MINISTRY OF BUSINESS, INNOVATION & EMPLOYMENT
HĪKINA WHAKATUTUKI

BRIEFING

Urban development authority legislation – Fundamental issues

Date:	11 January 2018	**Priority:**	High
Security classification:	In Confidence	**Tracking number:**	1262 17-18

Action sought		
	Action sought	**Deadline**
Hon Phil Twyford **Minister of Housing and Urban Development**	Discuss this briefing with MBIE officials. Indicate your preference for each option in the body of this paper. Forward this briefing and discuss these issues with the Minister for the Environment, the Minister for Local Government, the Minister of Finance, and the Attorney General. Forward this briefing to the Ministers of Conservation and Infrastructure for their information.	16 January 2018
Hon Jenny Salesa **Associate Minister of Housing and Urban Development**	For your information.	

Contact for telephone discussion (if required)				
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The following departments/agencies have been consulted
Ministry for the Environment, The Treasury and the Department of Internal Affairs

Minister's office to complete: ☐ Approved ☐ Declined

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- ☐ Withdrawn

Comments

MINISTRY OF BUSINESS, INNOVATION & EMPLOYMENT
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Urban development authority legislation – Fundamentals

Date:	11 January 2018	**Priority:**	High
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Purpose

This briefing contains our advice on a range of fundamental questions for the design of the urban development authority legislation.

Recommended action

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

a **discuss** this briefing with MBIE officials

Agree / Disagree

b **indicate** your preference for each option in the body of this paper

c **forward** this briefing and **discuss** these issues with the Minister for the Environment, the Minister for Local Government, the Minister of Finance and the Attorney General

Agree / Disagree

d given the links to the briefing *Urban Development Authorities Legislation: Planning and Consenting Issues* [1307 17-18] to be sent by 18 Jan, **forward** this briefing to the Ministers of Conservation and Infrastructure for their information.

Agree / Disagree

Di Anorpong
Manager, Construction and Housing Policy
Housing and Urban Branch
MBIE

11 / 1 / 18

Hon Phil Twyford
Minister of Housing and Urban Development

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

Context

1. On 20 December 2017, the Cabinet Business Committee agreed in principle to establish the Housing Commission as a national urban development authority with a process and development powers to:

   - support high quality urban development
   - provide greater coordination, certainty and speed, and
   - are capable of supporting a wide range of development projects.

2. The Cabinet Business Committee paper described the core elements proposed for the new legislation, and signalled that there are a number of critical policy issues that need to be resolved before detailed policy decisions can be made in early 2018. These issues are discussed in the following series of briefings (the ones you have received to date are highlighted):

1.	Fundamental issues
2.	Decision-making: priorities and principles (due 18 January)
3.	Organisational issues (due 18 January)
4.	Approach to Māori interests
5.	Land assembly powers, especially compulsory acquisition
6.	Infrastructure and funding powers
7.	Planning and consenting issues (due 18 January)
8.	Powers to change reserves

3. This paper considers a range of fundamental questions for the design of the urban development authority legislation (number 1 in the list above).

Structure of this briefing

4. This briefing is structured into three parts: firstly, it addresses issues relating to the overall legislative design of the new legislation. Secondly, it considers the issues associated with establishing development projects. Part three examines the issues associated with finalising and approving development plans.

	Issue	Description	Page number
		Part 1: Overall legislative design	
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1b.	**Statutory purpose**	What weight should be given to the statutory purpose in decision-making.	8
		Part 2: Establishing development projects	
2a.	**Strategic objectives**	Whether there should be mandatory objectives for every development project or mandatory subject matter that objectives must address.	10
2b.	**The role of territorial authorities**	What role the territorial authority has in the development project, especially whether the project is established in the first place.	13
2c.	**Eligibility criteria**	Whether to prescribe the types of development projects that can access the legislation and what those criteria should be.	17
2d.	**Access to development powers**	Whether central government selects the development powers that are available to each project.	22
2e.	**Coordinating central government functions**	How best to ensure that Government agencies support development projects.	24
		Part 3: Finalising and approving development plans	
3a.	**Appeals**	How to provide an appropriate mechanism to address stakeholders' objections.	28
3b.	**Final decision maker**	Who the final decision maker for the development plan should be.	31
3c.	**Discretion over approval**	Whether the Minister should have discretion over approving the final development plan and whether the Minister can delegate decision-making.	34

5. We have attached the overview diagram for the urban development legislation as Annex 1 to highlight the areas of the process that are discussed in this briefing.

2017 discussion document feedback

6. Throughout this briefing we reference stakeholder feedback drawn from the response to the previous Government's discussion document on *Urban Development Authorities* (February – May 2017).

Part 1: Overall legislative design

1a Legislative framework

7. The fundamental issue for the design of the new legislation is how best to enable significant and complex development projects to change multiple components of the urban development environment.

8. In response to the 2017 discussion document, territorial authorities were wary of the added layer of complication that new legislation could bring to the statutory environment in which they operate.

9. Local government also expressed concern at the potential for the proposed legislation to undermine established regional strategies for growth and development that had been developed in consultation with their communities.

10. That said, the only local authorities that opposed the concept of the proposed legislation were the Auckland local boards. Otherwise, nearly all city and district councils and their associated bodies supported the overall proposal, including Local Government New Zealand (provided that local government has a veto over proposed development projects).[1]

11. The high level of support was reflected across the written submissions as a whole, with most of the 112 organisations who submitted indicating support for the concept, including other key stakeholders such as the Property Council, Infrastructure New Zealand and the Planning Institute.

12. The positive tone of those submissions builds on the support the concept has generated for more than a decade. The previous Labour Government took the first steps towards this type of legislation in 2006, eventually culminating in the 2008 discussion document, *Building Sustainable Urban Communities* that advocated for this general approach. The Productivity Commission identified similar issues in its report on *Using Land for Housing*. To better enable urban development, the Commission recommended that the Government enable particular development projects to operate with different powers and land use rules.

13. Some territorial authorities questioned the need for new legislation whose more enabling development powers added little to their existing capabilities. They pointed out that the critical powers being proposed are all ones that local government can already employ: compulsory acquisition, plan changes, resource consenting, infrastructure provision and targeted rates. The implicit feedback in these submissions was that local government can deliver urban development within the existing statutory environment.

14. While it is true local government already has most of the powers under consideration, there are two key shortcomings:

    - local government cannot be relied upon to use the powers they have to support complex development projects and have historically not done so

    - authority to use the powers only fulfils one of the two objectives, better coordination of the powers is equally critical.

The impact of local governance on delivering complex urban development

15. The Productivity Commission[2] found that local democratic processes are dominated by interests that are stacked against accommodating growth. There is no requirement for local government to take national interests into account when making decisions concerning urban

[1] The only district councils that did not support the proposed legislation were neutral rather than opposed (Masterton District Council and officials from Taupo District Council).
[2] In their 2015 *Using Land for Housing* report

development in their district. There is also a lack of statutory authority for the Crown to participate directly in urban transformation activities at the regional or local level.

16. Consequently, the drivers for decision-making can fail to provide sufficient support for complex or strategically important urban development. Given that the existing statutory environment relies on local government to deliver urban development, it suggests that a new statutory process that better integrates national interests and provides for a strong central government role would be useful.

Coordination of the multiple components of complex urban development

17. Public amenities, utilities, transport and social infrastructure are all necessary for successful urban development. Consequently, complex development projects may need to change or coordinate all of these components of the urban environment.

18. Currently, there is no statutory process that can change or coordinate all of these components through one mechanism. Instead, the regulation of urban development planning, provision, funding and financing is spread across at least nine different statutes.[3] The result is that urban development is governed by multiple statutory processes that each operate under a different statutory framework with a different decision-maker and decision-making criteria.

19. More particularly:

- changing the applicable land use regulations and deciding how land can be used is governed by the Resource Management Act 1991 ('RMA')
- moving a reserve from one place to another, or replacing a large park with several smaller parks, is governed by the Reserves Act 1977
- stopping an existing road, moving it somewhere else or creating a new road is governed by a separate suite of roading legislation
- changing public transport services is governed by the Land Transport Management Act 2003.

20. Despite local government having certain powers under each of those statutory processes, the complicated array of statutory frameworks and processes delay development and undermine coordinated action. This is especially true for complex development projects that need to secure changes under each separate process.

21. The Legislation Design and Advisory Committee (LDAC)[4] has expressed concerns regarding the lack of efficiency of the existing development system. In LDAC's view, existing development legislation is not working efficiently. Nevertheless, LDAC was concerned that the proposed legislation will have complex and overlapping interactions with existing planning and consenting regimes under the Resource Management Act 1991, Public Works Act 1981, Local Government Act 2002, and Reserves Act 1977. Despite the flaws of the existing system, LDAC considered there was a risk that "bespoke urban development legislation may only exacerbate this more fundamental problem by adding to business costs and reducing accessibility for users." (see Annex 2 for further detail).

Conclusion

22. We consider that two main factors point to the need for new legislation. These are local experience with the problems of a "one-size-fits-all" urban development system that is

[3] Resource Management Act 1991; Local Government Act 1974; Local Government Act 2002; Local Government (Rating) Act 2002; Local Government (Auckland Council) Act 2009; Government Roading Powers Act 1989; Public Works Act 1981; Reserves Act 1977 and Land Transport Management Act 2003.
[4] LDAC advises the Attorney General and officials on the best approach to well-drafted legislation.

governed by a range of different statutes, and overseas experience with solutions that provide a different regime for complex or strategically important development projects.

Options

23. To address the governance and coordination issues outlined above, the choice for the design of the new legislation is between:

- adapting existing statutory processes to better support complex development projects
- creating a new statutory process especially for these projects.

24. These two options are described in the table below:

	Description	Considerations
Option 1: Adapting existing statutory processes to better support complex development projects	There are two possible ways of adapting existing processes: Under the **first method**, the new legislation would amend each of the existing statutes to adapt its particular process. This would require inserting a common definition into each of the statutes of the types of development project to which the amended process could apply, as well as enacting new provisions that provide for a more streamlined process. A new Act to establish the Housing Commission would still be required. The **second method** would enact a new Act with its own statutory purpose and provisions. Rather than create a separate statutory system, the new Act would still adopt each of the processes in existing legislation. For example, if the Housing Commission wanted to change land use regulations, it would still need to do so through the RMA, but the new legislation would include new provisions that provide for a more enabling, streamlined RMA process[5].	The fundamental problem with adapting existing statutory processes is that there will still be separate processes that need to be followed in each case, with separate decision-makers under the separate statutory frameworks of multiple different statutes, regardless of how enabling or streamlined the new legislation makes them.[6]
Option 2: Creating a new statutory process especially for these projects **(Recommended)**	The new Act would establish its own framework and self-contained process that together provide the more enabling, streamlined process for changing the urban environment. The new legislation would need to operate within the wider statutory environment and	The benefit of a new statutory system would be the ability to undertake all relevant changes using a single statutory process, within one decision-making framework that operates under a consistent set of criteria. This will greatly reduce process time and

[5] The Housing Accords and Special Housing Areas Act 2013 is a good example of this method.

