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Environmental Defence Society submission on the Urban Development Bill

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1. Introduction

The Environmental Defence Society (EDS) thanks the Environment Select Committee for the opportunity to make a submission on the Urban Development Bill (the Bill). EDS is a not-for-profit organisation dedicated to achieving good environmental outcomes for all New Zealanders. It is active in capacities as a litigator, a policy think tank, and a conference organiser. It has recently completed a 2.5 year project looking at the future of the broader resource management system in New Zealand, which has had (among other things) a focus on urban matters. We commented there on some concerns we had with the urban development authority proposal, prior to the introduction of the Bill. We are pleased to see that some of the concerns we have raised in the past have been addressed to some extent in the Bill, although a number of concerns remain outstanding.

The Bill aims to provide for functions, powers, rights, and duties of the Crown entity Kāinga Ora–Homes and Communities (Kāinga Ora) to enable it to undertake its urban development functions. Kāinga Ora as an entity has already been established under separate legislation, and this kind of entity has previously been referred to as an urban development authority or housing and urban development authority. Among other things, the Bill provides a mechanism to fast track urban development for large-scale and complex projects, called "specified development projects" (SDPs). Once a specified development project is established, Kāinga Ora is proposed to have wide ranging planning and consenting (and other) powers in order to achieve development at pace and scale. In our submission, we focus primarily on the environmental aspects of the Bill, including the relevance of the Resource Management Act 1991 (RMA), in relation to those powers.

2. The Bill has positive aspects

EDS does not oppose the use of an urban development authority model per se. As we have highlighted in previous work, there are many reasons that the current planning process in urban areas is not working well, and a more agile and coordinated approach is needed to tackle pressing issues (including housing supply). In particular, there is a need to overcome Nimby opposition to

changes in amenity values in existing urban communities, and a need to align the urban planning process with the funding and planning of infrastructure needed to service that land. While the preferable option would, in our view, be to address these issues in a more systemic way through wider resource management reforms (on which the government has established an independent panel chaired by the Hon Tony Randerson QC), EDS recognises that the Bill seeks to provide a shorter-term fix to some of these issues where the need is pressing.

We consider that one of the most promising aspects of the proposal is for central government to have a mechanism by which it can "get its hands dirty" in actually conducting urban development and renewal rather than relying on a private sector which, by itself, may not have the commercial drivers or ability to provide for public good urban outcomes at scale.

3. EDS has outstanding concerns

We have previously expressed concerns that an urban development authority proposal may have risks for environmental wellbeing. Housing supply, and the expansion of our cities, should not come at the expense of inter-generational environmental concerns. The actual drafting of the Bill, when compared to a discussion document issued in 2017 and various subsequent Cabinet papers and minutes, has addressed some of these concerns, to some extent. Notably, it is positive that:

- Part 2 of the RMA (containing important normative directions about environmental protections) is no longer expressly subordinate to development considerations in the purpose and principles of the Bill (cl 5);
- Specific reference is made to the need to consider low emissions urban environments and the need to adapt to climate change risks;
- Kāinga Ora will not be the consent authority for regional level consents.

However, a number of concerns remain. We still see a significant risk of environmental outcomes being diluted. In our view the powers in the Bill should focus on a narrower subset of "planning constraints" concerning amenity and Nimby opposition (especially to densification), and not treat essential environmental safeguards as obstacles to be overcome. Most of our concerns are about the protection of the environment, and relate to proposed powers to override or alter the application of the RMA once an SDP has been established, although we also acknowledge there are likely to be broader concerns from some around the extent of powers to override council priorities and community preferences.

4. Purpose and principles, and relationship with the RMA

We have previously raised concerns that Part 2 of the RMA (its purpose and principles) could be overridden or demoted in favour of the development-oriented "project objectives" of an SDP. Our view is that Part 2 of the RMA contains important normative direction for securing environmental wellbeing (including in cities), and must be defended.

The Bill takes a novel and relatively complex approach to how Part 2 of the RMA applies (or continues to apply) to decision-making. Clause 3 provides a dedicated purpose for the legislation that looks quite different to that of the RMA: "to facilitate urban development that contributes to sustainable, inclusive, and thriving communities." This difference is to be expected given that the Bill

covers broader territory (eg infrastructure funding, reserves, roading powers etc) beyond that of the RMA.

