

# **Submission**

By



to the

## **Productivity Commission**

on the

### **Using Land For Housing - Issues Paper**

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# USING LAND FOR HOUSING ISSUES PAPER SUBMISSION BY BUSINESSNZ<sup>1</sup>

## INTRODUCTION

### 1.0 INTRODUCTION

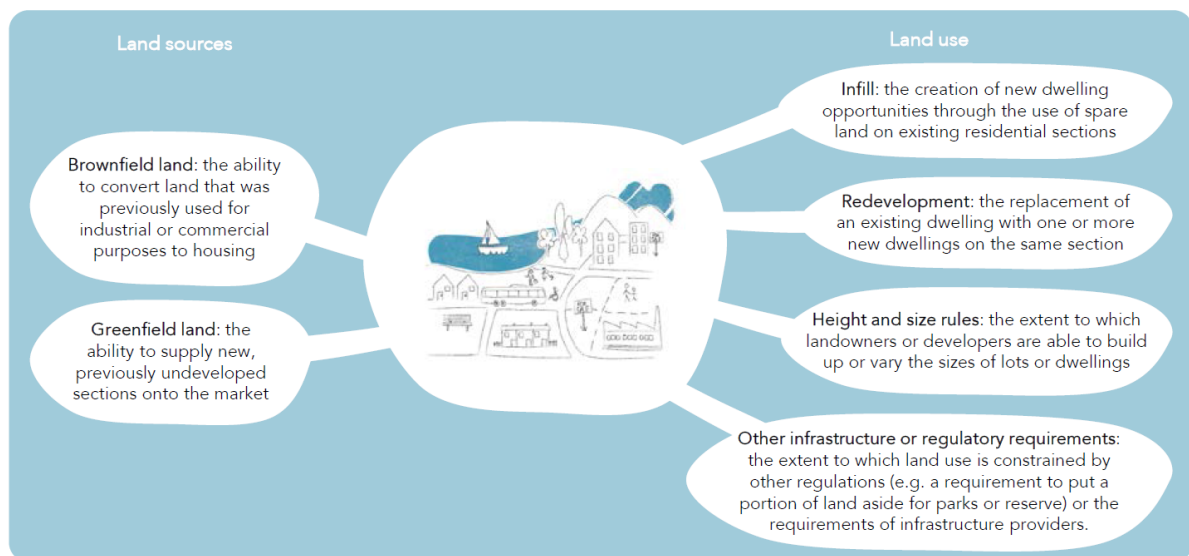
BusinessNZ welcomes the opportunity to comment on Productivity Commission’s “Using Land For Housing – Issues Paper” (the “Issues Paper”).

BusinessNZ would like to congratulate the Productivity Commission on the quality of the Issues Paper and the clarity with which it deals with many land supply issues. The quality of the Productivity Commission’s work on a range of matters sets a benchmark to which other Central and Local Government Agencies should aspire.

The Paper covers a number of issues where BusinessNZ is fundamentally in agreement and therefore has not addressed them in this submission.

The diagram below clearly demonstrates concerns in respect to housing development capacity.

**Figure 1** What contributes to the supply of development capacity?



Obviously member companies will have views on particular issues which can be raised directly with the Productivity Commission but that notwithstanding, BusinessNZ has concerns about placing increased costs (effectively liabilities) on local government either implicitly or explicitly. Increased costs will tend to make councils risk adverse when opening up new (or extending the use of existing) land for housing.

<sup>1</sup> Background information on BusinessNZ is attached as Appendix 1.

Second, BusinessNZ considers greater consideration should be given to the payment of compensation for loss of property rights and regulatory takings to ensure local and central government more fully consider the implications of unnecessarily restricting the use of property.

Both these issues are discussed in more detail below.

BusinessNZ would welcome the opportunity to discuss our submission with the Productivity Commission.

## **1. Risk Management associated with land use**

BusinessNZ considers householders should have greater responsibility for identifying and managing the risks associated with land use, rather than spreading the risks across all ratepayers and in some cases, central government. This would allow for increased housing development and in time should result in increased affordability.

It is important to understand up-front that there is an optimal amount of resource which should be utilised in reducing risk, just as there is an optimal amount of resource that should be spent on crime prevention, health interventions etc. The crucial and undeniable fact is that resources are limited and risk cannot be completely eliminated or if at all, not without great cost. While it may be possible to reduce risk, beyond a certain point the marginal cost of taking action becomes progressively higher while the potential returns reduce. Therefore it pays for companies and individuals to invest in risk minimisation strategies only up to the point at which the marginal cost equals the marginal benefit.

