



# Better urban planning



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Issues paper – December 2015

## **The New Zealand Productivity Commission**

Te Kōmihana Whai Hua o Aotearoa<sup>1</sup>

The Commission – an independent Crown entity – completes in-depth inquiry reports on topics selected by the Government, carries out productivity-related research, and promotes understanding of productivity issues. The Commission aims to provide insightful, well-informed and accessible advice that leads to the best possible improvement in the wellbeing of New Zealanders. The Commission is bound and guided by the New Zealand Productivity Commission Act 2010.

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<sup>1</sup> The Commission that pursues abundance for New Zealand.

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# The issues paper

This issues paper aims to assist individuals and organisations to participate in the inquiry. It outlines the background to the inquiry, the Commission's intended approach, and the matters about which the Commission is seeking comment and information.

This paper contains many specific questions to which responses are invited. These questions are not intended to limit comment. Participants should choose which (if any) questions are relevant to them. The Commission welcomes information and comment on all issues that participants consider relevant to the inquiry's terms of reference.

## Key inquiry dates

Receipt of terms of reference:	30 October 2015
Due date for initial submissions:	9 March 2016
Release of draft report:	July 2016
Draft report submissions due:	September 2016
Final report to Government:	30 November 2016

## Contacts

For further information about the inquiry please contact:

<b>Administrative matters:</b>	T: +64 4 903 5167 E: <a href="mailto:info@productivity.govt.nz">info@productivity.govt.nz</a>
<b>Other matters:</b>	Steven Bailey Inquiry Director T: +64 4 903 5156 E: <a href="mailto:steven.bailey@productivity.govt.nz">steven.bailey@productivity.govt.nz</a>
<b>Postal address for submissions:</b>	Better urban planning inquiry New Zealand Productivity Commission PO Box 8036 The Terrace WELLINGTON 6143
<b>Website</b>	<a href="http://www.productivity.govt.nz">www.productivity.govt.nz</a>



## Why you should make a submission

The Commission aims to provide insightful, well-informed and accessible advice that leads to the best possible improvement in the wellbeing of New Zealanders. Submissions help the Commission to gather ideas, opinions and information to ensure that its advice is relevant, credible and workable.

Submissions will help shape the nature and focus of this inquiry. Inquiry reports may cite or directly incorporate relevant information from submissions. There will be an opportunity to make further submissions in response to the draft report.

## How to make a submission

Anyone can make a submission. It may be in written, electronic or audio format. A submission can range from a short letter on a single issue to a more substantial document covering many issues. Please provide supporting facts, figures, data, examples and documentation where possible. Every submission is welcomed; however, multiple identical submissions will not carry any more weight than the merits of the arguments presented. Submissions may incorporate relevant material provided to other reviews or inquiries.

Submissions may be lodged at [www.productivity.govt.nz](http://www.productivity.govt.nz) or emailed to [info@productivity.govt.nz](mailto:info@productivity.govt.nz). Word or searchable PDF format is preferred. Submissions may also be posted. Please email an electronic copy as well, if possible.

Submissions should include the submitter's name and contact details, and the details of any organisation represented. The Commission will not accept submissions that, in its opinion, contain inappropriate or defamatory content.

## What the Commission will do with submissions

The Commission seeks to have as much information as possible on the public record. Submissions will become publicly available documents on the Commission's website shortly after receipt unless accompanied by a request to delay release for a short period of time.

The Commission is subject to the Official Information Act 1982, and can accept material in confidence only under special circumstances. Please contact the Commission before submitting such material.

## Other ways to participate

The Commission welcomes engagement on its inquiries. Please telephone or send an email, or get in touch to arrange a meeting with inquiry staff.



# 1 The inquiry

## What the Commission has been asked to do

The Government has asked the Productivity Commission to undertake an inquiry into the system of urban planning in New Zealand. The full terms of reference for the inquiry is in Appendix A. The main purpose of the inquiry is “to review New Zealand’s urban planning system and to identify, from first principles, the most appropriate system for allocating land use through this system to support desirable social, economic, environmental and cultural outcomes” (p. 1).

The inquiry will look beyond the current resource management and planning system to consider fundamentally different ways of delivering urban planning and development. The scope of the inquiry includes the types of interventions, the funding arrangements, and the governance frameworks that are currently delivered by:

- the Local Government Act 2002 (LGA);
- the Resource Management Act 1991 (RMA);
- the Land Transport Management Act 2003 (LTMA); and
- elements of the Building Act 2004, the Reserves Act 1977 and the Conservation Act 1987 that relate to land use.

Given the “blue skies” nature of this inquiry, it will not critique previous or ongoing reforms to the legislation that make up the urban planning system. However, the inquiry will consider lessons that can be drawn from the current planning system and its implementation in urban areas.

## The changing nature of urban areas

Urban areas are dynamic, complex places. Land uses and neighbourhoods can change dramatically in response to economic, technological and demographic forces.

One example of this evolution comes from Easterly, Freschi and Pennings (2015), who explored how a single stretch of a New York City street changed over four centuries of development. Easterly, Freschi and Pennings concluded that it is “difficult for prescriptive planners to anticipate changes in comparative advantage, and it is easy for regulations to stifle creative destruction and to create misallocation.” (p. 1)

The town of Petone in Lower Hutt illustrates the diversity of influences that shape urban areas. Box 1 provides an outline of its history, although inevitably many important details and events are overlooked. The transition of Petone – from a Māori village, to the intended site of a major

colonial settlement, to a working-class industrial area, a run-down town, at various times a retail destination, and a desirable residential neighbourhood – show how unpredictable the evolution of our urban areas can be.

### Box 1 **The evolution of Petone**

Prior to European settlement there was a large Te Āti Awa Pa at Pito-one. The New Zealand Company's surveyor, Captain William Mein Smith chose the Heretaunga (Hutt) river valley for the site of their planned settlement "Britannia", and the Company ships began arriving in January 1840. Relations between Māori and the settlers were positive in large part due to the hospitality and mana of local chief Te Puni. The grid street plan drawn up in England was soon abandoned. In March the river flooded the settlement, and a fire and earthquake followed in May. Britannia was largely abandoned by the end of 1840, with the settlers having moved to Pipitea/Thorndon, which Colonel Wakefield had long favoured for the settlement.

In 1847 there were probably no more than 20 settler households left, and it remained almost wholly deserted until 1875. The land was poor quality for grazing, and the Hutt River flooded at least annually. Pito-one Pa, with a population of 136, remained the largest and best-fortified pa in the Wellington area. In 1855 a major earthquake lifted the area, draining a portion of the lower valley.

In 1874 the Wellington-Wairarapa train line opened. A large railway workshop was built in Petone. That same year a butcher, James Gear, began to purchase and lease land around the Petone foreshore for a slaughterhouse. It was attractive for the cheap flat land, proximity to the harbour and railway line, and the small size of the local population to be offended by the waste and smell of the facility. In 1883 the company built a 380m long wharf, demolished in 1901. A large wool mill was established in 1886.

Petone grew rapidly, and was gazetted as a town in 1881. A series of factories and breweries were built. Schools, churches, newspapers, sports and social clubs were established in the 1880s, many of which survive today.

A local farmer, Edwin Jackson, sold portions of his land piecemeal with unsurveyed rights-of-way. The result was that by 1885 there was local concern that Jackson Street was an embarrassing series of dog-legs, of varying width along its length. Jackson Street was extended when the land was bought by the borough solicitor on behalf of the Crown in 1888. Blood and offal went straight into the harbour, attracting sharks, so Jackson built a swimming bath near the waterfront. Plans for a gasworks were abandoned in 1897, and the land that had been earmarked for this use was purchased by the council as a recreation ground. But the council declined to buy Jackson's baths, and a ratepayers poll in 1901 also decided against a purchase, so they were closed.

By the early 1900s Jackson Street was the hub of Hutt Valley commercial activity, with notable stores such as McKenzies, McDuffs and Liebezeits. The Grand Theatre opened in 1916. But Jackson Street's haphazard alignment was still a problem and between 1927 and 1938 the council widened and straightened Jackson Street, with buildings shifted back on rails or demolished.

New Zealand's earliest state houses were built in Patrick Street from 1906, although they were sold in the 1930s. Council chambers were built in 1903 and a town clock in 1913. A new wharf was constructed in 1907. Industrialisation continued: Lever Brothers factory opened in 1919, Sunlight Factory in 1924, and a number of car plants in the 1920s and 1930s. Three out of every four cars in New Zealand were said to come from Petone up until the 1950s. The town produced many successful sportspeople and the Petone Rugby Club numerous All Blacks.

Petone, by local standards, was densely populated and heavily industrialised, ugly, grimy, lively and close-knit, more like an English industrial town than a New Zealand one. (Butterworth, 1988, p. 13)

But from the 1950s the area began to decline, as some industries closed and residents moved to the new suburbs of the Hutt Valley. A number of state housing flats were built from the 1950s to the 1970s on the eastern part of Jackson Street. The Borough Council designated an area north of Jackson Street as an industrial zone, and

[t]he result of this was that no one was allowed to improve their properties, which meant many fell into disrepair and were sold off to developers. It was impossible for young Petone people to get a loan to buy property in their hometown so many left for Wainuiomata or Upper Hutt. The town became a place of rented properties owned by absentee landlords. By the mid seventies and eighties Jackson Street was pretty much derelict. (Johnston, 2015, pp. 93-95)

The Council proposed building a ring road around central Jackson Street, to create a mall in the centre of town at a cost of \$10 million and the demolition of 80 houses. But significant local opposition stopped the project, and many councillors were voted out.

Petone wharf took its last cargo in 1976. The Gear meatworks closed in 1981. Long-established stores closed and the council chambers were demolished in 1986. Deregulation of the New Zealand economy resulted in many of the remaining factories closing. Developers who were demolishing and rebuilding in Wellington regarded Jackson Street as a place of little commercial potential, so its old buildings were left untended. In turn, "this stagnation ironically preserved the historic CBD as a desirable social and economic centre" (Johnston, 2015, p. 177). Petone recovered in the 1990s as industrial land uses gave way to big box retailing in the west of Jackson Street. Petone again became a retail destination, and this benefited the smaller shops along Jackson Street. A burgeoning bar,

café, gallery, and retail sector followed. In 1996 the Historic Places Trust recognised Jackson Street as an Historic Area, but this had no regulatory force. There were a number of battles between local heritage groups, developers and the council over the next decade.

The “character homes” of Petone and its proximity and transport links to Wellington made Petone a desirable residential neighbourhood. A number of apartments were built or converted, consistent with council design guidelines. In 2014 it was announced that many of the state housing flats on the eastern part of Jackson Street were to be demolished, but the Patrick Street cottages survive and are protected. The Grand Theatre, which closed in 1964, was used as an electrical shop, furniture business, and in the 1990s was converted to an apartment complex with boutique shops below. Today, the site of the Gear meatworks is a supermarket, and Petone wharf is a popular fishing location, with fewer sharks than in the past.

*Source:* Butterworth, 1988; Johnston, 1999, 2009, 2015.

A wide range of factors have shaped Petone, including:

- its geography, and natural forces;
- infrastructure investment;
- planning action;
- benign neglect;
- private entrepreneurship;
- wider economic conditions; and
- community action.

Together these influences can produce path dependence in how urban areas evolve, but also significant changes that are not foreseeable. The inherent complexity of urban areas and the diverse range of influences that shape them are central to this inquiry.

The inquiry will seek to understand the role of planning and land use regulation in restricting or enabling those forces on an urban area. It will provide a framework of appropriate or desirable institutions, principles, processes and culture against which current practices and potential future reforms in resource management, planning and environmental management in urban areas might be judged.

# 2 A rationale for planning

## What is planning?

The Commission has adopted the following working definition of planning:

Planning is a group of activities undertaken primarily by local government in order to:

- fulfil their legal responsibilities under legislative frameworks governing land use and the provision and funding of infrastructure, and
- create the rules, plans, policies and pricing regimes used to give effect to these legislative frameworks.<sup>2</sup>

Yet even among planners, there appears to be no agreed definition of “planning” or “urban planning”, and writers have struggled with whether a definition can be provided.

## How does the planning profession define planning?

A fellow of the UK Royal Town Planning Institute (RTPI), Kelvin MacDonald has written that he is “unsure about what planning actually is” (2005, p. 25).

MacDonald favoured two definitions, one informal and one formal:

- that a planner is a “post-modernist, moderator, politician, rationalist, advocate, realist, economist, critic, risk-taker, developer, healer, geographer, sage, critical thinker, environmentalist, urbanist, manager, technocrat, strategist, statistician, negotiator, economist, ruralist, deconstructionist, internationalist, administrator”
- that planning concerns “the better use of land, shaping space, community and safety, improving the quality of the environment, sustainable development, encouraging growth in the economy, housing, improving the historic environment, the best use of resources and quality” (p. 25).

The RTPI summarises the work of planners as “mediation of space – making of place” ([www.rtpi.org.uk](http://www.rtpi.org.uk)).

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<sup>2</sup> In its inquiry *Using land for housing*, the Commission defined the planning system in New Zealand as: legislative frameworks governing land use and the planning and funding of infrastructure; rules, plans, policies and pricing regimes used by local authorities to give effect to these legislative frameworks; and the internal processes used by local authorities to carry out their responsibilities, rules and policies.

The American Planning Association says that planning

is a dynamic profession that works to improve the welfare of people and their communities by creating more convenient, equitable, healthful, efficient, and attractive places for present and future generations.

Planning enables civic leaders, businesses, and citizens to play a meaningful role in creating communities that enrich people's lives.

Good planning helps create communities that offer better choices for where and how people live. Planning helps communities to envision their future. It helps them find the right balance of new development and essential services, environmental protection, and innovative change. (n.d.)

The constitution of the New Zealand Planning Institute (2015) says that

Planning is a continuing, comprehensive process which involves the formulation, implementation and review of lwi management plans, public and corporate policies and proposals on local, regional and national levels concerning:

1. Land, water and air resources
2. Social, economic and cultural development
3. The management of the natural and modified environment. (pp. 4-5)

Adams and Watkins in *The Value of Planning* (2014) say: "A useful way to understand planning is to start by thinking about its broad purposes, in other words, to concentrate first on its ends rather than its means. At a high level, planning can be seen as helping to create the kind of places where people want to live, work, relax and invest, while acknowledging that different people will interpret concepts of place differently according to their own particular interests and experiences. ... planning is a collective endeavour that is about more than the mere sum of individual interests" (p. 9).

Adams and Tiesdell (2010, 2013) define planning as the deployment of policy instruments intended to shape, regulate or stimulate the behaviour of market actors or build capacity to do so, encompassing instruments as diverse as strategies, design codes, public private partnerships, and networking.

Even Adams and Tiesdell's definition of planning is not universal. It says that planners will deploy whatever tool they can in service of the objectives of planning. Alexander (2015) arrives at a similar conclusion:

Vickers' (1968) definition, "Planning is what planners do," looks like a tautology, but it offers a pragmatic answer to the question. One of its merits is that it closes an infinite regress of debate. As an old party in this debate, I have come to the conclusion that the effort to define "planning" is futile. Platonic definitions may make interesting theory, but realism



demands a contingent, not a universal, definition of planning. Vickers' definition's other merit is its validation principle, the social construction of knowledge. Expanding Vickers in the light of this principle: "Planners" are the people who a particular community acknowledges are involved in a process it recognizes as "planning". ...

Mainstream planning theory has some problematic concepts. One is generic "planning" with dubious definitions that resist closure and give planning an unlimited domain.

Another is the prescription of universalizing normative roles for planning, such as "planning as moral action" (Friedmann, 1978) or "planning as a philosophy" (Marcusen, 2000). The validity of any prescription is questionable because generic "planning" is not a normative practice. (pp. 1, 8-9)

A number of definitions proposed are described in terms of the aims or concerns of planning, rather than defining the practice of planning. The wide scope of these objectives presents a challenge in analysing the appropriate use of regulation that planners either exercise or advise on.

## The scope of planning

The practice of planning appears to cover a wide range of activities and objectives. The Commission (2015) identified some examples of the goals of planning in its *Using land for housing* inquiry:

- The spatial plan for the Auckland region (the Auckland Plan) includes 13 strategic directions, 43 priorities, and 74 targets. The goals include a range of activities that are not within the control of local government, including raising vaccination rates, export growth, improving second language fluency, and increasing homeownership rates.
- A number of District Plans include vaguely-worded "urban design" goals or assessment criteria, which have little obvious relationship to externalities and potentially increase uncertainty and costs for developers and property owners. In part, this reflects the poor quality of some central government planning advice such as the *New Zealand Urban Design Protocol*. Some examples include:
  - In some areas of Wellington new buildings should be constructed and placed so as to maintain "the rhythm of buildings along the street edge in areas of consistent character." (Wellington City Council, 2015, Vol.2, Residential Design Guide, p. 7)
  - Similarly, the Christchurch City Plan aims to ensure that "development on corner sites enhances the structure and legibility of the City and incorporates distinctive design treatments." (Christchurch City Council, 2015, Vol.2, Section 11, Policy 11.5.2(b))
  - Hamilton's proposed District Plan includes policies that "development within residential, business and City living areas shall be encouraged to promote a sense of human scale" and that "[s]ympathetic, contemporary design responses to cultural and heritage

character within the surrounding local environment shall be encouraged.” (Hamilton City Council, 2012, pp. 544-545)

These practices appear consistent with the definitions of planning outlined above – that planning is a “movement” with unlimited domain and the object of transforming society. Discussing this scope creep in *Using land for housing*, the Commission (2015) said that

Some of these rules and regulations do not provide a net benefit and increase the cost of housing unnecessarily, and some serve to protect the wealth of incumbents at the cost of non-homeowners. Others apply controls that appear to have little to do with managing negative impacts on others ... A need exists to more closely align the planning system with its fundamental roles, and to reconsider where the boundary between public and private decision rights should lie. (pp. 274-275)

Q1

### What is the appropriate scope of planning?

#### Urban design and aesthetics

The expanding scope of planning means that regulation is increasingly likely to restrict or control land use for aesthetic purposes. Aesthetic considerations are central to planning’s objective of creating “attractive places” that “enrich people’s lives”. Some places are more attractive than others. Buildings that are attractive to neighbours have positive externalities, and ugly buildings have negative externalities. But questions of good design are inherently subjective, and while some aesthetic judgments will receive broad agreement, others are clearly polarising.

Q2

### What is the appropriate role for planning in controlling land use for design or aesthetic reasons?

## A role for government in urban planning

### Market failures

There has long been a tradition of government intervention in markets where there are coordination failures or unpriced activities – that is, where markets do not fully capture the costs or benefits of resource use. Land markets and urban land markets in particular, are prone to problems of “market failure” (Figure 1).

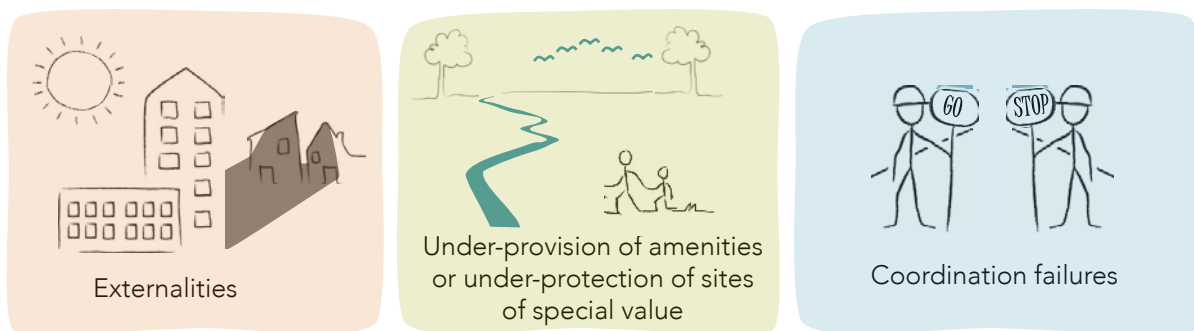
Specifically:

- Land markets are subject to negative externalities which are not priced – the actions of land users affect the amenity of other users – for example, industrial or commercial activities

create noise or generate other pollutants affecting nearby areas, and new residential development can increase traffic congestion, block sun or impede views, reducing the amenity of existing properties. There can also be positive externalities associated with land use that benefit nearby users, which are also not priced in markets.

