

Submission

By



to the

Productivity Commission

on the

Better Urban Planning Issues Paper December 2015

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BETTER URBAN PLANNING ISSUES PAPER SUBMISSION BY BUSINESSNZ¹

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 draft report 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)."*

¹ 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.²

² 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.’³

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

³ 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.

APPENDIX 1

BACKGROUND INFORMATION ON BUSINESSNZ

BusinessNZ is New Zealand's largest business advocacy body, representing:

- Regional business groups [EMA](#), [Business Central](#), [Canterbury Employers' Chamber of Commerce](#), and [Employers Otago Southland](#)
- [Major Companies Group](#) of New Zealand's largest businesses
- [Gold Group](#) of medium sized businesses
- [Affiliated Industries Group](#) of national industry associations
- [ExportNZ](#) representing New Zealand exporting enterprises
- [ManufacturingNZ](#) representing New Zealand manufacturing enterprises
- [Sustainable Business Council](#) of enterprises leading sustainable business practice
- [BusinessNZ Energy Council](#) of enterprises leading sustainable energy production and use
- [Buy NZ Made](#) representing producers, retailers and consumers of New Zealand-made goods

BusinessNZ is able to tap into 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 and services for enterprise, BusinessNZ contributes to Government, 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 ([OECD](#)).

BusinessNZ family

