A report to the New Zealand Productivity Commission

Proposed Modifications to Urban Plan-making

Stuart Shepherd

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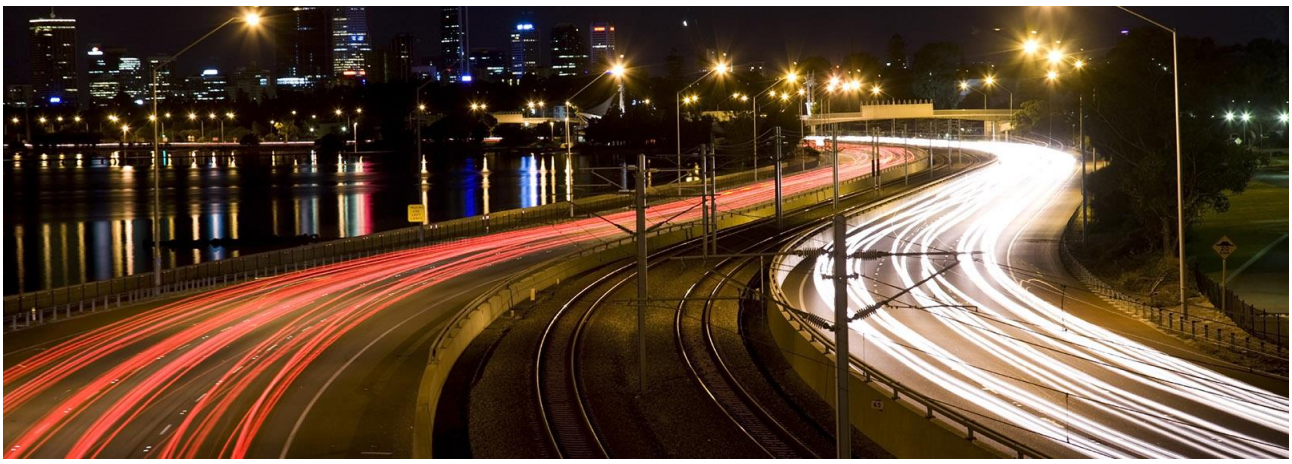

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About the Author

Stuart Shepherd advises on the economics of land-use planning, on the design and implementation of various regulated and non-regulated forms of pricing for infrastructure services, on public policy and economic issues, and on business strategy. He has prepared numerous submissions for and testified at New Zealand Commerce Commission regulatory hearings and Parliamentary Select Committees.

Stuart was a member of the Independent Hearings Panel from January 2014 – July 2016 which was appointed by the New Zealand Government to hear submissions on the notified Auckland Unitary Plan and to recommend a revised Plan to Auckland Council.

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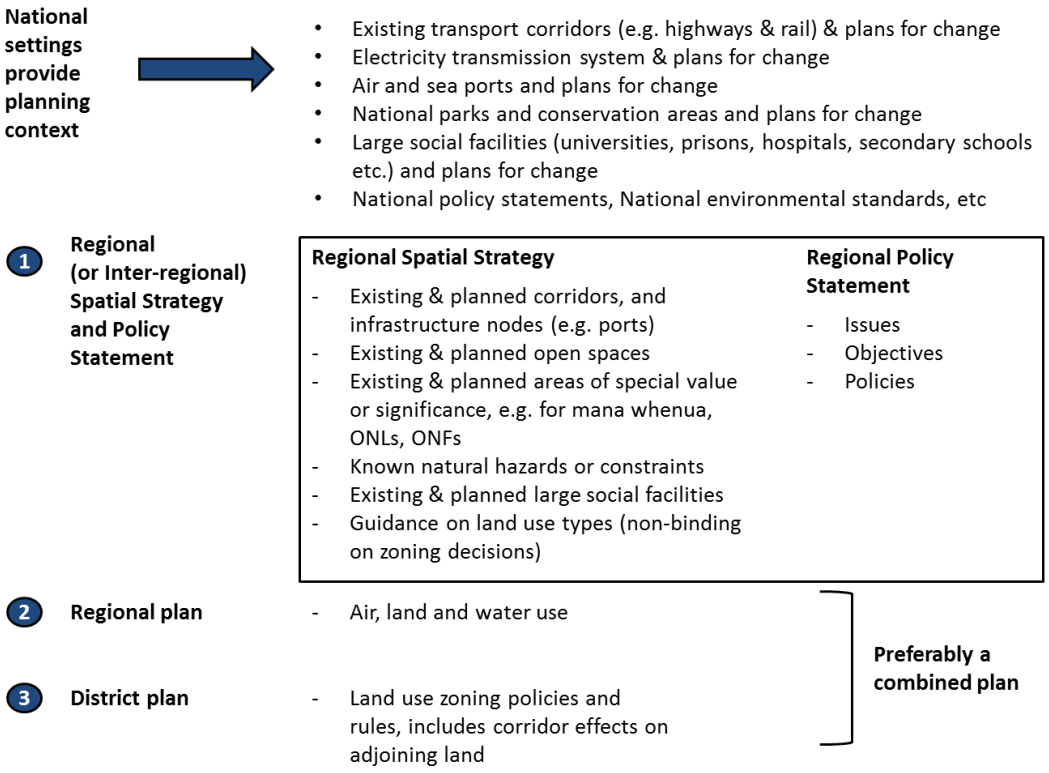
Executive summary

The New Zealand Productivity Commission (Commission) is undertaking a review of urban planning and within that is exploring an approach to Plan-making[1] that involves a single merits assessment (as opposed to the current potential two-step process) and which integrates spatial and infrastructure strategy with land-use planning. My proposal to achieve these features is summarised below in terms of the proposed content of Plans and a proposed high-level process for Plan-making.