The key provision, however, appears to be cl 5 (principles for specified development projects). This links the purpose of the Act ("in achieving the purpose of this Act…") to actual decision-making, stating that people exercising powers and functions must do two quite separate things:

1. promote sustainable management (essentially, the same direction as under the RMA, with the rider that current "amenity values" are not presumed to be best);
2. have particular regard to several additional matters that (at least to some extent) are not reflected what the RMA does (eg the provision of infrastructure).

The drafting currently reads (with our emphases):

5 Principles for specified development projects

(1) In achieving the purpose of this Act, all persons performing functions or exercising powers under it in relation to specified development projects, or urban development projects selected or assessed as potential specified development 5 projects, ***must****—*

(a) have particular regard to providing, or enabling,—

(i) integrated and effective use of land and buildings; and
(ii) quality infrastructure and amenities that support community needs; and
(iii) efficient, effective, and safe transport systems; and
(iv) access to open space for public use and enjoyment; and
(v) low-emission urban environments; and

(b) ***promote the sustainable management of natural and physical resources*** *and, in doing so,—*

(i) recognise and provide for the matters in section 6 of the Resource Management Act 1991; and
(ii) have particular regard to the matters in section 7 of that Act; but
(iii) recognise that amenity values may change.

(2) In this section, ***sustainable management has the same meaning as in section 5(2) of the Resource Management Act 1991****.*

As we have mentioned already, it is positive that Part 2 of the RMA is largely left intact in the principles of the legislation. Reference to low-emission urban environments is also positive (and, indeed, does better than the RMA itself).

There is no express clarification of the relationship between cl 5(1)(a) and 5(1)(b). Presumably this has been seen as unnecessary because the direction in relation to Part 2 ("must" promote sustainable management) is more directive than to "have particular regard to" the matters listed in cl 5(1)(a), and because there is no foreseeable tension between them.

Ideally, however, we consider that the order of these clauses would be reversed, highlighting that the primary touchstone for decision making remains Part 2 of the RMA. It may also be desirable to add a reference to principles of good urban design in matters to which particular regard must be had, as well as the desirability of enhancing the natural environment in urban areas through environmentally sensitive design. Principles of urban design appear later in the Bill in relation to more specific decision-making criteria (eg for a development plan), but it would be useful to have such considerations embedded in the higher level principles of the Act. It would also be desirable to highlight in cl 5(1)(a) the enhancement of the natural environment as a matter to be provided or enabled. Urban areas provide positive opportunities for improving environmental wellbeing.

Less clear is the legal relationship between the purpose of the legislation proposed in cl 3 and the principles relating specifically to SDPs in cl 5. Could the broader purpose of the legislation (to *facilitate* development) be used in legal argument as a "higher" provision to override or influence the interpretation of Part 2 of the RMA (referenced in cl 5)? Similar kinds of arguments have in the past been used under the RMA itself to undermine the protections contained in subordinate instruments like national direction.

Our view is that where there is the power for existing RMA instruments to be overridden, there remains a need for Part 2 of that Act to remain paramount (with the addition of more targeted urban principles as matters to which particular regard must be had). This should be made abundantly clear in cl 5, so as not to weaken environmental protections. For example, it could be clarified that a purpose of "facilitating sustainable urban development" *requires compliance* with cl 5(1)(b)), not just the more ambiguous direction that it must be done "in achieving the purpose of this Act".

It is also unclear at present whether cl 5 principles (and therefore Part 2 of the RMA) apply to how SDPs are selected in the first place. As worded, the principles appear to apply only to "specified development projects, or urban development projects selected or assessed as potential specified development projects". Part 2 of the RMA, and its environmental protections, are equally important when Ministers or Kāinga Ora are considering where projects should be pursued in the first place. That is particularly important where they are in greenfield areas (where productive soils or other environmental considerations need to be safeguarded).