- The value of some land uses that are un-priced or under-priced in the market can lead to a less than optimal provision of amenities such as parks, reserves, and playgrounds (which can have public good characteristics) or inadequate protection of sites whose value to the community is not fully reflected in its price, such as wāhi tapu sites or heritage areas.
- There can be a failure of coordination – for example, building new infrastructure such as roads, railway lines, electricity lines, and water treatment facilities often involves synchronising the activities of several public and private organisations, resulting in coordination problems that can lead to land not being used efficiently.

**Figure 1 Sources of market failure in the urban environment**



### Land use regulation and coordination of infrastructure planning as a typical response

Government intervention typically includes zoning land into commercial, industrial and residential areas to separate out incompatible land uses. It can also include specific rules such as specifying the maximum height of buildings or the maximum allowable site coverage, and rules protecting or restricting the uses of heritage sites. Zoning allows for the provision of parks and recreational areas near where people live. And co-location of compatible uses is also often undertaken to plan, coordinate and provide for infrastructure, which in many cases is an expensive and sunk investment, especially “trunk” infrastructure (assets that serve a large number of households).

The development of trunk infrastructure is particularly prone to coordination problems because it typically involves coordinating decisions across multiple landowners, local authorities and government agencies. Each of these parties has their own decision-making processes and timeframes, and responds to their own internal priorities and resource constraints. In such a setting, the construction of infrastructure is unlikely without some form of purposeful

intervention to coordinate the decisions and processes of parties within the system and local or central government agencies often fulfil this role.

### **The benefits of agglomeration**

While market failures are thought to be endemic to urban life (Cheshire, 2009; Cheshire & Vermeulen, 2009) there are also economic and social spillover benefits that spring from the concentration of people and firms in urban areas – called agglomeration economies. Significantly, the spatial arrangement of cities is thought to be important to achieve these benefits (Glaeser et al., 1991).

Firms in urban areas benefit from having access to a larger labour market and therefore better chances of finding the right match of skills to meet their needs. And, people have a greater choice of employment and more opportunities for specialised employment, training opportunities and higher wages (NZPC, 2015).

Compared to less densely populated areas, people living in urban areas have access to a larger supply or variety of goods and services. Larger urban areas offer more shops, restaurants, recreational and cultural amenities than rural areas. And urban areas can provide better quality infrastructure (NZPC, 2015).

That is not to say that urban areas only generate positive agglomeration benefits or that there are no disadvantages. As cities get larger, certain negative externalities, especially congestion associated with the use of infrastructure networks, become more acute.

### **The challenge for planning**

Bertaud (2014) argues that the fundamental challenge for city authorities is to reduce the negative externalities associated with agglomeration, without destroying the benefits that are brought by self-organisation.

To do that, they must plan and design infrastructure and regulations while leaving intact the self-organizing created by land and labor markets. (p. 2)

This suggests an important role for planning in urban areas and is the Commission's starting point for this inquiry.

## How should we plan?

### Complexity of cities

There are some that argue, however, that it is impossible to plan at all. Urban planning cannot respond to a complex system which has a very large number of components, many interactions among these components and is inherently dynamic. Portugali (1999) says of cities:

By their very nature as self-organizing systems, cities are unpredictable, uncontrollable and in this respect are unplannable. (p. 230)

Batty (2005) argues that cities are “too complex and diverse to be so controlled, too heterogeneous and responsive to their wider environments to be managed in their totality” (p.515). Batty (2008) emphasised that cities are:

...par excellence complex systems: emergent, far from equilibrium, requiring enormous energies to maintain themselves, displaying patterns of inequality spawned through agglomeration and intense competition for space, and saturated flow systems that use capacity in what appear to be barely sustainable but paradoxically resilient networks. (pp. 770-771)

### Complexity and the practice of planning

Jane Jacobs in *The Death and Life of Great American Cities* (1961) argued that the “pseudoscience of planning seems almost neurotic in its determination to imitate empiric failure and ignore empiric success” (p. 183). She argued that planning as then practiced was

...inevitably top down in contrast to the way cities develop organically from the bottom up, as a product of multitudes of local decisions, adapting environments in countless ways that add variety and diversity, function and meaning to living in cities. (Batty & Marshall, 2012, p. 30)

Jacobs made a case for planning as a science of “organised complexity”.

There remains considerable debate in the planning literature around the ability of current planning paradigms to deal with complex social interactions (see for example Alexander, Mazza & Moroni, 2012). But accepting the complexity of cities, and recognising a need for rules around land use to manage externalities and to overcome coordination problems, Moroni (2010) sets out two conceptions of how regulations should operate. Moroni draws a distinction between

- rules for made order (an organised, designed or planned order), and
- rules for spontaneous order (self-organising, self-adjusting or unplanned order).<sup>3</sup>

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<sup>3</sup> Moroni refers to these as teleocracy and nomocracy respectively.

**Table 1 Theories on rules for an ordered city**

Rules for made order	Rules for spontaneous order
Direct approach	Indirect approach
Presumption of knowledge	Recognition of unavoidable ignorance
Hierarchy	Policentricity
Integration	Competition
Uncertainty as a disadvantage	Uncertainty as an opportunity
Preferred ideas of the good life	No idea of the good life
Instrumentalist view of law (law as a means to concrete ends)	Non-instrumental view of the law (law as a framework)
Administrative state	Rule of law
Ample scope for discretion	Minimal scope for discretion

*Source:* Adapted from Moroni, 2010.

## Rules to deal with complexity

Rules that deal with complexity and allow for spontaneous order, according to Portugali (2012) must be

a set of regulatory planning principles or rules that refer to qualitative local and global relations in the city: between e.g. activities, buildings, people, firms and other agents that operate in parallel in the city, including the city's planner. ...

This way of looking at the city and its planning law differs fundamentally from the conventional plan-based planning law ... the planning law is rule-based and as such refers to qualitative relations between elements. (p. 238)

As an illustration, Moroni (2015) distinguishes between an urban plan (rules made for order) and an urban code (rules made for spontaneous order) in the way in which an externality might be treated.

Plans are collections of 'statements referring to specific situations'.... site Z can be developed within 2015 by building three-storey residential blocks for Y number of people and so on; site W can be developed by constructing an office building X metres high and so on. (p. 256)

The relational rules collected in the urban code refer to typical situations – ones that are repeatable and time-independent – and they are based on qualitative, not quantitative, knowledge. I refer to rules of the following kind: 'No land transformation and no building

development or use may produce externalities of type E, F and D'; 'No building of type H may be constructed within X metres from building of type K'; and so on. These rules define (unacceptable) relationships among elements of the urban fabric. (p. 257)

**Q3**

**Thinking beyond the current urban planning system, how could a new model best deal with the complex and dynamic nature of urban environments?**

# 3 Land and the context for land use regulation in NZ

## Land is valued for many reasons

There are lots of groups who value land in particular uses, including owners and non-owners. For example, environmentalists have an interest in how land is used in New Zealand, your neighbours are likely to have an interest in how you use your land, and Māori have a special relationship with ancestral land regardless of current ownership.

Importantly the concept of “value” goes beyond simply assessing how much income or wealth can be generated from a parcel of land. “Non-market” values are also central to discussions around the value of land and land use.

Economists generally think about the total value of a resource as consisting of three components<sup>4</sup>:

- use value – the value that people derive from using land either directly (such as when land is used for housing) or indirectly (such as when people enjoy ecosystem services)<sup>5</sup>;
- non-use values – the value that people assign to conserving land in its current form for future generations (ie, bequest value), or the value people derive from knowing that land will continue to exist undisturbed (ie, existence value); and
- option value – the value that people place on being able to use land in the future. Whereas use value reflects the value of current uses, option value reflects the desire to preserve opportunities for future use.

To economists, the sum of these three components represents the *total value of a resource*. For some parcels of land (such as a retail property), direct use values will be the greatest contributor to the total value of land. For other parcels (such as native species habitats), non-use values or indirect use values will be the major component of total value.

Adams and Watkins (2014), both professors of urban studies and planning, put forward a similar typology of values in their report *The Value of Planning*. They note:

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<sup>4</sup> See for example, Arrow et al. (1993), Atkinson & Mourato (2006) and Tietenberg & Lewis (2010).

<sup>5</sup> For example, forests act as carbon sinks and prevent soil erosion; and wetlands provide bird habitat and trap nutrients and sediments.



It is important to acknowledge that “value” has different meanings for different people... there are six different types of value that can be enhanced by planning:

- Exchange value, revealed by the price at which buildings are traded.
- Use value, evident in appeal of places to occupiers, reflected in their contribution to productivity, profitability and competitiveness.
- Social value, reflecting the extent to which places help connect people, enhance social interaction, reinforce civic pride, encourage social inclusion and promote neighbourly behaviour, while reducing vandalism and crime.
- Environmental value, shown by the degree of adaptability, flexibility and robustness and reflecting concern for intergenerational equity and biodiversity.
- Image value, demonstrated in the contribution places make to corporate identity, prestige, vision and reputation.
- Cultural value, apparent in the relationship of a place to location and context, and its contribution to the rich tapestry and broader patterns of historical development of the town or city in which it is situated. (p. 12)

For some people land (and the environment in general) has intrinsic value which is unrelated to the value that humans place on it. Intrinsic value is an ethical and philosophic concept whereby the environment is valued "in of itself" or "for its own sake" regardless of any use made by people. The Norwegian philosopher Arne Naess, used the term “deep ecology” to refer to the view that the nonhuman environment has intrinsic value that is independent of human interests (Naess, 1973).

Clearly, people can place a different value on the same parcel of land. Unlike the *price* of land (which is determined in the market), the total value of land includes subjective judgements – based largely on the importance people place on the different components of value as discussed above.

For example, imagine a landowner wants to redevelop a parcel of prime inner-city land currently occupied by a 1930s art deco building. The landowner has property rights which define what can be done with the land, set out in local land use regulations. Yet some people view the building as a piece of architectural history to be preserved, while others view the building as an “eyesore” and look forward to the site’s redevelopment. An effective planning system needs to account for these views in some way. This is important, as any planning decision to conserve the building will impact on the landowner’s ability to redevelop the site. Property rights are discussed below.

Q4

**Thinking beyond the existing planning system, how should diverse perspectives on the value of land be taken into account?**

## Property rights

Property rights form the basis of economic exchange and markets. Private property rights serve essential social and economic purposes, and provide for personal security. The presence of property rights – and their protection and enforcement by the state – creates incentives for work, risk-taking, investment and trade, because it provides individuals with confidence that any future value created will be theirs, and their right to it will be defended by the state and not seized by others. Legal protection of private property rights means individuals can redirect resources away from protecting their property towards more productive activities. It reduces the risk of economic activity and so increases expected returns, in turn enabling more investment. In this way, private property rights serve to advance the wellbeing of individuals and the community.

Despite this, there is little consensus among academics on the precise conception of property or definition of rights in property (Cole & Grossman, 2002). In simple terms, though, ownership of property entails a number of rights (frequently described as a “bundle of rights”) that are provided for by law. The “bundle” includes, for example the right to use, the right to exclusive possession, and the right to dispose of property. Importantly, each right is separable. For each right there is a corollary duty on others to respect the rights of others (traditionally the law of nuisance, discussed in Chapter 5, deals with situations where the exercise of one’s property rights infringes on the property rights of others).

Property rights are not absolute and can be constrained by law. Land use regulation both defines and constrains property rights. The extent of such restrictions can change over time, but where the law restricts existing rights then questions of compensation for the “regulatory takings” arise. Joseph (2001) notes that two contrasting perspectives shape the property rights debate.

One view holds that it is inherently the responsibility of the landowner to take appropriate environmental protection measures. Those who subscribe to this view advocate internalising the costs of environmental protection... The other philosophy holds that landowners have property rights that are constitutional in character, and that environmental regulation is a public responsibility. Those who subscribe to this view argue that the costs of environmental regulation should lie where the responsibility falls – with the community. They advocate the right to compensation where environmental controls impair rights of property ownership. For this school, a resource management regime that passes the burden on to landowners externalises the costs of environmental regulation.

Those viewpoints identify contesting philosophies. Does the RMA negotiate an appropriate balance between these views? Does the Act spread the burden fairly between the

landowner and the community? Is the Act geared to recognise the intrinsic worth of property rights? Does it recognise the economic rationale underlying these rights, as generating private risk-taking, investment and growth? (Joseph, 2001, pp. 2-3)

The Commission (2015) has previously commented that many land use regulations appear to have costs that exceed their benefits. Requiring compensation for regulatory takings can sharpen the incentive on regulators to ensure that the benefits of restricting property rights exceed the costs. Ryan (1998) reports that the creation of partial compensation systems in some Australian states has led to increased support from property owners for stronger environmental protections.

Planning systems can be thought of as a set of institutional arrangements that strike some balance between the rights of property owners to use and manage their land and the interests that others have in that land. This includes the community's interest in environmental outcomes.

**Q5**

**Thinking beyond the existing planning system, how should the property rights of landowners and other public interests in the use of land be balanced?**

## Land law

New Zealand has a statutory and common law framework of land law, including the Crown's radical title to all land in New Zealand, the broad division of land into three categories (general land, Crown land and Māori land), customary title as codified under the Te Ture Whenua Māori Act 1993, the common law doctrine of aboriginal title, and the Torrens system for protecting and registering interests in land.

Boast and Quigley (2011) consider that the principal characteristics of the legal framework relating to land in New Zealand are:

- a) the absence of a formal constitutional protection of property rights;
- b) strong protection of private property rights in land, partly deriving from the common law, but more particularly by means of the "Torrens system", currently implemented by the Land Transfer Act 1952;
- c) a countervailing tradition of partial protection of access to the countryside and rural areas by means of the Queen's chain (marginal strips), Crown/public ownership of the foreshore and seabed, and an elaborate system of national parks and other protected public lands;
- d) cheap and efficient conveyancing and highly effective state guarantee of private titles;

- e) a strong and well-developed law of compensation for public works takings, notwithstanding the absence of formal constitutional protection of property rights;
- f) a strong system of zoning laws, and a corresponding lack of clarity about the acceptable impacts of regulatory control over land (as opposed to direct takings for public works);
- g) a high degree of nationalisation of basic resources (development rights with respect to natural water, geothermal energy, petroleum etc.);
- h) a significant part of the country held under a unique form of tenure with no counterparts in other developed countries (Māori freehold land, which makes up about 12% of the surface area of the North Island);
- i) a significant percentage of the surface area of the country held directly by the Crown (about 50% of the land mass of the country), most set aside for conservation purposes; and
- j) a degree of persistent confusion about the scope and consequences of Māori customary rights under the Treaty of Waitangi and the common law doctrine of aboriginal title.

In f), above, Boast and Quigley note New Zealand's strong system of zoning. This feature, and possible alternatives to it, is the focus of the inquiry. But each of these other characteristics will influence the way that a system of land use regulation operates or could operate in New Zealand.

## The Treaty of Waitangi

An important consideration in the design of any regulatory regime is that the Crown's obligations under the Treaty of Waitangi are appropriately taken into account. In its inquiry into *Regulatory institutions and practices* (NZPC, 2014) the Commission discussed the key principles:

The Court of Appeal has stated that the Treaty of Waitangi enacts a relationship akin to a partnership and its central obligation is to act in good faith and work out answers in a spirit of honest cooperation (*Lands case*). The principle of consultation can be regarded as particularly important. Without it, Māori interests and values can be overlooked when developing and implementing legislation. In 1989 the Court of Appeal found that the principle of good faith "must extend to consultation on truly major issues" (*New Zealand Māori Council v Attorney-General*, 1989). In some circumstances the Crown's obligations will go beyond consultation to include "active steps to protect Māori interests" (*Ngāi Tahu Māori Trust Board v Director-General of Conservation*, 1995).

The partners to the Treaty are the Crown and Māori. An important question is what happens to the Crown's duties and obligations under the Treaty when it delegates its regulatory functions to non-Crown bodies? There is general agreement that the Crown cannot avoid or modify its

Treaty obligations by delegating its regulatory powers or Treaty obligations, and the Crown is under a continuing obligation to ensure that its Treaty duties are fulfilled:

...it is generally accepted that when the Crown statutorily delegates regulatory functions, it retains a responsibility to translate its related Treaty duties into procedural and policy requirements for the local authorities that carry out those regulatory functions. Central government needs to take an ongoing interest in whether the procedural and policy requirements it has placed on local authorities are effectively delivering on its Treaty duties. (NZPC, 2013, p. 177)

## Local government in New Zealand

Most land use regulation and the provision of land-based infrastructure in New Zealand is the responsibility of local authorities under the Resource Management Act 1991 (RMA) and the Local Government Act 2002 (LGA).

The structure and purpose of local government in New Zealand is established by the LGA. Its purpose is to

- 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<sup>6</sup> local infrastructure, local public services, and performance of regulatory functions in a way that is most cost-effective for households and businesses.

New Zealand has two types of local government structures: regional councils and territorial authorities. Territorial authorities are further broken down into three types: city, district and unitary authorities. A unitary authority is a city or district council that also has the functions of a regional council (Figure 2).

All councils have wide powers of general competence. But territorial authorities and regional councils have distinct functions and responsibilities.

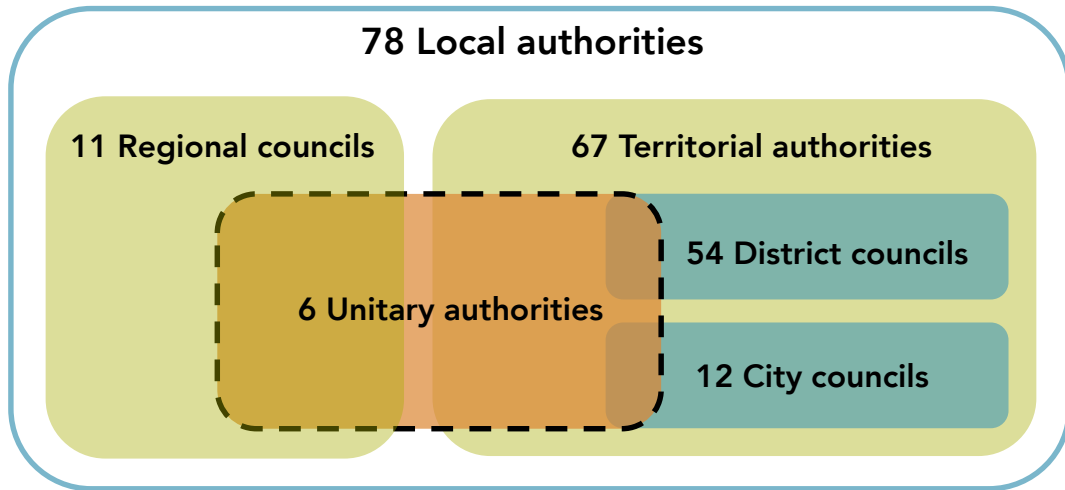
- Regional councils' responsibilities include regional land transport planning, regional emergency management and issuing RMA consents and developing regional policy statements to manage the effects of using freshwater, land, air and coastal waters.
- Territorial authorities include city councils, district councils and Auckland Council (which is also a unitary authority). Their responsibilities include providing local infrastructure and controlling the effects of land use (including hazardous substances, natural hazards and indigenous biodiversity), noise, and the effects of activities on the surface of lakes and rivers.

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<sup>6</sup> In the Act, good-quality, in relation to local infrastructure, local public services, and performance of regulatory functions, is further defined to mean infrastructure, services, and performance that are: efficient; effective; and appropriate to present and anticipated future circumstances.