Proposed content of Plans to integrate spatial & infrastructure strategy with land-use planning

Figure One: Proposed content of Plans



The components illustrated in Figure One are:

- The National settings that provide part of the context for regional planning. I have depicted these as a "given" for regional planning. I recognise in practice there are interactions between national and regional planning and it may be desirable to have a

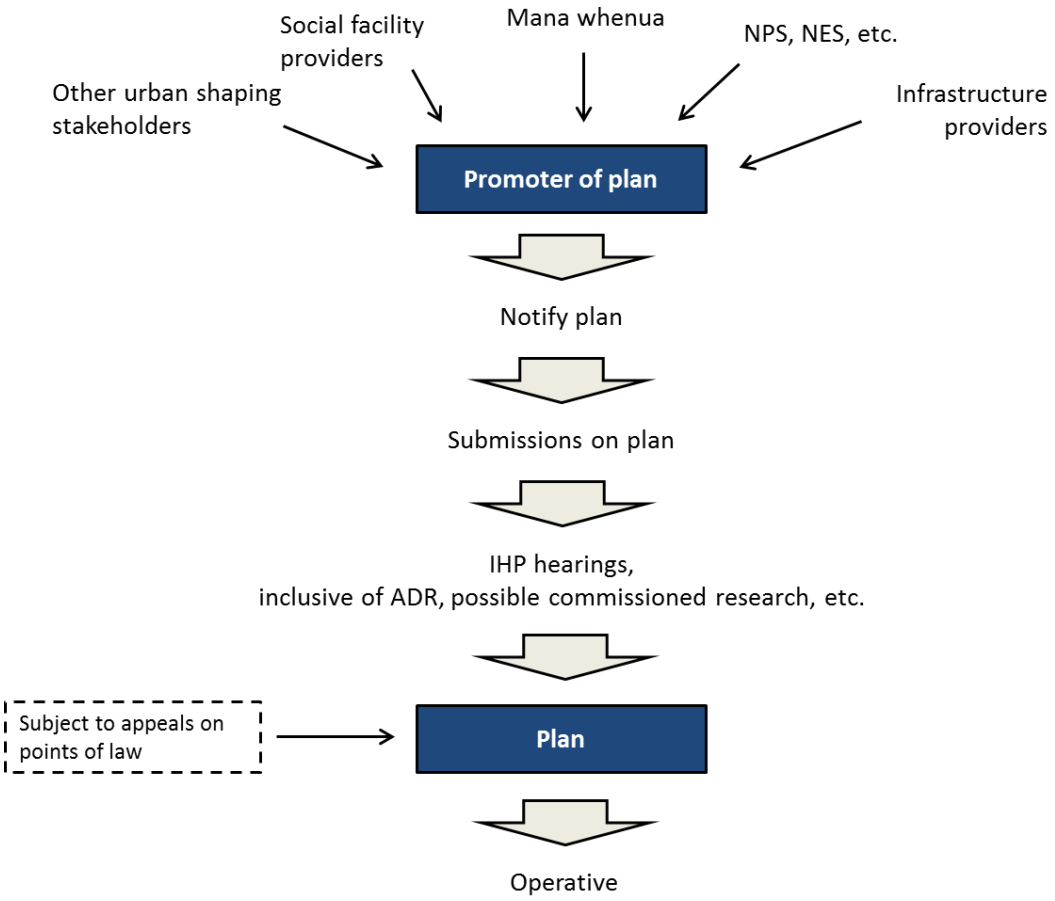
[1] "Plan-making" refers to the review of or changes to (whether initiated by Council, Ministers or private entities) the various Plans under the Resource Management Act (RMA).

more formal national planning process that provides greater structure for these interactions.

- A "Regional Spatial Strategy" which would be an addition to the current Regional Policy Statement. I see this Strategy as the linchpin at the strategic level between spatial and infrastructure strategy and land-use planning. It would have the same legal status as the Regional Policy Statement and be compiled in the same planning process.
- The corridors identified in the Strategy would have legal standing and the relevant requiring authorities would be required to offer to purchase these areas of land and have the option to acquire them under the Public Works Act. Thus this identification of corridors would be a significant issue for the requiring authorities and the affected land-owners and these corridors would then provide a clear and firm spatial skeleton for urban development. The other items in the Strategy would fill out this skeleton, providing clear constraints on urban development, with the expectation that urban development could proceed elsewhere as governed by the Regional Policy Statement and Regional and District Plans.
- The scope of Regional Policy Statements would remain similar to their current scope covering regional issues, objectives and policies and would need to be consistent with the Regional Spatial Strategy.
- Groupings of councils should be enabled to compile a Regional Spatial Strategy & Policy Statement on an inter-regional basis for those issues that transcend regional boundaries (e.g. transport and electricity transmission corridors, the catchment areas for air and sea ports, municipal water supply, and urban growth drivers).
- I envisage Regional and District Plans covering the same items as currently, with the main improvements to them arising from:
  - Being developed and varied together where possible, to lower the costs of change (one forum and process rather than multiple) and improve coherence.
  - Having a clearer and publicly available view as to the long-term Spatial Strategy for the region that provides a context within which these Plans are reviewed or varied.
  - Focusing on only those issues where planning and Plans have a comparative advantage over other methods for coordinating urban development and not intruding on those areas regulated under other regimes (e.g. under the Building Act).
  - A single merits assessment of the notified content of these Plans, with that assessment being undertaken by a panel that is both competent and independent of the promoter of the Plan and submitters. This point is developed further below in the proposed Plan-making process.

Proposed Plan-making process

Figure Two: Proposed Plan-making process



The steps in the process illustrated in Figure Two are:

- The relevant council(s) would remain the promoter of Plan[2] reviews and Plan changes when initiated by themselves. Changes to Regional and District Plans could also be initiated by Ministers and private parties (as is currently the case). Changes to Regional Spatial Strategies and Policy Statements could be initiated by Councils and Ministers (as is currently the case), by requiring authorities (to update corridors or other issues relevant to them) and by private initiative within certain limits.
- The process would provide for one merits assessment only. This would provide stronger incentives (than currently) on the promoter of the review or Plan change to provide a sound evidential basis and reasons for change at the first (and only) merits assessment. This should result in better informed assessments of first instance.

