

New Zealand Productivity Commission

Project: Legal issues in the New Zealand planning system 2017 Report by Dr Kenneth Palmer

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New Zealand Productivity Commission

Separating regulation of the built and natural environments – legislative options

Dr Kenneth Palmer

Working paper

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Introduction

The New Zealand Productivity Commission has released a draft report “Better Urban Planning” August 2016 (the BUP Report). In relation to a future planning framework, the Report raises an issue still to be resolved being a “legislative separation of planning and environmental protection”.¹

The primary purpose of the present working paper is to provide legal advice on the separation of regulation relating to the built and natural environments.

The project addresses four questions:

- What are the key legal issues and challenges associated with separating regulation of the built and natural environment? How are these issues and challenges best addressed?
- From a legal perspective, what are the pros and cons of the alternative legal structures identified in the Commission’s draft report (pp. 339-340)?
- What changes to the LGA and LTMA would be required to complement the new legal structure and create an integrated and effective body of law to underpin management of the built and natural environments?
- What is the likely impact of reform on jurisprudence established under the RMA 1991? How could the lessons from existing jurisprudence be reflected in new legislation?

Executive Summary

Key legal issues

1. A more flexible approach by local authorities in prescribing zoning rules and performance standards under plans, and through consents, related to effects on neighbours and the environment, could promote work efficiency and higher density developments, mitigate transport needs, and enable improved community wellbeing. [1.5]

¹ New Zealand Productivity Commission *Better Urban Planning – Draft report* (August 2016), 13.7.

2. As a proposition, identified in the Better Urban Planning, Draft Report, at table 13.1, that a future planning system could contain planning legislation which distinguishes between the natural and urban environment, it is appropriate to further reflect on the evolution of recognition of the environment, and the existing definitions as to the meaning or content of the term environment. [1.6]
3. An interim observation can be made that ranging from the environment definitions in the Environment Act, the RMA, EPA, up to the EEZ 2012 legislation, the assessment of activities and development in rules or in consent applications includes an integrated approach to regulation of both the built and natural environments. [1.6]
4. Another observation is that each Act has, in a dated manner, a tailor made purpose and appropriate definitions. In respect of any future legislative model, an element of consistency will be relevant but the purposes and structure of the legislation should be updated and reflect contemporary sustainable objectives. [1.6]
5. Under the Environmental Reporting Act 2015, the Minister for the Environment and the Minister of Statistics are responsible for systematic publication of synthesis reports on New Zealand's environment, and other domain reports covering five domains. The domains include the land domain. The obligations do not specifically identify the nature and extent of the built environment, and residential capacity as a relevant matter. Any revision of the planning law may require amendments to the reporting obligations to ensure that information is available on housing needs and urban capacity, especially if land release triggers are introduced. [1.6]
6. Regional councils and territorial authorities could differ on sustainable management objectives, especially in respect of the mandate given to regional councils to state in the policy statement the "significant resource management issues for the region". The most prominent points of difference have occurred in the determination by regional councils to set urban boundaries limiting the discretion of district councils to make plan changes or grant consents to accommodate housing needs. [1.7]
7. The bundling together of objectives for land, air and water regulation under ss 6 (matters of national importance) and s 7 (other matters) has been confusing and lacking in clarity. Many plans set out the content of the sections without any analysis or distinction between the application of the various matters in relation to policy, and plan rules. Further the single primary section for assessing resource consent applications (s 104) lacks focus and direction as to outcomes in the respective areas, and conflates the natural and built environment objectives. [1.7]
8. Regarding the identification of the built environment against the natural environment, the evolution of definitions indicates that at a pragmatic level, the inclusion of the built environment as part of the natural environment is the conventional solution, to minimise any problems of demarcation or omission from the environment definition....However, with effective definition, cross reference and recognition of other consequential factors, separate and complementary objectives for the built and natural environments could be maintained in legislation. [1.7]
9. The built environment is identified in an oblique manner under RMA s 5 in enabling people and communities to promote social, economic, and cultural wellbeing. The matters of national importance are predominantly relevant to the protection of the natural and heritage environment and do not comprehend the built environment other than in a negative manner. [1.8]
10. An economic approach is implied, as a matter to have particular regard to, under s 7(b) "the efficient use and development of natural and physical resources". That matter has been submerged in the other more prolific considerations of natural environment, and cultural protection. [1.8]

NPS and NES

11. Most council plans include detailed rules covering building height, boundary and yard setbacks, private outdoor space stipulations and site coverage, and do not attempt to specify building design, leaving design to personal choice of the developer and architectural preference. The Auckland Council has provision for voluntary referral of major commercial buildings to a non-statutory design panel. This degree of broad guidance appears to work adequately, especially where developers desire to collaborate with the council officials to facilitate the granting of non-notified consents. [1.9]
12. A point can be made about the national environmental standards which have a primary natural environment focus, and the national policy statements that tend to be more focused on the built environment, as to how practicable a separation of the built and natural environments will be in respect of those documents and regulatory functions. [1.9]

Resource consents

13. The regulatory structures of the RMA, contained essentially in ss 9-15, advance the premise that unless a regional or district plan allows an activity as a permitted activity, the activity can only proceed lawfully if a resource consent is obtained. Amongst those particular sections, there is an interesting variation of presumptions at the primary control level. [1.10]
14. The process to ensure that each of the possibly five different types of consents are assessed under a one-stop approach, and an integrated hearing where all the development cards are on the table, is an issue and challenge which needs to be considered if there is to be a separation of regulation of the built and natural environment. In principle, either a single resource management law with separate objectives for the natural and built environments, or separate planning and natural environment laws, could continue to be administered within the same one hearing parameters. [1.10]

Government policy statement option

15. The scope of the GPS would appear to encompass both natural and built environment aspects, and this combination of coverage would need to be assessed and reviewed if there was a separation of regulation of the built and natural environments. No doubt a GPS could cover both aspects, so the GPS would be a document to have regard to under either a combined or a separated regulatory system. [1.11]
16. Presently the NES's and NPS's cover a number of specific areas and have the benefit of informing local authorities as to minimum standards of expectation and performance, and entitlements for development which may proceed without any restriction at the local authority plan level. In principle a GPS could replace the NPS regime, but would not be an appropriate model for setting minimal environmental standards. [1.11]

Spatial plans as a core component

17. An advantage (or disadvantage) of a spatial plan process remaining under the LGA is that it will not be directly subject to any NPS or NES, or template, and no rights of appeal or referral apply. This allows for substantial council policy input, with public comment limited to the special consultative procedure. The form of the spatial plan may be less technical and more user friendly to the community by inclusion of colour plates and creative styling (Auckland Council model). The spatial plan may be useful for promoting the attractions of the region for new economic investment, development and tourism as a "most liveable region or district". [1.12]

18. Where a spatial plan forms a top tier and a mandatory part of the planning hierarchy, the plan should be a regional or unitary council responsibility. In this event, the spatial plan could replace the regional policy statement to avoid duplication of process and issue contestability (Q9.1). The scope and prescribed content of the spatial plan (possibly in a template) should be subject to some flexibility to respond to regional growth and needs. In regions where development or population growth is relatively static, the spatial plan could be in a limited form (of the regional policy statement) to focus on relevant matters that could benefit the region, and to minimise cost. On balance a conclusion is offered that the spatial plan obligation should form part of a new planning law. [1.12]

Pros and cons of alternative structures

19. In respect of the Building Act, a manifest conclusion can be offered that this comprehensive uniform legislation should not be absorbed into a planning law promoting the built environment and related land transport. [2.2]
20. A conclusion is offered that the LTMA presently has an effective system of consultation at the national and regional levels and integration of all land transport planning into a planning law dealing with the built environment, would be of no advantage, and could hinder the leadership role of central government in transportation. [2.3]
21. On the separate planning and natural environmental laws under option B, it is difficult to see any compelling or justifiable case for turning the clock back pre the RMA and reverting to the former separate regulatory statutes. [2.4]
22. Under para 13.6 there is envisaged to be “a presumption in favour of development in urban areas, subject to clear limits”. This desirable type of approach could also be implemented through fine tuning of a resource management law in respect of resource consent applications. [2.5]
23. As an overarching purpose, s 5 with its present definition of “sustainable management of natural and physical resources” could accommodate the sequential focus and refinement of recognising separate objectives to address and promote the built environment, and other objectives to address and enhance the quality of the natural environment. Section 5 could be left intact, or more consistently refocused to read “The purpose of this Act is to promote the sustainable management of the built and natural environments”. Under a replacement of the RMA, the purpose in s 5 could be revised as set out, with new definitions of the “built environment” and “natural environment”.. [2.5]
24. The revision of ss 6 and 7 advanced in 2013, and subsequently withdrawn before introduction into Parliament, did not have the clarity necessary to distinguish between development of the built environment and that of the natural environment. A more consultative approach with local authorities, and with collaboration between other stakeholders, iwi, and political parties, could result in a consensus as to the type of focus required to address the shortcomings identified in the Better Urban Planning Draft Report (ch 13 in particular). [2.5]
25. In respect of a “built environment section” of a refined single resource management law, it would be necessary to provide a definition of the built environment, to encompass the appropriate activities and development to be assessed within the purposes and objectives specified. [2.5]
26. Without going into detail or attempting a draft of a built environment section and a natural environment section, which could be a principled part of a refined single resource management law, the process should be reasonably straightforward from a legal perspective. Ideally, agreement should be reached on respective purposes or principles following consultation with all affected stakeholders and parties, and political agreement achieved. [2.6]
27. The provision for local authority policy and plans to be the subject of determinations by an Independent Hearings Panel, could introduce more consistency and prevent over-regulation

where not substantiated by needs or local circumstances. In establishing an independent hearings panel, it could be necessary to provide for more than one panel or for the panel to sit in divisions, depending on the workload facing the panel. [2.6]

28. The relationship of objectives in the respective built environment and natural environment sections, could be supplemented by regulations or the template requirements which are also envisaged under the pending reforms. [2.6]
29. At the resource consent level, the objectives of the built environment section and natural environment section would have a positive effect. Where a presumption can be appropriately added to the granting of consent, such as in respect of the built environment, it could facilitate approvals. [2.6]
30. On hindsight, the mixture of matters of national importance under s 6, and the other matters under s 7, does not have a rationality, and obscures any focus on the adequacy of management of the built environment. [2.6]
31. In times past, this may not have been a problem with a relatively static population, but with populations in certain parts of the country increasing significantly, and likely to continue to increase at that rate for the foreseeable future, it is timely for the legislative purposes under the RMA to be re-defined. [2.6]

LGA and LTMA changes to complement reform

32. At the present time local authorities may plan for but do not legally have the powers to financially support the whole of the visionary development that may be foreshadowed under the regional and district policy and plan documents under the RMA. The relevant plans could comprise zoning and incentives for business parks, educational facilities, commercial centres, and social housing. The Council does not have the power to finance or construct these developments, where beyond the provision of “local infrastructure” and “local public services”.. [3.1]
33. Assuming that a refined resource management or planning law model is likely to be recommended, the provision of a built environment section and a separate natural environment section, could have only marginal impact on the present functions of local authorities under the Local Government Act, unless intergration is improved. The LGA is primarily an administrative statute, governing the structures of local authorities and management obligations through the long-term plan and annual plan. [3.1]
34. The funding focus of the LTMA, implemented through the New Zealand Transport Agency at the state highways level, and by local authorities at the regional and district levels in relation to subsidies and networks, is significantly different to the wide sustainable management purpose under the RMA and procedures for public submissions. [3.2]
35. In summary, having regard to the purpose, goverance structure, consultation provisions, focus on the national land transport programme, regional land transport plans, regional public transport plans, and funding allocation under the LTMA, the author does not support integration of the LTMA in whole or part into a revised planning law covering the built environment and infrastructure (Option B). Adequate co-ordination of the LTMA with the urban planning process could be achieved by specific cross references in the respective legislation to relevant documents. [3.2]
36. Overall, the historical evolution through different Ministries and ministers, of the RMA, LGA, and LTMA, supports the statement in the BUP Draft Report that “The differing purposes of the three planning Acts create internal tensions, duplication, complexity and costs”. Any revision of the planning laws must endeavour to address these concerns. [3.2]

Impact of reform on established jurisprudence

37. Under the RMA 1991, s 85, simply states that compensation is not payable in the normal course of events for the effect of zoning rules or performance standards in regional and district

plans, unless the Environment Court determines that the rules or standards render the land incapable of reasonable use, and impose an unfair and unreasonable burden on the land owner. In that event, the remedy is not monetary compensation, but allows the Court to make an adjustment regarding rules if found to be unduly onerous, and not justifiable. This provision (as amended) regarding the effect of rules on land owners rights should be continued into any new planning law without change. [4.1]

38. Under a new planning law, it would be desirable for the council to have a power to take by agreement or by compulsion land which was needed to enable development by the council. This could enable a council to take land being retained by a land banker, and other private owner unwilling to sell to the council for a public purpose or to recognise the public need. At the present time the Crown, of behalf of the Housing Corporation, has the power to take land compulsorily for state housing purposes. [4.1]
39. The most likely impact of reform would be on any restatement of purposes. A division of the present matters in Part 2 of the RMA into a revised built environment section and a separate natural environment section, would inevitably require in part a fresh approach, and new interpretations as to the nature and extent of the policies, and obligations in implementation of the policies. Much would depend on the particular wording of the respective provisions and individual statements of purpose. In addition, the pending provision of templates, could have an effect on the content and expectations at the planning level. [4.2]
40. Assuming that the Environment Court would continue, as envisaged, the different role of the Court would be to deal with council rejection of recommendations from the permanent Independent Hearings Panel. Secondly in relation to consent decisions, directly affected parties would have a right of appeal, and applicants could challenge adverse decisions or conditions imposed. Also, the Court would have a role on direct referrals, and where appointed to hear major cases called-in by the Minister or the EPA, and would continue to have functions presumably in respect of civil enforcement matters. [4.2]
41. To the extent to which members of local authorities, planning staff, staff of the Ministry for the Environment, would continue in office, the present knowledge-bank, cultures and expectations of the planning system would remain to inform the decision-making of the respective bodies. That outcome is in many respects desirable, to ensure stability of the resource management process, which underpins property values and expectations as to future development. [4.2]

Enforcement issue at regional level

42. Overall, one would hesitate to make any recommendation that the EPA, with its present mandate, would be an appropriate body to administer throughout New Zealand matters of regional environmental enforcement. A major expansion of unit function, and amendment to the EPA Act would be required to add any RMA enforcement function to that body. [5.2]
43. This provision [s 24A] appears to be a tailor-made authorisation to investigate the performance of regional councils who are failing to monitor and carry out enforcement of national standards or rules under regional plans. The power is complemented by the residual powers of the Minister for the Environment under s 25. The Minister may appoint persons to take over and perform and exercise the functions and duties in place of the local authority. [5.4]
44. In conclusion on the enforcement issue raised in the Better Urban Planning Report, the author expresses the view that the Minister through the Ministry for the Environment squarely has the powers to take action following concerns over performance by all local authorities. It is desirable that any present uncertainty over the preliminary powers and functions of the Minister and Ministry to carry out effective auditing or monitoring of local authorities should be clarified. . [5.6]

45. An alternative, to ensure an element of consistency, not dependent on the initiative of the Minister, would be to empower the Secretary for the Environment, on behalf of the Ministry for the Environment, to monitor the effect and implementation of the RMA or revised planning law, and to make recommendations to the Minister regarding the exercise of the existing powers of intervention and direction. This duty would accord with the model and duty imposed on the Secretary as chief executive, under the Environmental Reporting Act 2015. [5.6]
46. As a backup audit provision, greater funding could be given to the Parliamentary Commissioner of the Environment, as the “systems guardian”, to be more effective in checking on performance of the Ministry for the Environment on the one hand, and local authorities on the other, to ensure that the expectations of the resource management legislation, in whatever form it may take, are attained. [5.6]

Addendum comment

Policy statement bounds

47. The decision of the Court of Appeal in 1995 approving as valid, a policy statement with a hard edge in the nature of a specific rural urban boundary has allowed any policy document (national or regional) to effectively include rules which normally should have been found in the regional plan or the district plan or in a future plan template. [6.1]
48. The problem of policy setting hard edge rules has also become manifest in the New Zealand Coastal Policy Statement, following the interpretation in the *King Salmon* case, that a policy which must be “given effect to”, may be expressed in a manner that prevents a plan change at the regional and district levels to enable an aquaculture development considered by a later Board of Inquiry to be justifiable in a particular factual situation or location. [6.1]
49. in any recommendation of reform legislation, it is important to address the scope and bounds of the policy documents and to clarify whether the policy should enable precise limitation or intervention affecting local authorities and land owners. If national policy statements (including the NZCPS) and regional policy statements are able to continue to include “hard edge” policies, it would be desirable to allow a later consent authority, to allow an exception in special situations to the duty to “give effect” to the full nature of the policy.. [6.1]
50. Under RMA s 82 Disputes, where there is an inconsistency between an NPS, NZCPS, or regional policy statement, and a regional or district plan, the Environment Court may allow the inconsistency or failure to give effect, to remain where “of minor significance that does not affect the general intent and purpose of the policy statement”. This provision was not addressed or applied in the *King Salmon* facts. The flexibility regarding policy documents on plan content matters should be widened. [6.1]
51. Any form of hard edge policy regulation could be better suited to a NES or mandatory template, rather than through a policy statement, if intended to have a rigid application and not allow overall broad judgment flexibility in any development situation. The convention that a policy document should not include specific performance or location standards as to place provides a rough guide as to the distinction between legitimate NPS content and appropriate NES content. [6.1]

Land release, housing and funding

52. In the built environment area, one of the recommendations in the draft report relates to land release. This provides for price signals which may inform the planning and infrastructure decisions and allow for time-driven release of land based on population projections rather than market conditions.... It would be desirable for some qualification of the price triggers to be included in any legislation, to ensure that undesirable outcomes do not also arise from the

procedures which may not allow for any public participation or council discretion as to the appropriate solution for the problem. [6.2]

53. Any prescription of separate objectives for the built environment should provide for local authorities to include in regional policy and plans an objective of zoning land for affordable housing, and sufficient housing supply according to population needs. These housing objectives are found in legislation applicable in Australia, Canada and the UK. [6.2]
54. Local authorities are under no legal obligation to provide any form of public or social housing. The Crown has the primary leadership role in providing for State housing, either for long term rental, and also for disposal to first home buyers. In New Zealand, the Minister of Housing has a discretion to provide State housing, and to that end to purchase or take land for housing, erect dwellings, and lease or dispose of the dwellings. [6.2]
55. Amendments to the Housing Corporation Act in 2016 extend the powers of the Minister to enter into social housing transactions, including the transfer of stock to other housing providers.... Although the housing legislation implicitly imposes an obligation on the Government and Minister to make provision for funding and developing public housing, there is no mandatory obligation to meet any housing shortage in any particular area. [6.2]
56. A problem with targeted rates to enable infrastructure funding, is that with many developments, the council will collect a significant development charge under the Local Government Act. To impose in addition on those developments a targeted rate, could constitute a situation of double dipping in charging the developers and occupiers, and increasing the costs of a new development. [6.2]

Non-complying activities and consent assessment

57. The gateways [s 104D] date back to the TCPA and were added to limit the discretion to grant the former specified departure, where the magnitude of the development or precedent nature of granting the consent was more suited to a plan change to obtain the same outcome. This situation could be better managed by the council having a discretion to disallow an application for a discretionary activity, where the consent authority determined on strong reasonable grounds that the development due to magnitude or precedent effect, should only proceed under a plan change. [6.3]
58. Innovative planning, especially in the built environment, may be frustrated and deterred by the non-complying activity culture of a local authority.... A case could be made in any reform of the RMA, that the class of non-complying activity, if retained, should be replaced with a more positive or less negative label, such as the former specified departure. [6.3]
59. The present non-complying category and gateways should be abolished and all applications categorised as discretionary activity applications. This would allow for greater flexibility and assessment on the merits, especially in the development of the built environment The default provision under the RMA for an activity not provided for is a “discretionary activity consent”... s 87B. [6.3]
60. Any separation between the built and natural environments in relation to regulatory approaches should extend to a complementary separation in respect of resource consent assessment for the five types of consents. The separation of purposes could relate back to differing objectives for the built and natural environment, and differing objectives that may be relevant to each of the five different types of resource consents that are provided for. [6.3]

Overall summary

61. The EDS report “Evaluating the environmental outcomes of the RMA” (2016) supports the case for a review and revision of the RMA to achieve better environmental outcomes. [7]

62. The recommendations of the New Zealand Productivity Commission to identify different regulatory goals and approaches to the natural and built environments are compelling. The ad hoc mixing of goals in RMA ss 6 and 7, reflects the past desire to integrate regulation of land, air and water, but has resulted in a legacy blurring the various environments. [7]
63. Affordable and adequate housing supply is conspicuous by its absence as a recognised matter of national importance under the RMA. These matters and other matters in ss 6 and 7 should not be regarded as sacrosanct and should be open to complete revision, and separate provision made for the natural and built environments. [7]
64. Under s 7 (b) “The efficient use and development of natural and physical resources” points towards economic efficiency and economic evaluation in development, but this pointer has been generally submerged in the collection of other pointers towards protecting intrinsic values of ecosystems and enhancing the quality of the environment. As a consequence, an overly conservative approach has been taken under many local authority policies and plans in constraining urban intensification within urban limits, and in endeavouring to protect to an unnecessary extent the variable rural areas and landscapes. [7]
65. Referring to Option A, a single refined resource management law would appear to be more consistent with continuation of the major reform achieved under the RMA. Within the scope of achieving “sustainable management”, the consequential purposes and objectives could be redrawn and refined to focus firstly on the built environment, and secondly on the natural environment, as areas of discrete purpose and outcomes. Certain cross references could be necessary. [7]
66. A conclusion could be restated that the refined single resource management law reform would be more consistent with continuation of the advantages of the RMA, in that it fosters a single integrated procedure at the consent level, under which all areas of consent can be assessed in an holistic manner, and any overlaps of regulation and conditions can be adjusted through a combined hearing process. The jurisdiction of a unitary authority under a combined plan, is an advantage in this administrative area. [7]
67. The likely impact of reform on jurisprudence established under the RMA is a matter that could be managed, as it has been managed in the past with the enactment of the RMA itself. Any new law will affect the jurisprudence established in case law, and possibly the approach in thinking and culture towards implementation of the statute. [7]
68. More radically, if all local authorities were reformed to comprise unitary authorities, the need for separate regional plans and district plans, could be eliminated....Having made an assumption that local government structures will not be changed, the administration of a refined single resource management law can be complemented and facilitated by the issue of national planning templates. Further an increased use of national environmental standards and policy documents, or government policy statements, which could allow for certain activities to be implemented as permitted activities, could produce development efficiencies and also protect the natural environment. [7]
69. In further conclusion, any impact of reform on existing jurisprudence, is likely to be transitory, and a matter which is capable of being absorbed in the administration of the law having regard to a strong history of law reform in New Zealand over the years. One objective of law reform in the resource management area should be to endeavour to provide a law based on a principled approach, and a statute which does not include a proliferation of detailed regulation. [7]
70. Improvements in efficiency could be achieved by a revision and separation of the objectives for the built and natural environments, the introduction of plan templates, and revision of the plan making and resource consent provisions and procedures. The implementation of one or more permanent hearings panels to assess the content of regional and district plans could also have merit. [7]
71. The land domain does not expressly cover or require reporting on the extent or content of the built environment, other than under the broad head “resource use and management, and other human

activities". This absence of focus may need to be addressed in any revision and separation of objectives for the built environment, to enable improved statistics as to housing stock and population needs. [app 3]

Question 1: "What are the key legal issues and challenges associated with separating regulation of the built and natural environment? How are these issues and challenges best addressed?"

In considering this question, it is desirable to have regard to the historical purpose of planning and regulation of the environment, which has led to the present situation of integration or fusion of regulation under the Resource Management Act 1991, relating to the built and natural environments. Consideration of the evolution of regulation, and the major reforms leading to the RMA, will inform the question of policy and determination of options for separation of regulation or policy applied to the built and natural environments. This background is relevant to the purpose of planning and the culture and capacity of the planning profession which is the subject of critical analysis in the BUP Report.²

1.1 Brief historical introduction

A starting point is to consider the evolving purpose of planning and the role of the planning profession. In the text *Planning and Development Law in New Zealand*, Volume 1 (1984) authored by Kenneth Palmer, Chapter 1 contained an elaboration of the competing theories of planning at that date.³ The text referred to the comparative recognition in differing jurisdictions, and by town planners as to the purpose of planning regulation. Six different scenarios were described.

(a) Planning as architecture

This head discussed the view that the justification for planning controls derived from classical theories of civilisation through town planning in Grecian and Roman civilisations. The architecture premised planning school placed weight on the grand master plan for city development, and its visual manifestation of governance and power. The political authority, economic efficiency, and social needs of the city and town would be promoted in the layout of the urban areas (including local and arterial roads, water and waste infrastructure) to support governance, wellbeing and other advancement of the public interest.

(b) Planning as a regulation of land use

Under this head, recognition was accorded to the early concerns leading to the first Public Health Act 1848 (UK), which recognised the essential needs for potable water supply for communities, provision for sanitation and sewage disposal, and minimum room sizes for healthy living. This recognition was followed by various model industrial villages, and the broader recognition by UK Parliament in the Housing, Town Planning Act 1909, introducing the first zoning system applied to new urban areas. The approach was basically to protect public health, by zoning for industrial areas separated from residential areas and high density housing, with further recognition of the need for roading access, and infrastructure for water supply and sewage disposal. The regulation of land use focused on the built environment, and the benefits to public health in zoning systems. It had no relevance to protecting the state of the natural environment from urban expansion, other than an attempt to remove air pollution from residential areas and provide for water supply and sanitation waste disposal. At this time under the Public Health Act, the alkali inspectorate, obtained powers to regulate

² At 12.3 - 12.5.

³ Kenneth Palmer, *Planning and Development Law in New Zealand* (Law Book Co, Sydney 1984), 1-7.

the worst excesses of coal dust air pollution deriving from factories and chemical manufacturing processes.

(c) *Planning as a political process*

This heading recognised that urban planning may be viewed by local government, and large land holders, as a method of imposing an element of political control over permissible development. Having a following primarily in the United States, the political control model promoted mixed urban land development, as the local body politicians tended to be the land owners and realtors and could act in self-interest in providing liberal zoning entitlements. The political control school placed significant reliance on permitted activities under zoning plans to ensure traditional property rights. An unstated objective could be the economic effect of a single dwelling zone to exclude persons from lower socio-economic levels, and to protect the land values of the zoning for benefit of the class of property owners. Other zones could facilitate high density housing intended for lower socio-economic groups. Public participation rights could allow for advocacy planning outcomes within a city zoning panel process. The scope of public participation, remains a factor in recent times as to the degree of participation, and the ability to take appeals (if any) and challenge the processes initiated through local government.

(d) *Planning as economic management*

The economic management school was based on the benefits and efficiencies arising in a free market. All zoning would be aimed at producing or maximising an economic return, and had a focus on highest use for justifiable management. The economic management school or theory, raises questions as to provision for the disadvantaged persons in society, especially the consequences of urban renewal projects which may, unless well managed, exclude existing occupants from the future more expensive development. The UK Barlow Commission in 1940, recommended central government control over the location of industry and commercial development to support declining industrial and business centres, as matter of market interference.⁴ The controls over location introduced post World War II in the UK have now been removed.

Matters of windfalls from re-zoning and betterment, and the possibility of any restraints on the free market and other forms of economic instruments have also been assessed. The UK Uthwatt Report in 1942 recommended that all financial gains produced by population growth resulting in rezoning should be passed back to the state under a capital gains tax.⁵ In New Zealand, past governments have used regional incentives and subsidies to influence planning and business location outcomes. Economic policy has been considered in the past by the Commission for the Future established in 1977 to advise the government, and by the subsequent New Zealand Planning Council under the New Zealand Planning Act 1982, since abolished. [In 1989, the NZ Treasury advanced a radical view that the RMA should not proceed and all development location should be left to the free market with no formal regulation.]⁶

⁴ Report, *Royal Commission on the Distribution of the Industrial Population*, 1940. Discussed in William Ashworth, *The Genesis of Modern British Town Planning* (Routledge 1954).

⁵ *Final Report of the Expert Committee on Compensation and Betterment*, BPP 1941-2 (Lord Uthwatt chair)

⁶ The City of Huston, Arizona, uniquely has no zoning system, and development and use of property is limited by the scope of land covenants. Adjoining property owners and the city council may enforce the covenants by civil action.

(e) Planning as an ecological systems process

The systems process school developed out of adoption of scientific biological method to advance the recognition of organic systems within the natural ecological environment. The school considered that protection of ecology and biodiversity were integral to planning systems, and should inform development decisions. The formal recognition of broad ecology and the intrinsic value of biodiversity, was acknowledged in the UK Scott Commission 1942, which looked into the question of land utilisation in rural areas and preservation of the countryside from urban encroachment.⁷ The Commission recognised the benefits of the ecological life cycle (including hedgerows, greenspace, wild life species, birds and insects), and was perhaps the first official body to raise awareness of an ecological approach to planning regulation. The report is a precursor to recognition of the natural environment as a finite system, but in 1942 the term “environment” was not part of the normal language of planning or governance. The recognition of the term “environment”, applied to the natural environment materialised in the 1980s, and is now a central part of the mainstream purposes to protect ecosystems.

(f) Planning as a multi-purpose process

The author put forward a conclusion, rather than a theory, that planning as a goal and method depended on many national and local factors. At base level, any acceptable system should safeguard the health, safety and welfare of each community and should also have regard to adjacent districts, regional and national needs, and be responsive to change.

A further view was put forward that a justification for planning regulation, should acknowledge and incorporate all the earlier schools of thought as to justification, and governments should have regard to the diverse objectives noted. A conclusion was reached “In New Zealand there is at present no government power of direction as to the location of private industry or commerce, except indirectly through the planning process and the grant of government-controlled finance. The ability to regulate population growth and location of employment is accordingly limited, and market forces and personal choice theoretically remain effective”.⁸

The BUP Report includes more modern expansive views as to the rationale for planning in an urban setting.⁹

1.2 Legislative regulation pre-1991

The history of formal land use regulation in New Zealand commenced under the Plans of Towns Regulation Act 1875, which instructed surveyors regarding the layout of the built environment to include roads of a specified width, and as practicable in grid patterns, and for 10% of land to be set aside for public purposes including reserves and municipal buildings. Subsequent Municipal Corporations and Counties Act, provided the necessary powers to establish or require adequate roadage, sewerage, water reticulation systems, and subsequently telephone and gas services.¹⁰ The first comprehensive zoning regulation was authorised under the Town-Planning Act 1926, which provided for the preparation of district plans. The Act included an interim control discretion to prevent development which could be seen to be contrary to principles of town planning. The actual

⁷ Ministry of Agriculture, *Report of the Committee on Land Utilisation in Rural Areas*, BPP 1941-2 (Lord Scott chair).

⁸ Palmer, n 3, at 7.

⁹ New Zealand Productivity Commission, *Better Urban Planning – Draft Report* (BUP Report), ch 3.2.

¹⁰ Palmer, n 3, at 7.

establishment of plans did not occur countrywide until the enactment of the Town and Country Planning Act 1953, which set up the present type of local authority governance structure. Each territorial authority would prepare a proposed plan, which could be the subject of submissions, with the right of appeal to an early planning appeal board. That plan was essentially one of land use zoning in town and city areas, with sparse emphasis on the natural environment.¹¹

The control of water use effectively arose under the Water and Soil Conservation Act 1967, which provided for water rights concerning the taking of water, damming, and discharge of wastes into water. Subsequently, rights of appeal to the Planning Tribunal were included, which allowed for a degree of integration between land use decisions and water management. A failing of the Water and Soil Conservation Act, was a complete lack of specific purposes of the regulation, but the courts came to pragmatic decisions by default, that water should be shared equitably, and that discharges of waste should not result in unacceptable pollution.

At the time, under the Mining Act 1971, and earlier iterations of the mining legislation, the Minister of Energy had the power to issue mining licences, and these activities were not regulated by zoning under the Town and Country Planning Act. However because many forms of mining required a water supply or discharge rights under the Water and Soil Conservation Act, with the rights of appeal to the Planning Tribunal, a degree of integrated regulation was possible.¹²

Concerning air pollution, the Clean Air Act 1972, copied from the UK Clean Air Act, introduced more effective controls for discharge of wastes into the air. It supplemented earlier rudimentary requirements under the Health Act to obtain permits for discharge of chemicals, and odour-producing emissions, from abattoirs and meat works. The Clean Air Act was effective in mitigating excesses of air pollution, and was managed by the Department of Health, without any direct connection to planning decisions.¹³ An interesting example of the failure to have an integrated system between regulation of the built environment, and the natural environment, occurred with the development of Auckland Hospital on Parnell rise. The Hospital as built in the 1970s, included a substantial chimney for disposal of hospital wastes. Upon first commissioning of the incinerator, the air pollution fallout on surrounding areas including the University of Auckland, was found to be unacceptable, and the incinerator had to be closed. The chimney has remained as a monument to a lack of integrated management and environmental assessment.

In 1973, an enquiry was conducted by a special tribunal into the effectiveness of the general purposes of planning under the TCPA 1953, which under s 18 concisely stated that “Every district scheme shall have for its general purpose the development of the area to which it relates...in such a way as will most effectively tend to promote and safeguard the health, safety, and convenience, and the economic and general welfare of its inhabitants, and the amenities of every part of the area”.

The Review Committee was charged with considering whether that purpose was sufficient to protect significant pressure for development of coastal areas for housing, and the expansion of Auckland as a major city into green field areas. The areas in particular were between the central city, and the suburbs of Pakuranga and Howick, and south Auckland, which at the time were separated by a substantial rural areas or green belt options. The Review Committee reported that the control of development by local authorities should be strengthened, and it recommended the introduction of the first matters of national importance.¹⁴ These comprised:

¹¹ Palmer, n 3, at 7-21.

¹² Palmer, n 3, vol II, at ch 16.

¹³ Palmer, n 3, at 530-533.

¹⁴ Palmer, n3, at 13.

TCPA 1953, s 2B

- (c) the preservation of the natural character of the coastal environment and the margins of lakes and rivers and the protection of them from unnecessary sub-division and development;
- (d) the avoidance of encroachment of urban development on, and the protection of, land having a high actual or potential value for the production of food;
- (e) the prevention of sporadic sub-division and urban development in rural areas;
- (f) the avoidance of unnecessary expansion of urban areas into rural areas and/or adjoining cities.¹⁵

In 1973, conventional strategies were to protect the coastline from further unnecessary development, and concentrate incremental development to existing settlements. This would protect in particular development in the Coromandel Peninsula, and in the Bay of Islands. The premise for protection was to retain a clean countryside and coastal environment, and to avoid the potential for baches to spread out along the New Zealand coastline as an unnecessary and untidy intrusion in the landscape.

These matters of national importance, were carried through into the redrafted Town and Country Planning Act 1977, and have had a lasting legacy. The objectives have been recognised and applied in the Auckland region up to the present day by continuation of the metropolitan urban limits, and under the more flexible proposed rural urban boundary.

The protection of rural land from urban expansion, was premised on the economic value of agriculture at the time, through production of wool exports, beef and lamb exports. Also locally, the protection of land of high productive value, was seen as a desirable factor, and had relevance in areas such as Pukekohe which included extensive market gardens and high soil quality. A further aspect was to limit the excesses of lifestyle developments or 10 acre blocks, which were beginning to proliferate in the West Auckland Waitakere ranges area, and in other parts in South Auckland and throughout New Zealand. This type of small lot proliferation was opposed by Federated Farmers, as undermining the economic integrity and viability of productive farms, and was mainstream thinking in central government. It is of note, that the consideration of protection of rural land, was premised on maintaining productive capacity and economic returns, and was not related to protection of the natural environment.

1.3 National Development Act 1979

The National Development Act 1979 was the product of the Muldoon government, which recognised the advantages of a one-stop process for obtaining consents, which were particularly aimed at the Think Big projects in Taranaki. The structure of the Act is relevant to the present question of integration or separation of management of the natural and urban environment.

The focus of the legislation was to enable direct referral of major projects to the Planning Tribunal. The application could be referred by order in council where the government considered the work was essential for orderly production, development, or utilisation of New Zealand's resources; or self-sufficiency in energy; or the major expansion of exports or import substitution; or the development of significant opportunities for employment and it was essential that a prompt decision should be made.¹⁶ The Planning Tribunal was given the jurisdiction to determine and recommend all necessary consents which could encompass both land use, water taking and discharge, and air emission consents. A particular feature was a requirement for an environmental impact report to be prepared, which would be audited by the Commissioner for the Environment. At that date the Commissioner was an employee of the public service, with no particular independence. General rights to make

¹⁵ TCPA 1953, s 2B. TCPA 1977, s 3.

¹⁶ National Development Act 1979, s 3. See Palmer, n3, vol II, at ch 17.

submissions and appear before the hearing were given to persons affected by the proposed work, or a person representing a relevant aspect of the public interest. The criteria for the inquiry and recommendation by the Tribunal were the existing criteria set out in the relevant Acts under which consents could be required. Included in the list were the TCPA 1977, Mining Act and Petroleum Act, as well as the water and air controls. A recommendation would be made to the Minister, and the decision, if favourable, could be implemented by order in council. Provision was allowed for judicial review, but no further appeal rights were provided.

As indicated, that legislation had the virtue of introducing for the first time the possibility of an integrated one-stop process for all consents which might affect both the built environment and the natural environment, in relation to effects of water take and discharges of wastes into water and the air. The requirement of a mandatory assessment of environmental effects, was also introduced for the first time. (Both these features were taken up as part of the reform under the RMA 1991. The call-in provisions under the RMA provide for the same major objectives of the 1979 Act.)

1.4 Environmental Reform 1984-1987

With the election of the Labour Government in 1984, a new zeal and vision occurred as to government departmental reforms. This was initiated in the State Owned Enterprises Act 1986, which separated the commercial delivery functions of government departments from the policy functions, and was based on a principle of transparency of functions and operations.

In the environmental area a discussion paper “Environmental Administration in New Zealand” (November 1984) also addressed for the first time the possibility of a complete reorganisation of management of the environment. The Office of the Minister for the Environment, had no statutory basis, other than recognition as a Minister by the government. The Minister Russell Marshall, endorsed a report of an environmental task group established in October 1984 as to future reform of the area. Chapter 1 set out the nature and scope of thinking which identified “the need for environmental considerations to be taken into account at the earliest possible opportunity in the planning of development proposals”. The government clearly recognised the need for a discrete Ministry for the Environment, as part of the reorganisation of government departments, and in particular the reform or replacement of the Ministry of Works and Development. The need for a Ministry was set out in Chapter 3. In relation to planning, in Chapter 5, the discussion paper recommended a combination of regulation effectively of the built environment and the natural environment, as a necessary and desirable consequence. Relevant extracts are set out in **appendix 1** of this paper.¹⁷

In a subsequent follow-up report of the Post Environment Forum Working Party, “Environment 1986”, the report endorsed the desirability of a permanent Parliamentary Commissioner and contained a statement:¹⁸

“Why a *Parliamentary* Commissioner? The Commissioner is the guardian of the system, in which the Crown plays a key role. That is one reason for him to be independent of the Crown. Secondly, the great effectiveness of the office will be less often it what it does than in what operators in the system perceive it to be able to do. This status or presence will be enhanced by making it an office of Parliament rather than the government”.

¹⁷ *Environmental Administration in New Zealand A discussion paper*, Minister for the Environment (Hon Russell Marshall), November 1984. See extracts **appendix 1** below.

¹⁸ *Post Environment Forum Working Party, “Environment 1986”* (June 1985), part VIII “Parliamentary Commissioner”, at para 131.

Furthermore, in Annex 2 of that report, provision for a proposed new Ministry for the Environment was set out, and a list of functions to be undertaken by that ministry. The ministry would essentially be an advisory body to the Minister on environmental policy and decisions by the public and private sector, where having a significant effect on the environment.

The ministry could provide the government and its agencies with advice on the review of natural resource statutes and the statutory planning process, advice on economic instruments for the improvement of economic environmental management, including appropriate charges on the use of natural resources, advice on pollution control and the coordination of the management of pollutants in the natural environment, and advice on the application of appropriate procedures in assessing and monitoring the impact on, and minimising the risk, to the environment of major policies and projects.

Subsequently, these proposals were carried forward in the Environment Act 1986 which established the Parliament Commissioner for the Environment as systems guardian, and the Ministry for the Environment as a specific ministry.

Of particular relevance, is the comprehension of both the built and natural environment in the purpose and definitions under the Environment Act?

The Preamble to the Act states

An Act to –

- (a) provide for the establishment of the office of Parliamentary Commissioner for the Environment;
- (b) provide for the establishment of the Ministry for the Environment;
- (c) ensure that, in the management of natural and physical resources, full and balanced account is taken of—
 - (i) the intrinsic values of ecosystems; and
 - (ii) all values which are placed by individuals and groups on the quality of the environment; and
 - (iii) the principles of the Treaty of Waitangi; and
 - (iv) the sustainability of natural and physical resources;
- and
- (v) the needs of future generations.

Under paragraph (c), it may be noted that the management of natural and physical resources is combined, with indications of the likely objectives that would subsequently be adopted under the RMA.

The definition of environment in s 2 is also significant:

environment includes—

- (a) ecosystems and their constituent parts including people and communities; and
- (b) all natural and physical resources; and
- (c) those physical qualities and characteristics of an area that contribute to people’s appreciation of its pleasantness, aesthetic coherence, and cultural and recreational attributes; and
- (d) the social, economic, aesthetic, and cultural conditions which affect the matters stated in paragraphs (a) to (c) or which are affected by those matters

The reference to natural and physical resources as part of the environment is further defined in s 2 as follows:

natural and physical resources includes water, air, soil, minerals, hydrocarbons, and energy, all forms of flora and fauna (whether native to New Zealand or introduced) and any building, structure, machine, device, or other facility made by people

It is noted that this definition includes in the natural and physical resources “any building, structure, machine, device or other facility made by people”. Accordingly, from this statute onwards, *the regulation or supervision of the built environment is addressed within the scope of natural and physical resources*.

In the following year, in the Conservation Act 1987, the purpose of the Act is concisely stated in the preamble “to promote the conservation of New Zealand’s natural and historic resources, and for that purpose to establish a Department of Conservation.” The Conservation Act was to establish the department to take over the management of conservation land, being lands which were not included in the ownership of state-owned enterprises, or in residual holdings of the Department of Lands, which could be available for subsequent disposition. The Act established the National Conservation Authority and regional conservation boards for management and advice to the Minister. Regarding the management strategies and management plans, the definition of natural resources in s 2 is of interest:

natural resources means—

- (a) plants and animals of all kinds; and
 - (b) the air, water, and soil in or on which any plant or animal lives or may live; and
 - (c) landscape and landform; and
 - (d) geological features; and
 - (e) systems of interacting living organisms, and their environment;—
- and includes any interest in a natural resource

This definition more clearly focuses on the natural environment, but development of conservation land may include structures, which could also be controlled under management plans. The authorisation of structures on conservation land is generally outside the control of district plans, but will be subject to regional plan control in relation to water discharges and air discharges.¹⁹

Coincidentally, the Brundtland Report “Our Common Future” (1987), articulated as an international objective for the first time the concept of sustainable development. It was stated to be “development that meets the needs of the present without compromising the ability of future generations to meet their own needs”.²⁰ It contains within it two key concepts, the concept of needs, in particular the needs of the world’s poor, and “the idea of limitations imposed by the state of technology and social organisation on the environment’s ability to meet present and future needs”. These objectives had been foreshadowed in New Zealand under the purposes of the Environment Act 1986, which recognised “the sustainability of natural and physical resources and the needs of future generations”.