Recommendations:

- **Subclauses 5(1)(a) and 5(1)(b) should be reversed, to emphasise that Part 2 of the RMA remains the primary touchstone for decision-making in an SDP.**
- **Reference should be made to opportunities for environmental enhancement in cl 5(1)(a) as a matter to which particular regard should be had.**
- **Clause 5 should be amended to clarify that the purpose of "facilitating sustainable urban development" *requires compliance* with cl 5(1)(b)).**
- **The Bill should make clear that the principles in cl 5 apply also to decisions about where SDPs should be located, by amending cl 5(1).**

5. National direction under the RMA

Despite requiring some improvements, the Bill takes a reasonably robust approach to Part 2 of the RMA in cl 5. However, that is not reflected (and is, indeed, undermined) at other key points of the Bill. We address these concerns in the sections that follow.

The proposal in the Bill (cl 60) is for a development plan (which can override both regional and district level RMA instruments) to be "not inconsistent with" national direction produced under the RMA. While this is still a reasonably strong direction, we do not see any compelling reason for it to be different to what is already in the RMA. To "not be inconsistent with" is a weaker (or at least more passive) direction than other plans under the RMA are subject to. Regional and district plans must *give effect to* national direction in an active way. If a development plan is proposing to amend a regional plan (for example), it should equally be expected to actively contribute to the outcomes sought under the NPS for Freshwater Management as regional councils are expected to do. Much degradation of freshwater occurs in the urban environment, and central government policies need to be aligned. In theory, it would be possible for a development plan to completely replace a district plan or regional plan in a project area, in which case it would be particularly concerning if it did not need to give effect to national direction.

The current proposal could therefore dilute key environmental bottom lines, which Part 2 of the Act has always envisaged would be fleshed out through national direction. In other words, if the Bill truly seeks to safeguard Part 2 (as it purports to do in cl 5), then a key part of that in practice is taking an equally robust approach to national direction, much of which is now designed to "recognise and provide for" key matters of national importance.

A weaker direction could also see the establishment of projects that undermine local government efforts (and obligations) to improve environmental outcomes at a broader scale than an SDP. In many cases such measures have been ongoing for many years and have been hard fought. In particular, if a small pocket of urban development (an area unlikely to be based on freshwater catchments) were to take a less robust approach to freshwater quality than in a regional policy statement or plan, that could have negative implications for water quality *elsewhere* in a region (eg downstream) and the ability of councils to give effect to the NPS for Freshwater Management as a whole.

Many existing and future provisions in regional and district plans will be necessary to give effect to NPSs under the RMA. In other words, it is not just the provisions of national direction themselves that need to be safeguarded, but also those provisions in other instruments that are necessary to give effect to them in regional or local contexts. These provisions should at least be required to be specifically identified in the preparation of the development plan. Kāinga Ora should also be obliged, in an evaluation report on environmental matters (see cl 73), to outline how national direction is being given effect to in a development plan. Furthermore, it should be clarified that Kāinga Ora is obliged to make changes to a development plan to give effect to new national direction or changes in national direction. Presently, the proposal (cl 94) is that Kāinga Ora *may* amend a development plan without using the normal process if needed to maintain consistency with new national direction, but it is not clear when it *must* amend a development plan (compare s 66 of the RMA, which states that a regional council *must* change a plan in accordance with national direction). If the intention is to exclude or weaken an SDP from the application of national direction, the appropriate mechanism is to change to the NPS or NES itself.

It is also of note that much effort over the last few years has gone into developing national direction specifically concerned with quality urban development (through the NPS Urban Development Capacity and proposed NPS Urban Development). It makes little sense for this to be subject to a weaker direction in some urban areas (SDPs) and not others, given that it has been designed to address many of the same kinds of issues.

In addition, a different direction to the RMA creates confusion, complexity and uncertainty. One can foresee extensive litigation concerning what the practical difference is between "giving effect to" national direction and "not being inconsistent with" it in the context of a particular project. The courts will pay close attention to the intention of Parliament in choosing different wording from the RMA, but the Bill does not make it clear what those intentions are.