[2] In this context "Plan" includes the Regional Spatial Strategy & Policy Statement.

- The merits assessment would be undertaken by an Independent Hearing Panel (IHP), appointed by an entity independent of the promoter and submitters. An independent Crown Entity is probably best suited to this role.
- The IHP would be required to seek submissions on the notified Plan or Plan change but not, as a matter of course, further (or cross) submissions.
- Participation in this process by submitters would likely be enhanced as submitters would know there would be only one merits assessment (versus possibly two currently); with that merits assessment being undertaken by a panel independent of all those otherwise involved in the Plan-making process.
- The output from an IHP would comprise a Plan or Plan change and reasons for any changes made to the notified version of the Plan. This Plan would be subject to appeal on points of law, but not subject to appeal on merits.
- All forms of Plan-making in regions experiencing significant urban growth would be required to submit to this Independent Hearing Panel (IHP) process (consideration needs to be given as to how Boards of Inquiry that have a Plan-making dimension would relate to the IHP approach). The appointing entity would need sufficient flexibility to be able to convene Panels proportionate to the nature of the Plan-making activity.
- The extent to which Plan-making in other regions (those outside urban growth regions) could access an IHP, or would be required to use an IHP in Plan-making, needs to be given further consideration in relation to the likely benefits and costs.
- This approach to Plan-making would provide a more promising path than is currently the case for integrated planning whereby councils could develop combined Plans[3] (including unitary Plans).
- These changes would not require any changes to consenting processes as currently provided for under the Resource Management Act (RMA), other than the training and qualifying of Commissioners for consent hearings which would be transferred to the IHP appointing entity. An appeal on merit would continue to lie with the Environment Court. However, if considered desirable the IHP mechanism for Plan-making could be extended as an optional path for consent applicants (as a single stage merit assessment without access to merits appeal) at the request of the applicant. This would likely be useful to applicants of large and complex consents and for applications that include both Plan changes and consents.

In relation to the Independent Hearings Panels:

- The appointing entity would have responsibility for training and qualifying Panel members as Commissioners. This training and qualification could apply also to Commissioners for consent hearings (e.g. include the current "Making Good Decisions" certification). More generally this entity should be resourced for and have the objective of being a centre of excellence in Plan-making.
- The appointing entity would be responsible for running the hearings processes for Plan-making. It would need the flexibility to do this in the manner it considered most

[3] See section 80 of the RMA for the way in which combined Plans may include more than one territorial area, or multiple layers in the planning hierarchy, or both.

efficient as there would be a large number of hearings at any point in time and a range of sizes and locations.

- The IHP would be empowered to use a wide range of techniques in undertaking its merits assessment, including being empowered to:
  - employ "alternative dispute resolution" techniques (ADR) such as mediation and expert caucusing.
  - obtain its own reports, research and expert advice.
  - call for additional (i.e. new) submissions on identified issues part way through the hearings process.
  - issue procedural minutes.
  - issue guidance to submitters as to the Panel's initial or final view on matters that are likely to usefully inform subsequent stages of the hearing. This needs to be able to extend to issuing draft or final positions in a staged manner, for example issuing a draft or a final Regional Spatial Strategy & Policy Statement part way through a unitary Plan hearing.

1. Introduction

In its Draft Report on Better Urban Planning (Draft Report) the Commission recommended that a new planning system should provide for a single merits assessment of council-proposed new Plans, Plan variations and private Plan changes, to be undertaken by an IHP. The Draft Report also explores possible ways to integrate spatial and infrastructure strategy with land-use planning. The Commission has requested proposed ways to achieve this.

In preparing this report I have drawn on my recent experience as a member of the IHP for the Auckland Unitary Plan, along with my experience over the last twenty years in advising on the design of and working within a number of regulatory regimes (e.g. various regimes operated by the Commerce Commission and Electricity Authority amongst others). I have benefited from review comments on various sections of this report from Jan Crawford, David Hill and Paula Hunter who were also members of the Auckland IHP and who have lengthy careers in the implementation of the RMA and its predecessor legislation. However, the views expressed in this report are mine.

1.1 The Commission's draft proposal

To provide context the Commission summarised its proposal, as part of the brief for this report, as follows.

"*The Commission's Draft Report drew on the experience with the Auckland and Christchurch IHPs and argued that IHPs would provide a more thorough and upfront review of decisions. This would reduce the need for later merit appeals and so provide greater certainty for both councils and residents about the stability of land use rules. The Commission argued that IHPs should include:*

- *upfront, expert review of proposed plans, informed by public submissions;*
- *review panels that include significant expertise and experience, including people with legal, economic and planning skills and capacity to dedicate a large amount of time to plan processes;*
- *a focus on removing excessive regulation – the statement of expectations for the Christchurch Panel includes a goal of significantly reducing "reliance on resource consent processes", "the number, extent, and prescriptiveness of development controls and design standards in the rules, in order to encourage innovation and choice" and "the requirements for notification and written approval" (Schedule 4, Canterbury Earthquake (Christchurch Replacement District Plan) Order 2014).*

The Commission proposed a central panel as it would be more likely to achieve the scale and expertise required to properly review new rules and controls than individual councils, and to apply a consistent approach to similar issues across the country.

To assure confidence from councils and the public in its impartiality, the panel should have formal independence from central government and would need to be led by someone with extensive expertise and mana (such as a former or current judge, as is the case with the Auckland and Christchurch IHPs). Formal independence of the panel would also align with the Commission's earlier advice on regulatory institutions in its Regulatory institutions and practices report http://www.productivity.govt.nz. That advice found that independence from political control was appropriate where:

- *a substantial degree of technical expertise, or expert judgement of complex analysis is required;*

- *public confidence in impartiality is important;*
- *a consistent approach is desired; and*
- *the oversight of government power is involved.*

The Commission considered the permanent IHP could be located in the court system, or a separate body serviced by a government department (such as MfE or the Ministry for Business, Innovation and Employment). Although some of the functions currently carried out by the Environment Court would be taken over by the IHP, the Court would continue to play an important role, including hearing appeals where a council rejected IHP recommendations, where directly affected parties or applicants wished to challenge resource consent decisions or conditions, and where decisions of national importance were "called in". The Environment Court would also continue to have roles and functions under other statutes."