[6] For example, one of the key enablers for complex development projects will be the ability to undertake a comprehensive plan change that is able to amend the land use regulations and development controls that apply to the project area (i.e. change the zoning rules). The RMA doesn't provide any means for changing the use of a reserve, the stopping of a road, or the construction and connections of new infrastructure for clean-, waste- and storm-water. Although the RMA can give some standing to a spatial plan that shows where reserves, roads and infrastructure will go, the statutory process for actually making those changes must occur under other legislation, with separate frameworks and criteria. Consequently, streamlining the RMA process and making it more enabling of urban development would only resolve part of the picture given that other pieces of legislation also apply.

	Description	Considerations
	address the same issues. So, the new framework and process would need to align with the existing statutory environment. However, the new Act would operate separately from existing statutory processes. For the key change processes required to deliver the development project (such as changing land use regulations; exchanging reserves; stopping, moving and creating roads and other infrastructure) the new legislation would replace the existing statutory processes with a separate, stand-alone process that sits within its own statutory framework. The only significant exception is access to powers of compulsory acquisition. We recommend that this power must be applied for separately under existing statutory processes in the Public Works Act 1981. Given the implications that these powers have for private property rights, it is important to maintain the integrity of this process and to ensure it remains aligned with international best practice.	will allow a more holistic approach to urban development that will achieve a wider public benefit. A single mechanism would allow all of the desired changes to be made together, each informed by the other. This is the mechanism we have described as a 'development plan'. The development plan would draw together into a single process changes to land use regulation, reserves, roads, infrastructure and funding.

Recommendations

Officials recommend that:

1. the new legislation create a separate statutory system for complex development projects that operates independently of the RMA and other parts of the existing urban development system

Agree / Disagree

2. the separate statutory system include in particular a single process, criteria and decision-maker through which most of the more enabling development powers can be proposed, consulted with the public, and decided.

Agree / Disagree

1b Statutory purpose: what weight should be given to the statutory purpose in decision-making

25. Unless the new legislation simply amends each of the existing statutes to adapt that statute's process, there will need to be a new Act that has its own statutory purpose and overarching priorities. The aim is to create a coherent system that has a clear internal framework for decision-making.

26. This raises the question of what weight the purpose of the new legislation should have, especially compared to the purpose of each of the statutes that comprise the existing

statutory environment. This issue is particularly significant if you prefer to adapt existing statutory processes, rather than create a new statutory system. It is also relevant if you prefer to create a new statutory system, but still wish to import the purpose and principles of one or more parts of the existing statutory system.

27. The obvious comparison is with the RMA, whose purpose is "to promote the sustainable management of natural and physical resources." In the context of urban development, its purpose is to manage the development of buildings and facilities to provide for social, economic and cultural well-being, while sustaining the potential to meet the needs of future generations and safeguarding the environment.

The statutory purpose of the new legislation should reflect the intention to enable urban development

28. Given that the proposed legislation is intended to be more enabling of urban development projects, we recommend this intention be reflected in the statutory purpose. Enacting legislation that encapsulates that intent can be expected to drive a more supportive approach towards changing the multiple components of the urban environment needed to facilitate complex development projects.

29. Encapsulating a more enabling intent need not mean that the statutory purpose ignores other important considerations. We consider that the statutory purpose would also benefit from referencing social, cultural and environmental well-being in an urban context and give consideration to the needs of future generations.

30. One potential formulation for the statutory purpose that captures this balance would be:

    The purpose of this Act is to better enable complex development projects by providing more enabling development powers that facilitate urban development to enhance the social, economic and cultural well-being of current and future generations.

Giving priority to the new legislation's statutory purpose

31. To maximise the more enabling intent of the new legislation, it would need to be clear that the new statutory purpose takes priority in decisions on urban development processes. If the design of the new legislation imports and prioritises the purpose and principles of the existing statutory system, the changed processes contained in the new legislation will not be underpinned by a more enabling foundation, even if the new legislation contains a statutory purpose that expresses that intent.

32. If you agree to create a new statutory system with a new process (our recommendation in the previous section), and if you still wanted to apply the purpose and principles of existing statutes to the parts of the new process that those statutes would otherwise govern,[7] it would be important to ensure that the purpose and principles of the new legislation take priority over the purpose and principles of the existing statute. One recent example of this approach is the Housing Accords and Special Housing Areas Act 2013 that adopted RMA processes and with them the purpose and principles of the RMA, but made them subject to the new Act's purpose.[8]

33. If you prefer to adapt existing statutory processes, then the new legislation would adopt those processes (such as the plan change process in the RMA) but amend them to provide a more enabling and streamlined approach. When implementing that amended process under the existing statute, it would therefore be important for the purpose and principles of the new legislation to take priority over the relevant process, rather than the purpose and principles of

[7] For example, still applying the purpose and principles of the RMA to changing land use regulations under the new legislation.

[8] "The purpose of this Act is to enhance housing affordability by facilitating an increase in land and housing supply in certain regions or districts...identified as having housing supply and affordability issues."

the existing statute. The current purpose and principles are less likely to realise the more enabling intent of the new legislation.

The need for coherence with existing statutes

34. Because there are several existing statutes involved, retaining the primacy of their statutory purposes would call for detailed provisions that prescribe which statutory purpose applies to which processes. Even if those provisions made it clear that the purpose of the new legislation was secondary to that of other statutes for particular processes, the presence of the new statutory purpose would still add a new consideration that would complicate the application of the existing statutory purposes.

35. For example, if the new legislation made it clear that the purpose of the RMA was paramount when changing land use regulations, it would not be clear what weight to give the purpose of the new legislation as compared to the other overarching principles of the RMA. Would those principles also take precedence along with the RMA's purpose; and, if not, which RMA principles would have equal weight and which principles a higher or lower weight? While it would be possible to provide for the answers, it would result in significantly more complicated legislation.

The statutory purpose of the new legislation should be given primacy within a development project area

36. For these reasons, we recommend that the new statutory purpose is given primacy over the current statutory processes needed to make changes within a project area, while taking care to identify appropriate exceptions.

37. One exception is compulsory acquisition, which we recommend continue to be subject to the purpose and processes of the Public Works Act 1981, because of the fundamental importance of protecting private property rights under New Zealand's constitution.[9] In this case we do not consider that the purpose of the new legislation should apply at all.

Recommendation

Officials recommend that:

3. the purpose of the new legislation:

    a. capture the intention that the legislation be more enabling of urban development (without that necessarily being its only purpose)

    Agree / Disagree

    b. takes priority over the processes provided for in existing legislation, except any application of the Public Works Act 1981

    Agree / Disagree

Part 2: Establishing development projects

38. The remaining sections of this briefing are prefaced by a high-level process map that illustrates which part of the process is being discussed.

[9] Note that we've discussed one exception with you to the standard process under the Public Works Act 1981, for land owned by Crown agents. But even here, any acquisition will still be subject to the rest of PWA processes.

2a Strategic objectives

39. The issue discussed in this section is whether there should be:

- mandatory strategic objectives for every development project, and/or
- mandatory subject matter that strategic objectives must address.

40. In our introductory briefing we proposed that each development project have strategic objectives. These objectives would help define the aims of the development project and guide planning and delivery.

41. We proposed that the draft strategic objectives would be identified as part of the first stage of public consultation (along with other core elements such as the proposed project boundaries).

42. In response to the 2017 discussion document, stakeholders wanted to ensure that the process of developing the objectives is robust. Examples included ensuring that the local community are able to participate and wanting clarity regarding the roles of the various parties in developing and approving the objectives. Stakeholders also wanted to ensure that the objectives are meaningful.

43. Stakeholders suggested the legislation should outline a set of minimum requirements or overarching objectives that all strategic objectives should cover.

Each development project would have both high level and specific strategic objectives

44. The Housing Commission represents an opportunity to deliver quality urban environments in the form of liveable communities which are sustainable, resilient, and well designed. For this to occur it is important that the nature and scope of development is informed by strategic objectives that bind projects to delivering positive urban outcomes that benefit the social, economic and cultural well-being of locals, community connections, and the natural environment.

45. We conceive of strategic objectives being specific to each project and thus capable of adapting the legislation to different types of urban development. We also envisage there being a requirement to express the objectives at two different levels of detail:

- high level objectives for the project as a whole
- specific objectives for realising those high level objectives.

46. Drawing on Panuku Development Auckland's work towards the development of Manukau, an example of a high level strategic objective for a specific development project would be Goal #1 for the Manukau Transformation:

> *A strong, permanent residential population in Manukau Central, allowing it to function as a vibrant and connected quality compact centre and place of manaakitanga, with an emphasis on local as well as regional activities and identity, supported by new and revitalised urban spaces adjoining healthy neighbourhoods.*

47. An example of a more specific objective for realising Goal #1:

The predominantly residential southern area (Wiri) will be substantially redeveloped to provide a better quality and range of housing (increasing the number of residents from 5,300 to 10,000), with an enlarged SuperClinic supporting healthy communities and creating local job opportunities.

Options

48. Below, we explore the following three different options for what approach to take to strategic objectives:

- mandatory strategic objectives for every development project
- mandatory subject matter that the strategic objectives must address
- hybrid approach, which merges the first two options.

