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NPS Urban Development Capacity
Ministry for the Environment
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Proposed National Policy Statement on Urban Development Capacity

Introduction

The New Zealand Law Society appreciates the opportunity to respond to consultation on the *Proposed National Policy Statement on Urban Development Capacity* (NPS-UDC).

A: General comments

1. The Law Society does not make any comment on the underlying policy or the ability of the proposed National Policy Statement to adequately give effect to that policy.
2. It does however have a number of concerns about the proposal.
3. First, there is a very real question about whether such a National Policy Statement is necessary at all. Planning under the Resource Management Act (and its predecessors) is about predicting and providing for the future. It is questionable whether a further instrument adds value.
4. Secondly, the proposed National Policy Statement has nationwide application. However, there are regional and district differences. The obligations in the proposed National Policy Statement for some regions and districts are unnecessary, and impose an undesirable set of directions and accompanying costs. This is particularly true in predominantly rural areas, and in regions and districts where populations are static or declining.
5. Thirdly, as currently drafted, the National Policy Statement does not resolve the tension between containing development or permitting expansion. No clear guidelines are proposed in this respect.
6. Fourthly, the proposal fails to grapple with the issues of the infrastructure necessary to support development and without which development is constrained and frustrated.
7. A narrow view is taken of “infrastructure”. So, for example, telecommunications and electricity are omitted from the definition. More significantly, social (education, health and other services) and economic infrastructure necessary to support both residential and business development are omitted.

8. Finally, the proposed National Policy Statement fails to address the significant challenges that all local authorities face in planning for climate change. There has been a great deal of development on flood plains and coastal margins around New Zealand, and local authorities now need to plan for relocating urban development on account of factors such as sea level rise, coastal erosion, and higher frequency flood events.
9. The Law Society respectfully submits that the proposed National Policy Statement needs to encompass and resolve these issues.
10. Comments on matters of detail follow.

B: Specific comments

Evidence to support decisions

i) Application to 'local authorities'

11. Policies PB1 to PB5 require the gathering and assessment of information.
12. As currently expressed, these policies apply to all local authorities that have part, or all, of a Medium Growth Urban Area or a High Growth Urban Area within their jurisdiction.
13. Because of the overlapping geographic jurisdictions of regional councils and territorial authorities, many Medium Growth Urban Areas and High Growth Urban Areas will be within the jurisdiction of at least two local authorities: i.e. a regional council and a territorial authority. This will be unavoidable where a relevant Urban Area is not within the jurisdiction of a unitary authority.
14. The practical ramification of this overlap is that both local authorities with jurisdiction over a given Medium Growth Urban Area or High Growth Urban Area will need to gather the information, and perform the assessments, required in Policies PB1 to PB5. Notwithstanding the requirement that the relevant authorities "work together to, as far as possible, ensure coordinated land use planning ..." (policies PC1 – PC3), there will inevitably be some duplication of effort. That duplication seems unnecessary and inefficient.
15. This issue could be addressed by requiring regional councils to have regard to the information gathered, and assessments carried out, by territorial authorities within their jurisdiction. This would allow the improved evidence base to flow through into regional council planning decisions, while avoiding duplication of effort and expense.

Recommendation

16. Change all references to 'local authorities' in the preamble to, and content of, Policies PB1 to PB5 to 'territorial authorities'.
17. Insert a new Policy PB6 as follows:

"Where a Medium Growth Urban Area or High Growth Urban Area is within the jurisdiction of both a territorial authority and a regional council, the territorial authority must provide copies of the assessments required under policy PB1 and the results of monitoring under policy PB5 to the regional council."

ii) Publication of assessments and monitoring results

18. Policies PB1 and PB5 respectively require local authorities to carry out:
 - a. Housing Assessments and Business Land Assessments; and
 - b. quarterly (or more frequent) monitoring of a specified range of indicators.
19. Both policies expressly require local authorities to “have regard to the benefits of publishing” the information they relate to.
20. The purpose and practical effect of this requirement are unclear.
21. Both types of information are likely to be publicly available under the Local Government Official Information and Meetings Act 1987, so a provision in the NPS-UDC providing for their availability is arguably unnecessary.
22. If the intent is to prompt local authorities to publish each type of information, then a stronger or more clearly worded suggestion – if not a requirement – should be considered. Express reference to the possibility of electronic publication or availability would also be useful.