2. Nature of the Plan-making challenge

The Commission provides a useful summary in its Draft Report of the rationale for urban planning and some of the tensions that any planning process needs to reconcile (page 36). This summary states that urban planning seeks to address three distinct problems of urban development (with which I agree):

- to regulate external (spill-over) effects on others and on the natural environment from the use of land by people and businesses;
- to make fair and efficient collective decisions about the provision of local public goods; and
- to plan and implement investments in transport and water infrastructure, and coordinate these investments with land use and investments in other infrastructure controlled by other parties.

Current Plan-making practice in New Zealand under the RMA tends to focus on the first point but also affects, and is affected by point two (e.g. the location, size and nature of enabled development in open spaces), and point three (location and size of transport and other utility corridors and the clustering of development in centres to enhance the efficiency of public transport). As the Commission notes:

- All three main functions of urban planning interact with private property rights and can therefore create tensions and controversies. The tensions and controversies tend to be greater in regulating land use and investing in infrastructure than in providing local public goods.

A durable and effective approach to Plan-making needs to be capable of taking into account (in an impartial manner) the various tensions inherent in Plan-making. These competing interests include (but are not limited to) the national public interest (e.g. as expressed by central government), local public interest (e.g. as expressed by local government), environmental, heritage, cultural and recreational interests (as expressed by a range of groups or individuals), club goods in a locality (e.g. as expressed by a local business association or a consortium of land owners), and private interests (e.g. as expressed by a land owner or tenant).

The current RMA process for Plan-making employs the Environment Court as the last point of call to resolve these tensions. Any single-stage merit assessment needs to be designed in such a way as to be capable of resolving these tensions in a manner that is, and is seen to be, fair and reasonable in the circumstances, and lawful. I consider a Plan-making process capable of achieving this needs at a minimum to have the following features:

- a notified Plan or Plan change, based on evidence and reasons.
- ready access to the merit assessment process for participants whose interests are affected by the notified Plan.

- a merit assessment undertaken by a competent Panel that is appointed by an entity independent of the Plan promoter and participants in the Plan process, and with a statutory appeal right to enable unlawful decisions to be challenged and remedied.

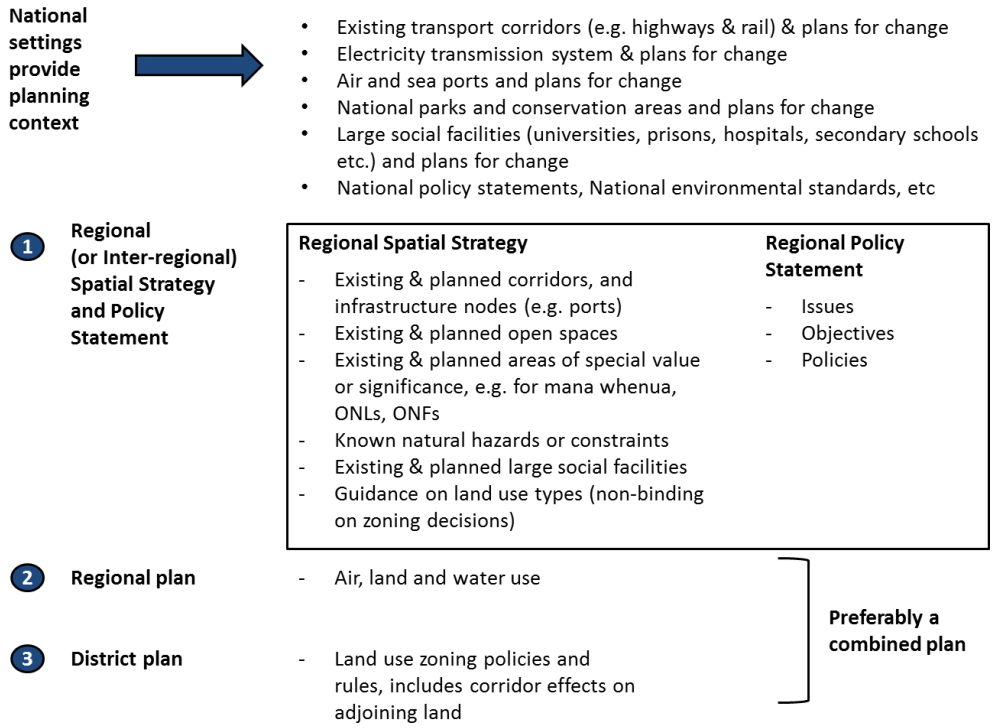
I describe in section 4 how these three features could be incorporated in a Plan-making process.

It is important to note that local government represents only one of the interests (albeit a very wide and important one) affected by Plan-making. It follows that a process to reconcile that interest with other affected interests should be independent of councils and by implication not under the control of councils. This is reflected in the current RMA arrangements where merit appeals are heard by the Environment Court which is independent of local government. For a single-stage merit assessment to be viewed as credible over extended periods of time by all interested parties (a prerequisite to it being durable) a key feature, in my view, is the independence of those appointing the IHPs from all other parties involved in the Plan-making process.

3. Proposed content of Plans to integrate spatial, infrastructure & land-use planning

In this section I propose changes to the content of Regional Policy Statements to facilitate integration of spatial and infrastructure strategy with land-use planning. Figure Three illustrates this proposal and each component is described below.