There is a need to consider how regulatory responsibilities – regulatory policy, standard setting and implementation – are allocated between central and local government (and between territorial and regional authorities). The Commission developed principles for allocating regulatory roles centrally or locally (NZPC, 2013).

**Figure 2** Types of local authorities



*Notes:*

1. Auckland Council is a unitary authority and a territorial authority but it is not a city council or a district council.

**Q6**

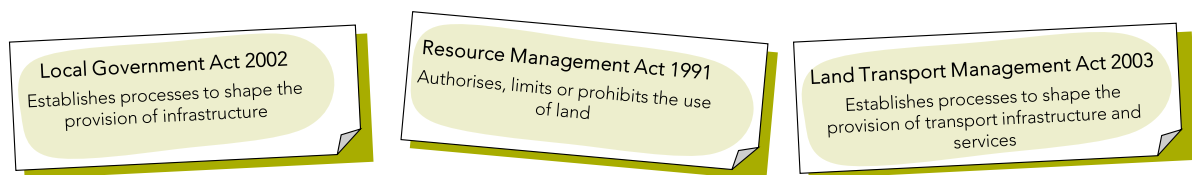
**How does the allocation of responsibilities to local government influence land use regulation and urban planning? Thinking beyond the current planning system, what allocation of responsibilities to different levels of government would support better urban planning?**

# 4 The current planning system

The current planning system has evolved over time. In considering whether and where change is needed, it is useful to assess the salient features – the strengths and weaknesses – of the system.

The planning and development system is governed by three main statutes – the Resource Management Act 1991 (RMA); the Local Government Act 2002 (LGA); and the Land Transport Management Act 2003 (LTMA) (Figure 3). The following sections describe the main processes under each statute.

**Figure 3 Major urban planning statutes**



## Resource Management Act 1991 processes

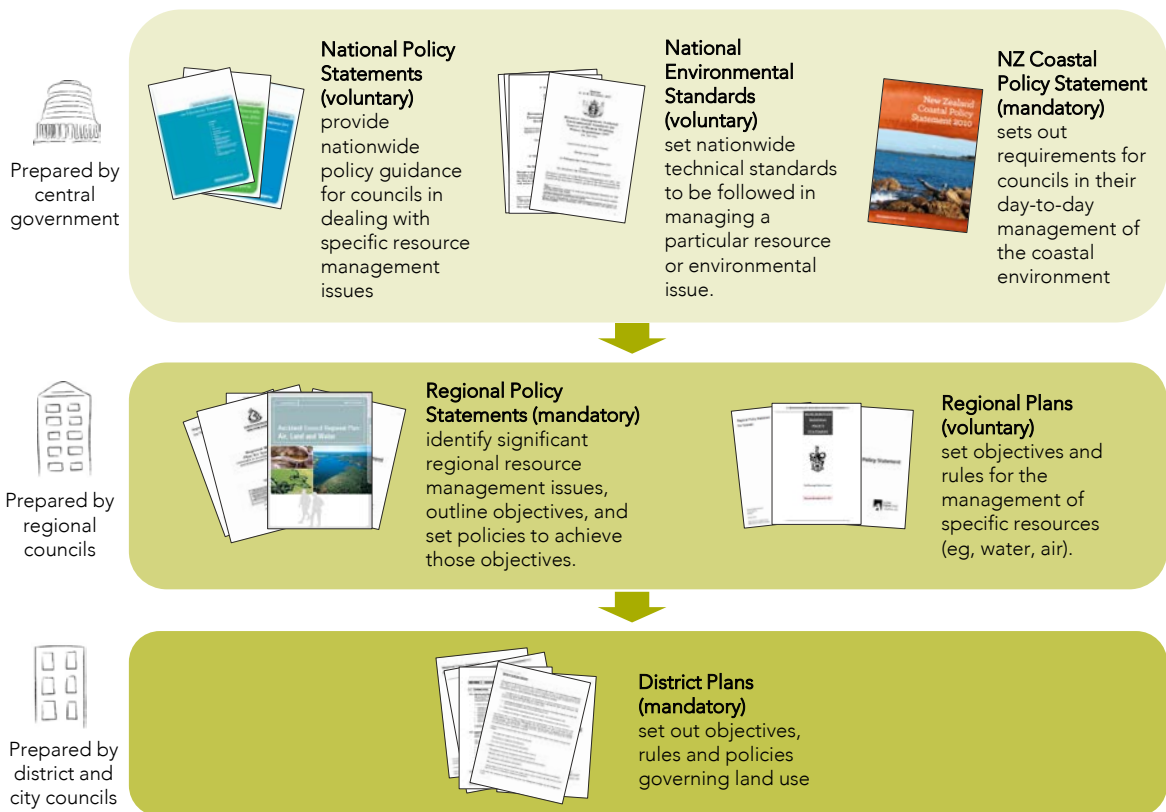
The RMA creates a hierarchy of plans and standards, starting with National Policy Statements (NPSs) and National Environmental Standards (NESs) at the top, flowing down to District Plans (Figure 4).

Each plan must give effect to those above it – so a District Plan must give effect to the relevant Regional Policy Statement (RPS), and both the District Plan and RPS must give effect to NPSs, NESs and the NZ Coastal Policy Statement.

District Plans are the main tool used to regulate land use, although other plans may affect particular types of development (eg, construction that affects a significant water supply may need to comply with a regional water plan). In particular, District Plans lay out whether or not a particular development activity can be carried out, and the sorts of regulatory tests that must be met before consent is issued. A common way of defining the sorts of activities that can be carried out is to set zones – that is, areas covering multiple sections of land, where particular activities are controlled in different ways depending on their designation (eg, “residential”, “industrial”, and so on). Each territorial authority sets its own rules and zones.

District Plans also set out the requirements that developments must meet to gain resource consent or be exempt from consenting requirements. These requirements typically include such aspects as requirements to set buildings back from the street by a minimum distance, minimum lot sizes, building height limits and restrictions on altering heritage buildings or areas. Requirements vary between cities' Plans, and within a single city's Plan – for example, minimum lot sizes are often larger in zones at the fringe of city than those closer to the centre.

**Figure 4 Hierarchy of RMA plans**



## Local Government Act 2002 processes

Section 10 of the LGA sets out the purpose of local government, and includes specific reference to the important role that local government has in meeting the infrastructure and service needs of both current and future residents:

- (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.



The Act also sets out a range of planning requirements relating to the provision of infrastructure that local authorities are required to undertake (Table 2).

**Table 2 LGA planning processes**

Requirement	Main purpose
Long-Term Plan (LTP)	All local authorities are required to prepare an LTP every three years, covering a period of at least 10 financial years. LTPs set out the local authority's planned activities and expected performance, the community outcomes it is pursuing, and forecast revenue and expenditure. These tasks are specifically required for: water supply; sewerage and the treatment and disposal of sewage; stormwater drainage; flood protection and control works; and roads and footpaths.
Infrastructure strategy	Local authorities are required to prepare a strategy to plan the maintenance and improvement of infrastructure assets, along with investment in new infrastructure, over a 30-year timeframe. The infrastructure strategy provides thinking and planning in terms of: <ul style="list-style-type: none"> <li>– the level of infrastructure investment needed to provide for community growth;</li> <li>– managing the timing of investment for growth, to avoid constraints on growth from limited infrastructure capacity while minimising the costs of underused capacity;</li> <li>– the level of investment needed to replace, renew or upgrade existing assets;</li> <li>– how to balance service-level expectations with affordability in the context of anticipated demographic changes such as depopulation and ageing; and</li> <li>– the level of investment needed to improve services.</li> </ul>
Asset management plans	Asset management plans are not mandatory in a prescriptive format, however the Local Government Act (2002) states that local authorities should "ensure prudent stewardship and the efficient and effective use of its resources ... including by planning effectively for the future management of its assets" (s 14 (1)(g)).  This provision reflects the fact that preparation of asset management plans is good practice, but stops short of introducing a mandatory requirement for local authorities to develop asset management plans in a prescribed format.
Annual plan and annual report	These documents set out and report on planned activities, revenue and expenditure for a financial year. Annual reports must contain information (such as the value of acquisitions made during the year) about core infrastructure assets.

Source: DIA, 2014; SOLGM, 2014.

The LGA allows territorial authorities to set bylaws for one or more of the following purposes:

- protecting the public from nuisance;
- protecting, promoting, and maintaining public health and safety; and
- minimising the potential for offensive behaviour in public places. (s. 145)

## Land Transport Management Act 2003 processes

The LTMA governs the funding of major transport projects and services, including road policing, public transport, and maintaining and developing the state highway network and local roads. The LTMA was amended in 2013, with several changes made to the Act's planning and funding framework. These changes sought to make the legislation more streamlined, simpler and less prescriptive (Ministry of Transport, 2015).

Through its Government Policy Statement (GPS) on Land Transport, central government sets the overall objectives and long-term results sought over a 10-year period, and expenditure ranges for each class of transport activity.<sup>7</sup> The New Zealand Transport Agency (NZTA) then develops a 3-year National Land Transport Programme (NLTP), which gives effect to the GPS and outlines the activities that will receive funding from the National Land Transport Fund. These activities are selected from proposals prepared by regional land transport committees, which include representatives of NZTA and the relevant regional council and territorial authorities.<sup>8</sup>

Activities proposed for funding must form part of a Regional Land Transport Plan (RLTP). A RLTP sets out the region's land transport objectives, policies and measures over a ten-year period. RLTPs must include transport priorities; a financial forecast of anticipated revenue and expenditure; all regionally significant land transport expenditure to be funded from sources other than the national land transport fund; and an identification of activities that have inter-regional significance.

Once the NLTP is confirmed, local authorities can seek funding for activities carried out in their area. The National Land Transport Fund typically does not cover the full cost of these activities. Recent NZTA decisions mean that the National Land Transport Fund will meet an average of 53% of costs across the country. Local authorities contribute the rest, from sources such as rates, development contributions and passenger fares.

## Features of the current planning system

In the course of its previous inquiries and in reviewing commentary and writing about the current urban planning system, the Commission has identified a number of salient features,

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<sup>7</sup> The 2015/16 – 2024/25 GPS notes 10 transport activities: state highway improvements; state highway maintenance; local road improvements; local road maintenance; public transport; walking and cycling improvements; regional improvements; road policing; road safety promotion; and investment management.

<sup>8</sup> Auckland Transport plays this role in Auckland.

discussed below. How these features are managed is likely to be important in the design of a new urban planning system and the Commission welcomes submissions on the questions posed.

### **Consolidation of legislation and processes but poor integration**

The introduction of the RMA consolidated the legislative landscape. The Act repealed 59 statutes and modified 50 regulations (Frieder, 1997, p. 17). A multitude of planning laws prior to the RMA created high compliance and transaction costs. Anthony Hearn, who was commissioned by the Government in 1987 to review the Town and Country Planning Act noted the frustration expressed by many submitters about:

...the duplication of cumbersome procedures, the time and expense involved in the obtaining of multiple consents and the position of being involved with different viewpoints and conflicting responsibilities of different and diverse consent authorities...In a thorough and detailed submission from a larger company involved in marina developments, the company explained that in its experience...consents are usually required under the Town and Country Planning Act 1977, Water and Soil Conservation Act 1967, Harbours Act 1950, special Act or Order in Council for reclamation, Marine Pollution Act 1974, Local Government Act 1974. It is noted some of the consent procedures can be run in parallel but others must be sequential. Each involves a separate adjudicating authority different in formation or requirements and procedures with different rights of appeal (if any). (p. 169-70)

The RMA brought multiple processes under one law with a common purpose, reduced the number of decision makers, and removed "arbitrary differences in management of land, air, and water" (Palmer, 2013, p. 8).

Even among critics of the RMA, this rationalisation of laws was considered a welcome development. In 1996, Owen McShane wrote:

There is general agreement that the "omnibus" nature of the Act has improved the project planning environment for major players. Instead of having to go through several separate application procedures, major projects are now dealt with through a single process and under a single Act. Before the RMA, an applicant proposing a major project, such as a power station or major industrial plan in the countryside, may have survived several specific consent procedures only to fail 'at the last hurdle'. These late failures represented a major waste of human and monetary resources. No one wants to revert to that particular past. (pp. 38-39)

Yet the Commission (2015) found that the current planning system is complex, and suffers from poor integration (Figure 5). This makes it difficult to effectively and efficiently coordinate decisions around land use, transport services and infrastructure provision.

The New Zealand Council for Infrastructure Development (2015) highlights a number of problems with the current system, such as:

- the absence of strong linkages between the various planning processes required under the three main Acts, and where links do exist, “these have different weightings and are often inconsistent between the statutes”
- “a lack of common purposes and goals across the planning framework” and an unclear “hierarchy between the RMA, LTMA and LGA plans”;
- “a lack of consistency of timeframes required by the various plans and the time-phases in which the plans must be developed”;
- “rigid, overlapping and time consuming consultative requirements”;
- “an absence of critical national policies under the RMA and LTMA [which] has given rise to inconsistency and differing approaches between regional and local plans.” (pp. 34-39)

For example, to make a particular area of land ready for development – setting planning controls, installing trunk infrastructure, providing sufficient capacity on the roading network – local authorities must take decisions through at least three distinct processes, each with different timeframes and implementation speeds. One process can lag behind another, there can be multiple duplicative consultation processes, and the requirement for decisions taken in one process to support each other is weak. This can lead to uncertainty about the likelihood and timing of new development capacity being made available.

A Ministry for the Environment (MfE) discussion paper commented that the

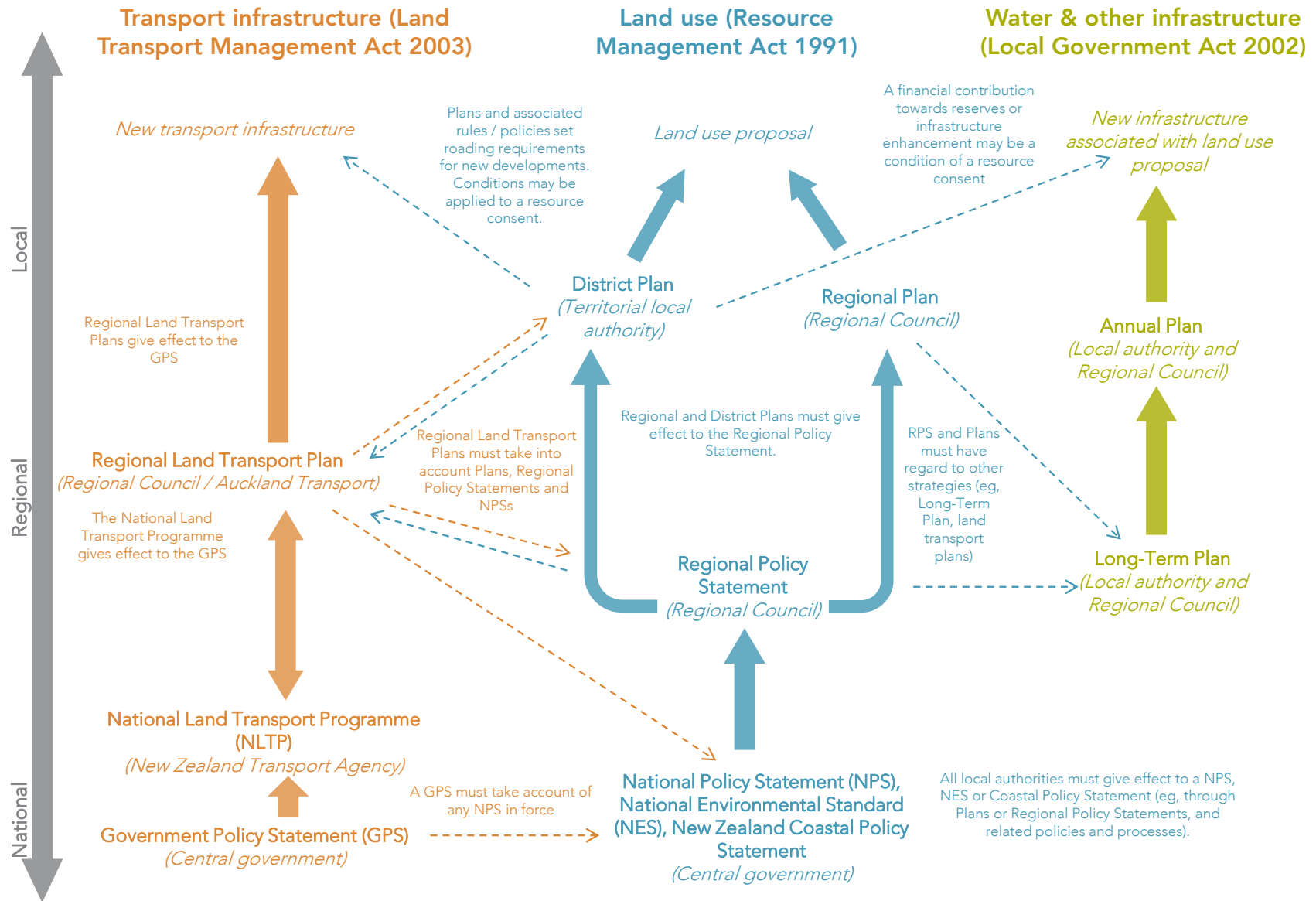
[t]hree planning Acts were never designed to work together as a complete urban planning system. Each Act, its plans and decision-making are all subject to different legal purposes, processes and criteria, and operate over different time frames. This results in duplication and lack of clarity, and demands considerable time and resourcing from all parties involved...The complex urban planning system also creates a lack of alignment between spending, policy, regulation and development. (2010, pp. 9–10, 11)

Webb Henderson (2015) identify a number of barriers to integrated land use and transport planning in New Zealand, including “independent legal structures, different policy drivers and value judgements, a lack of clarity around the role of central and local government, and pragmatic difficulties” (p. 7).

**Q7**

**How can an urban planning system better integrate land use regulation and infrastructure planning?**

**Figure 5** Stylised presentation of the planning and development system

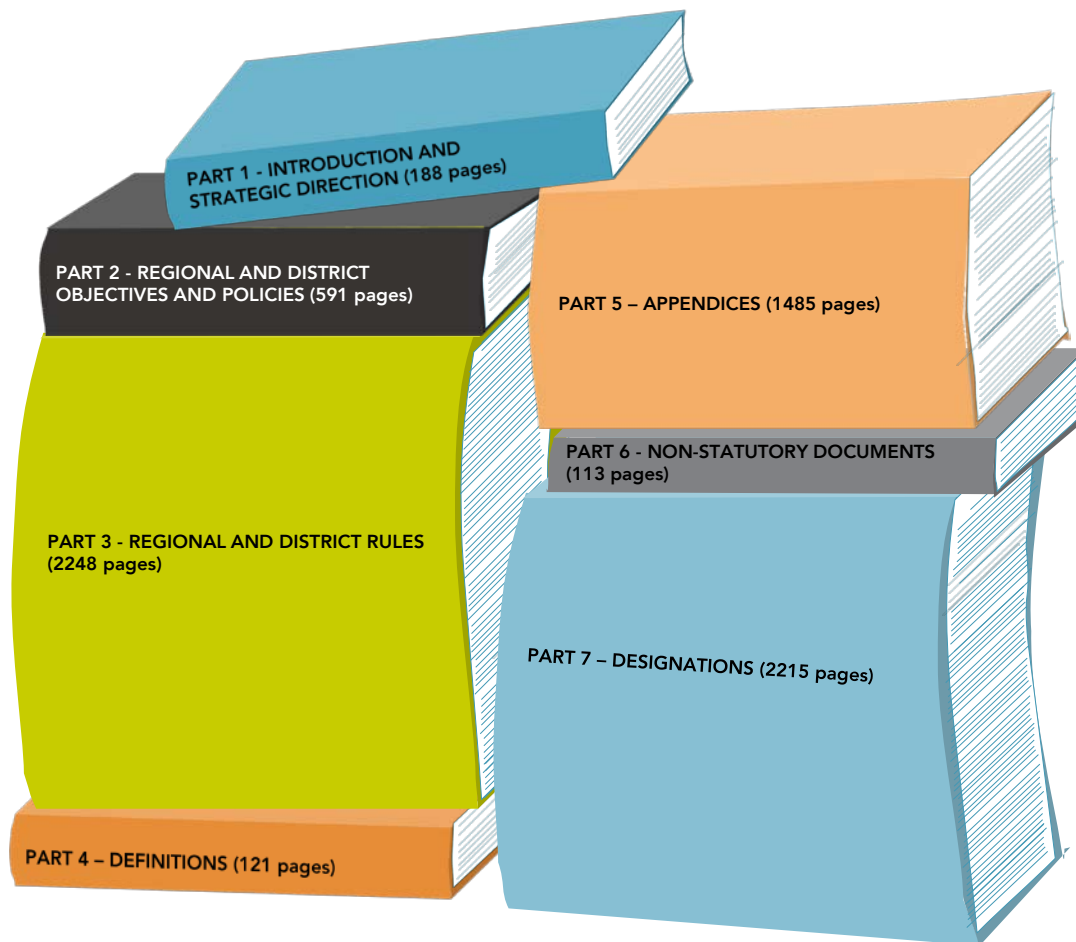


## Complicated and unclear legal frameworks and land use rules

Complicated and unclear legal frameworks are evident in the purposes of key statutes and the number of plans produced. For example, in its benchmarking of Australian planning systems, the Australian Productivity Commission concluded that the “regulations and agencies involved in planning, zoning and development assessments constitute one of the most complex regulatory regimes” in operation (APC, 2011, p. xxvi). Similar assessments could be made of New Zealand’s planning system.