Recommendation

23. Amend the final paragraphs of Policies PB1 and PB5 to read (as appropriate):

“Each local authority must publish and maintain [copies of its assessments under policy PB1 / the results of its monitoring under policy PB5] on an Internet site to which the public has free access.”

iii) Property market activity

24. The third bullet point of Policy PB2 requires local authorities, when carrying out the assessments required under Policy PB1, to have particular regard to “information on the market’s response to planning obtained through monitoring under PB5”.
25. Policy PB5 sets out a minimum of six economic indicators. Fluctuations in measurements against those indicators over time are likely to be affected by a large range of factors, including but not limited to “the market’s response to planning”. It is likely to be impossible to isolate and accurately assess the market’s response to planning.
26. While the symbolic intent of the bullet point is understood, as currently framed it sets an impossible test. The Law Society suggests a way that it could be simply remedied without affecting the substantive operation of Policy PB2.

Recommendation

27. Amend the third bullet point of Policy PB2 to read:

“Information ~~on the market’s response to planning~~ obtained through monitoring under policy PB5.”
28. The consultation document (at p 33) sets out some key questions regarding the interaction of the property market and resource management plans. The Law Society comments on these as follows.

What else would help local authorities and the government better understand how planning interacts with the market?

Property developers frequently impose covenants on the titles they are selling. Many of these limit what can be built and how the land can subsequently be developed – in other words, the covenants may restrict future growth even where local authority planning permits or encourages it. Generally, the covenants are intended to make the properties more marketable and developers will have given little thought to the planning aspects of future development of the land. To accurately understand limitations on development, the existence of these types of covenants needs to be taken into account.

What challenges do you see in interpreting price signals?

There will sometimes be a significant time lag in relation to price signals from property developments, especially when purchases are made off the plans. There may, for example, be a delay of up to two years between the date an agreement is signed and when settlement takes place (at which point the pricing information becomes publicly available).

iv) Inefficient allocation of scarce land resulting in land-banking/property speculation

29. Policy PD5 of the NPS-UDC requires local authorities to set aside significantly more land for urban uses than they consider will be required in both the short/medium term (extra 20%) and long-term (extra 15%). This requirement is also reflected in the definition of the term “sufficient”. Providing more land than is required is intended to recognise that not all capacity will be taken up. However, providing additional land does not necessarily mean more houses (and in particular more affordable housing) will be built in the short/medium or long-term. Whether that opportunity is ultimately taken up depends on a number of factors including developers and market conditions.
30. There are other more fundamental problems with the policy. The policy is inconsistent with section 7(b) of the RMA, as the policy requires the allocation of land for a purpose for which it is not required. By definition, this is not an ‘efficient’ use of land; particularly where the land in question is productive rural land, which is itself a scarce resource. The policy also assumes that in all cases urban development is the highest priority and the best use of the land. That is clearly not the case where the allocation of land for urban development exceeds the forecast demand.
31. Such a requirement may also have the effect of discouraging reinvestment in existing rural productive uses on the land, even though the land may ultimately not be required for urban purposes in the short, medium or long term. Such a policy may also encourage (rather than discourage) further land banking/property speculation, thereby undermining one of the aims of the NPS-UDC.

Recommendation

32. That the definition of “sufficient” in policy PD5 be amended to delete the requirement to provide additional margins for capacity, as follows:

“Sufficient means the provision of enough development capacity to meet residential and business demand. The total capacity should reflect the demands for different types and locations.”

“PD5: Regional councils must set minimum targets for the supply of sufficient residential development capacity that must be achieved, in accordance with its

Housing Assessment, and incorporate these into the relevant regional policy statement.”

