Ministry for the Environment
Manatū Mō Te Taiao

Making Aotearoa New Zealand the most liveable place in the world
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MINISTRY OF BUSINESS, INNOVATION & EMPLOYMENT
HĪKINA WHAKATUTUKI

BRIEFING

Urban development and transport agency legislation – Legislative framework

Date:	2 March 2018	**Priority:**	High
Security classification:	In Confidence	**Tracking number:**	MBIE: 2191 17-18 MfE: 2018-B-04295

Action sought		**Deadline**
Hon Phil Twyford **Minister of Housing and Urban Development**	Read in advance of your meeting with colleagues on Monday 5 March 2018. Forward a copy to Ministers Sage, Jones and Mahuta.	5 March 2018
Hon David Parker **Minister for the Environment**	Read in advance of your meeting with colleagues on Monday 5 March 2018.	5 March 2018

Contact for telephone discussion (if required)				
	Name	**Position**	**Telephone**	**1st contact**
MBIE	Di Anorpong	Manager, Construction & Housing Policy	s 9(2)(a)	✓
MFE	Lesley Baddon	Director, Urban and Infrastructure Policy		✓
	David Chittenden	Manager, Urban and Infrastructure Policy - Wellington		

Minister's office to complete:

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- ☐ Withdrawn

Comments

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Purpose

The Ministry of Business Innovation and Employment (MBIE) has provided you with briefings on fundamental issues (1262 17-18), the decision-making framework (1363 17-18) and planning and consenting issues (1307 17-18) for the proposed urban development and transport agency legislation. When Ministers met to discuss these briefings, you tabled certain issues and sought advice on six questions that we provide below.

Subsequently, Minister Parker also commissioned separate advice on the Ministry for the Environment's (MfE) proposed approach to design elements for the legislation (2018-B-04329). That approach and the approach recommended in the briefings noted above are compared below.

This briefing has been prepared jointly by MBIE and MfE for Ministers Twyford and Parker, under shortened circumstances. Other agencies, including the Department of Conservation (DOC), Department of Internal Affairs (DIA), Ministry of Transport (MoT) and Land Information New Zealand (LINZ), have not contributed to this briefing. The advice in this briefing would benefit from input from the agencies responsible for the other Acts mentioned in the briefing.

Meeting next Monday

Ministers Twyford, Parker, Sage, Jones, and Mahuta are scheduled to meet next Monday (5 March) for half an hour to discuss the issues that were tabled at your previous meeting.

We recommend that Ministers work through the outstanding recommendations in the earlier briefings. In particular, this briefing and MfE's separate advice will support Ministers' discussion on the outstanding recommendations in the fundamental issues briefing:

- whether the new legislation should create a separate statutory system for enabling complex development projects and, if so, the best model for doing so (paras 7-24 of that briefing); and
- the recommendations on finalising and approving development plans (paras 118-157 of that briefing).

Recommended action

We recommend you:

a **Forward** this briefing and **discuss** these issues with the Ministers of Conservation, Local Government and Infrastructure in advance of your meeting with them on Monday 5 March.

Agree / Disagree

b **Agree** the new legislation creates a separate statutory system through which most of the enabling development powers can be proposed, consulted with the public, and decided. The statutory system:

Either

Enacts a single new decision-making framework that integrates the principles from the existing statutory system.

Agree / Disagree

Or

Uses the existing decision-making criteria under existing Acts as relevant to the urban development project, provided the legislative purpose and the strategic objectives are met.

Agree / Disagree

c **Agree** the separate statutory system include a legislative purpose and principles, strategic objectives for individual projects, and a single decision-making process.

Agree / Disagree

Di Anorpong
Manager, Housing and Urban Branch
MBIE
2 / 3 / 18

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

Lesley Baddon
Director, Urban and Infrastructure Policy
MfE
2 / 3 / 18

Hon David Parker
Minister for the Environment
..... / ..... / .....

Introduction

1. At the Ministers' meeting on 13 February 2018, Ministers requested that MBIE and MfE prepare joint advice on the following outstanding issues regarding the proposed legislation for the Urban Development and Transport Agency (UDATA). Minister Parker asked officials to respond to the following six questions:

   a. Which aspects of the Resource Management Act 1991 (RMA) should be overridden (district plan, plus what else?)

   b. What should be overridden in other legislation (e.g. Long-Term Plans?)

   c. Is it correct that the review panel will be hearing matters not just relating to RMA planning but also:

      i. Land Transport Management Act 2003 (LTMA)

      ii. Reserves Act 1977

      iii. Local Government Act 2002 (LGA)

      iv. Others?

   d. If the answer to the third question is 'yes', are we agreed that the proposed independent hearings panel process has to be under the UDATA legislation rather than using an existing RMA process?

   e. What are the proposed checks and balances (membership of the review panel, appointment process, effect of their decision)?

   f. What is the environmental test in the UDATA legislation?