Another complication is the length of plans produced under the planning system. The Proposed Auckland Unitary Plan (as notified on 30 September 2013) is 6 961 pages, while Hamilton City Council’s District Plan is 1 061 pages.

**Figure 6 The Proposed Auckland Unitary Plan**



Founders of the RMA have noted the proliferation of plans was not envisaged when reforms were introduced. Joan Allin, who was one of the officials on the Resource Management Law Reform “Core Group” later commented:

The RMA was to pull them [different processes] into one Act so that you could have integrated management. The thing that I think is ironic is that a number of regions now have a water plan, an air plan and so on. They were separate, they got pulled into one document, but when you go to a region – maybe it makes sense – it gets separated again. (quoted in Young, 2001, p. 48)

Sir Geoffrey Palmer (2015) has similarly argued that there are “are simply too many plans. They are too diverse and they are too complicated. This has involved local authorities in considerable duplication of effort.”

Moroni (2010) argues that complicated rules are the inevitable consequence of governments trying to control complex social systems through “top-down” approaches. He argues that as the complexity of the system becomes apparent, the traditional response of planning regulation has been to add more rules in an effort to bring order to the complex system. Moroni contrasts this approach with one based on basic and plain rules that refer to general types of situations or actions, not to specific ones. See Chapter 2.

Q8

**Are complicated rules needed to control complex social systems? What are the alternative approaches for dealing with complexity?**

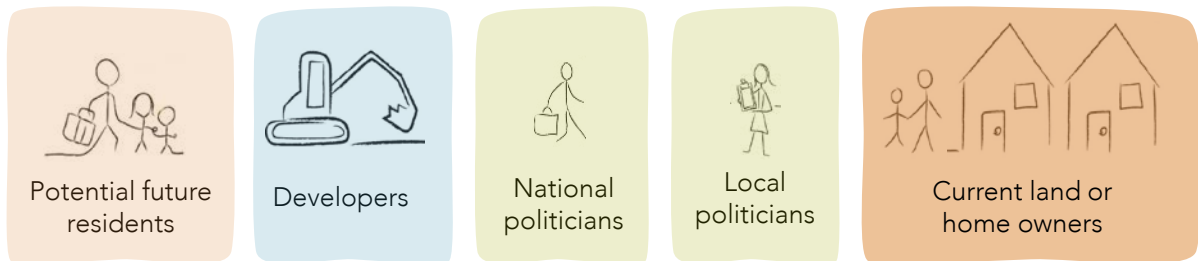
### **Greater consultation but outcomes skewed to favour some groups**

Expectations of greater community participation in local affairs has grown since the 1970s (NZPC, 2015). Provision for local residents to be consulted and object to planning decisions were enshrined in the local government and planning Acts of the 1970s, and expanded in the RMA and the LGA. The RMA introduced extensive public consultation and participation requirements. Interested people could make submissions on proposed Plans or Plan changes and on resource consent applications, be heard at council hearings concerning plans and consents, and could appeal certain matters to the Environment Court. Councils had to consult with specified people and groups when making plans and policy statements.

In its 2013 report *Towards better local regulation*, the Commission found that increasing diversity and greater community expectations present difficulties for local authorities in reconciling different community interests and making decisions. It noted that:

Diverse communities imply diverse needs. New Zealand’s communities have diverse cultures, age profiles, interests and expectations of local government. This poses challenges for local authorities and the way in which they engage and consult with people on the issues that affect them. (NZPC, 2013, p. 52)

A diverse range of participants operate within the planning system, each with their own objectives, incentives and behaviours (Figure 7). The aspirations of potential future residents are also important. These incentives may be aligned but may also diverge and conflict.

**Figure 7 Actors in the planning system**

In its inquiry into *Using land for housing* (2015), the Commission noted the risk that local democratic processes and consultation processes on planning matters can be captured by particular parts of the community in a way that skews urban outcomes in their favour. In particular, homeowners have a range of incentives that may induce them to oppose developments that could negatively affect the amenity and value of their homes and that may involve new infrastructure spending and higher rates. As a result, homeowners often use their political influence with local councils to secure land use regulation and spending decisions that restrict the supply of land for housing and limit expenditure on the infrastructure required to support urban growth.

The use of tools such as statistically robust and representative surveys can help to offset the tendency of planning engagement processes to be skewed towards particular segments of the community. But the Commission also found that some of the statutory requirements around consultation processes were outmoded and inhibited more innovative and potentially effective methods. Smarter pricing of infrastructure, which recovers the cost from those who benefit from new infrastructure, can go a long way to reducing opposition to expenditure on new infrastructure.

Involvement by the public in the planning system is often seen as being important for providing necessary information and legitimacy to decisions, particularly where these decisions are political in nature (eg, Dawson, 2013). The RMA was designed on the basis of “[o]pen public participation with no restrictions on standing” (Gow, 2014) and the LGA also puts a heavy emphasis on public consultation.

Public participation is an integral element of the RMA. The proposition that increased public involvement in resource management processes results in more informed decision making, and ultimately better environmental outcomes, has been described as a ‘founding principle’ of the RMA by the Court of Appeal in *Murray v Whakatane District Council*. (Nolan, 2007 pp. 121-122)

A counter-argument, however, is that high expectations of requirements for public participation unnecessarily slow down planning processes and creates opportunities for discriminatory or anti-competitive behaviour. This concern is often raised in the context of third party rights of objection or appeal (ie, where people other than the applicant or consent authority can object or appeal decisions).



Commentators have often questioned the motives behind organisations seeking to be heard in opposition to applications. These motives will sometimes be premised on self-interest rather than those of the public, the community, or the environment. Claims may be brought to protect the property interests or trade position of the members of the organisation. ... The risk of capture by groups motivated by self interest is compounded by the risk of vexatious litigants. (Nolan, 2007, p. 140)

The RMA has afforded wide scope for public participation in the planning system, although it has narrowed in some areas with legislative amendment.

The level and nature of public participation in urban planning processes, and standing to appeal decisions, can be a major influence on urban and environmental outcomes. The Commission is interested in submitters' views on how public participation and consultation should be provided for in a new urban planning regime.

Q9

**What principles around consultation and public participation should the Commission consider in the design of a new urban planning system?**

Q10

**Thinking beyond the existing planning system, what should be the appropriate level of consultation in making land use rules or taking planning decisions?**

## Greater recognition of the Treaty of Waitangi and of Māori interests

A key goal behind the introduction of the RMA was to provide better recognition and protection of Māori interests. Gow (2014) says that the Act was intended to:

- Identify and protect customary rights;
- Take into account the values and interests of Māori including through reflecting the principles of the Treaty of Waitangi in decisions;
- Provide ways and means for Māori interests to be represented in the development of plans and consent applications. (p. 9)

The RMA gives effect to these objectives in a number of ways. Sections 6 and 7 of the Act, which lay out issues of national importance and other factors that people exercising powers must have regard to, include requirements to:

- recognise and provide for "the relationship of Māori and their culture and traditions with their ancestral lands, water, sites, wāhi tapu, and other taonga",

- give particular regard to kaitiakitanga, defined as “the exercise of guardianship by the tangata whenua of an area in accordance with tikanga Māori in relation to natural and physical resources; and includes the ethic of stewardship.”

The recognition of kaitiakitanga is a particular feature of the current system. It recognises that the many different ways in which land is valued by people (as discussed in Chapter 2) can include a kinship relationship, which creates obligations for Māori of guardianship or protection of land.

## Box 2 Kaitiakitanga

In the Māori world people can have a kinship relationship with land that creates obligations of guardianship or protection.

The Reverend Māori Marsden explains the meaning of Kaitiakitanga.

The term ‘tiaki’ whilst its basic meaning is ‘to guard’ has other closely related meanings depending upon the context. Tiaki may therefore also mean, to keep, to preserve, to conserve, to foster, to protect, to shelter, to keep watch over. The prefix ‘kai’ with a verb denotes the agent of the act. A ‘kaitiaki’ is a guardian, keeper, preserver, conservator, foster-parent, protector. The suffix ‘tanga’ added to the noun means guardianship, preservation, conservation, fostering, protecting, sheltering. (Marsden, 1992, p. 15)

The Waitangi Tribunal explains that kaitiakitanga forms one of two foundational and interlinked concepts within Māori thinking on environmental management (the first is whanaungatanga—the organisation of concepts and relationships through whakapapa or familial connections).

Kaitiakitanga is really a product of whanaungatanga – that is, it is an intergenerational obligation that arises by virtue of the kin relationship. It is not possible to have kaitiakitanga without whanaungatanga. In the same way, whanaungatanga always creates kaitiakitanga obligations. (Waitangi Tribunal, 2011, p.105)

Because the relationship Māori have with the environment is described in terms of whakapapa, the claim that particular Māori groups have to kaitiakitanga is based on this sense of relationship. In Māori cosmology, there is little or no distinction between human ancestors and whenua, maunga, or awa from which one descends (or to put it in a cultural context, can whakapapa to).

*Source:* Marsden, 1992; Waitangi Tribunal, 2011.

Consultation with tangata whenua is mandatory when developing plans and regional policy statements, and the RMA lays down requirements for consulting with iwi authorities. In preparing plans and policy statements, councils must take into account planning documents recognised by an iwi authority.

Problems with the current consultation arrangements – particularly that iwi tend to be inundated with requests for consultation on minor resource consents, with the issues of real importance to iwi getting lost – are recognised in the proposed amendment to the RMA allowing for iwi participation arrangements.

The purpose of an iwi participation arrangement is to provide an opportunity for local authorities and iwi authorities to discuss, agree, and record ways in which tangata whenua may, through iwi authorities, participate in the preparation, change, or review of a policy statement or plan in accordance with the processes set out in Schedule 1. (Resource Legislation Amendment Bill Explanatory Note, 2015)

The proposed amendment will require that, when local authorities start the planning process, they sit down with iwi and come to an agreement about the way in which iwi will be able to be included.

The LGA also places obligations on local authorities to facilitate participation by Māori in council decision-making processes. These include requirements to:

- provide opportunities for Māori to contribute to decision-making processes;
- establish and maintain processes for Māori to contribute to decision making;
- consider ways in which they can foster the development of Māori capacity to contribute to decision-making processes;
- provide relevant information to Māori;
- take into account the relationship of Māori and their culture and traditions with their ancestral land, water, sites, wāhi tapu, valued flora and fauna, and other taonga; and
- set out in its long-term plan the steps that the local authority intends to take to foster the development of Māori capacity to contribute to decision-making processes.

Although the expectations on local authorities to include Māori in planning processes have increased, there has been criticism of the performance of some councils and of the regulatory regimes as a whole. Gow (2014) writes:

Māori participation has definitely improved and increased, though there is a continual backlash against this.... Ideas like transfer of powers and co-governance have had little uptake (p. 10).

Q11

**How could a new planning system provide recognition and protection of Māori interests?**

Q12

**What design features of a new urban planning system are needed for the Crown to meet its duties and obligations under the Treaty of Waitangi?**

### **A clearer focus on the environment but a lack of focus on urban issues**

The RMA was designed to place the environment and the concept of “sustainable management” at the centre of natural resources law.

The RMA defines “environment” as including

- 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.

In turn, “natural and physical resources” are defined as including “land, water, air, soil, minerals, and energy, all forms of plants and animals (whether native to New Zealand or introduced), and all structures”. “Amenity values” are “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” (s. 2).

Frieder (1997) cites the RMA as an example of ‘integrated environmental management’, which she defines as “a way of thinking about the environment as a whole in a way that recognises the links between elements of the whole” (p. 17).

Several commentators have commented on the RMA’s limited focus on urban and social planning (Perkins & Thorns, 2001; Memon & Gleeson, 1995; Perkins et al., 1993). Indeed, the RMA’s heavy emphasis on the biophysical environment was criticised by commentators at the time of its enactment as creating potential difficulties for urban social and economic planning.

The statute represented compromise between the various actors involved, namely central and local government, property developers, environmentalists, local communities, and planners. Tensions therefore arose quite early in the implementation process as the divergent agendas became reflected in the district plan formation and objection process. (Perkins & Thorns, 2001, p. 652)

Gow has said:

The RMA was designed more for natural resource management rather than urban planning where highly modified landscapes predominate. There should have been and still should be distinguishing and probably somewhat different sets of principles for urban planning and design. (2014, p. 8)

Some have argued that the problems lie in implementation, rather than the legislation. Munro and Beattie (2014) suggested that some local authorities have interpreted the law too narrowly:

Section 5 [of the] RMA is of course the apex and most important section of Part 2. It emphasises the need to enable social, economic and cultural wellbeing, as well as health and safety. In making this message, the Act discusses the natural and physical environment, not the natural and the biophysical environment as seems to be read by many. One can further look to the definition of 'environment' in s.3, RMA. It emphasises people and communities, and physical resources (which includes structures like buildings, bridges and roads). This inescapably includes the urban environment...

If there is a practice problem, it may be that some district plans stray into the dogma that avoiding, remedying or mitigating an adverse environmental effect is alone sufficient to promote sustainable management, or is inherently more important than enabling social, economic or cultural wellbeing (positive effects in simple terms). Such is not in our view a correct interpretation of the RMA. (p. 17)

### **Administrative, compliance and economic costs**

In 2012 the Productivity Commission conducted two surveys about local government regulation, one aimed at eliciting the views of councils, and the other targeted at 1 500 businesses from a cross section of industries (NZPC, 2012a). The surveys identified that the urban planning system is the source of significant costs, both from the perspective of local government implementation, and in terms of compliance for businesses:

- Around 40% of city councils, ranked "Planning, land use or water consents" as their most important regulatory function in terms of staff time and effort (the remaining 60% of city councils rated building and construction consents as their most important regulatory function).
- Nearly half of all businesses (47%) selected "planning, land use or water consents" as one of the three areas of regulation that has the greatest impact on their business in terms of time, effort and money.

Comparative research conducted by Koźluk (2014) suggests that New Zealand's environmental policies create relatively high barriers to entry and competition. Koźluk notes that:

- several of the countries that are recorded as having environmental policies with a relatively low economic burden are perceived as having relatively stringent environmental policies (eg, Austria, the Netherlands, Switzerland and the United Kingdom);

- a number of countries record a relatively high economic burden despite having environmental policies that are not particularly stringent (eg, Hungary, Israel, Italy, Greece, Portugal and Spain).

This finding does not suggest that the environmental protections should be watered down, rather that environmental policies could be designed in a way that results in lower administrative costs (for example through the use of single contact points and integrated permits) and that avoids creating barriers to entry (for example by avoiding policies that treat new entrants differently from incumbents). Figure 8 provides data on the administrative and compliance costs of environmental policies.

**Figure 8 Administrative and compliance costs due to environmental policies**



Source: Koźluk, 2014.

**Q13** Thinking beyond the current urban planning system, how should a new model be designed so as to avoid unnecessary administrative, economic and compliance costs?

## Poor alignment of interests

A major theme of the *Using land for housing* report was the divergence between national and local interests in the benefits of facilitating additional growth in our largest and fastest-growing cities. Where cities fail to meet demand for land for housing, the Commission concluded that there are a range of negative social and economic consequences. Managing these consequences is in large part the responsibility of central government; for example, it is government that ultimately has to manage the risks of macroeconomic instability, make larger payments through the accommodation supplement, or identify and pay health costs that arise from illness associated with overcrowding. And it is the nation that misses out on the productivity benefits of agglomeration.

In its inquiry into *International freight transport services*, the Commission found that

[c]entral government plays an important role in providing direction on issues that involve balancing local values with regional or national benefits. Without clear signals from central government, national benefits and costs may be assigned a lower priority during the planning and consent process – resulting in a potential reduction in the overall wellbeing of society. (2012b, p. 151)

Theories about the level of government where decisions should be taken emphasise that the jurisdiction of decision making should correspond to the jurisdiction of effects (NZPC, 2013; Oates, 1999). In *Towards better local regulation*, the Commission said that “[w]hen the costs and benefits of a particular outcome spill over outside local boundaries, then decision makers that cover the spillover should have control over the regulatory policy” (2013, p. 120).

The RMA is a highly devolved framework. In a case where the benefits are national and the costs local, one potential solution would be to shift decision making to a national level. For example, central government may be better able to balance the interests of existing homeowners against renters, those in temporary or other irregular accommodation, and those seeking to purchase a first home, in part because of its broader democratic mandate.

Kerr, Claridge and Milicich (1998) argued that while the legal/institutional structure of devolution in the RMA is basically sound, effective devolution requires careful attention to the relationship between central and local government, as well as to where decisions are made.

**Q14**

**Thinking beyond the current planning system, how should national interests in planning outcomes be recognised and taken into account? What are the national interests that should be recognised?**

## Outcomes of the current system

The terms of reference for this inquiry require the Commission to examine how environmental and urban development outcomes have changed over the last twenty years.

### Environmental outcomes

Gow (2014) highlights a number of improved environmental outcomes from the RMA, including the elimination of raw sewage and raw industrial discharges into water, better general management of point source discharges into water, higher air quality, and improving marine water quality. He also noted that there were continuing problems with nutrient and pathogen inflows into fresh and marine waters, due to urban and farming non-point sources. On the other hand, the Auckland Unitary Plan Independent Hearings Panel (2015) has noted that the RMA is not well-suited to managing the two main sources of air pollution in the city – emissions from domestic fires and motor vehicles.

The Environmental Reporting Act 2015 establishes a framework of reporting which aims to ensure New Zealanders have reliable, relevant, and regular access to environmental information. A recent report published pursuant to this Act, *Environment Aotearoa 2015* (Ministry for the Environment & Statistics New Zealand, 2015) provides information about the state of the environment in New Zealand across five environmental domains (Figure 9).

This evidence is important for a number of reasons.

