purposes' can be sold without triggering the offer back obligation, including the sale of land for the development of housing, and the sale of completed homes for their end owners to live in. This exception also covers commercial buildings that are ancillary to the houses, as well as works such as roads and drainage works that are for the benefit of the land or its occupiers.[2]

29. The above exceptions also apply for former Māori freehold land. However, as noted later, the UDA will be undertaking development at a greater scale than at present, meaning the broader context of the status quo will change.

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[1] The due diligence reports for Unitec, Point England, the Tauranga Racecourse Reserve and a Housing New Zealand development in Porirua East and Cannons Creek did not contain any Crown-owned former Māori freehold land. s 9(2)(f)(iv)

[2] These exceptions are set out in section 15 of the Housing Act 1955, which was modified in 2016 to clarify when offer back obligations apply in these circumstances.

Offer back obligations will not apply to most land transfers by the UDA

30. Cabinet has agreed that offer back obligations will not apply to the following land transfers under the new legislation [CAB-18-MIN-0399]:

    a. from the UDA to private developers to deliver public works (eg transferring land for development into works like housing)

    b. from the UDA to entities that operate public works (eg transferring land for drainage works to a territorial authority). Offer backs will apply again if the transferee no longer needs the land for that purpose

    c. from the UDA or another party to the end purchaser for works that are intended to end up in private ownership (eg selling completed houses, commercial or industrial buildings and 'urban renewal').

31. The provisions above are critical to the successful delivery of the Government's urban development objectives. The provisions enable the development model of the UDA, which will often work with private developers to deliver works in development areas. The UDA or developers will also need to be able to sell completed works (such as KiwiBuild houses) to the intended recipients without triggering offer backs.

Any right of first refusal will still apply under the urban development legislation

32. Any right of first refusal (RfR) under a Treaty of Waitangi settlement over public land will still apply under the urban development legislation, just as it would under the Housing Act.

33. In general, an RfR applies after the offer back obligation to former owners. The exception to this is in part of Auckland where, under the Tāmaki Collective Protocol, RfRs apply before any offer back.

34. In situations where an offer back obligation would not apply to a land transfer under the urban development legislation, any RfR would still have to be addressed before the land could be transferred.

35. The draft Māori interests Cabinet paper covers the importance of early engagement with RfR holders to see if the parties can agree an approach to RfR land. If no agreement is reached then either:

    a. the UDA must offer the land to the RfR holder (on commercial terms) before it can be sold to a developer, or

    b. the UDA could retain and develop the land itself, meaning that the RfR is not triggered.

UDA process for engagement with Māori who have connections to former Māori freehold land

We recommend the following process for the UDA to engage with Māori who have connections to former Māori freehold land in a UDA development area

36. We recommend that the urban development legislation specify a process for the UDA to engage with the former owners (and their successors) of former Māori freehold land in a UDA development area. This process would give whanau and hapū the opportunity to agree with the UDA a range of outcomes that would reflect their connections to the land.

37. This process was presented as 'option 1' in our previous advice [0082 18-19 refers]. We now recommend that this process apply, as appropriate, in addition to the two further options outlined in the following section.

38. At the beginning of the establishment of a development project, the UDA would identify former Māori freehold land in the project area. This would involve identifying the status of the land and the hapū associated with the land – we understand this is likely to take less time than identifying specific former owners and their successors.

39. The UDA would then approach members of the hapū. This process would also provide an opportunity for whānau associated with the land to come forward. In some areas, rohe (territorial areas of interest) overlap, in which case the UDA would need to refer to the historical records of the Māori Land Court to ascertain the relevant hapū to engage with (there may be more than one).