49. These options are described in the table below:

	Description	**Considerations**
Option 1: mandatory strategic objectives for every development project	This option would involve stipulating in the legislation at least some key strategic objectives that reflect the priorities of the legislation and that apply to all development projects. At the individual project level there would still be discretion to set other objectives that would be subject to public consultation and specifically targeted to the project's circumstances, challenges and priorities. The Housing Commission would work with the local community to identify project-specific objectives that reflect each project's individual circumstances and priorities.	Would help ensure consistency of outcomes across projects, while still allowing the flexibility and sensitivity to ensure that each project is subject to meaningful objectives that are capable of driving real development outcomes. It would provide a balance between ensuring that development projects contribute to the purpose of the legislation (and to the Government's housing and urban development objectives) and an opportunity for the local community to input what is important to them. A difficulty with this option lies in the balance between determining mandatory strategic objectives, which are necessarily broad and general enough to apply to all projects, without being so broad that they lose practical meaning at the project level, or are so open to differing interpretations that consistency of outcomes is compromised.
Option 2: mandatory subject matter that the strategic objectives must address **(Recommended)**	This option would involve prescribing the *types* of objectives that must be included when identifying strategic objectives for a development project. For example, a project could be required to have objectives around environmental, social, employment, skills and community outcomes. Further, the legislation could prescribe the particular principles that the strategic objectives must recognise and provide for when	This option would provide a clear signal that developments are required to achieve broad urban development outcomes. It would allow the Housing Commission to take a partnership approach to identifying the objectives with local government, and input from the local community. A further advantage of this option would be the ability to clarify both the priorities of the legislation and how environmental concerns fit within the overall decision-making framework. A risk with this option is that it may not result in clear priorities to guide decision-making.

	developing each type of objective.	This could be mitigated by allowing strategic objectives to be ranked to give certain objectives higher priority than others.
Option 3: Hybrid approach	A possible third option could be to merge aspects of the previous two options. As in Option 1, certain key strategic objectives would be stipulated in the legislation that applies to all projects. This would provide certainty around the legislation's priorities and would help ensure consistency of outcomes across all projects. Then, at the project level there would still be the requirement to consult with local communities and allocate specific strategic objectives for each individual project. Some of these project level objectives could be required to address the mandatory subject matters envisaged in Option 2. This reinforces the expectation that developments must achieve broad urban development outcomes, while still addressing local circumstances, challenges and priorities.	This option provides both mandatory objectives that ensure consistency across a broad range of urban development outcomes and project-specific objectives that enable the involvement of local communities to ensure that each project is subject to meaningful objectives capable of driving real development outcomes. Nevertheless, the mandatory objectives would still suffer from needing to be inherently broad.

Recommended approach: prescribe the types of strategic objectives to be covered

50. In our view, the more specific the strategic objectives, the greater the clarity the development project will have. Because universal strategic objectives would lack that specificity, we think the better way to ensure important matters are provided for across all projects is to prescribe certain types of strategic objectives that must be covered in all cases, together with the principles that must be provided for in those objectives. It would then be left up to the Housing Commission and the project's community to tailor the strategic objectives to local needs. We therefore recommend Option 2.

Recommendations and question

4. Officials recommend that the new legislation:

   a. require strategic objectives to be set for each development project that reflect the project's circumstances and priorities

   Agree / Disagree

   b. include mandatory subject matter that strategic objectives must address, such as environmental, social, employment, skills and community outcomes

   Agree / Disagree

5. Would you like the legislation to enable strategic objectives to be ranked to give some higher priority than others?

   Yes / No

2b Role of territorial authorities in development projects

51. This section discusses what role the territorial authority has in the development project, especially regarding whether the project is established in the first place.

52. As outlined in section 1 above, the new legislation would address the coordination and governance issues which are impacting the delivery of complex urban development projects. Given the many existing functions that territorial authorities perform in any local area, it is critical to include them in some form. The aim is to find the optimal mechanism for their contribution.

53. The 2017 discussion document proposed that the prior approval of the relevant territorial authority/s would be required to establish each development project. Significantly, in response to the discussion document, territorial authorities uniformly opposed the new legislation unless their prior agreement is required.

The importance of finding the optimum mechanism for territorial authority involvement in development projects

54. As we previously noted, local democratic processes are dominated by interests that are stacked against accommodating growth. The risk of requiring the territorial authority's prior agreement to establish a development project is that local interests will oppose the development. Certainly, it was notable that the Auckland local boards all opposed the previous Government's proposals for this type of legislation, when Auckland Council itself supported them in principle. As the opposition to the Auckland Unitary Plan has illustrated, it is likely that residents will strongly oppose development projects that seek to provide for higher density housing in existing neighbourhoods.

55. If the territorial authority can veto proposals for similar reasons, it would effectively prevent central government from using the legislation to pursue projects of national interest, such as

supporting the construction of high density housing in Auckland. For that reason, providing an outright veto would risk undermining the purpose of the new legislation.

56. That said, it would be extremely difficult for complex development projects to succeed without the support of the relevant territorial authority/s. Most significantly, no project could operate as an island that is separate and independent from the network infrastructure with which it must connect. All roads, railway tracks, public transport services, water pipes, sewerage and drains connect with local government's wider network.

57. The larger and more complex the development project, the more likely it is that it will need support from those wider networks that only local government can provide. The more additional or upgraded capacity required in the wider network, the higher the cost to provide that capacity, the more likely it is that the development project will not be able to fund that capacity itself and will therefore need the territorial authority's financial support. Even without a formal veto right, territorial authorities will still have an effective veto right in the form of funding control over the infrastructure capacity needed to support a project.

58. If the project is sufficiently discrete and it does not need any further support from the wider infrastructure networks, we still need to consider the opportunity that council land presents for the development potential of the project. Without the territorial authority's support for the project, strategically important opportunities to leverage existing public land may go unrealised.

59. Consider the Manukau transformation project, for example. Both central and local government own strategically important land in the project area. It would achieve greater benefits with the commitment of each party to contribute that land. While the Crown does have the power to take land by compulsion, that power is intended to be used as a last resort. The potential to capitalise a development with a wider portfolio of land holdings would be lost if the two parties cannot agree to work together.

60. Finally, there is all the local knowledge and expertise that local government has accumulated. This will be important to the successful development of most local projects, but which is unlikely to be forthcoming in the absence of local government support.

61. Consequently, there will be few development projects that would thrive as well (if at all) without the support of the territorial authority. For these reasons, we think a balance needs to be struck, between ensuring that development projects can proceed despite opposition from local interests, while still needing to seek the support of the relevant territorial authority.

Options

62. There are five different options for how the Housing Commission could work with territorial authorities:

- territorial authority's prior agreement to the project is required
- territorial authority's prior agreement is required, but with central government override
- prior agreement to a city-level agreement, with or without central government override
- project-specific consultation and consideration, but no agreement required
- central government proceeds without any requirement for consultation or collaboration.

63. These options are summarised in the table below. More detailed descriptions of the options are attached as Annex 3.

	Pros	Cons
Option 1: Territorial authority's (TA's) prior agreement to establish the project is required	- Supports local democracy - Respects local community views - Likely to result in development projects that are well integrated into the existing system and align with the wider strategic vision for the region - Access to local knowledge, data and expertise of the TA	- Risk that the TA will oppose strategically important projects - Delay required to secure agreement - Loss of development opportunity if agreement cannot be reached - Potential to impede KiwiBuild
Option 2: TA's prior agreement to establish the project is generally required, but with a reserve power for central government to override any opposition **(Recommended)**	- When needed, provides a tool with which to overcome local interests - Recognises the importance of partnership and collaboration with the TA as the default requirement	- TAs oppose the legislation unless they have a veto power - Exercise of the reserve power would undermine local democracy - Lack of incentive for Housing Commission to engage in authentic collaboration
Option 3: TA's prior approval of a city-level agreement is required, but not to each subsequent development project	- Removes the focus from particular development projects - Enables wider benefits to be traded (e.g. regional development fund) - Supports local democracy - Respects local community views - Likely to result in development projects that are well integrated into the existing system and align with the wider strategic vision for the region	- Risk that the TA will refuse, or only agree subject to veto-ing a particular development project, thereby preventing strategically important projects - Delay required to secure agreement - Loss of development opportunities if agreement cannot be reached - Potential to impede KiwiBuild
Option 4: Project-specific consultation and consideration, but no agreement required	- Projects can progress despite local opposition - Avoids any delay in having to seek agreement	- TAs oppose the legislation unless they have a veto power - Undermines local democracy - Lack of incentive for Housing Commission to engage in authentic collaboration
Option 5: Central government can establish a development project without any requirement for consultation or collaboration with the TA	- Likely to be faster - Greater certainty the development project will progress	- TAs oppose the legislation unless they have a veto power - Undermines local democracy - Inability to access development opportunities on TA land - Likely inability to access TA knowledge and expertise

Recommended approach: require territorial authority's agreement, with a reserve power to override

64. The importance of infrastructure means that territorial authorities will have an effective veto, irrespective of whether the legislation gives them one. Therefore, we think it is better to empower territorial authorities, than sideline them. However, given that in some cases it may be possible to overcome any infrastructure funding constraints, we think it would be useful to provide central government with the means to proceed if necessary. We therefore recommend Option 2.

Recommendation

Officials recommend that:

6. the territorial authority's prior agreement to establish the development project is generally required, but with a reserve power for central government to override any opposition on a case-by-case basis.

Agree / Disagree

2c Eligibility criteria for deciding whether a development project could be established under the new legislation

65. The core elements described in our introductory briefing included a requirement for each development project to demonstrate that it has the realistic potential to deliver tangible public benefits (the 'public benefits test').

66. This section discusses whether to require additional criteria to be met before a development project could be established under the new legislation. The objective is to exclude business-as-usual developments that are capable of progressing well under existing processes.

67. From a design perspective, there is also a need to reduce the risk that such powerful legislation is misused (without simultaneously undermining its intended application).

68. In response to the 2017 discussion document, stakeholders considered that urban development projects should be of an appropriate scale and complexity to warrant being granted more enabling development powers. Consequently, submitters supported the need for criteria, with a preference that it be adaptable to a range of different urban contexts.

69. Stakeholders pointed out that a prescriptive threshold to determine eligibility (such as geographic size or cost) would not be flexible enough to apply in different contexts around the country. For example, stakeholders felt that a suitable minimum threshold in Auckland is likely to be far too high a threshold in other cities (and vice versa).

70. Stakeholders also supported criteria as a means to prevent the responsible Minister from having too much discretion in the process to establish a development project.

The view of the Legislation Design and Advisory Committee (LDAC)

71. In LDAC's view, strong eligibility criteria are required to signal that the new legislation could only be used in special cases, rather than being the default approach to urban development. The criteria should require consideration of whether the anticipated public benefits justify the special powers and processes to be applied. Accordingly, LDAC suggested some or all of the following:

- that the development project is necessary or desirable for urban development purposes
- that the development project is of national or local significance
- that the development project would be unlikely to go ahead or to achieve the proposed public benefits using regular processes in existing legislation.

International comparisons of eligibility criteria for establishing development projects

72. Equivalent legislation in the UK and Australia avoids objective thresholds in favour of Ministerial judgement, process requirements and mandatory considerations before a decision can be made.

73. The UK and one Australian state (South Australia) include a prescriptive threshold for establishing a development project, which must be met to the Minister's satisfaction (noted under Option 3, further below). In contrast, there is no such requirement in Victoria, Western Australia and New South Wales, which instead include criteria that a decision-maker must have regard to, without requiring them to be satisfied that there will be any particular outcomes.

74. The UK also includes a significant procedural check, requiring a resolution of both Houses of Parliament to establish a project.

Is there a need for eligibility criteria in addition to the public benefits test?

75. The project-based nature of the legislation, the extensive processes required to establish a development project, and the need to demonstrate public benefits are ways in which the proposals already restrict the application of the legislation. The developer of a standard greenfield subdivision is unlikely to be attracted to processes that require two rounds of public consultation.