The Brundtland Report also focused on both the built environment and the natural environment, with reference to drought, desertification, climate change, and rising sea levels. This integration of the built and natural environment, underscores the development of integrated management of development affecting the environment, including provision for aiding world populations and redistribution of wealth. The vision in the Brundtland Report has a compelling relevance to modern issues of environmental refugees, and basic survival in areas of water shortage, rising climate, desertification, and sea level rise.

¹⁹ RMA 1991, s 4(3) (conservation land exemption).

²⁰ *Our Common Future*, Report of the World Commission on Environment and Development, March 1987 (Chair Gro Brundland), ch 2 Towards Sustainable Development.

1.5 Resource Management Law Reform 1987-1991

Following establishment of the Ministry for the Environment, a focus turned to the review of the Town and Country Planning Act 1977. A comprehensive report was carried out by Anthony Hearn QC, published August 1987. This extensive report proposed a multitude of detailed reforms to the Town and Country Planning Act by way of amendments. It proposed a substantial re-drafting of the purpose of the Act, to state "In respect of the conservation, management, use or development of New Zealand's land, maritime areas and associated natural resources the provisions of this Act shall be administered for the purposes of:

- (a) Ensuring their management in a manner which provides the maximum sustainable benefit to present and future generations of New Zealanders.
- (b) Mitigating and minimising adverse social, physical, economic and environmental impacts of their use or development.
- (c) Ensuring effective and objective evaluation of plans or proposals for their use and development.
- (i) Providing for the implementation of national policies as identified by the minister from time to time.
-
- (l) Protecting rare or representative samples of the flora and fauna, natural communities, habitats, ecosystems, genetic diversity, landscapes and historic places which give New Zealand its own recognisable character and values.
- (m) Minimising or preventing the adverse effects of natural or man-made hazards."²¹ (page.?)

The proposal provided for matters of national importance, to comprise matters declared from time to time by the Governor-General through order in council. No specific matters of natural or national importance were recommended as part of the Act. One legacy of the Report is the reminder that the purposes of planning are not set in stone and can be revisited as circumstances arise. The substantial report (237 pages) was shortly to be shelved and superseded by government decisions in favour of a major environmental regulation reform.

In 1988, the regions and districts of local authorities were reformed by the Local Government Commission under special legislation that omitted any polling rights that could have defeated most of the amalgamations.²² The expanded regions and districts were envisaged to have the capacity to administer more comprehensive and integrated land use and water regulation.

Coincidentally in 1988, the Minister for the Environment released a short epoch-making report "People, Environment and Decision-Making: the Government's Proposals for Resource Management Law Reform". The Ministry resolved to progress total replacement of the TCPA, and integration of other enactments controlling water use, contaminant discharges into land and air, with a single, comprehensive, integrated statute. The reformed Act would have a primary place for "sustainable development" and include greater recognition of Treaty principles. It reflected concepts in the Brundtland Report published in the previous year. After a limited period of consultation (the Government desiring to have the major reform completed within the 3 year Parliamentary term), the Resource Management Bill 1989 was introduced into Parliament. It set out in s 4, a purpose "to promote the sustainable management of natural and physical resources". The meaning of sustainable management was detailed to include reference to seven particular considerations (see **appendix 2**

²¹ A Hearn QC, *Review of the Town and Country Planning Act 1977* (Dept of Trade and Industry, Wellington, Aug 1987), 223.

²² Local Government Amendment Act (No 3) 1988. See Kenneth Palmer *Local Authorities Law in New Zealand* (Brookers, 2012), at 23.2.

below). Other principles were stated in s 5, but these were not at this stage identified as matters of national importance.²³

Following referral to a Parliamentary committee for submissions, and subsequent changes recommended by that committee, the Bill came back into Parliament in late 1990. On the last sitting day of Parliament under the Labour Government, the Bill failed to pass due to opposition from National party members and the expiry of time. Prior to the subsequent general election, the National Party had pledged to complete enactment of the RMA if elected, subject to a referral to an independent Review Group. The Review Group (chaired by AP Randerson QC, now Justice Randerson) examined in a short time frame the purpose of sustainable management. It confirmed that purpose as more appropriate than the wider purpose of sustainable development, which encompassed matters of economic redistribution. It noted submissions on a lack of focus on the *built environment*, but in the final analysis, although it reinstated the matters of national importance and re-defined the purpose of sustainable management, it did not adopt any wording specifically identifying the built environment as a distinct objective.

In their report the Review Group stated: "It must be kept in mind that the Resource Management Bill is not confined to land use planning. It is intended to operate on an integrated basis to include not only land use planning, but also the management of air and water. The comprehensive sweep of a statute requires purposes and principles which recognise that fact. The review group does not necessarily accept all of the criticisms of the Bill as outlined but has considered all of them in the process of the review".²⁴

The Group recommended changes to the purpose, matters of national importance, and other principles, which were subject to later modifications under supplementary order papers by the Minister before final voting.²⁵ Following enactment of the RMA, as summarised in the draft report of the Productivity Commission, regional and territorial authorities were largely left to their own initiatives in preparing the respective plans and setting environmental objectives and detailed rules. Existing proposed and operative district plans were carried forward under the transitional provisions. Regional plans were required to be remade under the RMA provisions. Guidance was limited to publications from the Ministry for the Environment, and no national policy statements or national environment standards were published until 2004.

Regarding governance capacity, consequent upon the reform of local government areas, it was considered economically viable and manageable for all local authorities to undertake the respective planning functions throughout the country. The one model for all local authorities, has been adaptable to the extent that councils have the ability to prescribe the extent of regulation, the volume and content of the respective regional and district plans, or combined plans. The discipline under s 32 of the RMA to consider the appropriateness of including policies and rules, was intended to ensure that the plans did not over-regulate areas. Due to the absence of any particular guidelines, this has not necessarily occurred in the period following 1991. Other factors at work, were the transitional provisions under the RMA, allowed for existing operative district plans to be carried forward, until replaced by a plan prepared under the RMA. This continued the general culture of regulation under the TCPA into the RMA, and other than a problematic attempt in Christchurch City to remove zoning

²³ Resource Management Bill 1989 (Rt. Hon Geoffrey Palmer, Minister for the Environment). Extracts, **appendix 2** below.

²⁴ *Report of the Review Group on the Resource Management Bill* (11 February 1991), at 2.3.

²⁵ Derek Nolan ed, *Environmental and Resource Management Law* (5th ed LexisNexis 2015), at 3.02-3.21. Peter Salmon & David Grinlinton, *Environmental Law in New Zealand* (Thomson Reuters 20115) at 11.2.

from the method of control and replace it with performance standards, all district plans uniformly continued the zoning approach.²⁶

A present comment could be that the historical imperative to separate incompatible activities, has diminished significantly with improvements in environmental management of noise, contaminant and odour emissions from commercial and industrial activities, and the desirability to locate those uses at a distance from residential development, is no longer uniformly compelling. The provision in recent years of mixed use zonings has been taken up in the larger urban centres, and the RMA has not prevented this outcome. Home occupations are now generally permitted activities in all residential zones. A more flexible approach by local authorities in prescribing zoning rules and performance standards under plans, and through consents, related to effects on neighbours and the environment, could promote work efficiency and higher density developments, mitigate transport needs, and enable improved community wellbeing.

1.6 Separation of the built and natural environment

As a proposition, identified in the Better Urban Planning, Draft Report, at table 13.1, that a future planning system, could contain planning legislation which distinguishes between the natural and urban environment, it is appropriate to further reflect on the evolution of recognition of the environment, and the existing definitions as to the meaning or content of the term environment. These definitions have their origins in the Environment Act 1986 (noted above), and can be set out consequentially.

RMA 1991

The relevance and scope of natural and physical resources, and the environment, are identified respectively in the purpose in s 5(1) and s 5(2)(c):

5 Purpose

(1) The purpose of this Act is to promote the sustainable management of natural and physical resources.

(2) In this Act, *sustainable management* means managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural well-being and for their health and safety while—

(a) sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and

(b) safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and

(c) avoiding, remedying, or mitigating any adverse effects of activities on the environment.

In relation to the content of natural and physical resources, the definitions in s 2 are relevant, to the extent that physical resources includes all structures, and a structure includes any building.

natural and physical resources includes land, water, air, soil, minerals, and energy, all forms of plants and animals (whether native to New Zealand or introduced), and all structures

structure means any building, equipment, device, or other facility made by people and which is fixed to land; and includes any raft

The definition of environment is relevant to the extent that it combines reference to ecosystems, natural and physical resources, and amenity values.

²⁶ *Application by Christchurch City Council* [1995] NZRMA 129. The term 'zoning' is not used in the RMA.

environment includes—

- (a) ecosystems and their constituent parts, including people and communities;
- and
- (b) all natural and physical resources; and
- (c) amenity values; and
- (d) the social, economic, aesthetic, and cultural conditions which affect the matters stated in paragraphs (a) to (c) or which are affected by those matters

amenity values means those natural or physical qualities and characteristics of an area that contribute to people's appreciation of its pleasantness, aesthetic coherence, and cultural and recreational attributes

Other relevant environmental legislation definitions are set out in **appendix 3** below, and commonly blend consideration of natural and physical resources together. An interim observation can be made that ranging from the environment definitions in the Environment Act, the RMA, EPA, up to the EEZ 2012 legislation, the assessment of activities and development in rules or in consent applications includes an integrated approach to regulation of both the built and natural environments. Another observation is that each Act has, in a dated manner, a tailor made purpose and appropriate definitions. In respect of any future legislative model, an element of consistency will be relevant but the purposes and structure of the legislation should be updated and reflect contemporary sustainable objectives.²⁷

Under the Environmental Reporting Act 2015, the Minister for the Environment and the Minister of Statistics are responsible for systematic publication of synthesis reports on New Zealand's environment, and other domain reports covering five domains. The domains include the land domain. The obligations do not specifically identify the nature and extent of the built environment, and residential capacity as a relevant matter. Any revision of the planning law may require amendments to the reporting obligations to ensure that information is available on housing needs and urban capacity, especially if land release triggers are introduced.²⁸

1.7 Key legal issues in separating regulation of built and natural environment

Implicit in the consideration of regulation under the RMA, which is premised on the integrated management of natural and physical resources which include both the built environment and natural environment, that milestone in 1991 was regarded as a fundamental achievement. At that date the possibility of integration of all consents under one enactment was seen as a pyramid of comprehensive integrated reform not reached in other countries and one which received significant attention.

That stated, a comment could be made that this integrated approach, was consequent upon the LGA reforms in expanded local authorities, and the division of functions. The allocation of air quality regulation, and water and soil control to regional councils, underscored the reality that the management of those parts of the natural environment were not generally suitable to district and city council administration due to the pervasive nature of air sheds and water resources across territorial boundaries and required a regional approach. The separation of those functions into regional councils in itself indicated a partial compromise of the integrated management approach.

Regional councils and territorial authorities could differ on sustainable management objectives, especially in respect of the mandate given to regional councils to state in the policy statement the

²⁷ Better Urban Planning Draft Report (2016), 5.2, F5.1; F7.11 Lack of clear limits.

²⁸ BUP draft report, table 13.1 Land release, and proposed NPS on Urban Development Capacity. See also **Schedule 3** to this paper for Environmental Reporting Act extracts.

“significant resource management issues for the region”. The most prominent points of difference have occurred in the determination by regional councils to set urban boundaries limiting the discretion of district councils to make plan changes or grant consents to accommodate housing needs.²⁹

On hindsight, the control of air and water management respectively could have continued under separate statutes such as a revised Water and Soil Conservation Act, and revised Clean Air Act 1972. The main deficiency in those statutes was the absence of any purpose or goals related to sustainable management, but it would have been relatively straightforward to add those goals in parallel to those inserted in the RMA (had the RMA been limited to the built environment). It is of note that initially the administration of the Crown mineral resource was included in the RMA Bill, but following submissions, was appropriately separated out into the Crown Minerals Act 1991.³⁰ This separation has not occurred in other areas such as aquaculture approval and administration, which continues to be an expanding and complicating part of the RMA.³¹ From the point of view of clarity of purpose and legislative structure, much could be said to support the removal of certain administration functions that now over-populate the RMA. A minor part of this administrative function may be removed under the Resource Legislation Amendment Act Bill 2015, which proposes to transfer the imposition of financial contributions wholly out of the RMA into the LGA.

In other countries such as the UK, amalgamation of air pollution and water management controls into a planning Act has not occurred, with separate legislation continuing to deal with those substantial functions. In New South Wales, under the Environment Planning and Assessment Act 1979, significant construction will require an approval under a development application. The application will include an environmental planning instrument. The relevant assessment section does not refer to principles of ecologically sustainable development, but one objective is to encourage ecologically sustainable development and as a matter of taking into account the public interest, consideration can be given to sustainability issues. Consents may be required under other Acts for disposal of contaminants and air emissions.³²

A view can be stated that in New Zealand, the allocation of control over air emissions and water to regional councils has been workable and pragmatic, and a central agency is not required for this regional administration. Likewise the focus of land use controls, primarily under s 9 of the RMA, is appropriately vested in territorial authorities or unitary councils, in accordance with provisions in district plans. However the bundling together of objectives for land, air and water regulation under ss 6 (matters of national importance) and s 7 (other matters) has been confusing and lacking in clarity. Many plans set out the content of the sections without any analysis or distinction between the application of the various matters in relation to policy, and plan rules. Further the single primary

²⁹ RMA 1991, s 62(1)(a). See *Becmead Investments Ltd v Christchurch City Council* [1997] NZRMA 1 (urban boundary); *Canterbury Regional Council v Selwyn District Council* [2005] NZRMA 25 (Lincoln College student housing needs); *North Shore City Council v Auckland Regional Council* [1997] NZRMA 59 (northern urban limit); *Dye v Auckland Regional Council* [2001] NZRMA 513 (Kumeu township expansion); *Auckland Regional Council v Roman Catholic Diocese of Auckland* [2008] NZRMA 409 (ARC opposing school outside urban limit); *Auckland Regional Council v Living Earth Ltd* [2009] NZCA 429, [2009] NZRMA 22 (location of composting plant); *Auckland Regional Council v Rodney District Council* [2009] NZRMA 453 (ARC opposing dwelling in rural area). Many other cases exist on differences between regional councils and territorial authorities.

³⁰ Resource Management Bill 1998, part IX, cls 202-293. Enacted into the Crown Minerals Act 1991.

³¹ RMA 1991, part 7 – coastal tendering (ss 151AA-165ZZA). A separate Aquaculture Management part would be desirable as part of the Aquaculture Reform legislation.

³² Lyster and others ed, *Environmental and Planning Law New South Wales* (Federation Press 2009) at p 90-93.

section for assessing resource consent applications (s 104) lacks focus and direction as to outcomes in the respective areas, and conflates the natural and built environment objectives.

The present separation between regional policy, regional rules and district plan rules is governed by consistency with higher level documents such as national environmental standards, national policy statements, and the New Zealand coastal policy statement, and any regional policy statement. A conclusion could be reached that the present governance system is appropriate for New Zealand with its relatively limited population other than in the major centres. In those centres, the financial rating base is sufficient to maintain competent staff to ensure the necessary and effective implementation of the responsibilities for efficient resource management. The implementation of a combined plan, or the delegation of functions within or between local authorities, are further opportunities for efficiencies and overall integrated management of objectives.

Regarding the identification of the built environment against the natural environment, the evolution of definitions indicates that at a pragmatic level, the inclusion of the built environment as part of the natural environment is the conventional solution, to minimise any problems of demarcation or omission from the environment definition.

Technically, it would be possible to define predominantly the built environment as against the natural environment, but significant issues could arise of crossover or effect of the built environment on the viability of the natural environment.

A graphic example of this problem was observed by the author in visiting Beijing in China in 2010. Within Beijing severe pollution was observed, and remains. An explanation given was that the approval of coal-fired power stations on the perimeter of Beijing City by the Energy Ministry, was conducted without any consultation or recognition of the consequential air pollution outcomes. The silo culture and failure of respective ministries to combine in their approaches or to take note of effects on the natural environment, was severe. The Water Ministry was directly affected by the air pollution which contributed to pollution of waterways and drinking water supplies. However, with effective definition, cross reference and recognition of other consequential factors, separate and complementary objectives for the built and natural environments could be maintained in legislation.

1.8 Existing blended purpose under the RMA and governance

The BUP Report states under para 13.5 What changes are needed? (p 332)

“The natural and built environments require different regulatory approaches. The natural environment needs a clear focus on setting standards that must be met while the built environment requires assessments that recognise the benefits of urban development and allow change. Current statutes and practice blurs the two environments, and provides inadequate security about environmental protection and insufficient security about the ability to develop within urban areas. Rather than attempting to regulate these different issues through the same framework, a future planning system should clearly distinguish between the natural and built environments, and clearly outline how to manage the inter-relationship between the two.”

In considering the substance and significance of this analysis, it is useful to briefly revisit the present situation under the RMA which leads to the blurring of the two environments.

The consideration of the evolution of the RMA following the major resource management law reform between 1988-1991, revealed the major purpose to amalgamate under one overarching principle of sustainable management the former separate focus on land use and the built environment under the Town and Country Planning Act 1977, and the management of natural resources in relation to water

take and discharges under the Water and Soil Conservation Act 1967 and air pollution management under the Clean Air Act 1972.

As acknowledged, the major exercise resulted in one overarching purpose of sustainable management in the RMA, and a mixture of matters of national importance and other matters set out in ss 5-7, with a consequential result of blurring of objectives and no specific focus on the built environment. The built environment is identified in an oblique manner under RMA s 5 in enabling people and communities to promote social, economic, and cultural wellbeing. The matters of national importance are predominantly relevant to the protection of the natural and heritage environment and do not comprehend the built environment other than in a negative manner. An economic approach is implied, as a matter to have particular regard to, under s 7(b) “the efficient use and development of natural and physical resources”. That matter has been submerged in the more prolific considerations of natural environment, and cultural protection.

As outlined, the Government reformed the size and location of regions and amalgamated many of the territorial authorities in 1988 to constitute viable local authorities for the environmental management tasks ahead.

For pragmatic and efficiency reasons, the regional councils were vested with continuing the former regional structure of water management under the Water and Soil Conservation Act, and with the clean air functions, formerly administered through the Department of Health. Recognising that management of the coastal marine area could comprehend several adjacent territorial authorities (or opposing local authorities as in the Auckland Waitemata Harbour situation), the regulation of the coastal marine area was also vested in the regional councils. The functions of water and air management focused on protection of the natural environment. The regulation of the coastal environment potentially included both natural and built environment aspects. To acknowledge a hierarchy of function and policy, regional councils were vested with the role of preparing a discrete regional policy statement as a mandatory document, and empowered to prepare one or more regional plans. These plans could cover the other parts of regional jurisdiction, including water and soil conservation which related directly to the natural environment protection.

District councils, as a complementary local authority, were vested with the matrix and details of land use regulation, which following the transitional plan provisions resulted in the widespread continuation of traditional zoning approaches. The zoning map did not lend itself to water and soil regulation except in a broad outline, so generally the nature of rules in the regional plans are those of performance standards with various standards in relation to air and water discharges. The type of rules prepared and imposed were initially left to the determination of the respective regional councils, with little direction from the Ministry for the Environment.

1.9 National policy statements and national environmental standards

As set out in the BUP Report, the New Zealand Coastal Policy Statement was a mandatory obligation under the RMA, and first NZCPA came into effect in 1994. That was replaced by an expanded NZCPA in 2010.

Regarding national environmental standards, for a number of reasons, the first national environmental standard did not appear until 2004, with issue of the national standard on air quality regulation.³³ This standard focused primarily on the state of the natural environment, with prohibitions on incineration of toxic substances, and the recognition of airsheds as a method of

³³ The Resource Management (National Environmental Standards for Air Quality) Regulations 2004 (as revised). See BUP Draft Report, 6.2.

monitoring of air quality, principally in the major urban centres. Subsequent national environmental standards on protecting sources of human drinking water (2007), facilitating telecommunications installations (2008), ensuring electricity transmission activity continuation and maintenance (2009), and managing contaminants in soil (2011) have had a focus primarily on the natural environment, but in respect of telecommunications, electricity transmission and soil contaminants, the standards are also influential in supporting the built environment.

In respect of national policy statements, the statements on electricity transmission security (2008), renewable electricity generation priorities (2011), and fresh water management objectives (2011, updated 2014), focus firstly on the built environment in respect of electricity transmission and renewable energy generation, and secondly on the natural environment in relation to fresh water management. However the promotion of renewable electricity generation 2011, also had a goal to improve the built environment, to the extent that it supported wind farms, solar panels, and hydro dam installations.³⁴

Another matter that was promoted, the “urban design protocol 2005”, had a more specific focus on the built environment, but was not formalised as a national policy statement. Although not having that status, over 176 local authorities and infrastructure providers and developers have signed up to the protocol.³⁵ Beyond these guidelines, district plans generally have minimal standards relating to design, unless related to a location of proven heritage or landscape character which may justify more prescriptive standards.³⁶ Any minimum standards can be enforced if challenged.³⁷ Most council plans include detailed rules covering building height, boundary and yard setbacks, private outdoor space stipulations and site coverage, and do not attempt to specify building design, leaving design to personal choice of the developer and architectural preference. The Auckland Council has provision for voluntary referral of major commercial buildings to a non-statutory design panel. This degree of broad guidance appears to work adequately, especially where developers desire to collaborate with the council officials to facilitate the granting of non-notified consents.

A point can be made about the national environmental standards which have a primary natural environment focus, and the national policy statements that tend to be more focused on the built environment, that the respective standards and policy statements do in various respects address both natural and built environments. Therefore questions may arise as to how practicable a separation of the built and natural environments will be in respect of those documents and regulatory functions.

1.10 Resource consents

The regulatory structures of the RMA, contained essentially in ss 9-15, advance the premise that unless a regional or district plan allows an activity as a permitted activity, the activity can only proceed lawfully if a resource consent is obtained. Amongst those particular sections, there is an interesting variation of presumptions at the primary control level. Without going into detail, under s 9 dealing with land use regulation, the presumption is that unless a plan regulates a particular land use activity, a person is free to proceed with that activity. Conversely, the remaining sections tend to state that unless the plan positively provides for a type of development whether it is a subdivision, development in the coastal marine area, the taking of water or discharge of wastes into water or the air, the activity

³⁴ National Policy Statement for Renewable Electricity Generation 2011.

³⁵ Urban Design Protocol (MfE 2005).

³⁶ The Queenstown Lakes District Plan has controls over building location, materials and colour in the landscapes zones, and within Arrowtown village.

³⁷ *Urban Auckland – Society for the Protection of Auckland City and Waterfront Inc v Auckland City Council* [2005] NZRMA 155 (HC) (CBD building design rules enforced).

is likely to be unauthorised unless the relevant plan allows the activity as a permitted activity or a resource consent is obtained.

In preparing plans, the RMA sets out the scope and choice of the classes of activities which may be applied to particular zones or performance standards. Under RMA s 77A, the class of an activity in a plan may be described as one of six types, namely:

- (a) a permitted activity; or
- (b) a controlled activity; or
- (c) a restricted discretionary activity; or
- (d) a discretionary activity; or
- (e) a non-complying activity; or
- (f) a prohibited activity.

The range of those activities for which a resource consent can be sought are those set out in paragraphs (b) – (e). [In part 6.3 of this paper, a recommendation is made for renaming, or better abolition, of the class of a non-complying activity to reduce the complexity of the consent process.]

The hierarchy of **classes** of consents, are further defined in s 87 with reference back to the regulatory sections 9-15. Section 87 provides for five **types** of consents to be granted by the local authority. These comprise the land use consent, a subdivision consent, a coastal permit, a water permit, and a discharge permit.

Within those categories there is an implied recognition of the focus and relevant matters for the consents. The land use and subdivision categories will essentially focus on implementing development of the built environment. The coastal permit may include both elements of development of the built environment through wharf structures, reclamations, and other coastal installations, but will also have a focus on protecting the ecology of the coastal marine area with a natural environment focus. The remaining types of consents for a water permit and a discharge permit, focus on regulation and protection of the natural environment.

A conclusion can be reached in respect of resource consents that in practice there is an informal recognition of the different regulatory approaches that will be desirable in respect of the respective consents.

In respect of larger developments that may require a land use and subdivision consents, and a discharge permit and possibly water permit, to facilitate the integrated decision making process, the RMA provides for a joint hearing of committees of the regional and district councils to ensure that only one hearing is required as a matter of efficiency and overall integrated assessment.³⁸ That process is simplified under a combined plan administered by a unitary authority. The process to ensure that each of the possibly five different types of consents are assessed under a one-stop approach, and an integrated hearing where all the development cards are on the table, is an issue and challenge which needs to be considered if there is to be a separation of regulation of the built and natural environment.³⁹ In principle, either a single resource management law with separate objectives for the natural and built environments, or separate planning and natural environment laws, could continue to be administered within the same one hearing parameters.

³⁸ RMA, s 102 (hearings by 2 or more consent authorities).

³⁹ At s 103.

1.11 Proposed Government policy statement

The Better Urban Planning Draft Report sets out a proposal for central government to issue a “government policy statement” on environmental sustainability which would be given effect to in local plans. “This GPS would differ from the current NPSs and NESs in that it would lay out clear environmental priorities and articulate principles to help decision makers prioritise environmental issues when faced with scarce resources or conflicting objectives.”⁴⁰

In the description, it is stated that “the aims of replacing NESs and NPSs with a single GPS on environmental priorities would be to: focus on the efforts of the planning system on protecting aspects of the natural environment most at risk or under pressure, [and to] provide clearer guidance to councils on where to put their resources...”.

The scope of the GPS would appear to encompass both natural and built environment aspects, and this combination of coverage would need to be assessed and reviewed if there was a separation of regulation of the built and natural environments. No doubt a GPS could cover both aspects, so the GPS would be a document to have regard to under either a combined or a separated regulatory system. Presently the NES’s and NPS’s cover a number of specific areas and have the benefit of informing local authorities as to minimum standards of expectation and performance, and entitlements for development which may proceed without any restriction at the local authority plan level. In principle a GPS could replace the NPS regime, but would not be an appropriate model for setting minimal environmental standards.

The NPS documents promoting electricity reticulation, renewable electricity generation, water quality standards in allocation and quality, standards relating to telecommunications, and remediation of contaminated land, have a substantial beneficial effect in matters of uniformity and efficiency in regulation, and are viewed as largely non-political documents. Whether the GPS would add effectively to this level of regulation, is a matter for further consideration especially if subject to annual ministerial variation or update. A comparison could be made with the GPS issued under the Land Transport Management Act. That type of GPS is wholly justifiable when the government is managing large sums of revenue to be allocated to local authorities and operators for transport improvement.

1.12 Spatial planning as a core component

The Better Urban Planning Draft Report, includes a recommendation that “Spatial plans should be a standard and mandatory part of the planning hierarchy in a future system. New and expanded infrastructure increases the supply of development capacity and can improve the mobility of people and goods...”⁴¹ As noted in the report, a number of local authorities including Auckland Council, have under mandatory direction or by choice prepared and adopted spatial plans as a basis for a long term vision of urban development. Once again, with a proposal to separate the regulation of the natural and built environment, a question could arise as to the nature of a spatial plan in dealing with these respective matters. A simple response could be that respective chapters in the spatial plan could focus on the protection of the natural environment, and another chapter on promotion or regulation of the built environment. The spatial plan for a whole region should provide for roading and transport systems, educational, commercial, residential space, employment opportunities and recreational balance, and include a local structure plan approach.

⁴⁰ Better Urban Planning Draft Report 2016, at 13.6 (p 334).

⁴¹ At p 336. See also 9.5 responses, Box 9.4, R9.1, Q9.1 (pp 234-236).

If the spatial plan proposal is envisaged to encompass local areas only as needed for future development, then an alternative structure plan obligation for integrated development is an alternative option, which is found in various regional and district plans under the RMA.

Overall a regional spatial plan obligation could provide a desirable opportunity for integrated planning which achieves sustainable management of natural and physical resources. On the question of duplication, depending on the agreed purpose and scope of a spatial plan, if remaining under the LGA it could replace the long-term plan; and if coming under the RMA or a revised planning law, could replace the regional policy statement.

If the spatial plan is integrated into the RMA or a new planning law, and encompasses transport planning under the LTMA, the plan could become part of a tier in the revised legislation, rather than under the LGA. However, that outcome should not be taken as read, because an advantage of the spatial plan being prepared under the LGA (as in the case of Auckland Council), is that the spatial plan may address broader social, economic, cultural aspects, and matters of economic support for sectors of the community in greater need.⁴² This type of expansion of function covering broad sustainable development and economic justice and equity, articulated under the Brundtland Report, is not technically available under the RMA which focuses on sustainable management.⁴³ Income or financial reallocation at the local authority level can only be identified under a long-term plan under the LGA, if that is seen to be an appropriate part of that long-term plan mandate.

An advantage (or disadvantage) of a spatial plan process remaining under the LGA is that it will not be directly subject to any NPS or NES, or template, and no rights of appeal or referral apply. This allows for substantial council policy input, with public comment limited to the special consultative procedure. The form of the spatial plan may be less technical and more user friendly to the community by inclusion of colour plates and creative styling (Auckland Council model). The spatial plan may be useful for promoting the attractions of the region for new economic investment, development and tourism as a “most liveable region or district”.

Conversely if the spatial plan obligation comes under a revised planning law, the degree of public participation and any appeal rights will need to be addressed, especially if a spatial plan is to inform the content of any district plan, and if the spatial plan replaces the regional policy statement.

Where a spatial plan forms a top tier and a mandatory part of the planning hierarchy, the plan should be a regional or unitary council responsibility. In this event, the spatial plan could replace the regional policy statement to avoid duplication of process and issue contestability (Q9.1). The scope and prescribed content of the spatial plan (possibly in a template) should be subject to some flexibility to respond to regional growth and needs. In regions where development or population growth is relatively static, the spatial plan could be in a limited form (of the regional policy statement) to focus on relevant matters that could benefit the region, and to minimise cost. On balance a conclusion is offered that the spatial plan obligation should form part of a new planning law.

2 Pros and cons of the alternative legal structures

⁴² Local Government (Auckland Council) Act 2009, ss 79, 80. The spatial plan was prepared under the special consultative procedure after consultation with central government, communities, iwi, utility operators, the private sector, the rural sector, and other parties. No rights of appeal applied.

⁴³ *St Columbia's Environmental House Group v Hawkes Bay Regional Council* [1994] NZRMA 560 (incorporation of Rio Declaration principles of “right to a productive life” ruled to be beyond the scope of the RMA and not able to be added to vision chapter).

The second question states:

“From a legal perspective, what are the pros and cons of the alternative legal structures identified in the Commission’s draft report (pp 339-340)?”

2.1 Two alternative structures

The two possible future legislative models are either option A, retention of a single resource management law but with clearly separated natural and physical and built environment sections; and option B, separate planning and natural environments laws (Fig 13.1). Under either approach, the Commission envisages land use regulation having separate purposes and definitions for the natural and built environments.

A further statement is made “A large point of difference between the two approaches is how land use regulation for the built environment could be linked to decisions on infrastructure and transport provision. A separate statute which regulates the built environment provides the opportunity to better integrate urban planning activities by combining the roles of land use regulation (within the urban environment) with infrastructure and transport provision into one piece of legislation.”⁴⁴ By way of comment, presumably the last option is that the Land Transport Management Act, in whole or part, would form part of the separate statute dealing with regulation and promotion of the built environment. As discussed below, any integration of the LTMA, beyond cross referencing, is not recommended.

In the draft report, the Commission includes a statement “However regulating the urban and natural environment under a single statute has the advantage of retaining a more integrated approach to resource management. Having separate laws raises the risk of inadequately recognising the inter-connection between urban and environmental issues. Adding a new law to the planning system may increase its complexity and create additional uncertainty for councils and developers.”⁴⁵

2.2 Other related legislation outside the two structures

As an introduction, it can be observed that various major Acts exist outside the RMA which directly relate to administration of the RMA. Firstly the Local Government Act 2002, provides for the constitution of local authorities throughout the country, with its own purpose which is potentially broader than that of sustainable management, and provides for the administrative structure of councils, through committees and delegations, to achieve outcomes. All councils will have an environmental committee to administer the RMA obligations. The LGA also provides for a raft of bylaws which may complement the regulation of permissible land use activities, and regulate the spectrum of activities in public places and road parking allocation.⁴⁶

Secondly, the Land Transport Management Act 2003 provides for the roading construction and functions of local authorities, within the context of national roading strategies, and the separate functions of the New Zealand Transport Agency. The revenue and funding aspects of the LTMA, are a substantial factor in road maintenance and support of new transport systems.

⁴⁴ At p 13.7, p 339.

⁴⁵ At 13.7, p 339.

⁴⁶ Kenneth Palmer, *Local Authorities Law in New Zealand* (Brookers, 2012), chs 1, 2, 13. LGA s 10 (purpose as amended 2012).

Thirdly the Building Act 2004 provides a complementary focus on the built environment and implementation of permitted development and resource consents under the RMA. The primary purpose of the Building Act is to ensure building integrity, through an assurance of building standards in relation to quality of construction, earthquake resilience, fire escape, and water resilience over a minimum 50 year building life period.⁴⁷ The councils must implement the building code, which is set as a nationwide standard of minimum quality for buildings, and administered centrally through the Ministry of Business, Innovation and Employment.

In relation to purposes and principles, the Building Act 2004, s 3(a) contains a purpose (iv) [that] “buildings are designed, constructed, and able to be used in ways that promote sustainable development”. In this context, sustainable development will be used in the sense of durability and integrity of the structure in relation to site risk, structural integrity and water resilience. Building consents can be declined for sites at risk of inundation from flooding and sea level rise.⁴⁸ A substantial problem in the past has been that of leaky homes or units, which have added to the burden on home owners and other building occupiers, and imposed potential liability on local authorities. This problem has influenced property construction costs, and a reluctance in some sectors to carry out highrise development.

In the Auckland region, the escalation of property prices has related primarily to land availability for single or low density units, which carry an assurance that if the building fails in some respect, the loss to the owner will be minimal as the land value is the substantial value component. On the other hand, purchasing of apartments in medium and high rise buildings, can be viewed as a significant risk. In the event of building failure after say 10 or 20 years, remediation costs can be substantial, and may exceed the purchase price of the original unit. To that extent, the increase of value of apartments in high rise buildings has been relatively moderate, and does not attract the type of investor who will favour purchasing land. Many apartment projects have failed due to lack of funding and uptake. The land purchases by investors have been a material factor in a shortage of affordable housing for buyers who simply want a dwelling or unit to live in.

In respect of the Building Act, a manifest conclusion can be offered that this comprehensive uniform legislation should not be absorbed into a planning law promoting the built environment and related land transport.⁴⁹ The regulation of building quality and integrity is best addressed, in its complexities, under the separate Building Act with national performance standards, and minimal local authority discretion.

A similar conclusion can be reached with the regulation of mining exploration and development in the EEZ area under the EEZ legislation. Regulation of heritage conservation is also best advanced under the separate Heritage New Zealand Pouhere Taonga Act 2014, allowing for flexible input to councils regarding RMA provisions, rather than being integrated into the RMA. The present relationship is workable and does not require to be changed. As previously noted, management of aquaculture farms, regarding coastal allocation and rental payments, could be transferred out of the RMA to another statute to reduce the bulk of the RMA.

2.3 Option B – separate planning and natural environment laws

Addressing Option B firstly, the proposal for separate planning and natural environment laws, has as one justification the combination of planning law to include built environment regulation, infrastructure and land transport planning. As noted, the Building Act is limited to ensuring building

⁴⁷ At ch 15.2.

⁴⁸ Building Act 2004, ss 71-74.

⁴⁹ The Building Act 2004, comprises 451 sections plus schedules and regulations (including the Building Code).

integrity and site risk reduction, and those important purposes should not be amalgamated into a planning law.

The LTMA has a focus not only on a hierarchy of a national transport strategy, regional transport strategy and local roading, but covers matters of allocation of the available land transport resource to support roading development and public transport. The public transport support function, comprising public transport through buses, rail, and ferry, is a significant fiscal focus, subject to government policies under the GPS issued under that legislation. To the extent that the LTMA, continues the substantial involvement of the New Zealand Transport Agency in the promotion, development and maintenance of the state highway network, the statute has an important purpose, deriving from the historic role of the National Roads Board.

An observation can be made that the development of the state highway network throughout New Zealand has been highly effective, and has substantially benefited the country. This leading role of central government to maintain a viable and efficient national transport system, has been complemented by the provision of subsidies for development at the territorial authority level. The present system has a flexibility in respect of government policy. As the financial resources available for land transport are effectively managed under a Government Policy Statement, it is appropriate that the LTMA should continue as a separate Act, rather than be integrated with a planning statute that could involve a greater role for regional and territorial authorities.⁵⁰

A conclusion is offered that the LTMA presently has an effective system of consultation at the national and regional levels and integration of all land transport planning into a planning law dealing with the built environment, would be of no advantage, and could hinder the leadership role of central government in transportation. For many years prior to the establishment of the Auckland Council, the multitude of local authorities which could not agree on transport planning, substantially hindered the development of local arterial roads and transport solutions in the Auckland region.

2.4 Option B - Distinction between the natural and built environments in legislation

The proposal to draw a distinction between the natural and built environments through separate planning and natural environment laws, runs counter to the pervasive movement and reform of regulatory statutes in this area since 1986. To establish separate laws, would require a deconstruction of the RMA, and a possible reversion to the silo approaches found in the 1970's and so heavily criticised by respective governments at the time. Also the international trend has been to recognise the need for integrated management of both natural and built resources. Almost all countries internationally with effective management systems, have adopted the Rio principles which subsequently evolved out of the Brundtland Report. The Rio Declaration on Environment and Development states in Principle 1 "Human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature".⁵¹

Principle 15 states "In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities..." The 27 principles overall clearly contemplate an integrated approach to environmental management, and this could be difficult to achieve where a distinction is attempted between the benefits of the built environment as a separate element or goal against protection of the natural environment.

⁵⁰ See J Harker, P Taylor, S Knight-Lenihan, *The Government Policy Statement on Land Transport Funding and Ecological Sustainability* (2012) 16 NZJEL 319. Also Public Transport Management Act 2008.

⁵¹ *United Nations Conference on Environment and Development* (UNCED), Rio de Janeiro June 1992.

That stated, it would not be impossible legally or practically to have two separate statutes. Another approach, found in various overseas jurisdictions, could be to place a primary focus on environmental assessments, to be submitted with applications under either statutes for consents where required by national direction, or under regional and district rules.

Regarding the disadvantages of the two statutes, the potential lack of integrated decision-making could be a concern, unless the two statutes were administered by the same or complementary public bodies and consent authorities together. This process could duplicate the procedures for obtaining planning consents. The demarcation of development into the built environment on the one hand and the natural environment on the other, could lead to inefficiencies and duplication of functions and administration. Enforcement of the terms of the consents could be complicated by having the respective statutes applicable.

At the present time, under the RMA, there is a degree of difficulty in compliance where certain consents may be given by a regional council and others by the territorial authority, in respect of the same development. Whether those consents are effectively monitored and enforced as to conditions, may depend on agreement between the respective local authorities as to whose function it should be or the particular types of conditions to be addressed. Any separate built environment and natural environment laws, could compound the administrative issues, with a cost to development, which should as a matter of principle be minimised. Overseas, the continuation of separate statutes to regulate the discharge of contaminants into the air, and onto land and water, and to regulate the taking of water, may be administered under separate laws, as a matter of clarity and convention. As indicated, the consequential management of building consents under the Building Act in New Zealand, is an example of the separation of administration in an effective and appropriate manner. The complexity of natural environmental regulation is not such in this country to justify a separate statute in that area nor in the built environment area.

In conclusion on the separate planning and natural environmental laws under option B, it is difficult to see any compelling or justifiable case for turning the clock back pre the RMA and reverting to the former separate regulatory statutes.

2.5 Option A - refined single resource management law

As the draft report foreshadows, under 13.7, "Regulating the urban and natural environment under a single statute has the advantage of retaining a more integrated approach to resource management." Earlier, under 13.5, the statement is made "The natural and built environments require different regulatory approaches.... Rather than attempting to regulate these different issues through the same framework, a future planning system should clearly distinguish between the natural and built environments, and clearly outline how to manage the inter-relationship between the two".⁵²

This statement is supplemented by further explanation (under 13.5):

A more restrained approach to land use regulation

"A future planning system should only apply rules where there is a clear net benefit, where the link to externalities is clear, and where alternative approaches are not feasible. This implies:

- broader zones that allow more uses,
- greater reliance on pricing and market-based tools rather than rules;
- less use of subjective and vague aesthetic rules and policies;
- greater use of local evidence to support land use rules ...

⁵² Better Urban Planning Draft Report 2016, at 13.5 (p 332).

- clearer and broader ‘development envelopes’ within which low risk development is either permitted or only subject to minimal controls.

At the present time, this type of approach identified is comprehended generally under RMA s 32 under the obligation to first consider the appropriateness of controls. That checkpoint should achieve some of the outcomes envisaged. In practice, this has not always occurred due to differing enthusiasms of local authorities and planners to define in substantial detail permissible activities or to require a high level of resource consent applications for development which has no substantial detrimental effect on the environment. For the future, the quality of planning could improve if the Ministry for the Environment introduces the template systems envisaged under the Resource Legislation Amendment Bill 2015, and gives greater support through a national policy statement on urban development capacity.

These outcomes can be legislated for as objectives to a certain extent in a regulatory statute, but may be better achieved by particular directives from central government through national policy statements (or a GPS). Further, the proposal of the draft Report to establish a permanent independent Hearings Panel, could have a similar desired outcome. The Hearings Panel could establish certain benchmarks as to permissiveness, and limit over regulation by local authorities where not justifiable. Over regulation is also a matter to consider in relation to the potential recognition of places of value to mana whenua, where those places are not established under normal community standards to be of significant importance, and have the effect of limiting the development rights of private property owners.

Under para 13.6 there is envisaged to be “a presumption in favour of development in urban areas, subject to clear limits”. This desirable type of approach could also be implemented through fine tuning of a resource management law in respect of resource consent applications.

Under Option A, in the future, a single resource management law could be revised to provide for different objectives and priorities in respect of the built environment section and a natural environment section. As an overarching purpose, s 5 with its present definition of “sustainable management of natural and physical resources” could accommodate the sequential focus and refinement of recognising separate objectives to address and promote the built environment, and other objectives to address and enhance the quality of the natural environment. Section 5 could be left intact, or more consistently refocused to read “The purpose of this Act is to promote the sustainable management of the built and natural environments”. Under a replacement of the RMA, the purpose in s 5 could be revised as set out, with new definitions of the “built environment” and “natural environment”.

Although a distinction between the two sections addressing the built environment and the natural environment will not necessarily be clear and could overlap in various types of developments, it could be legally achieved by a redrafting of ss 6 and 7 of the RMA in particular.