As a general principle, individuals and companies should bear the full costs associated with their behaviour (i.e. costs should be internalised); individuals will over-consume resources if they can shift costs on to third parties. Management of land use risk is no different. If individuals are to make rational decisions about risk, they should ideally bear the associated costs (and benefits).

Regulators generally have strong incentives to minimise their own risk by imposing higher standards than might be justified. Because regulators do not bear the costs associated with their decisions (costs will ultimately be passed on to consumers), they may well over-regulate rather than be aware of, or adequately consider, the cost/quality trade-offs consumers are willing to make. Given that each is unique, individuals will generally have different risk profiles, with some willing to pay a considerable amount to minimise risk while others will want to invest little in reducing real or perceived risk.

From an economic perspective, risk involves a consideration of two matters, that:

1. There is a need for more resources, including time and money in order to reduce risk; and
2. Because of what must be given up in terms of increased cost or whatever else is seen as desirable, people's actions indicate a desired level of risk well short of zero.

Often market-based mechanisms for determining risk will be far more effective than council-controlled outcomes and will fairly reflect the actual risk associated with land use. For example, in a competitive insurance market, individuals and businesses seek competitive quotes in dealing with hazardous situations. In some cases insurers may be unwilling to insure a building at all if the situation is considered too hazardous. This approach naturally incentivises people to assess the costs and benefits of building in areas where natural hazards have been identified.

There are a number of instances in the hazard management area where local government controls not only impact on the property rights of existing landowners but seriously restrict land available for housing development. This in turn increases the cost of available housing and as a result, rental prices.

Residents in the Kapiti Coast District Council area fought proposals to place new “hazard lines” (from the Lim report) on about 1800 properties along the coast, which sparked fears that the lines would affect valuations and insurance.

The Lim Report proposals not only seriously affected the value of the land in question due to questionable analysis but placed restrictions on the ability of affected residents to expand beyond their current property footprint.

Putting aside the debate as to whether the erosion hazard identified by the Council was within the reasonable bounds of probability, even should it eventuate, the risks would largely be borne by people whose residences were on or close to the foreshore. Arguably, the “risks” of further erosion would affect these individuals in the sense that their property values might decline and/or they would no longer be able to secure insurance, at least not without considerable cost. It is hard to see how such an outcome (even if unlikely, according to some sources) would involve adverse effects on external parties of such a magnitude as to justify the Council’s draconian response.<sup>2</sup>

There is no reason why councils should be unnecessarily concerned about land use hazards provided the externalities associated with any adverse event are internalised as much as possible (for example, parties involved in building on flood plains being responsible for any adverse impacts associated with their behaviour).

This general principle has been upheld in a decision of Judge Jackson and Commissioner Manning in the case of *Otago Regional Council v Dunedin City Council and BS and RG Holt* [2010] NZEnvC 120 where essentially BS and RG Holt wished to build a house on land which could be prone to flooding:

*‘We have thought carefully about the way in which Mr and Mrs Holt have said they understand and will accept the risk of flooding of their property at 96 Stornoway Street, Karitane. We do not believe they are being foolhardy in proposing to build and live in a house on the property, but have assessed the probabilities rationally..... There comes a point where a consent authority should not be paternalistic (at least not under the RMA) but leave people to be responsible for themselves, provided that does not place the moral hazard of things going wrong on other people.’ (p.4)*

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<sup>2</sup> It is understood that after much opposition, the Council has withdrawn its proposals.

Given that land users largely internalise the costs and benefits of land use, the case for controls is weak, and will, as outlined above, have unintended consequences, particularly by adding to land and housing costs. These costs will ultimately be reflected in reduced economic growth, not to mention reduced housing affordability and with associated poverty implications.

*“The major obstacle here is the combination of the Resource Management Act 1991 and the Local Government Act 2002. These give the planners effective power to decide how and where we should live, as opposed to what one might have thought the role of local authorities would be which is to provide us with services where and when we want them. Councils impose metropolitan urban limits and intensification of buildings while it is clear that what buyers want is larger houses and a suburban lifestyle. The council policies also drive prices up and make it harder for first time buyers to get onto the property ladder, reinforcing the divide between those who already have and those who do not.”<sup>3</sup>*

## **2. Compensation for loss of property rights and ‘regulatory takings’**

BusinessNZ is also of the view that greater consideration should be given to the payment of compensation for loss of property rights and regulatory takings to ensure local and central government more fully consider the implications of unnecessarily restricting the use of property.