40. The UDA would aim to understand their aspirations for housing and urban development, and discuss how the UDA's plans could incorporate these aspirations. We envisage that a range of possible outcomes could follow:

    a. Māori associated with the land may express an interest in being involved as development partners, in which case the UDA could offer the opportunity to develop the land, with conditions attached specifying development outcomes (eg a certain number of houses). Any applicable RfRs would have to be addressed first.

    b. The UDA and Māori associated with the land could agree to other ways of recognising their connections to the land – for example in the layout of the development project, in street names, or reserve names or locations.

    c. Māori partners may decline to be involved, in which case the UDA may choose to transfer the land to a private developer for development. (Any applicable RfRs would have to be addressed first).

41. Engaging with Māori with connections to the former Māori freehold land would take place concurrently as the UDA prepares its development plan. We imagine that the two processes will be inter-related, as discussions with Māori parties will feed into the preparation of the development plan.

42. This process would recognise the special circumstances of former Māori freehold land now held by the Crown, and would mean that Māori would have the opportunity to be involved in discussions around the development of this land.

43. It is important to note that the hapū that the UDA engages with will be a wider group than the individuals who originally held shares in the land – ie not necessarily the exact same people as the former owners. If the former owners are known, they will be able to participate in the engagement. If they become known at a later date and do not agree with the outcome of the engagement, there is a risk they may challenge the outcome. However, MOJ considers that this is a low risk, given the role and association of the hapū.

44. Further, there are limitations to taking a strictly property rights-based approach. Māori freehold land is ancestral land handed down through generations, not a property commodity that individuals trade legal rights to. The individualisation of ownership by the Native Land Court has been held to have been a breach of the Treaty of Waitangi (especially when the Native Land Court arbitrarily limited the number of owners to no more than 10). Ministry of Justice (MOJ) considers that dealing with the group associated in a tikanga sense with the land is appropriate and presents the least risk in Treaty terms.

45. This process would complement the existing framework you have already agreed for the UDA's engagement with Māori, as outlined in the first UDA Cabinet paper ['Legislating to empower complex urban development projects'] and the draft Māori interests UDA Cabinet paper [3277 17-18 refers].

46. MBIE, MOJ and Te Puni Kōkiri (TPK) support this proposed process.

Options for your consideration

We seek your decision on how to recognise the rights and interests of former owners of former Māori freehold land

47. As we have previously advised, there is a good case for treating former Māori freehold land differently in the urban development legislation (0082 18-19 refers). At the 26 July meeting, Ministers agreed that the urban development legislation should in some way recognise the special nature of former Māori freehold land.

48. We have worked with officials at the MOJ, TPK and LINZ to develop further options for approaching former Māori freehold land in the UDA legislation.

49. The options would apply to land which will no longer remain in public ownership under the UDA's development plan. Transfers of land which will remain in public ownership (eg for roads, schools) would not trigger any offer back, and offer back obligations will continue to apply, as appropriate, to any subsequent disposal.

50. Examples for how the options could work in practice are outlined in Annex 1.

The options in this briefing apply only to the UDA – this could result in perverse incentives on agencies

51. The options in this briefing only apply to the transfer of land held by the UDA. This means that the status quo will continue to apply to land held by other parts of the Crown and territorial authorities.

52. The justification for treating the UDA differently is that land transfers are likely to occur more frequently in the case of the UDA due to the scale of development and the involvement of private developers.

53. However, treating the UDA differently when it comes to former Māori freehold land will mean that the approach to offer back obligations on such land differs across the Crown. Accordingly, this variation would create a loophole and a perverse incentive that could influence the behaviour of agencies, including the UDA.

54. For example, other parts of the Crown will still be able to transfer any former Māori freehold land for housing without triggering offer back obligations to former owners using existing powers under the Housing Act.

55. If offer back obligations on such land do apply for the UDA, there would be an incentive for other parts of the Crown to continue to hold their land (rather than transfer it to the UDA), to avoid having to offer the land back to former owners. Depending on which option is selected, this incentive will be particularly acute where the development of the relevant land is vital to the development plans for the area. We don't know how likely it is that this theoretical risk will arise in practice.