Figure Three: Proposed content of Plans



3.1 National settings provide context

There are a range of policies and spatially defined features that are determined at the national level and thereby provide part of the context for regional spatial planning. I have depicted these national settings as exogenous to regional planning and therefore a "given" for regional planning. I recognise in practice there are interactions between national and regional planning and it may be desirable to have a more formal national planning process that provides structure for these interactions. However, at this stage I have not focused on such a planning process but rather recognise the importance of these nationally determined features for regional planning.

3.2 Regional (or inter-regional) Spatial Strategy & Policy Statements

I have depicted this component as regional, or inter-regional. The reason for including an "inter-regional" option is that spatial and policy issues often do not lend themselves to easy demarcation at the boundary of regional areas. Examples of issues that often transcend these boundaries are transport and electricity transmission corridors, the catchment areas for air and sea ports, municipal water supply, and urban growth drivers. An example of an area where these inter-regional effects are significant is the Auckland, Waikato and Bay of Plenty area. The RMA currently allows for combined plans (across territorial boundaries, see s80 of the RMA) without requiring consolidation of the relevant local authorities. I suggest this ability for combined Plans should remain and be given greater emphasis in practice.

The scope of the Regional Policy Statement aspect of this component would be similar to existing Regional Policy Statements, covering issues, objectives and policies. In my view this approach to articulating regional policy issues is sound and useful.

The additional item to this component would be a regional "Spatial Strategy". I see the Spatial Strategy as the linchpin at the strategic level between spatial, infrastructure corridor and land-use planning. I have named it a "Strategy" rather than a plan, as I consider that term better describes its intent and fits more comfortably alongside the "Regional Policy Statement" (which is also not called a "Plan").

It would be important to be clear as to the status of any corridors that are identified in a Spatial Strategy, as it is not uncommon for existing Plans (usually at the district level) to have, for example, "indicative" roads. In order for the Strategy to inform lower levels of planning over extended periods of time (which is its aim), I consider the corridors would need to be definitive in a number of ways.

First, the identification of these corridors should have longevity, that is remain unless and until revoked (this compares with current designations that have a statutory five-year lapse duration under s184 of the RMA unless a longer period is explicitly sought and granted).

Second, to lower the risk of moral hazard on the part of requiring authorities when requesting these corridors, the requiring authority should be required to offer to purchase the affected land once it has been identified in a Spatial Strategy at its value pre-identification (current designation procedures do not require this but some requiring authorities in practice do offer to purchase designated areas). Requiring authorities should also have the option to acquire this identified land under the Public Works Act. These features would elevate the identified corridors as significant decisions for the requiring authority and the land owners involved. Procedures as to how they are identified would need to reflect that significance.

I note that the value of corridors (due to their need for uninterrupted and lengthy spaces) lies in the real options they create for the community at low cost, relative to waiting until some or all of the land is developed for urban purposes. It follows that the community (via local authorities or the relevant infrastructure provider) should bear the cost of acquiring those real options, and not the affected land owners.

I also note in relation to corridors that it should not be necessary for the local authorities or infrastructure providers to be definitive as to the works that they will place in corridors. To have such requirements would diminish the value of the real options that the corridors create

and particularly over periods of technological disruption which are currently occurring in, for example, transport, electricity and wastewater. However, the flip side of flexibility within corridors is uncertainty for land owners that adjoin them. In order to provide adjoining landowners greater certainty (while not unduly diminishing flexibility within the corridor) it would be desirable to define an effects envelope at the corridor boundary (e.g. with respect to noise and air quality). Such effects envelopes would probably best sit at the Regional or District Plan level.

Consideration also needs to be given as to whether there should be an obligation to compensate land owners where the Spatial Strategy places other constraints on their land, for example in relation to open spaces, an outstanding natural landscape (ONL), outstanding natural feature (ONF), or sites of significance or value to mana whenua. I note that s85 of the RMA provides for relief proceedings on appeal where reasonable use is precluded by a plan provision, but does not allow for compensation. The loss of value to land owners will likely fall within a wide range from a modest constraint on reasonable use through to very significant constraints, and in some cases may enhance value of adjoining land. The manner of compensation (if any) should reflect this graduation. More generally, there needs to be coherent policy as between the ability within a regional Spatial Strategy to impair the value of land through identifying that land for the future supply of local public goods (e.g. corridors, open spaces, ONLs, ONFs, and places of significance or value to mana whenua) and compensation to land owners for that impairment.

Lastly, I have included in the Spatial Strategy "Guidance on land use types (non-binding on zoning decisions)". It seems to me it is not practical to expect all the other items in the Spatial Strategy to be identified in the absence of a high-level view of the likely land-use types (e.g. residential, commercial, light industry, heaving industry, or some combination of these). At the same time, when the Spatial Strategy is being compiled there typically will be insufficient information available on the most desirable uses and their possible mix from a local perspective, and on land owner preferences, for a definitive position to be taken on zoning. This is an issue of how best to coordinate Regional planning with District planning over what is likely to be a five to twenty-year period. The proposed "Guidance" is a way of bridging this gap by being transparent as to what the Regional Spatial Strategy assumes as to land use, while not locking those assumptions into zones and rules.