The endeavour by the Government under the *Summary of Reform Proposals 2013* to revise the content of s 6 (Principles) and s 7 (Methods) failed due to lack of political support.⁵³ The reason for this outcome was primarily the dilution of certain existing matters of national importance and the continuing mix and dominance of objectives in respect of the natural environment. The draft acknowledged in s 6(l) “the effective functioning of the built environment, including availability of land to support changes in population and urban development demand”, and (n) “the efficient provision

⁵³ Ministry for the Environment, *Resource Management Summary of Reform Proposals 2013* (MfE Wellington, August 2013), 13, 14. See **appendix 4** below.

of infrastructure”. These two items provided the only focus on the built environment objectives and where immersed in the other matters in (a)-(p). (set out in **appendix 4**)

The revision of ss 6 and 7 advanced in 2013, and subsequently withdrawn before introduction into Parliament, did not have the clarity necessary to distinguish between development of the built environment and that of the natural environment. A more consultative approach with local authorities, and with collaboration between other stakeholders, iwi, and political parties, could result in a consensus as to the type of focus required to address the shortcomings identified in the Better Urban Planning Draft Report (ch 13 in particular).

Further, in respect of a “built environment section” of a refined single resource management law, it would be necessary to provide a definition of the built environment, to encompass the appropriate activities and development to be assessed within the purposes and objectives specified.

The built environment is the focus of various academic journals.⁵⁴ In the UK, the planning regulation is generally administered through local authorities, except where major authorities may be called in for enquiry by a member of the central government inspectorate. The UK approach underscores the possibility of separate Acts to evaluate different aspects of development affecting both the built and natural environment. Articles within the journals are not restricted to purely the built environment but include effects on the natural environment. A simple definition of the built environment is that part of the physical environment constructed by human activity.

A broader definition and more impersonal approach is that the built environment consists of the following elements: land use patterns, distribution across space of activities and buildings that house the activities, transportation systems, physical infrastructure of roads and other service systems, and urban design. Broader elements of social wellbeing may be included as part of the objectives of the built environment. A number of these elements are implicit in the definition of sustainable management in s 5 of the RMA.

2.6 Conclusions on Option A

Without going into detail or attempting a draft of a built environment section and a natural environment section, which could be a principled part of a refined single resource management law, the process should be reasonably straightforward from a legal perspective. Ideally, agreement should be reached on respective purposes or principles following consultation with all affected stakeholders and parties, and political agreement achieved.

An assumption is made that the **purpose of sustainable management** in s 5(1) of the RMA could be amended to read “The purpose of this Act is to promote the sustainable management of the built and natural environments”. Section 5(2) could remain unchanged.

⁵⁴ The journals include *The International Journal of Law in the Built Environment* (online from 2009, Emerald Press, UK). The journal is generally edited out of the School of the Built Environment, at the University of Salford, UK. Legal academics associated with that publication have published a book D Wood, P Chynoweth, J Adshead, J Mason, *Law and the Built Environment*, Wiley-Blackwell 2011. The content of the text comprises a conventional coverage in respect of chapters on the Administration of Law, Law of Contract, Law of Tort, Land Law, Law of Landlord and Tenant, and Public Law Regulation. In respect of planning law, the text identifies the Town and Country Planning Act 1990 UK, and the Planning Act 2008 UK, as the main legislation controlling the development of land. Planning permission is generally required unless an activity is specified as a permitted development or an exempted activity. In addition water pollution may require separate consents under the Water Resources Act 1991 and prescribed regulations. Another UK journal is *Built Environment* (Alexandrine Press).

A further assumption is made that RMA s 6, matters of national importance, and s 7, other matters would be replaced by one or more sections. The replacement provisions could respectively comprehend:

(1) The objectives of management of the **built environment**. eg Provision of adequate or affordable housing, areas for industrial and commercial uses, provision of infrastructure and transport systems, civic, cultural and educational purposes, health facilities, sporting facilities and recreational areas, heritage protection, public access to waterways and seashore, and promotion of the built environment generally to enhance social , economic, and cultural wellbeing.

(2)The objectives of the management of the **natural environment**. eg preservation of the natural character of the coastlines and waterways, protection of outstanding landscapes, significant habitats, biodiversity, soil capacity, intrinsic values of nature, air quality, water quality, sea level rise, and climate change effects.

(3) A third category of objectives may be desirable to accommodate activities and matters that straddle both the built environment and the natural environment, and have crossover manifestations. The third category could list the purposes and objectives of management of activities affecting both the built and natural environments. Eg energy efficiency, transport systems which may have benefits for the built environment and adverse effects in relation to levels of air quality and noise. Mining activities, heavy industry, and farming activities have effects in respect to both the built environment and the natural environment. Maori cultural relationships to the environment and ancestral lands and waters, waahi tapu and other taonga, and kaitiakitanga status, which encompass a ‘world view” and both environments.

Conversely a third category of objectives may not be necessary with effective cross referencing techniques between the broad objectives for the built and natural environments. Much consultation should be undertaken in the matter of recognising and redefining sustainable management objectives.

Stronger links could be made to land transport planning under the Land Transport Management Act 2003 or a successor to that Act. It would not be desirable to clutter up the resource management law, by amalgamating the administration of land transport management into the one statute. Focus on the built environment at the regional and district levels is relatively contained, whereas land transport management has a much greater national focus, and is prone to greater direction from central government through the government policy statements and management of the national land transport fund.

In practice, a stronger identification of built environmental objectives in relation to natural environment objectives, could be translated through national environmental standards, national policy statements, [and a possible government policy statement] as a more flexible direction from central government. These higher level policies and directives could have an effect on spatial planning obligations, to the extent that they were added as a mandatory provision under the resource management or replacement planning law.

The existing regional policy statement obligations, options as to regional plans, provision of a mandatory coastal plan, and the obligation to prepare district plans could remain. These lower tier documents would be subject to the higher level directives.

The provision for local authority policy and plans to be the subject of determinations by an Independent Hearings Panel, could introduce more consistency and prevent over-regulation where not substantiated by needs or local circumstances. In establishing an Independent Hearings Panel, it could be necessary to provide for more than one panel or for the panel to sit in divisions, depending on the workload facing the panel. This could be an issue if a number of local authority plans came up for consideration at the same time. A benefit of the present system of local authority control over the plan content, is the flexibility and local knowledge which can be applied.

A further contingency is whether alternative procedures such as the collaborative procedure or the streamlined procedure, are enacted under the pending Resource Legislation Amendment Bill 2015. Restrictions on appeals from recommendations of an independent hearings panel, could reduce the number of appeals, but having regard to the progress of the proposed Auckland Unitary Plan, it is unlikely that all appeals would be eliminated under the proposed procedure.

The relationship of objectives in the respective built environment and natural environment sections, could be supplemented by regulations or the template requirements which are also envisaged under the pending reforms.

The extent to which any government policy statement or NPS, and templates prescribed through the Minister, set out specifications and activities which must be permitted or regulated at a certain level, could qualify and bring a degree of uniformity to the respective regional and district plans. The desirability of greater uniformity is self-evident, and a comparison can be made with the building code, which applies uniformly throughout the country, with individual councils having no entitlement to vary the standards of building integrity. The location of buildings may remain the subject of the zoning systems, and these controls are necessary for matters relating to protective zoning in respect of sea level rise, and areas of earthquake risk.

At the resource consent level, the objectives of the built environment section and natural environment section would have a positive effect. Where a presumption can be appropriately added to the granting of consent, such as in respect of the built environment, it could facilitate approvals. Conversely in respect of natural environment protection, it may be inappropriate to have any presumption on matters which involve potential emission of contaminants into the air or onto land, and regarding the use of water resources. Those particular areas of natural environmental effect, could continue to be regulated at a higher level through the government policy or by continuation of national environmental standards in particular.

In conclusion Option A a refined single source management law, can be affirmed in that current statutes and practice blur the two environments, and provide inadequate security about environmental protection and insufficient certainty about the ability to develop in urban areas. This situation is partly due to the ambitious amalgamation of the land use and water and air legislation under the RMA. That process was rushed to a certain extent due to a pending parliamentary election, and political decisions taken at the time. On hindsight, the mixture of matters of national importance under s 6, and the other matters under s 7, does not have a rationality, and obscures any focus on the adequacy of management of the built environment. In times past, this may not have been a problem with a relatively static population, but with populations in certain parts of the country increasing significantly, and likely to continue to increase at that rate for the foreseeable future, it is timely for the legislative purposes under the RMA to be re-defined.

3 Third Question

“What changes to the LGA and LTMA would be required to complement the new legal structure and create an integrated and effective body of law to underpin management of the built and natural environments?”

3.1 Local Government Act 2002

As acknowledged in the Draft Report, the purpose of local government under LGA 2002, s 10, has changed since first enactment. The former purpose “to promote the social, economic, environmental, and cultural wellbeing of communities, in the present and for the future”, was intended to confer a power of general competence. The objective was to free up the vision and lawful activities of local authorities to promote the “four wellbeings”, without being concerned over details of exceeding particular powers.⁵⁵

That expansive purpose complemented the purpose under RMA s 5 of sustainable management which postulates managing the use, development, and protection of natural and physical resources in a way or at a rate which enables people and communities to provide for their social, economic, and cultural wellbeing and for their health and safety while sustaining the potential to meet reasonably foreseeable needs of future generations, safeguarding the life-supporting capacity of natural resources, and avoiding and mitigating adverse effects on the environment.

Due in part to the increased scope of local authority governance, and increasing costs of administering the RMA with its unguided vision of regulation, an amendment in 2011 focused consideration on the primary role of local authorities to provide core services.⁵⁶ Subsequently in 2012, a further view that local authority costs were exceeding an appropriate mandate, led to a significant Government proposal to amend s 10(2) to draw back the purposes from promoting the four wellbeings of communities, and to replace that objective with a narrower purpose.

The amended purpose of local government would be “to meet the current and future needs of communities for good quality local infrastructure, local public services, and performance of regulatory functions in a way that is most cost effective for households and businesses”.⁵⁷ That revision was intended to have a direct effect on the expenditure of local authorities, which is to be flagged in the long-term plan and in annual plans under the LGA, and affects annual rating liability of land owners.

The Government’s reform paper “Better Local Government” March 2012 set out the justification to require local government to refocus on a narrower purpose and to introduce fiscal responsibility requirements. In dealing with the refocus of purpose, the statement was made (p 6) “The problem is illustrated by councils setting targets for NCEA pass rates, greenhouse gas emission reductions and reduced child abuse in their communities. These are very real and important issues but they are not the responsibility of councils”.

⁵⁵ Kenneth Palmer, *Local Authorities Law in New Zealand* (Brookers, 2012), chs 1.3, 23.4.

⁵⁶ At 1.3.2. Local Government Act 2002, s 11A.

⁵⁷ Better Urban Planning Draft Report (2016), at 5.2, F5.2. Local Government Act 2001 Amendment Act 2012, inserting s 10. Good quality is defined, and the question whether services are cost effective does not appear to be the subject of any close scrutiny by the Auditor-General as auditor of local authority financial compliance .

The Auckland District Law Society made a submission on the Bill (prepared by the present author) regarding the questionable impact of the amendment on the legality of the following actions commonly undertaken (in Auckland):

“Local boards are granted funds to support community initiatives and club wellbeing (small grant support); other grants may support orchestras, bands, art exhibitions, street festivals, outdoor concerts, fairs, parades, charities, and fireworks displays. On a strict reading of the redefined powers to be given to local authorities, the latter activities are unlikely to qualify as constituting local infrastructure, local public services, or the performance of regulatory functions. Expenditure on sister city relationships and trade promotion could be eliminated. The former specific ability (prior to 2002) of a rural council to provide a free or low rental house and surgery to attract a local GP doctor could be in doubt. Activities to improve educational achievement, law abiding behaviour by young persons, relief of poverty, and promotion of affordable housing may arguably be within community needs of local public services, but legal doubt will arise”.

“... Any change to the powers of local authorities may have a negative flow-on effect to the powers of council-controlled organisations. The powers of a council-controlled organisation to promote investment, job creation and area development may be affected. In principle a CCO should have no greater powers than the local authority which sets up the corporate body”.

This submission and others which were concerned with the removal of the power to promote the four wellbeings did not result in any alteration to the Bill by the select committee. The Committee was evenly divided on the amendment to purpose, and reported the Bill back making no recommendations. Requests to define the scope of “local infrastructure” and “local public services” were not successful. The Bill was subsequently passed by Parliament with a two vote majority. No cases have been considered by the High Court to date as to the scope of the revised powers of local authorities under the LGA.

The restraint on local authorities in expenditure to the LGA purpose of providing infrastructure and local services, does not prevent the local authority from proposing wider policies and plans under the RMA for a much broader visionary scale of development by the private sector which could promote wellbeing.

At the present time local authorities may plan for but do not legally have the powers to financially support the whole of the visionary development that may be foreshadowed under the regional and district policy and plan documents under the RMA. The relevant plans could comprise zoning and incentives for business parks, educational facilities, commercial centres, and social housing. The Council does not have the power to finance or construct these developments, where beyond the provision of “local infrastructure” and “local public services”. Trade delegations overseas to attract investment to a region would also be beyond the strict financial powers of a local authority. As noted, local authorities do have the power under the LGA to plan and construct good quality local infrastructure and local public services, and these latter elements are integral to making provision in planning documents for development of the built environment.

As assessed in the Better Urban Planning Report, one of the constraints is that of finance of infrastructure, and the relative straightjacket in which local authorities are bound in providing financial support. The traditional bases of rating to provide revenue or undertake borrowing, continue to be used, but in high growth areas, the costs of development may exceed the level of borrowing and local opposition may be a limiting factor as to targeted rates. Another power which has been inserted into

the Local Government Act, is the ability on new developments to impose a development charge.⁵⁸ This supersedes to a certain extent the financial conditions that could be imposed under the RMA under a consent. The development charges have since 2012 been subject to the possibility of review by an independent development contributions commissioner, and the scope of those charges is partly affected by the impact on the market.⁵⁹ Effectively development charges will be passed on to the buyers of properties, and operate to increase prices and influence the affordability of new development. Private development is likely to focus on the most profitable building which tends to be in the higher price level. Without incentives or support from local and central government, the situation regarding affordable housing remains problematic and contentious. The question of role clarity between functions of local authorities under the LGA, and planning functions under the RMA is assessed in the Report.⁶⁰

Assuming that a refined resource management or planning law model is likely to be recommended, the provision of a built environment section and a separate natural environment section, could have only marginal impact on the present functions of local authorities under the Local Government Act, unless intergration is improved. The LGA is primarily an administrative statute, governing the structures of local authorities and management obligations through the long-term plan and annual plan. The LGA includes the power to add to the detail of RMA regulation through a lower tier of local authority bylaws, and significant discretion remains as to the content of those bylaws in respect of parking and traffic management. Certain areas are not covered by bylaws, including air pollution arising from land use activities and in respect of moving vehicle operations. Motor vehicle emission standards remain the prerogative of central government.⁶¹

3.2 Land Transport Management Act

In the draft report, comment and criticism is voiced as to the lack of coordination between transport planning under the LTMA, and regional policy and district plans under the RMA.⁶² It is of note that the original purpose in s 3 of the LTMA, referred to a sustainable land transport system. Under s 3(1) the purpose was to achieve “an [affordable], integrated, safe, responsive and sustainable land transport system”, and under s 3(2) to contribute to that purpose, several transport objectives were identified, including an integrated approach to funding and improvement, social and environmental responsibility, long-term planning and investment in land transport.⁶³

In 2013, the contentious purpose was amended and truncated into one sentence reading “The purpose of this Act is to contribute to an effective, efficient, and safe land transport system in the public interest.” That concise statement has a consequential effect in respect of the Government Policy Statement to be issued every six years. Former objectives to assist economic development, safety, access, public health and environmental sustainability have been omitted, and the GPS must now set out national land transport objectives, policies, and measures for a period of at least 10 financial years.⁶⁴ These matters are reflected in the national land transport programme, and the regional public transport plans. The funding focus of the LTMA, implemented through the New Zealand Transport Agency at the state highways level, and by local authorities at the regional and

⁵⁸ Better Urban Planning Draft Report (2016), at 5.5, 6.8, ch 10. Local Government Act 2002, ss 197AA-207.

⁵⁹ At ss 199A-199P.

⁶⁰ Better Urban Planning Draft Report (2016), at 5.2, 5.5.

⁶¹ At 6.2 Air quality.

⁶² At 5.3, figure 5.6.

⁶³ LTMA 2003, s 3.

⁶⁴ At s 68 (as inserted 2013). Compare former provisions in J Harker, P Taylor, S Stephen-Knight, “The Government Policy Statement on Land Transport Funding and Ecological Sustainability” (2012) 16 NZJEL 319 (claim that GPS not supporting ecological sustainability).

district levels in relation to subsidies and networks, is significantly different to the wide sustainable management purpose under the RMA and procedures for public submissions.

The consultation provisions under the LTMA are narrower than under the RMA, but the LTMA does not prevent effective consultation and integration of the national land transport programme with the programme to be envisaged and implemented under regional policy and district plan provisions. Duplication of consultation and process could be mitigated. In short, a conclusion can be reached that relatively minor cross references would need to be added to a refined resource management law, to ensure and better facilitate integration of transport planning into the local plan situation. The distribution of land transport revenue is clearly within the policy of the government and the minister. These fiscal elements are relevant under the LGA to long-term plans and annual plans.

In summary, having regard to the purpose, governance structure, consultation provisions, focus on the national land transport programme, regional land transport plans, regional public transport plans, and funding allocation under the LTMA, the author does not support integration of the LTMA in whole or part into a revised planning law covering the built environment and infrastructure (Option B). Adequate co-ordination of the LTMA with the urban planning process could be achieved by specific cross references in the respective legislation to relevant documents. Otherwise, no major changes to the LTMA are envisaged as being necessary to complement a new planning law structure.

If any change was made to the LTMA, it could be in respect of funding to enable local authorities to have a discretion to impose and collect a higher regional fuel tax than the present tax.⁶⁵ Formerly this was the situation in the Auckland region. However central government appears to be opposed to this reasonable fiscal solution.

Overall, the historical evolution through different Ministries and ministers, of the RMA, LGA, and LTMA, supports the statement in the BUP Draft Report that “The differing purposes of the three planning Acts create internal tensions, duplication, complexity and costs”.⁶⁶ Any revision of the planning laws must endeavour to address these concerns.

Question 4

“What is the likely impact of reform on jurisprudence established under the RMA 1991. How could the lessons from existing jurisprudence be reflected in the new legislation?”

4.1 Introduction

Addressing the question of the likely impact of the reform on jurisprudence established under the RMA, one could reflect back on a similar situation regarding the impact of the RMA on the case law established under the previous separate enactments dealing with development of the built environment, land use activities, and the provisions relating to use and taking of water, discharges of contaminants into water, and discharges into the air.

Turning back to 1991, the impact of the RMA on practice was profound. The RMA was acknowledged as a statute that effectively amalgamated and replaced up to 20 statutes, and made many

⁶⁵ Local Government Act 1974, ss 181-188 (local authorities fuel tax - still in force). Tax forms part of general revenues of component authority. The provision for an increased regional fuel tax in LGA 1974, ss 200A-200N was repealed in 1996. Land Transport Management Act 2003, ss 65A-65ZE, Regional fuel tax (inserted 2008, repealed 2013).

⁶⁶ Better Urban Planning Draft Report (2016), at F5.2.

amendments to other Acts and existing instruments including as consents, and existing plans. Under the extensive transitional provisions, entitlements were included to allow district plans or schemes prepared under the former Town and Country Planning Act to be carried forward, whereas at the regional level, the plans were not carried forward, and regional councils were required to start afresh.

On the assumption that a new resource management law or possibly two separate laws could be enacted, and in either case there would be new provisions detailing purposes for regulation and promotion of the built environment on the one hand, and protection and utilisation of the natural environment on the other, similar issues could arise.

Firstly, decisions would need to be made as to the status of existing development entitlements, which include matters of existing use rights. Under the RMA, two different regimes were adopted. In respect of land use activities and subdivisions which were approved under the former Town and Country Planning Act, and earlier versions of the Local Government Act respectively, those consents were confirmed. Existing use rights for properties which were no longer able to be developed as of right, allowed for the restoration of those properties and the continuation of activities indefinitely.⁶⁷ The only restraint was in respect of significant excesses of land use activities which could detrimentally affect the environment. In this event, it was possible to seek an abatement notice or an enforcement order from the Environment Court, to mitigate the adverse effects.⁶⁸

In relation to regional activities, which subsumed existing water take permits and the discharge of contaminants onto land, into water and air, those activities were continued in the transitional provisions as lawful during the course of preparation of proposed policy and regional plans, but upon those plans becoming operative, the holders of the existing consents were given six months in which to apply for a resource consent to assess the possible validation and continuation of those activities.⁶⁹ To the extent that the activities dealt with matters which could have an adverse effect on the environment, affect the taking of the water resource, and discharge of wastes into water and the air, the transitional provisions were seen to be fair and appropriate. Replacement consents could upgrade the environmental performance, and incorporate new standards of compliance which had evolved since granting of the original consents.

Also time limitations were placed on the consents granted by regional councils. Generally these consents, including consents to activities in the coastal marine area, had a maximum time period of 35 years, and would come up for renewal at that time or a lesser time stipulated in the consent grant. On the other hand, land use consent and subdivision consents, were stated to be consents lasting indefinitely with no review period or need for renewal.⁷⁰ A similar transition would need to be defined in respect of any replacement resource management law. The justification for existing use rights in respect of land use activities and subdivisions, is simply one of fairness and equity. If the rights were not assured, a question of derogation from property rights could arise.

Compensation for plan effect and compulsory taking powers

On the point of loss of property rights, provisions in the former Town and Country Planning Act 1977, to allow claims for compensation for adverse effects of new zoning restrictions, were not carried forward under the RMA. The TCPA 1977 provided for a property owner to claim compensation for any injurious affection or effect of a zoning plan on property rights, subject to a number of

⁶⁷ RMA, s 10.

⁶⁸ RMA, ss 17, 314.

⁶⁹ RMA, s 20A.

⁷⁰ RMA, ss 123, 124.

qualifications. In practice, the provision for existing use rights, which allowed existing activities to continue and buildings to remain unaltered, virtually ruled out all the claims.⁷¹

Under the RMA 1991, s 85, simply states that compensation is not payable in the normal course of events for the effect of zoning rules or performance standards in regional and district plans, unless the Environment Court determines that the rules or standards render the land incapable of reasonable use, and impose an unfair and unreasonable burden on the land owner. In that event, the remedy is not monetary compensation, but allows the Court to make an adjustment regarding rules if found to be unduly onerous, and not justifiable. This provision (as amended) regarding the effect of rules on land owners rights should be continued into any new planning law without change.⁷²

Regarding compulsory acquisition, under the TCPA 1977, land could be taken by agreement or compulsorily for the purposes of implementing any objectives under the district plan. These plans could be contested by objections and appeals as to zoning or requirements and designations for works. For example, the power could be used to take land to establish commercial centres, and in certain instances housing regeneration. In these instances of taking of land, the normal entitlements to full compensation for the loss of land ownership, provided for under the Public Works Act 1984 would apply.⁷³

Under the Resource Management Act 1991, the power to acquire land for the purpose of eliminating any non-complying activity or facilitating a new activity in accordance with the objectives and policies of the regional or district plan, was limited to acquiring the land by way of agreement.⁷⁴ Where agreement was reached on the taking of land, but not on the amount of compensation, the compensation assessment could be determined by the Land Valuation Tribunal under the PWA.

This same date, councils had powers to acquire land for public works under the Local Government Act 1974. These powers extended to roads, infrastructure, and land that might be required for housing constructed by local authorities. Under the Local Government Act 2002, which initially conferred broader powers of promoting community well-being, the scope of the power given to a local authority to take land compulsorily, was pegged to the power available under the former legislation.⁷⁵ This was a precautionary approach to ensure that councils under the broader wellbeing purposes did not exceed the expected mandate of taking land compulsorily for public works or public purposes such as

⁷¹ TCPA 1977, s 26, p 736 *Mackay v Stratford Borough* [1957] NZLR 96 (claim by commercial property owner rejected).

⁷² RMA, s 85. *Steven v Christchurch City Council* [1998] NZRMA 290 is a rare example of a listing of a heritage cottage being successfully deleted, where the listing imposed unreasonable financial burdens on the owner. The dwelling was then able to be removed and the site redeveloped. Compare *Lambton Quay Properties Nominees Ltd v Wellington City Council* [2014] NZEnvC 229 (Harcourts building heritage listing confirmed – claim by owner of financial loss rejected). The Resource Legislation Amendment Bill 2015, will amend s 85 to provide an alternative remedy for the owner to elect to be paid out the value of the property where the rule is found to be onerous and imposes an unfair burden, but the council does not wish to change the provision.

⁷³ TCPA 1977, s 81. K Palmer, *Planning and Development Law in New Zealand* (Law Book Co, Sydney, 1984), vol 2, ch 13), p 685.

⁷⁴ RMA, s 86.

⁷⁵ LGA 2002, s 189.

housing. The ability to take land compulsorily for a shopping centre that might be developed by private enterprise as a joint venture was no longer available.

At the present date, councils may acquire land by agreement for any purpose, but may not use the compulsory acquisition powers for matters outside the purpose in the Local Government Act, under s 10, which has been discussed. The purpose is now limited to providing for local infrastructure, and local public services, of a nature which would have been authorised for compulsory acquisition prior to 2002. Provision of commercial or residential development land would arguably be beyond this scope and beyond any compulsory acquisition.

Under a new planning law, it would be desirable for the council to have a power to take by agreement or by compulsion land which was needed to enable development by the council. This could enable a council to take land being retained by a land banker, and other private owner unwilling to sell to the council for a public purpose or to recognise the public need. At the present time the Crown, of behalf of the Housing Corporation, has the power to take land compulsorily for state housing purposes. As defined, this power could be utilised in a joint-venture situation with the actual building being carried out by contractors on behalf of the Housing Corporation.⁷⁶

In all events, a landowner who receives a notice to acquire land compulsorily from a local authority or the Crown, or an authorised public utility provider, has an additional right to object under the PWA 1981, and refer the matter to the Environment Court for a determination as to whether the taking is fair, sound and reasonably necessary to achieve the objectives of the authority. This process provides an appropriate balance between the powers of compulsory acquisition and the interests of private property owners.⁷⁷ Where a taking proceeds, the owner will be paid out compensation in accordance with entitlements under the Public Works Act, or reached through negotiation.⁷⁸

No recommendations are made by the writer to change the compensation process at the present time. It is acknowledged that the Public Works Act may be reformed at a future date, and under the Resource Legislation Amendment Bill 2015, presently before Parliament, the amount of a solatium offered to an owner of residential property acquired, is to be increased to acknowledge the compulsory element.

4.2 Impact on existing case law jurisprudence

Under the RMA, certain pre 1991 cases of the higher courts relating to the relationship of matters of national importance to other planning objectives, continue to have some relevance in the interpretation of the RMA. The extent to which planning practices and legal jurisprudence would continue, could depend on the culture of central and local government, the ongoing engagement of environment professionals and members of an Environment Court, and the expectations of property owners and communities. The Planning Tribunal which was established under the former Town and Country Planning Acts, was continued into the RMA as the appellate body, and in 1996 retitled as the Environment Court to recognise the increasing status and standing of the Court in performing its many

⁷⁶ Housing Act 1955, s 5 (see appendix 5).

⁷⁷ PWA, s 23. *Grace v Minister for Land Information* [2014] NZRMA 454 (taking of ancestral Maori land for arterial road disallowed).

⁷⁸ PWA 1981. See Bennion ed, *New Zealand Land Law* (2nd ed Thomson Reuters 2009), ch 15 (K Palmer author).

functions in environmental adjudication. The Court has a significant role in civil enforcement. The Judges alone may preside on prosecutions in the District Court.

Accordingly, in brief summary, the question of likely impact of reform on jurisprudence, would depend on the extent of any reform and the continuation of other governance approaches. Assuming that the structure of management would remain one of allocation between regional councils and territorial authorities, with the possibility of a combined plan administered by a unitary council, that relationship could continue to be informed by existing decisions. The introduction of a government policy statement, in replacement or in addition to national environmental standards and national policy statements, could add another tier of obligation, but would be consistent with the present role of government in leadership in the resource management area.

The most likely impact of reform would be on any restatement of purposes. A division of the present matters in Part 2 of the RMA into a revised built environment section and a separate natural environment section, would inevitably require in part a fresh approach, and new interpretations as to the nature and extent of the policies, and obligations in implementation of the policies. Much would depend on the particular wording of the respective provisions and individual statements of purpose. In addition, the pending provision of templates, could have an effect on the content and expectations at the planning level.

Assuming that the Environment Court would continue, as envisaged, the different role of the Court would be to deal with council rejection of recommendations from the permanent Independent Hearings Panel. Secondly in relation to consent decisions, directly affected parties would have a right of appeal, and applicants could challenge adverse decisions or conditions imposed. Also, the Court would have a role on direct referrals, and where appointed to hear major cases called-in by the Minister or the EPA, and would continue to have functions presumably in respect of civil enforcement matters.⁷⁹ The latter would include enforcement of abatement notices, issue of enforcement orders, and the making of declarations in a wide variety of circumstances. The experience of the existing Judges would be continued and applicable to administration and interpretation of the new appeal and referral provisions.

To the extent to which members of local authorities, planning staff, members of the Ministry for the Environment, would continue in office, the present knowledge-bank, cultures and expectations of the planning system would remain to inform the decision-making of the respective bodies. That outcome is in many respects desirable, to ensure stability of the resource management process, which underpins property values and expectations as to future development. Any more radical changes which could be interpreted as undermining security of property rights, and the appropriate role of local government under the RMA, could be seen to be inappropriate and not in accordance with measured law reform. The constitutional relationship between central and local government remains at the heart of the planning system regarding the built environment, and the government can be properly expected to continue a leadership role in respect of protecting the natural environment.

⁷⁹ Better Urban Planning Draft Report (2016), at 13.6 “A different role for the Environment Court” (p 335)

5 Centralisation of environmental enforcement, or greater oversight of regional councils

5.1 Regional plan compliance introduction

In the BUP Draft Report 13.7, there is discussion regarding performance of regional councils and a statement that the monitoring and enforcement by the councils has been disappointing. A question is asked:

13.2 Which of two options would better ensure effective monitoring and enforcement of environmental regulation?

- Move environmental regulatory responsibilities to a national organisation (such as the Environmental Protection Authority).
- Increase external audit and oversight of regional council performance.

The latter option is acknowledged as a less radical alternative. Reference is made to the EPA or the Ministry for the Environment being given responsibilities to audit and report publicly on the performance of regional councils. Further that the government could appoint a commissioner, or Crown observer if necessary (under the RMA or LGA).

Looking back on effective management at the regional level, the Canterbury Regional Authority stands out as the one body which through internal division was unable to come up with an appropriate and timely water management plan. The replacement of that council by commissioners, has led to significant progress and appears to have been an appropriate and justifiable solution in relation to that council.⁸⁰ Elsewhere in New Zealand, the regional councils appear to be working reasonably effectively, and managing their functions in a coordinated and compatible way with the territorial authorities. As noted, the provision under the RMA for joint hearings, and increased provision for delegation or sharing of responsibilities for plan preparation and administration, have introduced a degree of choice and flexibility in this area of administration and goal setting.⁸¹

Outside the RMA and regional plan rules, the Fonterra Accord agreements relating to dairy farm suppliers and land and water pollution responsibilities, have been a reasonably effective non-statutory basis for environmental management and compliance.⁸²

5.2 Environmental Protection Authority functions

Regarding possible enforcement by the Environmental Protection Authority, a question could be raised as to whether that body is the appropriate body to take over enforcement at a national level.

Under the Environmental Protection Authority Act 2011, the Authority (EPA) has responsibility for the administration of various disparate environmental Acts or parts of the Acts. These include the Climate Change Response Act 2002, which involves a complex trading system of carbon units intended to mitigate industrial and commercial activities which give rise to greenhouse gas emissions. This Act appears to have had marginal influence on liable activities and industrial processes, and is not able to deal effectively with livestock emissions. Administration of the EEZ mining legislation, is a specialist

⁸⁰ Environment Canterbury (Temporary Commissioners and Improved Water Management) Act 2010 (as amended).

⁸¹ RMA, ss 33 (transfer of powers), 36B (joint management agreements), 80 (combined documents).

⁸² <https://www.fonterra.com/nz/en/sustainability+platform/sustainable+dairying/new+zealand/new+zealand> (effluent, nitrogen, waterway access management programmes); <http://www.dairynz.co.nz/environment/in-your-region/sustainable-dairying-water-accord/> (96% of waterways excluded from dairy cows). Accessed 6 October 2016.

function. Administration of the Hazardous Substances and New Organisms Act 1996, is a substantial specialist function which requires co-operation with local authorities and other bodies involved in administration. The EPA has a function of advising the Minister on call-ins under the RMA.

Overall, one would hesitate to make any recommendation that the EPA, with its present mandate, would be an appropriate body to administer throughout New Zealand matters of regional environmental enforcement. A major expansion of unit function, and amendment to the EPA Act would be required to add any RMA enforcement function to that body. The main justification could rest in the title “Environmental Protection Authority”, but that title belies the substantial administrative and management functions presently undertaken, and the absence of any specific statement in the Act that environmental protection is the main objective of the EPA.⁸³

5.3 Parliamentary Commissioner for the Environment functions

Under the Environment Act 1986, s 16 (1)(b) the functions of the parliamentary commissioner include: “Where the Commissioner considers it necessary, to investigate the effectiveness of environmental planning and environmental management carried out by public authorities, and to advise them on any remedial action the Commissioner considers desirable”.

The role of the Commissioner, as an independent officer of Parliament, has always been envisaged to be a “systems guardian”, and it is a matter of public comment that since 1986 the office of the commissioner has generally been funded at a level that maintains it at a minimum staffing complement, and has limited its scope and effectiveness in carrying out its functions.⁸⁴ The Commissioner has from time to time reported on the performance of selected local authorities, and water quality and pollution issues. In relation to performance by regional councils it would seem to be fitting and appropriate for the original functions of the parliamentary commissioner to be given more support from Parliament.

To the same end, the Commissioner has a right to be heard in civil proceedings. Under s 21, the Commissioner has the right to be present and call evidence in any proceeding relating to the obtaining of a resource consent. In practice, this is a power that has rarely been used, due apparently to inadequate staffing levels of the office to participate in any planning application or related plan change matters. The potential of the Commissioner as a systems guardian has not been achieved.

The other educational functions of the independent Commissioner through reports on matters of current importance in the environmental regulation area, have significant respect and influence. That research, information and educational role of the Commissioner would not be compromised in any way by according it a more robust function in auditing or monitoring the performance of all regional councils on a systematic basis. The Commissioner could recommend necessary changes to council administration and the achievement of the goals of the resource management legislation.

Consistent with those functions, the Environmental Reporting Act 2015 provides for the Commissioner in its discretion to assess any environmental report and the processes producing the report. Recommendations may be made on the report, trends, implications, and responses.⁸⁵

Overall, the Commissioner, with additional funding and staff, could have a primary or secondary role in the external audit and oversight of regional council performance.

⁸³ See Environmental Protection Authority Act 2011, extracts included in **Appendix 3** below.

⁸⁴ See [1.4] above.

⁸⁵ Environmental Reporting Act 2015, s 18.

5.4 Ministry for the Environment functions

Under Part 2 of the Environment Act 1986, the Ministry for the Environment was established as a department of State, under the control of the Minister. Under s 31, the functions of the Ministry comprise primarily advising the Minister on all aspects of environmental administration. A function under s 31 (c) is “To provide the Government, its agencies, and other public authorities with advice on – (i) the application, operation, and effectiveness of the Acts specified in the Schedule of this Act...”. The list includes a multitude of environmental-type enactments, including the Local Government Act 2002 and the Resource Management Act 1991. The Ministry is also given a function under s 31 (f) “Generally to provide advice on matters relating to the environment”.

In addition to those functions, under the Resource Management Act 1991, s 24, the Ministry for the Environment is given specific functions relating to the RMA implementation.

24 Functions of Minister for the Environment

The Minister for the Environment shall have the following functions under this Act:

- (a) the recommendation of the issue of national policy statements under section 52:
- (b) the recommendation of the making of national environmental standards:
- (c) to decide whether to intervene in a matter, or to make a direction for a matter that is or is part of a proposal of national significance, under Part 6AA:
- (d) the recommendation of the approval of an applicant as a requiring authority under section 167 or a heritage protection authority under section 188:
- (e) the recommendation of the issue of water conservation orders under section 214:
- (f) the monitoring of the effect and implementation of this Act (including any regulations in force under it), national policy statements, and water conservation orders:
- (g) the monitoring of the relationship between the functions, powers, and duties of central government and local government under this Part:
 - (ga) the monitoring and investigation, in such manner as the Minister thinks fit, of any matter of environmental significance:
 - (h) the consideration and investigation of the use of economic instruments (including charges, levies, other fiscal measures, and incentives) to achieve the purpose of this Act:
 - (i) any other functions specified in this Act.

The monitoring and investigation functions are directly relevant to the oversight of performance by regional councils. The tradition of the MfE preparing information and advisory documents is central to achieving best performance at local government level.

More directly under s 24A, the Minister for the Environment may investigate the exercise or performance of a local authority, of any of its functions, powers or duties under the RMA, or regulations, and make recommendations to the local authority on its exercise or performance of those functions, and investigate any failure or omission by the local authority to exercise those functions.

24A Power of Minister for the Environment to investigate and make recommendations

The Minister for the Environment may—

- (a) investigate the exercise or performance by a local authority of any of its functions, powers, or duties under this Act or regulations under this Act;

and

(b) make recommendations to the local authority on its exercise or performance of those functions, powers, or duties; and

(c) investigate the failure or omission by a local authority to exercise or perform any of its functions, powers, or duties under this Act or regulations under this Act; and

(d) make recommendations to the local authority on its failure or omission to exercise or perform those functions, powers, or duties; and

(e) take action under section 25 or section 25A if the local authority's failure or omission to act on a recommendation gives the Minister grounds to take action under one or both of those sections.

This provision [s 24A] appears to be a tailor-made authorisation to investigate the performance of regional councils who are failing to monitor and carry out enforcement of national standards or rules under regional plans. The power is complemented by the residual powers of the Minister for the Environment under s 25. The Minister may appoint persons to take over and perform and exercise the functions and duties in place of the local authority.

Further under s 25A the Minister may direct a regional council to prepare a regional plan to address a resource management issue relating to a function, or to prepare a change or variation to address the issue. The Minister may specify a reasonable period in which the plan change or variation must be notified. Under the same section the Minister may also direct a territorial authority to make changes to a district plan to address a resource management issue. Finally, under s 25B, the Minister may direct a regional council to commence a review of whole or part of a regional plan, and the Minister of Conservation may issue a similar direction in respect of a regional coastal plan.

Under s 26, that the Minister for the Environment is empowered to make grants and loans to any person to assist achieving the purpose of the Act. Except in emergency situations, the scope of this power has not been effectively utilised, and the Government could consider a more creative use of the provision in the public interest.

Under s 27 the Minister for the Environment also has a power to require local authorities to supply information regarding the exercise of functions, powers and duties which is held by the body and may reasonably be required by the minister.

5.5 Independent role of Ministry for the Environment

A supplementary issue is whether the Ministry could have an independent monitoring and audit role, and whether those functions already exist under current statutory arrangements. A question raised is whether it would be appropriate for the Secretary for the Environment (ie, the Ministry for the Environment) to have an independent power to monitor the effect and implementation of the Act, and regulations made under it; and to make recommendations to local authorities (similar to the provision of RMA, s 24A with respect to the Minister). And if this were appropriate, how would it be provided for in legislation?

Environment Act 1986, s 31 Functions of Ministry

The Ministry shall have the following functions:

(a) to advise the Minister on all aspects of environmental administration, including—

(i) policies for influencing the management of natural and physical resources and ecosystems so as to achieve the objectives of this Act:

(ii) significant environmental impacts of public or private sector proposals, particularly those that are not adequately covered by legislative or other environmental assessment requirements currently in force:

- (iii) ways of ensuring that effective provision is made for public participation in environmental planning and policy formulation processes in order to assist decision making, particularly at the regional and local level:
- (b) to solicit and obtain information from any source, and to conduct and supervise research, so far as it is necessary for the formulation of advice to the Government on environmental policies:
- (c) to provide the Government, its agencies, and other public authorities with advice on—
 - (i) the application, operation, and effectiveness of the Acts specified in the Schedule in relation to the achievement of the objectives of this Act:
 - (ii) procedures for the assessment and monitoring of environmental impacts:
 - (iii) pollution control and the co-ordination of the management of pollutants in the environment:
 - (iv) the identification and likelihood of natural hazards and the reduction of the effects of natural hazards:
 - (v) the control of hazardous substances, including the management of the manufacture, storage, transport, and disposal of hazardous substances:
- (d) to facilitate and encourage the resolution of conflict in relation to policies and proposals which may affect the environment:
- (e) to provide and disseminate information and services to promote environmental policies, including environmental education and mechanisms for promoting effective public participation in environmental planning:
- (f) generally to provide advice on matters relating to the environment:
- (g) to carry out any other functions that may be conferred on the Ministry by any enactment.

Regarding the functions of the Ministry for the Environment under s 31 of the Environment Act 1986, which establishes the Ministry, section 28 states the Ministry shall be under the control of the Minister.

In addressing the scope of functions under s 31, the Secretary for the Environment, who is the administrative head of the Ministry, may take the initiative to implement the functions, subject only to the control or direction of the Minister. Under s 31(c) the chief executive has a function and degree of independence to provide the Government, its agencies and other public authorities [includes local authorities] with advice on “the application, operation and effectiveness” of the Resource Management Act and other related Acts. With a liberal interpretation, this function could allow the Secretary to directly monitor the implementation of the RMA and regulations by local authorities. The Ministry does not carry out this monitoring function in a comprehensive at the present time. If the latter function were to be clearly conferred, it could be desirable for an amendment to the Environment Act s 31, to spell out a function to monitor local authorities regarding their implementation of the RMA and performance outcomes.

This clarification of function could complement the similar power conferred on the Parliamentary Commissioner for the Environment under s 16(1)(b), but not systematically implemented at the present time.

16 Functions of Commissioner

(1) The functions of the Commissioner shall be—

....

(b) where the Commissioner considers it necessary, to investigate the effectiveness of environmental planning and environmental management carried out by public authorities, and advise them on any remedial action the Commissioner considers

desirable:

An advantage of clarification of a specific mandatory role for the Ministry to monitor the performance of local authorities, would be to give improved effect to the separate powers vested in the Minister under the RMA ss 24, 24A, 25, 25A. The RMA powers depend upon the discretion of Minister. In practice the Minister would be expected to consider recommendations from the chief executive of the Ministry, subject to the conventions within the Ministry and other ministries with regard to ministerial responses.

An alternative would be to amend RMA s 24A, to provide an independent power and duty for the Secretary for the Environment to take the initiative in carrying out the investigations set out in paragraphs (a) to (d). Another approach would be for the Minister to have a discretion specifically to delegate those functions to the Secretary.

In respect of the Minister's powers under s 24A (e), to take action to appoint under s 25 a person to monitor or take over the duties of a local authority, or under s 25A, to give a direction to make changes to a regional or district plan, it would be appropriate for the Secretary to be authorised to recommend this course of action to the Minister. These possible improvements to clarify effectiveness of monitoring and performance could be achieved by a straight forward amendment to s 24A.

