

14 October 2019

Ministry for the Environment  
**Wellington**

By email: [npsurbandevelopment@mfe.govt.nz](mailto:npsurbandevelopment@mfe.govt.nz)

**Re: Planning for successful cities – proposed National Policy Statement on Urban Development**

**1. Introduction**

- 1.1. The New Zealand Law Society (Law Society) welcomes the opportunity to comment on the discussion document *Planning for successful cities – proposed National Policy Statement on Urban Development* (NPS-UD).
- 1.2. This submission discusses issues we have identified in the practical application of the draft National Policy Statement's provisions. We suggest some provisions would benefit from further consideration or clarification, to ensure the proposed National Policy Statement is clear and workable in practice.

**2. Identifying Urban Centres/Environments**

- 2.1. The discussion document proposes separating urban environments into two categories, being the "*major urban centres*" of Auckland, Hamilton, Tauranga, Wellington, Christchurch and Queenstown, and the rest. The way in which those major urban centres are described in Table 2 clearly indicates that a broad view is taken as to the ambit of the respective centres. Hamilton is described for instance as including land within Waikato District Council and Waipa District Council. Wellington is described as including land within Kapiti Coast District Council. This raises the question as to how far afield the proposed NPS-UD would stretch in each case.
- 2.2. This is an issue that arises under the existing NPS-UDC 2016, where the existing definition of "*urban environment*" includes land within which a concentrated settlement of 10,000 people or more is contained. This is fine for cities made up of a single concentrated area, with some open space within them. Most New Zealand cities, however, have outlying urban centres that may or may not have been treated historically as separate centres and with rural land separating them from the "main" city. Obvious examples are Pukekohe, Cambridge, Te Awamutu, Te Puke, Paraparaumu/Waikanae, Rangiora, Rolleston, Lincoln and (on a smaller scale) Arrowtown.
- 2.3. The draft NPS is not clear when it refers to these main urban centres how far they are intended to stretch. Taking Wellington as an example, clearly it is envisaged that Kapiti Coast District Council administers land within the Wellington Urban Centre as described, but how much land? Does it stop at the margins of Waikanae (which might seem to be the logical place to stop once you move north of Porirua/Mana)? Alternatively, is Otaki (and/or Otaki

Beach) intended to be caught within the ambit of “Wellington” and what is the status of the land (generally highly productive land that will be covered by the draft NPS for Highly Productive Land) between them?

- 2.4. Queenstown has the additional feature that much of the land between pockets of urban development is either an Outstanding Natural Landscape or Outstanding Natural Feature that section 6(b) instructs be protected from inappropriate subdivision, use and development. Is the draft NPS-UD seeking to signal that urban development is appropriate in those areas? Given the development pressures in Queenstown, that possibility is likely to be litigated if not clarified.
- 2.5. These issues require clarification – firstly to identify more clearly what the policy intent is, and then to ensure the definitions in the NPS reflect that.

### 3. Draft NPS Provisions

- 3.1. **Objective 1** – it is suggested that the objective state more clearly what is being strategically planned. The notes suggest that it applies to “all urban environments”. This raises the more general issue noted above. Is it actually “urban environments” as defined, or is it the urban settlements located within urban environments? The requirement that such planning provides for “quality urban environments” implies the latter given that while open space contributes to quality urban environments, it is hard to conceive of several kilometres of rural land doing so in any meaningful way.
- 3.2. More generally in relation to the reference to “quality urban environments”, this is a theme running through the draft NPS. The authors have decided that this is obviously an appropriate reference point. The issue is, however, quality from what perspective? One of the obvious policy objectives underlying the NPS is to facilitate affordable housing. “Quality” urban environments are generally expensive urban environments, because the quality of the urban environment is affected by the extent of views to the surrounding environment, the quality of that surrounding environment etc. Another way to view it is that quality could be internally focussed – safe, energy efficient, comfortable homes. Whatever the intent, greater clarity is required given the key role of this objective.
- 3.3. Policy P1A:
  - a. The draft policy requires local authorities to demonstrate how they will “achieve” quality urban environments in their existing and future urban areas. It is suggested that this would put an impossible obligation on local authorities, given the number of factors determining whether an urban environment is one of quality (or not) that are not within the local authority’s ability to control. Ultimately, this reflects the fact that the philosophical position of the Resource Management Act 1991 (RMA) is to provide local authorities with the ability to restrict the way in which land use activities are carried out, rather than to require people and communities to act positively. People and communities can be encouraged to act in a way which contributes to quality urban environments but are generally not required to do so. It is suggested that this sub-policy be framed around local authorities’ reasonable endeavours.
  - b. Sub-Policy P1A(b) refers to residential development capacity “bottom lines”. It is suggested that a cross-reference be inserted to Policy P4D, so the reader understands what is being referred to.