The *relative* strength of direction in relation to different subordinate instruments is also of concern. While the Bill provides that a development plan must "not be inconsistent" with national direction under the RMA, section 26 of the already existing Kāinga Ora – Homes and Communities Act provides that Kāinga Ora must "give effect to" the Government Policy Statement (GPS) on Housing and Urban Development when performing its functions. That instrument is focused firmly on development priorities (s 23), and (aside from some positive references to climate change) does not refer to environmental matters. This creates potential tensions and inconsistencies with national direction under the RMA, and is likely to require litigation to resolve when Kāinga Ora is preparing a development plan. It Is unclear what the outcome would be, but the difference between "giving effect to" and "not being inconsistent with" different instruments may prove important.

We recommend, at least to the extent that a development plan overrides or amends RMA planning instruments, that those exercising powers and functions *give effect to* national direction, and that a clarification that a GPS on Housing and Urban Development required under the Kāinga Ora Act is expressly subordinate to the need to give effect to national direction under the RMA. That should occur in cl 60 of the Bill ("relevance of certain national instruments").

Recommendations:

- **Clause 60 should be amended so that a development plan is required to give effect to national direction, as RMA planning instruments are required to do.**
- **Clause 60 should clarify that GPS on Housing and Urban Development required under the Kāinga Ora – Homes and Communities Act is expressly subordinate to the need to give effect to national direction under the RMA.**

6. Regional functions under the RMA

The Bill provides for an SDP's development plan to override, add to, or suspend the whole or part of "any planning instrument that applies to the project area" (cl 91). Furthermore, if there is any inconsistency, a development plan prevails over another instrument (cl 90). The general reason given for this is to overcome "planning constraints" on urban development. However, the concept of planning constraints has been treated as a very broad one. Although it is not particularly obvious on the face of the Bill, this in practice allows for a development plan to override or change regional policy statements, regional plans, and district plans (it does not apply to national direction). District

plans largely deal with land use and subdivision controls, whereas regional plans largely address what some may see as more "environmental" issues in the sense of pollution and common pool resources like air, freshwater and the coastal marine area.

The only exception to these powers appears to be for historic heritage, where existing protections in planning instruments cannot be undermined (only made more stringent) in a development plan. There is no mention of exceptions for existing environmental restrictions protecting domains like freshwater, air quality, soil, or biodiversity (other than in national direction).

This is a significant power, and in our view goes well beyond what is necessary to address urban development issues (eg amenity or Nimby arguments against densification or expansion). It contains substantial environmental risks. While we consider that a development plan should be able to amend district plan provisions to provide for quality development at pace and scale, we do not see a compelling case for a development plan to have the ability to override regional plans or anything other than the land use components of regional policy statements (except to make them more stringent or to give effect to national direction). Retaining safeguards in regional instruments would be important both for greenfield development (where an area is not already developed) and within existing urban areas (where protections in relation to things like freshwater and air quality are equally important). In short, legitimate environmental protections are not "planning constraints" to be weakened, and many significant environmental bottom lines envisaged in Part 2 of the RMA are given effect to in regional plans rather than national direction. There is a risk here in throwing the baby out with the bathwater; it is not clear that environmental restrictions in regional plans are the real problem in unjustifiably holding up urban development.

The risks of overriding regional functions is reflected in a regulatory impact statement prepared as part of a previous iteration of an urban development authority model (which recommended that territorial authority planning and consenting functions and powers be available to the within the urban development project area, but not those of regional councils). It is also reflected in another part of the Bill (cl 116(1)(b)), where Kāinga Ora expressly does not have ongoing jurisdiction over regional consenting once a development plan is notified and takes effect. This recognises that it is inappropriate for a development-oriented entity (indeed, one that is empowered itself to *do* development) to have regulatory powers in relation to environmental protections.

Recommendation:

- **The bill should remove the power to override regional plans and the aspects of regional policy statements not associated with land use, by narrowing the scope of a "planning instrument" defined in cl 9.**

The environmental risks associated with the power to override regional instruments are exacerbated by the lack of a role for regional councils in the project establishment and planning process. While territorial authorities do not have an absolute right of veto (national interest considerations can still override any opposition), they are anticipated to be closely involved in "partnership" with Kāinga Ora and must be invited to express support or opposition to a proposal (cl 30(h) and cl 43). They are also invited to nominate a representative for the project's governance body if supportive of a proposal (cl 284). Regional councils are not extended the same opportunities, and are only consulted as key stakeholders (cl 35(3)(a)). The Bill seems to assume that the interests and therefore involvement of local government in urban development are associated mainly with infrastructure

responsibilities, the provision of amenities, and land use jurisdiction, and not issues to do with the natural environment in urban areas. Effectively, the environmental mandate of regional councils under the RMA seems to be viewed as a roadblock to be overcome rather than a set of functions to contribute to sustainable urban development.

