MINISTRY OF BUSINESS, INNOVATION & EMPLOYMENT
HĪKINA WHAKATUTUKI

BRIEFING

Urban development authority legislation – Approach to Māori interests

Date:	1 December 2017	**Priority:**	High
Security classification:	In Confidence	**Tracking number:**	1235 17-18

Action sought		
	Action sought	**Deadline**
Hon Phil Twyford **Minister of Housing and Urban Development**	Indicate the option you prefer for each issue.	6 December 2017
Hon Jenny Salesa **Associate Minister of Housing and Urban Development**	For your information.	Click here to enter a date.

Contact for telephone discussion (if required)				
Name	**Position**	**Telephone**		**1st contact**
Di Anorpong	Manager, Construction & Housing Policy	(04) 901 8743	s 9(2)(a)	✓
Andre Anderson	Principal Advisor, Housing Markets	(04) 474 2815	s 9(2)(a)	

The following departments/agencies have been consulted

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- ☐ Withdrawn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

On 16 November 2017, you received a briefing that discussed new legislation:

- that may be required to establish a national urban development authority ("UDA"); and
- that is required to provide more enabling development powers to support complex or strategically important development projects, such as those that form part of your strategy for delivering KiwiBuild.

That briefing described the core elements proposed for the new legislation, and signalled the following series of further briefings on critical issues, of which this is one (highlighted):

1. Fundamentals: legislative design, decision-making, role of local government.
2. Decision-making: priorities and principles.
3. Organisational functions and form of the national UDA.
4. Approach to Māori interests.
5. Land assembly powers, especially compulsory acquisition
6. Infrastructure and funding powers.
7. Planning and consenting powers.
8. Powers to change reserves.

Recommended action

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

a **indicate** your preference for each option in the body of this paper; and

b **forward** this briefing and **discuss** these issues with the Ministers for Crown/Māori Relations, Treaty of Waitangi Negotiations, Māori Development and Land Information and any relevant Associate Ministers.

Agree / Disagree

Di Anorpong
Manager, Construction & Housing Policy
MBIE

..... / ..... / .....

Hon Phil Twyford
Minister of Housing and Urban Development

..... / ..... / .....

Background

1. The proposed legislation has significant implications for Māori as landholders and for the Crown's relationship with Māori.

2. There is an opportunity to take advantage of the legislation to support iwi led development projects. For iwi or hapū groups and post settlement governance entities that have completed Treaty settlements and have land or capital available, the proposals represent a significant business and social development opportunity.

3. However, there is also the potential for certain development powers to undermine Māori interests if they are inappropriately used. This briefing describes the approach we propose to addressing Māori interests under the new legislation, especially the following issues:

    - Māori concerns with the powers of compulsory land acquisition;
    - input into developing a development project's strategic objectives; and
    - the right of first refusal under Treaty settlements.

Core proposals

4. The introductory briefing you received set out the proposed process for establishing a development project and project area. This section sets out the approach that we propose for Māori interests during this process.

5. In general, we propose that land owned by individuals be subject to the same opportunities and powers as all other land in a project area, whether the land is owned by a person who identifies as Māori or as non-Māori.

Māori interests in land

6. In contrast, we propose that the following types of land in which Māori have an interest be approached differently, as described further below:

    a. land that was transferred to a claimant group as part of a Treaty settlement;

    b. land that the Crown has sold to a post-settlement governance entity under a right of first or second refusal agreed in a Treaty settlement;

    c. land held under Te Ture Whenua Māori Act 1993, or its successor;

    d. Crown land that is subject to a right of first or second refusal in favour of a post-settlement governance entity;

    e. land held by the Crown for future Treaty settlements;

    f. land that has a statutory acknowledgement under a Treaty settlement;

    g. land of special significance to Māori for cultural or historic reasons (e.g. wāhi tapu land); and

    h. land subject to an agreement negotiated between an entity representing an iwi, including an iwi collective or hapū, and a Crown agency.

Implications for Māori freehold land

7. Very little land held under Te Ture Whenua Māori Act 1993 is located either within or near the urban areas of most New Zealand cities and towns. In general, therefore, the chances that this land will feature within a proposed development project are low.

8. The main exception is Tauranga, where there is a significant amount of such land in areas likely for urban growth. Rotorua also has a significant amount of such land.

9. The proposals would make no changes to Te Ture Whenua Māori Act 1993 (nor to its successor). Consequently, for land held under this Act, the starting point for engagement with landowners would be with the trusts and Māori incorporations established for that land or with the owners through a Māori Land Court process.