3.4. **Policy P1D:**

- a. The draft policy requires identification of areas where evidence shows urban development “*must be avoided*”. This appears to set a high bar. Taking hazard risk as an obvious rationale to preclude urban development in a particular area, risk is relative. Judgments have to be made as to what level of risk is acceptable. An argument could, and almost certainly would, be mounted that anything other than the most obvious and imminent hazard risk would not mean that urban development “*must*” be avoided. The interaction with the draft NPS for Highly Productive Land also suggests a lower test. As with natural hazards, judgments have to be made, informed by the provisions of both NPSs (assuming they are confirmed). Consideration should be given to whether the terminology might require identification where urban development “*should*” be avoided.
- b. A second and related point is that the appropriate response may not necessarily be to avoid, but rather to constrain the extent of urban development. Again, this might be for hazard management purposes. Queenstown also offers the example of strongly enforced height limits established for the purpose of maintaining the qualities of its outstanding natural landscape.
- c. Sub-Policy (d) requires identification of “*broad locations for residential identification that contributes to quality urban environments*”. This relates to the point made above. If the term “*quality urban environment*” is given its natural and ordinary meaning, this might have the result that very little intensification would be identified, because any contribution intensification might make could be argued to be negative. It is suggested that a somewhat lower test be inserted e.g. that intensification not be inconsistent with quality urban environments.

3.5. **Policy P1G** introduces the concept of development capacity allocation. Policy P1A(c) refers to allocation of development capacity across existing and future urban areas. Is this what Policy P1G is referring to, or is the latter intended to encompass allocation of development capacity as between local authorities? If the latter is the case, it is suggested that a separate policy or policies are required, addressing how that process of allocation will be undertaken.

3.6. More generally, the Future Development Strategy (FDS) will enable local authorities to be more agile but will generally be out of step with Regional Policy Statements and district plans that are reviewed on 10-year cycles. Our understanding is that NPS-UD considerations generally only come into play through planning documents unless ‘consent decisions’ are specifically mentioned. This suggests there might be a potential gap where there is a short-term land supply issue. Is this intentional?

3.7. **Policy P1H** is framed somewhat strangely for a policy insofar as it strongly encourages an outcome, particularly in the context of an NPS which, by definition, relates to matters of national significance. It is suggested that it be framed in terms of the obligation of local authorities (consistently with the balance of policies): perhaps directing that local authorities should use their FDS for the nominated purposes unless there is good reason not to do so.

3.8. **Objective 2:**

- a. This objective highlights the internal contradiction between the NPS striving for quality urban environments that also address social policy objectives, including the need for affordable housing. This could be justified on the basis that it is aspirational,

but it might be more realistic and less prone to invite litigation in its application if some concept of practicability (e.g. “as far as practicable”) be ascribed to the extent to which urban environments achieve and/or retain their quality.

- b. The extent to which it will be possible in practice for all people, whanau, communities and future generations to provide for their well-being will be constrained by competing factors that, it is suggested, this objective needs to acknowledge. Obvious factors are those identified in Part 2 of the RMA. Physical constraints are also an issue in some urban environments, e.g. Wellington and Queenstown.
- c. Lastly, assuming the draft National Policy Statement for Highly Productive Land is confirmed, that too will be a relevant constraint that will need to be taken into account.
- d. As a drafting point, reference to “*people, whanau and communities*” already necessarily includes “*future generations*”. If reference needs to be made to future generations for emphasis, we suggest it be reworded “*including future generations*”.

3.9. **Policy P2B:**

- a. Objective 1 does not describe a quality urban environment. Should this be a cross-reference to Objective 2? If so, does it need to be broadened – is it just the specific matters described in Objective 2 to which particular regard must be had?
- b. We suggest that sub-Policy (a) might be expressed more simply and clearly as:

*... the potential for urban development to contribute positively to a quality urban environment.*

