

**Submission**

**By**



to the

**Productivity Commission**

on the

**Better Urban Planning Report**

**October 2016**

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**BETTER URBAN PLANNING DRAFT REPORT  
SUBMISSION BY BUSINESSNZ<sup>1</sup>**

**1.0 INTRODUCTION**

- 1.1 BusinessNZ welcomes the opportunity to comment on the *"Better Urban Planning Draft Report – August 2016" (the 'report')*.
- 1.2 The report provides a very thorough and readable explanation of what is wrong with current urban planning, along with a number of considered findings and recommendations. In particular, BusinessNZ readily endorses a key finding (7.1) that: *"The [current] planning system shows considerable evidence of unnecessary, excessive and poorly-targeted land use regulations."*
- 1.3 Perhaps not surprisingly, BusinessNZ fundamentally agrees with most of the report's findings and recommendations, so these are not further discussed in this submission.
- 1.4 The submission focuses on a few key areas where BusinessNZ believes we can add value to the Productivity Commission's (PC) endeavours as it develops its final report to government by 30 November this year.
- 1.5 The key issues raised in this submission (for ease of reference generally in the order in which they are raised in the report) are:
- (a) Information about land prices being central to releasing land for development... (Recommendations 7.2 and 7.3)
  - (b) Right of Appeal against proposed Plans (Findings 5.4 and 5.6) and Recommendations (7.4, 7.5 and 7.7)
  - (c) Government Policy Statement (GPS) on Environment Sustainability (Recommendation 8.1)
  - (d) Future Alternative Funding Mechanisms (Questions 10.2 and 10.3)
  - (e) Targeted Rates (Recommendations 10.2 and 10.3).
- 1.6 Issues relating to the Scope of Planning (including hazard management issues (Recommendation 9.1), and compensation for loss of property rights ("Regulatory takings") were discussed in our previous submission on the Urban Planning Issues Paper in March 2016 and are not therefore addressed again. Notwithstanding, we would emphasise that the issues considered in our previous submission are still highly relevant in the context of the current report and should be taken to be part of this submission. For convenience, our previous submission is attached as Appendix 2.

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

## 2.0 **Key Issues**

### (a) **Information about land prices being central to releasing land for development.... (Recommendations 7.2 and 7.3)**

- 2.1 BusinessNZ's position (set out in a number of our recent submissions)<sup>2</sup> is that businesses and individuals should generally be able to develop land as they see fit provided they bear the economic and environmental costs associated with same (i.e. costs should be internalised to a reasonable degree).
- 2.2 The report seems to accept this to a degree although it refers in general terms to the benefits of planning at a spatial level (i.e. outlining a possible skeleton of future development), which is fine.
- 2.3 The report also talks about the need to allow cities to develop (faster processes for changing land use controls etc.) without unduly restricting what can happen when and where. Again, BusinessNZ agrees with this point.
- 2.4 The report then appears to fall into the same trap as the Government's proposed NPS on Urban Development Capacity (submissions currently being analysed by officials), namely that the price of land should possibly determine whether permitted developments proceed. For example, the table on page 184 makes the simple case that when land value rises permitted activities should be ratcheted up - section sizes reduced, building heights increased etc. BusinessNZ considers this approach to be problematic for at least two reasons.
- 2.5 First, why should land values be the factor determining what people can or cannot do with their private property provided, that is, they pay the economic and environmental costs associated with their development activity? Individuals should essentially be allowed to do whatever they like with their property irrespective of something random called 'land prices' (or any other such trigger point), provided the externalities are dealt with adequately.
- 2.6 Second, land prices reflect a whole host of factors such as location (seaside/sea views etc.) and it would be problematic to let planners decide when - or if - trigger points would result in more land being released or greater intensification. The effect, arguably, could be to replace the current uncertain planning system with a system even more regimented yet still uncertain (which BusinessNZ believes the proposed NPS on Urban Development Capacity will essentially do). Minimal regulation only is required

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<sup>2</sup> For example, one of BusinessNZ's key recommendations in its submission to the Ministry for the Environment on the Proposed National Policy Statement on Urban Development Capacity Consultation Document (July 2016) was: "*As long as developers pay the economic and environmental costs of associated infrastructure, development should generally be allowed wherever businesses and owners choose to build. To avoid any doubt, existing metropolitan urban limits should be urgently removed.*"

and when it *is* imposed, this should be only when regulation is specifically in the public interest. Size of house is entirely irrelevant.

- 2.7 The real problem is that as long as planners constrain land supply, as they will continue to do under the proposed NPS, the price of land zoned urban will remain well above that of the same or equivalent rural-zoned land. Consequently, the many planning dislocations and unintended absurdities will continue.
- 2.8 Tying the release of land and/or changes to land use to political trigger points (e.g. land values) will see private property provided in locations and under conditions both of the planners' choosing and political necessity.
- 2.9 The consequence, as some commentators have pointed out, will likely be "upzoning", not necessarily where there are better amenities and infrastructure, nor the highest demand, but rather fewer people opposing development (unlike the Not In My Back Yard brigade – NIMBYs).
- 2.10 Potential benefits from an NPS are likely to be outweighed by the risks associated with:
- Unintended consequences (i.e. uncertainty as to the effects the policy could have, including an effect neither anticipated nor desired);
  - The potential for regulatory creep (i.e. the process of developing an NPS could result in moves from high level principles to detailed prescription on resource use, reducing the potential for economic growth). In short, replacing the current failed planning system with an even more prescriptive planning system; and
  - Councils having to second guess how much land to make available and burdened with unnecessary and bureaucratic reporting requirements they cannot realistically be expected to fulfil.

**(b) Right of Appeal to proposed Plans (Findings 5.4 and 5.6 and Recommendations 7.4, 7.5 and 7.7)**

- 2.11 It is interesting to note the statement in Finding 5.4 of the report that "*Appeal rights in New Zealand are broader than in other comparable jurisdictions. The ability to appeal provisions of Plans is particularly unusual.*" However, the report then states, quite correctly, under Finding 5.6 that "*Although local authorities are required to ensure that their plans, policies and regulations are necessary, efficient and effective, these checks and balances have had disappointing effects.*"
- 2.12 Subsequently, Recommendation 7.5 provides that "*Any appeal rights on Plans in a **future system** [emphasis added] should be limited to people or organisations directly affected by proposed plan provisions or rules*".