2. Underlying these questions is the first issue addressed in the briefing on fundamental issues: how best to enable complex development projects to change multiple components of the urban environment.

3. To address how aspects of the RMA and other legislation <u>should</u> be affected to enable these development projects, ministers need to consider:

   a. what policy problem the legislation is intended to overcome;

   b. what the optimal design solution to that problem would be; and

   c. how much change to the legislative status quo Ministers are comfortable with.

4. This briefing only relates to the second stage of establishing an urban development project: the decision making when preparing the detailed development plan. The first stage initiates the development plan, its boundaries and its strategic objectives through consultation and discussion among Ministers, local government, stakeholders and the wider community. It is in the second stage that the development plan brings together considerations across the statutory landscape to make specific decisions about the project, much like master planning.

Retaining Part 2 of the RMA

5. Minister Parker has expressed a strong preference to retain Part 2 of the RMA in the UDA framework. For this reason, we explore three options below that retain Part 2 with greater or lesser change depending on the approach to the first two considerations in paragraph 3.

The role of Part 2 of the RMA

6. Part 2 of the RMA contains the Act's purpose, matters of national importance that decision makers must "recognise and provide for", other matters to "have particular regard to", and a

requirement to take into account the principles of the Treaty of Waitangi. These matters relate to the natural and physical environments, including culturally significant matters.

7. Part 2 is not an environmental test itself, or a means to assess environmental effects. Instead, Part 2 is given effect in the RMA system through:

- National direction
- Regional policy statements
- Regional plans
- District plans
- Resource consent processing

8. Recent case law confirms the significant role of RMA Part 2 within the entire framework of RMA documents, but that Part 2 should not be used as a 'broad judgement' to override local planning decisions in most circumstances.

9. Analysis of the approach to Part 2 is described in each of the options below.

Statutory coordination for decision-making

10. The UDATA needs to be able to achieve good urban development projects at pace and scale. In doing so, it needs to address project complexity, the characteristics of the receiving environment, and existing communities.

11. One of the fundamental policy problems the UDATA needs to address is a lack of coordination. There are two coordination issues – co-ordination of disparate legislative processes with separate decision makers, and co-ordination of decision making. The first is addressed through the proposed one stop shop development plan process *with one decision maker making the substantive decisions on the entire contents of the development plan.* The second issue requires key policy decisions about how far to depart from the status quo for decision making on matters that are currently decided under a minimum of three core statutes (RMA, LGA and LTMA) and up to five others.[1]

12. When considering how far to depart from the status quo for decision making, some key principles of legislative design are relevant to consider:[2]

    a. new legislation should not re-state matters that are already addressed in existing Acts

    b. it is preferable not to repeat provisions from existing legislation in new legislation

    c. precedent in existing legislation should be considered.

13. Each existing Act under which decisions are currently made contain their own decision-making frameworks, which can include principles and criteria. These Acts have been established to provide frameworks for robust decision making on each of the issues they cover – from decisions about reserve exchanges or de-classification, and decisions on regional land transport management, to decisions on managing natural and physical resources through plans and resource consents under the RMA.

14. It is important to ensure that the decision making framework is robust and enables the right matters to be considered for each particular issue. At the same time, it must avoid situations where a permission/approval or other decision looks likely to fail or be declined, or made in a

[1] Local Government (Rating) Act 2002, Reserves Act 1977, Government Roading Powers Act 1989, Local Government Act 1974 and Local Government (Auckland Council) Act 2009. Note that two other statutes also form part of the system, but are out of scope of the proposed legislation: the Public Works Act 1981 and the Building Act 2004.
[2] LDAC guidelines, chapter 2.

way that would undermine the development plan. Therefore, to achieve co-ordination in the UDATA context we need to ensure that decision makers are able to consider the whole project and give permissions/approvals and make other decisions in a manner that takes the benefits of the entire development into account.

Potential solutions

15. The options below expand on the three options described briefly in the Fundamental Issues briefing (in the table under paragraph 24). The first two adapt existing statutes and processes, differentiated by whether or not a new statutory purpose takes precedence over those processes, and whether a single decision-maker makes a combined decision.[3] The third enacts a new process with its own decision-making framework:[4]

- Option 1: Coordinated processes only (with no new purpose, principles or objectives)
- Option 2: Single process (with a new purpose, principles, objectives), using existing decision-making frameworks for one coordinated decision
- Option 3: Single new process with a bespoke, integrated decision-making framework

Retaining Part 2 of the RMA

16. Ministers discussed what approach to take to the statutory purpose of the new legislation,[5] and supported a purpose that would take precedence over existing legislation, capturing the intent that the new legislation be more enabling of urban development. Options 2 and 3 both provide for that outcome.