- 3.10. **Policy P3A** seeks to provide direction regarding amenity values within urban environments. The expressed policy intent is to shift what is described as a current perception that urban development only has negative effects on amenity for individuals. The discussion paper suggests that current planning reflects a bias towards the status quo.
- 3.11. While urban development that is well conceived and well undertaken may maintain and enhance amenity values, as that term is defined in the RMA, the underlying intention is obviously to facilitate more intensive development in existing urban areas.
- 3.12. To the extent that existing planning involves an implicit or explicit bias towards the status quo, the way in which Objective 4 and Policy P3A are expressed is too subtle to make a meaningful difference to that current approach. We suggest that if the NPS-UD wishes to make a meaningful difference to current practice, it needs to confront the likelihood that in many if not most cases, intensification of urban development will result in loss of amenity. This is not necessarily fatal. Long-standing case law indicates that amenity does not have to be maintained or enhanced in all cases (refer *Shell NZ Limited v Auckland City Council* (1996) NZRMA 189).
- 3.13. We suggest that the NPS-UD needs to indicate the situations where loss of amenity values ought not to be accepted. One obvious example is where those amenity values are the product of historic heritage required to be recognised and provided for under section 6(f) of the RMA. If at the same time, the NPS-UD provided clarification of the ambit of potential historic heritage protection in an urban residential environment (e.g. is there a cut-off date after which residential development is not “*historic*?”), that would be useful as well.

- 3.14. **Objective 5 and Policy P4A** are framed in directive terms (variously “ensure” and “must ensure”). Objective 5 is framed sufficiently generally in terms of the outcome sought that this may be appropriate. Policy P4A however, is much more specific and, as drafted, poses an impossible obligation for local authorities to deliver on, namely that District Plans enable development capacity that is feasible and likely to be taken up to meet every demand for dwellings in terms of location, typology and price. To take a hypothetical example, one suspects that a large number of people would like to buy a standalone dwelling in Queenstown Bay with a view of Lake Wakatipu at a price somewhat lower than the current market value (assuming one could find such a dwelling). It is difficult to conceive how Queenstown Lakes District Council could go about ensuring enough development capacity to meet that demand. Nor is this solely a Queenstown issue. Virtually every major centre has areas that are highly sought after and where demand exceeds supply, reflected in a market price that is well out of the financial reach of many members of the community. Presumably the council would in each case notify the Minister in terms of Policy P4B (noting in passing that the existence of this policy supports the view that local authorities cannot ensure the outcomes directed in Policy P4A). It is unclear what the Minister would then do to address the situation other than to satisfy him or herself that the local authority is not adopting an unreasonable view. It is suggested that Policy P4A needs to be framed in terms of local authorities making reasonable endeavours to identify and enable the required development capacity. In reality, not all demand is going to be met, and it is suggested that the NPS-UD needs to provide direction that ensures that what reasonably can be done is done.
- 3.15. **Policy P4E** cross-references P3D. Should that be P4D? In addition, the reference to regional authorities should be to regional councils. More substantively, the Law Society questions whether it is appropriate that the content of District Plans be predetermined by what is in a non-RMA document (the FDS). This means that on a key policy issue, the community will have no opportunity to express its views via an RMA First Schedule process. Allocation of development capacity between local authorities with jurisdiction over a major urban centre ought to be a matter resolved in the context of the Regional Policy Statement and open to public submission.
- 3.16. **Objective 6(a)** directs local authorities to make decisions on urban development based on the best available evidence. Local authority decisions on every planning matter should be made based on the best available evidence. For this particular direction to add value, it is suggested that it needs to identify evidence that may not currently be being considered, or not given appropriate weight.
- 3.17. **Policy P5A** implies that each urban zone in a major urban centre will have a description of what development it envisages tailored to the growth identified in the FDS. This raises the same point of principle as that noted above in relation to Policy P4E (that the content of district plans should not be predetermined by the content of an RMA document with no opportunity for input under the First Schedule, save for good reason). In addition, it appears to be inconsistent with the recently promulgated National Planning Standards which specify the description of the type and nature of development envisaged in each urban zone. If the intention is that the zone applying to particular land should be consistent with the FDS, it is suggested this should be stated more clearly.
- 3.18. **Policy P5D(b)** has similar language to P2B. As with P2B, clarification is required.
- 3.19. **Objective 7** seeks that urban intensification be allowed in areas where its benefits “*are best realised*”. Urban intensification at any location will have both benefits and costs (i.e. adverse

effects). Logically, the optimum position is that the option chosen has the best balance of benefits and detriments. That would also be the most efficient outcome in terms of section 7(b) of the RMA. It is suggested that the concept of net benefit be incorporated into Objective 7.

