



To Hon Phil Twyford, Minister of Housing and Urban Development and Hon David Parker, Minister for the Environment CC Hon Nanaia Mahuta, Associate Minister for the Environment			MfE #: 2018-B-04376 MBIE #: 2577 17-18
<u>Security Level</u>	In Confidence	Number of associated papers (not attached): 2	1. Draft Cabinet paper (to be provided on Friday 27 April) 2. Slide pack (provided previously by Minister Twyford's office)
Date Submitted:	27 April 2018	Response needed by:	3 May 2018
MfE Priority:	Non-Urgent	Action Sought:	Decision

National Urban Development Authority Legislation: Decision-making Framework – Further Advice

Key messages

1. Cabinet has agreed that legislation be developed to enable selected urban development projects to operate with broader enabling powers. Cabinet has also agreed in principle to establish a national Urban Development Authority (UDA) (previously referred to as the Housing Commission) with responsibility for exercising the development powers in the UDA legislation [CBC-17-MIN-0051].
2. You have previously discussed options for managing the interaction between the UDA legislation, and the Resource Management Act 1991 (RMA) and Part 2 of the RMA in particular. You have not made a decision on how to manage this interaction and have requested officials provide further advice on this matter. This briefing responds to your request by presenting a single proposal for decision-making under the UDA legislation agreed to by Ministry of Business, Innovation and Employment (MBIE) and Ministry for the Environment (MfE) officials.
3. There are both opportunities and residual risks associated with this proposal. However, officials consider the risks associated with establishing legislation which prioritises urban development can be mitigated by incorporating sustainable management principles into the UDA legislation, and providing for public consultation and due process.
4. This proposal is included in the draft Cabinet paper on the UDA legislation, titled *Legislating to empower complex urban development projects*, which accompanies this briefing. You are meeting Ministers Mahuta, Jones and Sage to discuss this briefing and the draft Cabinet paper on 3 May.
5. In addition to the decision-making framework, the draft Cabinet paper covers the initial assessment and establishment of a development project and the preparation, independent review and approval of the development plan. Accordingly, we also provide comments on those aspects in this briefing.

Recommendations

6. We recommend that you:

- a. **Agree** that section 5 of the Resource Management Act 1991 be incorporated into the purpose, and sections 6 and 7 of the Resource Management Act 1991 be incorporated into the principles of the Urban Development Authority legislation.

Yes/No

- b. **Agree** strategic objectives must be in accordance with the purpose and principles of the Urban Development Authority legislation, be consistent with national direction under the Resource Management Act 1991, and consider regional policy statements, regional and district plans, and iwi management plans.

Yes/No

- c. **Agree** the development plan must give effect to strategic objectives, be consistent with national direction under the Resource Management Act 1991 and have regard to regional policy statements, regional and district plans, and iwi management plans.

Yes/No

- d. **Agree** to provide the independent hearing panel with the flexibility to consider the wider development plan when hearing objections, as outlined in paragraph 26, option b of this briefing.

Yes/No

- e. **Forward** this briefing note to Ministers Davis, Little, Jones and Sage.

Yes/No

- f. **Discuss** the content of this briefing with your colleagues during your meeting on 3 May 2018.

Yes/No

- g. **Provide** feedback to Ministry of Business, Innovation and Employment and Ministry for the Environment officials to further refine the options for inclusion in the final Cabinet paper.

Yes/No

Signature



Simon King
Acting Director, Urban and Infrastructure
Policy, MfE



Di Anorpong
Manager, Construction and Housing
Policy, MBIE

Hon Phil Twyford
Minister of Housing and Urban Development

Date

Hon David Parker
Minister for the Environment

Date

Contact for discussion (if required)

Agency	Position	Name	Cell phone	1 st contact
MfE	Director, Urban and Infrastructure Policy	Lesley Baddon	s 9(2)(a)	✓
	Manager, Urban and Infrastructure Policy - Wellington	David Chittenden	s 9(2)(a)	
MBIE	Manager, Construction and Housing Markets	Di Anorpong	s 9(2)(a)	
	Principal Advisor, Housing Markets	Andre Anderson	s 9(2)(a)	✓

National Urban Development Authority Legislation: Decision-making Framework – Further Advice