17. Under these options, Part 2 of the RMA (and the decision-making framework of each other part of the statutory system) will be secondary to the purpose of the new legislation. While this does not change the content of Part 2, it will change its application. Consequently, there is some degree of change to Part 2 under both Options 2 and 3.

18. The only way to retain Part 2 of the RMA without any change whatsoever would be to prefer a solution that retains each of the existing statutes and only amends their processes so that they are better coordinated. Option 1 provides for that outcome.

Option 1: Coordinated processes only

19. This option only addresses the problem of a lack of coordination between the various statutory processes. Thus, the amendments to existing statutes would provide for joint public consultation and for the processes to be conducted in parallel, but each process would remain legally separate, requiring a separate statutory decision under a separate decision-making framework. Under this option, the status quo decision maker, for example ministers and councils, would make separate decisions which were then collated into the Development Plan. Modifications to these existing processes would still be required to make the status quo processes work in the UDATA context.

[3] These were both part of Option 1 in the fundamental issues briefing, one described as the "first method" and the other as the "second method." See the first row of the table under paragraph 24.
[4] This was Option 2 in the fundamental issues briefing, in the second row of the table under paragraph 24.
[5] Ministers discussed paragraphs 25-37 and recommendation 3 of the fundamental issues briefing when they met on 15 February.

Option 1- Separate processes under original Acts, no overarching purpose or strategic objectives

Advantages	Disadvantages
Processes and decisions are better coordinated (though still separate), including joint public consultation.	No new statutory purpose and strategic objectives for urban development projects may slow progress, or potentially decrease projects' viability.
Complete retention of jurisprudence, with processes understood by participants. The least amount of intervention into existing statutory processes.	Risk that a critical decision (e.g. a reserve swap) is declined and undermines the project because the decision maker isn't acting with the overall UDATA project benefits in mind.
RMA Part 2, and the more specific parts of the RMA relevant to planning and consenting, are preserved.	Possible contrary or conflicting decisions because of independent decision makers.
The development plan and project when completed will be the easiest to integrate back into the existing statutory environment.	Process could appear to be not as directive or transparent in being about the delivery of an urban development project.
Likely public, local government and community comfort for status quo tests means litigation is less likely.	Combined decision-making done for the whole proposal could require a significant decision-making resource (including independent panel/UDATA board time and expertise).
Retains knowledge and expertise in the existing system.	

Option 1 and Part 2 of the RMA

20. Option 1 would retain Part 2 of the RMA as part of the RMA decision-making processes (for example, when changing a district plan, or a regional policy statement if necessary). However, Ministers discussed what approach to take to the statutory purpose of the new legislation, and supported a UDATA purpose that would take precedence over existing legislation and capture the intent that the new legislation be more enabling of urban development. Option 1 does not provide for that outcome.

Option 1 is not supported

21. MBIE and MfE do not support Option 1 because we agree with Ministers that the proposed legislation needs a new statutory purpose that takes precedence over existing decision-making frameworks (as recommended in the fundamental issues briefing). This is to ensure that complex re-developments at pace and scale do happen.

Option 2: Single process using decision-making frameworks from relevant statutes in one coordinated decision

22. This option addresses the problem of when there are conflicts between the statutes, and between the existing statutes and the new purpose of the UDATA, which will impede the development and implementation of development plans.

23. Option 2 would provide for a single process and public consultation, but each decision-making consideration would remain separate, using the existing decision-making criteria/tests, amendments to documents, and any necessary approvals/consents, through each of the relevant statutes.

24. The key difference would be that the purpose of the new legislation and the strategic objectives would now be the paramount consideration for the ultimate development plan decision, made under the UDATA. Where one or more decisions may be inconsistent with each other across the different statutes, the decision-maker would also have the ability to address those conflicts by referring back to the paramount purpose, principles and strategic objectives.