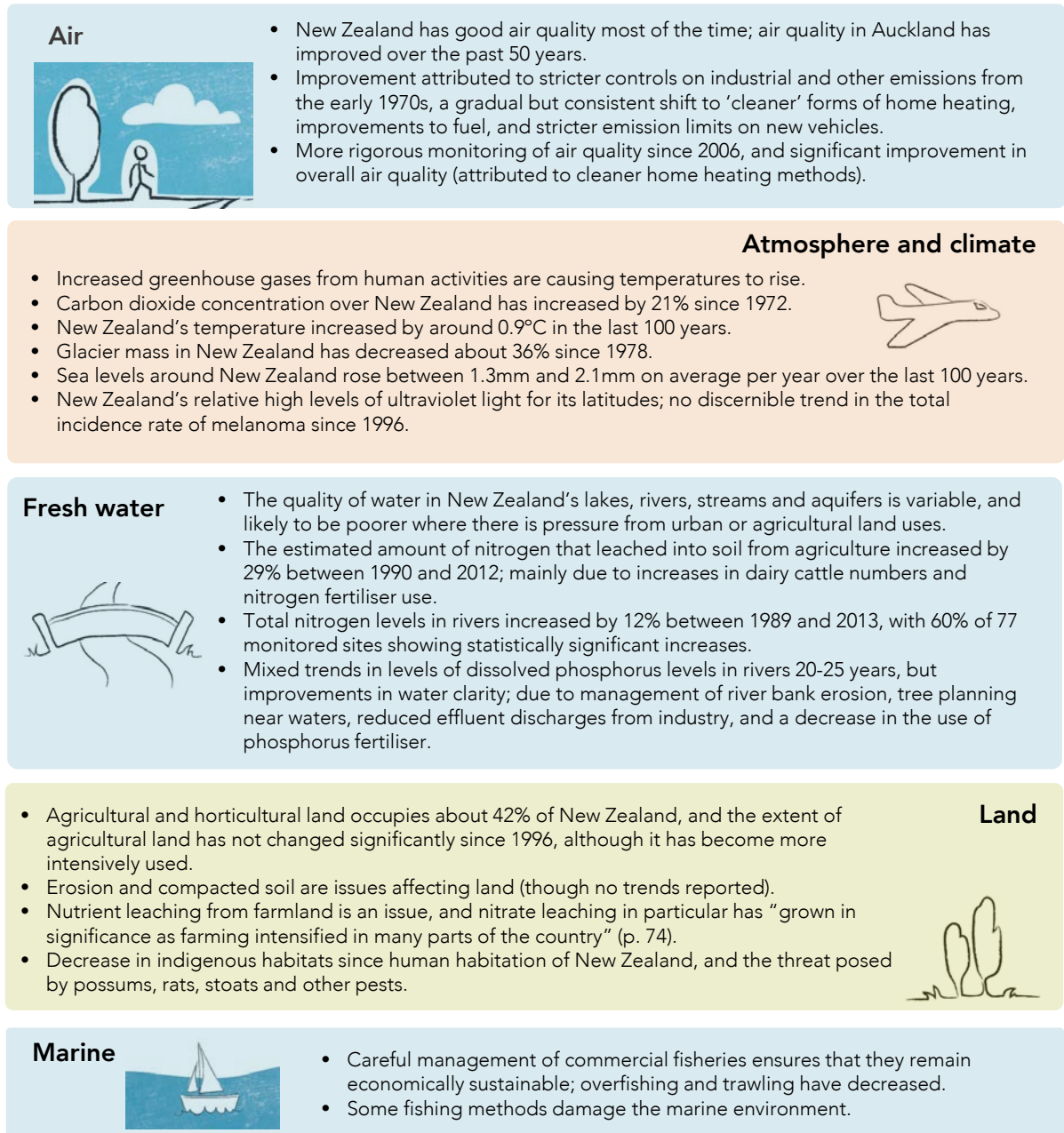
- It shows mixed picture of environmental trends, with some improving (eg air) and others worsening (eg water).
- There are clear limitations in both the extent and quality of environmental data available. This means there is limited information on trends in many environmental indicators, even over the relatively short recent period of the RMA.
- It is difficult to ascribe particular overall environmental outcomes or trends to the RMA or the planning system more generally. Particularly in urban areas, changes in environmental outcomes (such as improved air quality) relate to a range of factors including other regulatory instruments and technological change.

**Q15**

**What difference has the planning system made to environmental outcomes over the past 20 years?**



**Figure 9 Main findings from Environment Aotearoa 2015**



Source: Ministry for the Environment & Statistics New Zealand, 2015.

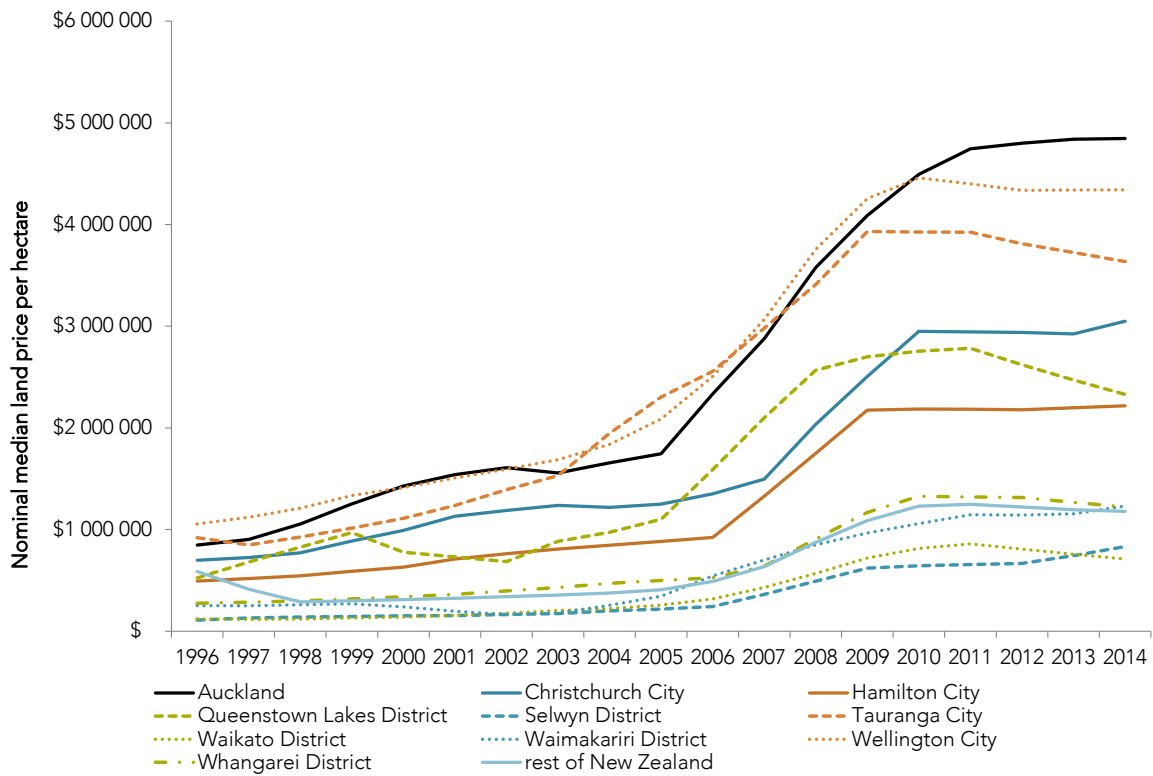
## Urban development outcomes

There are a range of views about what urban development outcomes a planning system should seek to achieve.

Over recent inquiries, the Commission has developed good evidence about some of the urban development outcomes produced by the RMA and planning system. In some of New Zealand’s fastest growing cities there is not sufficient construction of new residential dwellings to meet demand. Those dwellings that are built are increasingly large and relatively more expensive than the existing stock of dwellings. Unduly restrictive planning rules are a major cause of these outcomes (NZPC 2012a, 2015).

One significant outcome has been major increases in land price. This has been particularly evident in Auckland, because of high levels of demand stemming from rapid population growth and declining household size but is clear in other New Zealand cities as well (Figure 10).

**Figure 10 Land prices in some New Zealand cities**



The Ministry of Transport conducts a household travel survey, which provides some useful observations around how urban transport is changing over time. For example, in New Zealand’s main urban areas, the share of residents’ total trips that were undertaken by active modes of transport (such as walking and cycling) has decreased from 26% in 1989/90 to 19% in 2010-14.

Many councils have sought to promote the share of active modes through the planning system. But other factors, such as significant increases in car ownership will also drive transport outcomes, which make attributing particular outcomes to the planning system difficult.

The Commission is interested in submitters' views about how other urban outcomes have changed over time, and how much those changes can be attributed to the planning system.

**Q16**

**What difference has the planning system made to urban outcomes over the last 20 years?**

**Q17**

**What information about environmental outcomes and other urban outcomes would a decision-maker need to make good urban planning decisions?**

## What the RMA was supposed to achieve

Twenty-five years ago the RMA radically restructured New Zealand's planning system. The predominantly English-style town and country planning scheme was repealed and replaced with a very different form of statutory environmental planning and management. The explanatory note for the RMA itemised the concerns that the law was designed to address.

- There was no consistent set of resource management objectives.
- There were arbitrary differences in management of land, air and water.
- There were too many agencies involved in resource management with overlapping responsibilities and insufficient accountability.
- Consent procedures were unnecessarily complicated and costly and there were undue delays.
- Pollution laws were ad hoc and did not recognise the physical connections between land, air and water.
- In some aspects of resource management there was insufficient flexibility and too much prescription with a focus on activities rather than end results.
- Māori interests in the Treaty of Waitangi were frequently overlooked.
- Monitoring of the law was uneven.
- Enforcement was difficult.

Sir Geoffrey Palmer, Minister for the Environment at the time the RMA was introduced to Parliament, reflecting in 2015, said that

...it can be said with some confidence that some of those problems still remain. Many people would say that consent procedures are still unnecessarily complicated, costly and that there are undue delays. Many would also say that monitoring of the law is uneven and enforcement is difficult. (2015, pp. 5-6)

However, there were clear expectations that the RMA would be a regulatory regime more tightly targeted on environmental harms ("effects"), beyond which landowners would be left to make their own decisions about land use. Perkins and Thorns (2001) say that

...the post-1991 resource management legislation attempted to do away with zoning. It, instead, established an effects-based system, elaborated locally in a new type of plan known as the 'District Plan', such that any land use or activity could be permitted so long as it did not have adverse effects upon the biophysical environment. (p. 641)

The third reading speech of Hon Simon Upton, the Minister for the Environment at the time the RMA was passed, makes similar predictions that the RMA would provide greater certainty for developers and environmentalists alike, and constrain the ability of planners to control private actions:

Clause 4 enables people and communities to provide for their social, economic and cultural well-being. Significantly, it is not for those exercising powers under the Bill to promote, to control, or to direct. With respect to human activities it is a much more passive formulation. People are assumed to know best what it is that they are after in pursuing their well-being. Well-being is mentioned because the Bill is, of course, about the effects of human agency on the environment. The Bill would be quite unnecessary if there were no human activity.

The Bill provides us with a framework to establish objectives with a biophysical bottom line that must not be compromised. Provided that those objectives are met, what people get up to is their affair. As such, the Bill provides a more liberal regime for developers. On the other hand, activities will have to be compatible with hard environmental standards and society will set those standards. Clause 4 sets out the biophysical bottom line. Clauses 5 and 6 set out further specific matters that expand on the issues. The Bill has a clear and rigorous procedure for the setting of environmental standards – the debate will be concentrating on just where we set those standards. (Upton, 1991, 3018-3020)

The subsequent operation of the RMA did not meet these predictions, which can be attributed to a number of causes. Perkins and Thorns commented that "despite the radical change to land-use planning initiated by the Resource Management Act, there remains a distinct continuity between the new and old regimes" (2001, p. 653). They note, for example, that effects-based regulation was expected to remove zoning as a regulatory instrument, but zoning continues to be a major tool of district plans.

Attempts to introduce similar planning reforms in Australia have also struggled to achieve their original objectives (Box 3).

### Box 3 Performance-based planning in Queensland

The Integrated Planning Act 1997 (IPA), was Queensland's principal piece of planning legislation between March 1998 and December 2009. Prior to the introduction of the IPA, Queensland's planning system was prescriptive in nature, and used zoning to establish the nature of development that would be permitted. This system was viewed as inflexible and inefficient, and unable to respond to changing community preferences.

The IPA represented a significant departure from the previous system, and was intended to provide maximum flexibility in terms of how development was regulated at the local level. The purpose of the IPA was to achieve "ecological sustainability", and plans were intended to provide a comprehensive framework for managing the effects of development. The IPA prevented local governments from absolute prohibition of development and the term "zone" was a notable omission from the legislation.

Like the RMA, implementation of the IPA proved challenging:

- At the commencement of the IPA no plan-making guidance existed resulting in a wide range of interpretations of the legislation.
- Plans were unwieldy and complex and development costs and timeframes increased.
- The flexibility of the system "resulted in risk averse plan-making and practice swathed in multiple levels of policy specification ... the opposite of what was intended by IPA's architects".
- The IPA was subject to constant legislative amendments.

The IPA was replaced in December 2009 with the Sustainable Planning Act 2009 which introduced a more rigidly controlled approach to planning.

*Source:* Frew, Baker & Donehue, 2016.

## A lack of national guidance

Sir Geoffrey Palmer considers that a lack of national guidance is a major driver of poor outcomes from the RMA, driven by:

[T]he failure of successive governments to use the tools that have been available since the Act's inception, to provide National Policy Statements and National Environmental Standards at the central government level. In developing the statute at the beginning it

was clear that there were issues upon which central government had to decide upon the precise policy. (2015, pp. 15-16)

The Commission also pointed to this as a weakness of the system in its inquiry into *Using land for housing* (2015). Lindsay Gow, a senior Ministry for the Environment official during the RMA's development and implementation, has said that there was local resistance to national guidance from newly empowered local authorities:

Devolved decisions were taken up enthusiastically to the point where national decisions on policy statements and standards were vigorously resisted. In some cases, devolution has resulted in local interests having an unacceptable dominance; leading to poor decisions; in other cases political differences and inertia have led to insufficient change. (Gow, 2014, p. 7)

### **The legacy of existing rules and processes**

Gow considers that the retention of existing District Planning Schemes during the transition to the RMA meant that old rules and regulatory approaches were able to continue, notwithstanding the new legislative framework:

On balance, and despite probably rather too detailed specifications for plan thinking and making, too many plans didn't consistently show they were based on clear outcome and related evidence and reasoned analysis. And such plans had little overall coherence and comprised often disconnected provisions.

In my view, one of the contributing problems here was the decision to allow existing District Planning Schemes under the Town and Country Planning Act to be rolled unchanged into the new regime. Reviews would come later – much later as it often happened. This resulted in far too many rules that were not reassessed and/or removed, but simply added to under the RMA provisions. (Gow, 2014, pp. 7-8)

Similarly, Palmer has said that the RMA should have disestablished the Planning Tribunal, instead reconstituting it as the Environment Court, commenting that “[t]he need to change the judicial culture was overlooked” (1995, p. 178).

Given the continuity of staff and culture, plans, and institutions, it is perhaps not surprising that prescriptive zoning remained a major planning tool in almost all territorial authorities.

### **Is the original vision of the RMA still valid or achievable?**

As expressed at the time it was passed, the RMA was intended to provide an effects-based approach to regulating externalities measured against clear, nationally-established environmental bottom lines, beyond which it was envisaged individuals rather than planners would be the driving force in shaping land use.

The Commission is interested in whether this original objective remains valid or achievable after 25 years of the RMA. To the extent that planning under the RMA continued to utilise existing

regulatory tools and approaches in a way that was not intended by its designers, the Commission is interested in what lessons can be learnt about any future transition to a new regulatory approach to urban land use regulation.

**Q18****Why did the RMA not deliver on its original objectives?****Q19****Does a goal of limiting the scope of land use regulation to managing effects, based around nationally-established environmental bottom lines, remain a valid objective?****Q20****Which aspects of the existing planning system would be worth keeping in a new system?**

## 5 Alternative approaches

Many countries have planning and environmental management practices similar to New Zealand's, with local governments setting rules and zones to control land use. In theory, zoning is intended to achieve three main purposes:

- To separate incompatible uses, which generate negative externalities which harm each other;
- To integrate compatible uses, which generate positive externalities so that they are mutually beneficial; and
- To interject public goods like roads and open space in suitable locations. (Lai, 1994, p. 78)

However, there is a range of other approaches that can be taken to protect the environment and support the efficient functioning and development of cities. The original effects-based approach that the RMA sought to introduce (discussed in the previous chapter), could be considered as one alternative approach to urban planning. This section briefly discusses a range of other alternatives and provides some examples of approaches to urban planning in other jurisdictions. These alternative approaches, or some of their elements, could be used alongside a zoning-based system or could replace zoning.

### The common law and private bargaining

#### Nuisance

A number of scholars contend that tort law – especially the tort of “private nuisance” – can be a more efficient way of protecting the environment and planning urban areas than government regulation, in some circumstances.

Private nuisance provides a recourse for those with an ownership interest in land in response to an encroachment by a neighbour, direct physical injury to their land by a neighbour, or interference with the “quiet enjoyment of his or her land” (Besier, 2004, p. 564). People who believe they have been harmed by a neighbour's actions may sue them and seek damages or an injunction. Whether or not the courts will provide a remedy depends on “the scale of reasonableness. The level of annoyance and discomfort must be substantial and exceed the bounds of the normal ‘give and take’ expected of neighbours” (Besier, 2004, p. 565). Gearty (1989) says of private nuisance:

There is nothing better in the common law for getting sewage out of rivers, reducing wanted noise and cleansing the atmosphere of acid smuts, smoke and other pollutants. Its remedies – the injunction and damages – are the strongest that the courts have to offer.



They respond to the extent of the harm done, not as in negligence, to the culpability of the harmer. (p. 216)

Ellickson argues that private lawsuits are the best means of resolving disputes over “‘localised’ spillovers – that is, those that concern no more than several dozen parties.” (1973, p. 761). He argues such an approach is preferable to zoning or other government regulation because:

- It avoids blanket controls of specific land use activities, thereby creating more room for innovation and developments that suit individual preferences.
- It is triggered by individuals who have a detailed knowledge of the land and issues in question, and is therefore more responsive than centralised systems run by officials.
- Unlike zoning, which often takes existing land use activities as given, lawsuits provide opportunities to deal with existing nuisances.
- Unlike most zoning systems, lawsuits allow people suffering from nuisances to gain compensation. (p. 762)

Anderson & Leal (2001) contend that the liability and clear property rights created by tort law create strong incentives for individuals and companies to take steps to avoid harming others. They also argue that the evidentiary standard required of lawsuits helps avoid unnecessary burdens:

At common law, people have the right to have their property free of pollution, but they ‘must be able to demonstrate damages to obtain relief in court. Loose assertions about environmental quality and the need to protect it will not do the job. Ownership of damaged property or loss of recognized rights must be shown. Information relevant to the harm must be provided.’ In other words, under the property rights approach to pollution, the plaintiff must demonstrate that there is a connection between the cause and effect of pollution, that the defendant is responsible for the cause, and that damages have resulted. (p. 138)

Such arguments often draw on the work of Ronald Coase, who drew attention to the role of property rights in facilitating efficient exchanges in the presence of externalities (Box 4).

#### Box 4 **Coasian bargaining**

Ronald Coase explored the impact of property rights and transaction costs on the allocation of resources. Coase challenged the notion that negative externalities – such as pollution – were best managed by taxes on the harmful activity. Instead, he argued that:

- negotiation between the people affected by the externality, and those creating the externality, could provide efficient outcomes, and

- in a world without transaction costs, the assignment of legal rights does not affect the efficient allocation of resources.

The second point can be illustrated using the example of a factory belching smoke into a neighbourhood. Where the law does not protect neighbouring residents from pollution, they would have incentives to approach the factory and pay them to reduce their emissions. If the payments received from residents exceeded the profits created by polluting, the factory would reduce its emissions (Figure 11).

Alternatively, if residents have a legal right to block the factory from polluting (eg, through a court injunction), the factory owners would have an incentive to seek out residents and offer payments in compensation. Where the payments exceed the discomfort and damage caused by the smoke, they will permit the pollution to continue. Under both scenarios, the amount of pollution produced will reflect the preferences of local residents.