Furthermore, the weak role of regional councils does not recognise the importance of what is often strong regional level interest in economic development, flood protection and natural hazards management, and spatial planning for urban growth (which is many cases is reflected in regional policy statements). Regional councils are not just environmental regulators that operate in the countryside. They have an important region-wide focus and are well-placed to consider the bigger picture of urban development.

Recommendation:

- **In the event that powers to override aspects of regional instruments remain, the Bill should treat regional councils in the same manner as territorial authorities.**

7. Decision-making criteria for development plans

The Bill takes a relatively confusing and inconsistent approach to decision-making criteria when persons are preparing and making recommendations on development plans. Clause 69 outlines the relevant considerations for Kāinga Ora in preparing a plan. Confusingly, this does not refer to subpart 1 of Part 1 (purpose and principles for decision-making, including the cl 5 reference to Part 2 of the RMA), and only lists a number of other matters to which regard must be had. Presumably, subpart 1 of Part 1 still remains the primary touchstone for what the plan should look like (given that, as a blanket rule, it applies to all those "exercising functions and powers" for SDPs), but this should be made clearer in cl 69 itself. For example, cl 69 could state that the matters to which regard must be had are "subject to subpart 1 of Part 1" (in a similar way that s 104 of the RMA references the Act's purpose and principles) or that this must be done "in accordance with the provisions of subpart 1 of Part 1" (in a similar way that district and regional plans reference Part 2 of the RMA in ss 66 and 74 of that Act).

There is also a curious lack of reference in cl 69 to project objectives. We emphasise that these objectives should not be given greater weight than subpart 1 of Part 1 (including reference to Part 2 of the RMA). However, the lack of reference to project objectives in the list of matters to which regard must be had is strange, given that soon afterwards in cl 72 they are highlighted as something that must form a key part of an evaluation report (which must "examine whether the proposals in the draft development plan are the most appropriate way to achieve the project objectives"). Furthermore, the Bill clearly envisages that project objectives will be matters to be weighed when preparing plans, given that cl 29 provides that objectives can "provide for different weight to be given" relative to each other. Project objectives should be specifically listed in cl 69 as a matter to which regard must be had in preparing a development plan. This is necessary, as subpart 1 of Part 1 (including cl 5) does not itself refer to project objectives.

In contrast to cl 69, cl 81 (which outlines the matters to which an Independent Hearings Panel must have regard when making recommendations to the Minister on the development plan) *does* include reference to subpart 1 of Part 1, as well as reference to project objectives. However, this clause does

not impose any hierarchy between the matters (it simply lists matters to which regard must be had). This makes it inconsistent with the more general direction in cl 5, which gives reasonably clear primacy to Part 2 of the RMA (in that decisions "must" promote sustainable management).[1] In the same way as cl 69 described above, cl 81 should be amended to state that the other matters to which regard must be had (including project objectives) are "subject to subpart 1 of Part 1" or that recommendations must be "in accordance with the provisions of subpart 1 of Part 1".

Similarly, cl 85 (matters the Minister must consider in relation to a development plan) should have a clearer link to the purpose and principles of the legislation. For example, the clause could state that the Minister must be satisfied that the draft development plan is in accordance with subpart 1 of Part 1, and that it furthers the project objectives.

Recommendations:

- **Clause 69 should be amended to state that the matters to which regard must be had are "subject to subpart 1 of Part 1" or that this must be done "in accordance with the provisions of subpart 1 of Part 1".**
- **Project objectives should be specifically listed in cl 69 as a matter to which regard must be had in preparing a development plan.**
- **Clause 81 should be amended to state that the other matters to which regard must be had (including project objectives) are "subject to subpart 1 of Part 1" or that recommendations must be "in accordance with the provisions of subpart 1 of Part 1".**
- **Clause 85 should be amended to state that the Minister must be satisfied that the draft development plan is in accordance with subpart 1 of Part 1, and that it furthers the project objectives.**

8. Resource consenting

The Bill's provisions relating to resource consenting are of concern for two reasons.