56. There are limited mitigations to address the consequences of this inconsistent approach in the context of the urban development legislation. If Ministers wish to consider the application of the PWA to sensitive Māori land and former Māori freehold land more broadly (ie beyond the UDA), this would best be achieved through a separate process led by the Minister for Land Information and LINZ, and with the input of agencies such as TPK and MOJ.

There are a number of factors to consider when evaluating options

57. There are a number of factors Ministers may wish to consider when deciding on the best option for applying offer back obligations to former Māori freehold land. Annex 2 evaluates the options according to these criteria.

58. The criteria include:

a. Operating in accordance with the spirit and intent of the Treaty of Waitangi and Treaty principles.

b. Recognising the legal rights of offer back holders (under sections 40/41 of the PWA), while noting the limitations to those rights under the status quo. The first option proposes engagement with Māori with connections to former Māori freehold land, rather than the land's former owners (and their successors). On the other hand, MOJ advises that it is appropriate to deal with groups associated with the land in a tikanga sense.

c. Recognising Māori connections to former Māori freehold land and the historic context of the acquisition.

d. Providing opportunities for Māori to be involved in and benefit from UDA development projects. This could include partnering as providers of Māori housing, or having commercial opportunities from developing the land as part of a project (though not all former owners will have the capability or financing to develop the land).

e. Impact on UDA development timeframes. The UDA is intended to undertake development projects at pace and scale. However, identifying former owners and their successors can be a long process and may require significant resources. LINZ informs us it would take several years for a brownfield suburb-sized development[3]. It would also take time for former owners to decide whether to purchase the land subject to an offer back. MOJ notes that characteristics of the Māori land tenure system (such as ownership arrangements) can themselves reflect historic injustices and should not be factored into this policy decision.

f. The ability of the UDA to impose conditions on land transfers to secure development outcomes (eg to require a certain number or type of houses to be built on the land).

g. The ability of the UDA to ensure that the intended recipient is able to purchase a completed work (eg if offer back obligations applied to the purchase of a KiwiBuild home, it wouldn't be possible to ensure that the home goes to the intended buyer).

h. The incentive for the UDA in locating development projects (eg if policy settings aren't right, then the UDA may be incentivised to avoid locating projects in areas with significant parcels of former Māori freehold land).

59. There are tensions between these criteria. For instance, there is a trade-off between recognising the rights of offer back holders and the UDA's ability to apply conditions to land transfers to ensure development outcomes.

60. While the UDA will work with former owners to find mutually-agreeable outcomes, there are limits to this approach. Ultimately, Ministers' preferred option will determine the extent to which the urban development legislation recognises the rights of former owners or prioritises the UDA's ability to determine development outcomes and undertake developments at pace.

[3] LINZ provided MBIE this revised estimate for this briefing. Previously we had advised it would take 18 months on average.

Options for applying offer back obligations to former Māori freehold land

Option 1 – The Minister for Māori Development must sign off the transfer of former Māori freehold land into private ownership

61. This option is to require sign off from the Minister for Māori Development on the sale/transfer of any former Māori freehold land out of public ownership. The Minister's sign off provides a check on the appropriateness of such land ending up in private ownership. This sign off applies in addition to the other protections that Ministers have previously agreed (summarised in Annexes 3 and 4).

62. While the circumstances are different, there is a parallel to this option in section 5 of the Housing Act. This section requires the Minister of Māori Affairs to consent to any Māori land being taken for State housing purposes.

63. This option would mean that the Minister for Māori Development would have to approve any former Māori freehold land being transferred for works that end up in private ownership; namely the works of housing, commercial and industrial buildings, commercial community facilities (eg a swimming pool), urban renewal and the reinstatement of works located elsewhere.

64. The Minister's sign off would not be required for works that will remain in public ownership (eg roads, schools). This is because offer back obligations will remain on this land, and would apply in future if and when the land is no longer needed for a public work.