- 2.13 The report's overall philosophy that land use should not be unnecessarily constrained might give some comfort that inappropriate rules and regulations will disappear. But in the absence of a less-constrained system, BusinessNZ considers the removal of appeal rights would be premature, whereas if a new regime were soundly based, very few appeals would be likely.
- 2.14 The Resource Legislation Amendment (RLA) Bill 2015, at present before the Local Government and Environment Select Committee, will add two additional planning tracks to the current Resource Management Act (RMA) Schedule 1 process. These are a collaborative plan-making track and a streamlined process making provision for the Minister to grant councils the right to amend plans to give effect to national direction.<sup>3</sup>
- 2.15 The rationale for a more collaborative plan-making process (with limited appeal rights), is to encourage the parties to reach agreement without the degree of litigation some presently consider part and parcel of the planning process.<sup>4</sup>
- 2.16 While encouraging consensus-building is a laudable objective, the danger, in BusinessNZ's view, will come from the possible effects of plan changes on potential property rights and investment. Full appeal rights against regional council decisions are essential to ensuring transparency. Appeal rights act as a safety valve against inconsistent or ill-thought-through plans.
- 2.17 The RLA Bill's collaborative plan-making track proposal has been significantly influenced by the plan-making approach discussed and recommended by the Land and Water Forum (LWF) in its second report. Even so, the LWF was unable to reach agreement on the limitation of merit appeal rights. BusinessNZ remains particularly concerned about with the absence of such rights from the collaborative process plan option.
- 2.18 Two important points:
- Given the proposed more collaborative approach to plan decision-making is quite radical by NZ standards (and largely untested), removing the right of appeal is a serious matter and its effects should be thoroughly considered, particularly in regard to the potential impact of plan changes on user rights to, for example, freshwater;
  - Full rights of appeal are embedded in a large array of NZ legislation (and overseas in that of many Organisation for Economic Cooperation and Development OECD countries). Any changes to such an established framework should be made with a significant degree of caution.

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<sup>3</sup> It is accepted that there is no presumption in favour of Councils using a collaborative process but rather the decision to use a collaborative process will be based on a number of factors which Councils must have regard to before going down the collaborative planning track.

<sup>4</sup> It is understood that the Bill will only allow merit appeals to the Environment Court where a council decision is inconsistent with Panel recommendations unless the council determined the change was necessary to comply with ss4 or 5 of the RMA or Treaty of Waitangi Act.

- 2.19 While both the above points are important, it could be argued that the first is particularly pertinent in New Zealand where property rights to natural resources are in many cases far from clear. Consequently there is the potential for businesses to be particularly adversely affected if plan changes effectively make their businesses unprofitable with no right of redress.
- 2.20 Property rights and their enforcement are fundamental pillars of a market economy. Without reasonable security from confiscation by the state or others, the incentive for individuals and businesses to invest and build up productive assets is severely weakened.
- 2.21 There is still much debate about property right boundaries. At one extreme, property rights can generally be considered reasonably clear, for example, a private title over land and buildings. At another level, property rights can be assigned by government - resources such as fishing quotas, for example. Here property rights are generally reasonably secure or, if take is reduced (e.g. because of over-fishing), current quota holders have reasonable certainty their proportion of the total take will remain the same. At the other extreme, government, or its delegated authorities, give rights to certain persons to do certain things or use particular resources, but with significant restrictions. For example, water permits are issued to users for periods of up to 35 years (although often for much shorter periods) but with authorities able to modify/change them during their tenure if new information comes to hand. The point here is that while some property rights are relatively secure and enduring, others are not.
- 2.22 For water allocation in New Zealand, a resource consent (a water permit) is generally required. However, s122 the Resource Management Act (RMA) states that a resource consent "*is neither real nor personal property*". Therefore some might argue that a resource consent to take water (a permit) is not a property right.
- 2.23 While clearly a water user does not have the right to ownership of the actual water resource, resource consents give the user the right to take, dam or divert water so to that extent the resource consent *is* a property right. Moreover, water permits are recognised and valued as rights, particularly where there is an increasing demand for water. Water consents are therefore water rights and this is reflected in NZ's large infrastructure investments - electricity generation, large scale irrigation schemes, manufacturing, processing and mining etc. And in many cases the value of consents for agricultural irrigation has been capitalised into land values.
- 2.24 Clearly, investors would not invest in such schemes if their rights to future water would be unduly jeopardised. However, some investments have been delayed or simply abandoned because of uncertainty over existing and future water property rights. To secure future investment in water infrastructure, current property rights to water need to be enhanced to guarantee greater certainty of future use.

- 2.25 Notwithstanding the above, there is a strongly held view that merit appeal/review rights are essential in societies that fully respect fundamental rights. Merit appeals/reviews can be seen as a safeguard or safety valve.
- 2.26 There are a number of important reasons for continuing to promote merit appeal rights, not only in respect to RMA processes but in respect to many other legislative and regulatory powers across a whole range of statutes.
- 2.27 The reasons for supporting merit appeal rights are outlined below but are not necessarily listed in any order of importance. Every reason is important in its own right.
1. The prospect of scrutiny (appeals) will likely encourage primary decision-makers to make better and more careful decisions in the first place;
  2. Appeal decisions can often lead to better and higher quality outcomes given a fresh look at the issues;
  3. Some regulators have very wide powers that leave them, in effect, the rule makers. It is simply wrong that they should act as final judge and jury on the application of their own rules;
  4. The risks of excessive individual influence on decisions are reduced by the right to take a decision to an outside body;
  5. There can be more confidence in the integrity of the law, and support for it, when there is at least one full right of appeal;
  6. The parties are likely to crystallise the key issues better on their second run through of a case;
  7. The more elevated view of the appellate court makes it easier to extract principles of general application, and decisions are more likely to be stated in terms which allow people to predict how the law will work in future;
  8. Appeal rights provide protection for property rights and thus create the conditions for investor confidence and economic growth.
- 2.28 These are all important issues. Inferior decisions generate uncertainty. Poor decisions force businesses into expensive second best 'work arounds' to cope with the risk of uncertainty or arbitrary intervention. Poor precedents threaten investment and economic growth even though people may not be able to measure or even recognise the source of such costs. The difference between high quality predictable decisions and low quality ad hoc readings can be enormous for a small economy like New Zealand's.
- 2.29 Internationally, the role of merit appeal rights is firmly understood and is promoted strongly by OECD in their various documents relating to improving the quality of regulatory decision-making.