First, they create confusion and environmental risks by undermining the more general direction (in cl 5) that those with functions and powers *must* promote sustainable management (ie that decisions must be in accordance with Part 2 of the RMA).[2] As currently drafted in cl 119, a project's objectives (which can be extremely wide ranging and vary depending on the project, but are bound to be development oriented – see cl 29), are expressly given greater weight in consenting decisions than s 104 of the RMA. Section 104 of the RMA, in turn, is important because it states that all decisions are subject to Part 2 of the RMA.[3] The relevant passages of the clause currently read (our emphases):

(1) Every person exercising a power in relation to a resource consent application under this subpart must have regard to the following matters, giving them weight in the order listed, from greater to lesser:

[1] With the appropriate modification that amenity values can be expected to change and the status quo is not to be preferred.
[2] Again, with the appropriate modification that amenity values can be expected to change and the status quo is not to be preferred.
[3] References to Part 2 are to be taken as referring to the more balanced matters in the purpose and principles of the Bill (subpart 1 of Part 1).

(a) the project objectives; and
(b) the matters that arise for consideration under sections 104 to 107 of the Resource Management Act 1991, modified in accordance with subsection (2).

(2) The modifications referred to in subsection (1)(b) are:

(a) a reference to Part 2 of the Resource Management Act 1991 is to be read as a reference to subpart 1 of Part 1:
(b) a reference to a plan or proposed plan is to be read as a reference to a plan as overridden by, added to, or suspended by a development plan:
(c) a reference to other regulations includes regulations made under this Act.

The overall result is that, along with being tortuously confusing, a project's objectives will be paramount when making decisions on resource consents, and Part 2 of the RMA will be secondary.

Aside from the environmental risks this poses, it also creates inconsistencies with the more general direction in cl 5 that all persons with functions or powers in relation to specified development projects must promote sustainable management (ie that Part 2 is paramount). Clause 5 is therefore misleading, as it appears not to apply to all decision-making. The hierarchy in cl 119 is particularly confusing given that the project's objectives, specifically given greater weight, must (presumably, given that cl 5 applies to setting those objectives) *themselves* promote sustainable management.

The approach to consenting is also quite a different approach to decision-making on a development plan (see section 7 of this submission above), which does not contain any express hierarchy between project objectives and Part 2, and instead appears to be driven by the principles in cl 5.[4] This potentially means that if a development plan provided primarily for discretionary activities (ie it required consenting decisions to be made using the discretion of a consenting authority), then outcomes on the ground may be driven by a project's objectives at the expense of Part 2 matters (notably environmental protections) in a way that did not reflect the plan.

Recommendations:

- **Remove the hierarchy between project objectives and s 104 of the RMA in cl 119(1), and replace it with a direction that those exercising consenting powers implement "the directions under sections 104 to 107 of the Resource Management Act 1991, modified in accordance with subsection (2)".**
- **Clause 119(2) should then direct decision-makers to have particular regard to the project's objectives.**
- **The Bill should also clarify specifically in cl 119 that consenting decisions need to be consistent with national direction, not just "have regard" to it. This would remedy a similar deficiency found in the RMA.**

The second reason that the Bill's provisions relating to consenting are of concern is that they provide inappropriate powers in relation to regional level consenting. Essentially, Kāinga Ora has the power to "decline all or part of [a] consent or application, to impose conditions on the grant, or to

[4] As well as matters to which regard must be had – see cl 69 and 81.

modify any conditions that the consent authority would impose on the grant" (cl 106). This includes decisions on regional consents in the transitional period between the establishment of a project and its development plan becoming operative (cl 105-106), but not once a development plan is operative.

This approach is concerning because it potentially allows Kāinga Ora, a development-oriented entity, to weaken environmentally focused conditions on regional consents based largely on project objectives (see cl 106(2)-(3))[5] before a development plan has (1) been prepared, (2) been subject to recommendations from an Independent Hearings Panel, or (3) become operative following ministerial approval. In our view it is inappropriate for Kāinga Ora to have powers in relation to regional consent conditions in this transitional period.