5.6 Conclusions on environmental enforcement and oversight

In conclusion on the enforcement issue raised in the Better Urban Planning Report, the author expresses the view that the Minister through the Ministry for the Environment squarely has the powers to take action following concerns over performance by all local authorities. It is desirable that any present uncertainty over the preliminary powers and functions of the Minister and Ministry to carry out effective auditing or monitoring of local authorities should be clarified. If this is not possible due to funding or staffing inadequacy of the Ministry, then the Minister should ensure that the statutory functions and expectations are achieved. The Minister has the present powers of monitoring and investigation, and to make recommendations to any local authority. The Minister has the further powers to appoint persons to take over functions, and to give directions as to plan changes. These comprehensive powers are adequate to address concerns in Q13.2 of the Draft Report.

An alternative, to ensure an element of consistency, not dependent on the initiative of the Minister, would be to empower the Secretary for the Environment, on behalf of the Ministry for the Environment, to monitor the effect and implementation of the RMA or revised planning law, and to make recommendations to the Minister regarding the exercise of the existing powers of intervention and direction. This duty would accord with the model and duty imposed on the Secretary as chief executive, under the Environmental Reporting Act 2015.

In this situation, it cannot be recommended that enforcement of regulatory responsibilities should be given to another national organisation such as the Environmental Protection Authority, unless significant reform is envisaged as to functions. Local authorities have the primary duty and responsibility to enforce the RMA and plans.⁸⁶ Local authorities have a continuing obligation to

⁸⁶ RMA, s 84.

monitor the state of environment in the region or district, and effectiveness of policies and rules, exercise of consents, and take appropriate action as found necessary.⁸⁷

Every local authority must maintain records of consents granted and the conditions to be observed.⁸⁸ Local authorities have the obligation to appoint enforcement officers. These enforcement officers have the power to issue abatement notices which is the primary tool for efficient enforcement.⁸⁹ Case reports indicate that prosecution levels may vary between regional councils depending on the policies on enforcement and seriousness of breaches. The level of prosecutions in rural areas for significant pollution events appears to be appropriate. The enforcement officers can coordinate activities with building consent and public health enforcement responsibilities. Local officers are well placed to deal with urgent situations, and emergency response outcomes in coordination with other agencies.

The knowledge and response times of local authority enforcement officers would be difficult to match by any centrally based enforcement agency. To transfer some enforcement functions to a central agency such as the EPA would be a major restructuring of roles, and economically questionable as to efficiency. One could not envisage the NZ Police taking over these functions, with an environmental focus. In the past the NZ Police have declined the front line responsibility for excessive noise control.⁹⁰

As a backup audit provision, greater funding could be given to the Parliamentary Commissioner of the Environment, as the “systems guardian”, to be more effective in checking on performance of the Ministry for the Environment on the one hand, and local authorities on the other, to ensure that the expectations of the resource management legislation, in whatever form it may take, are attained.

6 Addendum comments regarding the Draft Report and related issues

6.1 Policy statement bounds

The Draft Report includes a proposal to provide for a Government Policy Statement. Whether this proceeds or not, a question is raised as to the scope of a policy function and document including in particular any national policy statement. By common understanding a policy is a broad directive as to a future or past action, and can be contrasted with a rule or a national standard which may require observance as to specific standards or measurable limits in space and time. The RMA, s 45(1) reads “The purpose of a national policy statement is to state objectives and policies for matters of national significance that are relevant to achieving the purpose of this Act”. Regarding the prescription for the New Zealand Coastal Policy Statement, s 56 states “The purpose of the [NZCPA] is to state policies in order to achieve the purpose of this Act in relation to the coastal environment”.

Regarding contents of a regional policy statement, the RPS must include 62(1)(e) “the methods (excluding rules) used, or to be used, to implement the policies...”.

This distinction as to purpose and content has become blurred following a decision of the Court of Appeal. In *Auckland Regional Council v North Shore City Council* (1995), the City challenged a stipulation in the regional policy statement determining a rigid metropolitan urban boundary binding on the district plan. The RMA provided for the regional policy statement to include policies (but not rules). In finding in favour of the validity of the regional council power under the policy statement to determine the urban boundary, Cooke P for the Court stated:⁹¹

⁸⁷ RMA, s 35(2).

⁸⁸ RMA, s 35(3).

⁸⁹ RMA, ss 38, 322.

⁹⁰ RMA, s 327.

⁹¹ *Auckland Regional Council v North Shore City Council* [1995] 3 NZLR 18, at 23.

It is obvious that in ordinary present-day speech a policy may be either flexible or inflexible, either broad or narrow. ... Counsel for the defendants are on unsound ground in suggesting that, in everyday New Zealand speech or in parliamentary drafting or in etymology, policy cannot include something highly specific. We can find nothing in the Resource Management Act adequate to remove the challenged provisions from the permissible scope of "policies". In our opinion they all fall within that term and are *intra vires* the regional council....

.....Regional policy statements may contain rules in the ordinary sense of that term, but they are not rules within the special statutory definition directly binding on individual citizens. Mainly they derive their impact from the stipulation of Parliament that district plans may not be inconsistent with them.

After determining the legal issue as to content and validity of the policy document, the Court remitted the case back to the Planning Tribunal to examine the merits of the urban boundary location. The subsequent case adjusted the location, and the lengthy decision included the well known statement that "The method of applying s 5 then involves an overall broad judgment of whether a proposal would promote the sustainable management of natural and physical resources".⁹²

The decision of the Court of Appeal in 1995 approving as valid, a policy statement with a hard edge in the nature of a specific rural urban boundary has allowed any policy document (national or regional) to effectively include rules which normally should have been found in the regional plan or the district plan or plan template. This toleration of policy encompassing rules has become an issue ever since, and can now be seen to influence the content of certain national policy statements. For example, the NPS for Freshwater Management (as revised 2014) goes beyond broad policy objectives, and now includes specific objectives, which require compliance with compulsory national values and other values, and compliance with attribute tables specifying compliance standards.⁹³ These later directives on water quality attributes are better suited to a National Environmental Standard.

The problem of policy setting hard edge rules has also become manifest in the New Zealand Coastal Policy Statement, following the interpretation in the *King Salmon* case, that a policy which must be "given effect to", may be expressed in a manner that prevents a plan change at the regional and district levels to enable an aquaculture development considered by a later Board of Inquiry to be justifiable in a particular factual situation or location.⁹⁴ The NZCPS should not have this rigidity of content and application, as recognised in the different prescription for relevant matters in determining a resource consent.⁹⁵

In any recommendation of reform legislation, it is important to address the scope and bounds of the policy and to clarify whether the policy should enable precise limitation or intervention affecting local authorities and land owners. If national policy statements (including the NZCPS) and regional policy statements are able to continue to include "hard edge" policies, it would be desirable to allow a later consent authority, to allow an exception in special situations to the duty to "give effect" to the full

⁹² *North Shore City Council v Auckland Regional Council* [1997] NZRMA 59, at 94. The Hearings Panel on the PAUP 2016 recommended the continuation of broad policies in the policy statement supporting a rural urban boundary but removed the actual boundary line into the district plan as a rule, which could be altered under a plan change by the council or upon a private plan change application. This is the appropriate legal approach.

⁹³ National Policy Statement For Freshwater Management 2014. The preamble includes a statement that "National bottom lines in the NPS are not standards that must be achieved immediately". This implicitly acknowledges that the policy document includes standards.

⁹⁴ *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593.

⁹⁵ RMA, s 104(1) (consent authority to have regard to NZCPS). As applied *Sustain Our Sounds Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 40, [2014] 1 NZLR 673.

nature of the policy. This amendment could reverse the *King Salmon* decision outcome, which fixes in time the impact of the policies in relation to plan content.

Under RMA s 82 Disputes, where there is an inconsistency between an NPS, NZCPS, or regional policy statement, and a regional or district plan, the Environment Court may allow the inconsistency or failure to give effect, to remain where “of minor significance that does not affect the general intent and purpose of the policy statement”. This provision was not addressed or applied in the *King Salmon* facts. The flexibility regarding policy documents on plan content matters should be widened.

By contrast flexibility is presently available on a resource consent application under RMA s 104(1) where the consent authority must have regard to policy documents and they are not necessarily binding. The distinction between approval under a plan change or under a resource consent can be blurred, and differing binding effects of policy documents is not always logical.

Any form of hard edge policy regulation could be better suited to a NES or mandatory template, rather than through a policy statement, if intended to have a rigid application and not allow overall broad judgment flexibility in any development situation. The convention that a policy document should not include specific performance or location standards as to place provides a rough guide as to the distinction between legitimate NPS content and appropriate NES content.

6.2 Land release, housing provision, funding

Land release

In the built environment area, one of the recommendations in the draft report relates to land release. This provides for price signals which may inform the planning and infrastructure decisions and allow for time-driven release of land based on population projections rather than market conditions.⁹⁶ This technique of staged changes or amendments triggered by certain measured criteria, is a feature of the proposed “national policy statement on urban development capacity”. In the NPS, the process may allow councils to make amendments to the plans without necessarily following the public participation procedures in the first schedule. This type of trigger, if expanded, does raise certain questions as to the appropriateness or reliability of the triggers, and the consequences that can be foreshadowed as being the necessary outcomes. For example within the Auckland region, the question remains as to whether urban expansion should be into green field sites beyond the rural urban boundary, or by way of active intensification of brown field and existing urban areas within the RUB.

A comment can be made that these triggers, which may relate to externalities beyond the control of property owners, and triggered by matters such as increased immigration permitted by central government, introduce an element of uncertainty into land holding and land values. The price triggers could introduce an element promoting land speculation, where investors and land development companies buy up lower value property outside established urban boundaries, in the expectation of awaiting the trigger points to arise. This is a long standing practice. The outcome in itself, could price off existing land holders who may find farming practices and market garden activities no longer economic due to the pending price signals.

It would be desirable for some qualification of the price triggers to be included in any legislation, to ensure that undesirable outcomes do not also arise from the procedures which may not allow for any public participation or council discretion as to the appropriate solution for the problem. If spatial plans are mandated, the need for land release through price signals could be minimised, as the spatial plan should provide for long term utilisation of land according to foreseeable needs and demand. The

⁹⁶ At Table 13.1 (p 338).

spatial plan could also provide for educational, commercial, employment and recreational balance through a structure plan approach.

Land release in itself will not produce a built environment. Experience with the housing accords legislation indicates that recognition of shared housing areas will not necessarily result in land subdivision and house or unit construction.⁹⁷ Any prescription of separate objectives for the built environment should provide for local authorities to include in regional policy and plans an objective of zoning land for affordable housing, and sufficient housing supply according to population needs. These housing objectives are found in legislation applicable in Australia, Canada and the UK.⁹⁸ As a consequence, regional policy statements, and provisions in regional and district plans should provide for present and future urban zoning to accommodate population needs, and to give guidance on infrastructure requirements, and development contributions to assist the financing of infrastructure.

Public housing provision

Local authorities are under no legal obligation to provide any form of public or social housing. The Crown has the primary leadership role in providing for State housing, either for long term rental, and also for disposal to first home buyers. In New Zealand, the Minister of Housing has a discretion to provide State housing, and to that end to purchase or take land for housing, erect dwellings, and lease or dispose of the dwellings.⁹⁹ The operational functions are carried out through the Housing New Zealand Corporation, which has objectives to give effect to the Crown's social objectives, which include housing for those who need it most. The powers and functions of the corporation are comprehensive and include entry into joint venture agreements with local authorities and developers for the purpose of giving effect to government policy. Amendments to the Housing Corporation Act in 2016 extend the powers of the Minister to enter into social housing transactions, including the transfer of stock to other housing providers. Those purposes include:¹⁰⁰

50D Meaning and relevance of social housing reform objectives

(1) The social housing reform objectives are any 1 or more of the following:

- (a) people who need housing support can access it and receive social services that meet their needs:
- (b) social housing is of the right size and configuration, and in the right areas, for households that need it:
- (c) social housing tenants are helped to independence, as appropriate:
- (d) there is more diverse ownership or provision of social housing:
- (e) there is more innovation and more responsiveness to social housing tenants and communities:
- (f) the supply of affordable housing is increased, especially in Auckland.

⁹⁷ Housing Accords and Special Housing Areas Act 2013. Thousands of residential sites have been approved but the pace of dwelling construction has been limited by the market and land banking. The NZ Herald, B1, 11 Oct 2016, reports that in the last year 35 Auckland multi-unit developments had been cancelled due to rising construction costs and funding problems. Further that 28 developments were apartment blocks containing 1900 units had been abandoned for the time being. See www.nzherald.co.nz/business

⁹⁸ Environmental Planning and Assessment Act 1979 (NSW); Development Act 1993 (South Australia); Planning and Development Act 2007 (ACT); Environmental Management Act 2004, Local Government Act 1966 (British Columbia). Town and Country Planning Act 1990, Planning and Compulsory Purchase Act 2004 (UK) (planning directives).

⁹⁹ Housing Act 1955, ss 3, 5, 15.

¹⁰⁰ Housing Corporation Act 1974, ss 3B, 3C, 18, 19, 20, 20B, 50A-50S (as amended). Housing Corporation (Social Housing Reform) Amendment Act 2016. See **schedule 5** below. The NZ Herald, 10 Oct 2016, states in response to an opposition Report on homelessness, that the Minister of Housing will recommend greater government expenditure on housing capacity in the Auckland region.

Although the housing legislation (set out **Appendix 5** below) implicitly imposes an obligation on the Government and Minister to make provision for funding and developing public housing, there is no mandatory obligation to meet any housing shortage in any particular area. The dependence upon government policy and discretion, and private providers, is a legal situation that is debatable in this modern age of social responsibility towards families and children, and does not acknowledge the stronger commitments to provide housing, as found in the United Kingdom and other countries with more comprehensive social well-being policies.

Overall, the view that central government should more clearly signal the national interests and planning decisions, and provide avenues to follow through the implications with local authorities can be endorsed. Greater involvement by central government may also carry with it an implication of increased responsibility for assisting in the funding of development through infrastructure support. A present positive example is the commitment of Government to funding half the cost of the rail line extension in central Auckland.

Infrastructure provision

In relation to infrastructure funding and procurement, a recommendation in the Draft Report is that the adoption of user charges and targeted rates could be increased to capture value uplift. This process can be commended, provided that the necessary powers and discretions are open to local government to implement those opportunities. As noted, the continuing requests of the Auckland Council to be empowered to increase the regional fuel tax to fund better infrastructure development, have been rejected by central government. The reasons for that rejection do not appear to be compelling, and the other alternatives such as tolling and targeted rates are not as practicable or necessarily as equitable.

A problem with targeted rates to enable infrastructure funding, is that with many developments, the council will collect a significant development charge under the Local Government Act. To impose in addition on those developments a targeted rate, could constitute a situation of double dipping by charging the developers and occupiers, and increasing the costs of a new development.

6.3 Non-complying activities and consent assessment

In relation to resource consent applications, the ability of a local authority to define within any zone or within any performance standard that an application may require discretionary activity consent or a restricted discretionary activity consent, is generally recognised as providing a foot in the door as to the probability of obtaining a resource consent. By concept the recognition in a plan of a discretionary activity is seen as an activity which is appropriate in a zone provided other purposes, standards and objectives are satisfied.

By contrast, an activity which is stated in a plan to be a “non-complying activity”, or under a rule covering non-identified residual activities to be a non-complying activity, faces greater hurdles or gateways in respect of any resource consent application. Under RMA s 104D, a resource consent for a non-complying activity can be granted only where the consent authority is satisfied either (a) that the adverse effects of the activity on the environment will be minor, or (b) the application will not be contrary to the objectives and policies of the relevant plan. The gateways [s 104D] date back to the TCPA and were added to limit the discretion to grant the former specified departure, where the magnitude of the development or precedent nature of granting the consent was more suited to a plan change to obtain the same outcome. This situation could be better managed by the council having a discretion to disallow an application for a discretionary activity, where the consent authority

determined on strong reasonable grounds that the development due to magnitude or precedent effect, should only proceed under a plan change.

In practice, an application for a non-complying activity may be viewed by the council planners and the council as an attempt to undermine the plan. The Courts have stated that simply because an activity is not provided for under a plan, it should not be assumed to be contrary to plan policies and rules unless patently at odds with the policies.¹⁰¹ Innovative design and development, especially in the built environment, may be frustrated and deterred by the non-complying activity culture of a local authority.¹⁰²

By contrast, under the former Town and Country Planning Act 1977, the equivalent application was for a “specified departure” from the plan. That description clearly indicated that the application was to achieve development which was not provided for in the plan, but could be approved on its merits, especially if being innovative and providing for community benefit. A case could be made in any reform of the RMA, that the class of non-complying activity, if retained, should be replaced with a more positive or less negative label, such as the former specified departure.

The present non-complying category and gateways should be abolished, and all residual applications categorised as discretionary activity applications. This would allow for greater flexibility and assessment on the merits, especially in the development of the built environment. [An attempt to abolish the category in the past failed due to opposition.] The default provision under the RMA for an activity not provided for is a “discretionary activity consent”,¹⁰³ but this provision is subject to rules in plans which commonly apply the more stringent non-complying activity category.

The resource consent approach could be supplemented by redefining the purposes in respect of assessment of the five types of categories of consents. Attempting to process these differing applications under one section, basically (s 104), is not an efficient and focused approach to administration. Any separation between the built and natural environments in relation to regulatory approaches should extend to a complementary separation in respect of resource consent assessment for the five types of consents. The separation of purposes could relate back to differing objectives for the built and natural environments, and differing objectives that may be relevant to each of the five different types of resource consents that are provided for.

The RMA does recognise in part that consents in relation to discharges of wastes are generally subject to certain bottom lines as to pollution (s 107). Applications relating to subdivisions may be assessed in relation to unsuitable or hazardous land conditions and building risks (s 106) and special conditions imposed (s 220).

7 Overall Summary

After 25 years in operation, the RMA has been comprehensively assessed in relation to urban development and found to be wanting by the New Zealand Productivity Commission in the “Better Urban Planning Report”.¹⁰⁴

¹⁰¹ RMA, s 104D. *Arrigato Investments Ltd v Auckland Regional Council* [2001] NZRMA 481 at [24] (Pakiri headland subdivision and restorative planting benefit).

¹⁰² Better Urban Planning Draft Report, at F7.4, (figure 7.2) (different activity classifications not changed). RMLA Conference, *Outstanding*, Nelson, 22 Sept 2016, per Mark Todd, Ockham Residential (non-complying consent applications viewed as bad). Accessible in part to members www.rmla.org.nz

¹⁰³ RMA, s 87B(1).

¹⁰⁴ New Zealand Productivity Commission *Better Urban Planning Draft report* (19 August 2016).

On a broader basis, an authoritative independent report, “Evaluating the environmental outcomes of the RMA”, prepared by the Environmental Defence Society with support from other bodies, concludes that the environmental outcomes of the RMA have not met expectations, largely as a result of poor implementation. The report identifies under 10 heads a range of key issues:¹⁰⁵

1. While the RMA has brought together a lot of decision-making processes, **it could be more integrated**. There are still key exclusions that should be better joined up to enhance overall environmental outcomes.
2. **A lack of effective strategy and oversight** of decision-making has reduced the potential to protect environmental values, including the capacity to manage cumulative effects.
3. The **incorrect jurisprudence** related to the ‘overall balance’ approach undermined the potential for environmental bottom lines to be applied. The reset of the case law and other amendments are likely to see this improve.
4. **Agency capture** of (particularly local) government by vested interests has reduced the power of the RMA to appropriately manage effects on the environment.
5. **A lack of national direction** has limited the potential of the RMA system to effectively and efficiently achieve its environmental goals.
6. **Agency capacity** has often been insufficient to successfully implement the RMA and opportunities for central government to provide financial and logistical support have generally not been taken.
7. **The design of implementing institutions and allocation of different mandates** requires systematic review to ensure it is the best means of delivering on statutory aspirations.
8. **Rigorous evaluation and monitoring of outcomes has been limited**, eroding the potential for adaptive governance and robust implementation.
9. **A narrow range of instruments** has been employed to generate behaviour change which, in many instances, has not been fit for purpose. Better outcomes are likely possible through employing a broader range of approaches, including economic tools.
10. Future reform of the resource management system for New Zealand should proceed only where the anticipated improvements are certain and where any changes are **based on robust evidence**.

The EDS report “Evaluating the environmental outcomes of the RMA” (2016) supports the case for a review and revision of the RMA to achieve better environmental outcomes.

The recommendations of the New Zealand Productivity Commission to identify different regulatory goals and approaches to the natural and built environments are compelling. The ad hoc mixing of goals in RMA ss 6 and 7, reflects the past desire to integrate regulation of land, air and water, but has resulted in a legacy blurring the various environments. The importance of the built environment is implicit in s 5, sustainable management purpose, but variable and often costly implementation establishes that more specific objectives are required for progressing the built environment to ensure wellbeing for all communities. Affordable and adequate housing supply is conspicuous by its absence as a recognised matter of national importance under the RMA. These matters and other matters in ss 6 and 7 should not be regarded as sacrosanct and should be open to complete revision, and separate provision made for the natural and built environments.

The incorporation of Part 2 objectives in relation to assessment of resource consents primarily under s 104 is inadequate. Section 104 is the pivotal provision for obtaining consents and has no specific recognition of the significance of the built environment. The category of a “non-complying activity” has for some planners and councils a pejorative implication of undesirable planning and an attempt to gainsay the planners and public. That implicit deterrent and the application of the gateways under s 104D should be revisited to ensure that innovative solutions are not unnecessarily denied by

¹⁰⁵ Environmental Defence Society, *Evaluating the environmental outcomes of the RMA* (June 2016). The 82 p report is supported by the New Zealand Council for Infrastructure Development, the Employers and Manufacturer Association Northern, and the Property Council New Zealand.

outdated policies and plans. Developers who are likely to be required to give full notification of non-complying applications may not wish to face the additional costs and delays of these applications, and consequently abandon projects.

In brief restatement, the key legal issues and challenges associated with separating regulation of the built and natural environment involve the ability to define the separation in a complementary manner. The RMA was seen as a progressive reform which integrated the regulation of the built and natural environment under one statute, with the ability to prepare policies, plans and performance standards which allowed for an overall integrated assessment and evaluation of development and other activities.

It is acknowledged that in the large scale integration under the RMA 1991 of a number of separate statutes dealing, firstly with the built environment and land use, and secondly the natural environment relating to water utilisation, and discharge of contaminants into land, water and air, resulted in a mixture of purposes in the matters of national importance. The first part of the definition of sustainable management in s 5 which refers to enabling "people and communities to provide for their social, economic, and cultural wellbeing and for their health and safety" implicitly covers appropriate development of the built environment to facilitate commerce, business, and housing activities, but does not specifically refer to the objective of promoting the built environment as such. Further, the mixture under s 6 of matters of national importance has provided a greater focus on protection of the natural environment, and omits any specific policies addressing desirable development of the built environment.

Under s 7 (b) "The efficient use and development of natural and physical resources" points towards economic efficiency and economic evaluation in development, but this pointer has been generally submerged in the collection of other pointers towards protecting intrinsic values of ecosystems and enhancing the quality of the environment. As a consequence, an overly conservative approach has been taken under many local authority policies and plans in constraining urban intensification within urban limits, and in endeavouring to protect to an unnecessary extent the untouched rural areas and landscapes. Opposition to urban expansion has been particularly strong in the past in the Christchurch and Auckland areas.¹⁰⁶ Conventional thinking in the 1990's has now been challenged by a greater acknowledgement of urban planning needs, and the need to give more support to development of the built environment. The question is how these changes in planning culture can be best addressed.

A proposal by the Productivity Commission to establish alternative structures to address the failings of the present RMA culture, postulates two future legislative models. Option A is a refined single resource management law, and Option B envisages separate planning and natural environments laws. In the present paper, an endeavour has been made to look at these options in an historical perspective. In principle, Option B involving separate planning and natural environments laws, would be a deconstruction of the RMA, and a regression to the separate enactments which existed prior to 1991 in dealing with land use activities on the one hand and water regulation and air emissions on the other. The integration of regulation of both the built and natural environment has been feasible within the New Zealand context, with its relatively small population and constricted land area, and the political drive by central government to have a single goal of sustainable management governing all aspects of environmental regulation.

This fully intergrated planning model that has not been followed in most overseas countries which may have greater complexity in legal systems through federal and state devolution of regulatory

¹⁰⁶ *Becmead Investments Ltd v Christchurch City Council* [1997] NZRMA 1; *Canterbury Regional Council v Selwyn District Council* [1997] NZRMA 25; *Harris v Central Otago District Council* [2016] NZEnvC 52, [2016] NZRMA 250. In these cases the Environment Court on appeal allowed subdivision of rural land for housing use.

powers, and more complex needs to manage greater populations as in the UK. The continuation in those countries of separate enactments to deal with the built environment, and protection of the natural environment, indicates that separate Acts could be adopted within the New Zealand context. However that change would represent a return to the pre-1991 structural situation. Presently, separate Acts remain for a number of associated areas of regulation, including land transport planning, administration under the Local Government Act, building consents, national heritage administration, fisheries administration, and regulation of offshore mining.

A problem with two separate laws could firstly be the demarcation between the natural environment, and the built environment, and the probable obligation to have separate applications for consents under both Acts, as well as documents to implement the respective protective elements. Presently, the integration within council plans is seen as an advantage, although plan documents may in practice comprise separate overlays focused on the region, district zoning, with character and heritage overlays, and land risk plans.

Referring to Option A, a single refined resource management law would appear to be more consistent with continuation of the major reforms achieved under the RMA. Within the scope of achieving “sustainable management”, the consequential purposes and objectives could be redrawn and refined to focus firstly on the built environment, and secondly on the natural environment, as areas of discrete purpose and outcomes. Certain cross references could be necessary.

In practice, the existing division between regional council functions and district council functions partly involves a structural separation without any particular direction to either council as to what its responsibilities are in the different environments.¹⁰⁷ The administration by regional councils of broad regional policies, and active administration of water permits and discharge permits and coastal marine consents, primarily focuses on the natural environment. The functions of territorial authorities to deal with land use consents and noise control, and subdivisions, focus on the built environment. In the event of an overlap the Court decisions indicate councils should collaborate over functions.¹⁰⁸ Those responsibilities could be given greater direction by a re-drafting of the purposes of administration of the respective areas.

A conclusion could be restated that the refined single resource management law reform would be more consistent with continuation of the advantages of the RMA, in that it fosters a single integrated procedure at the consent level, under which all areas of consent can be assessed in an holistic manner, and any overlaps of regulation and conditions can be adjusted through a combined hearing process. The jurisdiction of a unitary authority under a combined plan, is an advantage in this administrative area.

Concerning changes that might be required to the Local Government Act and the Land Transport Management Act, the view is expressed that a reform involving a refined single resource management law, would involve minimal changes to both Acts, and would not affect integrated planning to achieve management of the built and natural environments. The land transport management functions are relatively discrete. Under the LTMA there is a strong influence by central government, and effectively local government reacts to the provision of funding and may accommodate any planning by the New Zealand Transport Agency in accordance with the consultation, requirement and designation

¹⁰⁷ RMA s 80(8). A combined plan must clearly identify the provisions that comprise the regional policy statement, regional rules, and the district plan, and the local authority responsible for enforcement.

¹⁰⁸ *Canterbury Regional Council v Banks Peninsula District Council* [1995] 3 NZLR 189 (CA) (land hazard management).

procedures provided under the RMA. That integration of process appears to be working adequately. In any matter of urgency, a roading development may be called-in for hearing before the Environment Court or a board of inquiry. Those procedures appear to work efficiently and effectively to enable necessary decisions on transport matters.

The likely impact of reform on jurisprudence established under the RMA is a matter that could be managed, as it has been managed in the past with the enactment of the RMA itself. Any new law will affect the jurisprudence established in case law, and possibly the approach in thinking and culture towards implementation of the statute. The extent to which existing jurisprudence remains relevant will depend on the extent of change in a replacement resource management or planning law.

Assuming that the basic structure of legislation remains relatively intact, a government policy statement implementing the rewritten purposes of a built environment section and a natural environment section, should be effective. Whether a GPS should replace the existing provision for national environment standards and national policy statements, depends on the scope and function of the GPS. In principle a NES should comprise an enduring measurable bottom line environmental standard and not be the subject of any highly contestable ministerial policy. Conversely the GPS could replace or supplement a NPS. Either way, the leadership influence of central government should remain intact. The implementation and administration of these documents through regional policy statements, regional plans and district plans, is a longstanding structure that could continue.

More radically, if all local authorities were reformed to comprise unitary authorities, the need for separate regional plans and district plans, could be eliminated. It could provide for some economies of administration, but would not appear to be a compelling issue. The present Local Government Commission powers appear to be politically acceptable at both the central and local government level, and strong resistance has been shown in recent years to any amalgamations or reforms which could lead to the establishment of unitary councils, as the only basis for local government. A move toward further amalgamation could involve a significant disturbance of local communities, and local identification of places, and reduce the subsidiarity principle in local and community governance over development expectations. An assumption is made that the present structure of local government will continue, as long as provision is retained for elector polls to veto proposals by the Local Government Commission.

Having made an assumption that local government structures will not be changed, the administration of a refined single resource management law can be complemented and facilitated by the issue of national planning templates. Further an increased use of national environmental standards and policy documents, or government policy statements, which could allow for certain activities to be implemented as permitted activities, could produce development efficiencies and also protect the natural environment.

In further conclusion, any impact of reform on existing jurisprudence, is likely to be transitory, and a matter which is capable of being absorbed in the administration of the law having regard to a strong history of law reform in New Zealand over the years. One objective of law reform in the resource management area should be to endeavour to provide a law based on a principled approach, and a statute which does not include a proliferation of detailed regulation.

The best laws are usually those which set out in a clear and straightforward format, the purposes of the law, the basics of administration and regulation, and provide for effective enforcement or observance. These types of laws may include powers for issue of regulations to fill in details as

necessary. Regulations allow a degree of flexibility that is not enabled with a statute.¹⁰⁹ The RMA has progressively over the years increased in bulk and complexity, and this has been one of the criticisms that efforts at simplification and streamlining have not in fact occurred. The most recent legislation before Parliament, the Resource Legislation Amendment Bill, has the potential to complicate certain existing procedures. That stated, improvements in efficiency could be achieved by a revision and separation of the objectives for the built and natural environments, the introduction of plan templates, and revision of the plan making and resource consent provisions and procedures. The implementation of one or more permanent hearings panels to assess the content of regional and district plans could also have merit.

¹⁰⁹ The Hazardous Substances and New Organisms Act 1996 is a positive example of a statute which is supplemented by substantial detail set out in regulations.

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APPENDIX 1 [see 1.4]

ENVIRONMENTAL ADMINISTRATION IN NEW ZEALAND

A discussion paper. Minister for the Environment Nov 1984 [extracts]

Ch 1 INTRODUCTION [p 10]

This report is about improvements in environmental administration. The Labour Party policy for the 1984 election recognised the need for environmental considerations to be taken into account at the earliest possible opportunity in the planning of development proposals. Labour also recognised that the present planning processes are too complex and the present environmental administration too weak and scattered to achieve this end.

The policy stated that the fundamental purpose of a sound environmental policy is to ensure the management of the human use of the biosphere to yield the greatest sustainable benefit to present generations while maintaining potential to meet the needs and aspirations of future generations.

One of the ways in which the Government intends to promote this principle is to establish a Ministry for the Environment and a group of officials was created to work on this concept.

Ch 3 THE NEED FOR A MINISTRY [p 15]

In order to meet its brief, the Task Group has had to concentrate on defining the problems that lay behind the Government's policy. It has had to understand what needs it was intended to meet so that the Ministry's role could be identified and appropriate functions and structures subsequently assessed.

Problems which were identified include:

- generally we do not approach the environment as an integrated system: the meaning of "environment" has been narrowed in practice, and has been distorted, by focusing attention on natural resource use, maintenance of public health and preservation of natural landscapes and indigenous ecosystems. Public concerns about change and development clearly include other issues, such as employment, housing, welfare, recreation, transport services, energy prices, and the aesthetic aspect of rural and urban areas;
- there is an inadequate level of integrated advice, (and no clear responsibility for providing it) on significant issues of social, economic and environmental change;
- there is no process allowing national, regional and local perceptions to be brought to bear on policy formation. One particular need is for central government to match the obligation it has placed on local government (through the Town and Country Planning Act, and related legislation) to set objectives and implement these through the planning process;
- environmental responsibilities are scattered throughout Government. With or without a regrouping of these within a single agency, there is a need for a broad statement both of the Government's philosophy and its intent over the medium and long term. This could be met by the endorsement of a conservation strategy (within, say, the next two years) and/or by the preparation of an environmental policy "plan". Leadership, guidance, and creative thinking from within government are likely to be as important as any organisational or procedural changes.

Ch 5 PLANNING

The needs which are identified in Chapter 3 above offer some guide to the specific functions which could be carried out by the type of Ministry envisaged under the preferred option. There could however be other functions added to those listed and the priorities will need careful refinement.

A recurrent theme in our consultations has been that improved environmental advocacy within the Government structure will not in itself meet the needs of New Zealand's present situation. *The inadequacies of the planning process centre on the lack of an integrated development and conservation strategy (the "black hole") and of Government commitment to such a strategy.* Without it there can be no consistency among different arms of Government activity, sectoral plans, policy instruments and private sector initiatives. In the environmental area the problem created by this "black hole" can be summed up in the lack of any clear guidance to regional planners on the way in which Government would like to see resources developed and how the balance with conservation is to be articulated in the context of a regional plan. The adoption of the Conservation Strategy will assist in meeting the gap but it is not the complete answer. [*emphasis added*]

There is in fact a more fundamental reason for the preferred option. The Conservation Strategy will bring to the decision-making process something much more important than incorporation of conservation *values*; it will also introduce environmental *concepts*.

The most important of these is the need to see all elements of the physical, biological and social environment as components in an integrated system. This holistic approach is central to environmental administration and it is also becoming the dominant view in attempts to tackle the social and intersectoral planning issues of our age. At an earlier stage of its history New Zealand took bold steps to integrate social and economic decisions within the framework of the "welfare state". As far as natural resources were concerned there was at that stage little need to consider the conservation option because as a society we could still look at unutilized resources and plan our development accordingly. The environmental debate reflects the need to move to the next stage of sophistication and integrate resource use decisions within a combined view of social and economic development (such as that reflected during the Economic Summit). Although this is a tall order most of the responses to the Task Group indicated that an important opportunity would be missed if the new Ministry did not have this challenge laid squarely at its door. [*emphasis added*]

It is important to see where the combination of environmental analysis and the planning function could actually improve on the pattern of recent years, during which "environment" has generally been considered as an afterthought. Environmental thinking is concerned with horizontal cross-linkages and longer term goals rather than with achieving narrow objectives. It is not opposed to development and change but tries to minimise harmful consequences and meet other desirable objectives at the same time – hence the concept of environmental protection and enhancement.

Ch 10 THE MINISTRY FOR THE ENVIRONMENT – PREFERRED OPTION

The Government's strategy aimed at integrating conservation and development involves establishment of the position of Parliamentary Commissioner for the Environment, strengthening and unifying of advisory councils in the environment-conservation field, and setting up a Ministry for the Environment.

This was set out in the Government's pre-election policy release under the heading "Basic Principles".

- “Labour will therefore implement a strategy to integrate conservation and development so that:
 - (a) we move to a sustainable economic base by shifting from the use of non-renewable to renewable resources;
 - (b) those resources are used to achieve the needs of social justice;
 - (c) our trusteeship responsibilities for future generations are recognised;
 - (d) our remaining endangered species and ecosystems and representative examples of our full range of plants, animals and landscapes are protected”.

In practice, to pursue these objectives effectively requires changes to the nature of decision-making at all levels of government and in the private sector. The basic change which has to be made is to bring recognition of the physical, biological and social aspects of the man-made and natural environment into all stages of planning.

Bringing central government responsibilities for all these objectives together in a single agency would involve unacceptable if not impossible controls over public and private activities. Establishing an agency to be an advocate for the environment in the various existing planning processes would not achieve the purpose of the objectives either, as it would not bring about the necessary changes in the nature of the processes themselves.

The preferred option is one which is based on the philosophy of environmental management. This philosophy should underpin the processes of policy formulation and decision making throughout public and private sectors. It can be made explicit and understandable, and can be elaborated and modified by consensus-building processes, for application to various levels and sectors. For these reasons it can be a common, integrating element in the processes and formal procedures of resource use, conservation and development planning at national, regional and local levels.

Several bodies expressed the need for analytical, information-based advice to the Government on the social, ecological and physical, as well as the economic, aspects of development policies and proposals. Some saw this as a major shortcoming in government up until now, and the factor lying behind much of the dissatisfaction with development policies and major development decisions in recent years. The option preferred by the Task Group would be closely involved with development policy and decision making, and would have at least a substantial core of expertise to give such broadly-based policy advice.

The Town and Country Planning Act is at present the principal co-ordinating legislation for balancing economic, social and environmental considerations, but changes to it and related legislation would be needed to introduce a more integrated and explicit environmental management approach. The Town and Country Planning Act is focused on regional and local decision-making, and to a large degree it binds the Crown in effect, *but it lacks clear statements of conservation principles* and national development objectives. This creates uncertainty in regional and local (district) planning and limits its integrative effect on national and sectoral, as well as special purpose authority planning processes.

If it is to be the pivotal conservation and development legislation much more could be done to align other statutes and statutory procedures with it – cross-references in other legislation to environmental principles which could be expressed in the Town and Country Planning Act, and procedures that were parallel to or integrated with those of the Town and Country Planning Act would bring about a major advance in effectiveness and efficiency. Examples of legislation, and hence environmental management processes and formal procedures that could be aligned with the Town and Country Planning Act in this way are: Water and Soil Conservation Act, Harbours Act, National

Parks and Reserves Act, Forests Act, Mining Act, Clean Air Act. The Urban Transport legislation already has this kind of integration with the Town and Country Planning Act.

[emphasis added]

APPENDIX 2 [see 1.5]

Resource Management Bill 1989

EXPLANATORY NOTE

The objective of this Bill is to integrate the laws relating to resource management, and to set up a resource management system that promotes sustainable management of natural and physical resources.

This Bill integrates existing laws by bringing together the management of land, including land subdivision, water and soil, minerals and energy resources, the coast, air, and pollution control, including noise control. It sets out the rights and responsibilities of individuals, and territorial, regional and central government.

The central concept of sustainable management in this Bill encompasses the themes of use, development and protection. The Bill sets up a system of policy and plan preparation and administration which allows the balancing of a wide range of interests and values. The Bill aims to allow the needs of the present generation to be met without compromising the ability of future generations to meet their own needs.

BACKGROUND TO THE LAW REFORM

A large number of existing laws deal with procedures for managing and regulating the effects on the environment (including people) of various forms of development, and with the allocation of public resources such as water and minerals.

In the past these laws have been seen as conflicting, overlapping and confusing to users. They have not allowed all relevant values to be taken into account, and often did not achieve good environmental outcomes.

Major problems identified in current resource management systems include—

- (a) There is no consistent set of resource management objectives;
- (b) There are arbitrary differences in management of land, air and water;
- (c) There are too many agencies involved in resource management with overlapping responsibilities and insufficient accountability;
- (d) Consent procedures are unnecessarily complicated and costly, and there are undue delays;
- (e) Pollution laws are ad hoc and do not recognise the physical connections between land, air and water:

No. 224—1

A BILL INTITULED

An Act to restate and reform the law relating to the use of land, air, water, and Crown owned minerals

BEING ENACTED by the Parliament of New Zealand as follows:

- 1. Short Title and commencement—**(1) This Act may be cited as the Resource Management Act 1989. 5
- (2) This Act shall come into force on the 1st day of July 1990.

PURPOSE AND PRINCIPLES

4. Purpose—(1) The purpose of this Act is to promote the sustainable management of natural and physical resources.

40 (2) In this Act, “sustainable management” means managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people to meet their needs now without compromising the ability of future generations to meet their own needs, and includes the following considerations:

- (a) The efficient management of natural and physical resources:
- (b) The maintenance and enhancement of the life-supporting 5
capacity of the environment:
- (c) The use, development, or protection of natural and physical resources in a way which provides for the social, economic, and cultural needs and opportunities of the present and future inhabitants of 10
a community:
- (d) Where the environment is modified by human action, the adverse effects of irreversible change are fully recognised and avoided or mitigated to the extent practicable: 15
- (e) The use, development, or protection of renewable natural and physical resources so that their ability to yield long term benefits is not endangered:
- (f) The use or development of non-renewable natural and physical resources in a way that sees an orderly and 20
practical transition to adequate substitutes including renewable resources:
- (g) The exercise of kaitiakitanga which includes an ethic of stewardship.

(3) For the purposes of Part IX, the meaning of sustainable 25
management does not include paragraphs (b), (c), (d) or (g) of subsection (2).

5. Principles—(1) To achieve the purpose of this Act, all persons who exercise functions and powers under this Act shall 30
have regard to the importance of—

- (a) The maintenance and enhancement of the quality of the environment:
- (b) The actual or potential effect of an activity or natural process on the whole of the environment, including its actual or potential effect on— 35
 - (i) The health and safety, and the economic, cultural, social, and general wellbeing of people and communities:
 - (ii) Ecosystems, ecological processes, physical processes, and biological diversity: 40
 - (iii) The ability of future generations to meet their needs:
- (c) An appropriate balance between the public interest in achieving the purpose of this Act and any private

interests in the reasonable use of private or public property:

- (d) The potential costs and benefits of any objective, policy, or proposal to the environment:
- 5 (e) The maintenance of the natural, physical, and cultural features which give New Zealand its character, and the protection of them from inappropriate subdivision, use, and development including—
- 10 (i) The maintenance of the natural character of the coastal environment and the margins of lakes and rivers; and
- (ii) The retention of natural landforms and vegetation; and
- 15 (iii) The recognition and protection of heritage values including historic places and waahi tapu:
- (f) The relationship of Maori and their culture and traditions with their ancestral lands, waters, sites, and other taonga:
- 20 (g) The potential of the development, use, and protection of natural and physical resources to contribute to the wellbeing of the community.
- (2) Without limiting subsection (1) or precluding the use or development of coastal marine areas where appropriate, all persons who exercise functions and powers under this Act in relation to coastal marine areas shall have particular regard to the importance of the maintenance of the natural character of the coastal environment.
- 25 (3) Subsections (1) and (2) do not limit the matters to which persons may have regard when exercising functions or powers under this Act in order to achieve the purpose of this Act.
- 30 (4) This section does not apply in respect of functions or powers under Part IX.

6. **Treaty of Waitangi**—In achieving the purpose of this Act, all persons who exercise functions and powers under this Act have a duty to consider the Treaty of Waitangi.

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PART III

DUTIES AND RESTRICTIONS UNDER THIS ACT

Land

7. **Restrictions on use of land**—(1) No person may use any land (including the bed of a navigable water body) in a district in a manner that contravenes a rule of a plan or proposed plan unless the use is—

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APPENDIX 3 [see 1.6]

Definitions in other NZ environmental legislation relevant to recognition of the natural and built environment.

Biosecurity Act 1993 s 3

This Act focuses on matters of pest management and border control, and defines environment and natural and physical resources.

environment includes—

- (a) ecosystems and their constituent parts, including people and their communities; and
- (b) all natural and physical resources; and
- (c) amenity values; and
- (d) the aesthetic, cultural, economic, and social conditions that affect or are affected by any matter referred to in paragraphs (a) to (c)

natural and physical resources includes land, water, air, soil, minerals, and energy, all forms of plants and animals (whether native to New Zealand or introduced), and all structures

It may be noted that in the preceding definition, it extends to include structures of all kinds, and is not limited to the natural environment. The same definition appears in the RMA 1991.

