Submission

by

The New Zealand Initiative

on the

Productivity Commission's

Better Urban Planning draft report

Submitter: The New Zealand Initiative

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1. Introduction

1.1 This submission on the Productivity Commission's Better Urban Planning draft report is made by The New Zealand Initiative, an independent public policy think tank supported by chief executives of major New Zealand businesses.

1.2 We undertake research to develop evidence-based public policy to build a better, more prosperous New Zealand, for all New Zealanders.

1.3 We have undertaken significant research into land use planning, the trade-off of different urban forms, and local government policy, and these effect housing affordability in New Zealand.

1.4 Our submission focuses on the following key issues:

(a) Issues relating to regulation of the built environment, including the desirability of requiring local communities, rather than individual landowners, to meet the costs of regulation relating to visual amenity (**chapter 7**);

(b) The merits of a GPS on Environmental Sustainability, and the use of adaptive management to assess environmental effects in urban areas (**chapter 8)**

(c) The costs of urban growth, recovery of capital and operating costs from new infrastructure, and alternative funding arrangements for local government(**chapter 10);** and

(d) How to create a new urban planning framework (**chapter13**).

1.5 In this submission, we use the same abbreviations as the Commission uses in the draft report.

2. Summary

2.1 In summary, the Initiative's submissions are as follows:

(a) We agree with the Commission's essential conclusions that New Zealand's urban planning system has a number of deficiencies and that the problems have their roots in both the design and implementation of the system. The language of the primary planning legislation, the RMA, is broad and ambiguous which has seen its scope extend far beyond that contemplated at the time of its enactment. As a result, rather than protect environmental "bottom-lines" the Act has led to urban planning decision-making that is overly prescriptive, slow to adapt to the needs of the residents of New Zealand's urban areas, and excessively risk averse.

(b) We also agree that cultural and organisational changes are needed at both the local and central government level so that local government is appropriately incentivised to act in a manner that results in the efficient functioning of urban land markets.

(c) We agree with the Commission that a future planning system with a clearer legislative purpose would encourage better use of regulatory discretion. Although we would prefer reforms to cover all land use regulation, we accept that a dual planning regime may be more politically practical to implement. However, we do have concerns about several of the policy proposals, including the establishment of a permanent IHP to review all plan changes. We also believe that in some respects the proposals do not go far enough. For example, we believe the proposal that the costs of visual amenity conditions should be publically borne if the benefits accrue to the public, be it on new or heritage buildings.

(d) In principle we support the idea of a GPS on Environment Sustainability, particularly where it is backed by scientifically established baselines. However we are concerned to ensure that, in developing the GPS, the mistakes of the RMA are not carried over into the GPS, specifically the poor protection of private property rights, and ill-defined terms such as "sustainability". We are also supportive of adaptive management, but note that the use of this policy tool has run into problems in other resource use areas in New Zealand that remain unresolved.

(e) We agree with the Commission's assessment that the current local government funding arrangements have contributed to some urban development problems. We see great merit to introducing direct financial incentives as a means of addressing this shortcoming.

(f) We agree that a new planning system should be devised, with a clearer distinction between the built and the natural environment as suggested in chapter 13. We do not consider it is either feasible or possible to do this within the framework of the RMA. The purpose statement in section 5 of the RMA is so broad, and so ambiguous, that it is incapable of providing the guidance needed on priorities for decision-making in the urban environment. We comment in greater detail on this issue below.

3. Our specific responses to the Commission's questions

7.1. Would it be worth moving to common consultation and decision-making processes and principle for decisions on land use rules, transport and infrastructure provision? How could such processes and principles be designed to reflect both:

- **the interest of the general public in participating in decisions about local authority expenditure and revue; and**
- **the particular interest of property owners and other parties affected by changes to land use controls?**

Do the consultation and decision-making processes and principles in the LGA adequately reflect these interests?

We have no comment on this issue.

7.2. Should all Plan changes have to go before the permanent Independent Hearings Panel for review, or should councils have the ability to choose?