Regional Plans and District Plans

I propose the scope of Regional and District Plans remain largely as is currently the case under the RMA. It seems to me the key areas for improvement in these Plans are:

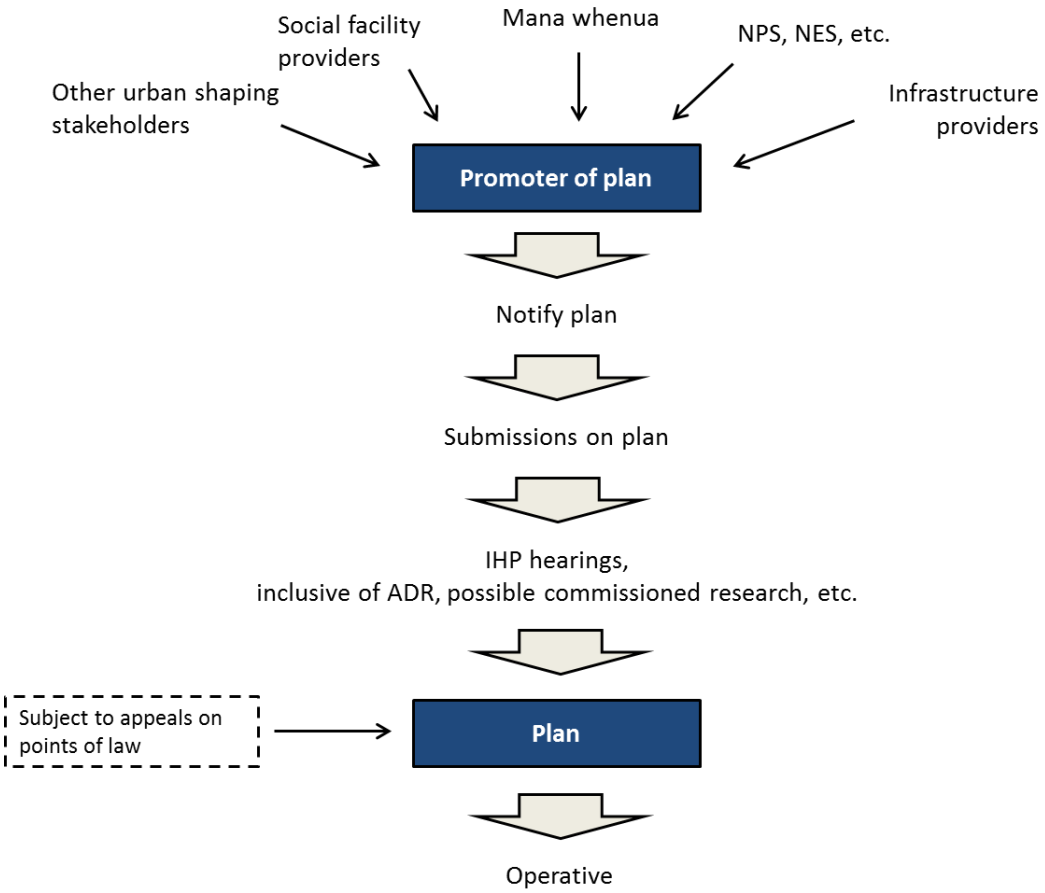
- To have a clearer and publicly available view as to the long-term Spatial Strategy for the region, to provide a context within which these Plans are reviewed or varied.
- That the practice of planning focuses on those issues where planning and Plans have a comparative advantage over other methods for coordinating urban development, and does not intrude on those areas regulated under other regimes (e.g. under the Building Act).
- That there is a single merits assessment of the proposed content of these Plans and that assessment is undertaken by a group that is both competent and independent of the promoter of the Plan and submitters. This point is developed in section 4.

4. Proposed process for Plan-making

In this section I focus on the process of Plan-making, designed to support the preparation of the content of Plans as described in section 3 and having the three desirable features identified in section 2 of:

- a notified Plan (or Plan change) based on evidence and reason.
- ready access to the merit assessment process for participants whose interests are affected by the notified Plan.
- a merit assessment undertaken by a competent Panel that is appointed by an entity independent of the Plan promoter and the participants in the Plan process, and with a statutory appeal right to enable unlawful decisions to be challenged and remedied.

Figure Four: Proposed Plan-making process



4.1 Comments on proposed process

As noted in section 3, it may be preferable in some instances for a Regional Spatial Strategy & Policy Statement, or at least some components of it, to be undertaken on an inter-regional basis. This is not to suggest consolidating the regional authorities, but rather that those aspects that have significant inter-regional implications are handled in a single forum and process. The proposed IHP process for assessing Plans (see below) could assist the emergence of this inter-regional planning, subject to the IHPs building a reputation for being effective and efficient.

In a review of Plans it would be preferable to sequence the Regional and District planning stages after the Regional Spatial Strategy & Policy Statement is finalised. Or alternatively, in the case of a Unitary Plan, that a final (or at the least a draft) is issued prior to the Regional and District planning stages (issuing a draft in this way would be similar to current Boards of Inquiry under the RMA which are required under s149Q to release a draft decision for technical review prior to finalising the decision).

In Figure Three (in section 3) I have noted that a combined Regional and District Plan is to be preferred, as the issues covered under each are interrelated and are more likely to be coherent if these Plans are compiled (or varied) together. Under a Unitary Plan this combination occurs as a matter of course, but absent a Unitary Plan there are also likely to be benefits from reviewing or varying these Plans together. Note where there is not a Unitary authority, combining Regional and District Plans is likely to involve a Regional Council and usually more than one City or District Councils.

The question of who is able to initiate variations (or changes) at each of the Plan levels needs to be considered. Currently only the relevant Council is able to prepare, and Minsters or local authorities can initiate variations to a Regional Policy Statement (cl2, 16A & 21 of Schedule 1 of the RMA), whereas any person (cl 21) can initiate variations to Regional and District Plans (and the relevant Council has the ability to decide whether to progress or otherwise such an initiative).

In my view the ability of affected parties to initiate variations to Regional and District Plans should remain. The main reason for this is that these Plans have direct effects on private parties, and some of those parties can be expected to have both the information and the incentive to seek out Plan variations that enable urban development which is consistent with the Regional Spatial Strategy & Policy Statement but not captured in an existing Plan. On this basis they should be afforded the opportunity to test those possible variations, provided they pay a substantial portion of the costs of undertaking the variation (to lower what otherwise may be a moral hazard issue).

The argument for private initiated variations to a Regional Spatial Strategy & Policy Statement are, in my view, less compelling, other than for the affected requiring authorities. If the Regional Spatial Strategy contains the mechanism for changing what are currently termed designations, it would be critical for requiring authorities to be able to seek a variation to change or add corridors so as to keep these up to date.