Hazardous Substances and New Organisms Act 1996

The HASNO Act has a dual purpose. First it regulates the location, storage, handling and transportation of hazardous substances. Secondly it regulates through the Environmental Protection Authority the importation or manufacture or development of genetically modified organisms, and the contained use or use in the open. The purpose and the principles of the Act and further matters are set out:

4 Purpose of Act

The purpose of this Act is to protect the environment, and the health and safety of people and communities, by preventing or managing the adverse effects of hazardous substances and new organisms.

5 Principles relevant to purpose of Act

All persons exercising functions, powers, and duties under this Act shall, to achieve the purpose of this Act, recognise and provide for the following principles:

- (a) the safeguarding of the life-supporting capacity of air, water, soil, and ecosystems:
- (b) the maintenance and enhancement of the capacity of people and communities to provide for their own economic, social, and cultural well-being and for the reasonably foreseeable needs of future generations.

6 Matters relevant to purpose of Act

All persons exercising functions, powers, and duties under this Act shall, to achieve the purpose of this Act, take into account the following matters:

- (a) the sustainability of all native and valued introduced flora and fauna:
- (b) the intrinsic value of ecosystems:
- (c) public health:
- (d) the relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, valued flora and fauna, and other taonga:
- (e) the economic and related benefits and costs of using a particular hazardous substance or new organism:

(f) New Zealand's international obligations.

Specifically a precautionary approach is required to be applied to this type of regulation as set out in s 7.

7 Precautionary approach

All persons exercising functions, powers, and duties under this Act including, but not limited to, functions, powers, and duties under [sections 28A, 29, 32, 38, 45, and 48](#), shall take into account the need for caution in managing adverse effects where there is scientific and technical uncertainty about those effects.

In dealing with the effect on the environment, the definition of environment in s 2 is relevant.

environment includes—

- (a) ecosystems and their constituent parts, including people and communities; and
- (b) all natural and physical resources; and
- (c) amenity values; and
- (d) the social, economic, aesthetic, and cultural conditions which affect the matters stated in paragraphs (a) to (c) or which are affected by those matters

Further, the definition of “natural and physical resources” comprises a cross reference to the RMA, and includes structures. Accordingly in the consideration of environmental effects, an integrated assessment will be undertaken in respect of both effects on the built environment (if any) and the natural environment.

Environmental Protection Authority Act 2011

In considering the existing functions and possible future functions of the EPA, it incorporates references to listed Environmental Acts which it is to manage or have a part in the administration.

environmental Act means—

- (a) the [Climate Change Response Act 2002](#);
- (ab) the [Exclusive Economic Zone and Continental Shelf \(Environmental Effects\) Act 2012](#);
- (b) the [Hazardous Substances and New Organisms Act 1996](#);
- (c) the [Imports and Exports \(Restrictions\) Act 1988](#);
- (d) the [Ozone Layer Protection Act 1996](#);
- (e) the [Resource Management Act 1991](#)

The definition of “environment” is cross referenced to that under the RMA. The EPA has a limited overall purpose to management of the environment, and the Act has no separate statement to promote environmental protection as implicit in the title of the Act. This weakness was first identified in the Bill, and has been partly remedied in the cross references under s 12:

12 Objective of EPA

- (1) The objective of the EPA is to undertake its functions in a way that—
 - (a) contributes to the efficient, effective, and transparent management of New Zealand's environment and natural and physical resources; and
 - (b) enables New Zealand to meet its international obligations.
- (2) When undertaking its particular functions under an environmental Act, the EPA must also act in a way that furthers any objectives (or purposes) stated in respect of that Act.

The devise of incorporation in s 12(2) of objectives contained in the other enactments where applicable gives a bottom line basis to the purpose of the EPA as a protector of the environment.

Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012

The EEZ Act contains a definition of environment which “means the natural environment, including ecosystems and their constituent parts and all natural resources...”

The definition of natural resources states:

natural resources,—

- (a) in relation to the exclusive economic zone, includes seabed, subsoil, water, air, minerals, and energy, and all forms of organisms (whether native to New Zealand or introduced); and
- (b) in relation to the continental shelf, means the mineral and other non-living resources of the seabed and subsoil and sedentary species

These definitions could be taken as precedents for a limitation of the environment to that of natural resources. The purpose of regulation stated under s 10, further concentrates the consideration on the natural environment, and includes its own definition of sustainable management which does not specifically encompass the built environment.

10 Purpose

(1) The purpose of this Act is—

- (a) to promote the sustainable management of the natural resources of the exclusive economic zone and the continental shelf; and
- (b) in relation to the exclusive economic zone, the continental shelf, and the waters above the continental shelf beyond the outer limits of the exclusive economic zone, to protect the environment from pollution by regulating or prohibiting the discharge of harmful substances and the dumping or incineration of waste or other matter.

(2) In this Act, *sustainable management* means managing the use, development, and protection of natural resources in a way, or at a rate, that enables people to provide for their economic well-being while—

- (a) sustaining the potential of natural resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and
- (b) safeguarding the life-supporting capacity of the environment; and
- (c) avoiding, remedying, or mitigating any adverse effects of activities on the environment.

(3) In order to achieve the purpose, decision-makers must—

- (a) take into account decision-making criteria specified in relation to particular decisions; and
- (b) apply the information principles to the development of regulations and the consideration of applications for marine consent.

Under s 10(3), decision makers must take into account decision-making criteria specified in relation to particular decisions, and apply the “information principles” to the development of regulations in the consideration of applications for a marine consent. The information principles refer to the best available information and data.

In relation to an application for a marine consent, an impact assessment must be provided (s 39), and in decision-making by the EPA (through its appointed Hearings Panel), under s 59 it must take into account a wide range of effects on human health that may arise from effects on the environment, and the importance of protecting ecosystems and habitats, as well as economic benefit to New Zealand of allowing an application. The definitions of offshore installations and structures clearly encompass the built environment. As a consequence any application will consider the regulation of the built environment as well as effects on the natural environment. (Two major applications to date have

been rejected by the Hearings Panel as failing to reach a threshold of environmental protection under the precautionary approach.)

Environmental Reporting Act 2015

3 Purpose

The purpose of this Act is to require regular reports on New Zealand's environment.

4 Interpretation

In this Act, unless the context otherwise requires,—

land domain—

(a) means the domain composed of soil and underlying rock; and

(b) includes the animals, vegetation, and *structures* associated with the land domain

structure has the meaning given in [section 2\(1\)](#) of the Resource Management Act 1991

[*structure* means any building, equipment, device, or other facility made by people and which is fixed to land; and includes any raft]

8 Content of synthesis reports

(1) Each synthesis report must describe, in relation to the topics prescribed in regulations made under section 19, all of the following matters:

(a) the state of New Zealand's environment including biodiversity and ecosystems;

and

(b) the pressures that may be causing, or have the potential to cause, changes to the state of New Zealand's environment; and

(c) the impacts that the state of the environment and changes to the state of the environment may be having on each of the following impact categories:

(i) ecological integrity; and

(ii) public health; and

(iii) the economy; and

(iv) te ao Māori; and

(v) culture and recreation

10 Domain reports

(1) The Secretary and the Government Statistician must jointly produce and publish reports on the following:

(a) the air domain:

(b) the atmosphere and climate domain:

(c) the freshwater domain:

(d) the land domain:

(e) the marine domain.

(2) As soon as is reasonably practicable after the Secretary and the Government Statistician have published a domain report, the Ministers must jointly present the report to the House of Representatives.

Environmental Reporting (Topics for Environmental Reports) Regulations 2016 (2016/127) r 8

8 Topics relating to land domain

In the environmental reports required by sections 7(1) and 10(1)(d) of the Act, the topics relating to the *land domain* are,—

PURPOSE AND PRINCIPLES

4. Purpose—(1) The purpose of this Act is to promote the sustainable management of natural and physical resources.

40 (2) In this Act, “sustainable management” means managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people to meet their needs now without compromising the ability of future generations to meet their own needs, and includes the following considerations:

- (a) The efficient management of natural and physical resources:
- (b) The maintenance and enhancement of the life-supporting 5
capacity of the environment:
- (c) The use, development, or protection of natural and physical resources in a way which provides for the social, economic, and cultural needs and opportunities of the present and future inhabitants of 10
a community:
- (d) Where the environment is modified by human action, the adverse effects of irreversible change are fully recognised and avoided or mitigated to the extent practicable: 15
- (e) The use, development, or protection of renewable natural and physical resources so that their ability to yield long term benefits is not endangered:
- (f) The use or development of non-renewable natural and physical resources in a way that sees an orderly and 20
practical transition to adequate substitutes including renewable resources:
- (g) The exercise of kaitiakitanga which includes an ethic of stewardship.

(3) For the purposes of Part IX, the meaning of sustainable 25
management does not include paragraphs (b), (c), (d) or (g) of subsection (2).

5. Principles—(1) To achieve the purpose of this Act, all persons who exercise functions and powers under this Act shall have regard to the importance of— 30

- (a) The maintenance and enhancement of the quality of the environment:
- (b) The actual or potential effect of an activity or natural process on the whole of the environment, including its actual or potential effect on— 35
 - (i) The health and safety, and the economic, cultural, social, and general wellbeing of people and communities:
 - (ii) Ecosystems, ecological processes, physical processes, and biological diversity: 40
 - (iii) The ability of future generations to meet their needs:
- (c) An appropriate balance between the public interest in achieving the purpose of this Act and any private

interests in the reasonable use of private or public property:

- (d) The potential costs and benefits of any objective, policy, or proposal to the environment:
- 5 (e) The maintenance of the natural, physical, and cultural features which give New Zealand its character, and the protection of them from inappropriate subdivision, use, and development including—
- 10 (i) The maintenance of the natural character of the coastal environment and the margins of lakes and rivers; and
- (ii) The retention of natural landforms and vegetation; and
- 15 (iii) The recognition and protection of heritage values including historic places and waahi tapu:
- (f) The relationship of Maori and their culture and traditions with their ancestral lands, waters, sites, and other taonga:
- 20 (g) The potential of the development, use, and protection of natural and physical resources to contribute to the wellbeing of the community.
- (2) Without limiting subsection (1) or precluding the use or development of coastal marine areas where appropriate, all persons who exercise functions and powers under this Act in relation to coastal marine areas shall have particular regard to the importance of the maintenance of the natural character of the coastal environment.
- 25 (3) Subsections (1) and (2) do not limit the matters to which persons may have regard when exercising functions or powers under this Act in order to achieve the purpose of this Act.
- 30 (4) This section does not apply in respect of functions or powers under Part IX.

6. **Treaty of Waitangi**—In achieving the purpose of this Act, all persons who exercise functions and powers under this Act have a duty to consider the Treaty of Waitangi.

35

PART III

DUTIES AND RESTRICTIONS UNDER THIS ACT

Land

7. **Restrictions on use of land**—(1) No person may use any land (including the bed of a navigable water body) in a district in a manner that contravenes a rule of a plan or proposed plan unless the use is—

40

APPENDIX 3 [see 1.6]

Definitions in other NZ environmental legislation relevant to recognition of the natural and built environment.

Biosecurity Act 1993 s 3

This Act focuses on matters of pest management and border control, and defines environment and natural and physical resources.

environment includes—

- (a) ecosystems and their constituent parts, including people and their communities; and
- (b) all natural and physical resources; and
- (c) amenity values; and
- (d) the aesthetic, cultural, economic, and social conditions that affect or are affected by any matter referred to in paragraphs (a) to (c)

natural and physical resources includes land, water, air, soil, minerals, and energy, all forms of plants and animals (whether native to New Zealand or introduced), and all structures

It may be noted that in the preceding definition, it extends to include structures of all kinds, and is not limited to the natural environment. The same definition appears in the RMA 1991.

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4 Purpose of Act

The purpose of this Act is to protect the environment, and the health and safety of people and communities, by preventing or managing the adverse effects of hazardous substances and new organisms.

5 Principles relevant to purpose of Act

All persons exercising functions, powers, and duties under this Act shall, to achieve the purpose of this Act, recognise and provide for the following principles:

- (a) the safeguarding of the life-supporting capacity of air, water, soil, and ecosystems:
- (b) the maintenance and enhancement of the capacity of people and communities to provide for their own economic, social, and cultural well-being and for the reasonably foreseeable needs of future generations.

6 Matters relevant to purpose of Act

All persons exercising functions, powers, and duties under this Act shall, to achieve the purpose of this Act, take into account the following matters:

- (a) the sustainability of all native and valued introduced flora and fauna:
- (b) the intrinsic value of ecosystems:
- (c) public health:
- (d) the relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, valued flora and fauna, and other taonga:
- (e) the economic and related benefits and costs of using a particular hazardous substance or new organism:

(f) New Zealand's international obligations.

Specifically a precautionary approach is required to be applied to this type of regulation as set out in s 7.

7 Precautionary approach

All persons exercising functions, powers, and duties under this Act including, but not limited to, functions, powers, and duties under [sections 28A, 29, 32, 38, 45, and 48](#), shall take into account the need for caution in managing adverse effects where there is scientific and technical uncertainty about those effects.

In dealing with the effect on the environment, the definition of environment in s 2 is relevant.

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Further, the definition of “natural and physical resources” comprises a cross reference to the RMA, and includes structures. Accordingly in the consideration of environmental effects, an integrated assessment will be undertaken in respect of both effects on the built environment (if any) and the natural environment.

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In considering the existing functions and possible future functions of the EPA, it incorporates references to listed Environmental Acts which it is to manage or have a part in the administration.

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- (c) the [Imports and Exports \(Restrictions\) Act 1988](#);
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- (e) the [Resource Management Act 1991](#)

The definition of “environment” is cross referenced to that under the RMA. The EPA has a limited overall purpose to management of the environment, and the Act has no separate statement to promote environmental protection as implicit in the title of the Act. This weakness was first identified in the Bill, and has been partly remedied in the cross references under s 12:

12 Objective of EPA

- (1) The objective of the EPA is to undertake its functions in a way that—
 - (a) contributes to the efficient, effective, and transparent management of New Zealand's environment and natural and physical resources; and
 - (b) enables New Zealand to meet its international obligations.
- (2) When undertaking its particular functions under an environmental Act, the EPA must also act in a way that furthers any objectives (or purposes) stated in respect of that Act.

The devise of incorporation in s 12(2) of objectives contained in the other enactments where applicable gives a bottom line basis to the purpose of the EPA as a protector of the environment.

Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012

The EEZ Act contains a definition of environment which “means the natural environment, including ecosystems and their constituent parts and all natural resources...”

The definition of natural resources states:

natural resources,—

- (a) in relation to the exclusive economic zone, includes seabed, subsoil, water, air, minerals, and energy, and all forms of organisms (whether native to New Zealand or introduced); and
- (b) in relation to the continental shelf, means the mineral and other non-living resources of the seabed and subsoil and sedentary species

These definitions could be taken as precedents for a limitation of the environment to that of natural resources. The purpose of regulation stated under s 10, further concentrates the consideration on the natural environment, and includes its own definition of sustainable management which does not specifically encompass the built environment.

10 Purpose

(1) The purpose of this Act is—

- (a) to promote the sustainable management of the natural resources of the exclusive economic zone and the continental shelf; and
- (b) in relation to the exclusive economic zone, the continental shelf, and the waters above the continental shelf beyond the outer limits of the exclusive economic zone, to protect the environment from pollution by regulating or prohibiting the discharge of harmful substances and the dumping or incineration of waste or other matter.

(2) In this Act, *sustainable management* means managing the use, development, and protection of natural resources in a way, or at a rate, that enables people to provide for their economic well-being while—

- (a) sustaining the potential of natural resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and
- (b) safeguarding the life-supporting capacity of the environment; and
- (c) avoiding, remedying, or mitigating any adverse effects of activities on the environment.

(3) In order to achieve the purpose, decision-makers must—

- (a) take into account decision-making criteria specified in relation to particular decisions; and
- (b) apply the information principles to the development of regulations and the consideration of applications for marine consent.

Under s 10(3), decision makers must take into account decision-making criteria specified in relation to particular decisions, and apply the “information principles” to the development of regulations in the consideration of applications for a marine consent. The information principles refer to the best available information and data.

In relation to an application for a marine consent, an impact assessment must be provided (s 39), and in decision-making by the EPA (through its appointed Hearings Panel), under s 59 it must take into account a wide range of effects on human health that may arise from effects on the environment, and the importance of protecting ecosystems and habitats, as well as economic benefit to New Zealand of allowing an application. The definitions of offshore installations and structures clearly encompass the built environment. As a consequence any application will consider the regulation of the built environment as well as effects on the natural environment. (Two major applications to date have

been rejected by the Hearings Panel as failing to reach a threshold of environmental protection under the precautionary approach.)

Environmental Reporting Act 2015

3 Purpose

The purpose of this Act is to require regular reports on New Zealand's environment.

4 Interpretation

In this Act, unless the context otherwise requires,—

land domain—

(a) means the domain composed of soil and underlying rock; and

(b) includes the animals, vegetation, and *structures* associated with the land domain

structure has the meaning given in [section 2\(1\)](#) of the Resource Management Act 1991

[*structure* means any building, equipment, device, or other facility made by people and which is fixed to land; and includes any raft]

8 Content of synthesis reports

(1) Each synthesis report must describe, in relation to the topics prescribed in regulations made under section 19, all of the following matters:

(a) the state of New Zealand's environment including biodiversity and ecosystems;

and

(b) the pressures that may be causing, or have the potential to cause, changes to the state of New Zealand's environment; and

(c) the impacts that the state of the environment and changes to the state of the environment may be having on each of the following impact categories:

(i) ecological integrity; and

(ii) public health; and

(iii) the economy; and

(iv) te ao Māori; and

(v) culture and recreation

10 Domain reports

(1) The Secretary and the Government Statistician must jointly produce and publish reports on the following:

(a) the air domain:

(b) the atmosphere and climate domain:

(c) the freshwater domain:

(d) the land domain:

(e) the marine domain.

(2) As soon as is reasonably practicable after the Secretary and the Government Statistician have published a domain report, the Ministers must jointly present the report to the House of Representatives.

Environmental Reporting (Topics for Environmental Reports) Regulations 2016 (2016/127) r 8

8 Topics relating to land domain

In the environmental reports required by sections 7(1) and 10(1)(d) of the Act, the topics relating to the *land domain* are,—

- (a) in relation to the state of the land domain,—
 - (i) land cover, ecosystems, and habitats; and
 - (ii) land species, taonga species, and genetic diversity; and
 - (iii) land and soil condition; and
- (b) in relation to the pressures causing, or having the potential to cause, changes to the state of the land domain,—
 - (i) pests, diseases, and exotic species; and
 - (ii) resource use and management, and other human activities; and
 - (iii) waste, effluent, and contaminants; and
 - (iv) the physical form of the land environment; and
 - (v) climate and natural processes.

10 Impact topics for all domains

The topics relating to the impact that the state of the environment and changes to it may be having on each of the impact categories in relation to each of the domains are as follows:

- (a) biodiversity and ecosystem processes; and
- (b) public health; and
- (c) the economy; and
- (d) mātauranga Māori, tikanga Māori, and kaitiakitanga; and
- (e) customary use and mahinga kai; and
- (f) sites of significance, including wāhi taonga and wāhi tapū; and
- (g) culture and recreation.

Comment: The land domain does not expressly cover or require reporting on the extend or content of the built environment, other than under the broad head “resource use and management, and other human activities”. This absence of focus may need to be addressed in any revision and separation of objectives for the built environment, to enable improved statistics as to housing stock and population needs.

APPENDIX 4

Resource Management Summary of Reform Proposals 2013 (MfE)

Extract [2.5]

Proposed section 6 and 7 revised wording

6 Principles

(1) In making the overall broad judgment under section 5 in order to achieve the purpose of this Act, all persons performing functions and exercising powers under the Act must, in relation to managing the use, development, and protection of natural and physical resources, recognise and provide for the following as matters of national importance:

- (a) the preservation of the natural character of the coastal environment (including the coastal marine area), wetlands, and lakes and rivers and their margins, and the protection of them from inappropriate subdivision, use and development;
- (b) the protection of specified outstanding natural features and landscapes from inappropriate subdivision, use and development
- (c) the protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna;
- (d) the maintenance and enhancement of public access to and along the coastal marine area, lakes and rivers;
- (e) the relationship of Māori and their culture and traditions with their ancestral lands, water, sites, waahi tapu and other taonga;
- (f) the protection of protected customary rights;
- (g) kaitiakitanga;
- (h) the efficient use and development of natural and physical resources, including the benefits derived from their use and development;
- (i) the importance and value of historic heritage;
- (j) the effects of climate change;
- (k) efficient energy use and benefits of renewable energy;
- (l) the effective functioning of the built environment, including the availability of land to support changes in population and urban development demand;
- (m) the management of significant risks from natural hazards
- (n) the efficient provision of infrastructure;

- (n) the efficient provision of infrastructure;
- (o) the maintenance of aquatic habitats, including significant habitats of trout and salmon;
- (p) the effective functioning of ecosystems.

7 Methods

In order to achieve the purpose of this Act, all persons performing functions and exercising powers under it must endeavour -

- a) to use timely, efficient and cost-effective resource management processes; and
- (b) in preparing policy statements and plans, -
 - (i) to include only those matters relevant to the purpose of this Act
 - (ii) to use clear, concise language; and
- (c) to promote collaboration between or among local authorities on their common resource management issues; and
- (d) to ensure that restrictions are not imposed under this Act on the use of private land except to the extent that any restriction is reasonably required to achieve the purpose of this Act.

This wording is subject to final drafting requirements.

(f) New Zealand's international obligations.

Specifically a precautionary approach is required to be applied to this type of regulation as set out in s 7.

7 Precautionary approach

All persons exercising functions, powers, and duties under this Act including, but not limited to, functions, powers, and duties under [sections 28A, 29, 32, 38, 45, and 48](#), shall take into account the need for caution in managing adverse effects where there is scientific and technical uncertainty about those effects.

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Further, the definition of “natural and physical resources” comprises a cross reference to the RMA, and includes structures. Accordingly in the consideration of environmental effects, an integrated assessment will be undertaken in respect of both effects on the built environment (if any) and the natural environment.

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- (b) in relation to the continental shelf, means the mineral and other non-living resources of the seabed and subsoil and sedentary species

These definitions could be taken as precedents for a limitation of the environment to that of natural resources. The purpose of regulation stated under s 10, further concentrates the consideration on the natural environment, and includes its own definition of sustainable management which does not specifically encompass the built environment.

10 Purpose

(1) The purpose of this Act is—

- (a) to promote the sustainable management of the natural resources of the exclusive economic zone and the continental shelf; and
- (b) in relation to the exclusive economic zone, the continental shelf, and the waters above the continental shelf beyond the outer limits of the exclusive economic zone, to protect the environment from pollution by regulating or prohibiting the discharge of harmful substances and the dumping or incineration of waste or other matter.

(2) In this Act, *sustainable management* means managing the use, development, and protection of natural resources in a way, or at a rate, that enables people to provide for their economic well-being while—

- (a) sustaining the potential of natural resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and
- (b) safeguarding the life-supporting capacity of the environment; and
- (c) avoiding, remedying, or mitigating any adverse effects of activities on the environment.

(3) In order to achieve the purpose, decision-makers must—

- (a) take into account decision-making criteria specified in relation to particular decisions; and
- (b) apply the information principles to the development of regulations and the consideration of applications for marine consent.

Under s 10(3), decision makers must take into account decision-making criteria specified in relation to particular decisions, and apply the “information principles” to the development of regulations in the consideration of applications for a marine consent. The information principles refer to the best available information and data.

In relation to an application for a marine consent, an impact assessment must be provided (s 39), and in decision-making by the EPA (through its appointed Hearings Panel), under s 59 it must take into account a wide range of effects on human health that may arise from effects on the environment, and the importance of protecting ecosystems and habitats, as well as economic benefit to New Zealand of allowing an application. The definitions of offshore installations and structures clearly encompass the built environment. As a consequence any application will consider the regulation of the built environment as well as effects on the natural environment. (Two major applications to date have

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Environmental Reporting Act 2015

3 Purpose

The purpose of this Act is to require regular reports on New Zealand's environment.

4 Interpretation

In this Act, unless the context otherwise requires,—

land domain—

(a) means the domain composed of soil and underlying rock; and

(b) includes the animals, vegetation, and *structures* associated with the land domain

structure has the meaning given in [section 2\(1\)](#) of the Resource Management Act 1991

[*structure* means any building, equipment, device, or other facility made by people and which is fixed to land; and includes any raft]

8 Content of synthesis reports

(1) Each synthesis report must describe, in relation to the topics prescribed in regulations made under section 19, all of the following matters:

(a) the state of New Zealand's environment including biodiversity and ecosystems;

and

(b) the pressures that may be causing, or have the potential to cause, changes to the state of New Zealand's environment; and

(c) the impacts that the state of the environment and changes to the state of the environment may be having on each of the following impact categories:

(i) ecological integrity; and

(ii) public health; and

(iii) the economy; and

(iv) te ao Māori; and

(v) culture and recreation

10 Domain reports

(1) The Secretary and the Government Statistician must jointly produce and publish reports on the following:

(a) the air domain:

(b) the atmosphere and climate domain:

(c) the freshwater domain:

(d) the land domain:

(e) the marine domain.

(2) As soon as is reasonably practicable after the Secretary and the Government Statistician have published a domain report, the Ministers must jointly present the report to the House of Representatives.

Environmental Reporting (Topics for Environmental Reports) Regulations 2016 (2016/127) r 8

8 Topics relating to land domain

In the environmental reports required by sections 7(1) and 10(1)(d) of the Act, the topics relating to the *land domain* are,—

7 Methods

In order to achieve the purpose of this Act, all persons performing functions and exercising powers under it must endeavour -

- a) to use timely, efficient and cost-effective resource management processes; and
- (b) in preparing policy statements and plans, -
 - (i) to include only those matters relevant to the purpose of this Act
 - (ii) to use clear, concise language; and
- (c) to promote collaboration between or among local authorities on their common resource management issues; and
- (d) to ensure that restrictions are not imposed under this Act on the use of private land except to the extent that any restriction is reasonably required to achieve the purpose of this Act.

This wording is subject to final drafting requirements.

- (a) in relation to the state of the land domain,—
 - (i) land cover, ecosystems, and habitats; and
 - (ii) land species, taonga species, and genetic diversity; and
 - (iii) land and soil condition; and
- (b) in relation to the pressures causing, or having the potential to cause, changes to the state of the land domain,—
 - (i) pests, diseases, and exotic species; and
 - (ii) resource use and management, and other human activities; and
 - (iii) waste, effluent, and contaminants; and
 - (iv) the physical form of the land environment; and
 - (v) climate and natural processes.

10 Impact topics for all domains

The topics relating to the impact that the state of the environment and changes to it may be having on each of the impact categories in relation to each of the domains are as follows:

- (a) biodiversity and ecosystem processes; and
- (b) public health; and
- (c) the economy; and
- (d) mātauranga Māori, tikanga Māori, and kaitiakitanga; and
- (e) customary use and mahinga kai; and
- (f) sites of significance, including wāhi taonga and wāhi tapū; and
- (g) culture and recreation.

Comment: The land domain does not expressly cover or require reporting on the extend or content of the built environment, other than under the broad head “resource use and management, and other human activities”. This absence of focus may need to be addressed in any revision and separation of objectives for the built environment, to enable improved statistics as to housing stock and population needs.

APPENDIX 4

Resource Management Summary of Reform Proposals 2013 (MfE)

Extract [2.5]

Proposed section 6 and 7 revised wording

6 Principles

(1) In making the overall broad judgment under section 5 in order to achieve the purpose of this Act, all persons performing functions and exercising powers under the Act must, in relation to managing the use, development, and protection of natural and physical resources, recognise and provide for the following as matters of national importance:

- (a) the preservation of the natural character of the coastal environment (including the coastal marine area), wetlands, and lakes and rivers and their margins, and the protection of them from inappropriate subdivision, use and development;
- (b) the protection of specified outstanding natural features and landscapes from inappropriate subdivision, use and development
- (c) the protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna;
- (d) the maintenance and enhancement of public access to and along the coastal marine area, lakes and rivers;
- (e) the relationship of Māori and their culture and traditions with their ancestral lands, water, sites, waahi tapu and other taonga;
- (f) the protection of protected customary rights;
- (g) kaitiakitanga;
- (h) the efficient use and development of natural and physical resources, including the benefits derived from their use and development;
- (i) the importance and value of historic heritage;
- (j) the effects of climate change;
- (k) efficient energy use and benefits of renewable energy;
- (l) the effective functioning of the built environment, including the availability of land to support changes in population and urban development demand;
- (m) the management of significant risks from natural hazards
- (n) the efficient provision of infrastructure;

- (n) the efficient provision of infrastructure;
- (o) the maintenance of aquatic habitats, including significant habitats of trout and salmon;
- (p) the effective functioning of ecosystems.

7 Methods

In order to achieve the purpose of this Act, all persons performing functions and exercising powers under it must endeavour -

- a) to use timely, efficient and cost-effective resource management processes; and
- (b) in preparing policy statements and plans, -
 - (i) to include only those matters relevant to the purpose of this Act
 - (ii) to use clear, concise language; and
- (c) to promote collaboration between or among local authorities on their common resource management issues; and
- (d) to ensure that restrictions are not imposed under this Act on the use of private land except to the extent that any restriction is reasonably required to achieve the purpose of this Act.

This wording is subject to final drafting requirements.

(f) New Zealand's international obligations.

Specifically a precautionary approach is required to be applied to this type of regulation as set out in s 7.

7 Precautionary approach

All persons exercising functions, powers, and duties under this Act including, but not limited to, functions, powers, and duties under [sections 28A, 29, 32, 38, 45, and 48](#), shall take into account the need for caution in managing adverse effects where there is scientific and technical uncertainty about those effects.

In dealing with the effect on the environment, the definition of environment in s 2 is relevant.

environment includes—

- (a) ecosystems and their constituent parts, including people and communities; and
- (b) all natural and physical resources; and
- (c) amenity values; and
- (d) the social, economic, aesthetic, and cultural conditions which affect the matters stated in paragraphs (a) to (c) or which are affected by those matters

Further, the definition of “natural and physical resources” comprises a cross reference to the RMA, and includes structures. Accordingly in the consideration of environmental effects, an integrated assessment will be undertaken in respect of both effects on the built environment (if any) and the natural environment.

Environmental Protection Authority Act 2011

In considering the existing functions and possible future functions of the EPA, it incorporates references to listed Environmental Acts which it is to manage or have a part in the administration.

environmental Act means—

- (a) the [Climate Change Response Act 2002](#);
- (ab) the [Exclusive Economic Zone and Continental Shelf \(Environmental Effects\) Act 2012](#);
- (b) the [Hazardous Substances and New Organisms Act 1996](#);
- (c) the [Imports and Exports \(Restrictions\) Act 1988](#);
- (d) the [Ozone Layer Protection Act 1996](#);
- (e) the [Resource Management Act 1991](#)

The definition of “environment” is cross referenced to that under the RMA. The EPA has a limited overall purpose to management of the environment, and the Act has no separate statement to promote environmental protection as implicit in the title of the Act. This weakness was first identified in the Bill, and has been partly remedied in the cross references under s 12:

12 Objective of EPA

- (1) The objective of the EPA is to undertake its functions in a way that—
 - (a) contributes to the efficient, effective, and transparent management of New Zealand's environment and natural and physical resources; and
 - (b) enables New Zealand to meet its international obligations.
- (2) When undertaking its particular functions under an environmental Act, the EPA must also act in a way that furthers any objectives (or purposes) stated in respect of that Act.

The devise of incorporation in s 12(2) of objectives contained in the other enactments where applicable gives a bottom line basis to the purpose of the EPA as a protector of the environment.

Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012

The EEZ Act contains a definition of environment which “means the natural environment, including ecosystems and their constituent parts and all natural resources...”

The definition of natural resources states:

natural resources,—

- (a) in relation to the exclusive economic zone, includes seabed, subsoil, water, air, minerals, and energy, and all forms of organisms (whether native to New Zealand or introduced); and
- (b) in relation to the continental shelf, means the mineral and other non-living resources of the seabed and subsoil and sedentary species

These definitions could be taken as precedents for a limitation of the environment to that of natural resources. The purpose of regulation stated under s 10, further concentrates the consideration on the natural environment, and includes its own definition of sustainable management which does not specifically encompass the built environment.

10 Purpose

(1) The purpose of this Act is—

- (a) to promote the sustainable management of the natural resources of the exclusive economic zone and the continental shelf; and
- (b) in relation to the exclusive economic zone, the continental shelf, and the waters above the continental shelf beyond the outer limits of the exclusive economic zone, to protect the environment from pollution by regulating or prohibiting the discharge of harmful substances and the dumping or incineration of waste or other matter.

(2) In this Act, *sustainable management* means managing the use, development, and protection of natural resources in a way, or at a rate, that enables people to provide for their economic well-being while—

- (a) sustaining the potential of natural resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and
- (b) safeguarding the life-supporting capacity of the environment; and
- (c) avoiding, remedying, or mitigating any adverse effects of activities on the environment.

(3) In order to achieve the purpose, decision-makers must—

- (a) take into account decision-making criteria specified in relation to particular decisions; and
- (b) apply the information principles to the development of regulations and the consideration of applications for marine consent.

Under s 10(3), decision makers must take into account decision-making criteria specified in relation to particular decisions, and apply the “information principles” to the development of regulations in the consideration of applications for a marine consent. The information principles refer to the best available information and data.

In relation to an application for a marine consent, an impact assessment must be provided (s 39), and in decision-making by the EPA (through its appointed Hearings Panel), under s 59 it must take into account a wide range of effects on human health that may arise from effects on the environment, and the importance of protecting ecosystems and habitats, as well as economic benefit to New Zealand of allowing an application. The definitions of offshore installations and structures clearly encompass the built environment. As a consequence any application will consider the regulation of the built environment as well as effects on the natural environment. (Two major applications to date have

been rejected by the Hearings Panel as failing to reach a threshold of environmental protection under the precautionary approach.)

Environmental Reporting Act 2015

3 Purpose

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4 Interpretation

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land domain—

(a) means the domain composed of soil and underlying rock; and

(b) includes the animals, vegetation, and *structures* associated with the land domain

structure has the meaning given in [section 2\(1\)](#) of the Resource Management Act 1991

[*structure* means any building, equipment, device, or other facility made by people and which is fixed to land; and includes any raft]

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(1) Each synthesis report must describe, in relation to the topics prescribed in regulations made under section 19, all of the following matters:

(a) the state of New Zealand's environment including biodiversity and ecosystems;

and

(b) the pressures that may be causing, or have the potential to cause, changes to the state of New Zealand's environment; and

(c) the impacts that the state of the environment and changes to the state of the environment may be having on each of the following impact categories:

(i) ecological integrity; and

(ii) public health; and

(iii) the economy; and

(iv) te ao Māori; and

(v) culture and recreation

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(1) The Secretary and the Government Statistician must jointly produce and publish reports on the following:

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- (b) in preparing policy statements and plans, -
 - (i) to include only those matters relevant to the purpose of this Act
 - (ii) to use clear, concise language; and
- (c) to promote collaboration between or among local authorities on their common resource management issues; and
- (d) to ensure that restrictions are not imposed under this Act on the use of private land except to the extent that any restriction is reasonably required to achieve the purpose of this Act.

This wording is subject to final drafting requirements.

APPENDIX 5 [6.2]

Crown powers to provide State housing

Housing Act 1955

3 Powers of Minister in relation to State housing

The Minister may from time to time determine either generally or in any particular case what land or classes of land may be acquired for State housing purposes and the general scheme of development thereof, the number and classes of dwellings and ancillary commercial buildings to be constructed, and any other matters of State housing policy.

3A Relationship to Resource Management Act 1991

Nothing in this Part shall derogate from any of the provisions of the Resource Management Act 1991.

4 Crown land may be set apart for State housing purposes

(1) The Minister of Lands may from time to time, by notice in the Gazette, set apart as State housing land any Crown land within the meaning of the Land Act 1948

5 Power to take land for State housing purposes

The Governor-General may take under the Public Works Act 1981 any land required for State housing purposes:
provided that no Maori land shall be taken for State housing purposes without the consent of the Minister of Maori Affairs.

6 Power to purchase land, dwellings, etc, for State housing purposes

(1) There may from time to time be purchased or taken on lease, out of money appropriated by Parliament for the purpose or (subject to any direction of the Minister) out of money received by the Corporation under subsection (1) of section 32, such land, dwellings, buildings, and chattels as may be required for State housing purposes....

8 Development of State housing land

The cost of doing all or any of the following may be paid or contributed to out of money appropriated by Parliament for the purpose, namely:

- (a) surveying and subdividing any State housing land:
- (b) developing any State housing land as sites for all types of buildings which are desirable for the general residential development of the area

9 Power to erect and repair dwellings

- (1) The Minister, from time to time out of money appropriated by Parliament for the purpose, may cause dwellings and ancillary commercial buildings to be erected for State housing purposes on any State housing land, and may cause any dwelling or building on any such land to be demolished or rebuilt.
- (2) The Minister or the Corporation may from time to time alter, enlarge, repair, or otherwise improve any dwelling or building on any State housing land.

15 Disposal of State housing land by sale or lease [amended 2016]

(1) Subject as hereafter provided in this Act, any State housing land and any buildings or chattels held for State housing purposes may be disposed of by way of sale, lease, or tenancy by the Corporation.

(2) To avoid doubt, sections 40 to 42 of the Public Works Act 1981 do not apply (and have never applied) to the disposal of State housing land if the land is disposed of as 1 or more of the following:

(a) land with dwellings and ancillary commercial buildings erected on it:

(b) land as sites for dwellings and ancillary commercial buildings:

(c) land for schemes of development and subdivision into sites for dwellings and ancillary commercial buildings....

Housing Corporation Act 1974

3B Objectives of Corporation

The Corporation's objectives are—

(a) to give effect to the Crown's social objectives by providing housing, and services related to housing, in a businesslike manner, and to that end to be an organisation that—

(i) exhibits a sense of social responsibility by having regard to the interests of the community in which it operates; and

(ii) exhibits a sense of environmental responsibility by having regard to the environmental implications of its operations; and

(iii) operates with good financial oversight and stewardship, and efficiently and effectively manages its assets and liabilities and the Crown's investment.

(b) but see section 50J for Part 5A objectives

3C Communication of the Crown's social objectives

(1) To enable the Corporation to achieve the objective stated in section 3B(a) and to prepare or review its statements of intent, the Minister must, at least 3 months before the commencement of each financial year of the Corporation, give it written notice of the Crown's social objectives for the provision of housing and services related to housing by the Corporation....

18 Functions of Corporation

(1) The Corporation's principal function is to achieve its objectives.

(2) The Corporation's functions include—

(a) providing rental housing, principally for those who need it most:

(b) providing appropriate accommodation, including housing, for community organisations (in particular for community organisations that provide residential support services for people with special needs):

(c) lending for housing purposes, and providing other help relating to housing:

(d) giving people (in particular people on low or modest incomes who wish to own their own homes) help and advice on matters relating to housing or services related to housing:

(e) undertaking housing and other development and renewal, whether on its own account or on behalf of other persons:

(f) acquiring and developing land for housing or other development and renewal, whether by—

(i) providing housing amenities, facilities, services, or works; or

- (ii) providing commercial or industrial amenities, facilities, services, or works; or
- (iii) providing related amenities, facilities, services, or works; or
- (iv) doing any other thing:
- (g) selling, leasing, disposing of, managing, or otherwise dealing with land, whether in the course of housing or other development and renewal or otherwise....

19 Powers of Corporation

(1) [Repealed]

(1A) The Corporation may take any action in the performance of its functions or achievement of its objectives jointly, or in conjunction, with—

- (a) a local authority; or
- (b) any other person or organisation that provides housing without having profit or gain as its principal motive; or
- (c) any other person or organisation.

(1B) Subsection (1A) does not limit section 17 of the Crown Entities Act 2004....

20 Corporation to give effect to government policy

(1) The Minister may require the Corporation to give effect to the policy of the Government, by—

- (a) giving the Corporation a direction under section 103 of the Crown Entities Act 2004; or
- (b) giving the Corporation a direction requiring it to enter into a written agreement with the Minister to give effect to a policy stated in the agreement.

20B Compensation of Corporation for providing certain services

(1) If under section 20 the Minister requires the Corporation to provide housing or services related to housing (or both) to any persons in return for the payment by the Crown of all or part of the price to the Corporation of doing so (as stated in the notice or agreement concerned),—

- (a) the Crown must pay to the Corporation all or part of that price (as the case requires); and
- (b) if the policy is for the Corporation to provide housing and related services to persons who are to be required to pay income-related rents rather than market rents for the housing, the notice or agreement concerned must state that the housing and related services are to be provided in return for the payment by the Crown to the Corporation of either—
 - (i) the difference between the amounts of market rents for the housing and the income-related rents charged; or
 - (ii) an alternative price, set out in that notice or agreement, that has been agreed to by the Corporation.

(2) If, because its statement of intent requires it to do so, the Corporation provides services that it cannot provide on normal business terms, the Crown may wholly or partly recompense it for doing so....

[social housing reform – Part 5A inserted 25 February 2016]

50B Overview of this Part

(1) This Part—

- (a) gives powers to the Minister to enter into social housing transactions for and on behalf of the Corporation or subsidiary; and

- (b) provides for both the Minister and the Corporation to have a role in implementing social housing transactions; and
 - (c) provides for other matters, such as delegation of the Minister's powers, and provisions relating to liabilities.
- (2) Subsection (1) is only a guide to the general scheme and effect of this Part.

50D Meaning and relevance of social housing reform objectives

- (1) The social housing reform objectives are any 1 or more of the following:
- (a) people who need housing support can access it and receive social services that meet their needs:
 - (b) social housing is of the right size and configuration, and in the right areas, for households that need it:
 - (c) social housing tenants are helped to independence, as appropriate:
 - (d) there is more diverse ownership or provision of social housing:
 - (e) there is more innovation and more responsiveness to social housing tenants and communities:
 - (f) the supply of affordable housing is increased, especially in Auckland.
- (2) The social housing reform objectives are relevant to decisions by the Minister to enter into transfer contracts (see section 50E) but may also be relevant to other decisions by the Minister under or in relation to this Part.

50E Minister may enter into transfer contracts as Corporation or subsidiary

- (1) The Minister may enter into a contract, for and on behalf of the Corporation or subsidiary, that provides for either or both of the following (a transfer contract), if the Minister considers that the entry into the contract is for the purpose of any 1 or more of the social housing reform objectives:
- (a) the transfer of ownership of assets of the Corporation or subsidiary:
 - (b) the grant of an interest in assets of the Corporation or subsidiary.
- (2) A transfer contract may be on any terms and conditions (including as to consideration) that the Minister may agree with the transferee.

50J Objectives of Corporation for this Part

- (1) The Corporation's principal objectives for this Part are to facilitate the transaction processes and to facilitate and implement social housing transactions.
- (2) The Corporation's principal objectives for this Part prevail over the Corporation's other objectives.