76. The equivalent to the UK's requirement for both Houses of Parliament to approve a resolution would be for the New Zealand legislation to require the relevant territorial authority to approve the establishment of the development project. Stakeholders considered that such a veto power would be an important safeguard against accessing the more enabling development powers. If both central and local government must separately agree before a project can be established, it creates a significant procedural constraint that arguably removes the need for any further eligibility criteria (although this approach would risk preventing central government from using the legislation to pursue projects of national interest). However, LDAC disagreed with that conclusion in the context of the previous Government's proposals.

77. If the prior agreement of the territorial authority is not required, additional criteria that prescribe the types of development projects that can access the legislation is an alternative means of restricting access to the more enabling development powers.

78. The risk of having no criteria beyond a public benefits test is the potential for a future Government to misuse the legislation by supporting inappropriate development projects. Because the proposed development powers will be far-reaching and more enabling than the status quo, there will be potential to use the legislation for a wide range of projects. While that will be appropriate to some extent, the advantage of including additional criteria would be to exclude projects that are obviously too small or straightforward to warrant a more enabling approach.

79. However, if criteria are to be included they need to be sufficiently flexible to avoid setting thresholds that struggle to apply appropriately across the country. This implies the need for Ministers to exercise their judgment within a prescribed framework, such as a requirement that the Minister be satisfied that the project is "complex" or "strategically important".

80. The risk with including those sorts of criteria is how inherently imprecise they are. Defining "complex" or "strategically important" in any definitive way would be difficult. They are likely to create a framework in which there are development projects that clearly fall inside and outside the scope of the legislation, but also a sizeable grey area in between.

81. In these cases, the framework would effectively defer to the Minister's judgement. However, the inherent uncertainty increases the risk of judicial review, because it gives opponents more scope to challenge a decision. A Minister would need to be able to point to some reasoning that supports his or her judgement. It is the grey area around the concepts that can open the door to arguments that the Minister has misinterpreted the scope of eligible development projects.

82. We think the scope of a public benefits test is sufficiently broad that those opposed to a development would struggle to challenge a Minister's judgement on that issue. That may not be the case for other potential criteria. Ultimately, the question is which risk is greater: the risk that central government will misuse the legislation by supporting inappropriate development projects, or the risk that broadly drawn criteria too often opens the door to judicial review proceedings that delay a development project from being established.

Recommendations

7. Further to the public benefits test you supported in our introductory briefing, officials recommend that:

   a. the new legislation not prescribe specific thresholds (such as a minimum geographic size, cost or number of houses) to determine which development projects are eligible

   Agree / Disagree

   b. if you agree that the prior agreement of the territorial authority is not required for the establishment of the development project **(recommendation 6)**, the new legislation include additional criteria that must be met before a development project can access the more enabling development powers, over and above the need to demonstrate public benefits (note that we discuss options for these additional criteria in the next section)

   Agree / Disagree

   OR

   c. if the territorial authority's prior agreement is provided, the development project need not meet any additional criteria.

   Agree / Disagree

If additional eligibility criteria are required, what are the options?

83. If you agree to include additional criteria (over and above the public benefits test), we have identified three options (one or all of which could be included):

- definition of urban area
- scale and complexity
- purpose or significance test.

84. These options were identified on the basis that they would support the purpose of the new legislation to enable complex urban development projects, without being overly prescriptive. The options are described below:

Option 1: Definition of urban area

85. One potential requirement to include in eligibility criteria is to define 'urban area'. Stakeholders asked for legislation that clearly defines 'urban', which would clarify to what extent small residential settlements fall within the scope of the legislation.

86. Options include the definitions used by Statistics NZ to differentiate between urban areas of different sizes.

87. Subject to any preferences you have, separate provision for greenfield development outside existing urban areas will need to be made to ensure it is not precluded by any definition of 'urban'.

Questions

If you would like additional eligibility criteria,

8. would you like the legislation to define 'urban area', thereby excluding development projects in areas that do not meet the definition?

Yes / No

9. if so, would you like to define 'urban area' to include:

   a. Main urban areas only, meaning concentrated settlements of at least 30,000 people?

   Yes / No

   b. Both main and secondary urban areas, meaning a concentrated settlement of at least 10,000 people?

   Yes / No

   c. Main, secondary and minor urban areas, meaning a concentrated settlement of at least 1,000 people?

   Yes / No

Option 2: Scale and complexity

88. A second option would be to require potential development projects to deliver a certain range of outcomes. The wider the range of outcomes involved, the more likely it is the project is both large and complex. Consequently, this method offers a way to test scale and complexity without having to specify fixed thresholds for land area, cost or number of houses.

89. Options include a minimum range of infrastructure and land use outcomes. For example:

- there could be an infrastructure criterion that requires some mix of local roads, highways, local water, trunk water and public transport outcomes
- there could be a land use criterion that requires some mix of retail, commercial, and industrial land uses and/or community facilities and public space.

90. In addition, housing is a land use outcome that could also be included, with options for public and KiwiBuild housing. You have indicated that you do not wish to have a mandatory housing requirement. However, you may wish to require housing in all greenfield projects as one measure to prevent the legislation from becoming the default planning regime for commercial and industrial expansion.

Question

If you would like additional eligibility criteria:

10. would you like the legislation to include requirements for a minimum range of infrastructure and land use outcomes?

Yes / No

11. would you like the legislation to require housing outcomes in all greenfield projects?

Yes / No

Option 3: Purpose or significance test

91. The third option is to adopt a similar approach to the one recommended by LDAC. As noted above, regardless of the subject matter, the only way to apply the test would be to base it on the Minister's judgement, rather than on some objective determination of whether the test is met.

92. In the UK, the Minister must be "of opinion that it is expedient in the national interest to do so." In South Australia, the Minister must "be satisfied that the [project] will facilitate" certain urban renewal and economic development outcomes.[10] Similarly, all three of the suggestions made by LDAC (noted in paragraph 71, above) would also need to be based on the Minister's judgement.

93. If challenged, the Minister will need to be able to point to evidence that they considered relevant information when forming their view and that their conclusion is not at odds with the generally accepted meaning of the test.

94. This is where the risk of judicial review lies. On one hand, a test based on the subjective views of the Minister might seem difficult to challenge. But an opponent of a proposed development project only needs a credible argument that the Minister has not made a proper decision.

95. By asserting a high threshold for "complex" or "locally significant", for example, an opponent could challenge a Minister whose decision was effectively based on a lower threshold. While the Minister's interpretation will have primary weight, there is still potential to test the scope of how a Minister applies the test; and judicial review proceedings could cause delays to a development project commencing.

[10] The equivalent legislation in South Australia requires the Minister to be satisfied that the precinct will facilitate: (i) the development of the area for the purposes of urban renewal; or (ii) the provision of land suitable for commercial, industrial or residential purposes close to public transport; or (iii) the establishment of new industries; or (iv) other planning and development outcomes for the renewal or redevelopment of a distinct area that promotes the purposes of the Planning Strategy.

Questions

If you would like additional eligibility criteria:

12. would you like the legislation to include a need for the Minister to be satisfied that the development project:

    a. is nationally or locally significant?

    Yes / No

    b. is necessary or desirable for urban development purposes / will facilitate urban development?

    Yes / No

    c. is complex or strategically important?

    Yes / No

Under any of the above options, the Minister should retain discretion

96. Finally, we suggest that any criteria be treated as necessary but not sufficient to access the development powers under the legislation. We recommend that, for projects that meet the eligibility criteria, the Minister retains discretion over whether a proposed project is established under the legislation.

97. In exercising that discretion, we recommend that the Minister must consider the key elements of the project. This follows similar approaches in equivalent legislation in Australia. In all cases, except Victoria, decision-makers must have regard to various economic, social, planning and environmental factors.

Recommendations

Officials recommend that:

13. meeting any eligibility criteria be a necessary, but not sufficient, condition of establishing a development project under the proposed legislation.

    Agree / Disagree

2d When should development projects be able to access development powers?

98. This section considers how to balance access to more enabling development powers with procedural checks that protect against their misuse.

Options

99. We have considered two options, whether:

- all of the development powers would be available to each development project, with the Housing Commission selecting which powers it wants to use in its recommended development plan; or
- the legislation require central government to delegate specific development powers to each project on a case-by-case basis, with the potential to exclude certain powers.

100. These options are summarised in the table below. More detailed analysis of the options is attached as Annex 4.

Approach	Pros	Cons
Option 1: Development powers would be automatically available to each development project that meets the eligibility criteria and is established under the legislation. The draft development plan would describe which powers the Housing Commission considers it needs to achieve the strategic objectives. The Minister's approval of the final development plan effectively includes the Minister's approval of the development powers that are being used for the project. **(Recommended)**	No central government time would be required to identify the powers at the outset or change them later. The Housing Commission would identify powers as a matter of course, and in consultation with the community, as part of its preparation of the development plan. One decision point for the Minister (approval of the development powers is combined with approval of development plan), reducing the risk of judicial review.	If all powers were nominally available, it could generate public opposition.
Option 2: The establishment process would include a requirement that central government delegate the development powers it wishes to make available to the project, through the Order-in-Council. There would be a requirement for the Order-in-Council to itemise which powers are delegated. The result would be that the Housing Commission would be restricted to using only the powers that have been delegated to that project.	Specifying the powers for each project when it is established would create the ability to tailor the powers to the needs of the project. Provides a check against the unnecessary use of far-reaching powers. Potentially provides a means to win community support for the project (for example, the public may view a proposal that only seeks powers for infrastructure provision quite differently from a proposal for a development project that has access to all the	Requires the Minister to make an additional decision, therefore increases the risk of judicial review. Would create a strong case for consulting the public prior to the Minister making a decision on what powers to delegate, but it would be difficult for the public to weigh the benefits of the project without a detailed plan. It may not be possible to anticipate all the development powers that might be needed in advance of preparing the development

	development powers).	plan - it would be necessary to include a mechanism through which the Housing Commission can go back to Government to ask for additional powers that were not granted initially, resulting in further delay. The Order-in-Council would potentially be very long and complex, and therefore potentially difficult for the Housing Commission to implement.

Recommended approach: development powers automatically available to each development project

101. The value of being able to propose a more limited set of powers is undermined by the need to reserve the ability to add further powers at a later date.

102. The potential misuse of more enabling development powers can be managed effectively through other procedural requirements, including the need for public consultation on the draft development plan, the ability to object to the plan and the need for the Minister's approval of the final plan.

103. Given the other disadvantages identified above, therefore, we recommend Option 1.

Recommendation

14. Officials recommend that:

    a. when preparing its recommended development plan, the Housing Commission be able to select from all of the development powers available in the legislation, to the extent required to realise the strategic objectives of the development project

    Agree / Disagree

    b. the selection and proposed use of the development powers be subject to public consu

    Agree / Disagree

2e Coordinating central government's contribution to a development project

104. Our introductory briefing proposed to consolidate several local government functions and processes into a single development process. This section discusses the remaining question of whether a similar approach is also needed for central government functions.