- 2.30 The *OECD Guiding Principles for Regulatory Quality and Performance* (2005) call on those charged with regulatory reform to *"Ensure that administrative procedures for applying regulations and regulatory decisions are transparent, non-discriminatory, contain an appeal process against individual actions, and do not unduly delay business decisions; ensure that efficient appeals procedures are in place."* (p.5)
- 2.31 In many jurisdictions, rights of appeal against the discretionary decisions of government planning agencies have been established to allow those affected to have the planning decisions reviewed.
- 2.32 Merit-based appeals against government planning decisions are not universal, but it is understood they exist in many common law countries including England and Wales, Ontario (Canada), Hong Kong, Australia, and of course, New Zealand.
- 2.33 The Commonwealth of Australia's Administrative Review Council in a report stated:  
*The Council prefers a broad approach to the identification of merit reviewable decisions. If an administrative decision is likely to have an effect on the interests of any person, in the absence of good reason, that decision should ordinarily be open to be reviewed on the merits.*
- If a more restrictive approach is adopted, there is a risk of denying an opportunity for review to someone whose interests have been adversely affected by the decision. Further, there is a risk of losing the broader and beneficial effects that merit review is intended to have on the overall quality of government decision-making.*
- The Council's approach is intended to be sufficiently broad to include decisions that affect intellectual and spiritual interests, and not merely, property, financial or physical interests."* (p.3)<sup>5</sup>
- 2.34 Given the place of merit appeals (reviews) in NZ's current legal framework, and the international support provided through credible international organisations such as the OECD, any moves to restrict appeal rights should be seriously considered before pre-emptive action is taken.

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<sup>5</sup> Commonwealth of Australia, Administrative Review Council – What decisions should be subject to merit review? (7 April 2011).



© **Government Policy Statement (GPS) on Environment Sustainability (Recommendation 8.1)**

2.35 BusinessNZ notes that the PC recommends under 8.1 that:

*"A future planning system should include a Government Policy Statement (GPS) on environmental sustainability. The GPS should:*

- Set out a long-term vision and direction for environmental sustainability;*
- Establish quantifiable and measurable goals against which progress would be monitored and reported on; and*
- Establish principles to help decision makers prioritise environmental issues when faced with conflicting priorities or scarce resources.*

2.36 The PPC then goes on to state that: *"The end goal would be to have a GPS on environmental sustainability embedded in all levels of government decision making – promoting consistent decisions using clear principles. Central government would need to revisit the GPS periodically (say every five years) to ensure that it remained current and reflected the latest scientific thinking: (p.207 PC report).*

2.37 While this might sound an attractive proposition on the surface, BusinessNZ would caution against rushing into such a GPS for a number of reasons, some of which are outlined in the report and so are not repeated here except to state that an obvious difficulty is conceptually and accurately defining what environmental sustainability is in the first place.

2.38 Both GPSs and National Policy Statements (NPSs) are generally problematic insofar as they are not durable long-term instruments. We have examples from the electricity market and their use of GPSs, and they are not favourable at all given the multiple and conflicting objectives of same. The overall outcome was to effectively stymie investment rather than encourage it.

2.39 While BusinessNZ understands that bottom lines for natural resource use might be appropriate in some cases (e.g. water quality limits), the nature of any GPS would need to be clearly defined.

2.40 If the GPS focused on scientifically-based bottom lines then a GPS on natural resource use across the board might be appropriate. However, a more aspirational-type GPS which could be changed at the whim of a particular government based on political considerations would not provide the sort of certainty that businesses and indeed householders require in making long-term or even relatively short term investment decisions.

2.41 BusinessNZ considers that where environmental bottom lines are justified on soundly-based scientific evidence, inserting them into primary legislation/regulations would be better than having them subject to regular and ad hoc changes reflecting the political whims of the day - as a GPS could encourage.

- 2.42 The perhaps obvious danger is that a GPS could become a mixture of scientifically-based evidence of bottom lines and aspirational targets and subject to change depending on whichever party holds the balance of power within government.
- 2.43 Given that environmental factors (such as water quality) could be generational in nature, investment in infrastructure might be stifled if, rather than being based on sound science, the rules of engagement can change depending on the political priorities of the day.
- 2.44 Business NZ generally does not support the establishment of GPSs, with the possible exception of matters that can be shown to be equally applicable to all environments. This is not usually the case with water as the effects on land use and landscapes etc. differ with geographical features, land-based activities and population density.
- 2.45 Notwithstanding the above, Business NZ would support the development of a GPS if it could be proved that this would add value by providing clear, meaningful, useful and constructive guidance to local authorities on matters of national significance. But the GPS would need to be flexible enough to take account of the different economic and environmental differences within and between regions in New Zealand.
- 2.46 Before considering moves towards the adoption of a GPS, it will be important to fully understand the nature of any problem (or perceived problem) the GPS is intended to address.
- 2.47 It is crucial that policymakers take a step back and ask some fundamental questions before coming to any decisions as to the merits or otherwise of a proposed GPS. Questions include, but are not limited to:
- Is there a problem with management systems *that a GPS can adequately address?*
  - Are there other options to address the problem in a more transparent manner which would minimise the risk of future uncertainty?
  - What are the costs and benefits (including unintended costs) of the proposed GPS?
  - Will a GPS achieve the outcome desired and at what cost?
- 2.48 Only after clearly addressing these questions will policy makers be in a position to determine the merits or otherwise of a GPS for environmental sustainability.