65. We propose that the urban development legislation provide guidance on factors that the Minister for Māori Development would consider in making decisions. These could include:

    a. outcomes from UDA engagement with Māori with connections to the land

    b. the nature of Māori connections to the land

    c. how the land came into Crown ownership (as far as can be known) and former owners' views on the proposed use of the land

    d. sensitivity of use – is the land being transferred for works that would be considered appropriate use of the land given its history

    e. national/local benefits from the proposed development project on the land

    f. how critical the land is to the UDA's development project.

66. The proposed engagement process outlined earlier in this briefing would also apply in addition to this option. This means that outcomes from the engagement would feed into the preparation of the development plan, and the proposed use of any former Māori freehold land.

67. This option would enable the UDA to work with Māori with connections to the land to agree an approach that best meets the interests of both parties. We expect that this approach will provide the flexibility to develop tailored outcomes which recognise connections to the land and the complexities of historic land acquisitions.

68. As noted earlier, any RfRs will still apply. MOJ notes that this would create an inconsistency between the rights of offer back holders relative to RfR holders.

69. MBIE, MOJ and TPK support this option.

Option 2 – Reinstate sections 40 and 41 of the Public Works Act for former Māori freehold land that would be transferred into private ownership

70. This option applies for works that would end up in private ownership. Sections 40 and 41 of the Public Works Act (described earlier) would be reinstated and would apply in situations where former Māori freehold land would pass out of public ownership.

71. This option means that for any former Māori freehold land, the chief executive of LINZ may either:

    a. offer the land back to former owners under section 40, or

    b. apply to the Māori Land Court to convert the land to Māori freehold land (under TTWM).

72. The appropriate approach (a or b) will depend largely on the extent of knowledge on former owners and their successors. If former owners can be readily identified, a section 40 offer back (option a) may be the best approach. On the other hand, if the exact former owners or their successors cannot be identified through historical records (or cannot be identified within a reasonable time frame), then an application to the Māori Land Court (option b) will likely be more appropriate.

73. If the chief executive selects option (b) above, the application could specify who the land should vest in, the price to be paid for the land, and any other conditions. If it is too difficult to identify the former owners and successors, the Court is able to determine who to vest the land in. The Court has jurisdiction to vest the land in trustees, a Māori incorporation or a Māori Trust Board on behalf of those people.

74. The Māori Land Court process means it is not essential to identify every successor of every former owner. It also provides more flexibility than section 40 to address the unique characteristics of Māori land ownership.

75. The status quo would continue to apply for any RfRs (which would apply *after* the former owners decide not to purchase any land subject to an applicable offer back, except in part of Auckland).

76. Alternatively, the UDA could use any former Māori freehold land for works that will remain in public ownership, as offer back obligations would not be triggered in these circumstances.

77. This option would recognise the special nature of former Māori freehold land, by reapplying sections 40 and 41 of the Public Works Act. It also carries the least risk from a Treaty of Waitangi perspective.

78. However, this option would mean that the UDA couldn't impose conditions on the transfer to secure development outcomes (eg to require a certain number of houses to be constructed). This option could also have significant implications for the UDA's development timeframes.

79. MBIE does not support this option. MOJ, TPK and LINZ do support this option.

Next steps

80. We recommend that you discuss the options in this briefing at the Ministers' meeting on 5 September.

81. We will incorporate Ministers' preferred option into the Cabinet paper on giving effect to Māori interests in the urban development legislation. We will provide you and Minister Davis as co-signatories with the revised draft Cabinet paper for your comment in late September, prior to wider Ministerial consultation.