We do not consider it desirable to establish or rely on a permanent IHP as a means of improving the planning process. The Auckland IHP appears to have produced a positive result (at the very least improving on the version of the Proposed Auckland Unitary Plan than was first put up), and the Initiative has publically supported many of the panel's recommendations. However, this positive experience does not mean that all such panels will produce equally good results.

There is a risk that economic considerations will be underweighted with future IHPs if they follow the same formation and appointment process as the Auckland IHP. This is because the Local Government (Auckland Transitional Provisions) Act 2010 only empowered the Minister for the Environment and the Minister of Conservation to appoint panel members.

More importantly, we have serious reservations about creating a system that subjects all plan changes to a permanent body whose members are appointed by central government. We consider planning decisions are likely to be more robust and responsive to the needs of local communities if the choice remains with local councils.

7.3. Would the features proposed for the built environment in a future planning system (e.g. clearer legislative purpose, narrower appeal rights, greater oversight of land use regulations) be sufficient to discourage poor use of regulatory discretion?

We agree a future planning system with a clearer legislative purpose would encourage better use of regulatory discretion. However, rather than narrowing appeal rights and introducing greater oversight of land use regulation, we believe this should be supported by a framework that adequately incentivises councils to exercise their regulatory discretion in a way that meets the needs of their communities. We set out our views on how to create a more robust framework for incentives in our answer to question 10.3 below.

In conjunction with incentives, we believe that as a first best solution, any future planning system should contain strong protection of property rights at its core. The system that replaces the current one should also apply to all land owners, instead of distinguishing between urban and non-urban land uses. It should also start with the presumption that property owners are free to develop their land as they like, provided externalities are dealt with adequately. This is the approach taken in Germany, where land owners are free to develop their properties as they see fit, provided it adheres to zoning restrictions.

For practical reasons, we recognize that it may be necessary to introduce a dual planning regime for the urban/non-urban environments. When distinguishing between the two different environments care needs to be taken to allow land to transition from one regime to the other as cities grow. We would recommend a mechanism be introduced in the legislation to allow this to happen automatically and according to nationally applicable criteria. This approach has already been proposed in the draft National Policy Statement on Urban Development Capacity, but it our view it gives too much discretion to local planners, and as such, is unlikely to improve on the status quo on urban land supply.

7.4. Would allowing or requiring the Environment Court to award a higher proportion of costs for successful appeals against unreasonable resource consent conditions be sufficient to encourage better behaviour by councils? What would be the disadvantages of this approach?

We do not consider it would be either appropriate or sufficient to allow or require the Environment Court to award a higher proportion of costs for successful appeals against unreasonable resource consent conditions.

We do not consider this would be appropriate, as the courts already have discretion in relation to the award of costs on successful appeals. We see no good reason for making councils – alone among decision-makers exercising discretionary statutory power – subject to a special costs regime.

Nor do we consider costs awards would be a sufficient incentive. We set out our views on how to create a more robust framework for incentives in our answer to question 10.3 below.

7.5 Would it be worthwhile requiring councils to pay some, or all, costs associated with their visual amenity objectives for private property owners? Should councils only rely on financial tools for visual amenity objectives, or should they be combined with regulatory powers?

We acknowledge that visual amenity is an important consideration when it comes to urban areas, as poor urban design at a building level can impose negative spill-over effects on the surrounding community that can last decades. Equally, good urban design can have the opposite effect. In less regulated land markets, we would not expect this to be a problem, as developers would seek to maximise the value of their projects by producing buildings that meet the expectations of different market tiers.

In our view, one of the goals of this planning system review should be to remove the regulatory barriers that prevent these market-based outcomes from occurring naturally. Where councils argue that they need to retain visual amenity powers while this transition occurs, then there should be compensation for the costs associated with requirements imposed to meet councils' visual amenity objectives. Visual amenity considerations should also be extended to heritage buildings. The New Zealand Initiative has previously argued that the off-budget regulatory expense that councils impose on heritage building owners should become an on-budget expense to compensate for the heritage amenity that these building owners provide.[1] As it stands, building owners face higher costs from owning a heritage protected buildings, but do not receive higher rents to offset these costs. Where councils insist on imposing heritage protections on buildings, they should fund this shortfall. It will act as a necessary check and balance on councils, and force them to make heritage decisions more critically.