**Figure 11 Coasian bargaining and pollution**



Of course, in the real world, transaction costs do exist and can be significant. The definition and assignment of legal rights and remedies can help reduce these costs, encourage bargaining, and promote efficient outcomes to disagreements over resource uses. For example, Calabresi and Melamed (1972) argue that where there are few obstacles to bargaining (eg, two neighbours, who know each other well), the best response is for a court to issue an injunction preventing the defendant's interference with the plaintiff's property. Neighbours can easily communicate with each other and monitor compliance with any agreement, so an injunction clarifies rights and encourages the two parties to reach a mutually-agreeable arrangement. In comparison, where there are high barriers to bargaining and a low likelihood that agreements can be reached (eg, large numbers of people involved), financial damages are a preferable remedy.

*Source:* Coase, 1959, 1960; Calabresi & Melamed, 1972.

Arguments in favour of tort and the common law as planning or environmental management tools have, however, been challenged. Brenner (1974) concludes that the common law had little effect on environmental protection during the English Industrial Revolution because of restrictions imposed by the courts. These restrictions included "a standard of care which was alien to nuisance", the different application of the law between industry and private individuals, and limited liability for "quasi-public enterprises with statutory authorization", such as railways (p. 431). The cost and slow pace of litigation and difficulties proving the source and amounts of damage were further barriers. As a result, "the common law was rendered impotent to deal with the already serious problems of air and water pollution." (ibid)

In the event that harm does occur, and the damage is irreparable, compensation may be of limited consolation to the land-owner whose property has been permanently damaged. In the United States the doctrine of "anticipatory nuisance", where one party seeks to prevent the commencement of an activity that is alleged will become a nuisance is recognised in both state and federal common law (Smith, 2005). However, the approach is used infrequently because a high burden of proof is usually required to prove that the activity will indeed prove to be a nuisance. Reflecting this, "many states are enacting environmental legislation to prevent pollution by public regulation rather than by providing damages to injured persons, shifting the emphasis from compensation to prevention" (Smith, 2005, p. 725).

Using US evidence, Thompson (1996) cites a number of barriers to the common law acting as an effective environmental protection tool:

The obstacles to legal action in the pre-statutory common law system included: (1) significant standing requirements; (2) tough evidentiary burdens on the plaintiff to prove that the alleged polluter's conduct was unreasonable; (3) "overly solicitous" defences available to the alleged polluter; (4) the burden on the plaintiff to prove that the

defendant's pollution caused the plaintiff's injury; and (5) the real possibility that even if the plaintiff proved injury and causation, a court would refuse to enjoin the polluting activity because of a balancing of the equities. The failings of the pre-statutory common law system of environmental protection are also explained by certain limitations in the judicial process: (1) the fortuitous nature of court action that prevents it from serving as a reliable pollution control program; (2) the ex post character of litigation and the resultant inability of courts to take preventive action in anticipation of future problems; (3) the traditional reluctance of courts to issue affirmative order requiring specific actions by polluters; and (4) the reality that the adversarial process does not ensure representation of the public's interest in pollution control. (pp. 1354-5)

In addition, Coase himself observed that the ability of litigation and property rights to manage pollution has limits, especially where "many people are harmed and there are several sources of pollution" (1959, p. 29). Negotiations between rights owners "may be so difficult and time-consuming as to make such transfers a practical impossibility", enforcement through the courts may be difficult, identifying the source of pollution may be costly, and it may be challenging to organise legal action between the multiple individuals affected (ibid).

The current planning system in New Zealand does make some provision for private bargaining over potentially problematic land uses. Neighbours, for example, can enter into "side agreements", through which one party compensates the other for the impact of their developments. The Ministry for the Environment (2015) outlines some hypothetical examples of what side agreements could include:

- a neighbour wants to build an additional storey on their house. Your agreement may be that they pay for opaque glass to be installed in your bathroom window to protect your privacy.
- a neighbour wants to double the size of a garage on your property boundary. Your agreement may be that they will seal the driveway that you both share.
- an applicant wants to establish a transport depot next door. Your agreement may be that they build a close-boarded fence along your common boundary to absorb the noise of moving trucks. (p. 10)

In general, however, the tort of nuisance plays little role in planning or environmental management in New Zealand. Besier (2004) attributes the "demise of the tort of private nuisance" to "the expansive application of the statutory environmental management framework...provided by the Resource Management Act" and to court decisions which have limited the application of the tort (p. 1).

**Q21**

**Would there be benefits in a future planning system making more provision for private lawsuits and bargaining to resolve disputes over land use? In what circumstances would lawsuits and bargaining be beneficial?**

## Covenants

Another form of private land use regulation is contractual arrangements such as covenants. As the Commission found in its *Using land for housing* report, covenants are widely used in New Zealand and play an important part in encouraging development, by reducing risks for both buyers and sellers (NZPC, 2015). They also create the potential for local residents to set rules over their properties that reflect their preferences. A few cities – like Houston, Texas – use covenants as a key means of regulating land use (Box 5).

### Box 5 Land use regulation in Houston

Houston's approach has been described as "land use without zoning" (Siegan, 1972), reflecting the fact that Houston is the only major US city not to have a formal zoning code (ie, rules which spell out how each parcel of land may be used). Homeowners or developers instead set restrictive covenants (called *deed titles*), which prescribe the size, location and other features of housing. Unlike in New Zealand, where covenants are enforced by private parties, the Houston deed titles are enforced by the council.

Enthusiasts for the Houston approach emphasise that, despite the fact that zoning is intended to ensure that incompatible land uses are separated, market forces appear to lead to similar outcomes in the absence of zoning. As Siegan (1990) notes, it is "generally too costly in terms of land prices and potential residential hostility for heavy industry to locate near new residential subdivisions." (1990, p. 297) Siegan also points out that, in comparison to universal coverage of zones, covenants only cover a small proportion of the land in Houston.

While Houston lacks a zoning code, the city government does regulate land use. Various city ordinances set minimum lot sizes, minimum parking requirements and setback rules. The city code also requires wide streets and long blocks (Lewyn, 2004). In addition, Lewyn argues that because "restrictive covenants are so heavily facilitated by government intervention...they resemble zoning regulation almost as much as they resemble traditional contracts" (2004, p. 1190).

Ellickson argues that covenants have a number of advantages over government regulation, in particular the fact that they are generally introduced only where there is a net benefit to participants:

Covenants negotiated between landowners will tend to optimize resource allocation between them. In other words, the reduction in future nuisance costs to each party will exceed the sum of prevention and administrative costs each agrees to bear, with all costs discounted to present value. (1973, p. 713)

Similarly, the potentially negative impact of overly-restrictive conditions on land values and the attractiveness of a property means that there are some inbuilt checks on the production of covenants:

...when a developer drafts covenants that will bind people who move into his subdivision, market forces prompt him to draft efficient ones. Covenants will enhance the developer's profit only if they increase his land values by more than the cost of imposing them. His land values will rise only if his home buyers perceive that the covenants will reduce the future nuisance costs they might suffer by an amount greater than the sum of their loss of flexibility in use and future administrative costs...In addition to promoting efficiency, covenants will not usually cause unfair wealth transfers among landowners. Absent fraud, duress, and the like, a party will not agree to a contract that he perceives as unfair. (pp. 713-4)

**Figure 12 Zoning versus covenants**



Covenants can have harmful social effects. Ellickson (1973) notes that covenants have been used in the United States to exclude poorer and minority groups from neighbourhoods. In New Zealand, the Human Rights Commission and Housing New Zealand Corporation (HNZC) have expressed concerns about the impact of covenants on the provision of social housing (Human Rights Commission, 2010; Housing New Zealand Corporation, 2009). Amendments to the Property Law Act in 2010 make void covenants which have the principal purpose of excluding people with low incomes, special needs or disabilities or which have the effect of preventing the conveyance of property to HNZC, private bodies that provide public, subsidised or institutional housing or to central or local government (section 277A).

Zoning and government regulation can also have regressive purposes and effects. Some early zoning rules in the southern United States were explicitly designed to enforce racial segregation, and some scholars have pointed to the exclusionary impacts of zoning rules such as large minimum lot sizes (Power, 1983; Pendall, 2000). Repeated efforts to introduce zoning in Houston, Texas have failed in part because of opposition from minority residents. McDonald (1995) argues that the vote against zoning was a reaction against "its use as a device for excluding lower-income people from certain areas" (p. 140). Fischel (2015) concludes that lower-income residents wanted that a system that could change according to their needs, not one in which the rule would be "dictated by a more affluent majority" (p. 311).

Under the current planning system, many local authority District Plans lay down rules and controls to protect the amenity of neighbourhoods. Such rules and controls can have the benefit of providing greater certainty and predictability, but may also make it harder for individuals to use or alter their property in a way that best suits their preferences and circumstances.

**Q22**

**Should more decisions about land use rules be made by property owners privately (for example through covenants)?**

## Tradable development rights and offsets

Tradable development rights (TDRs) are used in various forms around the world to manage the extent and nature of development. They typically involve:

- the unbundling of the right to use land from the ownership of land; and
- the ability to transfer the rights to carry out a particular activity (eg, building to a particular height or density) to another person or property.

While TDRs can be designed and applied in a number of ways, schemes can be classified into two broad categories, depending on whether or not they are used in conjunction with zoning.

- *Zoning-integrative* TDR schemes operate around a zoning plan that identifies areas to preserve (sending areas) and areas to develop (receiving areas). The government creates development rights and allocates these rights to landowners in *sending* areas. Landowners in *sending* areas then sell these rights to land developers in *receiving* areas. The revenue from the sale compensates landowners in sending areas for zoning decisions that remove their right to develop land. *Zoning-integrative* TDRs are therefore seen as a fairer policy approach than pure zoning (Thorsnes & Simons, 1999, p. 257).
- *Zoning-alternative* TDRs operate independently from zoning plan rules. The government sets a cap on the amount of development that is permitted and allocates a corresponding number of TDRs to landowners. Once TDRs have been allocated, the market determines where development will take place and by whom (Moroni, 2015).

In practice, most TDRs, such as the programmes used in many parts of the USA (Box 6), fall into the zoning-integrative category.

### Box 6 Tradeable development rights in the United States

America's first TDR programme was established in New York City in 1916. It allowed landowners to sell their unused air rights to adjacent lots, which could then exceed the new height and setback requirements. TDR programmes began to be used more widely in America in the 1970s and 1980s when a further 35 programmes were established (Messer, 2007). A review of TDR programmes published in 2007 identified 181 programmes operating in 33 states (Pruetz & Pruetz, 2007).

Most American TDR programmes have multiple objectives, however their most common use is to preserve specific areas of land from development (Kaplowitz, Machermer & Pruetz, 2008). Montgomery County, Maryland, is one example where a TDR programme was established to preserve land from residential development. The county rezoned 91 000 acres as an agricultural reserve, and imposed a restriction of one dwelling per 25 acres. Landowners within this reserve could opt to deed-restrict their farms and sell the resulting TDRs at the rate of one TDR per five acres. Landowners in designated receiving areas can purchase TDRs which allow additional development rights (Pruetz & Pruetz, 2007).

TDRs have also been used in America to compensate owners of historically-significant buildings. New York City introduced a TDR scheme for designated landmarks in 1968 which sought to compensate "landmark property" owners for financial losses incurred due to the restrictions imposed by the city's new Landmark Preservation Law. Under the programme, owners of landmark properties may transfer unused development rights to other lots in the immediate neighbourhood (Been & Infranca, 2012).

There are, however, a number of challenges in implementing TDR programmes. Governments need to design trading rules and property rights carefully - this can be a complicated task. They also need to administer trades and monitor the exercise of development rights. TDR markets may be "thin" (ie, have few buyers and sellers), creating the potential for market power. Finally, TDRs may lead to more development than would occur under a pure zoning model. Some owners of restricted land may not wish to develop their land, but it is very difficult for the government to identify these individuals in advance. Under TDR, these owners can sell their rights, leading to more development occurring elsewhere than would have occurred otherwise. (McConnell, Kopits & Walls, 2003.)

TDRs have been used to a limited extent in District Plans:

- The Western Bay of Plenty District Plan creates transferable rural lot entitlements, transferable amalgamation lots and transferable protection lots. Under the plan, existing lots within the rural zone that meet particular criteria can be traded in for specified development credits within the rural or lifestyle zones (WBOPDC, 2012).



- The Waipa District Plan creates transferable development rights for owners of land in the rural zone which is located in whole or in part within specified “sensitive locations.” To receive a development right, the owners of donor and recipient holdings must apply jointly (WDC, 2014).

Other councils are considering their introduction. For example, as part of its District Plan review, Rotorua Lakes District Council has proposed that a TDR could be issued where “a landowner can demonstrate that a proposed change to their land will reduce nutrient losses by 500kg N below the benchmark” (Rotorua Te Arawa Lakes Programme, n.d.). The proposal is aimed at reducing nutrients entering local lakes, and improving water quality.

Other forms of tradable rights can help control negative externalities associated with land use.

- *Tradeable permits* – there are many different types of tradable permit systems. The simplest is a cap-and-trade system whereby the government sets a limit (cap) on the amount of a given externality that firms can produce. They then create permits up to the level of the cap and allocated them to firms within the economy. Firms need enough permits to cover the externalities they produce – those that don’t face legal sanction. Firms that can reduce their externalities cheaply are able to sell their excess credits to firms that do not have enough credits to cover their externalities.
- *Environmental offsets* – this approach allows individuals to take actions to meet a certain environmental standard at a separate site from where an environmental externality occurs. The party causing the externality can either take the action themselves or pay for others to do it on their behalf (Ministry for the Environment, 2004).

For nearly a decade, the Victorian State Government has used environmental offsets to protect and manage native vegetation. The *BushBroker* system allows landowners to gain credits for permanent improvements to the quality and quantity of native vegetation on their land. Subject to government approval, property owners looking to clear and develop land can purchase credits to offset any loss of native vegetation.

**Q23**

**Would there be benefit in tradable development rights, tradeable permits and environmental offsets playing a stronger role in a future urban planning system? In what circumstances?**

## Levies and user charges

An alternative to controlling potentially harmful land use activities through rules is to use levies or charges to reflect the costs that these activities impose on the community. The use of levies and charges creates an incentive for individuals and firms to reduce the negative impacts of their actions. The revenue raised could go to local authorities to fund measures that offset any harm, or to compensate affected residents.

Ellickson (1973) notes that a levy-based approach can be preferable to a purely rules-based model, which can create high compliance costs and unnecessarily high restrictions on land use. Under a tax-based model,

An enterprise could then choose to violate an inefficient standard, pay the monetary penalty, and escape a higher level of prevention costs. Enforcement through carefully calculated monetary penalties is more like what Calabresi calls a system of general deterrence, where all activities are permitted if they pay for their external costs. (p. 707)

New Zealand's planning system already partially incorporates impact charges, in the form of financial and development contributions. However, these are used as a supplement to zoning controls, rather than a substitute.

In other areas – such as roading and transport – local authorities are limited in their ability to use economic tools to manage externalities. This inability to use charges and prices may be contributing to overly-restrictive land use rules, as the Environment Court has commented:

...bigger cities use district plans as their primary method of dealing with traffic congestion. This often seems to us to be inefficient, but as the councils lack pricing controls and other economic instruments, they have little choice. (sub. DR92 to *Using land for housing*, p. 4)

One challenge with a fine-based approach is calculating the appropriate financial charge to reflect the harm imposed on others. If the charge is set too low, then it will not provide a large enough incentive to reduce externalities to the desired level. If the charge is set too high, individuals and firms may not undertake activities that would otherwise benefit society.

In some instances, analytical tools such as hedonic pricing provide opportunities to quantify costs imposed on the community by individuals and firms.

**Q24**

**Are there opportunities to make greater use of economic tools such as prices, fines and user charges in a future planning system? Where do these opportunities lie? What changes would be required to facilitate their use?**

## Lessons from other jurisdictions

In addition to the theoretical alternatives to zoning discussed in the preceding section, urban planning systems in other jurisdictions offer alternative approaches that this inquiry can draw on.

The system of urban planning and land-use regulation in Germany has historically been viewed as a leading practice (Hirt, 2014). The German approach (Box 7) appears to perform favourably in across several dimensions. For example, the use of binding rules in local land-use plans provides certainty regarding the acceptability of development proposals, while the legislative

framework contains principles to promote coordination and consultation between different levels of government.

### Box 7 Urban planning in Germany

The approach to land-use planning in Germany is notable in that it places a strong emphasis on cooperation between different levels of government:

German planning is mediated through an integrated yet flexible institutional setting that emphasizes cooperation between all levels of government. As such, local planning decisions ... must function within a regional, state and national framework. (Schmidt & Buehler, 2007, p. 72).

Germany's Basic Law (*Grundgesetz*) clearly sets out the planning powers of different levels of government (Newman & Thornley, 1996). The primary actors involved in land use planning are the federal government, 16 state governments, 114 planning regions and approximately 14 000 municipalities (Schmidt & Buehler, 2007).

- Federal government sets the overall framework and policy structure to ensure some consistency across states, regions and municipalities through two federal acts:
  - The Federal Building Code standardises the level of expertise, rules and symbols used in compiling plans, and requires the lower levels of government to make plans that are consistent horizontally (with other regions) and vertically (among different levels of government).
  - The Federal Spatial Planning Act outlines broad aims, guidelines and organisational procedures for planning at the state level. It contains the *gegenstromprinzip* (the counter-current principle), which sets out that each level of planning must take account of higher level plans, while at the same time lower level planning must be allowed to participate in the preparation of higher level plans (European Commission, 1999).
- State governments employ spatial plans at two levels. State Development Plans are exercised across the State and outline goals (which regions and municipalities and regions are bound to follow) and principles (which are encouraged but not binding) (Schmidt & Buehler, 2007). As administrative boundaries often do not align with planning issues, Regional Plans are also prepared (after consultation with the public, and municipalities) and apply to certain areas within the State.
- Two local land use plans are developed at the municipality level:
  - The Preparatory Land Use Plan is essentially a zoning plan that illustrates at a high level the expected land uses for the entire municipality.

- The Binding Land Use Plan provides the basis for the detailed and legally binding control of building development. It provides “near-certainty” regarding development in that compliance with the rules in theory guarantees the right to develop (Hirt, 2014, p. 77).

While there are benefits associated with planning systems that provide certainty regarding permitted and non-permitted activities, a potentially conflicting principle against which planning systems can be evaluated is their ability to adapt to changing social priorities and individual preferences. Another feature against which an urban planning system might be evaluated is the whether the system only imposes restrictions on ownership/property rights to the minimum extent required to manage externalities. It has been argued that the typical approach to urban planning in the United States (Box 8) stacks up poorly against these two criteria.

### Box 8 **Urban planning in the United States**

Urban planning in the United States is highly devolved. Federal involvement in planning is limited to confined areas such as environmental regulation, the management of nationally owned lands and investment in transportation infrastructure. Primary responsibility for urban planning rests with local governments who typically exercise strict zoning policies.

A key objective of most zoning ordinances is to classify and separate different land-uses. Rules are usually strict, and if these rules are followed, development, in theory, is guaranteed. Rules are comprehensive in their coverage and include the regulation of “signs, landscaping, parking, aesthetic characteristics ... and many other aspects of built form” (Hirt, 2014, p. 47). Changes to zoning are typically difficult to achieve and are subject to heavy public scrutiny – often a public referendum is required before changes can be made to zoning ordinance (Hirt, 2014).

This traditional approach to zoning has been critiqued on a number of grounds – including that it works against the free market, that it generates social segregation, and that it has promoted sprawling urban developments with adverse environmental consequences.

While the zoning approach described above is typical in many parts of the United States, a number of alternatives exist. Some states have established TDR schemes (Box 6) and covenants are used widely in Houston (Box 5). Other approaches include:

- *Incentive zoning* – this approach was first implemented in New York City in the early 1960s and grants density and other bonuses to developers in exchange for community improvements such as publically available open space.