Annexes

Annex 1: Worked examples that illustrate how the different options would work in practice

Annex 2: Comparison of the options according to decision criteria

Annex 3: Ministers' previous decisions to give effect to Māori interests in the UDA

Annex 4: Overview of Māori engagement through the UDA development process

Annex 1: Worked examples that illustrate how the different options would work in practice

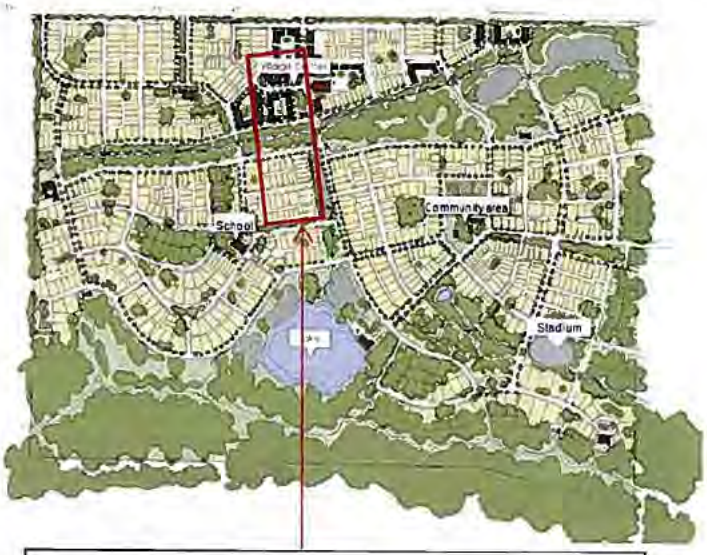
82. At the meeting on 26 July, Ministers requested that officials provide scenarios to illustrate how the options would work in practice.

83. We have examined several potential developments under consideration that could become UDA development projects. None of these developments contains former Māori freehold land. Another possible UDA project, the Auckland – Hamilton corridor, has not yet had its due diligence report prepared. This section therefore uses a hypothetical example to illustrate the options in the briefing.

Scenario A: Development area, with small parcels of Crown-owned former Māori freehold land on the edge of a project area

Land is earmarked for a mix of public housing, KiwiBuild and market homes. Note: public housing would stay in Crown ownership.

Scenario B: Development area, with Crown-owned former Māori freehold land in the middle of a project area



Housing is earmarked for KiwiBuild and market homes. Village centre will be a mix of commercial buildings, public spaces and market apartments.

Establish a process for the UDA to engage with Māori who have connections to former Māori freehold land in a UDA development area

Scenarios A and B

84. Through the due diligence report, the UDA will identify public land that was Māori freehold land or general land owned by Māori at the point it was acquired. The UDA will engage with one or more whānau or hapū associated with the land in accordance with tikanga Māori. The hapū associated with the land can be ascertained by reference to the records of the Māori Land Court.

85. The engagement would aim to understand their aspirations for housing and urban development, and discuss how the UDA's plans could incorporate these aspirations. Any of the range of outcomes in paragraph 40 could result from this engagement.

86. Note that this may require any rights of first refusal under Treaty settlements to be addressed at the same time.

Option 1 - The Minister for Māori Development must sign off the transfer of former Māori freehold land into private ownership

87. For both scenarios, the Minister for Māori Development will look at the engagement process that the UDA has undertaken with the whānau/ hapū with connections to the land. The Minister will consider the approach that has been agreed, taking into account the factors outlined in paragraph 65.

88. If the Minister is satisfied with the agreed approach, they can authorise the transfer. Any rights of first refusal under Treaty settlements would need to be addressed.

89. If the Minister is not satisfied with the approach, they can propose a new option, or decline to authorise the transfer of land outside of the Crown. If the transfer is declined the land must be either:

    a. used for a work that would stay in public ownership (such as public housing, a school, hospital, roading, or a reserve), or

    b. excluded from the UDA project area, or

    c. used for a different work (that will pass into private ownership) that the Minister considers appropriate.

Scenario A

90. As these parcels of land are on or near the border of the UDA project area, it may be less critical to the success of the development if the land earmarked for market and KiwiBuild homes could not pass out of Crown ownership.

91. However, if the land could not be developed in accordance with the UDA's development plan, it would affect the Government's KiwiBuild targets for that development. Additionally, the market homes may be helping to fund the rest of the development, including the delivery of the KiwiBuild homes and public housing.