105. The aim is for complex development projects to be able to coordinate all of the necessary functions needed to support urban development. The relevant local government functions tend to be focussed on network infrastructure, such as three waters, roads and public transport. The relevant central government functions tend to be focussed on social infrastructure, such as schools, health facilities and emergency services, but also extend to some types of network infrastructure (eg state highways and railways).

106. In response to the 2017 discussion document, public development agencies (such as the Tāmaki Regeneration Company) highlighted how important it is to be able to coordinate all government functions within a large, complex development project, across both central and local government responsibilities. The agencies also highlighted the difficulty of securing coordination across the multiple different agencies involved under the status quo, reporting a lack of incentive for those agencies to engage.

What would be required to consolidate central government functions within a development project?

107. Consolidating functions requires three critical components:

- the expertise to exercise that function
- the funding to support it
- the ability to integrate that function within its wider system.

108. The working assumption underpinning the proposals is that the Housing Commission can hire or contract the necessary capability to plan and provide network infrastructure and use the proposed funding tools to pay for it. The biggest challenge for network infrastructure will be integrating with the wider networks involved.

109. For social infrastructure, integrating with the wider system of education, health or emergency services (etc) would also be particularly challenging if those functions were consolidated within a single development project.

110. Funding is the most challenging issue for social infrastructure. Whereas the proposed funding powers will be capable of supporting some changes to network infrastructure within a project area, they will not be capable of supporting social infrastructure, such as the construction and operation of a school.

111. Funding and decision-making go together, therefore the delivery of social infrastructure must continue to remain a separate function. Development projects will need to comply with decisions that central government agencies make regarding the buildings and related infrastructure required for the provision of public services. Decisions about the number, size, type and development needs of central government services like schools, fire stations, defence and health facilities will still need to be made by the agencies responsible for providing these services (eg the Ministry of Education, DHBs). As such, the Housing Commission will need to work closely with these agencies to ensure their needs are met when planning any development.

Ensuring that relevant central government agencies engage in development projects

112. We propose that, at the time Cabinet recommends the establishment of a development project, it also agree the extent to which relevant agencies must support the realisation of the project's strategic objectives. This could include contributing their planning and expertise as appropriate, together with amending their strategies, planning, forward budget and investment accordingly. These mechanisms could be the expectation that Cabinet sets for government agencies.

113. Where new, extended or relocated central government services are needed, we propose that the Housing Commission be responsible for identifying their location in the development

plan. However, to ensure the site is fit for purpose, we propose that any recommended location must meet the needs of the central government service involved. This would require the Commission to collaborate early in the process of preparing the development plan, to incorporate the relevant agency's requirements. Therefore, while the Housing Commission would determine the location (subject to Ministerial approval of the development plan), the proposal is that the relevant central government agency determine the criteria that the selected location must fulfil.

114. In both development projects where there are existing central government services (such as the Tāmaki regeneration), and in new developments in greenfield areas where no central government services yet exist, we propose that the Housing Commission cannot recommend introducing, relocating, expanding or disestablishing any central government service without the prior agreement of the agency that provides that service. For example, the Housing Commission would not be able to determine that a new school, fire station or hospital is required, or that existing facilities must be expanded, in a development project area. Only the relevant agency could make that decision.

115. We expect that in most instances relevant agencies will engage with the needs of a development project without further prompting. However, to provide the Housing Commission with some leverage if an agency happens to be uncooperative (and an incentive to engage appropriately in the first place), we propose that the new legislation include a power for the chief executive of the Housing Commission to issue a statutory order requiring information and analysis from the agency.

116. This power could not force an agency to incur any capital expenditure or change their services, but it could force the agency to assess the impact of the development project. The existence of the assessment would then be a prompt to acting on the implications and a useful tool for the Housing Commission to advise Ministers if the agency fails to engage. To give the order some weight, we propose that, if the agency has not provided the required information and assessment within a reasonable time, the Housing Commission be able to contract for the advice from private providers for which the agency (not the Housing Commission) must pay.

117. We expect this power would seldom need to be used. But we think it serves two useful functions: First, it emphasises the cooperation that the Government expects its agencies to provide to development projects. Secondly, it sends a useful message to other stakeholders that central government is as committed to coordinating its own functions as it expects others to be.

Recommendations

15. Officials recommend that:

    a. decisions about the number, size, type and development needs of central government services in the project area (such as schools, fire stations and health facilities) must continue to be made by the central government agencies responsible for providing these services, and the Housing Commission must consult these agencies in the preparation of the development plan

    b. the Housing Commission cannot introduce, relocate, expand or disestablish any central government service – only the agency that provides that service can do so

    c. the relevant central government agency will continue to finance the construction and maintenance of any buildings required to support the provision of central government services in the project area

    d. where needed, the Housing Commission is responsible for identifying the location of any new, extended or relocated central government services in the development plan, provided the Housing Commission works closely with the relevant agency in advance and selects a location that meets that agency's needs.

Agree / Disagree

16. Officials recommend that:

    a. once a development project has been established, the Housing Commission may ask any relevant government agency:

        i. to provide all relevant information to assist the Housing Commission to plan for the development project

        ii. to assess the likely impact of the development project on the services that agency provides and how best to manage that impact, including identifying the cost and timing implications for changes to the agency's services

    b. the new legislation include a power for the chief executive of the Housing Commission to issue an order in writing requiring this information and assessment, which the agency must comply with

    c. if the agency fails to comply with the order within a reasonable time, the Housing Commission can commission any other qualified person or organisation to provide the information and undertake the assessment and the cost of that advice must be paid for by the agency (not the Housing Commission).

Agree / Disagree

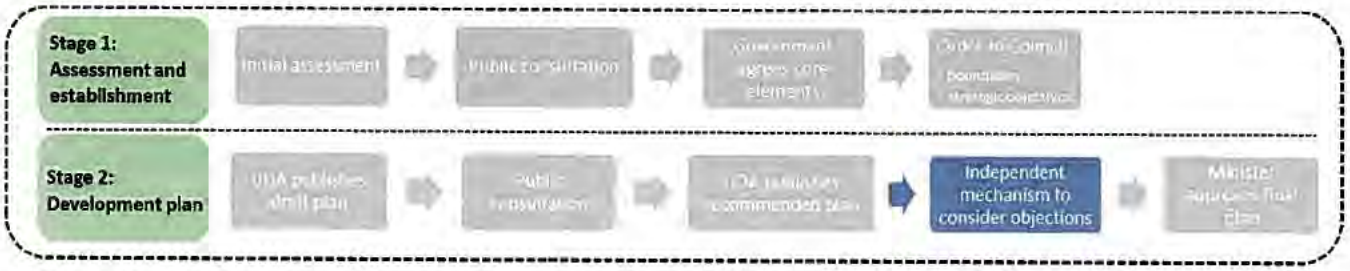
Part 3: Finalising and approving development plans

118. Part 3 considers how best to provide an appropriate mechanism for addressing any objections to the Housing Commission's development plan. This raises two interrelated issues that we consider separately:

- whether to allow appeals against the development plan
- who the final decision-maker should be.

119. There is no question that appeals on points of law and applications for judicial review should continue to be available under the new legislation. The issue is whether the courts should also consider appeals on the merits of a proposed plan, as these go to the content of the plan, not just to its application.

3a Appeals against the development plan



120. In terms of process, this issue arises after the Housing Commission has consulted with the public on the establishment of an urban development project and on its draft plan, and made any amendments to the plan it considers appropriate in light of the feedback it receives. The issue is how stakeholders who continue to have concerns with the recommended development plan can have those concerns addressed.

121. Where a public body makes a decision that affects a person's rights or interests, the principles of natural justice require that person to be given the opportunity to have the decision reviewed in some way. The aim of good process is to ensure that complaints are heard properly and given appropriate consideration so that a fully informed decision is made; and to ensure an appropriate degree of independence when necessary to prevent the public body responsible from also being the decision-making body.

122. In contrast, the purpose of the new legislation is to provide more enabling development powers and streamlined processes for making changes to the urban environment.

123. Consequently, the delays inherent to appeals can conflict with the desire for a streamlined process. The objective is to balance these competing priorities.

124. In response to the 2017 discussion document, stakeholders generally opposed any loss of appeal rights. They considered any proposal to remove appeals to the Environment Court to be detrimental to democratic rights and environmental justice.

125. In contrast, LDAC understood the benefit of some limits being placed on appeal rights, provided an objection procedure is still available at the time a development plan is developed. LDAC also opposed any changes to the normal process for judicial review.

International comparisons of appeal rights in the planning system

126. Appeal rights in New Zealand have expanded over successive iterations of the planning system and are now broad compared with similar appeal rights in other comparable jurisdictions. The ability to appeal decisions in the courts is particularly unusual:[11]

- No Australian state or territory provides for any right of appeal to a court or tribunal on the merits of a plan policy or rule.
- England and Wales have no provision for appeals on the merits of council plans.
- In Canada, neither Alberta nor British Columbia permits appeals on the merits of plans.
- Council decisions on submissions to plans in Ontario may be appealed to the Ontario Municipal Board. However, the Board is an expert review panel, not a court. Unlike in New Zealand, no submitter can appeal the Board's decisions to higher courts.

The need for a streamlined method for addressing stakeholder concerns

127. The ability to review or appeal a decision helps to ensure that the decisions taken under the legislation are correct and in accordance with the law. Appeal and review rights also serve the important purpose of incentivising first-instance decision-makers to make high-quality decisions that comply with legal requirements.

