

Submission

By



to the

Ministry for the Environment

on the

**Proposed National Policy Statement on Urban
Development Capacity Consultation Document**

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**PROPOSED NATIONAL POLICY STATEMENT (NPS) ON URBAN
DEVELOPMENT CAPACITY CONSULTATION DOCUMENT
SUBMISSION BY BUSINESSNZ¹**

1.0 EXECUTIVE SUMMARY

- 1.1 BusinessNZ supports moves to free up more land for development, but has concerns that a National Policy Statement (NPS) will not adequately achieve the objective of ensuring that land supply for housing and business development reflects changing market demands over time.
- 1.2 A gradual approach to dismantling metropolitan urban limits is insufficiently decisive to stem dramatic imbalances in land and house prices.
- 1.3 The NPS calls into question the role of planning itself. Problems with undersupply of housing in some areas, notably Auckland, stem from overly restrictive planning. Land value should be set by its highest value use and markets should be allowed to find that value.
- 1.4 Planners and regulators cannot be expected to keep up with market changes as quickly as market participants can. BusinessNZ advocates the need for a more market-based approach to housing provision, as this is more responsive and flexible than a planning approach. The NPS focuses too much on planning and not enough on allowing markets to work. Home-owners and businesses are best placed to make choices reflecting their needs and wants rather than having planners make decisions for them. Instead, the NPS imposes onerous planning obligations on councils, effectively setting them up to fail. It also fails the basic test of ensuring any regulatory regime is resilient and can automatically respond to changes in supply and demand conditions.
- 1.5 As long as developers pay the economic and environmental costs of associated infrastructure, development should be allowed wherever businesses and homeowners choose to build.
- 1.6 A more direct and urgent approach to removing urban limits is needed, not the replacement of one failed planning system with an even more regimented and prescriptive regime, imposing unnecessary obligations on councils which might be largely impossible to meet.

2.0 RECOMMENDATIONS

BusinessNZ **recommends** that:

The proposed National Policy Statement on Urban Development Capacity not proceed as it is likely to create even greater planning confusion than is currently the case while failing to meet the objective of delivering land as and when the market demands it.

¹ Background information on BusinessNZ is attached as Appendix 1.

BusinessNZ **recommends** that:

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.

BusinessNZ **recommends** 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 land use.

3.0 INTRODUCTION

- 3.1 BusinessNZ welcomes the opportunity to comment on the *Proposed National Policy Statement (NPS) on Urban Development Capacity Consultation Document* (“the Consultation Document”).
- 3.2 Business New Zealand supports moves to free up more land for development, but has concerns that a NPS would fail to achieve the objective of ensuring land supply for housing and business keeps pace with growth. BusinessNZ recommends that it does not proceed for the reasons outlined below.
- 3.3 Given the novelty of the proposed NPS, the probable end result will be the replacement of one form of planning complexity and uncertainty with another, for no substantive net gain. We believe the risk of unintended outcomes is high.
- 3.4 For many years there has been a clear case of regulatory failure with planning, causing much of the current cost escalation of sections and the rapid decoupling of land values inside and outside metropolitan urban limits. The adoption of an NPS, with limited teeth but imposing many bureaucratic obligations on councils, will exacerbate the current planning paralysis, cause greater uncertainty and potentially less, not more, investment in land development and infrastructure provision.
- 3.5 The shortage of appropriately zoned and serviced land for both residential and business development has been decades in the making; it is not necessarily the result of current council activity but of successive councils using the 25-year-old Resource Management Act (RMA) in a way contrary to that intended. It was to have been enabling. It has been used to restrict.
- 3.6 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, their many “planning” dislocations and unintended absurdities will continue.

- 3.7 Much new-home building is presently delayed in Auckland by “regime uncertainty” with the finger often pointed at so-called land-bankers waiting to see what finally appears from behind the closed doors of the proposed Unitary Plan. But even with a Unitary Plan finally enshrined, and the NPS in place - ensuring the release of land when political trigger points are hit - private property will be provided in a location and under conditions both of the planners’ choosing and political necessity.
- 3.8 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 (not the Not In My Back Yard brigade – NIMBYs).
- 3.9 Any potential benefits from a NPS are likely to be outweighed by the risks associated with:
- (a) Unintended consequences (i.e. uncertainty as to the effects the policy could have, including an effect not anticipated or desired);
 - (b) 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 opportunity for economic growth). In short, replacing the current failed planning system with an even more prescriptive planning system; and
 - (c) 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.

4.0 GENERAL COMMENTS ON URBAN DEVELOPMENT CAPACITY

- 4.1 In respect to the scope of planning, BusinessNZ strongly supports the statement on p.8 of the NZ Productivity Commission’s *Better Urban Planning Issues Paper (December 2015)* that to a large extent current:

“.....planning is a “movement” with unlimited domain and the objective of transforming society.”

- 4.2 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).”