Option 2 - One process, overarching purpose, strategic objectives, uses criteria of existing Acts

Advantages	Disadvantages
Processes are better coordinated, including joint public consultation and separate decisions are coordinated and integrated.	Combined decision-making done for the whole proposal could require a significant decision-making resource (including independent panel/UDATA board time and expertise).
Some jurisprudence retained as existing statutory decision-making is used,	The new purpose, principles and strategic objectives overtop existing statutory decision-making will likely create new points of legal challenge and jurisprudence.
Established decision-making processes under the RMA are retained, including Part 2 matters, except to meet the project's strategic objectives or to resolve the occasional conflict or inconsistency.	Likely concern about RMA Part 2 being undermined as the purpose, principles and objectives of the UDATA would be the deciding factors.
The development plan and project will easily integrate back into existing statutory environment when completed.	Process could appear to be not as directive or transparent in being about the delivery of an urban development project.
A single guiding purpose ensures that in the case of conflicts urban development projects will progress and maintain viability.	Unfamiliar process for participants, both technical and public – adjustments for the new system will be needed.

Less risk of public, local government and community discomfort for status quo tests, except for occasional exception, means litigation is less likely.	
Only changes that are needed for the development are made – the existing regulatory parameters are retained where they are not a barrier to the development projects.	
Retains case law, knowledge and expertise in the existing system.	

Option 2 and Part 2 of the RMA

25. Part 2 of the RMA would be secondary to the requirement to achieve the purpose, principles and strategic objectives of the UDATA legislation, which is enabling of urban development. This was the approach taken in the HASHAA, in which the goal of housing affordability and residential land supply was elevated above sustainable management in the decision-making framework. In addition to amendments to streamline the processes, the plan changes and resource consent applications under that Act were all subject to the most weight being given to housing affordability in decision-making.

26. This hierarchy would have effect when a conflict or inconsistency is unable to be resolved, and ensuring that the RMA decisions for the project meet the project's strategic objectives.

27. If desired, the new statutory purpose could also incorporate the sustainable management of natural and physical resources alongside the intention to better enable urban development Equivalent aspects of Part 2 of the RMA could also be incorporated into legislative principles or the strategic objectives for the project.

Main risk of Option 2

28. The main risk of Option 2 is that the use of existing decision-making criteria overly constrains and complicates the UDATA's decision-making, and does not send a clear signal to the community that the UDATA is a new and powerful means of addressing the urgent need to develop urban areas at pace and scale. It also requires a decision-maker to make decisions under separate frameworks to approve components of the development plan.

Option 3: Single process with single-tier decision-making framework

29. This option addresses the problem of when there are conflicts between the statutes, and between the existing statutes and the new purpose of the UDATA, which will impede the development and implementation of development plans.

30. Option 3 enacts a new single process and single decision-making framework. This would enable decisions about whether to build light rail, for example, to be made as part of the same legal process as decisions about whether to permit higher density housing, with the decision being made under the same framework.

31. Existing decision-making frameworks would contribute at two levels:

    a. When the new legislation is drafted, the principles and values contained within existing frameworks can be incorporated in the new Act's principles.

    b. When setting the strategic objectives of each development project, the Minister would need to have regard to the existing legislative frameworks, statutory documents and plans.

Option 3 – Single new process with integrated decision-making framework

Advantages	Disadvantages
A new, streamlined process that coordinates and replaces existing decision-making processes with one clear decision on all aspects.	Rewriting and merging of relevant purposes, principles and decision-making criteria into one Act creates legal uncertainty and risk of unintended consequences.
The public can understand the reasons for a bespoke process (if well communicated).	Unfamiliar decision-making framework for participants, both technical and public – adjustments for the new system will be needed.
The new statutory framework can have flexibility and scope to focus on good urban outcomes, with a single guiding purpose for urban development projects.	New (even if similar) legal tests and no existing jurisprudence means objectors with resources may be more likely to challenge and litigate, creating uncertainty and delaying project timeframes.
The matters in RMA Part 2 can be included as relevant principles or matters to address in the new decision-making process.	Likely concern about RMA Part 2 being undermined or revised as it is combined into the purpose, principles and objectives of the UDATA.
Only changes that are needed for the development are made – the existing regulatory parameters are retained where they are not a barrier to the development projects.	

Option 3 and Part 2 of the RMA

32. As in Option 2, the purpose of the RMA would no longer be paramount. However, the content of Part 2 can be replicated or incorporated by reference in the principles of the new legislation. This would retain the substance of sections 6 and 7 of the RMA and give those values and principles a similar level of legal weight as they currently have. But the decision-making framework of Part 2 would no longer apply in the way that it does under the RMA.

33. If desired, the new statutory purpose could also incorporate the sustainable management of natural and physical resources alongside the intention to better enable urban development. Equivalent aspects of Part 2 of the RMA could also be incorporated into legislative principles or the strategic objectives for the project. In Option 3, this would retain the substance of the RMA's purpose, but it would apply in a different framework.