50R Legal effect of things done by Minister

- (1) The Corporation or subsidiary is responsible and liable for anything done, or not done, under section 50E, 50F, or 50G as if the Corporation or subsidiary had acted, or not acted, under those sections with the same powers as the Minister.
- (2) Neither the Crown nor the Minister is responsible or liable to any person by reason of acting, or having not acted, under section 50E, 50F, or 50G.
- (3) In subsections (1) and (2), not acted includes failed to do something before acting.
- (4) Anything done, or purported to be done, under section 50E, 50F, or 50G is deemed to be done by the Corporation or subsidiary for the purpose of performing, or assisting the Corporation to perform, the Corporation's functions.
- (5) This section applies despite any enactment or rule of law to the contrary.
- (6) Nothing in this section affects the right of a person to apply, in accordance with the law, for judicial review.

APPENDIX 5 [6.2]

Crown powers to provide State housing

Housing Act 1955

3 Powers of Minister in relation to State housing

The Minister may from time to time determine either generally or in any particular case what land or classes of land may be acquired for State housing purposes and the general scheme of development thereof, the number and classes of dwellings and ancillary commercial buildings to be constructed, and any other matters of State housing policy.

3A Relationship to Resource Management Act 1991

Nothing in this Part shall derogate from any of the provisions of the Resource Management Act 1991.

4 Crown land may be set apart for State housing purposes

(1) The Minister of Lands may from time to time, by notice in the Gazette, set apart as State housing land any Crown land within the meaning of the Land Act 1948

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The Governor-General may take under the Public Works Act 1981 any land required for State housing purposes:
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(1) There may from time to time be purchased or taken on lease, out of money appropriated by Parliament for the purpose or (subject to any direction of the Minister) out of money received by the Corporation under subsection (1) of section 32, such land, dwellings, buildings, and chattels as may be required for State housing purposes....

8 Development of State housing land

The cost of doing all or any of the following may be paid or contributed to out of money appropriated by Parliament for the purpose, namely:

- (a) surveying and subdividing any State housing land:
- (b) developing any State housing land as sites for all types of buildings which are desirable for the general residential development of the area

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- (1) The Minister, from time to time out of money appropriated by Parliament for the purpose, may cause dwellings and ancillary commercial buildings to be erected for State housing purposes on any State housing land, and may cause any dwelling or building on any such land to be demolished or rebuilt.
- (2) The Minister or the Corporation may from time to time alter, enlarge, repair, or otherwise improve any dwelling or building on any State housing land.

15 Disposal of State housing land by sale or lease [amended 2016]

(1) Subject as hereafter provided in this Act, any State housing land and any buildings or chattels held for State housing purposes may be disposed of by way of sale, lease, or tenancy by the Corporation.

(2) To avoid doubt, sections 40 to 42 of the Public Works Act 1981 do not apply (and have never applied) to the disposal of State housing land if the land is disposed of as 1 or more of the following:

(a) land with dwellings and ancillary commercial buildings erected on it:

(b) land as sites for dwellings and ancillary commercial buildings:

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(ii) exhibits a sense of environmental responsibility by having regard to the environmental implications of its operations; and

(iii) operates with good financial oversight and stewardship, and efficiently and effectively manages its assets and liabilities and the Crown's investment.

(b) but see section 50J for Part 5A objectives

3C Communication of the Crown's social objectives

(1) To enable the Corporation to achieve the objective stated in section 3B(a) and to prepare or review its statements of intent, the Minister must, at least 3 months before the commencement of each financial year of the Corporation, give it written notice of the Crown's social objectives for the provision of housing and services related to housing by the Corporation....

18 Functions of Corporation

(1) The Corporation's principal function is to achieve its objectives.

(2) The Corporation's functions include—

(a) providing rental housing, principally for those who need it most:

(b) providing appropriate accommodation, including housing, for community organisations (in particular for community organisations that provide residential support services for people with special needs):

(c) lending for housing purposes, and providing other help relating to housing:

(d) giving people (in particular people on low or modest incomes who wish to own their own homes) help and advice on matters relating to housing or services related to housing:

(e) undertaking housing and other development and renewal, whether on its own account or on behalf of other persons:

(f) acquiring and developing land for housing or other development and renewal, whether by—

(i) providing housing amenities, facilities, services, or works; or

- (ii) providing commercial or industrial amenities, facilities, services, or works; or
- (iii) providing related amenities, facilities, services, or works; or
- (iv) doing any other thing:
- (g) selling, leasing, disposing of, managing, or otherwise dealing with land, whether in the course of housing or other development and renewal or otherwise....

19 Powers of Corporation

(1) [Repealed]

(1A) The Corporation may take any action in the performance of its functions or achievement of its objectives jointly, or in conjunction, with—

- (a) a local authority; or
- (b) any other person or organisation that provides housing without having profit or gain as its principal motive; or
- (c) any other person or organisation.

(1B) Subsection (1A) does not limit section 17 of the Crown Entities Act 2004....

20 Corporation to give effect to government policy

(1) The Minister may require the Corporation to give effect to the policy of the Government, by—

- (a) giving the Corporation a direction under section 103 of the Crown Entities Act 2004; or
- (b) giving the Corporation a direction requiring it to enter into a written agreement with the Minister to give effect to a policy stated in the agreement.

20B Compensation of Corporation for providing certain services

(1) If under section 20 the Minister requires the Corporation to provide housing or services related to housing (or both) to any persons in return for the payment by the Crown of all or part of the price to the Corporation of doing so (as stated in the notice or agreement concerned),—

- (a) the Crown must pay to the Corporation all or part of that price (as the case requires); and
- (b) if the policy is for the Corporation to provide housing and related services to persons who are to be required to pay income-related rents rather than market rents for the housing, the notice or agreement concerned must state that the housing and related services are to be provided in return for the payment by the Crown to the Corporation of either—
 - (i) the difference between the amounts of market rents for the housing and the income-related rents charged; or
 - (ii) an alternative price, set out in that notice or agreement, that has been agreed to by the Corporation.

(2) If, because its statement of intent requires it to do so, the Corporation provides services that it cannot provide on normal business terms, the Crown may wholly or partly recompense it for doing so....

[social housing reform – Part 5A inserted 25 February 2016]

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(1) This Part—

- (a) gives powers to the Minister to enter into social housing transactions for and on behalf of the Corporation or subsidiary; and

- (b) provides for both the Minister and the Corporation to have a role in implementing social housing transactions; and
 - (c) provides for other matters, such as delegation of the Minister's powers, and provisions relating to liabilities.
- (2) Subsection (1) is only a guide to the general scheme and effect of this Part.

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- (1) The social housing reform objectives are any 1 or more of the following:
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 - (b) social housing is of the right size and configuration, and in the right areas, for households that need it:
 - (c) social housing tenants are helped to independence, as appropriate:
 - (d) there is more diverse ownership or provision of social housing:
 - (e) there is more innovation and more responsiveness to social housing tenants and communities:
 - (f) the supply of affordable housing is increased, especially in Auckland.
- (2) The social housing reform objectives are relevant to decisions by the Minister to enter into transfer contracts (see section 50E) but may also be relevant to other decisions by the Minister under or in relation to this Part.

50E Minister may enter into transfer contracts as Corporation or subsidiary

- (1) The Minister may enter into a contract, for and on behalf of the Corporation or subsidiary, that provides for either or both of the following (a transfer contract), if the Minister considers that the entry into the contract is for the purpose of any 1 or more of the social housing reform objectives:
- (a) the transfer of ownership of assets of the Corporation or subsidiary:
 - (b) the grant of an interest in assets of the Corporation or subsidiary.
- (2) A transfer contract may be on any terms and conditions (including as to consideration) that the Minister may agree with the transferee.

50J Objectives of Corporation for this Part

- (1) The Corporation's principal objectives for this Part are to facilitate the transaction processes and to facilitate and implement social housing transactions.
- (2) The Corporation's principal objectives for this Part prevail over the Corporation's other objectives.

50R Legal effect of things done by Minister

- (1) The Corporation or subsidiary is responsible and liable for anything done, or not done, under section 50E, 50F, or 50G as if the Corporation or subsidiary had acted, or not acted, under those sections with the same powers as the Minister.
- (2) Neither the Crown nor the Minister is responsible or liable to any person by reason of acting, or having not acted, under section 50E, 50F, or 50G.
- (3) In subsections (1) and (2), not acted includes failed to do something before acting.
- (4) Anything done, or purported to be done, under section 50E, 50F, or 50G is deemed to be done by the Corporation or subsidiary for the purpose of performing, or assisting the Corporation to perform, the Corporation's functions.
- (5) This section applies despite any enactment or rule of law to the contrary.
- (6) Nothing in this section affects the right of a person to apply, in accordance with the law, for judicial review.

New Zealand Productivity Commission

Supplementary Report on Integration of Statutory Procedures

Dr Kenneth Palmer*

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1 Introduction

In the Draft report of the New Zealand Productivity Commission, *Better Urban Planning*, (August 2016), a statement is made “The differing purposes of the three planning Acts create internal tensions, duplication, complexity and costs”.¹ The three Acts referred to are the Resource Management Act 1991, the Local Government Act 2002, and the Land Transport Management Act 2003.

In a subsequent paper by the author, titled “Separating regulation of the built and natural environments – legislative options”, a conclusion is drawn in respect of the relationship between the Resource Management Act (RMA), the Local Government Act (LGA), and the Land Transport Management Act (LTMA), in the context of a proposition that the Land Transport Management Act could be wholly or partly or better integrated into the RMA or Planning Act provisions:²

In summary, having regard to the purpose, governance structure, consultation provisions, focus on the national land transport programme, regional land transport plans, regional public transport plans, and funding allocation under the LTMA, the author does not support integration of the LTMA in whole or part into a revised planning law covering the built environment and infrastructure (Option B). Adequate co-ordination of the LTMA with the urban planning process could be achieved by specific cross references in the respective legislation to relevant documents. Otherwise, no major changes to the LTMA are envisaged as being necessary to complement a new planning law structure.

A further consideration has arisen to outline what the cross-references would or could involve in more detail, and the nature of any consultation processes, and/or planning decisions or plan content.

In addressing these aspects, this report sets out firstly the key features of the Land Transport Management Act 2003 (as amended 2013), and the degree to which the LTMA coordinates procedures with the RMA and LGA. The complementary co-ordination from the perspectives of the LGA and RMA will then be assessed.

1.1 Summary of recommendations

1. The LTMA provides for issue of the government policy statement, national land transport programme, regional land transport plan, regional public transport plan, and administration through NZTA of the national land transport fund. Due to the differing functions, instruments, and time frames of the LTMA, LGA, and RMA, subject to subsequent recommendations, further structural integration of the purposes and consultation procedures is not seen to be necessary or necessarily productive of better efficiencies or outcomes. [2.7]

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¹ New Zealand Productivity Commission (2016) *Better Urban Planning Draft Report*, F5.2, p 92.

² Kenneth Palmer, “Separating regulation of the built and natural environments – legislative options” (2016), executive summary 35, part 3.2.

2. In support of that conclusion, a comment could be made that the cross-references under the LTMA are adequate, but (as recommended below) the cross-references under the RMA or any new Planning act, could be improved. [2.7]
3. Another conclusion is that the content of the LTMA, has suffered from the substantial amendments to that Act, and could benefit from a complete consolidation or revision, to provide for a more logical hierarchy of the functions. For example, the provision for the government policy statement should come at the beginning of the Act, and not follow towards the end of part 3. This piecemeal approach is the result of historic evolution of the legislation. The Act lacks a clarity of structure, and effective application is a challenge. [2.7]
4. On any revision of the LTMA, the dated situation regarding provision and management of government roads, and roads vested in local authorities could be addressed and revised. [2.7]
5. Under the National Policy Statement on Urban Development Capacity 2016 (NPS-UDC), the short term, medium term, and long term policies (to be implemented under RMA plans) must provide sufficient housing and business land development capacity serviced with “development infrastructure”. Development infrastructure is defined to include land transport as defined in the LTMA to the extent that it is controlled by local authorities. [2.7]
6. Looking to the future, it would be appropriate for the remaining provisions in the Local Government Act 1974 concerning roading to be relocated in other relevant Acts, and the 1974 Act fully repealed. The choice could be to place the planning function for major roads under the LTMA as consequent to the regional land transport plan. Alternatively, the road planning function could be placed principally under the RMA, as directly related to the likely content in the regional policy statement (RPS) in respect of transport systems and roading. The RPS provision should be consistent with or influenced by the regional land transport plan (under the LTMA). The construction powers vested in territorial authorities could be appropriately relocated into the LGA 2002 in the provisions relating to council works. [3.3]
7. The addition of specific cross references in the LGA 2002 (long-term plan and annual plan collation) to documents issued under the LTMA, where likely to be relevant, is recommended to assist councillors, officers and other persons who may not be familiar with the present complex integration of purpose and procedures. As stated the converse references in the LTMA to the LGA appear to be adequate (subject to the need to consolidate the LTMA). [3.3]
8. The importance of timely provision of development infrastructure to support the provision of urban land capacity for housing and business is underscored in the National Policy Statement on Urban Development Capacity 2016. Development infrastructure includes water supply, wastewater, stormwater, and land transport as defined in the LTMA. The NPS-UDC requires local authorities in high growth (and probably medium growth) urban areas to produce a “future development strategy” to be informed by the relevant long-term plan, and the infrastructure strategy required under the LGA. The future development strategy can be incorporated into a non-statutory document not

prepared under the RMA, including documents prepared under other legislation (eg LGA). The local authority has the choice of undertaking a consultation process that complies with either the LGA processes or sch 1 of the RMA. [3.3]

9. The NPS-UDC provides a useful link and cross reference between the urban capacity obligations with the LTMA processes, and may influence the content of the land transport part of the regional policy statement, and the district plan regarding land transport. Local authorities are required to “work with providers of development infrastructure, and other infrastructure, in preparing a future development strategy”. The NPS attempts to co-ordinate functions under the RMA, LGA, and LTMA to the extent relevant to the NPS obligations, and provides a lead for the wider use of co-ordination of objectives and processes under the respective statutes. [4.3]
10. More generally, the significance of land transport in urban and rural areas is such that specific reference to transport considerations should be included in the purposes of the RMA [or Planning Act]. Additional cross-references should be added in respect of the preparation of the regional policy statement, any regional plan, the district plan, any resource consent application, and any requirement for a public work or utility provision. The cross references would be to documents issued under the LTMA or any replacement of that Act. [4.3]
11. The RMA provides for a person having financial responsibility for a public work, a local authority or network utility operator, to carry out work where an adverse effect on the environment requires immediate preventive or remedial measures. A retrospective consent can be sought. This provision should be extended to remedial actions taken by all persons in responding to an adverse effect on the environment which requires immediate preventive or remedial measures. [5.2]
12. A recommendation is made that a general earthquake and other adverse environmental events statute should be considered to provide for a degree of flexibility in the future (outside a declared civil defence emergency, or a declared transition period) in the implementation, coordination and exemption as necessary, to allow for restoration of property, roads and other infrastructure in a timely and cost effective manner. The schedule to the Hurunui/Kaikoura Earthquakes Recovery Act 2016 sets out a list of 46 specific statutes under which an Order in Council may be made. Included in the list are the Resource Management Act, the Local Government Act, and the Land Transport Management Act. The other Acts included in the schedule are also relevant for achieving an integrated and comprehensive response to serious emergency situations and major environmental events. [5.2]

2 Land Transport Management Act processes and co-ordination

2.1 LTMA background

The Land Transport Management Act 2003 (LTMA) was enacted by the Labour government in collaboration with the Green Party, and reflected an endeavour to align transport planning with the sustainable management objectives under the RMA. The original purpose of the

LTMA was “to contribute to achieving an affordable, integrated, safe, responsive and sustainable land transport system”. A raft of transport strategies and programmes at Ministerial and local government levels were required to deliver these outcomes.

These aspirational objectives tended in practice to duplicate the policies, plans and consultation procedures under the RMA at regional and district levels, and gave rise to significant complexity through the approval and assemblage of documents. In particular, one focus of the reform of the Auckland local government region in 2009, was to find solutions to the intractable situation that had arisen as to road planning and transport integration (outside the State highways) in the Auckland region. The reform producing the Auckland Council, was accompanied by the creation of the body known as Auckland Transport, to ensure that transport planning proposals and solutions, were not immersed in local authority decision-making and conflicts between the regional and district levels.³ Auckland Transport was vested with significant independent powers, subject only to ultimate supervision by Auckland Council in respect of the statement on intent, and approval of the borrowing capacity of the entity.⁴

Consequent upon this attempt to improve planning objectives and outcomes at the regional level within Auckland, a broader major reform occurred under the Land Transport Management Amendment Act 2013. This Act comprehensively improved the structure of management under the 2003 Act, reduced the number of planning documents, and provided a matrix of cross-references to the RMA and LGA, to achieve effective co-ordination and avoid unnecessary duplication of process.

2.2 Structure of LTMA (as reformed 2013)

Government Policy Statement

At the top tier, the minister responsible must issue a “**government policy statement**” (GPS) on land transport, that covers a period of six financial years. In preparing the GPS, the minister must take into account any energy efficiency strategy, and any relevant national policy statement (as issued under the RMA) and have regard to the views of local government and representative groups of land transport users and providers. The GPS must refer to results to be achieved over a ten year period, and include the Crown’s land transport investment strategy, new revenue expectations and activity classes that could be funded from the national land transport fund.⁵ From a functional perspective, the GPS is similar to a National Policy Statement under the RMA, but is distinguished by the time frame for review. A NPS does not per se come up for review unless stated in the document, or determined by the Minister.

National land transport programme

At the second tier, the New Zealand Transport Agency (NZTA) is required to prepare a “**national land transport programme**”. Core requirements of the national land transport programme are to contribute to the purposes of the Act, which were simplified in 2013 to be “to contribute to an effective, efficient, and safe land transport system in the public interest”. In preparing the programme, the NZTA should take into account any existing regional land

³ Local Government (Auckland Council) Act 2009, part 4

⁴ Section 142. Local Government Act 2002, ss 63, 64.

⁵ Land Transport Management Act 2003, part 3, ss 66-71, 90, 91. See **appendix 1** below.

transport plans, any national energy efficiency and conservation strategy, any relevant national policy statement or regional policy statement or plans (in force under the RMA).⁶

National land transport fund

In relation to the “**national land transport fund**”, the Agency will determine in accordance with the GPS, the activities that may qualify for payments or subsidies, and may set rates for assistance and generally administer the fund. The Agency must take into account any relevant national policy statement and regional policy statements. A particular obligation on the Agency and councils is to provide opportunities for Maori to contribute to funding decisions.⁷

Regional land transport plan

At the third tier, regional councils or unitary authorities (and Auckland Transport) must prepare a “**regional land transport plan**” in a form that may be prescribed by NZTA. The plan must include land transport objectives, policies, and proposed measures over a 10 year period. Transport priorities, projected financial costs and funding sources must also be included. In relation to integration with the RMA, one core requirement is for the regional transport committee to “have taken into account any... (ii) relevant national policy statements and any relevant regional policy statements or plans that are for the time being in force under the Resource Management Act 1991”. This directive provides for clear integration with the RMA documents.⁸

In preparing the regional land transport plan, various consultation obligations must be observed. The procedures may include consultation with the public under the LGA procedures, including the procedures giving rise to the long-term plan, an annual plan, or otherwise under the special consultative procedure. Where the relevant matters in relation to the regional land transport plan are covered within the scope of those LGA procedures, no further consultation or duplication of process is required. The plan will be approved by the regional council.⁹

Additional consultation is required with Maori in respect of any activity proposed under the plan that may affect Maori land, a claim by Maori to other land, or affect Maori historical, cultural or spiritual interests.¹⁰

Regional public transport plan

Finally, under the LTMA, in regions where the regional council is likely to enter any contract for the supply of any public service or provide financial assistance to any taxi or other transport service, the regional council must prepare a “**regional public transport plan**”. That plan will, after similar consultation with the public, provide for public transport systems, including routes and fares, within a relevant region or urban area. That plan must take into account the needs of the public and persons who are transport disadvantaged, and covers a range of services that may be eligible for transport subsidies. The approval of the public transport plan is not subject to any appeal rights, other than by a service provider who may be affected by the plan.¹¹

⁶ Land Transport Management Act 2003, part 2, ss 19A-19F. See appendix 1 (s 19C)).

⁷ Land Transport Management Act 2003, ss 10, 11, 18H, 20-22. See appendix 1 below (s 20(3)).

⁸ At, ss 12-14. See appendix 1 (s 14(1)(c)).

⁹ At, ss 18-18F. See appendix 1.

¹⁰ At ss 18G, 18H. See appendix 1.

¹¹ At ss 117-149. The right of appeal is to the Environment Court.

2.3 Interim conclusions on LTMA

Conclusions can be drawn, that the Minister in respect of the GPS, NZTA in respect of the national land transport programme, the regional land transport committee functions, and any submitters, should be well alerted to the relevance of any national policy statement and regional policy documents under the RMA, when preparing the respective land transport policies and documents. This co-ordination of function is pragmatic and workable.

Secondly, under the LTMA it is clear that where the consultation on the regional transport plan or regional public transport plan, occurs in conjunction with the preparation of a long-term plan or annual plan or special consultative procedure under the LGA, that the consultation procedures need not be duplicated. This outcome allows for efficient integration of the consultation processes where the respective time frames for the various procedures can be practically combined.

2.4 Limitations on co-ordination and consultation under the LTMA, LGA and RMA

The differing time frames between the LTMA and LGA (and RMA) reflect the differing objectives of the three Acts, which may be related to election cycles, ministerial directives and council changes at both regional and local government levels. Harmonisation of the time cycles may be desirable in theory, but is not a practical outcome for many reasons upon close analysis. Harmonisation edicts could give rise to an undesirable rigidity in administration and work load, in areas where flexibility of process, including plan changes, reviews and variations, is desirable. This flexibility may be beneficial to both government and private enterprise.

Persons making submissions on the regional land transport plan under the LTMA ought to be aware that no rights of appeal apply to the Environment Court in respect of decisions made on the transport documents or plans. Similarly submissions on long-term and annual plans under the LGA do not give rise to any appeal rights. Conversely, persons should be aware that if the matter is also part of a regional policy statement or provision in a regional plan or district plan (works requirement or resource consent application), that the normal rights of appeal to the Environment Court could apply.

The justification for the different outcomes and for retaining the separate statutory procedures under the RMA and LTMA, are that the LTMA focuses primarily on the implementation of the State roading programme, regional roading plan, and local roads within a territorial authority area, and funding priorities. Challenges to the location of the highways and roads, will remain possible under the RMA, as primarily individual property rights could be affected, and persons could be vulnerable to loss of their properties for roading purposes or loss of amenity from roading projects and transport use.

At the national level, the independence of the NZTA (and former Transit New Zealand) has been instrumental in successfully implementing the Government roading programme.¹² The RMA is mainly an environmental management Act with acknowledgment of local government policy and property interests. The LTMA is essentially an Act to administer the funding of approved highway and local roading development.

¹² Government Roothing Powers Act 1989.

Upon an overview, it is appropriate that the regional public transport plan should be prepared under the LTMA, as it is an operational matter outside the detailed scope of any static district plan under the RMA. The provision of public transport services and subsidies, is premised upon delivering a public service at an affordable level. As the public transport service may be the subject of provisions in the GPS, and national land transport strategy, and regional land transport plan, it fits appropriately into the hierarchy and matrix of the LTMA.

2.5 A Common Decision-Making Process?

A question remains as to whether a common decision-making process should be applied to the RMA, LGA, and LTMA. Various comments have been received from the greater Wellington Regional Council, Local Government New Zealand and the Whanganui District Council in particular. The greater Wellington Regional Council points to the integration in preparing plans under the LTMA with the LGA procedures, which are said to work well. In both instances, the consultation procedures do not give rise to any rights of appeal, and may thereby be conducted at a rather less formal manner than under the RMA. As noted, the RMA procedures may involve directly a person's property rights, and allow for the opportunity of appeals.

LGNZ states that the LTMA operates on a scale that is larger than the scale relevant to preparation of local budgets. A statement is made that "attention should be given to the linkages and ensuring that the "have regard to" and "take account of" provisions are designed appropriately. These type of cross references or linkages are well provided for in the LTMA in respect of actions under the LGA and RMA.

At the present time, from a lay public perspective, making submissions on a long-term plan, annual plan, a proposed regional transport plan, and a submission under the RMA in respect of a plan, may have a similar element of public participation, and generally at the local authority level, the submissions are received within the scope of informal procedures. No cross-examination is allowed. Whether there is any duplication of process or repetition, is debateable.

Most submitters will be aware of the nature of the document they are making submissions upon, and the limitations of those submissions. For many submitters, there will be an advantage in keeping the procedures separate. The conclusion could be reached that attempting to blend the procedures could in fact increase the complexity and uncertainty, as the three statutes essentially have different purposes, time frames, and different outcomes.

2.6 Land Transport Plans in practice

Persons who have submitted on regional land transport plans, will be aware of the reality that proposals for roading and other transport services under the plan, will need to be funded either from the national land transport fund, council borrowing or by ratepayer contributions, and that the regional and district councils, will be required to act prudently in borrowing and increasing rates to achieve the proposed outcomes.¹³ Under the priorities, many submitters and the community will be aware, that desirable transport projects may often not proceed, due to a lack of funding.

¹³ Local Government Act 2002, ss 101 (prudent financial management), 101A (financial strategy), 101B (infrastructure strategy).

Likewise, under the LGA, the council has a broad mandate to provide for good local infrastructure, and local public services, through the long-term plan and annual plan, and is not subject to any appeals to the Environment Court which could limit or mitigate the ambitions of the local authority. Funding will be mitigating consideration.

By comparison, with submissions under the RMA it is open to the council to take a more visionary approach to desirable long term development, and make provision for zoning, infrastructure, roading and other works, which will in fact be dependent on public funding, private development initiative, or joint ventures (public-private partnerships). Where these funding options are not available, or are dependent upon economic viability, many of the projects may not proceed, especially in regions that are relatively static in development.

Under the National Policy Statement on Urban Development Capacity (NPS-UDC), the short term, medium term, and long term policies (to be implemented under RMA plans) must provide sufficient housing and business land development capacity serviced with “development infrastructure”. Development infrastructure is defined to include land transport as defined in the LTMA to the extent that it is controlled by local authorities. Land transport means transport on land, and the infrastructure (roads) facilitating that transport. The NPS provides a link between the urban capacity provision with the LTMA processes, and may influence the content of the regional land transport plan and any regional public transport plan.¹⁴

2.7 LTMA conclusions and recommendations

The LTMA provides for issue of the government policy statement, national land transport programme, regional land transport plan, regional public transport plan, and administration through NZTA of the national land transport fund. Due to the differing functions, instruments, and time frames of the LTMA, LGA, and RMA, subject to subsequent recommendations, further structural integration of the purposes and consultation procedures, is not seen to be necessary or necessarily productive of better efficiencies or outcomes.

In support of that conclusion, a comment could be made that the cross-references under the LTMA are adequate, but (as recommended below) the cross-references under the RMA or any new Planning act, could be improved.

Another conclusion is that the content of the LTMA, has suffered from the substantial amendments to that Act, and could benefit from a complete consolidation or revision, to provide for a more logical hierarchy of the functions. For example, the provision for the government policy statement should come at the beginning of the Act, and not follow towards the end of part 3. This piecemeal approach is the result of historic evolution of the legislation. The Act lacks a clarity of structure, and effective application is a challenge.

On any revision of the LTMA, the dated situation regarding provision and management of government roads, and roads vested in local authorities could be addressed and revised.¹⁵

¹⁴ National Policy Statement on Urban Development Capacity 2016 (NZ Government), PA 1, PB3, PC13.

¹⁵ Government Roothing Powers Act 1989 (renaming of amended Transit New Zealand Act 1989). Local Government Act 1974, part 21.

Under the National Policy Statement on Urban Development Capacity (NPS-UDC), the short term, medium term, and long term policies (to be implemented under RMA plans) must provide sufficient housing and business land development capacity serviced with “development infrastructure”. Development infrastructure is defined to include land transport as defined in the LTMA to the extent that it is controlled by local authorities.

3 Local Government Act 2002 processes and co-ordination

3.1 Local Government Act 1974 background

The Local Government Act 1974 part 20, formerly included detailed provisions relating to the approval of land subdivision, and this part was transferred into the RMA in 1991. The RMA provides specifically for a “subdivision consent” as a method of obtaining approval of a land subdivision. Large subdivisions will usually include roads or rights of way, as vehicle access to every new lot is normally required.¹⁶ The district plan under the RMA will include a part providing policies or rules in relation to approval of land subdivisions, with minimum standards for roading and road width. In addition the plan may provide for requirements and designations for state highways and for proposed local roads. Existing public roads have the status of a “designation”.¹⁷

The Local Government Act 1974, part 21, includes the powers held by territorial authorities to approve road layout, and the powers given to local authorities to construct and maintain roads. These powers, that also enable forward planning, were not transferred into the RMA 1991, and remain in force (subject to any RMA consents). Further, the powers were not included in the Local Government Act 2002. The reason for not including the roading powers in the LGA 2002 appeared to relate to policy decisions of the government (Labour), which essentially ran out of time to include a revision of part 20 in that major reform. Although it was expected that a further amendment would incorporate roading powers in the LGA 2002, this has not occurred to date. Provisions relating to bylaws to control the use of roads, have been relocated to the Land Transport Act 1998.¹⁸

Looking to the future, it would be appropriate for the remaining provisions in the Local Government Act 1974 concerning roading to be relocated in other relevant Acts, and the 1974 Act fully repealed. The choice could be to place the planning function for major roads under the LTMA as consequent to the regional land transport plan. Alternatively, the road planning function could be placed principally under the RMA, as directly related to the likely content in the regional policy statement (RPS) in respect of transport systems and roading. The RPS provision should be consistent with or influenced by the regional land transport plan (under the LTMA). The construction powers vested in territorial authorities could be appropriately relocated into the LGA in the provisions relating to council works.¹⁹

¹⁶ Resource Management Act 1991, ss 87, 106(1)(c). *Waitakere City Council v Estate Homes Ltd* [2006] NZSC 112, [2007] 2 NZLR 149 (SC determining arterial road bisecting subdivision a valid condition subject to financial adjustment).

¹⁷ At, part 8, ss 166-176.

¹⁸ Land Transport Act 1998, s 22AB (inserted 2009, 2011).

¹⁹ Local Government Act 2002, ss 189, 190 (power to acquire land). Public Works Act 1981 (acquisition procedures).

3.2 Local Government Act 2002

Under the Local Government Act 2002, s 10, the purpose of local government does not specifically refer to any roading function. However, under s 11A the “core services” do refer to the provision of network infrastructure and public transport services.²⁰ In the subsequent “development contributions” section, one justification for obtaining a development contribution is to fund network infrastructure, which includes specifically the provision of roads and other transport.²¹ A more recent addition (2014) to the functions of all local authorities is to include in the long-term plan under the mandatory financial management provisions, an “infrastructure strategy” for a period of at least 30 years. The definition of “infrastructure assets” includes provision of roads and footpaths.²²

The LGA includes comprehensive guidance in relation to governance principles, and decision-making. The council must consult with a community (and iwi) in respect of any significant decision, and provide for these decisions in the long-term plan or annual plan, and use the special consultative procedure for other significant decisions.²³

In respect of the long-term plan (and annual plan), the schedule setting out the information to be included, refers to five groups of activities. One group is “the provision of roads and footpaths”.²⁴ The annual plan must include a funding impact statement, which is a precondition to the making of rates for the district or region. If the source of funding for a group is a targeted rate, the impact statement must identify the activities and details of the rate. In respect of each group of activities, the annual report must identify the activities, and capital expenditure, including replacement of existing assets, and an audited funding impact statement. The provision for roading will be a major consideration for most local authorities, which historically have been the lead providers of roads in districts (other than State highways).²⁵ The power to provide for core services under the LGA 2002, the power to construct roads under the LGA 1974, and the opportunity to obtain funding for road construction and improvement under the LTMA, are central functions for local authorities.

The importance of timely provision of development infrastructure to support the provision of urban land capacity for housing and business is underscored in the National Policy Statement on Urban Development Capacity 2016. Development infrastructure includes water supply, wastewater, stormwater, and land transport as defined in the LTMA. The NPS-UDC requires local authorities in high growth (and probably medium growth) urban areas to produce a “future development strategy” to be informed by the relevant long-term plan, and the infrastructure strategy required under the LGA. The future development strategy can be incorporated into a non-statutory document not prepared under the RMA, including documents prepared under other legislation (eg LGA). The local authority has the choice of undertaking a consultation process that complies with either the LGA processes or sch 1 of the RMA.²⁶ The LGA processes have no rights of appeal, and the RMA processes have rights of appeal. Councils are

²⁰ Local Government Act 2002, ss 10, 11A (core services meaning inserted 2010). See **appendix 2**, below.

²¹ At, s 197(2).

²² At, s 101B (inserted 2014). See appendix 2, below.

²³ At, ss 82-95B. See appendix 2, below.

²⁴ At, schedule 10, part 1, clause 2.

²⁵ At sch 10.

²⁶ NPS-UDC 2016, PC12-PC14.

likely to choose the LGA processes and location. The future development strategy could be integrated into the “infrastructure strategy” under the LGA.

Although the LGA 2002 does not have specific cross references to the LTMA, in practice this situation should not be a concern. The requirement of the “infrastructure strategy” for a 30 year period (and future development strategy under the NPS-UDC), together with an awareness through consultation on the regional land transport plan, the contribution of core services including network infrastructure and public transport, should focus the regional, district or unitary council on transport needs and plans. The key ability to achieve roading development could involve participation in the preparation of the regional land transport plan, and qualification for funding subsidies administered by NZTA.

3.3 LGA recommendations

Looking to the future, it would be appropriate for the remaining provisions in the Local Government Act 1974 concerning roading to be relocated in other relevant Acts, and the 1974 Act fully repealed. The choice could be to place the planning function for major roads under the LTMA as consequent to the regional land transport plan. Alternatively, the road planning function could be placed principally under the RMA, as directly related to the likely content in the regional policy statement (RPS) in respect of transport systems and roading. The RPS provision should be consistent with or influenced by the regional land transport plan (under the LTMA). The construction powers vested in territorial authorities could be appropriately relocated into the LGA 2002 in the provisions relating to council works

The addition of specific cross references in the LGA 2002 (long-term plan and annual plan collation) to documents issued under the LTMA, where likely to be relevant, is recommended to assist councillors, officers and other persons who may not be familiar with the present complex integration of purpose and procedures. As stated the converse references in the LTMA to the LGA appear to be adequate (subject to the need to consolidate the LTMA).

The importance of timely provision of development infrastructure to support the provision of urban land capacity for housing and business is underscored in the National Policy Statement on Urban Development Capacity 2016. Development infrastructure includes water supply, wastewater, stormwater, and land transport as defined in the LTMA. The NPS-UDC requires local authorities in high growth (and probably medium growth) urban areas to produce a “future development strategy” to be informed by the relevant long-term plan, and the infrastructure strategy required under the LGA. The future development strategy can be incorporated into a non-statutory document not prepared under the RMA, including documents prepared under other legislation (eg LGA). The local authority has the choice of undertaking a consultation process that complies with either the LGA processes or sch 1 of the RMA.²⁷

4 RMA or Planning Act processes and co-ordination

In any reform of the RMA or a new planning Act, better provision should be made to have cross-references to take into account or have regard to land transport documents under the LTMA.

²⁷ National Policy Statement on Urban Development Capacity 2016, , PA1, PB3, PC12-PC14.

4.1 RMA background

The RMA 1991, as originally enacted, included a second schedule which set out firstly matters to be provided for in regional policy statements and regional plans. The list referred mainly to the regulation of water and soil conservation, and the occupation and use of the coastal marine area, being functions newly imposed upon regional councils. Planning for roads and public transport was not included in the list, (but was a function provided for regional councils under earlier legislation).²⁸

Regarding matters related to districts, the second schedule contained a separate list of provisions to be covered in the district plan. The list referred to subdivision of land, and the scale, timing and priority of proposed public works, including public utility networks, and land to be used for a public work for which the territorial authority had responsibility.²⁹ Again, planning for roads and public transportation was not specifically identified. The second schedule was repealed in 2003, presumably upon the reasoning that it was restrictive to the scope of planning and resource management. At the same time certain of the more significant matters for regional councils were reenacted under s 30 which sets out the functions of those councils.

4.2 RMA recognition of roading and transport

The purpose of the RMA s 5, is a broad brush purpose, and makes no reference to any roading or transport function. The matters of national importance under s 6 are essentially negative in protecting landscape and cultural features, and make no reference to roading, land transport, public transport (or urban development capacity). The other matters under s 7, make no reference to land transport (or urban development). The reference in s 7(b) to “the efficient use and development of natural and physical resources”, covers structures, but does not appear to cover transportation explicitly.³⁰

In any revision of the matters of national importance or other relevant matters, it would be desirable to have a specific reference or cross reference to relevant land transport documents as a matter “to have particular regard to”, or “to be taken into account”.

The functions of *regional councils* in s 30 include the strategic integration of infrastructure with land use. The definition of infrastructure includes “structures for transport on land by cycleways, rail, roads, walkways or other means”.³¹ To that extent the regional council will be alerted to the need to provide in the regional policy statement and to the extent relevant in the regional plan, matters dealing with roads and transport infrastructure. By implication, the regional council through its involvement in approving the “regional land transport plan” under the LTMA, should be aware of the complementary statutory duty to engage in the regional land transport plan exercise, and the latter plan could inform the transport part of the RPS. Also the regional council, where it administers funding support, will prepare a regional public transport plan.

²⁸ Local Government Act 1974, ss 363-369 (regional road declaration powers) (repealed). National Roads Act 1953 (funding); Transit New Zealand Act 1989.

²⁹ Resource Management Act 1991, second schedule, part II (repealed 2003).

³⁰ Resource Management Act 1991, ss 5, 6, 7. See **Appendix 3**, below.

³¹ Resource Management Act 1991, s 2 (definition), 30(1)(gb). See appendix 3, below.

Regarding functions at the district plan level, *territorial authorities* have a function to control actual and potential effects from the transportation of hazardous substances, and are required in the preparation of a district plan to have regard to any “management plans and strategies prepared under other Acts”.³² In practice, officers and advisers should be aware of the regional land transport plan and regional public transport plan prepared under the LTMA. The absence of any specific reference to the LTMA is unlikely to give rise to any oversight. However, to avoid doubt, the addition of a specific reference to transport documents under the LTMA would be desirable.

In processing an application for a resource consent, especially in relation to a large subdivision or development of land, the policies and rules in the district plan relating to subdivisions are likely to prescribe road access requirements, conditions as to road width and parking, and a consent can be refused where adequate road access is not provided. Conditions on a resource consent can require the construction and sealing of roads, and installation of utility services including drainage, streetlights and vehicle crossings. Consents can be refused if road or path access is not provided.³³

Regarding the call-in powers, likely to be exercised through the Environmental Protection Authority, major road developments such as State highways can be referred directly to a Board of Inquiry or the Environment Court for a final determination. This efficient process has been used in recent years to approve a number of government highway projects.³⁴

Complementing the district plan provisions for roads and transport, and the ability to seek a resource consent for road works, the “requirement procedure” may be utilised by a local authority or infrastructure provider. The application can be tailored for the specific needs to designate public and private land for the development. If the requirement is confirmed, the provider may have the ability to acquire land compulsorily in the event of the owner not wishing to sell the property by agreement. This procedure applies at the territorial authority level, and is reasonably efficient in enabling the completion of roading projects. The procedure may complement the objectives of the LTMA and the GPS under that Act.³⁵

Under the National Policy Statement on Urban Development Capacity (NPS-UDC), the short term, medium term, and long term policies (to be implemented under RMA plans) must provide sufficient housing and business land development capacity serviced with “development infrastructure”. Development infrastructure is defined to include land transport as defined in the LTMA to the extent that it is controlled by local authorities. Land transport means transport on land, and the infrastructure (roads) facilitating that transport. The NPS-UDC provides a useful link and cross reference between the urban capacity obligations with the LTMA processes, and may influence the content of the land transport part of the regional policy statement, and the district plan regarding land transport. Local authorities are required to “work with providers of development infrastructure, and other infrastructure, in preparing a future development strategy”.³⁶ The NPS attempts to co-ordinate functions under the RMA, LGA,

³² At ss 31(1)(b)(ii), 74(2)(b)(i). The reference to hazardous substances could relate to related functions under the Hazardous Substances and New Organisms Act 1996.

³³ At ss 104, 106, 108, 218-246. See extracts, appendix 3, below.

³⁴ At part 6AA, 140-150AA. Examples include the Waterview extension; the Puhoi – Warkworth bypass highway, Auckland; Transmission Gully motorway, Wellington.

³⁵ Resource Management Act 1991, part 8, ss 166-186.

³⁶ National Policy Statement on Urban Development Capacity 2016, PA1, PC12-PC14, PD1-PD4.

and LTMA to the extent relevant to the NPS obligations, and provides a lead for the wider use of co-ordination of objectives and processes under the respective instruments.

In summary, except as recently provided under the NPS-UDC, the RMA does not specifically identify land transport or public transport as a relevant matter. By implication these activities and developments will be taken into account in preparing any national policy statement, regional policy statement, regional plan, and more particularly any district plan. The matters of land transport may be important to any resource consent application for a land subdivision consent, or other development that gives rise to transport issues and matters of noise and pollution from motor vehicles.

In any revision of the RMA, or a new planning Act, specific cross-references to documents under the LTMA such as the national land transport programme and the regional land transport plan, where relevant, could be an advantage to ensure that these documents are taken into account and not overlooked. This cross-referencing could promote better coordination of functions and planning for the future.

4.3 RMA recommendations

The NPS-UDC provides a useful link and cross reference between the urban capacity obligations with the LTMA processes, and may influence the content of the land transport part of the regional policy statement, and the district plan regarding land transport. Local authorities are required to “work with providers of development infrastructure, and other infrastructure, in preparing a future development strategy”. The NPS attempts to co-ordinate functions under the RMA, LGA, and LTMA to the extent relevant to the NPS obligations, and provides a lead for the wider use of co-ordination of objectives and processes under the respective statutes.

More generally, the significance of land transport in urban and rural areas is such that specific reference to transport considerations should be included in the purposes of the RMA [or Planning Act]. Additional cross-references should be added in respect of the preparation of the regional policy statement, any regional plan, the district plan, any resource consent application, and any requirement for a public work or utility provision. The cross references would be to documents issued under the LTMA or any replacement of that Act.

To repeat, the references in the RMA to taking into account or have regard to LTMA documents should be included at points relating to:

1. The purpose and principles of the RMA [or Planning Act]
2. Preparation of any national policy statement
3. Preparation of the regional policy statement and regional plan
4. Preparation of the district plan
5. Consideration of any call-in application
6. Consideration of a resource consent application
7. Consideration of any works requirement and designation.

5 Earthquakes and other emergencies

5.1 Legislative response overview

Regarding coordination of the LTMA, LGA, and RMA, it is timely to consider the legislative provisions made for a response to any major earthquakes or other emergencies giving rise to damage to property, roads and transport infrastructure and services generally. Under the LTMA, there is no specific provision for the government policy statement, national land transport programme, national land transport fund, regional land transport plan, to respond to an emergency.³⁷ The LGA provides a defence to liability for offences under the Act or bylaws, that the action was necessary to protect life or health or prevent serious damage to property or avoid damage to the environment and was reasonable in the circumstances. The LGA does not otherwise specifically endorse actions to respond to emergencies.³⁸

Under the RMA, where any person carries out an activity in breach of the Act, or relevant plan, the person may raise a defence to a prosecution that the action or event was due to a natural disaster which could not reasonably have been foreseen or provided for, and the effects of the action were adequately mitigated or remedied by the defendant.³⁹ To the same end, the RMA provides for a person having financial responsibility for a public work, a local authority or network utility operator, to carry out work where the adverse effect on the environment requires immediate preventive or remedial measures. These emergency works may be carried out without a resource consent, but the Council, NZTA, or utility provider must give notice within seven days to the consent authority that the activity has been undertaken, and must apply within 20 working days for a resource consent.⁴⁰ This limited entitlement or exemption does not apply to private owners or occupiers who are not acting on behalf of the local authority, NZTA or utility provider, so strictly self-help could be unlawful. This may be an unreasonable outcome in the circumstances and against the public interest.