- 4.3 As a general principle, individuals and companies should bear the full cost of their behaviour (i.e. costs should be internalised). Over-consumption of resources is always likely if the cost can be shifted on to 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.
- 4.4 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.
- 4.5 Land use allocation can be developed according to any number of principles but ideally, like any allocation of natural resources, the underlying principles should encourage an efficient allocation of resources (i.e. encouraging land use to gravitate to its most highly valued use).
- 4.6 In economic terms, three specific components of efficiency are relevant. Ideally, true efficiency involves achieving all components simultaneously; however, these individual efficiency measures are also distinct and can be achieved independently of one another.
- (i) *Productive efficiency*
Productive efficiency means output at the least cost to the producer. Generally speaking, in this scenario, producers put land to use in such a way that they themselves accrue the greatest benefit.
 - (ii) *Allocative efficiency*
Allocative efficiency refers to allocating resources to the form of production most valued by society. This could mean weighing the relative importance of alternative land uses against each other.
 - (iii) *Dynamic efficiency*
Dynamic efficiency is sometimes called innovative efficiency. Here, technological change is encouraged to produce productivity gains over time. Decisions on resource allocation are based on likely production capacity and future requirements, underlining the importance of having policies that are resilient and can adapt seamlessly in the face of future supply and demand conditions.
- 4.7 If 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.

- 4.8 As long as developers pay the economic and environmental costs of associated infrastructure, development should be allowed where businesses and owners choose to build. Under current planning, regulation is increasingly likely to restrict or control land use for aesthetic purposes (however defined).
- 4.9 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 the approval given for a \$1.2 billion housing redevelopment on the disused site of the Three Kings quarry in Auckland. Instead of the proposed 1500 apartments and town houses, the groups are asking for low-rise housing which would see fewer than 1000 houses built. Affordable Auckland Mayoral candidate, Stephen Berry, stated in support of the Government's unusual step of joining the 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."* (Press Release - 1 February 2016).
- 4.10 There are also a number of instances where local government controls not only impact on the property rights of existing landowners' property rights but seriously restrict land available for housing development. This in turn increases the cost of available housing and as a result, affects rental prices making housing less not more affordable.
- 4.11 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.
- 4.12 The Lim Report proposal, the product of questionable analysis, not only seriously affected the value of the land in question but placed restrictions on affected residents' ability to expand beyond their current property footprint.
- 4.13 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 be largely borne by people whose residences were on or close to the foreshore. Arguably, the "risk" of further erosion would mainly affect the individuals concerned - 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. Moreover, even with the changes, the Council would still be subject to residual risk of getting it wrong.²

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

- 4.14 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).
- 4.15 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 likely to 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)

- 4.16 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

Compensation

- 4.17 Given the above considerations, BusinessNZ also believes greater consideration should be given to paying compensation for loss of property rights and regulatory takings to ensure local and central government take better account of the effects of unnecessarily restricting the use of property.

³ Child poverty and inequality - The New Zealand Law Journal (November 2014)

- 4.18 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).
- 4.19 Investors too must have confidence that any assets they purchase or improve upon will be safe from confiscation and unreasonable restrictions, or alternatively, that they will be compensated for any erosion of property rights. Otherwise, there will be limited incentive for anyone to undertake long-term investment.
- 4.20 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. And territorial authorities will have little incentive to fully investigate housing affordability options; confiscating developers' land and money is an easy option.
- 4.21 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).
- 4.22 With little certainty that the rules won't be changed down the track and at relatively short notice, there is a real danger that regulators will minimise their own risks - hardly encouraging investment in building activity.
- 4.23 Apart from the Public Works Act, only in one or two specific instances is allowance currently made for the payment of compensation for regulatory takings (that is, for reducing in private property rights in the public interest).
- 4.24 Regulatory takings should not be legislatively condoned; an acknowledgment of the right to compensation is at the core of property rights with a general presumption that these should not be diminished without compensation. This is a long-held view. BusinessNZ considers the payment of compensation to be a vital check and balance for the economic system.
- 4.25 The need to compensate for regulatory takings is hardly a new or novel concept 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.
- 4.26 The compensation principle recognises that local democracy and the ability for local communities to make relevant choices are important but not costless.
- 4.27 Therefore, BusinessNZ considers Resource Management Act (RMA) provisions dealing with compensation where property is taken, or its use or value restricted, must be strengthened (in the case of section 85, this means *reversing* the current presumption of no compensation). Currently, compensation is the only relief available and at that, there is an excessively

high threshold to meet. Compensation will be paid only if the taking or proposed taking would render the land incapable of reasonable use.

- 4.28 If local authorities had 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.
- 4.29 Compensation claims would need to rest on more than an assertion of impaired land use but on evidence sufficient to support a claim of changed land use.
- 4.30 The claims' process would not be costless and both parties would have to assess the value of the compensation sought, the likelihood of gaining (or paying) compensation and the cost of participation. Rules - requiring the losing party to pay the other's costs, for example - would contribute to getting the incentives for claiming or opposing compensation right.
- 4.31 Finally, BusinessNZ recognises that in some cases, the transaction costs associated with determining the winners and losers 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