**(d) Future Alternative Funding Mechanisms (Questions 10.2 and 10.3)**

- 2.49 Local government has a vital role to play in advancing the overall well-being of New Zealanders. However, that role is not all-encompassing but needs to be established on a principled basis and properly circumscribed.
- 2.50 The purpose statement under the Local Government Act 2002 requires local government to focus on economic, social, environmental and cultural issues (the four 'well-beings'). It has arguably resulted in a number of councils taking on, or investing in, too many non-essential activities, exposing ratepayers to unnecessary risk and cost.
- 2.51 A more recent amendment to the Act (December 2012) removed the focus on the four well-beings and introduced instead a new purpose statement, namely: *to meet the current and future needs of communities for good quality infrastructure, local public services, and the performance of regulatory functions in a way that is most cost-effective for households and businesses.*
- 2.52 While there will always be debate about the meaning of words used in the purpose statement, clearly, the intention is that local government should stick to core activities to the extent practicable, with the emphasis on providing the goods and services (including infrastructure) that only local government can provide.
- 2.53 BusinessNZ considers local government should focus on the provision of local public goods, where their provision will likely be inadequate, there being little incentive for the private sector to provide goods and services for a low or in the worst case, non-existent, return on investment.<sup>6</sup>
- 2.54 The distinctive features of public goods are first, non-payers cannot easily be excluded from receiving the benefit others pay for (that is, public goods are susceptible to free riding) and second, one person's consumption does not reduce others' consumption opportunities. These are known as the non-excludability and non-rivalry characteristics of public goods.
- 2.55 On the margins at least, what constitutes a public or private good will continue to be debatable but a diagram from a Local Government Forum (LGF) publication, "Local Government and the Provision of Public Goods" (November 2008), provides a very useful overview of some of the key goods and services many local authorities currently offer. The goods and services are categorised as either relatively pure public goods or as private goods, based on the fundamental tests of *rivalry in consumption* and *excludability of consumption* (private good) and *non-rivalry in consumption* and *non-excludability of consumption* (public good). The table below provides a good basis for focusing on local government provision of core public goods.

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<sup>6</sup> See Local Government Forum (LGF) publication "Local Government and the Provision of Public Goods" (2008) for a fuller description on the role of local government and the provision of both public and private goods.

Figure 1: Characteristics of local government services – rivalry and excludability

		Rivalry in consumption →		
		Public goods		
Excludability of consumption ↓		Low	Medium	High
	Low	Street lighting, street and traffic signs, parks and reserves, civil defence, public health and safety (eg security cameras), and democratic, representative and regulatory functions	Low-use roads, footpaths and cycleways	Remedying marine pollution, biosecurity (pests and noxious plants) and graffiti removal from public facilities and areas
	Medium	Flood protection	Sports grounds, public conveniences and bus ways	High-use roads, tourism promotion, economic development
	High	Museums and galleries	Public libraries, swimming pools, indoor recreation facilities and public venues	Ports, airports, public transport, water and waste water, rubbish disposal, cemeteries, car parks, cinemas and housing
				Private goods

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**Source:** Local Government Forum (LGF, November 2008), "Local Government and the Provision of Public Goods.

- 2.56 The above outline of local government's role is important in that it sets out the infrastructure provision in which local government should ideally be involved - public goods as opposed to the provision of private goods.
- 2.57 This is particularly important given that the report has raised significant issues regarding future local government funding, including the potential for targeted rates etc.
- 2.58 BusinessNZ notes that the report contains questions about the viability of alternative local authority funding systems (local taxes amongst others) as a way of improving infrastructure to accommodate growth (Question 10.3, page 343).
- 2.59 While the search for new funding tools should be seen as positive, there is a distinct danger of new funding mechanisms being used to source additional revenue without any clear understanding of the proper role of local government. There are already arguable cases where targeted rates (including development contributions) have not been based on sound economic principles but seen as additional revenue-generating devices,

although recent moves to provide for greater transparency in development contributions should minimise this tendency.

- 2.60 BusinessNZ considers councils should receive better guidance on the use of available funding tools to ensure greater consistency across the country underpinned by an economically principled approach to funding their various activities. There should also be greater clarity in distinguishing among the following:
1. A user charge that constitutes an appropriate price for services supplied by a local authority;
  2. A tax on a subset of a local authority's ratepayers justified as funding local public goods of clear benefit to subset members;
  3. An appropriate tax to fund local public goods that benefit all residents; and
  4. Justified charges to internalise external costs imposed on people or firms.

### **User charges**

- 2.61 Charging for the use of private goods and services would bring greater efficiencies. For example, paying for waste disposal out of general rates and supplying every ratepayer with a rubbish disposal bin takes no account of the amount of rubbish ratepayers generate. This could actively encourage waste generation because effective cross-subsidisation means the full costs of waste disposal are not sheeted home to every household. Water is another good example where clear user-pays pricing principles would encourage greater efficiencies.
- 2.62 While some councils charge for water and waste on a user-pays basis, many still fund such activities out of general rates, sending strictly limited signals to consumers as to the real costs associated with their behaviour.<sup>7</sup>

### **Differential and targeted rating**

- 2.63 Differential and targeted rating should only be permitted where a clearly identified community (such as a remote rural area) is provided with a distinctly different level of public goods from that of other ratepayers and the differential or targeted tax reflects the difference in the level of services supplied. There should also be an objective test for 'benefits received' to ensure a consistency of approach. However, rates differentials, if used at all,

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<sup>7</sup> Refer to the Local Government Forum's publication "*Democracy and Performance – A Manifesto for Local Government*" (February 2007) which has a very useful section on Funding of Local Government (p.15-24) explaining the appropriateness of different funding tools. Clearly, given that most local government-supplied goods and services are of a private good nature, user-pays, where possible, is the most appropriate tool to use.

should be used sparingly not, as some councils have done, as a general revenue raising device on unprincipled and unsubstantiated grounds.