“The minimum targets must specify:

- *The total number of dwellings; and*
- *Different types of dwellings.”*

33. That further consideration be given to how the NPS-UDC can be amended to discourage land-banking and speculative property purchases.

vi) Uncertain status and enforcement mechanism for future land release and intensification strategy

34. Policies PD7 to PD9 require local authorities that have all or part of a High Growth Urban Area within their jurisdiction to provide a future land release and intensification strategy (“strategy”).

35. Policy PD9 states that a strategy must be informed by the Housing and Business Land Assessments carried out under Policy PB1, take the views of various stakeholders into account and have particular regard to Policy PA1.

36. However, there is no clear indication as to:

- c. how a strategy is intended or required to relate to the rest of the ‘PD’ suite of policies;
- d. what the status of a strategy is under the RMA or other local authority statutes, such as the Local Government Act 2002; or
- e. what the implications are for other actions taken, or decisions made, by a local authority under the NPS-UDC if a valid strategy is not provided where required by Policies PD7 to PD9.

37. This could most effectively be remedied by strengthening the reference to Policies PD7 to PD9 that currently appears at the end of Policy PD6.

Recommendation

38. Amend Policies PD5 and PD6 to provide that a regional council must have particular regard to any strategy provided under Policies PD7 to PD9 when setting or revising targets under Policies PD5 and PD6.

39. Consider whether other provisions within the NPS-UDC should refer to strategies provided under Policies PD7 to PD9.

C: Consultation

40. There is no express requirement to consult with all potentially affected parties or the wider community when determining what further land is required for urban areas under the NPS-UDC.

41. The obligation to consult under policy PB4 when housing and business land assessments are being carried out only extends to infrastructure providers, community and social housing providers, the property development sector and any other stakeholders the local authorities

think fit. While the assessments are focused on estimating the demand for dwellings and business land, the assessments also need to consider development capacity to meet demand in the short, medium and long-term. Capacity, particularly in the long-term, is likely to involve significant incursions into greenfield/rural areas, and there is therefore a need to consider impacts on the productive rural sector. The wording of the policy at present leaves consultation with other stakeholders to the discretion of the body undertaking the assessments.

42. It is also notable that there is no requirement to consult with iwi authorities when undertaking the Housing and Business Land assessments. This is inconsistent with the obligations set out in Part 2 of the Act – particularly section 8. It is also inconsistent with the policy and plan change process set out in Schedule 1 of the RMA which requires that local authorities consult with iwi authorities before notifying any policies or plans, or changes to such instruments.
43. Requiring consultation with iwi authorities would give better effect to the purpose and principles of the Act, and would promote a consistent approach to consultation with iwi when promulgating RMA instruments.
44. Even more concerning is the absence of any requirement for consultation when local authorities are preparing a future release and land intensification strategy under policy PD7. While local authorities are required to “take into account” the views of certain groups under policy PD9, there is no requirement to consult.
45. It is vital that the views of those potentially affected by any change in use have an opportunity to be heard. Consultation with affected parties is a key principle of the resource management system and the NPS-UDC should not alter this.
46. A further issue relates to the use of the phrase ‘as they see fit’ in Policy PB4. These words introduce uncertainty. They could be narrowly interpreted as meaning that local authorities have discretion as to who they will consult with and how consultation is conducted. Alternatively, the words could be broadly interpreted to mean that local authorities have discretion whether to consult at all.
47. If, as seems likely, the underlying policy intent is that local authorities are required to consult with at least the listed categories of persons but in a manner they are free to determine, then that should be clearly stated. The Law Society considers that this can be achieved by adopting similar language to provisions in the Local Government Act 2002 that deal with local authority consultation.

Recommendation

48. That policies PB4 and PD9 be amended as follows:

“PB4: In carrying out the assessments required under policy PB1, local authorities must consult with infrastructure providers, community and social housing providers, the property development sector, relevant iwi authorities, any potentially affected landowners and any other stakeholders in such manner as the local authority considers, in its discretion, to be appropriate.”