Indeed, the Bill already recognises elsewhere that Kāinga Ora is not an appropriate entity to make decisions relating to regional consenting once a development plan is operative, and the same rationale applies before that point. Being a developer and planner rather than a dedicated environmental authority, it is by no means certain that Kāinga Ora would have the kinds of expertise to qualify it to make decisions in relation to conditions concerning freshwater, soil quality, air quality and so forth.

It is also unclear whether cl 135 (providing rights of appeal to the Environment Court on consent decisions) applies to decisions of Kāinga Ora to grant, modify or decline regional consents in the transitional period, or whether this is limited to where Kāinga Ora is the actual consent authority (ie on district level consents following the development plan being made operative). At the very least, the Bill should clarify that appeal rights flow from any decision to grant, modify or decline consents in the transitional period.

Finally, we reiterate that regional functions more broadly should lie beyond the powers of Kāinga Ora. Although it is not deemed to be a regional consenting authority once a development plan becomes operative, it does have significant powers in relation to regional functions in the plan itself. Planning powers have considerable implications for consenting. For example, providing for activities to be permitted or controlled in a development plan has significant implications for subsequent consents (no consent is required, or it must be granted). And it is of concern that while it has the power to override or alter regional plans, Kāinga Ora does not have corresponding *functions* to ensure that a regional council's environmental mandates are still met (cl 59 reflects only territorial authority functions). This may prove significant, given that the institution's functions under the Act may well influence decisions about staffing and expertise.

Recommendation:

- **The Bill should remove the jurisdiction of Kāinga Ora to make decisions in relation to regional consents in the transitional period between project establishment and a development plan becoming operative. A regional council could, however, be required to have particular regard to the views of Kāinga Ora when making consenting decisions.**

[5] The relative weight to be given to a project's objectives and matters in s 104 of the RMA remains unclear in the way cl 106(2)-(3) is drafted.

9. Project establishment

We make several high level comments about the Bill's provisions concerning project establishment.

First, we consider that it would be useful for the Bill to provide more guidance or principles about what the objectives of a specified development project can and should be (cl 29), and for what reasons it is appropriate to establish a project (cl 30). In particular, there should be a requirement for some form of public interest or public good outcome, which could be included in the definition of "urban development" in cl 10. This caveat would not prevent "commercial" developments being pursued under the legislation, but would require them to have strong public good outcomes (eg the revitalisation of a city centre, but not the pursuit of profit through a big box development). It could also usefully be made clear that projects are to be undertaken to enhance environmental wellbeing *alongside* social wellbeing (eg improving water quality and biodiversity through environmentally sensitive urban design and green infrastructure). The legislation should not *just* be treated as a way to build more houses faster or to stimulate economic growth.

Secondly, as foreshadowed earlier, Part 2 of the RMA should be expressly identified as relevant in decisions determining where projects should go (cl 30(c)). This is because the purpose and principles of the RMA will be important in influencing what is "generally suitable for urban use" and what "to exclude from development". This should be in addition to the "specified conservation-related areas" provided for already in cl 30(d) and for which approval is required from the Minister of Conservation. There are many considerations under the RMA that may mean an area is unsuitable for development (eg landscape, biodiversity and significant natural areas, food production), not all of which are encompassed by "specific conservation-related areas". Some of these areas may be on private land and not protected by property law mechanisms like covenants. Such areas should be required to be identified as environmental constraints under cl 34(1).

Thirdly, careful thought should also be given to whether it is appropriate to put some kind of scale restriction on projects, whether at the smaller end (eg a few lots) or the larger end (eg to override a city's entire urban growth strategy). The Bill should not become a mechanism by which central government can intervene in site specific planning disputes. Nor should an urban development authority model become the default mechanism for urban planning, or be able to ride roughshod over a carefully developed regional spatial plan or urban growth strategy that might exist. That is a recipe for ad hoc planning. Indeed, a regulatory impact statement associated with the 2017 discussion document on urban development authorities stated that there is "a risk of undermining the coherence of the overall planning regime by 'tinkering' with overarching purpose and principles in only specific areas and/or contexts". For example, SDPs could be limited to implementing, rather than overriding, a regional or local growth strategy required under RMA national direction. Alternatively, planning powers could be limited to brownfields or greyfields development, to prevent the use of powers to facilitate urban sprawl, and to target planning powers where problems and opposition are typically more acute (in existing urban areas).

