



## BRIEFING

### Urban Development Legislation: Resource Management Planning and Consenting

<b>Date:</b>	21 June 2018	<b>Priority:</b>	Medium
<b>Security classification:</b>	In Confidence	<b>Tracking number:</b>	MBIE: 3818 17-18 MfE: 2018-B-04579

Action sought		
	Action sought	Deadline
Hon Phil Twyford <b>Minister of Housing and Urban Development, and</b>  Hon David Parker <b>Minister for the Environment</b>	Review the draft Cabinet paper and indicate any changes	26 June 2018

Contact for telephone discussion (if required)				
Name	Position	Telephone		1st contact
Di Anorpong	Manager, Urban Development Policy (MBIE)	(04) 901 8743	s 9(2)(a)	X
Chris Worth	Senior Policy Advisor (MBIE)	(04) 901 8735		
Lesley Baddon	Director, Urban and Infrastructure (MfE)		s 9(2)(a)	X
Rhedyn Law	Senior Analyst (MfE)		s 9(2)(a)	

The following departments/agencies have been consulted
The Treasury, Department of Internal Affairs, Land Information New Zealand, Department of Conservation, Ministry of Transport, New Zealand Transport Agency, Te Puni Kōkiri, Office of Treaty Settlements, Ministry of Justice, Ministry of Education, State Services Commission, Ministry for Primary Industries, New Zealand Defence Force, Heritage New Zealand, Pouhere Taonga, Ministry of Culture and Heritage, Ministry of Health, Housing New Zealand Corporation, Transpower New Zealand, Fire and Emergency New Zealand, and Parliamentary Counsel Office were consulted on the Cabinet paper to which this briefing refers. The Department of Prime Minister and Cabinet was informed.

**Minister's office to complete:**

☐ Approved

☐ Declined

☐ Noted

☐ Needs change

☐ Seen

☐ Overtaken by Events

☐ See Minister's Notes

☐ Withdrawn

**Comments**



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#### Purpose

This joint briefing accompanies a draft Cabinet paper which sets out the planning and consenting policy for Urban Development Authority (UDA) developments (Annex 1). It is the third in a series of four Cabinet papers on detailed policy proposals for the UDA legislation.

This briefing also provides advice on a number of aspects left undecided following your meeting on 8 May 2018 on the Ministry of Business, Innovation and Employment (MBIE) briefing note (1307 17-18 *Housing Commission Legislation – Planning and Consenting Issues*). This advice is reflected in the recommendations of the draft Cabinet paper.

#### Recommended action

We recommend that you:

- a. **indicate** any changes you want to make to the draft Cabinet paper. We will need these by 26 June so it can be circulated for ministerial and cross-party consultation on 29 June
- b. **note** that Cabinet authorised the Minister of Housing and Urban Development and the Minister for the Environment [CAB-18-MIN-0243 paragraph 18 refers] to determine the manner and extent of any appeal rights on points of law, and to issue drafting instructions to the Parliamentary Counsel Office accordingly
- c. **agree** that, notwithstanding the authorisation provided by Cabinet mentioned above, because appeals are integral to the whole process of decision making for urban development projects, the proposed approach to planning, consenting and appeals is included in the draft Cabinet paper. For appeals this is as follows:
  - i. points of law appeals to the High Court on the development plan be allowed, but any further appeal on points of law be limited to the Court of Appeal  
*agree/disagree*
  - ii. merit appeals to the Environment Court be allowed for decisions on resource consents, notices of requirement, designations and heritage orders, with any points of law appeals being limited to the High Court  
*agree/disagree*
- d. **note** that Minister Twyford's office has directed officials to consult with Local Government New Zealand (LGNZ) in the development of the UDA policy proposals, although the specifics of consultation are yet to be finalised
- e. **note** that we may make further changes to the draft Cabinet paper to incorporate final departmental comments and any LGNZ comments to address minor technical issues and inconsistencies, and for readability

- f. **note** that we will provide you with a final Cabinet paper on Thursday 26 July for lodging with the Cabinet Office
- g. **indicate** if you would like to discuss the draft Cabinet paper with officials.