8.1. What should be the process for developing a Government Policy Statement (GPS) on Environment Sustainability? What challenges would developing a GPS present? How could these challenges be overcome?

In principle we support the idea of developing a Government Policy Statement on Environment Sustainability, particularly where it is backed by scientifically established baselines. Compared to many European countries, New Zealand is comparatively under-governed, particularly in the area of planning and the environment. This is particularly problematic at the central government level, where officials have passed highly complex statutory duties to local authorities with little guidance, support, or performance measurement. A clear example is ecological compensation, an activity allowed under the RMA whereby a land owner can compensate for the impact of a development by commensurate investments in other parts of the environmental estate. In practice the complexity of these schemes outstrips the capability of many councils. An academic reviews found 90% of ecological compensation schemes in New Zealand have no objective quantification of the compensation needed to ameliorate the impact of resource development. Furthermore, of the 245 conditions placed on 81 ecological compensation schemes in New Zealand, only 68% of requirements were met.[2]

Our support for a GPS is countered to some extent by practical concerns about repeating the mistakes of the current system, in particularly the term "environment sustainability". A significant problem with RMA is that the term "sustainable management" is not meaningfully defined. As the Productivity Commission itself has noted in the draft report, there is a risk that the same weakness may be carried over into the GPS.

We would also urge that the protection of property rights be strengthened if a GPS on Environment Sustainability is to be adopted. Under section 85 of the RMA, councils do not have to compensate land owners for regulatory takings. As a result, councils do not face the full cost of their decisions in the planning process, and may be more open to making politically-weighted rather than economically efficient decisions. A good example of this are the view shafts introduced in the Auckland Plan. Landowners face the full costs of these decisions. Some relief is available through the courts, but this is often costly and disadvantageous to the landowner. Appeal to the Environment Court on any property takings is an important protection in the Public Works Act, and should be carried over to the planning framework.

8.2. Would a greater emphasis on adaptive management assist in managing cumulative environmental effects in urban areas? What are the obstacles to using adaptive management> How could adaptive management work in practice?

In principle, the Initiative is supportive of adaptive management. However, Trans-Tasman Resources' experience in trying to establish an adaptive management framework to mine undersea iron sands suggests that the broader regulatory setting may be too restrictive for it to be practical. This is particularly so where any

[1] Eric Crampton and Linda Meade, "Deadly heritage" (Wellington: The New Zealand Initiative, 2016) pp4.
[2] Jason Krupp "From red tape to green gold" (Wellington: The New Zealand Initiative, 2016) pp11.

development would fall under the New Zealand Coastal Policy Statement 2010. In the Sustain our Sounds vs King Salmon decision, the Supreme Court set four tests (extent of the environmental risk; importance of the activity; degree of uncertainty; and extent to which adaptive management will diminish risk and uncertainty).[3] It is likely that any attempt to use adaptive management would have to answer the same tests, potentially setting a test that will be very difficult for private developers to cost effectively meet (particularly as some are high subjective).

9.1. Which components of the current planning system could spatial plans replace? Where would the greatest benefits lie in formalising spatial plans?

We have no comment on this question.

10.1. Is there other evidence that either support or challenges the view that "growth does not pay for growth"?

The Initiative's research has found that councils have a long-term financial incentive to grow their populations, as larger districts tend to have lower rates per capita than smaller councils.[4] However, it is debatable whether this long-term incentive is recognised and/or sufficiently strong to overcome the short-term costs associated with accommodating high rates of population growth. This is because councils have to immediately carry the costs of growth on their books in the form of depreciation and interest expenses, whereas revenue from these investments will only be received at a later stage, typically in the form of property taxes and developer contributions. To limit these costs, councils often limit the expansion of their infrastructure footprints, even if this action constrains the supply of developable land and pushes up house prices. This can create the impression that "growth does not pay for growth".