92. Possible solutions:

    a. the parcels of land could be excluded from the project area and other parcels of land may be able to be used instead, or

    b. some of the proposed KiwiBuild and market homes could be turned into more public housing (thereby not triggering an offer back). This could include papakainga housing. It may be undesirable for all or the majority of the parcels of land in the top left of the diagram to be public housing.

Scenario B

93. This parcel of land is critical to the success of the UDA project, as it encompasses the town centre. It is unlikely that the town centre could be moved to another location.

94. The housing is earmarked for market and KiwiBuild homes. As in Scenario A above, if the land could not be developed in accordance with the UDA's development plan, it would affect the Government's KiwiBuild targets for the development and the number of market houses that could be sold.

95. Possible partial solution: the development plan could be altered to put facilities that will remain in public ownership into the area earmarked for housing, such as the nearby school, some public amenities (eg a library) and public housing (including papakainga housing). However, it may be undesirable for a majority of the area to be used for public housing. This solution would not resolve the issue of the village centre.

Option 2 - Reinstate sections 40 and 41 of the Public Works Act for former Māori freehold land that would be transferred into private ownership

Scenarios A and B

96. Through the due diligence report, the UDA would identify the public land that was Māori freehold land at the point it was acquired by the Crown or territorial authority. The UDA would be able to use former Māori freehold land for public housing and other works that will remain in public ownership, as offer back obligations would not be triggered in these circumstances. This may not be desirable, as discussed above.

Where former owners can be identified in a reasonable timeframe

97. If possible, the due diligence report would identify who the former owner(s) is/are, and whether they or their immediate successor(s) are still alive. For the land that would pass out of Crown ownership (land for commercial purposes, KiwiBuild houses and market houses etc), the UDA would have to first offer the former owners (and their successors) the opportunity to purchase back any former Māori freehold land, before it could be transferred out of public ownership.

98. If the offer is declined, any RfRs under Treaty settlements would also need to be addressed. If neither the former owners nor RfR holders purchase the land, then the UDA can sell it, either to a developer or to private buyers of completed works. Note this would likely cause delays in timing for the UDA's development project to work these through.

99. If the offer is accepted by the former owner or successor, the land may or may not be not be developed by the new owners in accordance with the UDA's development plan. This is because the UDA could not impose conditions on land transfers, for example to require a certain number or type of houses to be built.

100. If the land is not developed in accordance to the development plan, this may affect the Government's KiwiBuild targets for that development. Additionally, the market homes may be helping to fund the rest of the development, including the delivery of the KiwiBuild homes and public housing.

If exact former owners are not identifiable in a reasonable timeframe

101. If there were multiple owners of the land and the acquisition occurred decades previously, it could take several years to identify who to engage with to undertake an offer back under section 40 of the PWA. In this case, the UDA can either:

    a. use former Māori freehold land for public housing and other works that will remain in public ownership, as offer back obligations would not be triggered in these circumstances, or

    b. initiate the process under section 41 of the PWA, as described earlier. If the section 41 process was used, the UDA could engage with the Court-appointed trustees to understand the owners' aspirations for housing and urban development, and discuss how the UDA's plans could incorporate them.

102. The land may not be able to be developed in accordance with the UDA's development plan. It could affect the Government's KiwiBuild targets for that development. The market homes may be helping to fund the rest of the development, including the delivery of KiwiBuild homes and public housing. The above points may create a disincentive for the UDA to include former Māori freehold land in the development area. This could lead to inefficient urban outcomes in areas experiencing housing shortages.