There may be some instances where, for example, a landowner wishes to initiate the urban development of a large area that is only possible at the Regional and District Plan level if there is first a variation to the Regional Spatial Strategy & Policy Statement. If they are unable to convince the relevant Council to initiate such a variation, it seems to me it would

be beneficial to the long-term interests of the community that such a proposal is able to be tested in a formal process. At the same time, I am mindful that relative stability in a Regional Spatial Strategy & Policy Statement is desirable. Perhaps the best balance would be to have a stand-down period commencing from the last Regional Spatial Strategy & Policy Statement review, within which time (say three years) the relevant Council could refuse to progress such an initiative. This would be similar to the two-year hiatus provided under cl 25(4) of Schedule 1 of the RMA for changes to Regional and District Plans. In addition I consider any private initiative should be required to cover most of the direct costs (of the IHP and Council) of considering such a variation. This approach should limit these initiatives to only substantial ones that are perceived (by the promoter) to have a high likelihood of success, while still allowing such initiatives to come forward.

4.2 The notified Plan

A process that has only one merit assessment relative to the current approach of potentially two merit assessments would create stronger incentives on the promoter of the Plan (or Plan change) to provide a strong evidential base, with reasons, at the notified stage, and for participants to marshal their full evidence at this first (and only) stage.

My understanding of current practice is that the evidential base for Plan reviews and changes, and the reasons for the changes (including section 32 reports) are often compiled in a much more comprehensive manner in response to an appeal to the Environment Court than as part of the notified proposed Plan change. This results in the first merit assessment being less well informed than the second. Stronger incentives on the promoter and participants to inform the merit assessment of first instances are highly desirable, in order to lay the basis for a more effective and efficient merits assessment at the first step.

Similarly, it is desirable that there are incentives (and no barriers) on the promoter to obtain input from stakeholders prior to notifying a proposed Plan or Plan change, for example from infrastructure providers, mana whenua, education and health providers, and from others whose intentions and interests are likely to have a shaping effect on the Plan. Early input allows the intentions of these other parties to be considered from the outset.

4.3 Participation

New Zealand RMA processes rely heavily on participation of those whose interests are likely to be affected by the Plan. The perceived legitimacy of the resulting Plans depends in large part on the credibility of this participation. This is not surprising as Plans will reflect values and norms of a community and often have extensive and long term effects on land, air and water issues and on the value (e.g. social, in-use and market related) of property rights related to them.

A single merit assessment undertaken by an IHP could improve participation, relative to the current arrangement that has the potential for two merit assessments, in the following ways:

- there would be stronger incentives on the promoter of the Plan (or Plan change) to support the notified version of the Plan with an evidential base and reasons, thus providing participants with a better informed starting position.

- participants would face the same duty to provide an evidence-based submission but could anticipate a lower expected cost of making their case, as they would be assured that the first merit assessment would be the only one. I understand in the current process any second merit assessment (in the Environment Court) tends to be pursued primarily (but not exclusively) by the better resourced participants.
- an IHP (which is independent of the promoter of the Plan change) undertaking the merits assessment, and the IHP procedures treating both the promoter and participants as submitters, can be expected to improve the credibility of the process from the perspective of participants, and thus enhance from their perspective the value of participating. This is relative to the current process that in the first instance is under the control of the council or its appointed Commissioners and if it goes to appeal, the Environment Court.

One of the primary means of participation is via a written submission. I consider this should be retained as a requirement, but I am less convinced that a general further (or cross) submission opportunity is warranted. In the Auckland case the volume of further submissions was very large and unwieldy but did not, in my view, add substantially to the points made in the initial submissions. The further submissions and compiling a summary of them delayed the overall process by 5-6 months and increased complexity for the Panel and submitters.

I think a more effective and efficient role for further submissions is of a targeted nature. The IHP should be empowered to identify throughout the hearing particular issues that it considers warrant further exploration with participants and have the ability to call for (further) submissions on those identified issues.

4.4 The IHP, its output and its standing

A single merit assessment would place more reliance on the IHP undertaking that assessment and on its processes than one that can be challenged on its merits on appeal. In my view important attributes of such a Panel and its output include:

- independence from the promoter and participants
- competency
- scope of powers
- nature and standing of output

4.4.1 Independence

In my view the independence of an IHP needs to be anchored in its appointment process, including that the appointor is independent of the promoter and the participants in the Plan-making exercise. Local government and Ministers are likely to be promoters or participants in Plan-making, which indicates the need for the appointor to be outside their direct influence.

The Commission discusses this issue of independence of regulators in chapter 9 of its 2014 report on "Regulatory institutions and practices". The findings in that chapter and the typologies of institutional forms for regulators in the New Zealand context presented on

page 240 suggest the most appropriate institutional form to achieve independence in this circumstance would be the independent Crown Entity. I concur.

4.4.2 Competency

In my experience and observation Plan-making draws primarily on the professional disciplines of planning, law and economics (albeit not always framed explicitly as economics), plus there is a wide range of subject-specific skills involved such as transport, urban design, geology, ecology, landscape architecture, acoustic engineering, and so forth. In the New Zealand context an understanding of mana whenua perspectives and interests is also required.

The competency of any IHP needs to be assessed with respect to the nature of the Plan-making issues coming before the Panel. Thus I consider the appointing entity needs wide scope to exercise its judgement as to the appropriate expertise for IHP members. Further, I consider it would be advantageous to locate responsibility for the training and qualifying of IHP members with the same organisation. This would assist the appointing entity to build a pool of capable IHP members and develop practice norms. This would involve shifting responsibility for the "Making Good Decisions" training and certification from the Ministry for the Environment to this entity and strengthening its Plan-making component. More broadly this entity should be resourced and have the objective of becoming a centre of excellence in Plan-making.