Context

1. Ministers were introduced to the development plan and decision-making process for the UDA legislation in a briefing on fundamental issues (MBIE reference: 1262 17-18). This was discussed during a meeting on 15 February 2018. In this meeting, Ministers indicated a preference for the UDA legislation to have an overarching purpose, principles, a single decision-making process and to allow project-specific strategic objectives to be set.
2. A key topic of discussion was the interaction between the UDA legislation and Part 2 of the Resource Management Act 1991 (RMA). Another key topic was access to due process and the role of the proposed independent decision-making panel in reviewing project development plans.
3. These topics were further explored in the legislative framework briefing (MBIE reference: 2191 17-18 and MfE reference: 2018-B-04295) and in discussion with Environment Court Judges Newhook and Kirkpatrick on 22 March.
4. Since that time MBIE and MfE officials have been working closely to develop an option that presents a single model for decision-making under the UDA legislation while retaining the sustainable management principles encompassed in the RMA and Treaty of Waitangi obligations. Officials have also refined the model for providing due process in decision-making. This is outlined in the analysis section below.

Analysis

Policy objectives

5. Under the current system there are limited opportunities for the Government to intervene to achieve urban development at a local level. Urban development is also hindered by complex and misaligned decision-making across numerous existing statutes.
6. This briefing outlines a proposal that provides for streamlined and coordinated decision-making to simultaneously facilitate multiple changes to existing urban environments. It describes the:
 - a. purpose and principles of the UDA legislation and how they will incorporate Part 2 of the RMA
 - b. proposal to provide for streamlined and coordinated decision-making, including key decision points relating to:
 - i. strategic objectives
 - ii. the development plan
 - c. role of the independent hearings panel in providing for due process
 - d. risks and opportunities, including the implications for Part 2 of the RMA.
7. Appendix 1 provides a diagram of the process from the initial project assessment stage to the final approval of the development plan.

The purpose and principles of the legislation

8. In response to your direction on the nature of the purpose and principles of the UDA legislation¹, we propose the following:

a. Purpose

The purpose of the UDA legislation should reflect its intent – to promote urban development. However, to ensure this purpose promotes urban development while also providing for the sustainable management of natural and physical resources, we recommend section 5 of the RMA be incorporated into the new purpose. This can be achieved by including “*the sustainable management of natural and physical resources*” in the purpose statement.

b. Principles

Part 2 of the RMA sets out matters of national importance (section 6) and other matters (section 7), which are considered by all decision-makers when acting under the RMA. There is also a requirement under section 8 to “take into account the principles of the Treaty of Waitangi (Te Tiriti o Waitangi)”. We recommend that the UDA legislation also include important matters or “principles” to consider when promoting urban development. Principles should encompass both matters of importance for urban development, such as affordable housing supply, timely and efficient delivery of infrastructure, and matters of importance to sustainable management.

To incorporate sustainable management principles, we recommend the new principles include the matters in sections 6 and 7 of the RMA. This ensures previously recognised important environmental, cultural and heritage values are considered when acting under the UDA legislation. Principles must also include recognition of the Treaty of Waitangi and encompass components of other statutes, such as the Local Government Act 2002 and Land Transport Management Act 2003.

An indicative statement of the proposed purpose and principles is included as Appendix 1 of the accompanying draft Cabinet paper.

Providing for streamlined and coordinated decision-making

9. The intent of UDA legislation is to streamline and coordinate the decision-making currently occurring across various statutes to promote urban development. There are two main decision points in the proposed decision-making process, as outlined in the fundamental issues briefing:
- a. the approval of strategic objectives, which are a project-based application and expression of the purpose and principles of the UDA legislation
 - b. the approval of a development plan that gives effect to the strategic objectives and aligns with the RMA.
10. The first decision on setting strategic objectives will be a Ministerial decision. The second decision is broken down into two parts; it includes a recommendation on the development plan made by an independent hearing panel and a final decision by the Minister. These processes are set out in the following paragraphs.

¹ These matters were described in the fundamentals briefing (MBIE reference: 1262 17-18) and the legislative framework briefing (MBIE reference: 2191 17-18 and MfE reference: 2018-B-04295).

Developing strategic objectives

11. Strategic objectives will be an expression of the purpose and principles of the UDA legislation as they apply to the project area, both taking into account the existing environment and providing significant direction on what the project needs to achieve. Strategic objectives must be general enough to allow for flexibility in responding to changing conditions as development progresses (perhaps over a 20 year period), yet specific enough to safeguard the expectations of communities, stakeholders and the government.
12. The development of strategic objectives begins with the identification of an urban development project. Once identified, an initial assessment is undertaken by the UDA to demonstrate that the project is able to deliver a tangible net public benefit.
13. Once a project meets this test, opportunity is provided for the community to shape the project and inform the content of the strategic objectives. Guided by the community and the purpose and principles of the new legislation the UDA will draft strategic objectives, which, along with all relevant information on its proposed project, will be provided to the Minister for consideration.
14. The Minister will then decide to either approve the strategic objectives or request changes to them. The decision to approve the strategic objectives would then be confirmed through an Order in Council as part of the formal process of establishing the development project.