Main risk of Option 3

34. The main risks of Option 3 are the potential for community discomfort and potential litigation if existing statutes are not clearly reflected in the legislation, the loss of existing jurisprudence and case law, and complexities or errors involved with duplicating and referencing RMA provisions into a separate, stand-alone planning system.

Analysis

35. A summary of the critical elements of the three options is provided below, followed by a comparison of the decision-making frameworks:

<table>
<tr><th>Option 1: Coordinated processes only</th><th>Option 2: Single process using decision-making frameworks from relevant statutes in one coordinated decision</th><th>Option 3: Single new process with integrated decision-making framework</th></tr>
<tr><td>No new statutory purpose</td><td colspan="2">New paramount purpose</td></tr>
<tr><td>No new principles</td><td colspan="2">New national level principles determine strategic objectives</td></tr>
<tr><td>No strategic objectives</td><td colspan="2">Strategic objectives apply to all decisions</td></tr>
<tr><td colspan="2">Multiple decision-making frameworks</td><td>Single decision-making framework</td></tr>
<tr><td>Existing decision-making frameworks continue to apply unchanged</td><td>Existing decision-making frameworks continue to apply subject to the new purpose, principles and strategic objectives</td><td>The Minister must have regard to existing decision-making frameworks when setting the strategic objectives; otherwise they don't apply</td></tr>
<tr><td>Multiple processes conducted together</td><td colspan="2">Single process</td></tr>
<tr><td>Joint public consultation for multiple processes</td><td colspan="2">Single public consultation</td></tr>
<tr><td>Single decision-maker</td><td colspan="2">Single decision-maker</td></tr>
<tr><td colspan="2">Multiple decisions made at the same time</td><td>Single decision</td></tr>
<tr><td colspan="2">Multiple separate components compiled in a single document</td><td>Single plan</td></tr>
</table>

Comparison

36. The following table provides a summary assessment of the decision-making framework under each option:

Decision-making framework	Option 1	Option 2	Option 3
Degree of legal change	None	Partial	Comprehensive
Part 2 of the RMA	Unchanged	Subordinated	Subsumed
Structure	Compartmentalised	Layered	Integrated
Familiarity	High	Recognisable	Unfamiliar
Ease of use	Uncoordinated	Involved	Straightforward

37. We have discounted Option 1 as we consider that, in order to produce fit for purpose development plans, the UDATA will need the ability to:

- 'cut through' the complexity of decision making processes to align timeframes, public participation, technical inputs and multiple decision points.
- elevate the purpose of urban development legislation above the other statutes' purpose in case of a conflict between the statutes and/or decisions under them.

38. Officials are less aligned on the choice of Option 2 or 3.

Observations

39. Overall, the key consideration is the degree of change Ministers are comfortable with compared to the ease of use of the new framework.

Option 2

40. Option 2 limits the changes to existing decision-making frameworks. It combines the familiarity of the status quo with the key changes required from the new legislation. Part 2 is subordinated, but retains its structure within the new framework.

41. Its main drawback is that it requires a decision-maker to make decisions under separate frameworks to approve components of the development plan. The decision-maker would need to identify which parts of the plan must be decided under which existing framework and ensure they are applying the correct considerations.

42. A model with separate existing frameworks that are subordinated to a higher level framework may also generate an involved decision-making process that is challenging to apply in practice. For example, a decision-maker would need to show that for a land use decision they applied the RMA framework and for a roading decision they applied the LGA framework, while in both cases also giving material weight to the purpose of the new legislation and the strategic objectives.

43. There is also a possibility that the layers of the framework will generate internal duplication. Given that existing principles such as Part 2 of the RMA are likely to be included in the principles of the new legislation (to ensure that appropriate values shape the strategic objectives), it would mean that the same principles would be applied twice.

Option 3

44. Option 3 is the only option that provides a single decision-making framework. Its main advantage is its ease of use and straightforward structure. For every decision they make, all the board members of the UDATA would need to do under this option is to consider how best to realise the strategic objectives in light of the new statutory purpose.

45. Its main drawback is the extent of change involved. To apply a single decision-making framework requires legislation that replaces all of the existing frameworks in the project area. While the substance of Part 2 of the RMA could be incorporated into the new framework, Part 2 would no longer retain its current role in decision-making.

46. With this degree of change comes the attendant risk of unintended consequences and the need for clarifying litigation. The level of communication required to teach stakeholders and participants the new framework would also be high.