In addition, action may be taken as authorised under the civil defence legislation in a declared emergency, or a notified transition period, and the person must advise the consent authority within seven days. Where the activity could contravene a provision under the RMA, an application for a resource consent must be made within 20 working days. The exemptions cease to apply after the declaration of emergency, or notified transition period, expires.⁴¹

The emergency provisions allowing for remedial works to be undertaken, subject to notice and retrospective resource consents, appear to be appropriate for one-off events such as a single earthquake or flooding event, but could be cumbersome and inappropriate for ongoing adverse environmental events which require a continuing response. With multiple earthquakes and after-shocks causing cumulative damage, the provisions may impose an administrative burden

³⁷ Land Transport Management Act 2003. References are made to the national energy and conservation strategy.

³⁸ Local Government Act 2002, s 240.

³⁹ Resource Management Act 1991, ss 18, 341(2).

⁴⁰ At s 330.

⁴¹ At s 330B (amended 2016). For civil defence emergency declarations and response powers given to emergency services and local authorities, see Civil Defence Emergency Management Act 2002. Kenneth Palmer, *Local Authorities Law in New Zealand* (Brookers, Wellington, 2012), ch 22.2, 1041-1048.

on the responsible authorities and private property occupiers. Recent challenges relating to the Christchurch earthquake response and the Hurunui Kaikoura earthquake recovery legislation, confirm that broader generic powers are desirable to enable the responsible Minister through government and the Order in Council procedure, to grant exemptions from the strict legislative obligations which do not encompass long-term adverse environmental events.⁴² The legal and management situation has been improved under amendments in late 2016 to provide for a declaration of emergency to be succeeded by a declaration of a national transition period or a local transition period. A “group recovery manager” will be appointed, and any defined recovery action may be lawfully taken. These actions include the co-ordination of planning, decisions, actions, and resources, regeneration of communities, government and entities working together, and building resilience.⁴³

5.2 Response recommendations

The RMA provides for a person having financial responsibility for a public work, a local authority or network utility operator, to carry out work where the adverse effect on the environment requires immediate preventive or remedial measures. A retrospective consent can be sought. This provision should be extended to remedial actions taken by all persons in responding to an adverse effect on the environment which requires immediate preventive or remedial measures.

A recommendation is made that a general earthquake and other adverse environmental events statute should be considered to provide for a further degree of flexibility (outside the powers available under a declared civil defence emergency, and any declared transition period) in the implementation, coordination and exemption as necessary, to allow for restoration of property, roads and other infrastructure in a timely and cost effective manner. The schedule to the Hurunui/Kaikoura Earthquakes Recovery Act sets out a list of 46 specific statutes under which an Order in Council may be made. Included in the list are the Resource Management Act, the Local Government Act, and the Land Transport Management Act. The other Acts in the schedule are also relevant for achieving an integrated and comprehensive response to serious emergency situations and major environmental events.

6 Brief summary and conclusions

The LTMA provides for funding of the national land transport programme, in accordance with directions under the government policy statement. The national land transport programme informs the content of the regional land transport plan, and the regional public transport plan. Other aspects include approval of toll roads, and the administration of the national land transport fund through the New Zealand Transport Agency. The LTMA includes adequate cross-references at all levels to any national policy statements, and regional land transport plans. It includes adequate provisions for public consultation, and for the coordination of the consultation with the procedures under the Local Government Act where appropriate. The coordination procedures are considered to be satisfactory. Overall, the only problem with the

⁴² Canterbury Earthquake Response and Recovery Act 2010; Canterbury Earthquake Recovery Act 2011; Greater Christchurch Regeneration Act 2016; Hurunui/Kaikoura Earthquakes Recovery Act 2016.

⁴³ Civil Defence Emergency Management Amendment Act 2016 (in force 15 November 2016).

LTMA is the need for it to be consolidated or revised to follow a logical structure according to functions, and to remove a multitude of references to repealed sections.

The Local Government Act 2002, empowers local authorities to provide for good quality local infrastructure and local public services. To this end the Act specifies certain core services for local authorities in performing their role, to have particular regard to. These services include the provision of network infrastructure and public transport services. The ability to deliver the services and infrastructure, will be qualified by the infrastructure strategy document, which is required to cover a 30 year financial term. In light of those considerations, the Council is required to prepare a long-term plan, and an annual plan. These documents will comprehend the need for roads and other infrastructure. A comprehensive public consultation process applies. Additional obligations apply to consultation with Maori. Overall the need for improved recognition of the roading and transport functions in the LGA is debatable, as the LGA documents will balance planning aspirations with financial reality and priorities. However in the interests of improving comprehension by councils and the public, specific cross-references could be included in the LGA in the long-term plan and annual plan content, and consultation guidelines.

In addition, the Local Government Act 1974 is an anachronism and should be repealed. The roading powers under that Act should be removed and reallocated to the LGA 2002, RMA and other statutes as appropriate. Various options are indicated to complete the reform envisaged under the LGA 2002.

The Resource Management Act 1991 has a broad brush purpose of sustainable management of natural and physical resources. Neither the purpose nor the matters of national importance and other matters in part 2 refer to roading or transport objectives.⁴⁴ By necessary implication, in providing for roads in the regional policy statement, to complement the existence of the regional transport plan, a degree of coordination between the RMA procedures and the LTMA documents will arise. Likewise, at the district plan level, territorial and unitary authorities will provide for road policies and rules, which are particularly relevant to land subdivision rules. The land subdivision approval is usually obtained under the resource consent process, and it is common for roads to be required to the satisfaction of the Council as part of a development or subdivision consent. Similar issues may also be relevant in any call-in procedure for major works, and may be the basis for a requirement from NZTA or a territorial authority, and will be determined in accordance with relevant procedures and relevant documents.

The National Policy Statement on Urban Development Capacity 2016 (NPS-UDC), should alert local authorities in any growth areas to provide for urban land development capacity, and in high and medium growth areas to prepare a “future development strategy” to provide for development infrastructure. The infrastructure includes land transport under the LTMA. The council may use the LGA consultative procedures, and include the future development strategy with other plan documents under the LGA. Except for these recent obligations, the express recognition of road and transport purposes under the RMA is marginal and lacks visibility. Recognition should be strengthened by more specific references in the purpose and principles, and in respect of plan preparation and resource consent assessment. Recommendations are made to add these specific references.

⁴⁴ Resource Management Act 1991, ss 5, 6, 7.

Regarding major earthquake and other environmental emergencies, and ancilliary coordination of relevant legislation, the opportunity for legislative reform should be taken to allow for better responses at central government and local government levels for events which require action and consents beyond the special administrative powers and pathways where a civil defence emergency or transition recovery period is declared.⁴⁵ Flexibility in application of law for promotion of community and economic well-being comes within the scope of sustainable management of natural and physical resources, and is consistent with the primary objectives of the RMA, LGA and LTMA.

⁴⁵ The Hurunui/Kaikoura Earthquakes Recovery Act 2016, provides a template for a general statute to manage emergency situations and major environmental events in the public interest. See also Civil Defence Emergency Management Amendment Act 2016 (transition recovery periods).

Appendix 1

Land Transport Management Act 2003

(Key obligations and cross references to the LGA and RMA (*italics added*))

3 Purpose

The purpose of this Act is to contribute to an effective, efficient, and safe land transport system in the public interest.

Government Policy Statement on land transport

66 Minister must issue GPS on land transport

- (1) The Minister must issue a GPS on land transport—
 - (a) before the start of the first financial year to which it applies; and
 - (b) that covers a period of *6 financial years*.
- (2) The Minister must issue a replacement GPS on land transport under subsection (1) before the current GPS on land transport expires.
- (3) If a GPS on land transport that is issued under subsection (1) is replaced, the GPS on land transport that is replaced expires on the date that it is replaced.

67 Preparation or review of GPS on land transport

- (1) When preparing or reviewing a GPS on land transport, the Minister must—
 - (a) be satisfied that the GPS on land transport contributes to the purpose of this Act; and
 - (b) take into account—
 - (i) any national energy efficiency and conservation strategy; and
 - (ii) *any relevant national policy statement that is in force under the Resource Management Act 1991*; and
 - (c) *have regard to the views of Local Government New Zealand and representative groups of land transport users and providers.*
- (2) For the purposes of subsection (1), the Minister must, at least once in every period of 3 financial years, review the Crown's land transport investment strategy required under section 68(1)(b).
- (3) To avoid doubt, nothing in subsection (2) limits section 90(1).
- (4) Before issuing a GPS on land transport, the Minister must consult the Agency about the proposed GPS on land transport

National land transport programme

19A Responsibility for preparing and adopting national land transport programme

- (1) Every 3 financial years, the Agency must prepare and adopt a national land transport programme for the following 3 financial years.

(2)

19B Core requirements for national land transport programme

The Agency must, in preparing a national land transport programme,—

- (a) ensure that the national land transport programme—
 - (i) contributes to the purpose of this Act; and
 - (ii) [Repealed]
 - (iii) gives effect to the GPS on land transport; and
- (b) take into account any—
 - (i) [Repealed]
 - (ii) [Repealed]
 - (iii) *regional land transport plans*; and
 - (iv) national energy efficiency and conservation strategy; and
 - (v) *relevant national policy statement and any relevant regional policy statements or plans that are for the time being in force under the Resource Management Act 1991*; and
 - (vi) [Repealed]

19C Content of national land transport programme

A national land transport programme must include the following matters:

- (f) activities and combinations of activities that the Agency anticipates being funded from the national land transport fund if they are—
 - (i) *included in a regional land transport plan*; or
 - (ii) activities or combinations of activities (other than those relating to State highways) for which the Agency is responsible for delivery or managing delivery; and
- (g) an indication of any nationally or regionally significant activities that are likely to be considered for funding in the 3 financial years that follow the 3 financial years covered by the national land transport programme....

20 Approval of activities and combinations of activities

- (1) The Agency may approve an activity or combination of activities as qualifying for payments from the national land transport fund.
- (2)
- (3) In approving a proposed activity or combination of activities, the Agency must—
 - (a) take into account—
 - (i) any national energy efficiency and conservation strategy; and
 - (ii) *any relevant national policy statements and relevant regional policy statements that are for the time being in force under the Resource Management Act 1991*; and
 - (b) act in accordance with its operating principles.

Regional land transport plans

13 Responsibility for preparing and approving regional land transport plans

- (1) Every 6 *financial years*, each regional council, in the case of every region except

Auckland, must—

- (a) ensure that the relevant regional transport committee prepares, on the regional council's behalf, a regional land transport plan; and
- (b) approve the regional land transport plan by a date appointed by the Agency.

(2) Every 6 financial years, *Auckland Transport*, in the case of Auckland, must—

- (a) prepare an Auckland regional land transport plan; and
- (b) approve the Auckland regional land transport plan by a date appointed by the Agency.

14 Core requirements of regional land transport plans

Before a regional transport committee submits a regional land transport plan to a regional council or Auckland Transport (as the case may be) for approval, the regional transport committee must—

- (a) be satisfied that the regional land transport plan—
 - (i) contributes to the purpose of this Act; and
 - (ii) is consistent with the GPS on land transport; and
- (b) have considered—
 - (i) alternative regional land transport objectives that would contribute to the purpose of this Act; and
 - (ii) the feasibility and affordability of those alternative objectives; and
- (c) *have taken into account any—*
 - (i) national energy efficiency and conservation strategy; and
 - (ii) *relevant national policy statements and any relevant regional policy statements or plans that are for the time being in force under the Resource Management Act 1991; and*
 - (iii) likely funding from any source.

16 Form and content of regional land transport plans

(1) A regional land transport plan must set out the region's land transport objectives, policies, and measures for at least 10 financial years from the start of the regional land transport plan.

(2) A regional land transport plan must include—

- (a) a statement of transport priorities for the region for the 10 financial years from the start of the regional land transport plan; and
- (b) a financial forecast of anticipated revenue and expenditure on activities for the 10 financial years from the start of the regional land transport plan; and
- (c) all regionally significant expenditure on land transport activities to be funded from sources other than the national land transport fund during the 6 financial years from the start of the regional land transport plan; and
- (d) an identification of those activities (if any) that have inter-regional significance.

(3)

(5) For the purpose of the inclusion of activities in a national land transport programme,—

- (a) *a regional land transport plan must be in the form and contain the detail that the Agency may prescribe in writing to regional transport committees;*
- and
- (b)

18 Consultation requirements

- (1) When preparing a regional land transport plan, a regional transport committee—
- (a) *must consult in accordance with the consultation principles specified in section 82 of the Local Government Act 2002; and*
 - (b) *may use the special consultative procedure specified in section 83 of the Local Government Act 2002.*
- (2) If consulting the Auckland Council, a regional land transport committee or Auckland Transport must consult both the governing body and each affected local board of the Council.

18A Combining consultation processes

- (1) [Repealed]
- (2) A regional transport committee complies with section 18(1) *if the required consultation on the regional land transport plan is carried out in conjunction with the relevant regional council's consultation on its long-term plan or its annual plan under the Local Government Act 2002.*
- (3) Auckland Transport complies with section 18(1) if the required consultation on the regional land transport plan is carried out in conjunction with the Auckland Council's consultation on its long-term plan or its annual plan under the Local Government Act 2002.
- (4) Auckland Transport is not required to consult any organisation or person if the Auckland Council has already consulted the organisation or person—
- (a) in the course of preparing the Council's current long-term plan or annual plan; and
 - (b) in accordance with the Local Government Act 2002.

18B Process for approving regional land transport plans prepared for regional councils

- (1) A regional transport committee that has prepared a regional land transport plan on behalf of a regional council must, after it has consulted under sections 18 and 18A, lodge the regional land transport plan with the regional council....

18CA Review of regional land transport plans

- (1) A regional transport committee must complete a review of the regional land transport plan during the 6-month period immediately before the expiry of the third year of the plan.
- (2) In carrying out the review, the regional transport committee must have regard to the views of representative groups of land transport users and providers.

18G Separate consultation with Māori on particular activities

- (1) An approved organisation, the Auckland Council, or the Agency (as the case may require) must do everything reasonably practicable to separately consult Māori affected by any activity proposed by the approved organisation, the Auckland Council, or the Agency that affects or is likely to affect—

- (a) Māori land; or
- (b) land subject to any Māori claims settlement Act; or
- (c) Māori historical, cultural, or spiritual interests.

18H Māori contribution to decision making

(1) The Agency and approved public organisations must, with respect to funding from the national land transport fund,—

- (a) establish and maintain processes to provide opportunities for Māori to contribute to the organisation's land transport decision-making processes; and
- (b) consider ways in which the organisation may foster the development of Māori capacity to contribute to the organisation's land transport decision-making processes; and
- (c) provide relevant information to Māori for the purposes of paragraphs (a) and (b).

(2) Subsection (1) does not limit the ability of the Agency or an approved public organisation to take similar action in respect of any other population group.

Regional public transport plan

117 Purpose of regional public transport plans

The purpose of a regional public transport plan is to provide—

- (a) *a means for encouraging regional councils and public transport operators to work together in developing public transport services and infrastructure; and*
- (b) *an instrument for engaging with the public in the region on the design and operation of the public transport network; and*
- (c) a statement of—
 - (i) the public transport services that are integral to the public transport network; and
 - (ii) the policies and procedures that apply to those services; and
 - (iii) the information and infrastructure that support those services.

119 Adoption of regional public transport plans

....

(4) A regional council (or a territorial authority to which the responsibility is transferred under the Local Government Act 2002) may not delegate the responsibility for adopting, varying, or renewing a regional public transport plan to a committee or other subordinate decision-making body, or a member or an officer of the council (or territorial authority, as the case may be), or any other person.

(5)

120 Contents of regional public transport plans

(1) A regional council, in a regional public transport plan,—

- (a) must—
 - (i) identify the public transport services that are integral to the public transport network that the regional council proposes to provide; and
 - (ii) provide an outline of the routes, frequency, and hours of operation

of the services identified under subparagraph (i); and
(iii)

....

(5) A regional public transport plan may—

(a) provide that an action described in the plan must or may be done by a regional council or a committee or other subordinate decision-making body or a member or officer of the regional council; and

(b) specify conditions that apply to that action.

(6) Subsection (5) does not limit or affect anything in the Local Government Act 2002.

124 Matters to take into account when adopting regional public transport plans

A regional council must, before adopting a regional public transport plan,—

(a) be satisfied that the plan—

(i) contributes to the purpose of this Act; and

(ii) has been *prepared in accordance with any relevant guidelines* that the Agency has issued; and

(iii) is, if it includes a matter that is not within the scope of the regional land transport plan, otherwise consistent with that plan; and

(b) be satisfied that it has applied the principles specified in section 115(1); and

(c) *take into account—*

(i) any national energy efficiency and conservation strategy; and

(ii) *any relevant regional policy statement, regional plan, district plan, or proposed regional plan or district plan under the Resource Management Act 1991; and*

(iii) the public transport funding likely to be available within the region; and

(iv) the need to obtain the best value for money, having regard to the desirability of encouraging a competitive and efficient market for public transport services; and

(v) *the views of public transport operators in the region; and*

(d) *consider the needs of persons who are transport-disadvantaged.*

Section 124: inserted, on 13 June 2013, by section 70 of the Land Transport Management Amendment Act 2013 (2013 No 35).

Reprinted 18 October 2016

Appendix 2

Local Government Act 2002 (selected extracts)

S 5 Interpretation

Local infrastructure - not defined

Local public services – not defined

“Network infrastructure has the meaning set out in section 197(2)”

Role of local authorities and related matters

10 Purpose of local government

(1) The purpose of local government is—

(a) to enable democratic local decision-making and action by, and on behalf of, communities; and

(b) to meet the current and future needs of communities for good-quality local infrastructure, local public services, and performance of regulatory functions in a way that is most cost-effective for households and businesses.

(2) In this Act, good-quality, in relation to local infrastructure, local public services, and performance of regulatory functions, means infrastructure, services, and performance that are—

(a) efficient; and

(b) effective; and

(c) appropriate to present and anticipated future circumstances.

11 Role of local authority

The role of a local authority is to—

(a) give effect, in relation to its district or region, to the purpose of local government stated in section 10; and

(b) perform the duties, and exercise the rights, conferred on it by or under this Act and any other enactment.

11A Core services to be considered in performing role

In performing its role, a local authority must have particular regard to the contribution that the following core services make to its communities:

(a) *network infrastructure*;

(b) *public transport services*;

(c) solid waste collection and disposal;

(d) the avoidance or mitigation of natural hazards;

(e) libraries, museums, reserves, and other recreational facilities and community amenities.

12 Status and powers

- (1) A local authority is a body corporate with perpetual succession.
 - (2) For the purposes of performing its role, a local authority has—
 - (a) full capacity to carry on or undertake any activity or business, do any act, or enter into any transaction; and
 - (b) for the purposes of paragraph (a), full rights, powers, and privileges.
 - (3) Subsection (2) is subject to this Act, any other enactment, and the general law.
-

13 Performance of functions under other enactments

Sections 10 and 12(2) apply to a local authority performing a function under another enactment to the extent that the application of those provisions is not inconsistent with the other enactment.

39 Governance principles

A local authority must act in accordance with the following principles in relation to its governance:

- (a) a local authority should ensure that the role of democratic governance of the community, and the expected conduct of elected members, is clear and understood by elected members and the community; and
- (b) a local authority should ensure that the governance structures and processes are effective, open, and transparent; and
- (c)

Decision-making

76 Decision-making

- (1) Every decision made by a local authority must be made in accordance with such of the provisions of sections 77, 78, 80, 81, and 82 as are applicable.
 - (2) Subsection (1) is subject, in relation to compliance with sections 77 and 78, to the judgments made by the local authority under section 79.
-

77 Requirements in relation to decisions

- (1) A local authority must, in the course of the decision-making process,—
 - (a) seek to identify all reasonably practicable options for the achievement of the objective of a decision; and
 - (b) assess the options in terms of their advantages and disadvantages.
-

78 Community views in relation to decisions

- (1) A local authority must, in the course of its decision-making process in relation to a matter, give consideration to the views and preferences of persons likely to be affected by, or to have an interest in, the matter.
-

79 Compliance with procedures in relation to decisions

- (1) It is the responsibility of a local authority to make, in its discretion, judgments—

(a) about how to achieve compliance with sections 77 and 78 that is largely in proportion to the significance of the matters affected by the decision as determined in accordance with the policy under section 76AA;

....

81 Contributions to decision-making processes by Māori

(1) A local authority must—

(a) establish and maintain processes to provide opportunities for Māori to contribute to the decision-making processes of the local authority;

....

Consultation

82 Principles of consultation

(1) Consultation that a local authority undertakes in relation to any decision or other matter must be undertaken, subject to subsections (3) to (5), in accordance with the following principles:

(a) that persons who will or may be affected by, or have an interest in, the decision or matter should be provided by the local authority with reasonable access to relevant information in a manner and format that is appropriate to the preferences and needs of those persons:

(b) that persons who will or may be affected by, or have an interest in, the decision or matter should be encouraged by the local authority to present their views to the local authority:

83 Special consultative procedure

(1) Where this Act or any other enactment requires a local authority to use or adopt the special consultative procedure, that local authority must—

(a) prepare and adopt—

(i) a statement of proposal; and

(ii) if the local authority considers on reasonable grounds that it is necessary to enable public understanding of the proposal, a summary of the information contained in the statement of proposal (which summary must comply with section 83AA); and

....

LGA Planning

93 Long-term plan

(1) A local authority must, at all times, have a long-term plan under this section.

(2) A local authority must use the special consultative procedure in adopting a long-term plan.

(3) A long-term plan must be adopted before the commencement of the first year to which it relates, and continues in force until the close of the third consecutive year to which it relates.

(4) A local authority may amend a long-term plan at any time....

93B Purpose of consultation document for long-term plan

The purpose of the consultation document is to provide an effective basis for public participation in local authority decision-making processes relating to the content of a long-term plan by—

- (a) providing a fair representation of the matters that are proposed for inclusion in the long-term plan, and presenting these in a way that—
 - (i) explains the overall objectives of the proposals, and how rates, debt, and levels of service might be affected; and
 - (ii) can be readily understood by interested or affected people; and
- (b) identifying and explaining to the people of the district or region, significant and other important issues and choices facing the local authority and district or region, and the consequences of those choices; and
- (c) informing discussions between the local authority and its communities about the matters in paragraphs (a) and (b).

95 Annual plan

- (1) A local authority must prepare and adopt an annual plan for each financial year.
- (2) Subject to subsection (2A), a local authority must consult in a manner that gives effect to the requirements of section 82 before adopting an annual plan under this section.
- (2A) Subsection (2) does not apply if the proposed annual plan does not include significant or material differences from the content of the long-term plan for the financial year to which the proposed annual plan relates.
- (3) An annual plan must be adopted before the commencement of the year to which it relates.
- (4) ...
- (5) The purpose of an annual plan is to—
 - (a) contain the proposed annual budget and funding impact statement for the year to which the annual plan relates; and
 - (b) identify any variation from the financial statements and funding impact statement included in the local authority's long-term plan in respect of the year; and
 - (c) *provide integrated decision making and co-ordination of the resources of the local authority; and*
 - (d) contribute to the accountability of the local authority to the community.

95B Combined or concurrent consultation on long-term plan and annual plan

If a local authority carries out consultation in relation to an amendment to a long-term plan at the same time as, or combined with, consultation on an annual plan,—

- (a) the content of consultation documents required under any of sections 93D, 93E, and 95A, as the case may be, for each consultation process must be combined into 1 consultation document; and
- (b) the special consultative procedure must be used in relation to both matters.

Financial management

101B Infrastructure strategy

- (1) A local authority must, as part of its long-term plan, prepare and adopt an infrastructure strategy for a period of at least 30 consecutive financial years.

- (2) The purpose of the infrastructure strategy is to—
- (a) identify significant infrastructure issues for the local authority over the period covered by the strategy; and
 - (b) identify the principal options for managing those issues and the implications of those options.
- (3) The infrastructure strategy must outline how the local authority intends to manage its infrastructure assets, taking into account the need to—
- (a) renew or replace existing assets; and
 - (b) respond to growth or decline in the demand for services reliant on those assets; and
 - (c) allow for planned increases or decreases in levels of service provided through those assets; and
 - (d) maintain or improve public health and environmental outcomes or mitigate adverse effects on them; and
 - (e) provide for the resilience of infrastructure assets by identifying and managing risks relating to natural hazards and by making appropriate financial provision for those risks.
- (4)

- (6) In this section, *infrastructure assets* includes—
- (a) existing or proposed assets to be used to provide services by or on behalf of the local authority in relation to the following groups of activities:
 - (i) water supply;
 - (ii) sewerage and the treatment and disposal of sewage;
 - (iii) stormwater drainage;
 - (iv) flood protection and control works;
 - (v) the *provision of roads and footpaths*; and
 - (b) any other assets that the local authority, in its discretion, wishes to include in the strategy.

Section 101B: inserted, on 8 August 2014

197 Interpretation [development contributions]

- (2) In this Act, unless the context otherwise requires,—
- network infrastructure** means the provision of roads and other transport, water, wastewater, and stormwater collection and management.

Appendix 3

Resource Management Act 1991 (selected extracts)

2 Interpretation

- (1) In this Act, unless the context otherwise requires,—

infrastructure, in section 30, means—

....

- (g) structures for transport on land by cycleways, rail, roads, walkways, or any other means:

natural and physical resources includes land, water, air, soil, minerals, and energy, all forms of plants and animals (whether native to New Zealand or introduced), and all structures

structure means any building, equipment, device, or other facility made by people and which is fixed to land; and includes any raft

private road has the same meaning as in section 315 of the Local Government Act 1974

road has the same meaning as in section 315 of the Local Government Act 1974; and includes a motorway as defined in section 2(1) of the Government Roading Powers Act 1989

State highway has the same meaning as in section 2(1) of the Government Roading Powers Act 1989

5 Purpose

(1) The purpose of this Act is to promote the sustainable management of natural and physical resources.

(2) In this Act, sustainable management means managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural well-being and for their health and safety while—

(a) sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations;

and

(b) safeguarding the life-supporting capacity of air, water, soil, and ecosystems;

and

(c) avoiding, remedying, or mitigating any adverse effects of activities on the environment.

6 Matters of national importance [no specific reference to roads or transport]

In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall recognise and provide for the following matters of national importance:

(a) the preservation of the natural character of the coastal environment (including the coastal marine area), wetlands, and lakes and rivers and their margins, and the protection of them from inappropriate subdivision, use, and development:

(b) the protection of outstanding natural features and landscapes from inappropriate subdivision, use, and development:

(c) the protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna:

(d) the maintenance and enhancement of public access to and along the coastal marine area, lakes, and rivers:

(e) the relationship of Maori and their culture and traditions with their ancestral

lands, water, sites, waahi tapu, and other taonga:

(f) the protection of historic heritage from inappropriate subdivision, use, and development:

(g) the protection of protected customary rights.

7 Other matters [no specific reference to roads or transport]

In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall have particular regard to—

(a) kaitiakitanga:

(aa) the ethic of stewardship:

(b) the efficient use and development of natural and physical resources:

(ba) the efficiency of the end use of energy:

(c) the maintenance and enhancement of amenity values:

(d) intrinsic values of ecosystems:

(e) [Repealed]

(f) maintenance and enhancement of the quality of the environment:

(g) any finite characteristics of natural and physical resources:

(h) the protection of the habitat of trout and salmon:

(i) the effects of climate change:

(j) the benefits to be derived from the use and development of renewable energy.

24 Functions of Minister for the Environment

The Minister for the Environment shall have the following functions under this Act:

(a) the recommendation of the issue of *national policy statements* under section 52:

(b) the recommendation of the making of *national environmental standards*:

(c) to decide whether to intervene in a matter, or to make a direction for a matter that is or is part of a proposal of national significance, under Part 6AA:

(d)

30 Functions of regional councils under this Act

(1) Every regional council shall have the following functions for the purpose of giving effect to this Act in its region:

(a) the establishment, implementation, and review of objectives, policies, and methods to achieve integrated management of the natural and physical resources of the region:

(b) the preparation of objectives and policies in relation to any actual or potential effects of the use, development, or protection of land which are of regional significance:

....

(gb) the strategic integration of *infrastructure* with land use through objectives, policies, and methods:

31 Functions of territorial authorities under this Act

(1) Every territorial authority shall have the following functions for the purpose of giving effect to this Act in its district:

(a) the establishment, implementation, and review of objectives, policies, and methods to achieve integrated management of the effects of the use, development, or protection of land and associated natural and physical resources of the district:

....

43 Regulations prescribing national environmental standards

(1) The Governor-General may, by Order in Council, make regulations, to be known as national environmental standards, that prescribe any or all of the following technical standards, methods, or requirements:

(a) standards for the matters referred to in section 9, section 11, section 12, section 13, section 14, or section 15, including, but not limited to—

(i) contaminants:

(ii) water quality, level, or flow:

(iii) air quality:

(iv) soil quality in relation to the discharge of contaminants:

(b) standards for noise:

(c) standards, methods, or requirements for monitoring....

45 Purpose of national policy statements (other than New Zealand coastal policy statements)

(1) The purpose of national policy statements is to state objectives and policies for matters of national significance that are relevant to achieving the purpose of this Act.

(2) In determining whether it is desirable to prepare a national policy statement, the Minister may have regard to—

(a) the actual or potential effects of the use, development, or protection of natural and physical resources:

(b) New Zealand's interests and obligations in maintaining or enhancing aspects of the national or global environment:

(c) anything which affects or potentially affects any structure, feature, place, or area of national significance:

(d) anything which affects or potentially affects more than 1 region:

(e) anything concerning the actual or potential effects of the introduction or use of new technology or a process which may affect the environment:

(f) anything which, because of its scale or the nature or degree of change to a community or to natural and physical resources, may have an impact on, or is of significance to, New Zealand:

(g) anything which, because of its uniqueness, or the irreversibility or potential magnitude or risk of its actual or potential effects, is of significance to the environment of New Zealand:

(h) anything which is significant in terms of section 8 (Treaty of Waitangi):

(i) the need to identify practices (including the measures referred to in section 24(h), relating to economic instruments) to implement the purpose of this Act:

(j) any other matter related to the purpose of a national policy statement.

59 Purpose of regional policy statements

The purpose of a regional policy statement is to achieve the purpose of the Act by providing an overview of the resource management issues of the region and policies and methods to achieve integrated management of the natural and physical resources of the whole region.

63 Purpose of regional plans

(1) The purpose of the preparation, implementation, and administration of regional plans is to assist a regional council to carry out any of its functions in order to achieve the purpose of this Act.

(2)

65 Preparation and change of other regional plans

(1) A regional council may prepare a regional plan for the whole or part of its region for any function specified in section 30(1)(c), (ca), (e), (f), (fa), (fb), (g), or (ga).

(1A) A regional council given a direction under section 25A(1) must—

(a) prepare a regional plan that implements the direction; or

(b) prepare a change to its regional plan in a way that implements the direction; or

(c) prepare a variation to its regional plan in a way that implements the direction.

(2) A plan must be prepared in accordance with Schedule 1.

...

66 Matters to be considered by regional council (plans)

(1) A regional council must prepare and change any regional plan in accordance with—

(a) its functions under section 30; and

(b) the provisions of Part 2; and

(c) a direction given under section 25A(1); and

(d) its obligation (if any) to prepare an evaluation report in accordance with section 32; and

(e) its obligation to have particular regard to an evaluation report prepared in accordance with section 32; and

(f) any regulations.

(2) In addition to the requirements of section 67(3) and (4), when preparing or changing any regional plan, *the regional council shall have regard to—*

(a) any proposed regional policy statement in respect of the region; and

(b) the Crown's interests in the coastal marine area; and

(c) any—

(i) *management plans and strategies prepared under other Acts*; and

...,

67 Contents of regional plans

....

(3) A regional plan must give effect to—

(a) any *national policy statement*; and

- (b) any New Zealand coastal policy statement; and
 - (c) any regional policy statement.
 - (4) A regional plan must not be inconsistent with—
 - (a) a water conservation order; or
 - (b) *any other regional plan for the region*; or
-

72 Purpose of district plans

The purpose of the preparation, implementation, and administration of district plans is to assist territorial authorities to carry out their functions in order to achieve the purpose of this Act.

74 Matters to be considered by territorial authority

-
- (2) In addition to the requirements of section 75(3) and (4), when preparing or changing a district plan, a territorial authority shall have regard to—
 - (a) any—
 - (i) proposed regional policy statement; or
 - (ii) proposed regional plan of its region in regard to any matter of regional significance or for which the regional council has primary responsibility under Part 4; and
 - (b) any—
 - (i) *management plans and strategies prepared under other Acts*; and
-

Application for resource consent

88 Making an application

- (1) A person may apply to the relevant consent authority for a resource consent.
 - (2) An application must—
 - (a) be made in the prescribed form and manner; and
 - (b) include the information relating to the activity, including an assessment of the activity's effects on the environment, as required by Schedule 4.
-

104 Consideration of applications

- (1) When considering an application for a resource consent and any submissions received, the consent authority must, subject to Part 2, have regard to—
 - (a) any actual and potential effects on the environment of allowing the activity; and
 - (b) any relevant provisions of—
 - (i) a national environmental standard;
 - (ii) other regulations;
 - (iii) a national policy statement;
 - (iv) a New Zealand coastal policy statement;
 - (v) a regional policy statement or proposed regional policy statement;
 - (vi) a plan or proposed plan; and
 - (c) any other matter the consent authority considers relevant and reasonably necessary to determine the application.
- (2) When forming an opinion for the purposes of subsection (1)(a), a consent authority

may disregard an adverse effect of the activity on the environment if a national environmental standard or the plan permits an activity with that effect. (2A) When considering an application affected by section 124 or 165ZH(1)(c), the consent authority must have regard to the value of the investment of the existing consent holder.

....

106 Consent authority may refuse subdivision consent in certain circumstances

(1) A consent authority may refuse to grant a subdivision consent, or may grant a subdivision consent subject to conditions, if it considers that—

- (a) the land in respect of which a consent is sought, or any structure on the land, is or is likely to be subject to material damage by erosion, falling debris, subsidence, slippage, or inundation from any source; or
- (b) any subsequent use that is likely to be made of the land is likely to accelerate, worsen, or result in material damage to the land, other land, or structure by erosion, falling debris, subsidence, slippage, or inundation from any source; or
- (c) *sufficient provision has not been made for legal and physical access to each allotment to be created by the subdivision.*

....

108 Conditions of resource consents

(1) Except as expressly provided in this section and subject to any regulations, a resource consent may be granted on any condition that the consent authority considers appropriate, including any condition of a kind referred to in subsection (2).

(2) A resource consent may include any 1 or more of the following conditions:

- (a) subject to subsection (10), a condition requiring that a financial contribution be made:
- (b) a condition requiring provision of a bond (and describing the terms of that bond) in accordance with section 108A:
- (c) a condition requiring that *services or works*, including (but without limitation) the protection, planting, or replanting of any tree or other vegetation or the protection, restoration, or enhancement of any natural or physical resource, be provided:

.....

Call-in power

142 Minister may call in matter that is or is part of proposal of national significance

(1) This section applies if a matter has been lodged with a local authority and—

- (a) the Minister, at his or her own initiative, decides to apply this section; or
- (b) the Minister receives a request from an applicant or a local authority to make a direction for the matter under subsection (2).

(2) If the Minister considers that a matter is or is part of a proposal of national significance, the Minister may call in the matter by making a direction to—

- (a) refer the matter to a board of inquiry for decision; or
- (b) refer the matter to the Environment Court for decision.

(3) In deciding whether a matter is, or is part of, a proposal of national significance, the Minister may have regard to—

(a) any relevant factor, including whether the matter—

(i) has aroused widespread public concern or interest regarding its actual or likely effect on the environment (including the global environment);

or

(ii) involves or is likely to involve significant use of natural and physical resources; or

(iii) affects or is likely to affect a structure, feature, place, or area of national significance; or

(iv) affects or is likely to affect or is relevant to New Zealand's international obligations to the global environment; or

(v) results or is likely to result in or contribute to significant or irreversible changes to the environment (including the global environment);

or

(vi) involves or is likely to involve technology, processes, or methods that are new to New Zealand and that may affect its environment;

or

(vii) is or is likely to be significant in terms of section 8; or

(viii) will assist the Crown in fulfilling its public health, welfare, security, or safety obligations or functions; or

(ix) affects or is likely to affect more than 1 region or district; or

(x) *relates to a network utility operation that extends or is proposed to extend to more than 1 district or region; and*

(b) any advice provided by the EPA.

Designations

[The requirement and designation procedure does not apply to regional plans, due to historical reasons]

166 Meaning of designation, network utility operator, and requiring authority

In this Act—

designation means a provision made in a district plan to give effect to a requirement made by a requiring authority under section 168 or section 168A or clause 4 of Schedule 1

network utility operator means a person who—

(a)

(f) constructs, operates, or proposes to construct or operate, a road or railway line; or

....

171. Recommendation by territorial authority

....

(1) When considering a requirement and any submissions received, a territorial authority must, subject to Part 2, consider the effects on the environment of allowing the requirement, having particular regard to—

(a) any relevant provisions of—

(i) a national policy statement:

(ii) a New Zealand coastal policy statement:

(iii) a regional policy statement or proposed regional policy statement:

(iv) a plan or proposed plan; and

(b) whether adequate consideration has been given to alternative sites, routes, or methods of undertaking the work if—

(i) the requiring authority does not have an interest in the land sufficient for undertaking the work; or

(ii) it is likely that the work will have a significant adverse effect on the environment; and

(c) *whether the work and designation are reasonably necessary for achieving the objectives of the requiring authority for which the designation is sought*; and

(d) any other matter the territorial authority considers reasonably necessary in order to make a recommendation on the requirement.

(2) The territorial authority may recommend to the requiring authority that it—

(a) confirm the requirement:

(b) modify the requirement:

(c) impose conditions:

(d) withdraw the requirement.

(3) The territorial authority must give reasons for its recommendation under subsection

(2).

176 Effect of designation

(1) If a designation is included in a district plan, then—

(a) section 9(3) does not apply to a public work or project or work undertaken by a requiring authority under the designation; and

....

223 Approval of survey plan by territorial authority

(1) An owner of any land may submit to a territorial authority for its approval, a survey plan in respect of that land if—

(a) a subdivision consent has been obtained for the subdivision to which the survey plan relates, and that consent has not lapsed; or

(b) a certificate of compliance has been obtained, and that certificate has not lapsed.

....

(5) A certificate under subsection (3) is conclusive evidence that *all roads*, private roads, reserves, land vested in the authority in lieu of reserves, and private ways shown on the survey plan have been authorised and accepted by the territorial authority under this Act and under the Local Government Act 1974.

(6)

New Zealand Productivity Commission

Appeals from Independent Hearings Panel to the Environment Court

[Dealing with out of scope proposals]

Dr Kenneth Palmer

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Summary

1. One or more permanent Independent Hearings Panels could be established to consider and review new plans, plan variations and private plan changes across the country.
2. Depending on actual and foreseeable workload, one or more permanent panels in the North and South Islands could be required to deal efficiently with submissions made in respect of proposed plans.
3. Any appeal from the recommendations of the Hearings Panel, as accepted by the local authority, should be limited to an appeal on a question of law.

4. Models for the constitution and powers of the independent hearings panel, could be the Canterbury or Christchurch panel procedures which are binding on the local authorities, or the Auckland Combined Plan panel which allowed for the council to make a final decision on recommendations by the panel. The present choice of model appears to be that of the Auckland procedure. This outcome is consistent with a major purpose and role of a local authority to enable democratic local decision-making (LGA, s 10).
5. Support for a permanent Independent Hearings Panel model can be found in relation to marine consents administered by the EPA; the call-in procedures before Boards of Inquiry for major developments; a policy view expressed by Government in 2013 that the Environment Court should not be fully involved in policy-making for local authorities; and proposals in the Resource Legislation Amendment Bill 2015 under the collaborative planning process, which will limit the jurisdiction of the Environment Court.
6. In relation to appeals on questions of law, the jurisdiction should be given in the first instance to the Environment Court which has long experience and expertise in determining questions of law (as well as matters of merit), and questions of law have been at the heart of the declaration procedure in the Environment Court.
7. A “question of law” includes a degree of flexibility extending to whether conclusions reached or proposals made by a Panel or local authority have a basis of reason and rationality, and to that extent an appeal right limited to a question of law provides an adequate safeguard for private property rights, and the public interest.
8. The right of appeal on a question of law to the Environment Court, should provide for any further appeal from that decision to be determined by the High Court. Under the principles applicable to the hierarchy of courts, there is no provision or need for the High Court to be supplemented by an Environment Court Judge or Commissioner. The independence and separation of the levels of the respective Courts should be maintained.
9. Regarding the permanent Independent Hearings Panel recommendation, the prevailing practice of local authorities appointing planning committees (which comprise or include elected members) to prepare plans should continue. However those planning committees should no longer have the function or jurisdiction of hearing submissions made on regional policy, regional and district plans, and recommending outcomes. Fair procedures and natural justice principles require this separation of function.
10. For the future, as an alternative (if recommended) to the mandatory use of a permanent Independent Hearings Panel or Panels, local authorities should be required to appoint truly independent hearings panels, which should include at least one person with legal qualifications, another with experience in tikanga Maori, one or other persons with significant planning or community experience. The hearings panel should not include any elected council member, local or community board member, any local authority officer, or any consultant to the local authority.

11. The obligation on a local authority to appoint an Independent Hearings Panel (or Independent Hearings Commissioners) should apply also to all notified resource consent application hearings.
12. The decisions or recommendations of Independent Hearings Panels on plans should be conclusive on matters of merit where approved by the local authority, and in that situation, no right of appeal on the merits should apply to the Environment Court. The only right of appeal should be on a question of law to the Environment Court. The separate ability to bring judicial review proceedings against a council decision in the High Court would remain.
13. Where the recommendations of a permanent Independent Hearings Panel (or, if provided for, an Independent Hearings Panel appointed by a local authority) on plan content are not accepted by the local authority or requiring authority, a right of appeal on the merits of an alternative solution (or “out of scope” matter), or on a question of law, should remain available to the Environment Court.
14. The above recommendations on appeals would apply to regional policy, regional and district plan content, and private plan changes, and would not be applied to notified applications for resource consents. The present system of allowing appeals in respect of resource consent applications (and requirements for public works and any heritage orders) on the merits to the Environment Court would remain. This would include appeals from a final decision of an Independent Hearings Panel or Independent Commissioners on a resource consent application and conditions.
15. If the Environment Court is to retain a role of hearing appeals on the merits in relation to plan content, the original broad discretion under RMA s 293 (prior to substitution in 2005) to progress “out of scope” proposals by giving further notice and receiving new submissions should be restored to the Court.
16. To deal with “out of scope” or “beyond scope” matters at the local authority level, the present option of the council to resolve to prepare and publish a formal variation allowing further submissions, should be supplemented by a new discretion for the hearings panel, in appropriate situations, to direct the council to give public or limited notice of the out of scope proposals, and to proceed to hear any new submissions on those proposals. That discretion, similar in intent to an expanded discretion envisaged for the Environment Court under s 293, would promote greater efficiency and flexibility in the finalisation of plans.