- *Inclusionary zoning* – states such as New Jersey and Pennsylvania have established requirements for local governments to zone for low- and moderate-income housing.
- *Floating zones* – floating zones specify a certain type of land-use, but do not pinpoint it on a zoning map. Rather, developers are able to apply to have the zoning applied to a particular location or parcel of land.
- *Planned Unit Development districts (PUDs)* – PUDs enable a developer to negotiate the rules that apply to a unified development plan for a selected area.
- *Form-based zoning* – this approach replaces the traditional land-use categories that are employed in zoning, and replaces them with categories that pertain to the architectural form of developments, such as the size, style and shape of buildings. There are around 300 form-based codes in use in the United States, however many of these codes are optional, or are applied only to specific sites (Hirt, 2014). Miami is the first example where a form-based code has been adopted for an entire city (Kasdin & Frey, 2009).

Many urban planning systems set out to achieve a “specific idea of the good life” (Moroni, 2010, p. 143). One example of this is the adoption of “smart growth”, a set of broad principles that typically seek to:

- limit sprawl and greenfield developments through use of urban growth boundaries;
- increase residential density and promote mixed land uses; and
- encourage public transport and the development of neighbourhoods that are walking and cycling friendly (Durand et al., 2010).

Critics of Smart Growth argue that it contradicts market demand, and is a way for planners to impose particular values on communities through the use of strict rules and regulations (Litman, 2015). In contrast, the American Planning Association (2012) argue that

Smart Growth provides choices – in housing, in transportation, in jobs, and in amenities (including cultural, social services, recreational, educational, among others) – using comprehensive planning to guide, design, develop, manage, revitalize, and build inclusive communities.

Smart growth objectives have gained currency in the planning systems of many cities, including Vancouver (Box 9).

### Box 9 Urban planning in Vancouver

Planning in the greater Vancouver area is undertaken on a regional level by the Greater Vancouver Regional District (GVRD). The GVRD was established in 1968 when the municipalities in the Vancouver area devolved powers upwards to the GVRD and mandated it to undertake provision of a services such as water supply, and to undertake regional planning.

The GVRD is responsible for developing a regional growth strategy, which is an agreement between a regional district and its member municipalities on social, economic and environmental goals. All regional bylaws and community plans must be consistent with the regional growth strategy.

In 2007, the GVRD changed its name to Metro Vancouver. In July 2011, after five years of work, Metro Vancouver endorsed a new metropolitan plan called, *Metro Vancouver 2040: Shaping Our Future*. The plan's main goals are:

- Containing growth within a defined area.
- Supporting the region's economy, by protecting industrial and agricultural lands and ensuring their efficient use.
- Protecting the region's natural environment, promoting ecological health and supporting land use and transportation patterns that improve the region's ability to adapt to climate change.
- Building complete communities with affordable and diverse housing, close to employment and amenities, with good transportation choices.
- Integrating land use and transportation planning to encourage lower use of private cars, support the safe and efficient movement of goods and people, and reduce greenhouse gas emissions.

Advocates of Vancouver's urban planning approach note that the city frequently ranks at the top of various international "liveability" rankings. However, others note that Vancouver is one of the world's worst cities in terms of housing affordability.

*Source:* OECD, 2012; Abbott, 2012; Metro Vancouver, 2015.

One principle against which urban planning systems might be assessed is the extent to which the purpose of the system, and the roles of its participants are clearly understood. One frequently raised criticism of New Zealand's urban planning system is that its central purpose promotes sustainable environmental outcomes at the expense of economic objectives. For

example, the report of the Minister for the Environment's 2009 Technical Advisory Group identified that ss. 6 and 7 of the RMA are

a hotch-potch collection of sentiments, all directed at "environmental" issues... rather than the economic, cultural and social questions which are also central to sustainability issues which lie at the heart of the Act. (TAG, 2009, p. 38).

The Japanese approach to urban planning involves a clear hierarchy between different levels of government and includes an explicit focus on economic growth (Box 10).

### Box 10 Urban planning in Japan

Land-use planning in Japan is designed primarily to pursue economic goals, rather than social goals, or certain types of urban form. Broad economic goals are set by central government through a series of national economic plans. Regional plans, which are usually set at prefectural level, are responsible for some of the implementation of national economic and development plans. However implementation occurs primarily at the local level by means of local plans and through land use zoning.

At the local level, land-use regulations are administered for *City Planning Areas* (CPAs). CPAs are established by the prefectural governor in consultation with the Ministry for construction and constitute established urban areas, or areas that are soon-to-be developed. CPAs are divided into urbanisation promotion areas, and urbanisation control areas.

Urban promotion areas are zones which are considered appropriate for development, and are zoned to accommodate ten years of development at current rates and densities. A zoning system imposes a range of restrictions on how land is used including the type of use (eg, residential, commercial, mixed-use etc.), building to land ratios, and floor area ratios. Urban control areas are designated areas where urbanisation is constrained either to protect natural resources, or to preserve land for urban development at some point in the future. Protections are provided through specific standards and land-use restrictions.

*Source:* Saizen, Mizuno & Kobayashi, 2006; Callies, 1994.

In contrast with the Japanese approach, the Swiss devolve much greater responsibility for urban planning to the local level. It has been suggested that the devolved approach promotes beneficial competition between local governments (Box 11).

**Box 11 Urban planning in Switzerland**

The urban planning system in Switzerland delegates a relatively high level of responsibility for spatial planning to local levels of government. The Federal Government is responsible for establishing high-level principles for planning, and may also introduce specific regulations regarding land-use issues deemed important for Switzerland as a whole.

Practical planning implementation is the responsibility of Switzerland's 26 Cantons (states), which in turn often delegate a number of planning and implementation tasks to the country's 2 551 municipalities. Cantons are responsible for developing structure plans which show how the activities of the three tiers of government (the Confederation, the canton and the municipalities) are harmonized with each other. Municipalities are responsible for establishing binding land-use rules such as setting the type and extent of building that is permitted in certain zones (Muggli, n.d.).

Bassett and Malpass (2012) argue that the devolved nature of governance arrangements in Switzerland, combined with local powers of direct taxation, creates beneficial competition between the Cantons. This competition extends to local planning systems and has helped Switzerland to maintain stable housing costs.

However some environmental and conservation groups have argued that too much land has been set aside for housing. The total urban and settled area in Switzerland increased by 23% between 1984 and 2009 (Price et al., 2015). These concerns prompted amendments to Switzerland's Spatial Planning Act that give the Confederation greater powers regarding land use. In particular the amendment seeks to reduce suburban sprawl through the promotion of urban density and introduces measures to restrict development zones in the cantons and municipalities.

**Q25****What international approaches to planning and environmental protection should the Commission consider?**



## 6 Specific issues

### One law or more?

There will inevitably be boundaries to any statutory regulatory framework. For example, the RMA integrated environmental regulation and town planning, but infrastructure regulation and planning are dealt with under separate regimes. Determining what elements should be part of an integrated statutory framework, and what elements should be provided for separately, is a key question for the inquiry.

**Q26**

**Should New Zealand continue to have a unitary regulatory framework for environmental and land use regulation? What are the advantages and disadvantages?**

**Q27**

**Should regulating land use and/or environmental effects in an urban context be separated from resource management legislation that applies in non-urban areas? What are the advantages and disadvantages?**

**Q28**

**Should provisions relating to infrastructure planning and funding be integrated in a planning statute? What are the advantages and disadvantages?**

For example, the use and reuse of land in urban areas is not only regulated by the Resource Management Act 1991 (RMA). Parcels of land in a number of New Zealand cities are also governed by the Reserves Act 1977 and the Conservation Act 1987.

Where land has been designated as a public reserve under the Reserves Act, it must be held and administered for the purposes to which it is dedicated. The Act sets out seven different types of reserves: recreation reserves, historic reserves, scenic reserves, nature reserves, scientific reserves, Government purpose reserves, and local purpose reserves<sup>9</sup>.

The purpose or designation of a public reserve can be changed by an administering body, but only following notification of interested parties, and consideration of any objections by the Minister of Conservation. The Minister may not agree to a change of purpose for scenic, nature,

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<sup>9</sup> Government purpose reserves are areas of land (or land and water) set aside for a specific government purpose, generally conservation related. Local purpose reserves are land (or land and water) areas that are retained for a wide range of purposes including drainage, community purposes and roading (Department of Conservation, 2006).

scientific or historic reserves, unless physical changes have made the reserve unsuitable for its designated purpose. Where the revocation or change of purpose also requires a change to the local district plan, the local authority must notify the wider public, as required under Schedule 1 of the RMA. The Minister can also authorise the exchange of reserve land for other land to be held for the same purpose. The requirements of the Reserves Act have been criticised for creating unnecessarily duplicative processes and undue burdens on councils, and for being unresponsive. (eg, sub. 58 to *Towards better local regulation*; Rules Reduction Taskforce, 2015)

Q29

**Are there provisions of other statutes (for example in the Conservation Act or Reserves Act) that should be integrated into a new statutory framework for urban planning? What reforms are needed to these frameworks?**

## Commercial and industrial land

In recent years, public and official attention has been focused on the ability of the planning system to deliver sufficient development capacity for residential housing. Relatively less attention has been paid to the effectiveness of planning system in providing enough land for commercial and industrial uses, although media coverage has suggested that there are significant shortfalls of such land in Auckland.

A report prepared by Urbis in 2011 for the Southern Gateway Consortium<sup>10</sup> reported that industrial land “in Auckland is some of the most expensive in Australasia even after the 30% decline in value since March 2008” (Urbis, 2011, p. 1). Similarly, research on the impacts of the Proposed Auckland Unitary Plan commissioned by the Property Council New Zealand concluded that the plan provides a roughly 50% “shortfall of the amount that is required to enable an ‘efficient market’ in which land and property prices are not artificially inflated through supply shortages. Under this shortfall of ‘zoned capacity’ commercial land prices will be artificially increased and this will reduce the economic productivity and efficiency of the City” (Urban Economics, 2014, p. 6).

Research into American planning strategies which seek to constrain urban sprawl has noted that such approaches can underestimate the importance of providing sufficient industrial land. Leigh and Hoelzel (2012) report that “smart growth” policies in some US cities promoted “nonindustrial activities over industrial activities”, placed little priority on providing sufficient industrial development capacity and allowed existing industrial land to be converted to other uses. In New Zealand, the Property Council has questioned whether shortfalls of commercial land may be exacerbated by “residential building activity [being] encouraged on land where business activities should logically have been allowed to grow to support the demand generated by residential growth” (Property Council New Zealand, 2014).

<sup>10</sup> The consortium was a group of landowners that wished to develop land in Manukau for industrial and commercial purposes.

Q30

**How could the planning system be designed to provide a sufficient supply of industrial and commercial land? Are there particular tools that could be used to ensure an adequate supply?**

### How much discretion?

The OECD (2015) makes the distinction between indicative planning systems and discretionary systems.

- Indicative systems typically seek to provide certainty through detailed and binding land-use plans. This approach provides certainty for investors and communities on permissible land uses, and relies on up-to-date plans to guide decisions.
- In a discretionary system each land-use decision is subject to administrative and political discretion with the plan providing general guidance. Discretionary systems are more flexible and allow planning decisions to respond to changing circumstances without the need to amend a legally binding land-use plan.

Most planning systems try to strike a balance between discretion and certainty. In New Zealand, this can be seen in many of the rules and policies set down in District Plans. District Plans set down the activities that are “permitted” (ie, require no resource consent), those that are prohibited (ie, may not be carried out under any circumstances) and those over which local authorities may add conditions or exercise varying degrees of discretion in approving or declining.

Planning systems in other countries use other mechanisms to enable flexibility – such as floating zones and planned unit developments that are used in some parts of the United States (Box 8). In contrast, land-use plans in Israel are relatively rigid, with few opportunities for flexibility and discretion in local decisions (Alfarsi, 2006).

In its *Using land for housing* report, the Commission argued that there was a need for greater certainty in New Zealand’s planning system, because

- uncertainty increases risk and cost for developers, potentially reducing the supply of housing; and
- the planning system and supporting institutions lacked the capability and levels of trust required to make more discretionary regulatory regimes function effectively. (NZPC, 2015)

Some scholars have argued that planning systems which provide greater certainty or make more use of “bright line” rules perform better. Cheshire, Nathan and Overman (2014) claim that the rule-based Dutch or German approach of master planning is preferable to England’s discretionary development control system, on the grounds that developers have “virtual certainty that so long as what they wanted to do conformed to the plans and rules they could go

ahead" (pp. 225-6). Rule-based systems are, however, often accompanied by very detailed and prescriptive controls on what can be built "as of right". In the case of the Dutch planning system, there is some evidence to suggest that rigid rules are difficult to maintain over time (Box 12).

### Box 12 **Legal certainty in the Dutch planning system**

Spatial planning in the Netherlands is conducted through a formal hierarchy of plans:

- The central government prepares a *Spatial Vision on Infrastructure & Spatial Planning* which focuses on issues that are of importance to the entire country, such as important transportation links and infrastructure.
- Planning conducted by provincial governments focuses on issues such as landscape management, urbanisation and the preservation of green spaces.
- Municipalities are responsible for land-use plans. These plans contain land-use regulations that stipulate where construction can take place, what types of structure can be built, and what buildings can be used for (Government of the Netherlands, 2015).

Because municipal land-use plans contain a relatively high degree of detail (particularly those that are applied to residential areas), there is a general perception that the Dutch planning system provides high levels of certainty.

However, Buitelaar and Sorel (2010) argue that in practice, the system is less rigid than is often perceived. They note that the level of detail in municipal land-use plans causes them to rapidly become obsolete. As a result, many development initiatives are permitted on the basis of "exemptions" to the plan – in some municipalities exemptions have been granted for around 50% of all housing developments. Buitelaar and Sorel (2010, p. 987) also note that in some municipalities, many developments are permitted within two years of the plan's establishment, indicating that "land-use plans were primarily used – afterwards – for registering already existing development initiatives" and that "the land-use plan was drawn up to be in accordance with the building initiative".

Hills and Schleicher (2015) argue that binding, rule-based citywide plans can help counteract the tendency of elected representatives to resist development in their wards and extract excess "side payments" from developers, such as land contributions for parks or "affordable units", through "parcel-by-parcel deals". In comparison, "the typical process of citywide remapping can protect citywide interests against more parochial ones" (p. 39). According to Hills and Schleicher, binding, rule-based plans can also clarify property rights, reduce transaction costs and attract investment.

Q31

**How much discretion should be built into an urban planning system? Are there examples of urban planning systems in other countries that successfully manage the tension between certainty and discretion?**

## Barriers to competition and scale

Planning systems in other countries have been criticised as being anti-competitive and pushing up the cost of living:

- The United Kingdom Competition Commission found in 2008 that the planning system “necessarily constrains new entry by larger grocery stores. It also has the effect of increasing the time for new larger grocery store entry to take place due to the need to assemble sites likely to be granted planning permission as well as the time required by LPAs [local planning authorities] to consider planning applications.” (p. 136)
- The Australian Competition and Consumer Commission (ACCC) similarly found that “zoning and planning regimes act as an artificial barrier to new supermarkets establishing in areas with a, likely unintended, consequence of thereby potentially impacting on competition to supply consumers.” (2008, p. 195) The ACCC highlighted the role of council city centre policies (which seek to concentrate retail activities in one location) in encouraging concentration and making it harder for independent supermarkets to enter the market.
- The Harper review of competition policy in Australia concluded that planning and zoning requirements “can restrict competition by creating unnecessary barriers to entry” and recommended that restrictions on competition in planning rules should be subject to a public interest test (2015, pp. 130-1).
- In its benchmarking of planning, zoning and development assessments, the Australian Productivity Commission highlighted a number of planning rules which appears to “unjustifiably restrict competition”, including:
  - large number of prescriptive zones and complex codes and use conditions;
  - restrictions on business numbers and the use of floor space;
  - site-specific restrictions on the type and size of businesses allowed; and
  - detailed controls on the internal fit-out of developments, signage, landscaping and parking (2011, p. 351).
- A review of planning rules in New South Wales by former ACCC chairman Allan Fels for the Urban Taskforce concluded that barriers to the entry and growth of large-scale grocery stores were likely to have inhibited productivity growth and contributed to higher food prices (Fels, Beare & Szakiel, 2008). Cheshire and Hilber (2011) undertook similar research in the United Kingdom and found that the “town centre first” planning policy reduced

supermarket productivity in England by 16%. Moran (2006) cites data suggesting that New Zealand and Australia are undersupplied with shopping centres, relative to North American markets.

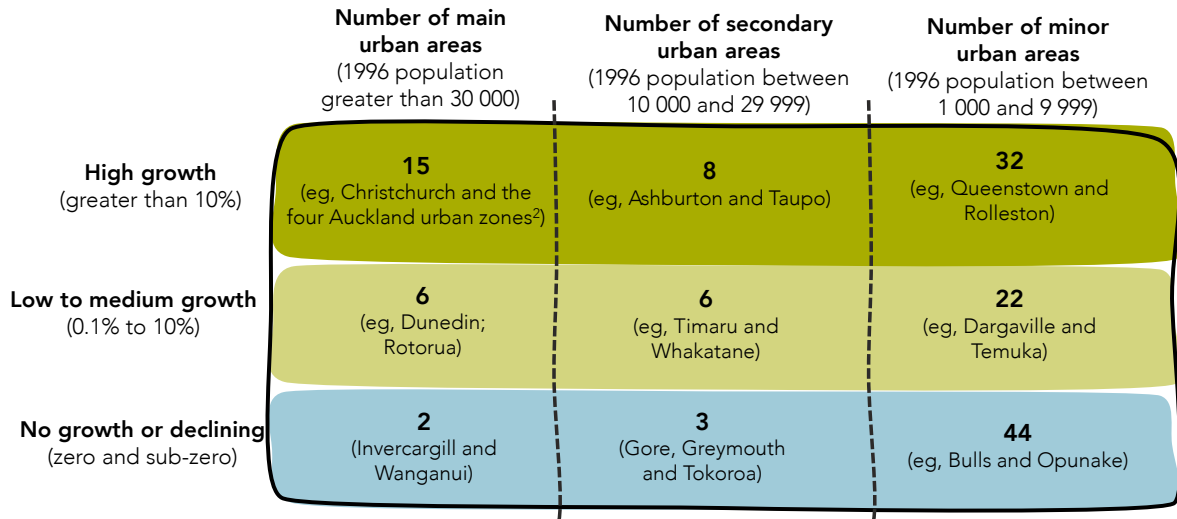
New Zealand’s planning system does not require planning or consenting agencies to consider the wider benefits to consumers that arise from greater competition, and a number of District Plans include centres policies and restrictions on the placement and size of large format retail stores, such as those discussed above. In one publicised case, the international retail chain Ikea was explicitly barred from a development in Auckland by the city council and Environment Court because of concerns that it would create high traffic flows in the immediate vicinity.

**Q32** How could a future planning system be designed to consider the benefits to consumers that may arise from greater competition?

### Urban areas with declining populations

New Zealand has one set of planning laws and processes, but they cover cities and urban areas with very different circumstances. Figure 13 classifies main urban areas, secondary urban areas and minor urban areas according to their total population growth between 1996 and 2015.

**Figure 13 Population change between 1996 and 2015**



Source: Productivity Commission analysis of Statistics New Zealand data.

Notes:

1. Classifications into main, secondary and minor urban areas are based on total population in 1996.
2. Auckland is made up of the Northern, Southern, Central and Western Auckland Urban Zones.

High-growth cities like Auckland and Tauranga face difficulties funding the expansion of infrastructure networks, making enough development capacity available, and managing pressure on roads and neighbourhood amenity. Other cities facing static or declining populations – such as Invercargill and Whanganui – have other challenges, such as maintaining service levels and funding the maintenance and replacement of infrastructure assets with a declining rating base.