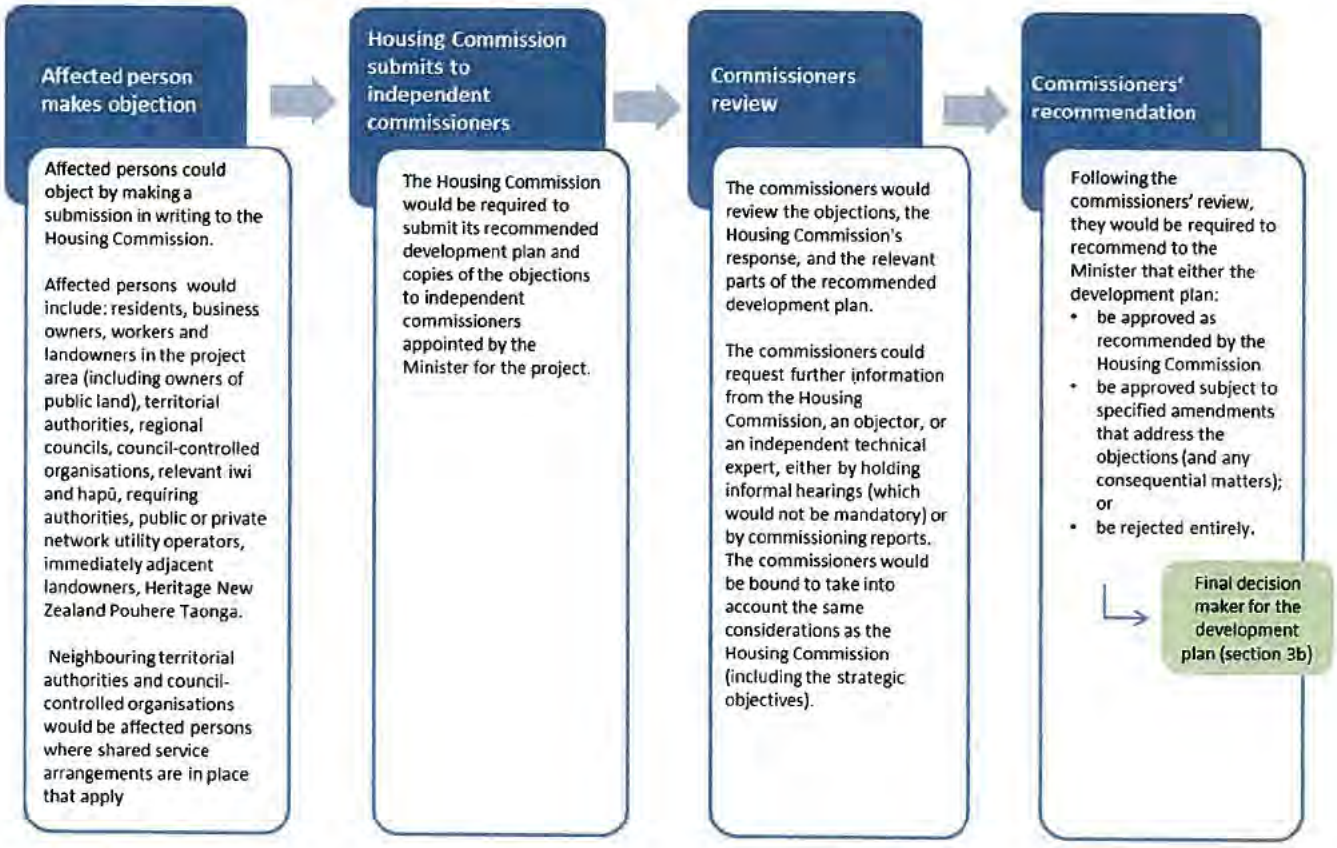
128. The problem with retaining appeal rights is the lengthy delays likely to be involved and the quality of the decisions. Given the complexity of the development projects being contemplated, if appeal rights were retained we could expect every development plan to be challenged in court, which would take considerable time.

129. The problem with removing appeal rights is that it would undermine due process and generate the potential for unfair outcomes that are binding on stakeholders who have few other means of challenging them. In turn, this would increase the risk of judicial review, as that would then be the only means of recourse available to those who continue to object to a development plan.

130. These competing considerations suggest the need for a streamlined method for addressing stakeholder concerns. Accordingly, we propose that the new legislation provide for an objections process to be available after the Housing Commission has published its recommended development plan and before the Minister has approved it, outlined in the diagram below:

[11] Productivity Commission, F8.13, Better Urban Planning, March 2017, page 236.

Figure 1: Proposed Objections Process



Recommended approach: independent consideration of the development plan by two separate bodies

131. Under the proposals described above, the development plan process would enable two separate bodies to each independently consider the merits of the issues: first the Housing Commission itself when it prepares its recommended development plan, and then independent commissioners who respond to objectors' particular concerns. The Minister who decides whether to approve the development plan is a third independent decision-maker, although he or she is not expected to re-examine the merits of each perspective.

132. Adding a right of appeal to this process would add a fourth decision-maker and a third body able to consider the merits of the issues. Given that expert opinions can differ on planning issues and that all decision-makers will be bound to take into account the same considerations, the risk is that any further layer of re-examination would add delay without substantially increasing the quality of decision-making. Ultimately, when measured against the policy objective of ensuring good process, we consider that the proposed objections process meets the required standard.

133. When measured against the desire for a streamlined process, the proposed approach does introduce some delay, as ensuring good process requires taking the time to do so. But by avoiding the inherent delays of a formal adversarial court process and the need to work to the timetable of a court with a heavy work load, we think the proposed process strikes the right balance between the need for a streamlined process and the need to ensure objections can be properly considered.

Recommendations

17. Officials recommend that:

    a. affected persons be able to object to the recommended development plan within a specified time by written submission to the Housing Commission, stating the reason for the objections and the change the person seeks to the recommended plan

    b. if objections are received—

        i. the Housing Commission must submit the recommended development plan to independent commissioners for examination, and provide the independent commissioners with copies of the objections that the Housing Commission received, together with the Housing Commission's views on those objections

        ii. the independent commissioners review the objections and the relevant parts of the recommended development plan

        iii. the independent commissioners can seek further information from the Housing Commission, objectors or an independent technical expert by either holding informal hearings (which are not mandatory) or commissioning reports (with the ability of the Minister to apply timeframes)

        iv. the independent commissioners can recommend to the Minister that the development plan can either: be approved as recommended by the Housing Commission; be approved subject to specified amendments that address the objections (and any consequential matters); or be rejected entirely.

Agree / Disagree

3b Final decision-maker for the development plan

134. Given that the development plan is the key statutory mechanism for making the changes needed in a project area, the aim is to ensure that the most appropriate decision-maker approves the content of the plan.

135. Our introductory briefing proposed that the Minister approve the development plan. If appeals on the merits of a development plan are allowed against the Minister's decision, the Minister would no longer be the final decision-maker in those cases, the courts would be.

136. Under existing legislation, a territorial authority is not the final decision-maker over its district plan, any changes to that plan, nor any resource consent applications. While the territorial authority is the decision-maker in the first instance, because the RMA provides for appeals on the merits of a plan, court judges are the final decision-maker(s).

137. For this reason, in its report on *Better Urban Planning*, the Productivity Commission recommended that independent hearings panels (IHPs)[12] be established to consider and review new plans,[13] instead of the courts. The Productivity Commission also recommended that an IHP should have the final decision on the merits of plans with appeals only on points of law to the Environment Court.

What would be an appropriate role for an IHP?

138. At a conceptual level, the issue is whether decisions over the content of land-use regulations are policy decisions that should be made by the legislature and government or are legal decisions that should be made by the courts.

139. In principle, Parliament makes the laws and the courts interpret them. When applied in the planning context, making the law generally takes the form of local government making land use regulations under the statutory authority that Parliament has delegated to it. However, the planning system in New Zealand also empowers the courts to determine the content of plans when that content is appealed.

140. This feature of the existing statutory environment is one reason that the current system struggles to support urban development. Because the courts can be used to contest policy decisions that local government makes, it delays the plan-making process and introduces the potential for multiple layers of decision-makers who can each reconsider policy content. This situation introduces considerable uncertainty and risk to the plan-making process.

141. Finally, there is also the matter of accountability. Through the democratic process, government can be held to account for its decisions (or for decisions made by those it appoints). The courts cannot. That independence is appropriate when the courts are interpreting the laws made by government. It is not appropriate when the courts themselves are making the laws.

Options

142. In our introductory briefing, we proposed that the Minister be the final decision-maker, following an independent objections process described above. That proposal broadly reproduces the process used to develop the Unitary Plan in Auckland, in which the equivalent of an IHP reviewed and recommended changes to the draft plan that Auckland Council produced. However, the Council was the final decision-maker, not the IHP.

143. We have considered three alternative options, outlined in the table below:

	Description	**Considerations**
Option 1: Environment Court as final decision maker in certain cases	Reproduces the existing statutory environment by enabling appeals to the Environment Court on the merits of the Minister's decision, which would enable the Court to be the final decision-maker in certain cases.	As noted in the previous section, we do not consider this to be a viable option because it would add delay without substantially increasing the quality of decision-making.

[12] The objections process to independent commissioners that we propose above is effectively an IHP. This means that our proposal overlaps with that of the Productivity Commission to an extent.

[13] Productivity Commission, Better Urban Planning, March 2017, recommendation 8.6, page 245.

	Description	Considerations
Option 2: IHP as the final decision maker	The IHP's decisions would not be triggered by an appeal. Instead, the Housing Commission would recommend its development plan, then (following the objections process in section 3a, if needed) automatically pass it to the IHP for review and final decision.	Would avoid formal appeals while still providing for an independent review. The Productivity Commission has recommended this option for the planning system as a whole.
Option 3: Minister as final decision-maker, with power to delegate if desired **(Recommended)**	By default the final decision-maker for approval of the development plan is the Minister. If desired, the Minister could transfer the authority to make the final decision to the independent commissioners (from the objections process).	Political accountability for the decision would remain with the Minister.

Recommended approach: Minister as final decision-maker, with power to delegate if desired

144. If you preferred to align the proposed legislation with what the Productivity Commission has recommended, you may wish to require that an IHP make the final decision on the merits of the development plan, rather than the Minister. The advantage would be to locate decision-making at arms' length from Ministers, in an expert body with the capability to make quality planning decisions.

145. Given the experience and capability that the Environment Court has developed regarding planning decisions, the option to automatically refer the plan to the Court for final decision has the same advantages. In fact, the same pool of individuals is likely to be drawn upon to comprise either an IHP or the Environment Court. Thus, the difference between these two options is administrative and procedural.

146. Whereas an IHP could operate to a timeframe set by the new legislation and have greater procedural flexibility, the independence of the Environment Court would require the development project to work to the Court's timetables and within the Court's processes. Against those constraints, the perceived independence and credibility of the Environment Court would have greater weight than that of an IHP (even if comprised of the same people).

147. Given the importance the new legislation places on a streamlined process, we would recommend the IHP over the Environment Court. But that still leaves the question of whether either option is appropriate to be the final decision-maker, as opposed to simply being an authoritative review mechanism.

148. One difference between general planning and the planning for urban development projects is the project-based nature of the latter, with its focus on one particular area. In cases where government has significant capital invested in a development project, the increased risk and cost to government of pursuing a development project may suggest that it is more appropriate for the final decision-maker to be the Minister, albeit with the benefit of independent advice.

149. Consider the Tāmaki regeneration project, for example. The Crown has invested $1.6 billion worth of land and loaned $200m in operational funding. Given the significant risks the Crown faces in such scenarios, it may be more appropriate to retain decision-making with the Minister, as giving decision-making rights to an unelected panel would remove direct political accountability for statutory powers that have significant impacts.