Finally, we see a case for more caution around when powers are granted to Kāinga Ora. Not every project will require a full suite of powers (eg planning, consenting, land acquisition etc), and these could be conferred on a "need to have" basis at the point at which a project is established rather than being held in reserve through an ongoing planning process.

Recommendations:

- **Clauses 10(1), 29 and 30 should provide more guidance or principles about what the objectives of a SDP can and should be and for what reasons it is appropriate to establish a project (or give specific planning and consenting powers). This should include reference to public good outcomes, and environmental enhancement.**
- **Part 2 of the RMA should be listed in cl 30 as a relevant matter in determining where SDPs are located, and influence the types of areas that are identified as environmental "constraints" in cl 34.**
- **Careful thought should be given to introducing some constraints on the geographical of projects.**

10. Miscellaneous

Finally, we raise various miscellaneous matters.

- It is not clear which Minister will be responsible for the legislation. To safeguard the interests of the environment, we suggest that mandatory engagement around project establishment (cl 35) should include the Secretary for the Environment, in a similar way that local authorities and the chief executive of the Ministry responsible for the administration of the Act must be consulted.
- Clause 106(3) provides that the normal consenting provisions in the RMA apply to decisions by Kāinga Ora to decide, decline, or impose conditions on resource consent applications. This effectively means that (due to s 104E of the RMA) the impacts of activities on climate change cannot be considered unless there is national direction promulgated on the subject. This may undermine the positive directives elsewhere in the Bill to consider climate change mitigation and low emissions urban environments. Clause 106(3) should be amended to clarify that ss 104E and 104F do not apply to consenting decisions in a SDP.
- In cl 73, "likely effects" on the environment should be replaced with "actual and potential effects" on the environment, and a "broad assessment" should be replaced with an "assessment". These are important to ensure that an environmental evaluation is robust and proportionate to the risks.
- Specific reference in clauses 72 and 73 should also be made to the need to assess compliance with cl 5 (including promoting sustainable management), not just a requirement to have regard to it when assessing the extent to which a draft development plan is the best way to achieve project objectives.
- There is a typographical error in clause 116(1)(b) ("authorty")

Recommendations:

- **Mandatory engagement around project establishment in cl 35 should include the Secretary for the Environment.**
- **Clause 106(3) should be amended to clarify that ss 104E and 104F of the RMA do not apply to consenting decisions in a SDP.**
- **In cl 73, "likely effects" on the environment should be replaced with "actual and potential effects" on the environment, and a "broad assessment" should be replaced with an "assessment".**

- **An environmental evaluation should assess the extent to which a draft development plan is the most appropriate way to achieve the principles in cl 5, not just project objectives.**

11. Concluding comments

The overall thrust of our submission is that the Bill should be seen not as a way to weaken environmental protections, but rather as a way for development to be done faster in ways that safeguard and actively *improve* environmental outcomes. At a broader level, law makers should also be cognisant of how the Bill might fit within a reformed wider resource management system. We note that the Bill is long and adds another layer of considerable complexity and cross-references to a planning system that is already in need of simplification and overhaul. While it is designed to address a range of urban-related issues, we note that a much more effective and systemic solution will need to be found through the parallel process currently being undertaken for resource management system reform, including a meaningful deployment of spatial planning.

The Bill's value is, to us, primarily in the ability to make decisions under different statutes concurrently rather than sequentially, as a way for central government to be involved in actual development (and funding) of urban areas for public benefit that the private sector may not otherwise provide, and to overcome Nimby opposition to allow densification and changes in amenity values. But its purpose is categorically *not* to weaken legitimate environmental protections, and more robust safeguards are required to avoid throwing the baby out with the bathwater.

We again thank the Environment Select Committee for the opportunity to submit on the Urban Development Bill. How we respond to pressures in our urban environments is critical to New Zealand's social and environmental wellbeing.