New Zealand is not alone in having urban areas where the population is in decline. Over the last fifty years, 370 cities throughout the world with populations over 100 000 have shrunk by at least 10% (Hollander et al., 2009). Twenty cities in Japan with a population greater than 300 000 experienced population decline between 2005 and 2010, while the two largest cities in South Korea, Seoul and Busan, both have declining populations (The Economist, 2015).

Despite the prominence of declining cities around the world, the topic has received relatively little attention. For example, one Canadian review of planning literature that deals with population change found that the vast majority of research focused on attracting growth, the consequences of growth, and growth management. In contrast, studies that focused on decline or the absence of growth made up just 6% of articles addressing population change (Hall & Hall, 2008).

The most common planning response to urban shrinkage has been the implementation of plans to re-vitalise the local economy, however such approaches are rarely effective:

Aiming for economic growth in order to regain population growth – an uneasy compromise – is the most typical response of planners and politicians, a strategy that rarely leads to success anywhere. (Hollander et al., 2009, p. 12)

The Commission is interested in further information regarding the effectiveness of the planning system for areas experiencing minimal growth, or population decline, and whether a different approach to planning is needed depending on an urban area's growth profile.

**Q33**

**How could a future planning system be designed to reflect the differing circumstances and needs of New Zealand cities? Are new or different planning and funding tools needed?**

## Managing natural hazards

The 2010 and 2011 Canterbury earthquakes, and ongoing discussions about the impact of climate change on land use and urbanised areas, has put a focus on the role of the planning system on managing risks from natural hazards. The Government proposed in 2013 to amend section 6 of the RMA to make “the management of significant risks from natural hazards” a

matter of national importance,<sup>11</sup> and is currently aiming to have a National Policy Statement on natural hazard risk management completed by 2018.

Local authorities have numerous responsibilities for managing risks from natural hazards. These responsibilities are set out in statutes such as the Local Government Act 2002, the Building Act 2004, the Civil Defence and Emergency Management Act 2002, and the RMA.

For example, responsibilities of Regional Councils include controlling the use of land to avoid or mitigate natural hazards (section 30 RMA 1991) and addressing the risk of natural hazards when carrying out its RMA planning and consent processing functions.

Similarly, the responsibilities of Territorial Authorities include exercising discretion to refuse a subdivision consent where the land is subject to certain hazards (or where a hazards will be exacerbated) and controlling building under the Building Act by issuing permits for building that complies with the Building Code schemes (Local Government New Zealand, 2014).

Yet many “hazardous” areas are also highly desirable places for people to live. For example, beachfront properties in some areas are subject to damage from coastal erosion yet demand for beachfront land remains high. This raises the questions of how much risk should be borne by the government and how much should be borne by private individuals that choose to live in hazardous areas because of the amenities they offer.

**Q34**

**Thinking beyond the existing planning system, how should a new model manage the risk of natural hazards? Who should bear the risk of building in areas where natural hazards may occur?**

## Responsiveness to technological change

Technological developments and innovation create new employment, recreation and residential opportunities. They can also present challenges to the operation of the planning system, especially around transport. Some hypothetical examples are outlined below:

- A significant source of funding for transport services and investment comes from fuel excise duties (52% of the 2015-18 National Land Transport Fund). The emergence of more fuel-efficient and entirely electric vehicles will put pressure on this revenue. Other jurisdictions, such as the US state of Oregon, are experimenting with alternative funding models, such as charges for distances travelled. These approaches, however, require investment in new monitoring processes.
- Infrastructure such as roads and highways are expensive, enduring assets which require long forward planning periods and can consume large amounts of land. Technologies such as driverless cars create the potential to make better use of existing assets, reducing the

<sup>11</sup> This proposed amendment is currently on hold, pending wider support in Parliament.



demand for new roads. Webb Henderson (2015) question whether land use regulation in New Zealand is sufficiently responsive to accommodate the growing range of individual transport choices.

- Many District Plans and council policies in New Zealand seek to control the outward expansion of cities and structure their internal layout in order to reduce greenhouse gas emissions from cars. Questions have been raised about the efficacy and side-effects of these policies (eg, Cheshire & Vermeulen, 2009). The rise of electric cars is likely to undermine rationales for tight urban planning based on emissions control (NZIER, 2014).

**Q35**

**Where will technological change put most pressure on the planning system? How could the system be designed to be flexible enough to respond to technological change?**

### Responding to coordination challenges

Countries have adopted a range of mechanisms to promote vertical coordination (coordination between different planning instruments and the institutions that prepare them at the national and sub-national levels) and horizontal coordination (coordination between the sectoral policies which have territorial impacts and the agencies that prepare them). Compared with other OECD countries, New Zealand's planning system is one which focuses primarily on vertical coordination (Table 3).

**Table 3 Vertical and horizontal coordination in selected OECD countries**

Strong vertical and horizontal coordination	Mainly vertical coordination	Mainly horizontal coordination	Weak vertical and horizontal coordination
Australia	Austria	Greece	Chile
Canada	Belgium	Luxembourg	Czech Republic
Denmark	Hungary	Slovenia	Italy
France	Israel	Sweden	Mexico
Germany	Japan	USA	Spain
Netherlands	<b>New Zealand</b>	UK	Turkey

Source: OECD, 2015.

Despite the classification of New Zealand's spatial planning system as one that incorporates "mainly vertical coordination", the Commission's *Using land for housing* inquiry identified that central government plays a relatively small role in the urban planning system, outside of

transport planning and funding. The Commission recommended that central government should work more closely with councils in the development of their plans, and that the government establish processes to better coordinate departments involved in urban planning.

The Commission's *Using land for housing* inquiry identified that many local authorities are using spatial plans to help coordinate land use, infrastructure and transport decisions. With the exception of the Auckland Plan (which is required under the Local Government (Auckland Council) Act 2009), all of these spatial plans were prepared voluntarily at the initiative of participating councils. Spatial planning exercises were identified by a number of submitters as helping to improve regional cooperation and understanding.

**Q36**

**Is there a need for greater vertical or horizontal coordination in New Zealand's planning system? In which areas? How could such coordination be supported?**

## Culture and capability

In its *Regulatory institutions and practices* report, the Commission highlighted the importance of culture and capability to the successful implementation of a new regulatory regime (NZPC, 2014).

"Organisation culture" can be thought of as the norms, values and beliefs shared by staff working within an organisation. This includes norms of behaviour and commonly held views around the best way to achieve organisational goals and the factors important for organisational success. Within organisations, occupations can develop subcultures of their own based, for example, on common educational backgrounds or the requirements of occupational licences.

Alternative approaches to urban planning (for example, the use of urban codes as suggested by Moroni (2010), rather than the current urban plans) imply a different role for planners and officials.

To conceive, control, enforce, and respect an urban code, rather than an urban plan, is actually quite a different task. In particular, an urban code is not based on a 'knowledge of detail' but on a 'knowledge of the principle'. (p. 147).

There may be tension between the new roles and the prevailing organisational and professional cultures. Such tensions have the potential to slow, or even undermine, reform of the urban planning system. For example, some have argued that the failure of the RMA's implementation to meet its founders' goals was due to the continuation of the mindsets and institutions from previous planning laws. Geoffrey Palmer cited the Planning Tribunal as a key source of difficulties:

There appears to be reluctance among some of the judges of the Tribunal to boldly follow the intent of the legislation and strike out on new and creative paths. Rather, the Tribunal

seems have preferred a narrow approach...In hindsight I regret that Parliament did not abolish the Planning Tribunal when the new legislation was framed. The Tribunal is a hangover from the old prescriptive town and country planning approach. It would have been better to substitute a new Environment Court. I was persuaded to retain the Planning Tribunal because of what I perceived to be community confidence in it and the point that there needed to be some areas of familiarity within the new statutory terrain. The need to change the judicial culture was overlooked. (1995, p. 170)

Similarly, as noted earlier, the former Environment Ministry deputy secretary Lindsay Gow attributed problems with the RMA to the carrying over of old planning schemes into the new regime.

**Q37**

**Would there be tension between a fundamentally different approach to urban planning, and the prevailing culture within organisations and professions involved in urban planning? How should tensions best be managed to provide for a successful transition?**

The Commission's *Regulatory institutions and practices* report also stresses importance of organisational capability in delivering good regulatory outcomes. The report noted that, amongst other things, a lack of capability can:

- create integrity and reputation risks for regulators, both individually and collectively;
- mean activities are not always performed to an acceptable standard, resulting in poor compliance outcomes/regulatory failure;
- contribute to harm, including serious harm to people, the environment and the economy; and
- lead to inconsistent approaches to carrying out regulatory compliance functions that create public confusion about the purpose of regulatory compliance and the role of regulation.

The use of alternative models to urban planning may mean planners and officials need to acquire new skills or increase their capability to perform specific tasks.

**Q38**

**Does the capability exist within local and central government to implement a fundamentally different approach to urban planning? Where are any gaps in capability likely to be?**

### **Reforms to land-use planning in other jurisdictions**

Many other countries have undertaken reforms to their urban planning systems. In particular, over the past two decades many European countries have implemented land-use planning reforms. Broadly speaking, reforms sought to achieve three objectives:

- greater integration between different policy sectors, and between different levels of government;
- greater involvement of the public, and other interested parties in the planning process; and
- strengthening the role of municipal and local governments, and renewed interest in long-term planning at the regional and local levels (Roodbol-Mekkes & van den Brink, 2015).

Examples of countries undertaking reforms of this nature include Denmark and England (Box 13).

### Box 13 **Recent reforms to planning systems in Denmark and England**

A revised Spatial Planning Act was introduced in Denmark in 2007. An underlying objective of this reform was to bring the execution of government tasks closer to the citizen. The reform simplified the planning system by reducing the number of statutory plans, and allocated greater responsibilities to municipal governments. Previously, regional government had been responsible for developing comprehensive regional land-use plans, however the substantive planning responsibility of regional government was transferred to the municipality level. Municipalities are now required to prepare municipal plans which combine political objectives, land use policies and more detailed land-use regulations. Central government approves municipal plans after reviewing them against a set of national guidelines (Galland & Enemark, 2015).

Recent reforms to the planning system in England have also sought to devolve greater responsibility to the local level, and to simplify the planning process. The Localism Act 2011 devolved most planning matters to local authorities and neighbourhood communities, and the central government condensed more than a thousand pages of national planning policies into a single sixty-page document (Roodbol-Mekkes and van den Brink, 2015). The Localism Act also enabled the regional tier of land-use planning to be essentially abandoned. Prior to 2011, regional strategies set out where new development needed to occur and included housing targets for different areas, set by central government. Regional strategies were considered overly bureaucratic and undemocratic, as local communities had limited opportunities to influence the strategies (Department for Communities and Local Government, 2011).

The Commission is interested in what lessons can be drawn from reform initiatives completed or underway in other jurisdictions.

**Q39**

**Are there leading practices from other countries about how a transition to a new urban planning system should be undertaken?**

## The challenge ahead

Writing in the 1960s about the development of cities, Jane Jacobs said cities would be more intricate, comprehensive, and diversified than in her day, “and will have even more complicated jumbles of old and new things than ours do.” In highly developed future economies, “there will be more kinds of work to do than today, not fewer. And many people in great, growing cities of the future will be engaged in the unroutine business of economic trial and error” (Jacobs, 1969, pp. 250-251). What type of planning system can embrace such complexity, diversity and unpredictability?

The example of Petone’s life history described at the beginning of this paper underlines the many influences on how urban areas evolve, many of these unimaginable in advance. The big questions for this inquiry are around the appropriate role of a planning system in restricting or enabling these influences. How can a planning system successfully capture the immense benefits that urban areas offer their residents and the wider economy while, at the same time, managing the negative effects? This inquiry presents an opportunity to design from first principles a system that meets New Zealand’s future needs. The Issues Paper invites submissions from interested parties to be part of that process.

# Summary of questions

**Q1**

**What is the appropriate scope of planning?**

**Q2**

**What is the appropriate role for planning in controlling land use for design or aesthetic reasons?**

**Q3**

**Thinking beyond the current urban planning system, how could a new model best deal with the complex and dynamic nature of urban environments?**

**Q4**

**Thinking beyond the existing planning system, how should diverse perspectives on the value of land be taken into account?**

**Q5**

**Thinking beyond the existing planning system, how should the property rights of landowners and other public interests in the use of land be balanced?**

**Q6**

**How does the allocation of responsibilities to local government influence land use regulation and urban planning? Thinking beyond the current planning system, what allocation of responsibilities to different levels of government would support better urban planning?**

**Q7**

**How can an urban planning system better integrate land use regulation and infrastructure planning?**

**Q8**

**Are complicated rules needed to control complex social systems? What are the alternative approaches for dealing with complexity?**

**Q9**

**What principles around consultation and public participation should the Commission consider in the design of a new urban planning system?**

- Q10** Thinking beyond the existing planning system, what should be the appropriate level of consultation in making land use rules or taking planning decisions?
- Q11** How could a new planning system provide recognition and protection of Māori interests?
- Q12** What design features of a new urban planning system are needed for the Crown to meet its duties and obligations under the Treaty of Waitangi?
- Q13** Thinking beyond the current urban planning system, how should a new model be designed so as to avoid unnecessary administrative, economic and compliance costs?
- Q14** Thinking beyond the current planning system, how should national interests in planning outcomes be recognised and taken into account? What are the national interests that should be recognised?
- Q15** What difference has the planning system made to environmental outcomes over the past 20 years?
- Q16** What difference has the planning system made to urban outcomes over the last 20 years?
- Q17** What information about environmental outcomes and other urban outcomes would a decision-maker need to make good urban planning decisions?
- Q18** Why did the RMA not deliver on its original objectives?
- Q19** Does a goal of limiting the scope of land use regulation to managing effects, based around nationally-established environmental bottom lines, remain a valid objective?
- Q20** Which aspects of the existing planning system would be worth keeping in a new system?

- Q21** Would there be benefits in a future planning system making more provision for private lawsuits and bargaining to resolve disputes over land use? In what circumstances would lawsuits and bargaining be beneficial?
- Q22** Should more decisions about land use rules be made by property owners privately (for example through covenants)?
- Q23** Would there be benefit in tradable development rights, tradeable permits and environmental offsets playing a stronger role in a future urban planning system? In what circumstances?
- Q24** Are there opportunities to make greater use of economic tools such as prices, fines and user charges in a future planning system? Where do these opportunities lie? What changes would be required to facilitate their use?
- Q25** What international approaches to planning and environmental protection should the Commission consider?
- Q26** Should New Zealand continue to have a unitary regulatory framework for environmental and land use regulation? What are the advantages and disadvantages?
- Q27** Should regulating land use and/or environmental effects in an urban context be separated from resource management legislation that applies in non-urban areas? What are the advantages and disadvantages?
- Q28** Should provisions relating to infrastructure planning and funding be integrated in a planning statute? What are the advantages and disadvantages?
- Q29** Are there provisions of other statutes (for example in the Conservation Act or Reserves Act) that should be integrated into a new statutory framework for urban planning? What reforms are needed to these frameworks?
- Q30** How could the planning system be designed to provide a sufficient supply of industrial and commercial land? Are there particular tools that could be used to ensure an adequate supply?



**Q31**

How much discretion should be built into an urban planning system? Are there examples of urban planning systems in other countries that successfully manage the tension between certainty and discretion?

**Q32**

How could a future planning system be designed to consider the benefits to consumers that may arise from greater competition?

**Q33**

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**Q39**

Are there leading practices from other countries about how a transition to a new urban planning system should be undertaken?

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## Appendix A Terms of reference

### **New Zealand Productivity Commission Inquiry into the System of Urban Planning in New Zealand**

Issued by the Minister of Finance, the Minister of Local Government, the Minister for Building and Housing, the Minister for the Environment, and the Minister of Transport (the “referring Ministers”).

Pursuant to sections 9 and 11 of the New Zealand Productivity Commission Act 2010, we hereby request that the New Zealand Productivity Commission (“the Commission”) undertake an inquiry into alternative approaches to the urban planning system.

#### **Context**

In its 2012 housing affordability report, the Productivity Commission noted:

*Planning must take account of the Resource Management Act (RMA), the Local Government Act (LGA) and the Land Transport Management Act (LTMA). These statutes have different legal purposes, timeframes, processes and criteria. With multiple participants and decision-makers, there is no single mechanism for facilitating engagement, securing agreement among participants and providing information for robust decision-making. The Government should consider the case for reviewing planning-related legislation. (p10)*

*Development proposals are broken down into economic, infrastructure and environmental components, and examined separately according to relevant legislation. This disconnect can make it difficult to achieve quality integrated urban development. (p121)*

The Commission recommended the Government “consider the case for a review of planning-related legislation to reduce the costs, complexity and uncertainty associated with the interaction of planning processes under the Local Government Act, the Resource Management Act and the Land Transport Management Act.”

These regimes underpin not just planning for housing but the productivity of New Zealand’s wider economy. Many parts of the regime have been in existence for considerable time and have evolved in a piecemeal fashion. International best practice has also moved on, and a fundamental review of the urban planning system is due.

#### **Scope and aims**

The purpose of this inquiry is to review New Zealand’s urban planning system and to identify, from first principles, the most appropriate system for allocating land use through this system to support desirable social, economic, environmental and cultural outcomes.

The review should identify options to align the priorities of actors and institutions within these regimes, where possible; improve economic, environmental and community outcomes through urban planning; and to deliver optimal efficiency in the delivery of these outcomes.

This will include identifying the most effective methods of planning for and providing sufficient urban development capacity including residential, commercial, industrial and place-based amenity uses, supporting infrastructure and linkages with other regions.

The review should look beyond the current resource management and planning paradigm and legislative arrangements to consider fundamentally alternative ways of delivering improved urban planning, and subsequently, development.

It should also consider ways to ensure that the regime is responsive to changing demands in the future, how national priorities and the potential for new entrants can be considered alongside existing local priorities and what different arrangements, if any, might need to be put in place for areas of the country seeing economic contraction rather than growth.

The scope of this review should include, but not be limited to the kinds of interventions and funding/governance frameworks currently delivered through the Local Government Act, the Resource Management Act, the Land Transport Management Act and the elements of Building Act, Reserves Act and Conservation Act relating to land use (as well as the formal and informal processes, institutions and practices around these pieces of legislation).

The review should also consider the interaction of the urban planning system with planning for other regions and identify those areas where broader system-level change is needed to deliver more efficient urban planning.

The inquiry should cover:

- Background, objectives, outcomes and learnings from the current urban planning system in New Zealand, particularly:
  - how environmental and urban development outcomes have changed over the last twenty years
  - explaining the behaviour, role and capability/capacity of councils, planners, central government, the judiciary and private actors under the regime.
  - the tendency for increasing complexity and scope creep of institutions and regulatory frameworks.
- Examination of best practice internationally and in other cases where power is devolved to a local level in New Zealand.
- Alternative approaches to the urban planning system.



The report should deliver a range of alternative models for the urban planning system and set up a framework against which current practices and potential future reforms in resource management, planning and environmental management in urban areas might be judged.

**Exclusions**

This inquiry should not constitute a critique of previous or ongoing reforms to the systems or legislation which make up the urban planning system. Rather, it is intended to take a 'first principles' approach to the urban planning system.

**Consultation**

To ensure that the inquiry's findings provide practical and tangible ways to improve the performance of the urban planning system, the Commission should consult with Local Government New Zealand, the Society of Local Government Managers and the wider local government sector.

The Commission should also consult with the Parliamentary Commissioner for the Environment, non-governmental organisations, resource management practitioners and lawyers and affected industry groups; taking note of the significant bodies of work already produced by many of these groups.

**Timeframes**

The Commission must publish a draft report and/or discussion document, for public comment, followed by a final report that must be presented to referring Ministers by 30 November 2016.

HON BILL ENGLISH, MINISTER OF FINANCE

HON PAULA BENNETT, MINISTER OF LOCAL GOVERNMENT

HON DR NICK SMITH, MINISTER FOR BUILDING AND HOUSING, MINISTER FOR THE ENVIRONMENT

HON SIMON BRIDGES, MINISTER OF TRANSPORT





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