yes/no

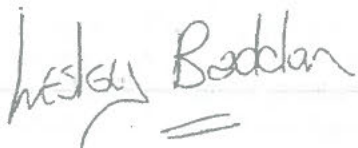


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**Manager, Urban Development Policy**  
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Hon Phil Twyford  
**Minister of Housing and Urban Development**

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Lesley Baddon  
**Director, Urban and Infrastructure**  
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Hon David Parker  
**Minister for the Environment**

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## Advice

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1. You have requested that we provide you with further advice on some planning and consenting issues that were left undecided at your meeting on 8 May 2018. This section of the briefing note contains advice on:
  - a. assessing the efficiency and effectiveness of proposed development plans
  - b. rights of appeal against both the development plan and consenting decisions
  - c. the use of “particular regard” in considering local government views.
2. This section also provides our advice on consenting functions and processes within the project area. This is informed by further analysis undertaken by officials since the meeting on 8 May 2018 and differs slightly from advice provided to you in MBIE’s briefing (1307 17-18 *Housing Commission Legislation – Planning and Consenting Issues*).

### How to assess the development plan for efficiency and effectiveness

3. Cabinet has agreed that the UDA must provide an assessment of the efficiency and effectiveness of any proposed rules on land-use and the management of environmental effects in the project area [CAB-18-MIN-0243 paragraph 48.11.1 refers]. This assessment must accompany the draft development plan as part of consultation and becomes one of the matters that the independent hearing panel and the Minister must consider when recommending and deciding on a development plan. You have requested that we provide you with further advice on how this assessment should occur.
4. We recommend using the requirements for the evaluation of plans under the Resource Management Act 1991 (RMA) as the basis for this assessment. This is because we consider this approach to be the most appropriate for the UDA, given the comparable impact that development plan provisions will have on land-use and the environment within the project area.
5. We therefore recommend the UDA be required to evaluate the efficiency and effectiveness of the development plan to achieve the purpose and principles of the proposed UDA legislation and the strategic objectives of the development project (rather than the RMA). The scale of the assessment must be sufficient to show that the project aligns with the purpose of the UDA legislation, and to demonstrate that the plan can achieve the strategic objectives effectively and efficiently. It must also demonstrate consistency with RMA national direction. This advice is reflected in **recommendations 31 and 32** of the draft Cabinet paper.

### Rights of Appeal

6. Cabinet has agreed that there should be no merit appeals on the Order in Council establishing the development project or on the content of the development plan, and that judicial review rights will be retained. Cabinet has also directed officials to provide further advice on whether to retain appeals on points of law and, if so, to what extent any limitations should apply [CAB-18-MIN-0243 paragraphs 15-17 refer].
7. This section provides the above advice, as well as advice on appeal rights for consenting decisions, designations, notices of requirement, and heritage orders.

#### *Appeals against the development plan*

8. You have been authorised by Cabinet to determine the manner and extent of any appeal rights on points of law, and to issue drafting instructions to the Parliamentary Counsel Office accordingly [CAB-18-MIN-0243 paragraph 18 refers].

9. We recommend retaining points of law appeals to the High Court on the land-use planning components of the development plan but limiting any further appeals to the Court of Appeal. The advantage of this approach is that, as time limits can be set within which points of law appeal rights must be exercised (the RMA provides for 15 working days), it is generally more expeditious than a judicial review process. Limiting further appeals to the Court of Appeal provides greater certainty to the UDA, and reduces the risk that the development plan is held up for an extended period while appellants challenge decisions up through the court hierarchy.
10. We recommend that judicial review of the development plan should only be available once points of law appeal rights have been exhausted. This advice is consistent with existing RMA processes and is reflected in **recommendation 78.3** of the draft Cabinet paper.