150. The counter-argument in cases of significant Crown investment is that the Crown has a vested interest, meaning there is a risk that the Minister is a biased decision-maker. In contrast, an IHP (or the Environment Court) would be independent. Thus, at least in scenarios that involve lower Crown risk, the legislation could enable the Minister to transfer decision-making to the IHP (or the Environment Court) if preferred.

151. Ultimately, however, the question is which institution is best placed to be the final decision-maker: the Minister, an IHP or the Environment Court. In our view, it confuses the Court's role to have it determine both the plan content and the interpretation of a plan, which is why overseas jurisdictions do not permit appeals on the merits of planning decisions. Accordingly, we consider that the Courts should not be the final decision-makers on the merits of a development plan, therefore precluding any appeals on the merits.

152. As an IHP would not hold the same two roles as the Court, it remains an option for making the final decision. But its principal weakness is that it is not politically accountable, which we consider will be a critical factor for the more significant projects established under this legislation. We therefore recommend that the Minister be the final decision-maker (with the ability to seek advice), while retaining the power to delegate that role if desired.

Recommendations

18. Officials recommend that:

    a. the new legislation not provide for any right of appeal to a court on the merits of a policy, rule or regulation included in a development plan, while retaining the ability to appeal to the courts on points of law and to apply to the courts for judicial review

    Agree / Disagree

    b. that by default the final decision-maker for approval of the development plan is the Minister, but that if desired, he or she can transfer the authority to make the decision to independent commissioners who hear the submissions.

    Agree / Disagree

3c Discretion over approval of the development plan

153. Lastly, this section considers the issue of how much discretion to give the Minister as the final decision-maker.

154. The most flexible option would enable the Minister to decide between the plan that the Housing Commission originally recommended, the changes recommended through the objections process, or changes that the Minister chooses at their discretion, albeit restricted to matters raised in objections. However, more restrictive options are available, particularly removing the Minister's discretion.

155. The risk with allowing the Minister to determine what changes to make is that they would not have personally considered the arguments or evidence. Whereas the Housing Commission and any independent commissioners are both responsible for consulting directly with stakeholders and both have the right to seek independent expert advice, the Minister is one step removed from the process. Consequently, there is a risk of procedural injustice if the Minister can exercise their discretion over matters that they have not personally considered, even when supported by officials' advice.

156. However, there is a risk of delay if neither set of recommendations is optimal. There could be a situation in which the Minister's choice is between agreeing to a plan that is obviously sub-optimal in some respect (whether it is the Housing Commission's recommended version or the independent commissioners' recommended version), or rejecting the plan outright and having to wait for the development plan process to be re-done. For that reason, we think it is important that the Minister has discretion to make changes that have not been recommended.

157. While exercising that discretion would expose the Minister to risk, it is that exposure that will ensure the Minister only exercises their discretion where it is warranted, given that the Minister will need to be able to justify their decision if challenged through judicial review.

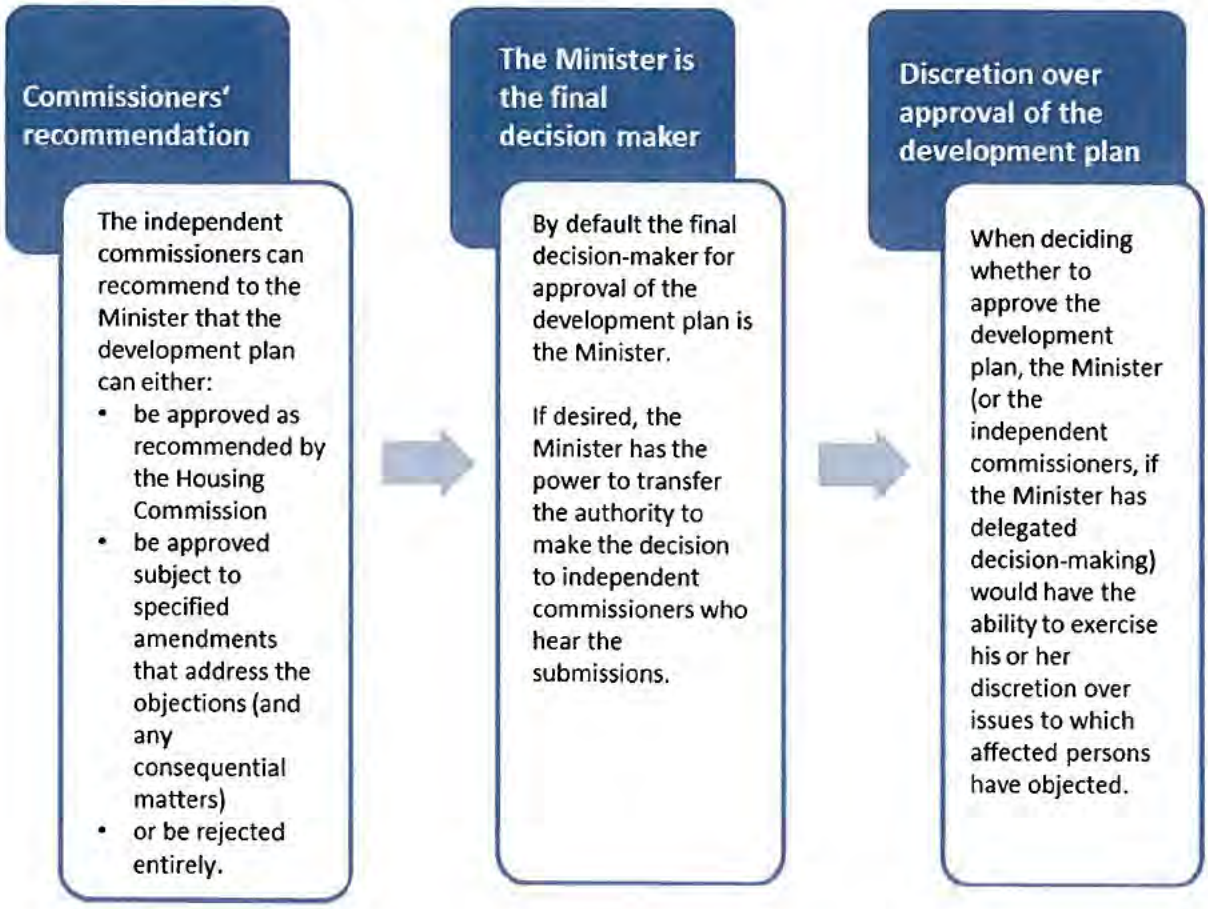
Recommendation

19. Officials recommend that, when deciding whether to approve the development plan, the Minister have the ability to exercise his or her discretion over issues to which affected persons have objected.

Agree / Disagree

158. The diagram below summarises our recommended approach to finalising and approving development plans.

Figure 2: Finalising and approving development plans



Annexes

Annex 1: National UDA overview diagram

Annex 2: MBIE's response to the Legislation Design and Advisory Committee's views on the proposed new legislation

Annex 3: Detailed descriptions of options for territorial authority involvement in development projects

Annex 4: Detailed analysis of options for when development projects should access development powers

Annex 2: MBIE's response to the Legislation Design and Advisory Committee's views on the proposed new legislation

1. The Legislation Design and Advisory Committee (LDAC) advises the Attorney-General and officials on the best approach to well-drafted legislation.

2. In the context of the previous Government's proposals for the same legislation, LDAC had concerns that new legislation would add a new statutory regime to the already complex statutory environment governing urban development.

LDAC's concerns

3. In LDAC's view, existing development legislation is not working efficiently.

4. Nevertheless, LDAC was concerned that the proposed legislation will have complex and overlapping interactions with existing planning and consenting regimes under the Resource Management Act 1991, Public Works Act 1981, Local Government Act 2002, and Reserves Act 1977. Despite the flaws of the existing system, LDAC considered there was a risk that "bespoke urban development legislation may only exacerbate this more fundamental problem by adding to business costs and reducing accessibility for users."

5. For that reason, LDAC suggested that broader integrated reform may be the better option to alleviate the concerns driving the proposed legislation. "To the extent a bespoke urban development regime is still required, the proposal would be strengthened by slotting it into reformed planning and consenting legislation."

6. The fundamental question prompted by LDAC's concerns is whether:

   - broader integrated reform can solve the problems on its own, by producing a general urban development system that is sufficiently supportive of complex development projects (at the same time as it addresses all other planning and development issues)

   - even if general reform goes ahead, future legislation would still require within it a more enabling approach to support complex development projects.

Feedback from stakeholders

7. In their submissions on the previous Government's discussion document, territorial authorities were wary of the added layer of complication that new legislation could bring to the statutory environment in which they operate. They were concerned at the upskilling their staff would need to undertake and the resourcing implications that this would have for their operations.

8. Local government also expressed concern at the potential for the proposed legislation to undermine established regional strategies for growth and development that had been developed in consultation with their communities.

9. That said, the only local authorities that opposed the concept of the proposed legislation were the Auckland local boards. Otherwise, nearly all city and district councils and their associated bodies supported the overall proposal, including Local Government New Zealand (provided that local government has a veto over proposed development projects).[14]

10. The high level of support was reflected across the written submissions as a whole, with most of the 112 organisations who submitted indicating support for the concept, including other

[14] The only district councils that did not support the proposed legislation were neutral rather than opposed (Masterton District Council and officials from Taupo District Council).

key stakeholders such as the Property Council, Infrastructure New Zealand and the Planning Institute.

11. The positive tone of those submissions builds on the support the concept has generated for more than a decade. The previous Labour Government took the first steps towards this type of legislation in 2006, eventually culminating in the 2008 discussion document, *Building Sustainable Urban Communities* that advocated for this general approach. The Productivity Commission identified similar issues in its report on *Using Land for Housing*. To better enable urban development, the Commission recommended that the Government enable particular development projects to operate with different powers and land use rules.

Context

12. Currently, the assumption underlying the statutory environment in New Zealand is that one general system can appropriately cater for all circumstances. That means strategically important urban development projects of national significance are governed by the same decision-making settings as a backyard subdivision.

13. When faced with the same issue, comparable countries such as Australia and the UK have enacted legislation that treats complex or strategically important projects as special cases and gives them access to their own legislative framework and processes. These processes are separate from those that apply to development in general (albeit that they still form part of the overall statutory environment for urban planning and development).

14. The overseas comparisons point to the struggles a single planning regime has with striking the right balance in all cases and the benefits of applying different frameworks and processes to different types of development, including a more enabling approach for complex development projects.

15. Inherent to the approach taken in Australia and the UK is the necessity of an additional layer within the urban development system, together with the greater complexity this entails. That is the trade-off those jurisdictions have made to get a more flexible statutory environment for urban planning and development.

Conclusion

16. We consider that two main factors point to the need for new legislation. These are local experience with the problems of a "one-size-fits-all" urban development system that is governed by a range of different statutes, and overseas experience with solutions that provide a different regime for complex or strategically important development project.