1 Introduction

In the draft report, of the New Zealand Productivity Commission, “Better Urban Planning” (August 2016) at R7.7 (p 189), a recommendation is made:

A permanent Independent Hearings Panel should be established to consider and review new Plans, Plan variations and private Plan changes across the country. As with the Auckland and Christchurch IHPs:

- the councils should retain the rights to accept or reject recommendations from the permanent Independent Hearings Panel; and

- once a council accepts a recommendation from the permanent Independent Hearings Panel, appeal rights should be limited to points of law.

A question has arisen as to whether the appeals on points of law should be heard by the Environment Court or alternatively by the High Court. Further if the High Court remained the jurisdiction for appeals on questions of law, could or should it avail itself of the expertise of the Environment Court.

This paper can be viewed as a supplement to sections 1 and 2 of Deliverable 3 by the author, which considered the respective roles of the Environment Court and the High Court.

2 General RMA provision

Under the Resource Management Act 1991 as presently enacted, subject to special procedures which have been applied in the Auckland and Canterbury regions, preparation of regional policy statements, regional plans and district plans, are all subject to a common submission process, and the respective councils may appoint hearing committees or hearing panels to consider the submissions.¹ These committees or panels of commissioners will determine matters on the merits, and subject to final decisions of the councils, the decisions will be made on the matters in contention.² In all instances, rights of appeal are given to submitters, and local authorities, and applicants (for private plan changes). Regarding resource consents, applicants and submitters have rights of appeal. The Environment Court has full jurisdiction in plan appeals to consider the merits afresh, and may substitute its own views on the policy matters in plans, and rules where properly in contention.³

In addition to these rights of appeal to the Environment Court, which may include questions of law, parties have consequential rights of appeal on questions of law to the High Court, and with leave, to the Court of Appeal and Supreme Court.⁴

Further, where any right of appeal to the Environment Court is not available, a person affected may seek judicial review of a council decision or practice by application to the High Court. Judicial review will normally be limited to compliance with procedural matters and questions of law.⁵

3 Special procedures applied to Auckland and Christchurch

Regarding the preparation of the first Auckland unitary or combined plan for the region, under the control of Auckland Council, being a unitary authority, the Local Government (Auckland Transitional Provisions) Act 2010 constituted a special Hearings Panel to consider the submissions on the proposed plan, and limited the conventional rights of appeal. The right of appeal to the Environment Court applies firstly where the council has rejected a

¹ RMA, Sch 1

² RMA, ss 34, 34A.

³ RMA, s 120 (resource consent appeals), 290 (powers to consider merits on appeal), sch1, cl 14 (appeals on plan matters). Where the appeal concerns a matter included in a national policy statement, under s 290AA, the Environment Court “may consider only the question of law raised”.

⁴ RMA, ss 299, 308.

⁵ RMA, s 296.

recommendation of the Panel and decided upon an alternative solution which may affect the person in particular. Secondly where the panel has made an “out of scope” decision, persons who claim to be affected may appeal to the Environment Court.⁶ Otherwise the only right of appeal is on a question of law to the High Court, which could be available to any submitter or person who can show they have been affected in a manner different from the public generally. Judicial review in the High Court is also available.⁷ This procedure has excluded a significant number of appeals on the merits to the Environment Court, which would normally have applied. The limited number of appeals presently before the Environment Court and High Court indicates that the procedure has been effective in curtailing the appeals and ensuring acceptance of decisions made by the hearings panel and endorsed by Auckland Council. Several appeals have related to significant errors or oversights in the decisions, allowing for correction of the outcomes.

It may be observed that the Auckland Hearings Panel as constituted included a chair who was appointed an Environment Court Judge. On that basis, it would be seen to be a duplication of process for general rights of appeal to the Environment Court to apply on the merits, as a comparable body of specialist constitution would have assessed the issues and come to appropriate conclusions.

In the Canterbury region and Christchurch urban area, special procedures have been applied in two separate situations. Firstly in relation to the temporary replacement of Environment Canterbury by commissioners, the relevant legislation provided for processing of the Canterbury water management strategy to be undertaken by a panel of the commissioners. The decision of the panel on the merits was stated to be conclusive, and the jurisdiction of the Environment Court to hear appeals was excluded. A right of appeal by submitters remained on questions of law to the High Court.⁸ This procedure has been confirmed and modified under the Environment Canterbury (Transitional Governance Arrangements) Act 2016.

Secondly in relation to major damage from the Canterbury earthquakes, special procedures for preparing a recovery strategy and recovery plans, for approval by the Minister under the former Canterbury Earthquake Recovery Act 2011, have prevailed over RMA plans and consent processes.⁹ Under the Greater Christchurch Regeneration Act 2016, special procedures are applied to approval of regeneration plans by the Minister, which prevail over RMA documents.¹⁰

With reference to the Christchurch replacement district plan, regulations under the legislation have provided for appointment by the Minister of a special independent hearings panel, of which the chairperson should be a current or former Environment Judge or retired High Court Judge, together with three other members with particular qualifications.¹¹ Persons are allowed

⁶ Local Government (Auckland Transitional Provisions) Act 2010, part 4, s 155, 157, 158. A matter may be “out of scope” if beyond the purpose of the RMA or beyond the scope of remedies sought under a submission. See the **Addendum** below on the “out of scope” issue.

⁷ At ss 158, 159.

⁸ Environment Canterbury (Temporary Commissioners and Improved Water Management) Act 2010.

⁹ Canterbury Earthquake Recovery Act 2011.

¹⁰ Greater Christchurch Regeneration Act 2016, ss 60-63.

¹¹ Canterbury Earthquake (Christchurch Replacement District Plan) Order 2014, cl 8. A retired High Court Judge Hon Sir John Hansen, is appointed the first chairperson.

to make submissions to the hearings panel in relation to matters in the proposed district plan. Where proposals beyond scope arise, the Panel must direct a new proposal and invite further public submissions.¹² The panel decisions are binding and conclusive and must be implemented by the Christchurch City Council, subject to a right of appeal to the High Court on questions of law.¹³

In these instances in Canterbury, the jurisdiction of the Environment Court has been wholly excluded. The rationale for this exclusion is that the hearings panel or panels as constituted have the equivalent capacity and status effectively of the Environment Court, and any right of appeal to the Environment Court on the merits would be a duplication of process and not in the public interest.

4 Marine consents in exclusive economic zone

Regarding appeal structures in the area of marine environmental management, brief reference can be made to the planning structure under the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012. Under this legislation, the Environmental Protection Authority (EPA) determines through regulations whether a proposed mining or mineral exploration activity, marine discharge or marine dumping, in the exclusive economic zone and continental shelf areas will be a permitted activity, or a discretionary activity which requires a marine consent. In determining the nature and scope of the permitted and discretionary activities, there is no involvement of the Environment Court. Any applications for marine consents are made to the EPA, which may delegate the hearing and decision making function to an appointed hearings panel.¹⁴ The panel may be chaired by a retired Environment Judge, but that is not a statutory requirement. No rights of appeal on the merits or on questions of law are available to the Environment Court, which has no jurisdiction in respect of marine consent applications, but the Court does have a role in enforcement. The Act provides for any applicant or submitter to appeal to the High Court on a question of law. No appeals are available on the merits, except to the extent of raised in a question of law.¹⁵

5 RMA Reform proposals

In a discussion document “Improving our Resource Management System” (MfE February 2013) the Government expressed a view that the role of the Environment Court in respect of the preparation and approval of regional and district plans should be limited to appeals on questions of law, and the Court should not be involved in policy making which was essentially a matter for the elected council representatives. Although that proposal was not carried forward into the Resource Management Summary of Reform Proposals (MfE August 2013) a legitimate question has remained as to whether the Environment Court should have a more restricted role in plan preparation and not have jurisdiction to consider afresh the full merits of submissions made in relation to policy and plan rules.

The halfway house approach adopted in the Auckland and Christchurch legislation, to ensure that the hearings panel is of a competency similar to that of the Environment Court, provides a

¹² At cl 13. See the **Addendum** below on the “out of scope” issue.

¹³ At cl 19.

¹⁴ Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012, ss 88-100.

¹⁵ At ss 105-113.

ready justification for excluding the present general jurisdiction of the Environment Court to hear appeals on the merits of the policies and plan provisions. An assumption is made that this sound reasoning is behind the proposal in the Draft report of the New Zealand Productivity Commission to exclude appeals where a council accepts a recommendation from the permanent Independent Hearings Panel (IHP), and to allow appeals only on a question of law. If the IHP could make final decisions on the plan matters, as in the Christchurch situation, without any override by the council, then the rights of appeal should also be restricted to questions of law.

6 Resource Legislation Amendment Bill 2015

The Resource Legislation Amendment Bill 2015 proposes two new procedures for preparing plans. Under the proposed “collaborative planning process”, a review panel will consider proposals from the council, and recommend a final plan. The review panel (3-8 members) appointed by the council must include a majority of members “who are not elected members of an appointer”. Merit appeals by way of rehearing to the Environment Court may be made by a group only in relation to a decision of the council which is inconsistent with the decision and recommendations of the review panel. Appeals are not available on the merits in respect of decisions which are consistent with the recommendations.¹⁶ However, the collaborative group, an iwi authority, or any person who made a submission, will have a right of appeal against any decision of the council to the Environment Court on a question of law only.¹⁷ Subject to one exception, this proposal is the first occasion in which the Environment Court will have jurisdiction limited to questions of law alone.¹⁸ It would appear that subsequent appeals from a decision of the Environment Court on a question of law, would be available to the High Court under the normal procedures in the RMA.¹⁹

Secondly under the “streamlined planning process”, which requires approval by the Minister for application of the process, the proposed Part 5 of Schedule 1, sets out the revised procedural directions. The minister has the right after review to approve the planning instrument. No rights of appeal under the RMA to the Environment Court or the High Court will apply against a decision of the responsible minister, a local authority or any other person under the streamlined procedure.²⁰ However nothing in this exclusion will affect a person’s right to apply to the High Court in accordance with the law for judicial review in relation to a decision or action of the minister, local authority or other person.²¹ Accordingly the streamlined planning process will remove entirely the role of the Environment Court in the procedure, with the minister effectively being the consent authority, subject to the ordinary rights of judicial review to the High Court remaining.

7 What is a Question of Law?

¹⁶ Resource Legislation Amendment Bill 2015, cl 52, inserting s 80A; sch1, cls 59 (appeals by way of rehearing), 63 (panel membership).

¹⁷ At sch 1; cl 60.

¹⁸ RMA, s 290AA states that on an appeal against a provision in a plan which relates to implementation of a National Policy Statement, the Environment Court “may consider only the question of law raised”.

¹⁹ RMA, s 299.

²⁰ Resource Legislation Amendment Bill 2015, cl 52, inserting ss 80B, 80C; sch 1, cls 74-93.

²¹ At sch 1, cl 93.

On the assumption that appeal rights to the Environment Court on plan matters should be limited to questions of law, it is important to understand the scope of a question of law, and to determine the degree to which it differs from a question on the merits of the proposal. This distinction has come up in many cases before the High Court where appellants have from time to time endeavoured to raise matters of merit and policy under the guise of a question of law. The High Court and Court of Appeal have consistently confirmed the parameters of a question of law.

A recent example arises in *Thumb Point Station v Auckland Council* (2015), relating to an appeal to the High Court regarding a determination of rules setting minimum lot sizes in rural areas on Waiheke Island.²² This decision of the Environment Court on the merits, was the subject of an appeal on a question of law. The High Court Judge stated the position to be as follows:²³

(a) An appeal to this Court under s 299 of the [RMA] is an appeal limited to questions of law, and appellate intervention is therefore only justified if the Environment Court can be shown to have:

- i) applied a wrong legal test; or
- ii) come to a conclusion without evidence or one to which on the evidence it could not reasonably have come; or
- iii) taken into account matters which it should not have taken into account; or
- iv) failed to take into account matters which it should have taken into account.

(b) The Court will not engage in a re-examination of the merits of the case under the guise of a question of law, and the question of the weight to be given relevant considerations is for the Environment Court alone and is not for reconsideration by the High Court as a point of law.

(c) Further, not only must there have been an error of law, the error must have been a ‘material’ error, in the sense that it materially affected the result of the Environment Court’s decision.

(d) The High Court acknowledges the expertise of the Environment Court, and will be slow to determine what are really planning questions, involving the application of planning principles to the circumstances of the case.

As will be observed, a question of law may encompass a Council committee, hearings panel [or Environment Court], applying a wrong legal test; coming to a conclusion without relevant evidence or one to which on the evidence it could not reasonably have come; or have taken into account matters which should not have been taken into account, or the panel failed to take into account matters which it should have taken into account. The error must be material in affecting the outcome.

²² *Thumb Point Station Ltd v Auckland Council* [2015] NZHC 1035, [2016] NZRMA 55 (Andrews J). The appeal did not succeed.

²³ At [25].

The second ground (a)(ii), that the hearings panel (or Court) came to a conclusion without evidence or one to which on the evidence it could not reasonably have come, provides scope to challenge decisions made which appear to be decisions on the merits. This challenge is possible if it can be shown that the decision had no appropriate backing on fact or evidence, or was beyond the scope of the planning law. For example a rule in a district plan could require all persons to paint their houses a particular shade of green. That type of decision could be seen as unreasonable or irrational and not one which could be supported on any proper assessment of relevant evidence. Accordingly, in practice, the limitation of appeals on questions of law is not a significant problem in endeavouring to determine whether an appropriate policy or rule has been reached.

Where the matter, however, is clearly one of discretion or policy or evaluation of environmental effects, the matter may be seen as a question of merit and not a question of law. For example in *Arrigato Investments v Auckland Regional Council*, a question of law was taken to the High Court as to whether the Environment Court could have reasonably concluded that a proposed large lot subdivision along a cliff face above Pakiri Beach did not involve development of an outstanding natural landscape, and that it should be approved. In the High Court the Judge concluded that the Environment Court must have misunderstood the nature of an outstanding natural landscape and the application of rules in the plans to support protection, and had made a material error of law. On further appeal, the Court of Appeal overruled the High Court judge, finding that the matter was one of a reasonable decision on the merits made by the Environment Court, that the landscape was not outstanding and did not need protection, and the question was not one of law.²⁴ The subdivision approval (with planting conditions) remained effective as a reasonable evaluation and outcome. In many other cases on questions of law, the High Court has been able to determine the true questions of law, and may reject appeals which raise only the merits of a decision or policy.

8 Jurisdiction of the Environment Court on Questions of Law

Presently, the Environment Court has civil jurisdiction under the RMA to hear matters relating to declarations, enforcement orders, and compliance with abatement notices. These applications or appeals are heard by an Environment Court judge sitting alone or by the Environment Court with Commissioners.²⁵

The jurisdiction to make a declaration extends to many matters which raise questions of law, namely those relating to duties under the Act, interpretation of provisions in regional policy statements, regional plans, and district plans as to their legality, and whether actions taken by any person may constitute a breach of the Act and broadly any other issue or matter relating to the interpretation, administration, and enforcement of the RMA.²⁶ Accordingly, the declaration jurisdiction will mainly focus upon questions of law, but may have in addition certain factual findings as part of the determination of the question of law. In practice, the Environment Court judges will have had considerable experience in making determinations on merits appeals, including those parts of the determination that raise matters of law. More probably under the declaration procedure, the issues are likely to be questions of law. Further in relation to enforcement, questions of legality will usually require finding a factual situation and the

²⁴ *Arrigato Investments Ltd v Auckland Regional Council* [2002] 1 NZLR 323; [2001] NZRMA 481.

²⁵ RMA, s 309.

²⁶ RMA, s 310.

application of the legal position, and closely approximate a determination on a question of law as to outcome.

Relating back to the hierarchy or structure of appeal rights, it should be noted that under the direct call-in procedure before a Board of Inquiry which may relate to a plan change or works requirement, the Board will issue a draft, then final, determination, that is not subject to appeal on the merits to the Environment Court. The only appeal is to the High Court on a question of law.²⁷ The rationale is that the chair of the board of inquiry could be an Environment Court judge or person of equivalent status, and it would be a duplication of process to allow an appeal on the merits to the Environment Court.

9 Arguments for or against appeals on Questions of Law being heard by the Environment Court or High Court

In the situations where the hearings panel has the equivalent status of the Environment Court, the issue may be raised whether or not that any appeal on a question of law should be to the Environment Court or the High Court.

On this issue, it may be noted in relation to the proposed Auckland Unitary Plan, that an application for a declaration was made during the hearing proceedings to the Environment Court on questions of law relating to the validity of proposed rules prescribing “Framework Plans” for developments, including proposed rules providing for an approval of the Framework plan to alter the status of subsequent resource consents. In *Re Auckland Council* (2016), the Environment Court was constituted as a full Court of three Environment Judges to consider this declaration, and gave a decision on the legality of the proposed rules.²⁸ The decision was instructive for the Hearings Panel, which was later able to make an informed decision on the merits and legality of the rules. The combined wisdom of the three Environment Judges with substantial legal experience, would have equalled that of a Judge of the High Court.

The case illustrates a point that if a difficult question of law was taken to the Environment Court, it would have the flexibility to constitute a bench of more than one Judge if desirable, and give the hearing any necessary urgency. It may be further observed that the ability to seek a declaration in the Environment Court remains an option during any procedure, so the exclusion of the Environment Court from hearing applications for declarations, if desired, would need to be specifically stated in legislation, as in the Christchurch provisions.²⁹

Having regard to the submission of the Resource Management Law Association (DR115, paras 68ff), it is noted that the RMLA has expressed a view that if any appeal from the IHP is to the High Court, the Environment Court will be bypassed and its workload reduced, and this could put additional pressure on the High Court. The RMLA states the proposal could significantly risk under-utilising the experience and capabilities of the Environment Court Judges who are arguably more qualified and capable on adjudicating on complex resource management and planning matters than other, less specialised Judges of the High Court could be. The RMLA

²⁷ RMA, s 149V. The High Court decision cannot be further appealed to the Court of Appeal, but may with leave be appealed to the Supreme Court. This procedure is intended to limit delays in implementation of any major development approved.

²⁸ *Re Auckland Council* [2016] NZEnvC 56, [2016] NZRMA 319.

²⁹ RMA, ss 310-313.

recommends that the Environment Court, being a specialist Court, is best placed to hear points of law appeals on planning instruments in the first instance.

The RMLA adds that “the Environment Court also plays a significant and important role in society generally; acting as a ‘check and balance’ on public decision-making in the context of land and resource use and planning. This important role should continue to be recognised, along with the potential to further expand and make the best, most efficient use of the Court.”

From personal observations of the role played by the Environment Court since its constitution in 1996, it must be acknowledged that the Court has in-depth hands on experience of the content of district and regional plans and policies, and cannot be faulted on any basis of lack of expertise. Secondly, the Court will have a close knowledge of the consequences of policies and rules, and evolving practices, as they translate into permitted activities or form the basis of resource consent applications, and enforcement orders. It is assumed that appeals from resource consent applications will not be limited in relation to appeals on the merits to the Environment Court.

In considering the appeals to the High Court on questions of law, many of the judgments confirm that by and large the High Court judges who hear the appeals are extremely capable and give compelling erudite decisions, even though they will not specialise on a day to day basis on environmental and planning matters. That stated, a view has been raised from time to time, that the High Court could benefit from a degree of specialisation. It is understood the judicial policy coming from the respective Chief Justices over the years is that specialisation is not a formal aspect of the allocation of cases among the High Court Judges, and a sharing of experiences in different areas of the law should be the norm. However, there does appear to be an informal practice of allocating many of the appeals from the Environment Court to High Court Judges who have an acknowledged background and experience in resource management matters. This is certainly an advantage from the point of view of counsel who can have confidence in addressing the High Court and are not obliged to explain the matters in greater detail than would be required before an Environment Court Judge.

As a conclusion, it is the view of the writer, that appeals on questions of law from decisions of the Independent Hearings Panel or Panels, could confidently be given to the Environment Court, as part of its existing jurisdiction. The Environment Court Judges have the ability to assess whether an appeal is within the scope and bounds of a question of law, and could be expected and relied upon to distinguish between appeals which are endeavouring to raise matters of merit that have no basis as a question of law. That outcome would ensure that the current provision of unrestricted appeals on the merits of decisions of local authorities through independent hearings panels, are appropriately reassessed. This conclusion endorses the special procedures for plan preparation in Christchurch and Auckland which mainly exclude merits appeals to the Environment Court, but allow a right of appeal on questions of law.

One qualification could be in respect of decisions on requirements made by the Crown, local authorities and utility providers, which have the final say on a recommendation from the council or hearings panel, and may affect private property rights through subsequent compulsory acquisition. In these instances, fuller rights of appeal on the merits to the

Environment Court could remain, in parallel with the cumulative right of referral to the Environment Court under the Public Works Act.³⁰

10 Questions of Law reserved to the High Court

On an assumption, that appeals on questions of law might not be allocated to the Environment Court, and the Environment Court could be wholly excluded from appeals on merit and questions of law in relation to decisions of councils or the Independent Hearing Panel, a residual question is whether the High Court could or should avail itself of the expertise of the Environment Court.

Under the present Court structures, it is difficult to see how the constitution of the High Court with a single High Court Judge or possibly two or three High Court judges sitting as a full court in major cases, could be supplemented in any way by the expertise of the Environment Court. There is no provision for an Environment Court Judge to sit on the High Court during this type of appeal. A distinction could be made in relation to full appeals from the Land Valuation Tribunal (chaired by a District Court Judge) to the High Court. On this type of appeal, the High Court will sit with one or two assessors as part of the constitution of the Court, with the assessor usually being a registered land valuer or possibly a retired District Court Judge.³¹

The present convention of informing the High Court of the expertise of the Environment Court, is through the practice of making submissions to the High Court. Legal submissions include where appropriate, arguments based on decisions and extracts of the Environment Court decisions in comparable matters, and the High Court has the benefit of the reasoning and precedents set by these lower court decisions. Under the normal Court hierarchy, the High Court has the ability to approve, disapprove or distinguish an Environment Court decision, and that is part of the conventional processes of legal method, judicial precedent and decision-making.

It is not recommended that an Environment Court Judge should sit with a High Court Judge on any appeal on a question of law to the High Court, as that could be seen to compromise the independence of the judicial hierarchy and administration of the respective Courts.

11 Appeals from the Environment Court on questions of law to the High Court

On an assumption that the right of appeal from the Independent Hearings Panel (or council) is limited to questions of law to be heard by the Environment Court, a further issue is whether that decision of the Environment Court should be the subject of a further appeal to the High Court or in the alternative directly to the Court of Appeal.

A comparison can be made with the situation under the Employment Relations Act 2000. Under this Act, decisions of the first tier Employment Relations Authority may be the subject of a merits appeal to the Employment Court. It may be noted that the Employment Court has exclusive jurisdiction to hear and determine questions of law referred to it by an Employment

³⁰ Public Works Act 1981, s 24 (Environment Court may determine whether acquisition “fair, sound, and reasonably necessary for achieving the objectives” of the public body or utility provider). In Christchurch District Plan procedure, the Hearings Panel made the final decisions on works requirements binding the providers.

³¹ Land Valuation Proceedings Act 1948, ss 3, 13 (quorum of Judge and one member).

Relations Authority, and also has exclusive jurisdiction in relation to an application for judicial review (in place of the High Court).³² Decisions of the Employment Court are not subject to further appeal to the High Court, but are able to be appealed on questions of law directly to the Court of Appeal.³³ The reason for this hierarchy, is historical in that in earlier times, Judges of the now Employment Court were regarded as equivalent in status to Judges of the High Court.

That arcane relationship could be regarded as an anomaly today, but if the hierarchy was revised to determine that Environment Judges had the same status as Employment Court judges, a view could be put forward that any appeal from the Environment Court on a question of law, should go directly to the Court of Appeal. If that procedure was adopted, the downside would be that the experience of the High Court Judge would be side-lined, and the Court of Appeal would not have the added benefit of a High Court decision on the question.

Having regard to the history of the Courts' structure, there is no compelling reason why a decision of the Environment Court on a question of law should not to be subject to further appeal to the High Court. Presently the High Court has a discretion, on application, to remit an appeal directly to the Court of Appeal in special circumstances. Any appeals from the High Court to the Court of Appeal are on leave, and appeals to the Supreme Court are also on leave.

12 Independent Hearings Panel model

The proposal in the Draft Report "Better Urban Planning", raises several questions as to the capacity of an individual independent hearings panel to assess and consider submissions in respect of plan matters.³⁴ As noted, separate independent hearings panels have been appointed in respect of the Canterbury water allocation plan and the Canterbury regional plan, and preparation of a replacement Christchurch City district plan. The provisions in relation to the district plan allow for "beyond scope" proposals, but these proposals must be the subject of further public notice and submissions. The decisions of the independent hearings panels are not subject to review or rejection by the local authorities, and are subject only to appeals on questions of law to the High Court.

The independent hearings panel appointed to consider submissions on the proposed Auckland Unitary Plan or Combined Plan, also enable the panel to make "out of scope" recommendations, but unlike the Christchurch procedure, the Panel has no powers to make final decisions binding on Auckland Council. A practical restraint on Auckland Council in determining the final outcome of the unitary plan has been the provision for beyond scope decisions, where identified, to be appealed to the Environment Court. Other appeals have been limited to questions of law to be determined by the High Court or by way of judicial review.³⁵

In finalising the recommendation as to the establishment of any Hearings Panel, the recommendation in the Draft Report appears to follow the Auckland Council model as to appeal rights, and may allow appeals on merits to the Environment Court in respect of rejected recommendations and possibly beyond scope determinations by the Panel and Council.

³² Employment Relations Act 2000, ss 187, 194.

³³ At s 214.

³⁴ New Zealand Productivity Commission, Draft Report "Better Urban Planning", R7.7 (p 189).

³⁵ Local Government (Auckland Transitional Provisions) Act 2010, part 4, ss 155-159.

It may be observed that in the Auckland Unitary Plan appeals to the High Court, the question as to whether a decision is “out of scope” can be problematic, and a source of delays and uncertainty. The writer’s opinion is that the Christchurch replacement district plan order provides a preferable model in that beyond scope proposals should be the subject of further public notice and submissions, and that area of adequate notice and public participation is suitably addressed.

A separate issue is whether recommendations or decisions of the Hearings Panel should be final and should not be subject to any review or rejection by the local authority, and must be implemented as the decision of the local authority. As noted, under the Christchurch District Plan model, the Panel which makes the final decisions, and has powers to correct any errors in the decisions and in the district plan.³⁶

To clarify the last point, it is recommended in accordance with the Auckland model, that the permanent Independent Hearings Panel (or, if provided for, an Independent Hearings Panel appointed by a local authority) would make recommendations to the local authority (or requiring body), and only where not accepted that a right of appeal on the merits of an alternative solution, to the Environment Court should be available. In all situations, a right of appeal on a question of law to the same Court would be available. Allowing the local authority, or a committee under lawful delegation, to make the final decisions on policy and plan content, is consistent with the purposes and principles of local government “to enable democratic local decision-making and action by, and on behalf of, communities”.³⁷

In supporting the establishment of an Independent Hearings Panel, it is assumed that one or more panels may be established, according to the likely workload to be faced by the panel or panels. Practically at least one panel could be constituted for the Auckland and Northland regions, a second panel for other parts of the North Island, and a third panel for the South Island local authorities. The panel could include a chairperson or member with a legal qualification, a person conversant with tikanga Maori, and another person with planning or engineering experience or equivalent qualifications. The ability to appoint a person with experience relating to the local community, as specified in Christchurch, may not be necessary if the panel has jurisdiction over a number of local authority regions and districts.

13 Other Independent Hearings Panels appointed by local authorities

In proposing a permanent Independent Hearings Panel, or alternative panels, a question could be raised as to whether use of the Panel will be mandatory for all local authorities, or whether local authorities should have a discretion to establish their own independent hearing panels. In considering the history of planning administration, and procedures under the RMA in particular, it is of relevance that most local authorities have established planning or environmental committees, constituted with elected members of the local authority, to take a central place in the preparation of policy and rules in proposed regional and district plans, and plan changes and reviews. That conventional approach with the local authority continuing to retain democratic responsibility for the proposed content of the regional policies and regional

³⁶ Canterbury Earthquake (Christchurch Replacement District Plan) Order 2014. See also the **Addendum** below on the “out of scope” issue

³⁷ Local Government Act 2002, s 10(1).

and district plans (other than private plan changes) remains a central feature of local government and local democracy.³⁸

A problem that has arisen in practice is that those council planning committees have in most instances also being the hearing bodies and decision-makers in respect of submissions made by property owners and other members of the public in respect of proposed policy, plans, changes and reviews. The appointment of this type of planning committee is lawful, but if the planning committee is the adjudicator on a hearing, many members of the public and the legal profession may regard the process as compromised as to fairness and compliance with the principles of natural justice.³⁹

A central principle of fairness and natural justice is that the local authority or body who prepares and proposes the plan should not also be the hearing panel in respect of submissions which may challenge those policies and rules. For example, the former Auckland City Council constituted member or mixed hearing panels which included both elected members and some independent members. The public would not have had full confidence in these panels, where they included persons with a potential conflict of interest, and who could be expected to favour submissions by the council planning teams. The councillor members could be viewed as incompatible with independence and an objective assessment of the submissions.⁴⁰

Looking to the future, a significant improvement to the RMA or a planning Act would be to stipulate that any hearing of submissions on a plan prepared by a local authority should be heard by a truly Independent Hearings Panel or independent Hearings Commissioners appointed by the council. Under this power of delegation, the Council must retain the power to make the final resolution approving a proposed policy statement or plan, and the date when it becomes fully operative.⁴¹ This panel should not comprise any elected member, or elected local or community board member, any officer of the local authority, or any consultant with ongoing engagement with the local authority. Preferably the chairperson of the panel would be legally qualified, or as a minimum every panel should include a member with legal qualifications. In all instances the members of the panel would be accredited in accordance with the provisions in the RMA.⁴²

If councils were required to constitute this type of independent hearings panel, and to follow a procedure similar to that in Christchurch regarding beyond scope proposals, and allow for further submissions, there would appear to be no reason in principle why the final decisions of that panel, once accepted by the local authority, should not be conclusive, with no rights of appeal on the merits to the Environment Court.

As recommended, a right of appeal on a question of law to the Environment Court would still apply. Under this proposal, the status of decisions from any permanent Independent Hearings Panel appointed by the Minister, would be matched by the status of an Independent Hearings Panel appointed by a local authority, with the same appeal provisions.

³⁸ RMA, s 34.

³⁹ RMA, s 39 (hearing procedure to be appropriate and fair in the circumstances).

⁴⁰ See Kenneth Palmer, *Local Authorities Law in New Zealand* (Brookers, Wellington 2012), 2.3 (natural justice), 17.4.6 (delegation).

⁴¹ RMA, s 34A (delegation power).

⁴² RMA, ss 39A, 39B, 39C.

To clarify and repeat another point, where the recommendations of an Independent Hearings Panel appointed by a local authority were not accepted by the local authority or requiring authority, a right of appeal on the merits of any alternative solution (or on a question of law), to the Environment Court should remain available.

In putting forward the option of local authorities appointing Independent Hearings Panels as an alternative to a permanent Independent Hearings Panel, the author is cognisant of submissions voiced by local government against the permanent model. A permanent Hearings Panel will need to have extra members to cover for members who become unavailable, and in covering the country will face significant on-road commitments of time and location, and a need to become familiar with local plans and circumstances. This obligation could be a demanding commitment for any permanent Panel or Panels. With the probable advent of plan templates, or interim regulations prescribing plan content, and increasing application of national policy statements and national environmental standards, the need for consistency or standardisation in policies and plans throughout the country, may be diminished.

14 Conclusions

A number of refinements have been applied in particular situations regarding the jurisdiction of the Environment Court to hear appeals on issues of merit from council committees or hearing panel decisions. The special procedures applied in Christchurch and Auckland, have excluded or limited the ability to take merit appeals to the Environment Court, and have limited the Environment Court to declarations on questions of law. Under the respective Canterbury and Christchurch enactments, any appeals on questions of law are to the High Court only.

Under the proposed collaborative procedure, restrictions similar to those under the Auckland Unitary Plan will apply to general appeals to the Environment Court. Under the streamlined planning procedure, there is no provision for appeals. In all instances the High Court retains its jurisdiction on judicial review, which will essentially relate to questions of law.

The experience of the Environment Court in dealing with applications for declarations, and in assessing and deciding appeals upon merits, will include significant elements in many cases of questions of law. The Environment Court has the experience, capability and expertise, to manage any appeals limited to questions of law. One can have confidence in the ability of the Environment Court to deal with those matters, should its jurisdiction be restricted to questions of law.

The role of the High Court, as a further appellate body from a decision of the Environment Court on a question of law, should be maintained.

Appeals on questions of law, are not commonplace, and are available practically to bodies with the capacity to fund such appeals, mainly being local authorities, commercial operators and public interest groups, with significant financial or pro bono backing. Since amendments to the RMA in 2009 to limit submissions and appeals based on trade competition, the scope for delay and appeals to buy time against trade competitors has effectively been eliminated.⁴³

Overall, a justification for restricting the right of appeal to the Environment Court to questions of law in relation to regional policy, and regional and district plan content, is the timely

⁴³ RMA, part 11A, 308A-308I (damage awards by the High Court for breach).

improvement in quality of decision-making by accredited hearing panels. The competence and professionalism of hearing panels has increased markedly since enactment of the RMA. The requirements for accreditation of persons on hearing panels, including a greater use of legally qualified members or chairs, has given rise to an increase in quality of decision-making and confidence in the decisions reached.

Present common practices of local authorities appointing planning committees comprising elected members to deal with the preparation of the content of the policy and plan rules should continue to the point where those proposed plan documents are publicly notified. Where submissions are received, councils should be required to appoint truly independent hearings panels for consideration of the submissions and recommendations (or possible determinations) on the outcome. The traditional council member planning committee should not be allowed to conduct this function. The end result of this reform would allow for any appeals to the Environment Court to be justly limited to recommendations that are not accepted by the local authority, or on questions of law only.

In principle, local authorities should also be required to appoint an independent Hearings Panel or independent Commissioners for the hearing of any notified resource consent application. Full rights of appeal on the merits or questions of law would remain to the Environment Court on resource consent and works requirements.

The retention of the Environment Court, as an appropriate jurisdiction for appeals on questions of law, in plan matters, will recognise and retain the specialist nature and expertise of the Court, and maintain an accessible pathway for persons who wish to take appeals on questions of law.

Addendum

15 Fair procedures and “out of scope” issues

15.1 Introduction

The RMA states regarding the powers and duties in relation to hearings that a local authority or a consent authority which has the power to conduct hearings in relation to a proposed policy statement, plan, change or variation, “shall establish a procedure that is appropriate and fair in the circumstances”.⁴⁴

Under the common law, a substantial volume of caselaw provides guidance as to what constitutes an appropriate and fair procedure. The principles of “natural justice” established by common law provide further guidelines as to compliance with the fairness concept. Two principles are to the forefront, namely that the person making submissions on a plan issue, is aware of the scope of the proposals. Secondly that the adjudicating body acts objectively on relevant information and evidence, and arrives at a reasonable decision on the matter. In delegating the powers to determine the content of plans to local authorities, it is implicit that Parliament expects local authorities to act fairly and reasonably.

The obligation to place before the public the relevant documents which could form the basis of a submission, has led to a principle that the scope of the documents as published, and the scope

⁴⁴ RMA, s 39.

of the submissions made on those documents, provide parameters for the decision. For example, a submission should not raise new matters wholly beyond the scope of the proposal. The submission must be “on” the proposal. Secondly the hearing authority is limited to making decisions within the scope of the originating documents and within the scope of relevant submissions.⁴⁵ The determination of the scope of the proposals and submissions may be difficult in practice where the original policy and plan documents or submissions are expressed in broad terms. The limits are intended to ensure that all persons will be given fair notice of proposals which are reasonably specific and not uncertain as to content, area or location, and obligations, and affected persons should not be denied the opportunity to participate in the procedures.

15.2 Proposed plan variation option

Under the RMA, provision is made in schedule 1, where the local authority wishes to add to a proposed plan, a matter beyond the scope of the original documents, to put forward a formal “variation” of the proposed plan or review plan, and that process provides a new opportunity for further submissions from persons affected by the plan variation proposals now published. The variation procedure allows for flexibility in accommodating new proposals or making corrections to the original proposals. Both the proposed plan and any formal variations will be blended in the decision-making on completion of the procedures.⁴⁶

An assumption is made that a council will observe the fair procedure rules, and if a desirable “out of scope” proposal arises, the council will either put forward a formal variation, or possibly withdraw the proposed plan documents and start afresh with revised proposals. This procedure could be at the cost of a private applicant.

15.3 Environment Court and “out of scope” issues

An appeal from a council decision to the Environment Court may raise “out of scope” issues, and similar jurisdictional issues as to fair procedure may arise.

Firstly, a notice of appeal and new submissions may raise matters beyond the scope of the originating documents and the original submissions. To provide a degree of flexibility, the RMA 1991, s 293, as originally enacted, conferred on the Environment Court a discretion on the matter of “out of scope” proposals, where it found “that a reasonable case has been presented for changing or revoking any provision in a policy statement or plan, and that some opportunity should be given to interested parties to consider the proposed change or revocation...”. This discretion clearly allowed the Environment Court to follow a simplified procedure (not amounting to a formal plan variation which only the council could resolve to put forward), and could allow for public notice of the new proposals and an opportunity for further submissions. In the end result a fair procedure would be followed, as affected persons would have the opportunity to participate in the procedures.⁴⁷

⁴⁵ *Palmerston North City Council v Motor Machinists Ltd* [2013] NZHC 1290, [2014] NZRMA 519 (submission seeking rezoning of land outside area of proposed plan change – submission disallowed as not “on” or beyond the scope of the plan change).

⁴⁶ RMA, sch 1, cls 16A, 16B.

⁴⁷ *Wakatipu Environmental Society Inc v Queenstown Lakes District Council* [2005] NZRMA 441, Judge Jackson (plan change to introduce rule to limit spread of wilding pines – plan change area enlarged under s 293 procedure).

However, in 2005, RMA, s 293 was the subject of an amendment, which regrettably narrowed the discretion of the Environment Court, and appeared to limit action under s 293 to matters of inconsistency between higher-level documents such as national policy statements, and the content of regional or district planning documents. The Court was empowered to allow that inconsistency or departure to remain if it considered that it was of minor significance and would not affect the general intent and purpose of the proposed policy statement or plan. That amendment should be revisited and the wider jurisdiction restored.

15.4 Auckland Unitary Plan and “out of scope” decisions

As outlined above, the special legislation applied to the first proposed Auckland combined plan provided that the Hearings Panel was “not limited to making recommendations only within the scope of submissions”, and could make recommendations on any other matters relating to the proposed plan identified by the Panel or any other person during the hearing.⁴⁸ The report of the Panel was required to “identify of any recommendations that are beyond the scope of the submissions made in respect of that topic or those topics”, and generally required reasons supporting decisions made.⁴⁹

The Auckland Council was empowered to accept or decline the recommendations. The rights of appeal to the Environment Court were limited firstly to situations where the council rejected a recommendation and provided its own solution, and secondly where the council accepted a recommendation which had been identified as being beyond the scope of the submissions made on the proposed plan.⁵⁰ The latter right of appeal has given rise to further litigation before the High Court in which the adequacy of the identification of matters being within or beyond scope by the Hearings Panel is being challenged. It is alleged that a substantial number of properties shown in the proposed plan have been upzoned without being the subject of any specific submission requesting a change of zoning.⁵¹

An observation could be made that an alternative provision for the Panel to direct Auckland Council to put forward a formal variation identifying the areas for upzoning, and inviting further submissions was available but was not activated.⁵² A possible reason could have been a desire to complete the new combined plan within an original timeframe of the council three-year election cycle. Had a direction been made to prepare a plan variation, or to ensure that submissions clearly identified properties that would be affected, the challenge before the High Court which basically alleges that the procedures were not fair, could have been avoided.

15.5 Christchurch Replacement District Plan and “out of scope” matters

As outlined, a different approach has been taken to preparation of the Christchurch replacement district plan. The procedure provides that the hearings panel “is not limited to making changes within the scope of the submissions made on the proposal”. However “if the hearings panel considers that changes are needed to deal with matters that are, in a material way, outside the

⁴⁸ Local Government (Auckland Transitional Provisions) Act 2010, s 144(5)

⁴⁹ At s 155(8).

⁵⁰ At s 156.

⁵¹ *Character Coalition Inc, Auckland 2040 Inc v Auckland Council* High Court, Auckland, CIV 2016 404 0002327.

⁵² At s 124.

scope of the proposal as notified and to deal with submissions on it, the panel must direct the council to – (a) prepare and notify a new proposal; and (b) invite submissions on the new proposal in accordance with schedule 1 [of the Order]”.⁵³

This provision effectively empowers the hearings panel to utilise a modified plan variation procedure, which is normally limited to an formal variation initiative to be taken by the council. On this point, the modified process complies with accepted principles of fair procedure, and allows for affected persons to make further submissions. As also noted, the procedure provides for the hearings panel to make final decisions, which cannot be rejected by the Christchurch City Council. There is no provision for appeals to the Environment Court on the merits. The only appeals are to the High Court on a question of law.⁵⁴

15.6 Recommendations

- Where plan provisions are put forward by a local authority, with submissions made on those provisions, and recommendations determined by an independent hearings panel are adopted by the council, there are sound reasons for decisions of the council to be final on the merits, with appeals limited to questions of law. These appeals could be to the Environment Court (or the High Court).
- In putting forward this recommendation, it is envisaged that the Christchurch procedures should be adopted on beyond scope matters. The hearings panel should have a discretion where it finds that desirable matters or solutions may, in a material way, be beyond the scope of the proposals and submissions, and it wishes to proceed with those proposals. The panel should be able to direct or invite the council to prepare and notify the new proposals, either as a formal plan variation for major matters, or under a new discretion direct full or limited notification of other proposals as part of the plan hearings procedures, allowing for further submissions. The latter discretion could be similar to the discretion held by the Environment Court under RMA s 293 (in its original 1991 form). A hearings authority already has a limited power to give directions under RMA, s 41C regarding further information.
- If the present two-stage procedure is to remain under the RMA, with appeals on merits fully available to the council and submitters, the discretion originally conferred on the Environment Court, under s 293 should be restored to enable the Court to deal efficiently with beyond scope matters by directing further public or limited notice of the matters, and allowing for specified persons or the public to make further submissions.
- It is not recommended that the Auckland Unitary Plan procedure regarding significant “out of scope” decisions should be followed, as no discretion was conferred to allow further submissions on the out of scope proposals. The opportunity to appeal for persons affected has enabled only persons with substantial financial or professional resources to consider an appeal to the Environment Court, or the High Court on questions of law. The fairer procedure would be to allow for further notification and for the hearings panel to receive additional submissions, as provided for under the Christchurch replacement district plan procedures.

⁵³ Canterbury Earthquake (Christchurch Replacement District Plan) Order 2014, cl 13(2), (4).

⁵⁴ At cl 19.

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