Minister makes recommendation on setting strategic objectives

15. The first substantive decision will be for the responsible Minister to be satisfied that the strategic objectives will ensure the purpose and principles of the UDA legislation are met in the project area. In addition, we propose the Minister also considers whether the project:
 - a. has the realistic potential to deliver a tangible net public benefit including social, cultural, economic and environmental outcomes
 - b. will facilitate urban development
 - c. will be undertaken in or adjacent to an existing urban area.
16. We understand Ministers wish to have the ability to weight strategic objectives to prioritise certain project outcomes over others. This can be achieved in two ways by:
 - a. providing for weighting in the legislation or
 - b. applying the desired weighting through the drafting of good objectives, which can be achieved without being legislated.
17. As strategic objectives are project-specific, we do not recommend that particular types of objectives be given greater weight in the legislation. Rather, Ministers can apply their desired weighting when they set the strategic objectives for each project (for example, by using different language, such as 'achieve' versus 'promote').

Preparation, consultation and approval of the development plan

18. Once the Order in Council has confirmed the strategic objectives for the project, the UDA must then prepare a draft development plan.
19. The development plan must be a clear expression of the strategic objectives as delivered by land-use planning and other components such as assembling landholdings, integrating the delivery of infrastructure and transport, funding and governance. This briefing addresses only the land use planning aspect of the development plan.

20. The draft development plan is subject to a consultation process which provides an opportunity for the public to help shape the specific details of the development plan. The UDA considers submissions received and publishes a recommended development plan.

The RMA and making decisions on the land use planning aspects of the development plan

21. There are two important elements to our proposed decision-making framework that we think the UDA should **consider when developing** the land use planning components of the development plan:
- a. the UDA legislation – by giving effect to the project specific strategic objectives and acting in accordance with the purpose and principles
 - b. the current RMA decision-making framework which includes national direction, and existing RMA plans (ie, regional policy statements, regional plans and district plans, and any relevant iwi management plans).
22. We recommend that any person exercising functions and powers under the UDA legislation act in accordance with its purpose and principles, giving primary consideration to realising the relevant project's strategic objectives.
23. In **making decisions** on the land use planning components of the development plan, the decision-maker will also be required to assess the proposal against certain other parts of the RMA decision-making hierarchy where this is consistent with the project specific strategic objectives
24. Both the strategic objectives and the development plan must be consistent with national direction. If there is any ambiguity with the meaning of national direction (or other policies and plans developed under the RMA), it must be resolved solely by reference to the RMA framework (and not by reference to the new purpose and principles of the UDA legislation).
25. Any ambiguity regarding the strategic objectives must be resolved by reference to the UDA legislation's purpose and principles.

Due process and testing the development plan through an independent hearing panel

26. We propose that an independent hearing panel (the panel) hear objections to the recommended development plan. There are two options for the scope this panel could have when considering objections:

a. *Panel considers only parts of the plan to which there are objections*

This would result in the panel only being able to amend components of the plan subject to the objection. It would not provide for objections to be resolved in a manner that takes into consideration all strategic objectives, and may limit opportunities to maximise the benefits of the project.

b. *Panel considers the wider plan*

In considering any objections, the panel would have the ability to refer back to any relevant submissions made to the draft development plan. This would provide the panel with the ability to amend any part of the plan to maximise the benefits of the project and ensure the views of the community are balanced in achieving the strategic objectives.

Not limiting the hearing of submissions to a narrow interpretation of an objection may increase timeframes for the panel to consider the proposal. However, this is a more consultative option that mitigates the likelihood of the legal challenges that

may result from the exclusion of submissions on previous versions of the development plan.

The aim is to avoid the need for the panel to reconsider matters that have no relevance to any objections, but enable it to provide a sensible set of recommendations that respond in all the circumstances to the objections that it is asked to consider.

27. It is recommended that the panel have as much flexibility as possible in the way that they operate and address objections. This flexibility includes the scope to commission independent advice on aspects of the proposal and the ability to direct mediation or conferencing between parties and experts. To provide this flexibility, we recommend the panel has the ability to consider the wider plan to the extent relevant to an objection (option b). This reflects learnings from the Auckland Unitary Plan and the Christchurch Replacement District Plan.