Process for establishing a development project

10. When located in a proposed project area, the overall approach to providing more enabling development powers offers opportunities for owners of land held under Te Ture Whenua Māori Act 1993 and for iwi or hapū groups and governance entities that own land, to choose to partner in the development of their land, or to develop it themselves taking advantage of the more enabling development framework (if their governing legislation and constitutional instruments permit them to do so).

11. As with other private developers, iwi and hapū organisations, and Māori land owners, trusts and incorporations that can partner with a private developer will be able to approach central government to consider supporting significant developments that they wish to lead on land in which they have an interest.

Initial assessment

12. We propose that one of the requirements of the initial assessment of a development project be for officials to identify all of the land in the proposed project area in which Māori have an interest, together with the nature of that interest, and the potential opportunities to partner with the relevant landowner to develop that land as part of delivering the project.

13. To achieve this, the UDA would need to engage with owners of land held under Te Ture Whenua Māori Act, including through their trusts and incorporations, and with post-settlement governance entities, representative entities for claimant groups and governance entities for relevant iwi and hapū.

14. Any land that may potentially be needed to settle future Treaty settlements would also need to be identified by the Office of Treaty Settlements as part of the initial assessment. This includes both land that has already been ear-marked for that purpose and land that may yet be needed. Before any decisions could be made for either the disposal or development of this land, we propose that the Minister responsible for the legislation must consult with the Minister for Treaty of Waitangi Negotiations.

Agree / Disagree

Pre-establishment consultation

15. We previously proposed that the public must be consulted before the establishment of any new development project. Building on that idea, we recommend that the UDA be required to seek feedback on the development proposal from relevant Māori landowners in the proposed project area that have one of the interests in land described above.

Agree / Disagree

Establishing a development project

16. One of the requirements of establishing a development project is to set the strategic objectives, which become the paramount guide to decision-making for the project.

17. To ensure the relationship Māori have with their land and other taonga is maintained under the proposed legislation, we propose that it be mandatory for this principle to be reflected in the strategic objectives of all development projects (discussed in more detail below).

Preparation of a development plan

18. We recommend that one of the requirements when preparing the development plan be for the UDA to show how commitments arising out of settlements of Treaty claims are being complied with. In addition, we recommend that development plans must give effect to any Treaty settlements and must adopt the same level of protection for sites of significance for mana whenua usually provided for through district and regional plans.

Agree / Disagree

19. In some cases, the different planning processes that are proposed for project areas may not be directly compatible with co-governance arrangements established through Treaty settlements, which are built around the existing planning framework. Several co-governance arrangements involve the establishment of joint committees or iwi representation on council committees. Some of these entities, like the Hawkes Bay Regional Planning Committee, have a direct role in the preparation of planning documents. The functions of others, such as the Waikato River Authority, include the preparation of documents which must be given specific legal weighting in the preparation of plans and policy statements.

20. If and when scenarios like these arise there is a need to uphold the Treaty settlement arrangements through other means. Accordingly, there would need to be a series of mechanisms to ensure that existing Treaty settlement obligations are upheld in the new legislation.

21. Separately, there is also the issue of whether to apply to the UDA and development plan process the new provisions relating to iwi participation agreements in the Resource Management Act ("mana whakahono a rohe"). We address that issue in our separate briefing on planning and consenting.

Consultation on the draft development plan

22. Our introductory briefing recommended that any interested member of the public can make submissions in response to the draft development plan, which would include relevant Māori land trusts and incorporations, post-settlement governance entities, iwi and hapū.

23. Following submissions and the publication of the UDA's recommended development plan, there will need to be a mechanism in place for stakeholders to object to the development plan, which we propose Māori be able to access alongside all other affected persons. The nature of that mechanism is addressed in a separate briefing.

24. To ensure the development plan complies with applicable Treaty settlements and other signed agreements between the iwi and the Crown that confer rights in land, we propose that before a development plan can be approved, both the Attorney-General (or whichever Minister is appointed to be responsible for settlement commitments) and the Minister for Treaty of Waitangi Negotiations must confirm in writing that the recommended development plan complies. If it does not, we recommend that those Ministers be able to recommend the changes that would be necessary to ensure compliance.

Agree / Disagree

Critical issues

25. Given the proposed approach outlined above, this section provides advice on some of the critical issues that generated concern among Māori stakeholders when responding to the previous Government's discussion document.