Conclusions

47. In making a recommendation to you, officials have landed between Options 2 and 3. The difference boils down to how best to incorporate existing decision-making frameworks (including Part 2 of the RMA) into the new decision-making framework of the proposed legislation:

    a. MfE prefers an approach (Option 2) that:

        i. retains the existing decision-making frameworks separately;

        ii. continues to apply them in the first instance;

        iii. while also applying the new statute's purpose, principles and strategic objectives to resolve any conflicts and to ensure the decisions meet the project's objectives

    b. MBIE prefers an approach (Option 3) that adapts the principles of existing decision-making frameworks into a new, stand-alone decision-making framework in the UDATA legislation.

Responses to Minister Parker's questions

Which aspects of the RMA should be overridden (district plan, plus what else?)

48. The extent to which Part 2 of the RMA and plan-making processes should be overridden have been considered above. Other choices depend on whether you prefer to adapt existing processes or create a separate self-contained piece of legislation. As with the decision-making framework, the main considerations are the disadvantages of greater change weighed against the advantages of a "one stop shop" with the potential for better coordination.

District plan provisions

49. We recommend that the development plan is able to override district plan provisions where needed to achieve the strategic objectives.

50. If adapting the existing statutory system (such as Option 2), the development plan would amend elements of the district plan as it applies to the project area, as necessary to meet the strategic objectives. The territorial authority would then be unable to change those amendments without the UDATA's prior approval.

51. Under a new statutory system (i.e. Option 3), the legislation could also simply amend the district plan. Alternatively, the development plan could replace the district plan in the project area, either by providing replacement provisions, by replicating existing provisions, or by incorporating existing provisions by reference. At the end of the development project, the land use regulations in the development plan would be deemed to be a schedule to the district plan that could then be amended by the territorial authority under standard processes.

Regional policy statements and regional plans

52. For complex urban redevelopment projects anticipated by this proposal, we have recommended that the new legislation not enable regional plans to be overridden. Boards of inquiry for nationally significant proposals have the ability to change regional plans (although they have not yet needed to do so), so you may wish to consider whether development plans should too.

53. We have recommended that regional policy statements may be overridden where the urban growth and development constraints are not based on natural resource or natural environment reasons. The discussion about these overrides is in MBIE's Planning and Consenting briefing note.

Consenting

54. Under a coordinated process only (Option 1), RMA consenting, monitoring and enforcement would still operate as normal. Where the existing decision-making frameworks are subject to a new UDATA purpose and principles (Option 2) RMA consenting, monitoring and enforcement would also operate as normal, except that applications would need to be considered under the new UDATA's purpose and the project's strategic objectives. This is the same approach that was taken under the HASHAA, which elevated that statute's purpose above the purpose of the RMA when resource consent applications were being determined.

55. Under Option 3, you could still choose to use the existing system if preferred; or RMA consenting would be replaced by a new system that is similar to the land use and subdivision consents process under the RMA.

56. The advantage of a new system would be that UDATA could be the consent authority. Because the UDATA would be exercising the wastewater, clean water, stormwater, roads and reserves functions in the project area, making the UDATA the consent authority would enable it to coordinate all of these functions. In contrast, leaving the consenting function with the territorial authority would separate across two organisations the consenting function from the key functions that need to be considered when granting consent. However the UDATA could not process consents for which it is the developer.

57. Under both Options 2 and 3, the development plan could include resource consents or other applications that are approved simultaneously with the approval of the land use regulations in the plan.

Compliance, monitoring, enforcement

58. The organisation that issued the consent would be responsible for compliance, monitoring and enforcement of that consent. If adapting the existing statutory system (Options 1 and 2), the legislation would use the relevant regime depending on the breach: RMA for RMA consents, Local Government Act for bylaw breaches, etc. Under a new statutory system (Option 3), the legislation could do the same thing, replicate the same provisions or incorporate them by reference. Subject to whether you'd like the development plan to be able to override regional plans, RMA regional compliance, monitoring and enforcement under regional plan provisions would continue as normal.

Designations and heritage orders

59. The development plan would override designations, except for nationally significant infrastructure (e.g. the national grid, heavy rail, international airports, sea ports, state highways). RMA Part 8 would continue to apply to these. For all other designations, the proposal is that the requiring authority must obtain prior approval of the UDATA to establish or roll over a designation. If the UDATA and requiring authority cannot agree then the final decision is made through the approval of the development plan (which enables the independent panel to consider the issue). The approach is the same under all options, with choices under a new statutory system to adopt designations from the RMA or to have a similar mechanism and authority in the development plan. This would ensure that at the end of a development project, all designations would continue to be treated the same way under the status quo. Heritage orders would also remain under the jurisdiction of Part 8 of the RMA.