Ministerial decision to give final approval of the development plan

28. Based on the recommendation of the panel, the Minister will make the final decision to approve the development plan (with or without minor or inconsequential amendments). Where the Minister has concerns with certain aspects, they may refer the plan back to the panel for further consideration.
29. Once the development plan has been approved, it will have legal effect as the guiding planning document for all development within the project area.

Limited appeal rights

30. We propose that there are no appeal rights against the decision to establish an urban development project or the associated content of the Order-in-Council. We also propose that there are no appeal rights against the content of the development plan, but that appeals remain available on points of law. Judicial review would remain available at all these decision points.
31. Our experience with the Auckland Unitary Plan process is that allowing appeals on the merits of planning decisions can result in substantial delays.

The proposed decision-making framework: opportunities, risks and implications for Part 2 of the RMA

32. The UDA legislation provides a single streamlined and coordinated model for decision-making that retains the sustainable management principles encompassed in the RMA. There are both opportunities and risks associated with this approach. These primarily relate to the interaction between the UDA legislation and the RMA, and are detailed in Table 1 on the following page.

Table 1: Opportunities and risks of the recommended decision-making framework

	Opportunities	Risks
Processes	Processes are better coordinated, including joint public consultation, and integrated land use, acquisition, funding and infrastructure decisions.	There is a small pool of people available with the necessary skills to manage a complex new process. However, people with these skills are available; Environment Court Judges and other expert decision-makers are practiced at making complex decisions and balancing competing objectives. The level of risk this presents will depend on the number of processes underway at any one time.
Jurisprudence	Some jurisprudence is retained as existing statutory RMA decision-making processes are included.	The new purpose, principles and strategic objectives sit above the existing statutory decision-making creating new points of legal challenge and jurisprudence.
RMA Part 2	The core concept of sustainable management and the list of matters of national significance and importance are included within the fundamental framework of the UDA legislation. Treaty of Waitangi obligations will be integrated into the legislation in the same way that they are integrated into the RMA and the Local Government Act 2002.	Incorporating Part 2 matters into the purpose and principles of the UDA legislation will reduce the relative weight of Part 2. This is due to Part 2 having to be considered alongside other non-RMA matters. To address this risk, it is important that consideration is also given to other matters set out under the RMA
Prioritising urban development	Prioritising urban development above all other considerations in decision-making aims to achieve the purpose of enacting the UDA legislation. A single guiding purpose ensures that in the case of conflicts urban development projects will progress and maintain viability	There is a precedent for this approach - the purpose of the HASHAA legislation is given precedence over the RMA.
Land use decisions	Established decision-making frameworks under the RMA are predominantly retained, including required regard be had to national direction, regional policy and plans, local plans and regulations, and iwi management plans.	Decision-makers may find it confusing to have to refer to both the RMA and the UDA legislation in making decisions. There is precedent for this approach in HASHAA. This can be mitigated by clearly drafted legislation.
Perception	Making use of the existing RMA framework means there is less risk of public, local government and community discomfort with status quo tests, so except for occasional exceptions, litigation is less likely.	The proposed decision-making framework is new. This means there will be a level of unfamiliarity with the process and environmental protection measures which may result in more litigation.

33. Overall, officials consider that the risks associated with establishing legislation to prioritise urban development are able to be mitigated. This can be achieved by incorporating sustainable management principles and providing sufficient opportunity for public consultation and due process.

Consultation and Collaboration

34. No other agencies were consulted in preparing this briefing note.

Legal issues

35. There are specific legal issues that have not yet been fully addressed and will be the subject of a future Cabinet paper. These include, but are not limited to:
- a. how specific consultation obligations and persons would be identified
 - b. relationship and integration of the development plan, into existing legislative settings
 - c. how resource consenting will work; including specific mechanisms for integrating the RMA decision-making frameworks into the UDA legislation.
36. Internal legal advice, and, if required, Crown Law support will be used to inform further policy development on these areas.
37. Additionally, the policy proposals raise issues about access to justice due to limited avenues for appeal. The Ministry of Justice will take an active interest in these issues when they are completing a Bill of Rights vet on the future bill. If not resolved or mitigated, these issues may provide potential avenues for legal challenge.

Legislative implications

38. This briefing is provided to accompany the draft Cabinet Paper titled *Legislating to empower complex urban development projects*. Legislative implications are addressed in that Cabinet Paper.

Next Steps

39. Discuss the content of this briefing during your meeting on 3 May with Ministers Mahuta, Jones and Sage prior to finalising the draft Cabinet paper titled *Legislating to empower complex urban development projects*.
40. Provide feedback to MBIE and MfE officials to further refine the options for inclusion in the final Cabinet paper.

Appendix 1: Outline of the national Urban Development Authority process