- 2.64 Sometimes differential rating is applied to the business sector on the unsubstantiated ground that the business sector benefits more than proportionately from council services. Such thinking is often found to be groundless, yet councils continue to apply significant differentials simply because they can, rather than on any principled economic basis. Where councils have agreed to reduce such differentials, they have generally proceeded at a snail's pace, being mindful not to upset the majority of residential ratepayers who enjoy the advantages of a lower rates burden courtesy of the business sector.
- 2.65 In the past, a number of people have argued (and many still do) that businesses are advantaged relative to residential ratepayers because they can deduct rates for income tax purposes and claim a credit for the GST paid on them. These claims have been discredited by reputable economists for the following reasons. First a firm can only claim a tax deduction for rates because its income is subject to tax and nobody could seriously argue it is an advantage to be subject to income tax. Second, a GST registered person or firm can claim a credit for GST paid on inputs because supplies (outputs) are subject to GST. But as the net GST collected is paid to Inland Revenue, businesses get no advantage.
- 2.66 BusinessNZ remains concerned about targeted rates (taxes) mainly because there is a danger these can be used as another simple way of raising needed revenue without taking the full use implications into account.
- 2.67 As previously noted, there might be isolated cases where levying additional rates (taxes) on a particular class of ratepayers is appropriate, for example, where specific local public goods benefit a clearly defined subset of ratepayers such as schemes to control floods. However, for such taxes to be justified on both economic efficiency and equity grounds, the target group must be clearly identified and share equally in the benefits. And ideally, its consent should be sought before any targeted taxes are considered. More importantly, targeted taxes should not tap into previously untapped pockets of revenue-raising potential – a distinct danger without clear controls on when and how such tools are to be used.

### **Development contributions**

- 2.68 BusinessNZ welcomed recent changes requiring greater transparency as to when and for what purpose development contributions can be used; the reintroduction of a right of appeal was also important. Transparency is needed between development contribution income and actual development costs. Without such information, development contributions could increase in line with the demands of residents not required to pay them (i.e. free-riders).

### **Uniform annual general charges**

- 2.69 While BusinessNZ supports much greater use of user-charges where practicable, there is scope for increasing, if not completely removing, the 30% cap on the Uniform Annual General Charge (UAGC). It is noted that use of the UAGC varies widely across the country with some councils utilising it to the full 30% provided for and others not using it at all.
- 2.70 If councils made much greater use of user charges for most service provision, current concerns about the UAGC might be lessened. Some do not make full use of the existing cap, thus sending distorted signals to ratepayers about the costs associated with the provision of services to, and the benefits received by, individual households.

### **Other tax mechanisms, including local income tax or GST**

- 2.71 BusinessNZ notes that the third report of the Local Authority Funding Project team *Alternative Tax Bases for Local Government*<sup>8</sup>, looked at a number of options other than current rates (property based) taxes including:
- A local income tax
  - Local consumption tax
  - Industry and commodity-specific taxation
  - Citizen's tax (poll tax)
  - Payroll tax

The funding Project team concluded: "*...none of the alternatives provide a clear and compelling alternative to property taxation as a means of funding a local government that has traditionally had a high level of autonomy and a high level of accountability to its communities.*" (p.32)

- 2.72 All the above mechanisms have inherent weaknesses. A local income or consumption tax would be heavily discounted since it would mean identifying the areas in which individuals and businesses earn their income. This would be well-nigh impossible given the many complex business arrangements entered into both by businesses and individual ratepayers. Moreover, low income or consumption taxes might have little relationship to the amount of goods or services consumed via local government.
- 2.73 Industry or specific-commodity taxes (such as 'bed taxes') are inherently distortionary there being often little or no relationship between the 'payer' and the alleged benefits received.

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<sup>8</sup> *Alternative Tax Bases for Local Government*, third report of the Local Authority Funding Project Team, December 2006, p 32.

- 2.74 The history of poll taxes suggests they are highly unpalatable. There would not only be practical enforcement and fairness difficulties but the late 1980s UK experience showed them to be notably unpopular. Poll taxes often provide a very poor indication of the actual use of central or local government services or of ability or willingness to pay. However, people-based payments might be appropriate where goods and services provided are of benefit to all citizens e.g. local government administration.
- 2.75 Payroll taxes are inherently distortionary, targeting only one aspect of production – labour. A report prepared for Business NZ<sup>9</sup> found that:
- "[A payroll tax]...would distort the economy by making one factor relatively more expensive i.e. labour, and with this distortion comes deadweight losses to the economy. The size of this deadweight loss may be considerable since this tax would be across the entire New Zealand labour market. Thus, although the government may aim for it to be revenue neutral, they should consider the indirect deadweight losses within this decision. The deadweight losses come from reduced efficiency of markets, artificially high labour costs, which will lead to capital being substituted for labour, higher administrative costs, and knocking marginal companies out of business." (p.3)*
- 2.76 In addition, a payroll tax would be a highly targeted tax based on salary and wages with no relationship at all to the consumption of local government goods and services. It would penalise wage and salary earners while other potentially asset rich ratepayers would be exempt.
- 2.77 In respect to land taxes, BusinessNZ notes that a land tax is nothing new. NZ had a land tax up until 1992 but the exemptions were considerable so that only a small group of taxpayers was affected making the tax highly distortionary. As with a Capital Gains Tax (CGT), the temptation to grant exemptions over time is often politically hard to ignore, potentially undermining the benefits associated with any comprehensive form of land tax.

### **Royalties**

- 2.78 Another option promoted by various groups and organisations is for local government to move towards receiving a partial share of any royalty payments both as a funding mechanism and to incentivise the issue of consents. The BusinessNZ Energy Council considers this has significant risks (see p21-22 under "Should local authorities have a prior claim on exploration royalties").
- [http://www.bec.org.nz/\\_data/assets/pdf\\_file/0005/89420/BusinessNZ-Energy-Council-Energy-Briefing-2014.pdf](http://www.bec.org.nz/_data/assets/pdf_file/0005/89420/BusinessNZ-Energy-Council-Energy-Briefing-2014.pdf)

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<sup>9</sup> Is there a case for a payroll tax? Report to BusinessNZ by Business and Economic Research Ltd (BERL) February 2006



- 2.79 The publication found that: *"On the face of it, the case for such a diversion of monies is seductive...However, there are also reasons not to support it."* BusinessNZ urges policy makers to consider carefully the implications of pursuing a local share of royalties' solution given the issues outlined in the BusinessNZ Energy Council publication referred to above.