Relationship with other RMA documents

60. Under all options, national direction would apply: national policy statements, national environmental standards, the National Planning Standards, and regulations. If adapting the existing statutory system (Option 2), the UDATA would use the RMA decision-making framework for district plan changes (e.g. does it give effect to the regional policy statement and national direction, does it have regard to other planning documents and iwi planning documents), but subject to the paramount purpose of the new legislation and the strategic objectives of the development project. Under a new statutory system (Option 3), the UDATA would have regard to all relevant RMA planning documents, and other planning documents, including the key urban design qualities expressed in the New Zealand Urban Design Protocol (2005), as part of its broad consideration of relevant matters, and when also applying the paramount purpose and strategic objectives.

What should be overridden in other legislation (e.g. Long Term Plans?)

61. The other Acts affected by the proposed legislation include:

- Reserves Act 1977
- Local Government Act 2002
- Local Government Act 1974
- Local Government Ratings Act 2002
- Public Works Act 1981
- Land Transport Management Act 2003
- Government Roading Powers Act 1989
- Local Government (Auckland Council) Act 2009

62. Each of these Acts includes separate processes and procedures and decision-making criteria for making decisions on the issues they address. There are two key considerations when discussing overrides: process and decision-making.

Process requirements

63. As a general rule, any "process" requirements that exist in the other legislation, for example, requirements for public consultation or notification, should be overridden by the one-stop process proposed for the UDATA legislation. There is no utility in retaining these separate requirements when the proposed UDATA model incorporates time for public consultation and input. For example a council is required to follow a special consultative procedure to amend a Long Term Plan made under the Local Government Act 2002 (the LGA). It would be

inefficient to require this process to be completed separately when there is a consultation process built into the new legislation.

64. That said, because the development plan will not change or replace the Long Term Plan under the proposed legislation, there is no proposal to force the council to use the one process for any desired amendments to its plan. There will simply be an option to do so. As councils will not know for sure what the content of the development plan will be when the public are first consulted, in some cases it may be important for the relevant council to wait until the final plan is approved before conducting the public consultation necessary to change a long-term plan.

65. We discuss the status of plans under other statutes, below.

Decision making requirements

66. Briefings you have received to-date indicate that the following powers and decision-making processes will be overridden/replaced by the new legislation:

    a. infrastructure planning provisions in the Local Government Act 1974 and 2002 (LGA 1974 2002) and the Land Transport Management Act (LTMA)

    b. funding and financing powers in the LGA 2002 (including with respect to Council Long Term Plans) and Local Government (Rating) Act 2002

    c. classification and reserve management provisions of the Reserves Act 1977.

67. Previous advice has also identified that the decision-making elements of the Public Works Act 1981 will be retained in full, as will the application of Te Ture Whenua Maori Act 1993 and the Treaty of Waitangi Act 1975 and any instruments and agreements arising from that Act and Treaty settlements.

Plans and regulations under other statutes

68. The proposals have implications for the following types of statutory plans and regulations: (i) long-term plans, (ii) annual plans, (iii) regional land transport plans, (iv) regional public transport plans; and (v) local by-laws:

Long Term Plans and Annual Plans (Local Government Act 2002)

69. The proposal is that the new legislation include a requirement for the relevant council to change these plans to be consistent with the development plan. It is not a straight override (more a "duty to be consistent with") as long-term plans and annual plans involve projects and funding that has already been publicly consulted on that is more diverse and usually outside a project area. Note that under the LGA a long-term plan can be changed at any time.

70. There are also "asset management" plans prepared by councils, but technically these have no legal status and there is no formal process for their preparation or amendment. They are given effect through long-term plans and annual plans.

Regional Land Transport Plans and Regional Public Transport Plans (Land Transport Management Act 2003)

71. There is no proposal to override these plans as such. Instead, the proposal is that regional councils have a duty to collaborate with the UDATA when developing their Regional Land Transport Plans so that they are consistent with the UDATA's development plan. We also propose that the UDATA have the power to recommend changes to those plans – and the regional council must then have regard to those recommendations.

Local Government bylaws (Local Government Act 2002, Local Government 1974)

72. The proposal is that the UDATA have the power to change, suspend or make (but not revoke) bylaws that apply within the project area. The UDATA may also require the host council to change, make or revoke bylaws that apply to the project area. However these powers would be limited to "the extent necessary" to achieve the strategic objectives of the development project and consultation with the relevant councils would need to have taken place before the powers are exercised.

Is it correct that the review panel will be hearing matters not just relating to RMA planning but also Land Transport Management Act, Reserves Act, Local Government Act, etc?