As far as we are aware, no quantitative work has been done to assess whether the long-term benefits outweigh the short-term costs. This is probably because establishing an apples-for-apples comparison is difficult due to policy variation among councils. For example, Queenstown-Lakes District Council's targeted rates accounted for 96% of total rates revenue in 2013, presumably confronting those benefitting from infrastructure investments with the costs of providing it (tourism businesses in this case). Tauranga City Council, however, made no use of targeted rates during this period, choosing instead to apportion the costs of growth across the whole of the city's population.[5]

10.2. Would there be benefit in introducing a legislative expectation that councils should recover capital and operating costs of new infrastructure from beneficiaries, except where this is impractical?

There is certainly merit in applying the beneficiary pays principle to local infrastructure, however there is a risk it may push up prices and supress development activity. The Initiative's research into the housing market has

[3] "Trans-Tasman Resources Ltd Marine Consent Decision" (Wellington: Environment Protection Agency, 2014) pp169.
[4] Jason Krupp & Bryce Wilkinson, "The local formula: myths, facts & challenges" (Wellington: The New Zealand Initiative, 2015) pp35.
[5] Jason Krupp & Bryce Wilkinson, "The local formula: myths, facts & challenges" (Wellington: The New Zealand Initiative, 2015) pp44.

showed how developer contributions are simply passed onto buyers in the upfront asking price of a house, and there is also little clarity into how these contributions are determined.[6]

This problem is circumvented in the United States by spreading these costs over the life of the infrastructure asset using municipal bonds with long maturity dates. These debts are either serviced from general taxes or by specific revenue streams (localised tax revenues). If councils are to be made to recover operating and capital expenses on new infrastructure, there should also be a requirement that it only be done so where the benefits are well defined and the cost be spread out over the life of that asset.

10.3. Would alternative funding system for local authorities (such as local taxes) improve the ability to provide infrastructure to accommodate growth? Which funding systems are worth considering? Why?

As noted earlier in this submission, the direct financial incentives on councils are weak, as it is not self-evident to councils that the long-term benefits make up for the financial or political costs in the short-term. Furthermore, many of the main financial benefits from investments in local infrastructure flow to central government in the form of higher sales, profit and salary taxes. In this environment it is not surprising that we see fast growing councils like Auckland limit the scope and scale of their infrastructure provision, even though this has flow-on effects in the housing market.

One means of encourage councils to provide more infrastructure to accommodate population growth is to introduce direct financial incentives. In the United Kingdom, for example, the Earn Back deal has been introduced in Greater Manchester. Under this scheme, the city-region will share in any business rates uplift that is generated from any local infrastructure investment. This revenue is tied to further infrastructure investment, which also falls under the Earn Back scheme, creating a virtuous cycle.[7]

In places like Switzerland, direct local taxes create clear incentives that are aligned with economic growth.[8] This is because all residents pay local taxes, not just property owners. An important feature of this system is that if dissatisfied residents move from one jurisdiction to another they take their tax revenues with them. This rewards councils that pursue good policies and punishes those that do not.

If Swiss local authorities want to increase their revenues they can either raise taxes or put policies in place that will attract new residents. Since tax increases are never popular, most local authorities compete on policy, such as time obtain building permits, or opening land for development. There are several related points about the Swiss system that need to be raised. The first is that in some respects the planning system is more restrictive than in New Zealand (it is a small country with limited potential for development). The second is that the Swiss federal government sets the planning framework but also directs policy within this framework where there are national-level implications. Looking at the RMA and the scope of the National Policy Statements produced to date, New Zealand looks under-governed by comparison, as noted earlier. Third, the Swiss planning system has not stopped the country from maintaining stable housing prices over the long-term even as its population grew. One of the reasons for this that local authorities have a strong incentive to work efficiently within this system, regardless of how complex it is.

The Initiative has previous proposed that central government introduce financial incentives for jurisdictions facing population growth pressures and high house prices.[9] These Housing Encouragement Grants,

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[6] Michael Bassett and Luke Malpass, "Priced out: how New Zealand lost its housing affordability," (Wellington: The New Zealand Initiative, 2015) pp26.