*Appeals against consent decisions, designations, notices of requirement and heritage orders*

11. We recommend retaining merit appeals to the Environment Court for consenting decisions, designations, notices of requirement and heritage orders. This is consistent with natural justice principles which advocate against infringing on appeal rights for decisions which may impact on an individual person's rights. Under this approach, applicants, the UDA and submitters (in the event that a consent is notified) will be able to appeal these decisions on their merits. Any further appeal on these decisions will be confined to points of law and limited to the High Court.
12. We consider that this approach mitigates the risk of undue cost and delay. There is currently a very low rate of appeal against RMA consent decisions (between 2014 and 2016 approximately 0.3% of consent decisions were appealed). We recommend the risk of appeal be further mitigated by:
  - a. ensuring that development plans provide for an appropriate level of development without the need for resource consent, and enable consents to be non-notified
  - b. requiring an applicant to exercise any right of objection process provided in the RMA before a merit appeal is available. A right of objection provides for matters to be resolved outside of the courts with less associated cost and delay.
13. We consider the above approach provides for sufficient due process, while providing a level of certainty to the community, iwi, the UDA, and developers. We have discussed these proposals with Ministry of Justice officials who are generally comfortable with our recommended approach. This advice is reflected in **recommendation 78** of the draft Cabinet paper.

**The use of 'particular regard' in considering local government views**

14. At your meeting on 8 May 2018, you requested further advice on the implications of requiring the UDA to have 'particular regard' to the relevant councils' (territorial authorities and regional councils) views on environmental matters when conducting the initial assessment of a proposed development project and when preparing a draft development plan.
15. The phrase 'particular regard' has a specific meaning and established jurisprudence in the RMA. For the proposed UDA legislation it would impose an obligation for the UDA to carefully consider councils' views in the course of making a decision and to weigh them up with all other relevant factors, but does not require that actual provision be made for them. This would give the views of relevant councils comparable weighting to some matters in the principles of the UDA legislation. We consider that this is an appropriate weighting for the views of the relevant councils who will be significantly impacted by these proposals. This advice is reflected in **recommendation 100** of the draft Cabinet paper.



## Consenting

### *Who grants consents under a development plan?*

16. Ministers have suggested that the UDA should have consenting powers, duties, and functions for activities taking place within the project area. For the reasons outlined below, we recommend drawing a distinction between the consenting powers, duties and functions exercised by territorial authorities and those carried out by regional councils.
17. We recommend that the UDA be granted the consenting powers, functions and duties usually exercised by territorial authorities. These include district plan consenting, compliance, monitoring, enforcement, recommendations on notices of requirement for designations and heritage orders, and the processing of consents required by national environmental standards with district application. This would provide for efficient and coordinated decision making as other development functions (such as the provision of infrastructure) are also being directed by the UDA. This advice is reflected in **recommendations 38, 47, 85, and 95** of the draft Cabinet paper.
18. We also recommend providing for the UDA to delegate these powers, duties and functions to the territorial authority or to independent commissioners in situations where the UDA does not have the necessary capacity, expertise or independence to do it itself. In situations where the UDA is the applicant, we recommend that this delegation be mandatory to ensure independent decision making and avoid any conflict of interest. This advice is reflected in **recommendations 44 and 45** of the draft Cabinet paper.
19. We recommend that regional councils retain the consenting powers, duties and functions that they normally exercise. This advice is reflected in **recommendation 46** of the draft Cabinet paper. The reasons for this are:
  - a. the effects of activities managed by regional councils are unlikely to be confined to the project area and we consider it more appropriate for regional councils to be making these decisions
  - b. activities requiring regional consents will often affect the whole project area and it is likely that the UDA will be the applicant on a large number of these consent applications. In these instances the UDA would be required to delegate the consenting function to avoid any conflict of interest, meaning that regional councils would be processing the consents anyway
  - c. the UDA is unlikely to possess the technical expertise, data sets, and monitoring capabilities required for issuing regional consents
  - d. retaining compliance, monitoring, and enforcement responsibilities enables regional councils to continue to use the data collected to inform future plan amendments, and manage environmental systems, including water quality.
20. There is a risk that regional councils may lack the capacity or expertise to undertake consenting processes at the scale and pace needed for the urban development project. We therefore recommend that regional councils are able to transfer or delegate their consenting powers, duties and functions to the UDA.