17. We agree with LDAC that such new legislation will introduce an additional layer to the statutory environment that may generate further complications. However, we consider that the risk of further complicating the development system is outweighed by the benefits, particularly the fact that <u>within</u> a project area the statutory environment would be simplified by the proposed legislation. The level of support the concept has generated, both in submissions to the recent discussion document and over the previous decade, suggests that most stakeholders agree.

Annex 3: Detailed descriptions of options for territorial authority involvement in development projects

Option 1: Territorial authority's prior agreement to the project is required

1. The prior agreement of the territorial authority would be required before a development project can be established. That agreement cannot later be withdrawn; but without agreement, the project could not progress. The parties would need to agree the strategic objectives and boundaries of the project.

2. This is a partnership approach based on close collaboration and joint agreement between territorial authorities and the Housing Commission. It would emphasise thorough joint-planning and identification of projects, then allocation of roles and responsibilities. This approach is based on the assumption that agreement and commitment can be reached (and maintained) in good faith between territorial authorities and the Housing Commission.

Option 2: Territorial authority's prior agreement to the project is required, but with central government override

3. The legislation would require central government to take all reasonable endeavours to secure the territorial authority's prior agreement to establish the development project, but would reserve a power for central government to proceed anyway, perhaps setting tighter criteria before that reserve power can be exercised. For example, the project could be required to meet a national public benefits test and justify the funding of any costs incurred by the territorial authority as a result of the development. Territorial authorities could not be obliged to fund the infrastructure for a project is has not agreed to.

4. The default requirement would be to secure the prior agreement of both parties. This approach would still emphasise the desire for partnership and collaboration. But the reserve power would effectively ensure that the territorial authority cannot veto the project for the wrong reasons.

Option 3: Prior agreement to a city-level agreement, with or without central government override

5. Rather than seeking the territorial authority's prior agreement for each separate development project, the legislation would seek agreement between the parties at a city (or district) wide level. The agreement could stipulate the wider strategy for urban development in the city and the contribution that each arm of government will make. Development projects could be identified generically or at a high level, without the same need to agree the strategic objectives and boundaries under options one and two.

6. The advantage of seeking a more general agreement is that it would be less likely to attract the local opposition that can be expected to discrete geographic projects. There would also be the opportunity for central government to offer wider incentives as part of the agreement that go beyond the more enabling development powers. This could also help to overcome local concerns. For example, the potential to include commitments to regional economic development drawn from the $1 billion annual fund could overcome more specific opposition to any one development project (but would first need to be discussed with the Minister for Regional Economic Development).

7. Under this option, there would be the same sub-options as in options one and two:

   - to prevent any development project from progressing unless and until a city-wide agreement has been secured (i.e. a territorial authority veto, but at a wider level); or

   - to require central government to seek a city-wide agreement, but enable it to progress a particular development project despite being unable to secure that agreement, perhaps in more restricted circumstances.

Option 4: Project-specific consultation and consideration, but no agreement required

8. Central government would be required to consult and collaborate with the territorial authority regarding a proposed development project and give particular consideration to any concerns that are expressed. But there would be no need to seek the territorial authority's prior agreement.

9. Like the previous approaches, this is also partnership-based. However, instead of requiring or at least seeking the territorial authority's agreement, the Government could automatically proceed to establish the development project, provided it had given proper consideration to the territorial authority's concerns.

10. Without any need to secure the territorial authority's support, this option would raise the difficult issues with respect to funding and providing key infrastructure noted above. Development projects that do not need additional or upgraded infrastructure capacity would be able to progress. But those projects that depend on additional capacity from the wider network will effectively require the territorial authority's prior support, regardless of whether or not that is a formal requirement of the legislation.

Option 5: Central government proceeds without any requirement for consultation or collaboration

11. Central government could establish a development project without any need to consult or collaborate with the territorial authority in advance.

12. This approach is different, as it lacks any emphasis on collaboration or partnership with the territorial authority. It implies that territorial authorities would either not be involved in the project or their involvement would be directed and controlled by the Housing Commission.

13. Even under this option, the Housing Commission would be reliant on the territorial authority's infrastructure networks. Thus, the same effective veto power would arise, at least for the larger projects. It means that the need for collaboration and partnership is essentially inherent to the nature of these development projects. In effect, it is not really possible to pursue these developments without seeking to establish and maintain a positive and constructive working relationship with the territorial authority from the outset. Yet, while that need may be as great as under Option 4, simply by omitting that requirement from the legislation it is likely to be more difficult to secure that relationship.

Annex 4: Detailed analysis of options for when development projects should access development powers

Option 1: no requirement for central government to delegate the development powers.

1. Instead, they are automatically available to each development project that meets the eligibility criteria and is established under the legislation. However, none of the powers could be deployed immediately. Instead, the Housing Commission would need to choose which powers it thought it would need to achieve the strategic objectives of the development project and then propose how it would use each power in the draft development plan that it publishes for public consultation. Ultimately, the Minister's approval of the final development plan would also effectively include the Minister's approval of the development powers that are being used for the project. This is the approach taken by equivalent legislation overseas.

Option 2: the establishment process would include a requirement that central government delegate the development powers it wishes to make available to the project.

2. This would happen as part of the formal legal mechanism by which the development project is established and empowered, likely to be an Order-in-Council signed by the Governor-General.

3. There would be a requirement for the Order to itemise which powers are delegated, with further options regarding how detailed the delegation can be (ie whether the legislation only permits a choice to delegate all or none of the powers to provide infrastructure, or if it permits a choice to grant a power to provide roads separately from a choice to grant a power to provide sewer pipes etc). The result would be that, when the Housing Commission prepared its draft development plan for a particular development project, it would be restricted to using only the powers that have been delegated to that project.

4. In both options, therefore, central government would approve the powers that are delegated. The difference is timing. Under Option 2, the decision regarding which powers are available is made <u>before</u> the development plan is prepared, whereas in option 1 the decision is made <u>after</u> the development plan has been prepared. But in neither case could the development powers be exercised until after the development plan has been approved by the Minister.[15]

Assessment

5. Specifying the powers for each project when it is established (**Option 2**) creates the ability to tailor the legislation to the needs of the project. There are two principal advantages. First, it provides a check against the unnecessary use of far-reaching powers. If a development project does not need to change any roads, then it does not need access to a power with which to do so.

6. Secondly, Option 2 potentially provides a means with which to win community support for the project. The public will view a proposal that only seeks development powers for, say, infrastructure provision quite differently from a proposal for a development project that has access to all of the development powers.

Anticipating what powers are needed

7. However, it may not be possible to anticipate all the development powers that might be needed in advance of preparing the development plan. While it will be apparent that certain powers are required at the outset, it may not become obvious that other powers are needed until much later in the planning process.

[15] The main exception would be powers of compulsory acquisition, which would not need to wait for the development plan to be approved to be used. But even in this case prior Ministerial approval would still be required before the powers could be used; it is just that it would be the Minister for Land Information's approval that would be needed, rather than the approval of the Minister responsible for the Housing Commission.

8. Under Option 2, therefore, it would be necessary to include a mechanism through which the Housing Commission can go back to the Government to ask for additional powers that were not granted the first time. This would add further delay. It would also undermine community confidence in the original proposal. (The public will view a proposal that only seeks development powers for infrastructure provision quite differently from a proposal that only seeks those powers to begin with, but has the ability to seek further powers at a later date.) Yet it would undermine the purpose of the legislation if there was no mechanism for adding additional powers that later work shows are needed.

9. Under Option 1, no central government time is required to identify the powers at the outset or to change them later. Instead, the Housing Commission does that work as a matter of course during its preparation of the development plan. It also does that work in consultation with the community, as part of its consultation on the draft plan.

Complexity

10. A third key difference between the options is the potential length and complexity of the Order-in-Council, which would have to specify the development powers under Option 2, but not under Option 1.

11. If the choices are limited to higher level ones and the legislation includes a prescribed template with boxes to check for each power, then the Order would still be reasonably straightforward. But if the aim is to tailor the powers to the project with greater specificity, that would require the legislation to enable choices at a detailed level and perhaps to give central government the discretion to add project-related conditions to the use of each power. In that case, the Order under Option 2 becomes increasingly long and complex and thus more difficult for the Housing Commission to implement.

Risk of judicial review

12. Option 2 requires the Minister to make an additional decision that is not required under Option 1. Combining the approval of the development powers with the approval of the development plan under Option 1 means there is only one decision that can be challenged. In contrast, requiring the Minister to specify the development powers to be included in the Order-in-Council creates the need for an additional decision. Given that the legislation would need to include a framework for this decision, it increases the potential for judicial review.

13. That risk can be managed to some extent by design choices for the decision-making framework (meaning what factors need to be considered in choosing which powers to delegate). The less prescriptive the framework, the less risk there is of judicial review. However, the less prescriptive the framework, the less effective this step would be as a check on the use of the powers.

14. The purpose of requiring the Minister to decide which powers are needed on a case-by-case basis would be to ensure that unnecessary powers are not available. To be effective, therefore, the framework for making that decision would need to require the Minister to be satisfied that each power is required to realise one or more of the strategic objectives of the development project. As that is a more prescriptive framework, it would increase the risk of judicial review compared to Option 1.

15. Yet it is unlikely that Option 1 provides any less protection against the misuse of the powers, as the Minister would effectively still be deciding whether the Housing Commission has made wise choices about which of the powers to deploy.

Public consultation

16. If the Minister is going to select which powers to delegate (Option 2), then there would be a strong case for consulting the public prior to making that decision, at the same time as consulting on the strategic objectives and proposed boundaries of the project area. This

process would involve identifying the powers required as part of the initial assessment of a potential project, then proposing them to the public in that first round of consultation. The Minister could then make final decisions on the powers in light of public feedback.

17. However, there is a risk that the public will not be able to weigh the benefits of the proposed powers when they are not attached to particular plans. In the abstract, for example, a proposal to grant the power to stop and move roads, without specifying which road will be stopped, risks attracting opposition because the public may consider that the power could be applied to all roads in the development project area. In contrast, when the proposed use of the powers is illustrated in the recommended development plan, the public will be able to see which road the Housing Commission is proposing to change and so be better able to weigh the costs and benefits of that proposal and thus make more informed submissions on the plan.

18. Of course, the same risk applies under Option 1. If all development powers are theoretically available, then the risk the public will focus on is that the powers could be used anywhere in the project area. That risk is likely to generate opposition to the establishment of the development project, which is why ruling out some powers could be advantageous to winning public support.

19. Nevertheless, there is a difference in emphasis between the options. Option 2 would draw the public's attention to the proposed powers by explicitly consulting on them. Option 1 would acknowledge the full range of powers that could potentially be used, but emphasise that none of them can be used until after a further round of public consultation on the content of the development plan.