73. Yes, the review (or independent) panel would be making decisions on the whole development plan, which would encompass decisions on clean and wastewater infrastructure, parks, stormwater and roads, together with decisions on levying the rates to pay for these improvements. However, the matters would be limited regarding the regulations and plans discussed above.

If the answer to the third question is yes, are we agreed that the independent panel process has to be under the UDATA legislation rather than using an existing RMA process?

74. The panel process would be set up under the UDATA but would likely operate in a similar manner to an Independent Hearings Panel or Board of Inquiry under the RMA. However, it would have wider decision-making scope under the UDATA.

75. Note, however, that the intent of the new legislation is that it be used in limited circumstances (i.e. solely for complex development projects). Where an existing RMA process already exists that is more appropriate for implementing the changes to land use regulations that are required for an urban development, we expect that the UDATA would seek to use that process over and above the development plan process. For example, if the UDATA was seeking to undertake a relatively straightforward housing development on land already zoned for residential development, it may choose one of the existing plan change and/or consenting processes under the RMA.

What are the proposed checks and balances (membership of the review panel, appointment process, effect of their decision)?

Cabinet decision or Order-in-Council to establish a development project

76. The relevant government agencies would agree on the core elements of the project: strategic objectives which may include balancing of competing values or objectives, key deliverables, project boundary, indicative timeframe and concept plan. The agreement of the territorial authority would also be sought prior to project establishment. Cabinet could choose to continue without territorial authority agreement, but this would risk significant funding and infrastructure alignment problems later.

77. An Order-in-Council could set the project strategic objectives and boundaries which the development plan would be bound by. An Order-in-Council is subject to scrutiny from the Regulations Review Committee, and gives weight to the strategic objectives and powers being exercised by the UDATA. This is the mechanism used under HASHAA.

78. Alternatively, the strategic objectives and boundaries could be set by a gazetted Cabinet decision. This would be faster than an Order-in-Council, but would have the same legal effect under the proposed legislation. However, a Cabinet decision to establish a development plan process may be perceived as being more politically driven than an Order-in-Council.

Independent panel membership

79. The Independent Panel could be led by an Environment Court judge (or retired Judge), leading a quasi-judicial process to ensure a robust recommendation to the Minister or UDATA (depending on process). The form and membership of the Independent Panel has not been decided, but we can provide advice on this point if you request.

Independent panel purpose and role

80. The independent panel may hear public submissions at first instance (Option A), or be an objection-hearing panel that follows the public consultation undertaken by the UDATA (Option B). In both cases it would have an inquisitorial, not adversarial, role. Either option can be adapted to suit whoever is preferred as the final decision-maker (UDATA, the panel, the Minister, or a court on appeal).

81. Option A: The UDATA would notify its draft development plan and any related consents for public submissions. The Independent Panel would hear all submissions, consider all evidence and make recommended changes to the development plan. The UDATA (or other decision maker) would then decide whether to accept or reject the Panel's recommendations. If the recommendation were rejected, this decision could be subject to an appeal to the Environment Court. This process is similar to the Auckland Unitary Plan approval process.

82. Option B: The UDATA would notify its draft development plan and any related consents for public submissions. The Commission would consider all submissions, liaise with affected parties and submitters further, then would notify its recommended development plan. Affected persons could lodge objections (equivalent to appeals) to the Independent Panel. Panel recommendations would then go back to the UDATA (or other decision maker) for final approval or rejection. If rejected, the UDATA could notify a revised version of the development plan for public submissions, could go back to the start and seek Ministerial support for different strategic objectives, or could cancel the project.

83. The advantages of Option A are:

- A shorter process, except for rejected recommendations which could be appealed to the Environment Court and appellate courts.
- As the UDATA knows the project best, it could best decide whether the Panel recommendations will work or not.

84. The advantages of Option B are:

- The panel provides the means for a second hearing of issues, better upholding due process.
- The UDATA could deal with submitters directly and resolve concerns before going to the Independent Panel.
- No appeals to the courts would be permitted on the merits of the plan, thereby avoiding delays.

85. Points of law appeals, and judicial reviews, would still be available for all decisions under either option.

What is the 'environmental test' in the UDATA legislation?

86. We assume this question does not relate to the assessment of environmental effects that happens during both the initial assessment and preparation of the development plan, but instead relates to how RMA Part 2 matters would be tested in the UDATA process.

87. The project's strategic objectives would need to apply the matters in RMA Part 2, and other relevant topics listed in the proposed UDATA legislation, to the specifics of the project as relevant. RMA Part 2 would also be brought into the process through the RMA documents (e.g. national direction, regional policy statements). These documents are given effect to (for national level documents) and given regard to (for regional level documents) in the development plan preparation and in decision-making for RMA-related matters.