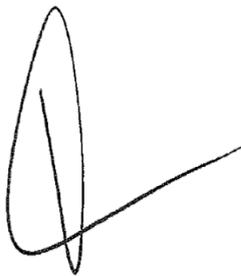
- 3.20. Consistent with the point just above, the sole focus of **Policy P6A** is on the benefits of higher-density development, with no consideration of countervailing disbenefits.
- 3.21. The opening words of the draft policy are also framed extremely generally: they suggest “higher-density” development should be enabled in all locations. That gives rise to two questions: higher than what, and how high? It would be helpful for the policy to be framed more precisely to provide guidance on how the “higher” density is to be measured and to ensure that countervailing situations that might indicate higher density development is inappropriate are taken into account.
- 3.22. **Policy P6B** requires that an objective be inserted in Regional Policy Statements for regions with major urban centres, indicating an intention to enable residential intensification “*that ensures the efficient use of existing urban land, infrastructure, services and facilities*”. We question whether efficiency should be the sole criterion. On the face of it, the most efficient use of urban land would result in a proliferation of Hong Kong style 20-storey apartment blocks. Is that what is intended? Has consideration been given to the consistency of the suggested objective with the RMA Part 2 purpose and principles? Clearly efficiency is an important consideration, but it should not be the sole consideration, and we suggest that further thought needs to be given to this provision.
- 3.23. Considering the two options suggested for **Policy P6C** the terminology “*zone for*” lacks clarity. Given the standardisation of zoning approaches required by the National Planning Standards, it is suggested that whichever option is chosen, what is required should be expressed in terms of the standard zone framework in those standards.
- 3.24. If Option 2 is chosen, the suggestion that high-density development has a minimum of 60 residential units per hectare raises the question as to how district plans should treat residential development less than that specified density. Is it intended that it would be prohibited? This would have potentially significant implications for established residential communities e.g. in Hamilton East and Thorndon, that are clearly within 1.5 km of their respective city centres.
- 3.25. **Policy P6D** incorporates a test for higher density residential activity than currently provided, based on whether the development will provide “*more choice of housing*”. Given that the subject matter is higher density residential development than the status quo, it will be axiomatic that such development will provide more choice. Accordingly, the suggested sub-policy adds no value and might be deleted. Alternatively, if the intention is to ensure that higher density development provide “*affordable*” housing (rather than just expensive inner-city apartments), it is suggested that this be stated more clearly.
- 3.26. Considering the example policy provided on page 39:
  - a. If the reference in limb (b) to “*protected areas*” is retained, what might fall within such a description should be clarified.
  - b. We question whether the infrastructure test in limb (e) should be framed in terms of the possibility that infrastructure to enable the development is provided (“*can be provided*”). The provision of infrastructure is usually, but not invariably, an issue of

cost. If the funds are available, infrastructure is likely to be able to be provided. It is suggested that a better test might be framed around either whether infrastructure is planned to be provided or is likely to be provided.

- 3.27. In relation to the section seeking feedback on pages 42-45, this raises a similar point to that discussed above. The focus is on identification of rules currently applied in District Plans that may not be necessary. Accordingly, viewing the policy question as being whether removal of such rules will enable quality urban development (as per the heading) might be considered to pose too high a test. As suggested above, reframing the test as one looking to determine whether deletion or amendment to particular rules would be inconsistent with quality development, might better facilitate the policy objective.
- 3.28. **Policy P10A** has the same language as Policy P1H. For the same reasons, rather than the policy “strongly encouraging” action, this should be expressed in a form consistent with the language of the other policies of the NPS. For example, it might be worded along the lines “... *work together to implement this NPS, having particular regard to the desirability of cooperation and agreement on ...*”.
- 3.29. **Policy P10B** requires local authorities to work with third parties who are under no legal obligation regarding the stance that they might take. It is suggested the policy should be reframed to require local authorities to exercise reasonable endeavours to work with providers of development and other infrastructure in the manner directed.
- 3.30. **Policy 10C** has the same language as Policy P10A (strongly encouraged). For the same reasons, it is suggested that this be reframed in terms of a direction to endeavour to collaborate and cooperate on the matters specified.

These comments have been prepared by the Law Society’s Environmental Law Committee. If further discussion would assist, please do not hesitate to contact the committee convenor, Bronwyn Carruthers, via the Law Society’s Law Reform Adviser Emily Sutton ([emily.sutton@lawsociety.org.nz](mailto:emily.sutton@lawsociety.org.nz)).

Yours faithfully

A handwritten signature in black ink, consisting of a large, stylized loop followed by a horizontal stroke extending to the right.

Andrew Logan  
**Vice President**