A fundamental principle on which a market economy (such as New Zealand) is based is that property owners (including businesses) have relative security in their property rights with the right to use their property in the manner they choose (while respecting the rights of other property owners).

Investors too must have confidence that any assets they purchase or improve upon will be safe from confiscation and unreasonable restrictions, or alternatively, that the investor will be compensated for any erosion of property rights. If this is not the case, then there will be limited incentive for anyone to undertake long-term investment.

Property developers who see themselves as at the mercy of the territorial authority with little guarantee of long term security in their investment, will have little incentive to invest in projects. And territorial authorities will have little incentive to fully investigate other housing affordability options; confiscating developers’ land and money is an easy option.

Given that markets are generally faster at self-correcting than is government intervention, the onus of proof must be on government (and councils) to prove beyond reasonable doubt that the benefits of intervention exceed the costs, including the unintended costs associated with regulation (such as non-compliance).

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<sup>3</sup> Child poverty and inequality - The New Zealand Law Journal (November 2014)

The real danger is that regulators will minimise their own risks with little certainty that the rules won't be changed down the track and at relatively short notice - hardly encouraging investment in building activity.

Apart from the Public Works Act, there is currently no allowance, other than in one or two specific instances, for the payment of compensation for regulatory takings (that is, a reduction in private property rights in the public interest).

Regulatory takings should not be legislatively condoned and an acknowledgment of the right to compensation is at the core of the property rights issue with a general presumption that property rights should not be diminished without compensation. This is a long-held view. BusinessNZ considers the presumption of compensation to be a vital check and balance for the economic system.

The need to compensate for regulatory takings is hardly a new or novel conclusion in public policy terms. Over recent years the Crown, in the process of regulating private property rights in the public interest *has* provided compensation, most notably in the areas of carbon emissions and fisheries management.

The compensation principle recognises that local democracy and the ability for local communities to make relevant choices are important but not costless.

Therefore, BusinessNZ considers Resource Management Act (RMA) provisions relating to compensation where property is taken, or its use or value is restricted, require strengthening (in the case of section 85, this means the *reversal* of the current presumption that there be no compensation). Currently compensation is the only relief available and at that, there is an exceedingly high threshold to be met, relief being available only if the taking or proposed taking would render the land incapable of reasonable use.

If local authorities were required to provide compensation for regulatory takings BusinessNZ would expect them to take more care when regulating private interests in the public interest. It might then be expected that the need for regulatory takings would be low, perhaps based initially on one or two test cases.

Claims for compensation would need to rest on more than an assertion that land use had been impaired but on evidence sufficient to support a claim of changed land use.

The claims' process would not be costless and both parties would need to assess the value of the compensation sought, the likelihood of gaining (or paying) compensation and the cost of participating in the claims' process. Rules such as requiring the losing party to pay the other's costs would contribute to getting the incentives for claiming compensation (or opposing the claim) right.

Finally, BusinessNZ recognises that in some cases, the transaction costs associated with determining the "winners" and "losers" involved in a regulatory taking might be disproportionately high and therefore the payment of compensation impractical. This possibility reinforces the importance of having a sound process (including robust decision making requirements) and appeal rights.

## **APPENDIX 1**

### **BACKGROUND INFORMATION ON BUSINESSNZ**

BusinessNZ is New Zealand's largest business advocacy organisation.

Through its four founding member organisations – EMA Northern, BusinessCentral, Canterbury Employers' Chamber of Commerce (CECC), and the Otago-Southland Employers' Association (OSEA) – and 74 affiliated trade and industry associations, Business NZ represents the views of over 76,000 employers and businesses, ranging from the smallest to the largest and reflecting the make-up of the New Zealand economy.

In addition to advocacy on behalf of enterprise, BusinessNZ contributes to Governmental and tripartite working parties and international bodies including the International Labour Organisation (ILO), the International Organisation of Employers (IOE) and the Business and Industry Advisory Council (BIAC) to the Organisation for Economic Cooperation and Development.