Sensitivity with powers of compulsory land acquisition

26. In our introductory briefing, we proposed that the new legislation include powers of compulsory land acquisition. The issue is how best to manage the application of those powers regarding Māori interests.

27. Although powers of compulsory acquisition aren't being extended under the new legislation, Māori are still likely to be concerned with the proposal to enable the UDA to ask the Crown to exercise them. This is because the availability of the power is likely to increase the frequency with which they are used in a project area and because, in the case of acquisition for housing or urban development purposes, when the land is on-sold to third-party owners it will no longer be possible for Māori to get it back.

Feedback

28. Māori are concerned at the potential for land that has been returned under a Treaty settlement or that must be retained in Māori ownership under Te Ture Whenua Māori Act 1993 to be compulsorily acquired by the UDA ("sensitive Māori land"). Any resumption of sensitive Māori land returned under a Treaty settlement would likely be seen as a breach of that settlement, with the real potential for litigation that could hold up the progress of the relevant development project and set back the Crown-Māori relationship.

29. Submitters in response to the discussion document highlighted this concern. They thought that it was important to protect their rights and mana in land. Protection of Māori interests was described as essential in this regard.

Crown Law advice

30. s 9(2)(h)

Context

31. In general, all land is subject to compulsory acquisition in New Zealand. The main exceptions are land held in the name of Her Majesty the Queen, and protections for Māori customary land and for land set apart as a Māori reservation.

32. s 9(2)(g)(i)

Options

33. There are four options that could respond to these issues:

    1. Provide an opt-out mechanism for sensitive Māori land.
    2. Prevent the use of compulsory acquisition powers for sensitive Māori land.
    3. Add further procedural requirements to the compulsory acquisition process.
    4. Treat sensitive Māori land like any other land.

34. The first of these options was the one that the previous Government proposed in its discussion document, so has been well developed. In contrast, the second and third options are alternatives that would require closer examination. If your initial preference is for either of these options, officials recommend that you seek further advice before making any final determination, in particular with respect to the issues that option would raise for the operation and integrity of the Public Works Act 1981 ("PWA").

Option 1: Provide an opt out mechanism for sensitive Māori land—

35. The first option would be for the legislation to provide that sensitive Māori land cannot be included in a development project without the prior consent of the relevant landowner (an opt out option). This would include land that the Crown had sold to a post-settlement governance entity under a right of first or second refusal after the relevant Treaty settlement, but before the project is established (provided that it is still held by that entity).

36. Subject to their governing legislation and constitutional instruments permitting them to do so, under this option the owners of sensitive Māori land could choose whether or not their land is part of a development project at its establishment:

    a. If the choice is to be part of the development project, the land would be subject to the same powers, opportunities and benefits as all other land within the project area.

    b. If the owners opt out, then the land would be excluded from the development project and so would not be subject to the proposed development powers. That would protect the land from unwanted powers, but also mean it would not be able to access the potential opportunities and benefits of the legislation. Instead, it would continue to be subject to the existing development rules, land use regulations and legislative framework.

37. The appeal of this option is that a choice needs to be made between seeking protection from the UDA exercising undesirable powers, such as compulsory acquisition, and the benefits of accessing more enabling development powers. This forces a trade-off that introduces a measure of balance to the proposal, which may be significant when communicating with other stakeholders.

38. It is also important to note that opting out of a development project will not protect sensitive Māori land from compulsory land acquisition for other public works, as the existing PWA will still apply. The sole difference would be that the UDA could not apply for compulsory acquisition, but the Crown or local government could still do so under standard processes and criteria. Thus, the proposal would offer the opportunity to protect sensitive Māori land from the changes involved with the new legislation, while maintaining the status quo.

Option 2: Prevent the use of compulsory acquisition powers for sensitive Māori land—

39. Option 2 would prevent the UDA from being able to apply to use compulsory acquisition for any sensitive Māori land within the project area. All of the other more enabling development powers being proposed (planning and consenting, infrastructure and funding powers) would continue to apply, as relevant.

40. Like Option 1, this option would help to protect Treaty settlement processes and recognise the special nature of sensitive Māori land, Crown-Māori relations, and the statutory purpose of Te Ture Whenua Māori Act 1993. Again, however, the protection would only apply as against the UDA, meaning the land would still be subject to other public works undertaken by agencies other than the UDA.