### **Tolling**

- 2.80 Business NZ has long supported moves to allow tolling, public private partnerships (PPPs) and other investment options for urgently-needed high cost road transport initiatives that have significant community support. The Independent Inquiry into Local Government Rates recommended removing legislative barriers to the funding of transport projects through the use of tolls<sup>10</sup>.
- 2.81 Tolling would mean people (particularly road users) could seriously question the value of particular projects since the cost would be transparent and up-front. This would put more heat on decision-makers to ensure only efficient transport options made the grade rather than 'nice to have' projects.
- 2.82 It is important to distinguish clearly between tolling related to congestion charging and tolling directed to paying for new roads. Tolling for new roads and congestion charging are two totally different concepts and need to be treated as such rather than lumped together.
- 2.83 In effect, congestion charging is a system of charging users to manage demand effectively (as with peak pricing in the electricity sector). The pricing strategy makes it possible to manage congestion without increasing supply. According to market economic theory, under a congestion pricing regime users have to pay for the negative externalities created, making them conscious of the costs imposed when consuming during peak demand. It is not, as such, a pricing mechanism that should necessarily be used to pay for new roads – a main concern of road users and taxpayers around the world with congestion charging regimes.
- 2.84 Notwithstanding general support for tolling as the most efficient way of funding new roads, BusinessNZ generally opposes the use of this mechanism on existing roads to subsidise new roads. For all intents and purposes such usage would amount to double taxation (paying twice for assets that have already been paid for). Tolls should arguably apply only to new roads so that the public and road users have advance notice of the total cost and understand the trade-offs required for infrastructure development. Fudging cost through the use of a wide range of funding mechanisms well beyond tolling new roads (e.g. rates hikes, regional fuel taxes etc.) waters down the

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<sup>10</sup> *Funding Local Government*, report of the Local Government Rates Inquiry (August 2007). See discussion on pages 157-158 of the Report and Recommendation 21.

signals which road users should receive about the true cost of the various transport options.

**(e) Targeted Rates (Recommendations 10.2 and 10.3).**

- 2.85 Recommendation 10.1 in the report states that "*Councils should use targeted rates to help fund investment in local infrastructure, wherever the benefit generated can be well defined*". BusinessNZ agrees with this approach and referred earlier to the example of a flood protection scheme where all benefit and therefore all should pay.
- 2.86 By contrast, however, the report then appears to suggest that individuals and households should 'compensate' (or pay for) the alleged benefits of a public action which they might or might not enjoy depending on individual circumstances (for example urban rail upgrades or other infrastructure investments such as sports stadiums etc).
- 2.87 Recommendation 10.3 of the report states – "*A future planning system should enable councils to levy targeted rates on the basis of changes in land value, where this occurs as a result of public action (e.g., installation of new infrastructure, upzoning)*".
- 2.88 BusinessNZ has real concerns about this approach for a number reasons including those raised in the report, namely that it would require "*[councils to identify] ...properties that would benefit from council investment*" (p.260).
- 2.89 Policy makers need to be very clear to differentiate between property rights adversely affected by government or local government action and acts of nature or people's changing preferences which might similarly affect land values. The latter effect has been visible of late in a number of areas in NZ which, almost overnight, have become 'trendy areas' where people are prepared to pay significant amounts of money to buy land or houses.
- 2.90 It would nonsense to assume that if a railway station is established very close to someone's house that person will receive a direct benefit and will therefore have an enhanced property right. The assumption is that nearby rail transport will automatically be used and that is not necessarily the case. It might equally be claimed that someone who dislikes skateboarding but is able to walk to a local, rate-payer funded, skate board park is receiving a benefit which requires a contribution to the cost. What constitutes a benefit is in the eye of the beholder.
- 2.91 Identifying which properties will benefit from council investment is no easy ask since whatever is decided on will likely conflict directly with individual values – that is, with what is valued and what is not. For example, as noted, a flood prevention rate targeted to a clearly identified group of ratepayers can be considered relatively straight forward and appropriate. But trying to put a value on the change in land values as a result of an infrastructure upgrade

would be extremely difficult, taking no account of individual preferences. For example, a recent council road extension in Churton Park (Westchester Drive Extension), Wellington, saw residents on the street close to the proposed development, for a variety of reasons, strongly supporting, strongly opposing or neutral to the extension proposal. Similarly with a private sector (New World) investment decision in the same area – with no council funding involved. Whether individuals consider they benefit from or are disadvantaged by such developments will inevitably vary, although on the margin at least, associated land prices will more probably have gone up rather than down.

- 2.92 While land values will likely be tied in to much more than the provision of council (or publicly) funded infrastructure, where people choose to live will be based on a number of factors that might or might not be related to specific infrastructure provision (apart perhaps, from obvious services such as sewerage and water).
- 2.93 Except where everyone benefits (as in the flood control scheme), the council investment approach suggested in the report raises real issues as to where the boundaries of any council scheme should start and end. The result could be the promotion of public infrastructure which many people affected by it would not support. Consider the numerous activities in which councils are currently involved, cycleways are a case in point.
- 2.94 There could be specific, isolated cases where land prices radically increase as a result of public investment provision of infrastructure but BusinessNZ would caution about using any such proposals generally without rigorous analysis of the overall costs and benefits. This will be particularly pertinent if councils have a relatively free rein when deciding what to be involved with. Just about every investment decision will have some impact on land values but this does not justify using targeted rates as a mechanism to extract money from householders who personally see little or no value in the specific development.
- 2.95 At its worst, an investment proposal could be seen as an easy funding mechanism for councils wanting to involve themselves in all sorts of projects which do not necessarily meet a rigorous public goods test – or if they do – are not necessarily sought (and happily paid for) by ratepayers.
- 2.96 With private investments, there are externalities that might sometimes positively affect, for example, land prices but this does not justify subsidising developers to build infrastructure they would ordinarily have market incentives to provide anyway – as with the provision of most private goods and services.
- 2.97 Virtually every activity has spillover consequences which do not necessarily justify government/local government involvement to address such externalities. For involvement to be justified in a specific case, the externalities must be particularly large to the extent that the benefit of involvement (taxpayers/ratepayers support) is warranted.