### *What is the consenting process?*

21. Subject to the changes outlined below, we recommend that any consent required for an activity within the project area should be processed as a resource consent under RMA sections 104 to 108. These provide a familiar decision making framework based on the environmental effects associated with the proposal being considered, as well as the plans and policies that apply to the area. This approach retains existing procedures and

jurisprudence, reducing the likelihood of legal challenge. This advice is reflected in **recommendation 9.6** of the draft Cabinet paper.

22. We recommend that some changes to the RMA consenting process would provide greater certainty, efficiency and consistency within the urban development project area. These changes:
- a. require all consenting decisions to be consistent with the purpose and principles of the UDA legislation and achieve the strategic objectives of the development project. This will ensure that the intent of the UDA legislation is reflected in consenting decisions. This advice is reflected in **recommendations 9.4 and 9.5** of the draft Cabinet paper
  - b. provide a streamlined consenting process for controlled and restricted discretionary consent applications. Consent processes would be truncated under this framework to ensure that consenting decisions do not unduly hold up implementation of the development. For more complex discretionary and non-complying consent applications, the existing RMA consent processes would apply. This advice is reflected in **recommendations 59 – 75** of the draft Cabinet paper. Further detail on the consenting process is provided in **paragraphs 63 - 65** of the draft Cabinet paper.

*How is the granting of consents monitored?*

23. The RMA requires local authorities to report on all consenting and notification decisions. We recommend extending this to apply to the UDA. Also, the Minister for the Environment can require local authorities to supply the Ministry for the Environment (MfE) with information on their functions, powers and duties. We recommend enabling the Minister for the Environment to require the same provision of information from the UDA. This will allow MfE to monitor both how the consenting process is functioning under the UDA legislation and whether the UDA's objectives are being met, and make these evaluations publicly available through the National Monitoring System. This advice is reflected in **recommendation 50** of the draft Cabinet paper.

## **Brief summary of proposed powers in the draft Cabinet paper**

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24. The proposals in the draft Cabinet paper reflect Ministers' decisions on briefings, and direction from Ministers' meetings on planning and consenting. They also reflect the further advice outlined above on undecided issues. Following Ministers' decisions, we have made various technical modifications based on further analysis, comments from other agencies and to ensure consistency.

### **The UDA has powers to override RMA planning documents**

25. Development plan provisions can override, add to, or suspend existing planning provisions (district plans, regional plans, and regional policy statements) in order to realise the strategic objectives of the development project. However, for development plans to achieve the project's strategic objectives, they will need to integrate with existing planning provisions established under the RMA. The draft Cabinet paper proposes to achieve integration through ensuring that development plans are easy to use, interact well with the existing system, and protect environmental bottom lines.
26. Therefore :
- a. development plans must be consistent with national direction set under the RMA
  - b. protections will remain for significant built and natural heritage



- c. development plans will integrate with district and regional plans in a manner that will enable councils to continue business as usual without negatively impacting the development plan
- d. the UDA will be required to produce an efficiency and effectiveness report which accompanies the draft development plan. More detailed advice on this proposal is provided in **paragraphs 3-5** above
- e. transitional provisions will be put in place to provide for the dis-establishment of the development plan as the development project is completed. Land-use consents granted under the development plan may be retained in perpetuity. Other consents and permits that contain expiry dates will continue to be valid until that expiry date is reached.

### **Additional weight to be given to consultation with local government**

- 27. The UDA must consult with regional councils and territorial authorities as part of the initial assessment of a proposed development project, and when preparing the draft development plan and have particular regard to their views. More detailed advice on this proposal is provided in **paragraphs 14 and 15** above.

### **The UDA has powers to exercise some territorial authority RMA functions within the project area**

- 28. Within the project area, the UDA may undertake responsibilities usually held by territorial authorities under the RMA. The development plan will set out the functions and powers the UDA will exercise, which may include:
  - a. granting resource consents under the development plan, district plan, and under national environmental standards
  - b. compliance, monitoring and enforcement of consents issued by the UDA
  - c. miscellaneous administrative functions in support of the above two functions.