Annex 2: Comparison of the options according to decision criteria

	Option 1 – Minister for Māori Development must sign off proposals for works that involve the land passing into private ownership	Option 2 – Reinstate sections 40 and 41 of the Public Works Act for former Māori freehold land that would be transferred into private ownership
In accordance with the spirit and intent of the Treaty of Waitangi and Ṭreaty principles	✓	✓✓
Recognising the legal rights of offer back holders	x	✓✓
Recognising Māori connections to former Māori freehold land and historic context of acquisition	✓✓	✓✓
Providing opportunities for Māori to be involved and benefit from UDA projects	✓	✓
Reduced impact on UDA development timeframes	✓	x
The ability of the UDA to impose conditions on land transfers to secure development outcomes	✓✓	x
The ability of the UDA to ensure that the intended recipient is able to purchase a completed work	✓✓	x
Unlikely to impact UDA decisions in locating development projects	✓	x

Annex 3: Ministers' previous decisions to give effect to Māori interests in the UDA

On 20 December 2017, the Cabinet Business Committee [CBC-17-MIN-0051]:

103. noted that the key aims of a project-based approach to urban development include partnering with public sector organisations, private sector developers and iwi authorities to deliver those projects;

104. noted that the benefits of new legislation can be expected to include incorporation of Māori aspirations and priorities for urban development and increased access to private sector investment in urban development through joint ventures and partnership arrangements between public and private sectors, including iwi authorities;

105. noted the government's priorities include commencing work to establish an urban development authority with cut through planning powers to be responsible for undertaking major greenfield and brownfield regeneration projects in partnership with Councils, private developers and iwi/Māori;

106. noted that the proposed powers will have implications for the Crown's relationship with Māori, with respect to Treaty settlements, rights of first refusal, and Te Ture Whenua Māori Act 1993;

107. agreed that the new legislation:

    a. ensure Māori interests are identified and protected;

    b. recognise and provide for the relationship of Māori and their culture and traditions with their ancestral lands, water, sites, wāhi tapu and other taonga;

    c. provide for both the Treaty of Waitangi and Te Ture Whenua Māori Act to be upheld;

    d. ensure Treaty settlements are honoured in each urban development project;

108. invited the Minister of Housing and Urban Development to consult with relevant Ministers on:

    a. how the proposed legislation should address the Crown's obligations to Māori, particularly with respect to Treaty settlements and rights of first refusal;

    b. how iwi/Māori would like to be engaged in respect of any particular development proposals, and what role iwi organisations may wish to play.

On 28 May 2018, following reference from the Cabinet Economic Development Committee, Cabinet [CAB-18-MIN-0243]:

109. noted a further paper will cover the approach to Māori interests;

110. agreed that in achieving the purpose of the new legislation, all persons exercising functions and powers under it must take into account the principles of the Treaty of Waitangi (Te Tiriti o Waitangi);

111. agreed that decision-makers must ensure that Treaty settlement commitments and the provisions of Te Ture Whenua Māori Act 1993 are upheld, irrespective of the purpose and principles of the new legislation or the strategic objectives of a particular development project;

112. agreed that Māori be engaged early to allow enough time for meaningful discussions and decisions that satisfy Treaty settlements and/or Te Ture Whenua Māori Act requirements or other iwi/hapū decision-making processes;

113. agreed that any person may recommend a development project for consideration, including territorial authorities, the private sector, Māori land owners, mana whenua, Māori developers, iwi and central government;

114. agreed that, to inform the initial assessment of a development project, stakeholders who must be consulted include relevant post-settlement governance entities, Māori land owners, mana whenua and iwi/Māori developers (noting the particular importance of undertaking early engagement with these groups in order to fulfil the Crown's Treaty obligations) who are best placed to identify:

    a. land or natural resources in the proposed project area in which Māori have an interest, together with the nature of that interest;

    b. whether land owners and relevant post settlement governance entities would like to partner to develop their land as part of delivering the development project;

115. agreed that the initial assessment of a development project must identify all relevant Māori interests, including:

    a. land in the proposed project area in which Māori have an interest, together with the nature of the interest;

    b. whether land owners and relevant post settlement governance entities would like to partner to develop their land as part of delivering the development project;

    c. Treaty settlement commitments that relate to the proposed project area;

116. agreed that, before any decisions are made for either the disposal or development of land that may potentially be needed to settle future Treaty settlements, the Minister must consult with the Minister for Treaty of Waitangi Negotiations;