- 2.98 Goods of a largely private good nature should ideally be paid for by users. On the other hand, goods that clearly meet the definition of public goods are generally best funded via general taxation or by ratepayers, if they benefit a region, or central government (taxpayer) funded if there is a national public good (e.g. national defence systems).
- 2.99 Although not mentioned explicitly in the report, given the PC encouraged the inclusion of Recommendation 10.3 (*"A future planning system should enable councils to levy targeted rates on the basis of changes in land value, where this occurs as the result of public action (e.g. installation of new infrastructure, upzoning)"*), presumably the PC also supports a requirement on land owners outside urban limits to compensate councils (or effectively other ratepayers) if the urban limits are abolished. This would be untenable for the reasons outlined below.
- 3.00 First, any value landowners outside urban limits gain from the abolition of those limits can at best be considered a 'one-off' windfall - at best, because in most cases the value of land very close to (but outside) the urban limit will rise (or fall) depending on what the land can produce as the next best option (whether dairy, horticulture etc.) More importantly, current value will reflect market perceptions of the risk the limit will be retained or removed over time and that if the risk assessment changes, land prices will do likewise. But with the risk of urban limit removal probably already largely reflected in the price of land, any windfall gain is likely to be minimal.
- 3.01 As an analogy, some people consider that agricultural users of water for say irrigation will make windfall gains if their rights to use water are strengthened.
- 3.02 This submission has previously considered the process of water allocation in New Zealand where a resource consent (water permit) is generally required. But as noted in paragraph 2.22, s122 of the RMA, states that a resource consent *"is neither real nor personal property"*. So is it a property right?
- 3.03 In paragraph 2.23 this submission's response was 'yes', a resource consent is clearly a property right, more particularly as water permits are most often capitalised into land values with frequently even the banks relying on those values when lending on land.
- 3.04 In the hypothetical case of a person buying a farm outside the urban limit, the value will already be implicit in the land price before any council (or central government) decision to abolish the urban limit. Again, as with water permits, there is unlikely to be much if any windfall gain.
- 3.05 It is important to differentiate between actions which might impact on property rights (where there is justification for compensation for loss of such rights), and the multitude of issues/market factors which could affect land

values over time (either positively or negatively) where compensation for changes in land values should not be paid.

- 3.06 Bryce Wilkinson, in an excellent paper "*A Primer on Property Rights, Takings and Compensation*"<sup>11</sup> (2008), makes a very important point:

*"Property rights are different from property values. Property rights expose owners to the risk associated with those rights. Commonly, for example, they expose the owner to the risk that some event or act of nature will increase or decrease the value of the property. Such events alter property values but not property rights. Of course, government actions that reduce property values by restricting the legal use of property without the consent of the property owner are takings."* (p.9)

- 3.07 When considering who benefits most from the removal of urban limits, it can be argued that it is not existing landowners just outside the boundary but everyone wanting to build outside the urban limit because of land scarcity and cost inside the limit. It is unlikely land prices outside the limit would increase markedly if urban boundaries were removed (although this might not always be the case) provided there were a significant number of new areas in which individuals and businesses could build and develop (normal supply and demand factors would determine relative prices).
- 3.08 Finally, even if land prices increased significantly with urban limits removed or extended, requiring landowners to compensate councils (ratepayers) for their removal/extension would be completely inequitable. It is unlikely reduced land value compensation was paid when those limits were put in place.

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<sup>11</sup> "A Primer on Property Rights, Takings and Compensation" by Bryce Wilkinson (prepared for BusinessNZ, Federated Farmers, the NZ Business Roundtable, and the NZ Chambers of Commerce (September 2008).

## APPENDIX 1

### BACKGROUND INFORMATION ON BUSINESSNZ

*BusinessNZ* is New Zealand's largest business advocacy body, representing the majority of New Zealand private sector companies as members or affiliates.

BusinessNZ divisions cover business interests across a wide range of sectors including the Major Companies Group, ExportNZ, ManufacturingNZ, the Sustainable Business Council and Buy NZ Made.

BusinessNZ champions policies leading to:

- international competitiveness
- balanced employment, economic and environmental legislation
- compliance and tax levels that foster growth and investment
- innovation and skill development
- an environment fostering the production of high value goods and services

[www.businessnz.org.nz](http://www.businessnz.org.nz)

**APPENDIX 2:**

**Submission**

**By**



to the

**Productivity Commission**

on the

**Better Urban Planning Issues Paper  
December 2015**

**March 2016**

PO Box 1925  
Wellington  
Ph: 04 496 6555  
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**BETTER URBAN PLANNING ISSUES PAPER  
SUBMISSION BY BUSINESSNZ<sup>12</sup>**

**1.0 INTRODUCTION**

- 1.1 BusinessNZ welcomes the opportunity to comment on the Productivity Commission's *"Better Urban Planning Issues Paper – December 2015"* (the *"Issues Paper"*).
- 1.2 The problems associated with NZ's current urban planning system are outlined clearly in the Issues Paper and almost daily in the general media.
- 1.3 As the Issues Paper covers a number of matters with which BusinessNZ is fundamentally in agreement, this submission largely focuses on two issues: the scope of planning and the question of compensation.
- 1.4 While there will be cases where land use restrictions are appropriate (for example, where there are significant externalities and costs cannot be internalised), for the most part private negotiations between affected parties will be more productive than the blanket restrictions on land use.
- 1.5 Members of the BusinessNZ family will have views on particular issues of specific concern to them which can be raised directly with the Productivity Commission but that notwithstanding, BusinessNZ would welcome the opportunity to discuss our submission with the Commission and looks forward to commenting on the Commission's later this year.