41. The two key differences with Option 1 are:

    a. First, the relevant landowners would still enjoy any benefits of the development project. The owners of sensitive Māori land would secure both the protection and the benefits at the same time, something that wouldn't be available to other landowners.

    b. s 9(2)(g)(i)

Option 3: Add further procedural requirements to the compulsory acquisition process—

42. Option 3 would add an additional check on the use of compulsory land acquisition for sensitive Māori land in a development project, rather than excluding its use altogether. This could be structured in a number of different ways that would need to be explored further. One option might be to require the consent of a Minister responsible for Māori interests when the use of compulsory acquisition is proposed by the UDA for development projects.

43. As key decision-making powers with respect to any compulsory land acquisition will continue to be exercised by the Minister for Land Information, this consent would add another layer of protection to the process. The additional check would help mitigate concerns about the increased potential for sensitive Māori land to be taken by compulsion.

44. Alternatively (or in addition), the new legislation could require an additional gateway test to those that already apply under the PWA. Such a test could require the decision-maker to also be satisfied that relevant Treaty settlements and the principles of Te Ture Whenua Māori Act have been considered. A similar proposal (that would have applied generally, not just to development projects) formed part of the previous Government's proposals for amendments to the Te Ture Whenua Māori Act.

45. Whether this level of protection would go far enough would need to be tested with Māori.

46. s 9(2)(g)(i)

Option 4: Treat sensitive Māori land like any other land—

47. Option 4 would provide no additional protection for sensitive Māori land. Under this option, such land would be included in a project area along with all other land and there would be no constraints on the operation of existing powers of compulsory acquisition.

48. Although apparently treating all land owners equally, this option would not recognise the special nature of sensitive Māori land and is likely to cause strong opposition and challenge at the potential for increased use of compulsory land acquisition powers within a development project.

49. s 9(2)(h)

Assessment

50. s 9(2)(g)(i)

51. The main risk with that option is the perception of special treatment for sensitive Māori land. However, s 9(2)(h) we consider such treatment to be justified. Accordingly, that is the option we recommend.

Recommendation

We recommend that, if the proposed project area includes sensitive Māori land, then before a development project is established, the owners of sensitive Māori Land must be asked whether that land can be included within a proposed development project; and:

- if the owners elect for their sensitive Māori land to be part of the development project, then when that project is formally established that land is subject to the same opportunities and development powers as all other land within the project area;
- if the owners make no choice or choose to exclude their land from a development project, then when that project is established the sensitive Māori land must be excluded from the geographic boundaries of the project area, in which case the existing development rules, land use regulations and legislative framework continue to apply to that land.

Agree / Disagree

Input into strategic objectives

52. In our introductory briefing, we proposed that one of the requirements of establishing a development project be to set its strategic objectives. These objectives would help define what each development project is and guide the planning and delivery of that project. In developing those objectives, one issue is whether the new legislation require at least one of those objectives to address Māori interests.

53. The Resource Management Act requires decision-makers to recognise and provide for:

> *The relationship of Māori and their culture and traditions with their ancestral lands, water, sites, wāhi tapu and other taonga.*

54. We propose that the new legislation require this principle to be provided for in at least one of the strategic objectives of all development projects.

55. Given that this principle is stated in the abstract, in each case it would need to be translated into more specific strategic objectives that are relevant to the nature of the particular development project. This would need to be done with the input of mana whenua.

56. Consequently, one option would be to also grant mana whenua responsibility for preparing the first draft of the strategic objective(s) required within the scope of the principle. This would enable these strategic objectives to be meaningfully tied to mana whenua in the area. It would also foster buy-in and build relationships between the UDA and mana whenua.

57. Submissions on the discussion document sought a greater role in the establishment of development projects and in protecting Māori values and their traditional guardianship role. Granting this role would provide for greater participation by Māori. However, this opportunity could be perceived as unfair to other parities within the development area that are not given the same opportunity.

58. Nevertheless, since the principle would need input from mana whenua to be translated into more specific objectives anyway, this option could generate better support for the project. Nor would mana whenua be able to act unilaterally. Their draft objective(s) would still be subject to public consultation and it would still be the Government that made the final determination of what the objectives should be.

Question

Would you like the new legislation to provide that, for each development project, mana whenua have responsibility for preparing the first draft of strategic objectives that recognise and provide for the relationship of Māori and their culture and traditions with their ancestral lands, water, sites, wāhi tapu and other taonga?