[7] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/221014/Greater-Manchester-City-Deal-final_0.pdf

[8] Jason Krupp "The local benchmark: when smaller is better," (Wellington: The New Zealand Initiative, 2016) pp17-24

[9] Michael Bassett, Luke Malpass and Jason Krupp "Free to build: restoring New Zealand's housing affordability," (Wellington: The New Zealand Initiative, 2016) pp17.

benchmarked on the GST generated by the dwelling's construction and sale, would be paid for every new dwelling built in their area, provided the house met minimum delivery deadlines from application to completion. This policy could encourage councils to reduce the time it takes to consent a house and reduce bureaucratic delays due to the time restrictions placed on the grants. It would also encourage councils to open more land for development, and provide them with a source of funding to cover the costs of new development.

However the Initiative has concerns about recommendation 10.3. There is merit in considering schemes that capture some of the value increase that stems from zoning uplift, particularly where the benefits are well defined and costs can be applied to the beneficiaries. Cases where this may apply include changing land use at edge of cities from agricultural to residential, provided that these funds are used to fund related infrastructure provision. This approach has been used successfully in the US to fund the expansion of some urban areas.

It is far more problematic to try and do so in already established areas, particularly where it is left to the discretion of planners to decide the extent to which a public investment has increased the value of nearby properties. There are many unquantifiable factors that can shift property values that are likely to confound this process. It could also create an incentive for local officials to pursue politically popular projects, such as light rail, knowing they can force the costs on a narrow subset of the community. This may be acceptable to the majority but it is not necessarily fair to affected land owners.

10.4. Would there be benefit in allowing councils to auction and sell a certain quantity of development rights above the standard controls set in a District Plan? How would such a system be designed?

While we think this idea has superficial merit, in practice it creates a serious risk of abuse. It is not unimaginable that a councils could raise the standard controls so as to increase the number of development rights it has to sell. We do not consider that this proposal should be pursued. There should be no need for councils to retain any "head-room" in the extent of permissible development rights in a properly designed future planning system.

10.5 Should a requirement to consider public-private partnerships apply to all significant local government infrastructure projects, not just those seeking Crown funding?

If there are any legislative impediments to councils considering public-private partnerships, these should be removed. However, in properly designed future planning system, with the right incentives, there should be no need to require local councils to consider public-private partnerships.

Q13.1 What are the strengths and weaknesses of these two approaches to land use legislation? Specifically:

- **What are the strengths and weaknesses in keeping a single resource management law, with clearly-separated built and natural environment sections?**

- **What are the strengths and weaknesses in establishing two laws, which regulate the built and natural environment separately?**

Q13.2 Which of these two options would better ensure effective monitoring and enforcement of environmental regulation?

- **Move environmental regulatory responsibilities to a national organisation (such as the Environmental Protection Authority).**

- **Increase external audit and oversight of regional council performance**

We agree that a new planning system should be devised, with a clearer distinction between the built and the natural environment. However, we do not consider it is either feasible or possible to do this within the framework of the RMA. The purpose statement in section 5 of the RMA is so broad, and so ambiguous, that it is incapable of providing the guidance needed on priorities for decision-making in the urban environment.

The principle flaws with section 5 are:

1. A failure to acknowledge the existence of private property rights, a critical starting point for a well-functioning planning framework;
2. The use of the vague concept of sustainable management, a term that has proved incapable of objective interpretation and which is therefore not a useful public policy construct;
3. The absence of any reference to the concepts of public goods and externalities, which are also critical concepts for a workable and effective planning framework; and
4. It includes intrinsic values that are incapable of evaluation, rather than the well-understood human welfare, which is susceptible of evaluation.

These flaws are fundamental. Vague and unquantifiable terms create insuperable barriers to certainty and accountability. They confer enormous discretionary power on officials and other decision makers, including the courts, and on those capturing local political processes. They are therefore antithetical to the rule of law.

They are also antithetical to the primary goal of any well-functioning planning system – that is the goal of advancing welfare. We agree that an effective planning system can advance welfare. But, as the Commission notes in its draft report, defining property rights and setting clear expectations are essential requirements for an effective planning system.

The absence of any property-rights focus in section 5, and the reliance instead on fuzzy concepts like “sustainable management” and “intrinsic values”, means section 5 is unsuitable as the foundation for a new urban planning system.

As it is likely to be politically impossible to remove section 5 from the RMA, it will be necessary to create separate built-environment planning framework in a separate, but related, Act.

(Ends)