In its Draft Report the Commission notes (page 189) "*To assure confidence from councils and the public in its impartiality, the panel should have formal independence from central government and would need to be led by someone with extensive expertise and mana (such as a former or current judge, as is the case with the Auckland and Christchurch IHPs).*" I agree the role of the chair is critical to effective and efficient process and outcomes, but I am not convinced that only former or current judges are able to fulfil this role. I suggest others with the requisite training and experience can also effectively and reliably undertake this role.

An IHP may have legal expertise amongst its members and should be empowered to retain counsel to provide it. Retaining the ability to appeal on points of law would keep an IHP alert to ensuring its procedures and decisions are lawful and provide an avenue for redress if required. Further, the number of IHPs operating at any point in time would likely swamp the supply in New Zealand of available chairs that are grounded in the RMA and are former or current Judges. And lastly, having Environment Court Judges sitting on IHPs on a regular basis may lead to perceived conflicts of interest where they would find themselves adjudicating consent cases taken in relation to Plans they had themselves chaired (it is noted this situation can arise under the current system of the Court adjudicating on Plan-making and on consent applications). I suggest a better approach would be for the appointing body to be clear in its recruiting and appointing processes of the qualities and competencies it requires of chairs and that it purposely trains and develops a pool of strong and competent chairs.

4.4.3 Scope of powers

There are various techniques that a Panel can employ to undertake a merits assessment of a Plan or Plan change and it would be important that these techniques are available to an IHP. These include the ability to:

- employ "alternative dispute resolution" (ADR) techniques such as mediation and expert caucusing.
- call for further submissions on identified issues part way through the hearings process.
- obtain its own reports, research and expert advice.
- issue procedural minutes.
- issue guidance to submitters as to the Panel's initial view on matters that are likely to usefully inform subsequent stages of the hearing. This needs to be able to extend to issuing draft positions, for example a draft Regional Policy Statement in the context of a unitary plan hearing.

4.4.4 Nature and standing of IHP output

I consider the output of an IHP should be its version of the notified Plan or Plan change, and its reasons for any changes it has made to the notified Plan.

I consider the standing of the IHP version of the Plan should be subject to appeals on points of law (with any merit issue arising from a successful appeal on a point of law being referred back to the IHP), but not to merit appeals. My reasoning for this is as follows.

The objective of the Commission (which I agree with) is that it would be desirable to have a single-stage merit assessment for Plan-making. This objective rules out a merits appeal on an IHP's Plan.

The other possibilities I have considered are:

1. That the promoting council has the ability to accept, reject or modify aspects of the Plan as recommended to it by the IHP, with a merits appeal right for participants with respect to those aspects that are modified (similar to the arrangements for the Auckland Unitary Plan).

2. That the promoting council is able to accept or reject the Plan as a whole, and if it rejects it, the council must send it back to the Panel with reasons for its rejection and recommendations to address its concerns. This would trigger a second round of the IHP process.

The first option has a council, that has not heard the evidence from participants on the notified Plan, making a decision to reverse that made by the IHP which has heard the evidence. The main argument for this approach seems to be that it would allow an appropriate avenue for democratically elected councils to express local interest issues.

However, a primary reason for establishing an IHP and ensuring the IHP appointor is independent of the promoter and participants of the Plan is for the IHP to be positioned impartially to reconcile tensions between the various interests affected by the Plan. It would be inconsistent to then allow one of those interests (albeit a wide and important one) to overrule the results of that independent process. The introduction of a merits appeal right with respect to any rejected or modified sections of the Plan or Plan change would remove the certainty for participants that there will be only one merits assessment (and would erode the desirable incentives on councils and participants that flow from that certainty to put forward their full evidence at the merits assessment of first instance).

Councils would continue to be able to exercise strong influence over the outcome of the IHP process, while staying consistent with the reasons for introducing an IHP into the Plan-making process, by:

- the council(s) setting the nature and scope of changes in the notified Plan (where they are the promoter), obtaining input from stakeholders prior to notification, and ensuring the evidential base and reasons supporting the notified Plan (or Plan change) are sound.
- participating in the hearings process, including responding to issues and new information as they arise.
- having the ability to launch a Plan change if it is dissatisfied with the outcome.

4.5 Possible implications for integrated planning

The majority of RMA Plans in New Zealand are not "combined Plans" (a combined Plan is some combination of Plans that cover more than one territorial area and/or multiple levels in the planning hierarchy, see s80 of the RMA). Unitary Plans are a subset of combined Plans. The relative absence of combined Plans reflects in part the fact that the majority of councils are not unitary bodies. However, it is possible under the RMA for non-unitary councils to produce combined Plans (inclusive of unitary Plans).

In my Auckland experience I was impressed by the extent to which consideration at one level in the unitary Plan influenced outcomes in other levels (both up and down the vertical hierarchy). This occurred in an effort to achieve "vertical alignment", as a unitary Plan review opens up the possibility of ensuring this alignment in ways that are not available in separate reviews of the various Plan layers.

A single merits assessment in Plan-making, undertaken by an IHP independent of all the councils involved in the region, would open a new and possibly more acceptable path for councils to develop combined plans for their region (or regions) than hitherto has been the case. The possible advantages from this would be better integrated planning and management at all levels, lower overall costs from a single Plan review process (rather than numerous Plan reviews undertaken by the various councils), and a more coherent planning result.

4.6 Consenting processes

The approach to Plan-making proposed in this report would not require any change to the current consenting processes under the RMA, other than that the training and qualifying of Commissioners for consent hearings would be transferred to the IHP appointing entity.

However, many of the benefits from having an IHP undertake a single-stage merits assessment for Plan-making may accrue to large and complex consenting projects, and particularly where there are both consenting and Plan changes involved, or where the issue being considered has precedent elsewhere in New Zealand but is outside the particular council's area of expertise (e.g. wind farm consents). I see potential benefit and little risk from extending an IHP and single-stage merits assessment approach to be an option for processing consents. This approach would be similar to that of current Boards of Inquiry.

The applicant is probably the party best placed to choose if an IHP is to be used for a consent hearing.