### **The UDA will have powers over designations within the project area**

- 29. Within the project area, the designation powers and functions<sup>1</sup> in the RMA will be modified. The key proposals are:
  - a. the UDA will have powers to alter, remove or replace exiting designations with the designating authority indicating if it wishes these to be retained. Confirmation of roll-over or removal of the designation may only occur with ministerial approval
  - b. any new designation will be directed to the UDA which will have the power to approve or decline that request. The UDA will also have the right to issue and make recommendations on heritage orders to heritage protection authorities who will make a decision
  - c. nationally significant infrastructure, such as the national grid, will be exempt from the powers set out above. For these authorities, existing designations will not be affected and the provisions of the RMA will continue to apply. Any new notices of requirement for a designation will be considered and recommended by the UDA.

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<sup>1</sup> The establishment of notices of requirement for public works such as power transmission, roads, water and sewage reticulation.



### **All consenting decisions must be made in accordance with the new legislation**

30. All decisions on resource consents within the project area must be in accordance with the purpose and principles of the new legislation and the project's strategic objectives, and be consistent with national direction.

### **The UDA will have new streamlined resource consent, subdivision and land amalgamation processes**

31. Development plans for the development project areas will be more enabling of the desired activities with a focus on controlled and restricted discretionary activities.
32. Resource consenting under the development plan will follow a truncated process for controlled and restricted discretionary resource consents. More complex discretionary and non-complying consenting decisions will make use of the processes set out in the RMA. More detailed advice on consenting is provided in **paragraphs 16-23** above.

### **Appeals will be limited**

33. More detailed advice on appeals is provided in **paragraphs 6-13** above. The key proposals are:
- a. appeals on the development plan will be limited to points of law appeals to the High Court, with further appeals limited to the Court of Appeal
  - b. merit appeals to the Environment Court will be retained for applicants, the UDA and any submitters (where a consent is notified) on resource consents, designations, notices of requirement and heritage orders. Further appeals on points of law will be limited to the High Court.

### **Transitional powers between project establishment and development plan approval**

34. We propose that the UDA have powers of veto over any activity within the project area that could prevent or hinder the strategic objectives being met for the period between the establishment of the development project by Order in Council and the development plan becoming operative. This will ensure that the overall development is not compromised by a newly established activity.

### **The UDA can use existing RMA processes**

35. In addition to the suite of powers provided for by the development plan, the UDA will have the ability to use all the existing provisions of the RMA as if it were a natural person.

### **Next steps**

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36. Following receipt of any comments from you by 26 June, officials will amend the Cabinet paper so that it can be circulated for ministerial and cross-party consultation on 29 June.
37. Provide feedback from other Ministers to officials by 23 July so that content can be refined for the final Cabinet paper which will then be lodged on 26 July in time for DEV (1 August).
38. Further Cabinet papers will be provided on:
- a. Māori interests and the Crown / Māori relationship (joint paper by Ministers Davis and Twyford)
  - b. Organisational issues (joint paper by Ministers Twyford and Parker) including matters on entity form and structure, financing, and local government and Māori representation.

## Remaining Cabinet papers

<b>Cabinet paper 3B</b> Māori interests and the Crown / Māori relationship	<ul style="list-style-type: none"><li>• Draft to Ministers 27 June</li><li>• Final to Ministers 31 July</li><li>• Lodged with Cabinet Office 2 August</li><li>• DEV 8 August</li><li>• Cabinet 13 August.</li></ul>
<b>Cabinet paper 4</b> Organisational issues	<ul style="list-style-type: none"><li>• Draft to Ministers on 16 August</li><li>• Final to Ministers on 11 September</li><li>• Lodged with Cabinet Office 13 September</li><li>• DEV 19 September</li><li>• Cabinet 24 September.</li></ul>

## Annexes

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Annex 1: Draft Cabinet paper



## **Annex 1: Draft Cabinet paper**

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Draft Cabinet paper: Urban Development Legislation: Resource Management Planning and Consenting

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