**2.0 Scope of Planning**

- 2.1 In respect to the scope of planning, BusinessNZ strongly supports the statement on p.8 of the Issues Paper that to a large extent current *".....planning is a "movement" with unlimited domain and the objective of transforming society."* Discussing the scope of this movement in relation to the use of land for housing, the Commission (2015) notes 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)."*

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<sup>12</sup> Background information on BusinessNZ is attached as Appendix 1.



- 2.2 As a general principle, individuals and companies should bear the full cost of their behaviour (i.e. cost should be internalised). Over-consumption of resources is always likely if the cost can be shifted onto third parties. Management of land use - and risk – is no different. If individuals and companies are to make rational decisions about land use, they should ideally bear the cost (and benefits) associated with specific options/outcomes. If, on the other hand, individuals and companies are forced to pay a greater amount than any cost they impose, the outcome will either be a more expensive product and/or reduced commercial activity, with associated flow-on implications for employment etc.
- 2.3 Before contemplating restrictions on land use, it is first important to fully understand the nature of the problem - who it affects, the cost of taking action, and who bears the cost. Regulatory intervention, because it is not costless, should generally be considered as a last resort, only to be taken when all other cost effective approaches have been exhausted, including greater education about risk in particular communities.
- 2.4 In order to justify the imposition of restrictions, current land use arrangements must result in clear and significant cases of market failure. To the best of Business NZ's knowledge, to date this has not been happened; land use has not demonstrated significant market failure. The Issues Paper talks in rather loose terms about potential market failure but to justify regulatory intervention in the use of land, the failure must be significant. Regulatory failure can too readily replace market failure.
- 2.5 Provided individuals are reasonably informed about known and potential risks, BusinessNZ considers they should be free to go about their lawful business. This can, for example, include developing housing on potentially flood-prone land provided any potential impacts on third parties are effectively mitigated. This suggests that alternative approaches as outlined in the Issues Paper e.g. the common law and private bargaining arrangements (see Chapter 5) have merit in being considered further.
- 2.6 Notwithstanding the above, there will be cases where individual councils might need to make decisions restricting potential building sites and/or land use options if there is a clear public benefit in doing so – in the above case, such as the potential impact on communities and third parties should significant flooding occur. However, such restrictions should be imposed on a local case-by-case basis, not nationally.
- 2.7 Moreover, restrictions of this sort should be based on sound scientific evidence also taking into account the costs and benefits of potentially restricting land use. Where potential restrictions are to be placed on current land users, those users should be fully consulted and ideally compensated for any losses incurred on current or potential future land use options. Under

current planning, regulation is increasingly likely to restrict or control land use for aesthetic purposes (however defined) as outlined in the Issues Paper. But, as the Issues Paper states “...*questions of good design are inherently subjective, and while some aesthetic judgements will receive broad agreement, others are clearly polarising*” (p.8)

- 2.8 To give a practical example of the extent of the problem, community groups South Epsom Planning Group and Three Kings United Group want to overturn approval for the redevelopment of the \$1.2 billion housing redevelopment on the disused site of the Three Kings quarry in Auckland. The groups want the development to be low-rise housing which would see fewer than 1000 houses built, instead of the proposed 1500 apartments and townhouses. Affordable Auckland Mayoral candidate Stephen Berry stated, in support of the Government’s unusual step to join Auckland Council in fighting the appeal: *“More than enough time and money has been spent consulting on an issue which really should just be a simple question of property rights. Does this development violate the rights of its neighbours? Is it a genuine impact or an invalid moan about property values; the sort that are artificially inflated by stopping other people enjoying their own property.”* (1 February 2016).
- 2.9 There are also a number of instances 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, affects rental prices.
- 2.10 Residents in the Kapiti Coast District Council area fought a proposal to place new “hazard lines” (from the Lim report) on about 1800 properties along the coast, a proposal which sparked fears that the lines would affect valuations and insurance.
- 2.11 The Lim Report proposal, the product of questionable analysis, not only seriously affected the value of the land in question but placed restrictions on the ability of affected residents to expand beyond their current property footprint.
- 2.12 Putting aside the debate as to whether the erosion hazard identified by the council was within the reasonable bounds of probability, the risk, even should it eventuate, would largely be borne by people whose residences were on or close to the foreshore. Arguably, the “risk” of further erosion would mainly affect the individuals concerned 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 outcomes (even though unlikely) would involve adverse effects on external parties of such a magnitude as to justify the council’s draconian response.<sup>13</sup>

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<sup>13</sup> It is understood that after much opposition, the Council has withdrawn its proposals.

- 2.13 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).
- 2.14 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)*

- 2.15 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 the cost of land and housing. This increased cost will ultimately be reflected in reduced economic growth, not to mention reduced housing affordability, 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>14</sup>*

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

- 3.1 Given the above considerations, 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. As the Issues Paper correctly states on p.8: *‘Some of these*

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<sup>14</sup> Child poverty and inequality - The New Zealand Law Journal (November 2014)

*[existing] rules do not provide net benefit and increase the cost of housing unnecessarily..."*

- 3.2 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).
- 3.3 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.
- 3.4 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.
- 3.5 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 of regulation (such as non-compliance).
- 3.6 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.
- 3.7 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).
- 3.8 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.
- 3.9 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.

- 3.10 The compensation principle recognises that local democracy and the ability for local communities to make relevant choices are important but not costless.
- 3.11 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. Compensation will be paid only if the taking or proposed taking would render the land incapable of reasonable use.
- 3.12 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.
- 3.13 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.
- 3.14 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 participation. Rules such as requiring the losing party to pay the other's costs would contribute to getting the incentives for claiming or opposing compensation right.
- 3.15 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, making the payment of compensation impractical. This possibility reinforces the importance of having both a sound process (including robust decision making requirements) and appeal rights.