117. agreed that, when preparing a draft development plan, the new legislation require the UDA to:

    a. consult with the same persons who must be consulted for the initial assessment of a proposed development project;

    b. describe the treatment of Crown land in the project area that is subject to a right of first refusal, deferred selection, deferred purchase or other relevant redress as part of a Treaty settlement;

    c. confirm whether the owners of Māori land and/or post settlement governance entities wish to develop their land as part of the development project;

118. agreed that the development project must give effect to any applicable Treaty settlements;

119. agreed that project development plans must:

    a. show how commitments arising out of the settlements of Treaty claims are being complied with;

    b. describe Māori cultural relationships to land or other resources in a project area and how these interests will be catered for;

    c. adopt the same level of protection for significant historic heritage and sites of significance for mana whenua usually provided for through district and regional plans;

    d. if the project area includes Māori land (as defined in Te Ture Whenua Māori Act 1993), provide for the protections and processes applying to that land under existing

legislation (e.g. Te Ture Whenua Māori Act 1993 and Part 4 of the Local Government (Rating) Act 2002);

120. agreed that:

a. before a development plan can be approved, the Minister responsible for Treaty settlement commitments must confirm in writing that the recommended development plan complies with all relevant Treaty settlement obligations;

b. if the recommended plan does not comply, the Minister can recommend the changes that would be necessary to ensure compliance;

c. the Minister can make those changes to the development plan, irrespective of what either the UDA or independent panel have recommended;

121. noted that:

a. some Treaty settlements provide Māori with certain processes in which Māori views and interests must be sought and in some cases given effect, particularly with respect to land use planning and consenting under Resource Management Act processes;

b. because redress is specific to each Treaty settlement, a specific approach tailored to each development project and the Treaty settlements that apply in that project area is required;

c. accordingly, there will be further obligations regarding the way in which the UDA and development plan need to approach Māori interests which will be addressed in a future Cabinet paper;

d. s 9(2)(h)

On 12 June 2018 Ministers Twyford, Davis, Little, Mahuta and Sage:

[The recommendations below are taken from the draft Māori interests Cabinet paper, and reflect Ministers' decisions at the 12 June meeting]

122. noted that the principles of the Treaty of Waitangi apply to Māori rights and interests in the following types of land (referred to as "sensitive land"):

a. Māori freehold land as defined by Te Ture Whenua Māori Act 1993;

b. former Māori freehold land that is owned by a Māori or a group of persons of whom a majority are Māori and that ceased to be Māori freehold land pursuant to an order of the Māori Land Court or pursuant to a declaration issued under Part 1 of the Māori Affairs Amendment Act 1967;

c. land set apart as a Māori reservation under Te Ture Whenua Māori Act 1993 (or its predecessor);

d. land held by a post-settlement governance entity on behalf of a claimant group that was vested in, or transferred to, the post-settlement governance entity as part of a Treaty settlement;

e. land held by a post-settlement governance entity (or an entity controlled by it) on behalf of a claimant group that was acquired by the post-settlement governance entity under a right of first or second refusal agreed in a Treaty settlement; and

f. land held by an entity (or another entity controlled by it) on behalf of a mana whenua iwi or hapū that was vested in, or transferred to, the entity pursuant to an agreement with a Crown agency or local authority;

123. noted that most sensitive land can be compulsorily acquired under the Public Works Act 1981 but in practice rarely is;

124. noted that sensitive land will be exposed to a more frequent risk of compulsory acquisition, if it is situated within or adjacent to a development project and this change in practice will lead to risks:

    a. that more frequent use of compulsory acquisition, including acquisition for developments that will pass to private ownership, could be found to be inconsistent with the principles of the Treaty of Waitangi; and

    b. of litigation and protest that could set back the Crown-Māori relationship and hold up the progress of a UDA development project;

125. agreed that no sensitive land, or any interest in sensitive land (such as an easement), can be compulsorily acquired for the UDA at any time, whether that land is inside or outside a development project area;

Annex 4: Overview of Māori engagement through the UDA development process