Yes / No

Right of first refusal

59. If the Crown is considering selling Crown land that is subject to a right of first or second refusal under a Treaty settlement ("RFR land") and that land is located within a development project, it must offer the land to the relevant post-settlement governance entity first, with no development conditions attached. It must be offered free of conditions for iwi to develop or not as they choose.

60. Although Māori stakeholders welcomed the previous Government's commitment to upholding the Crown's obligations regarding RFR land, they noted the power for an urban development authority to re-purpose any public land it is given, develop that land itself and only then offer it for sale once there is no further development profit to be made. Although the land would remain subject to RFR in this scenario, it would eliminate the commercial opportunity and so undermine the commercial redress that the RFR is designed to support.

61. In general, the Crown is currently entitled to change the purpose for which it holds public land, provided it continues to be held for a public purpose. Thus, should the Crown wish to do so, in principle it has the right to take RFR land held for, say, education purposes and instead develop it for housing without ever offering it to iwi first, provided the land remains in Crown ownership during the development. Only at the point that the completed homes are offered for sale to end users would the Crown be obliged to make the first offer to iwi. The potential to pursue this approach on a large scale through the UDA is likely to be a source of conflict between the Crown and iwi because it would be depriving iwi of the commercial opportunity they were promised in their Treaty settlement.

62. Relationships the Crown has built with iwi who are willing developers suggest that a solution that would both ensure that:

    a. iwi can realise the commercial development opportunity of RFR land and

    b. the UDA could control development outcomes on RFR land

    would be for the new legislation to prevent the UDA from developing RFR land itself without first giving iwi the opportunity to be the developer on terms that the authority sets.

63. We recommend that where the UDA holds or controls RFR land, if and when the UDA wishes to develop that land as part of the development plan, the legislation requires the UDA in the first instance to give the relevant post-settlement governance entity the opportunity to be the developer of that land on any terms and conditions that the UDA wishes to set.

64. The post-settlement governance entity could then choose whether or not to agree to purchase the RFR land subject to those development conditions. Where the post-settlement governance entity does not agree to purchase the land on those conditions, the Crown and UDA remain bound by the right of first or second refusal and, where that right is triggered,

must offer the same land to the post-settlement governance entity without any conditions attached.

65. But the UDA would also have the option to develop the land itself, thereby continuing to own it, and only offer it to iwi at the end, once the UDA is offering the completed homes (or other buildings) for sale. Avoiding that outcome is the incentive for the post-settlement governance entity to prefer to purchase the RFR land subject to development conditions.

66. Further consultation with post-settlement governance entities would be needed to test whether this proposal would be workable. But it's worth noting that a similar arrangement already applies under the collective Treaty settlement in Auckland.

Recommendation

We recommend that, where the UDA holds or controls land that is subject to a right of first or second refusal under a Treaty settlement, if and when the UDA wishes to develop that land as part of the development plan:

I. the legislation requires the UDA to first give the relevant post-settlement governance entity the opportunity to be the developer of that land on any terms and conditions that the UDA wishes to set for its development;

II. the post-settlement governance entity can choose whether or not to agree to purchase the land subject to those development conditions;

III. where the post-settlement governance entity does not agree to purchase the land on those conditions, the Crown and UDA remain bound by the right of first or second refusal and, where that right is triggered, must offer the same land to the post-settlement governance entity without any conditions attached.

Agree / Disagree

Annex One: Submission feedback on Māori interest

Māori interests
• Iwi were concerned that the protections they access through the RMA and regional plans would be diluted by UDAs. • There was concern that Māori environmental and cultural guardianship roles will be undermined by UDA legislation. • Iwi expressed their expectation that they want to play an expanded role in UDAs, not just a token appointment, but full representation in the establishment decision and subsequent governance group; plus desire to be involved in drafting the strategic objectives. • Co-governance is the goal. • There was concern with the potential for UDAs to re-purpose land subject to a right of first refusal, develop that land, and then offer it for sale only once it has been developed. This would remove the commercial opportunity and so undermine the commercial redress that such land is intended to provide in Treaty settlements. • Submitters sought clarification that UDAs would not remove any Treaty rights. • Feedback expressed concern that relationships that have been built up between iwi and councils (both local and regional) may be lost if UDAs are established. There was a desire to ensure that any gains made in those relationships carry over to UDAs. • There were concerns about the potential environmental impact of increased urbanisation, which links back to the strong desire to protect the guardianship role of Māori. • Concerns were expressed that iwi that are not yet settled will be shut out.