“PD9: In developing this strategy local authorities must:

- *Be informed by the Housing Assessment and Business Land Assessment required under policy PB1;*

- *Consult with infrastructure providers, landowners, the property development sector, relevant iwi authorities any potentially affected landowners and any other stakeholders as they see fit.*

D: Interpretation

Business land

(See use of the term in PB1, PB5, PD9, “Providing for business needs”, “Constraints on providing sufficient development capacity for business and housing needs.”)

49. The definition of “business land” hinges on land being zoned for “productive economic activities”. This phrase is not defined and is ambiguous. Within urban areas, there are a wide range of economic activities undertaken, with some likely to be regarded as more productive than others. The productivity of activities can also rise, or fall, over time. Even a residential zoning could be considered to provide for “productive economic activities” as home based businesses may be provided for, and provision of residential rental accommodation is itself a form of economic activity.

Recommendation

50. That the definition of “business land” be redrafted so that it does not revolve around the ambiguous term “productive economic activities”. If reference to “productive economic activities” is to be retained as the measure of what is “business land”, then that term should itself be clearly and unambiguously defined.

(See also discussion re Policy PA1 and “economic activity” at paragraph 55 below).

Customer-focused

(See use of the term in PD2, PD3)

51. The use of the term “customer-focused” by reference to consenting processes in PD2 is questioned. If what is meant is a process that is efficient (in terms of timeliness etc) then there can be little objection. However, consent authorities exercise quasi-judicial functions and must be entirely fair and unbiased. The phrase “customer focused” may raise unrealistic expectations of preferential treatment in the minds of applicants.

Recommendation

52. Replace the term “customer-focused” with “efficient”.

Demand

(Term used throughout the NPS including in the definition of “Development Capacity”)

53. In relation to business land, demand is assessed as demand for ‘floor area’ in the short, medium and long term. For some business activities, demand for land other than ‘floor area’ may be the critical factor, e.g. car parking, industrial processing, open yard space etc.

Recommendation

54. That in relation to business land, a broader criterion than simply ‘floor area’ be considered in assessing demand, to take into account the needs of businesses which rely on land other than developed ‘floor area’ in carrying out their business activities.

Economic Exchange

(See use of the term in PA1)

55. Policy PA1 uses the term “economic exchange” as a policy goal for urban form, without explanation. The term “urban form” is defined with reference to “economic exchange”, and the term “business land” is defined, but including instead the term “productive economic activities”. It appears that “economic exchange” is something different to a “productive economic activity”, since it is a goal for all urban form rather than the more limited subset of “business land”. However, it is not at all clear what “economic exchange” is, if it is not also a “productive economic activity”. It might be inferred from policy PA1 that business land should be included in all urban areas. If that is the intention, it ought to be made explicit.

(See also discussion in paragraphs 72 – 73 below regarding “social exchange”)

Recommendation

56. Either define “economic exchange” so that the intention is clear or use consistent terminology so that intended differences in meaning are readily apparent.

High-Growth Urban Area

(See use of the term in PB1-PB5, PC1-PC3, PD4, PD5-PD9)

57. There are several issues in relation to this definition.
58. First, the references to “according to the most recent Statistics New Zealand growth projections set out in Appendix A2” are either contradictory or superfluous. While Appendix A2 is understood to set out what are currently ‘the most recent Statistics NZ growth projections’, those statistics will inevitably change over the life of the NPS. The intent appears to be that decision makers should at any particular time assess what are High Growth Urban Areas in accordance with the most recent Statistics NZ growth projections. Accordingly, Appendix A2 simply represents the most recent relevant statistics at the time of preparation of the NPS-UDC, and this should be clarified.
59. Furthermore, ascertaining which Main Urban Area or Secondary Urban Area is projected to experience population growth of more than 10% over the medium term, involves computations, which are themselves contingent on some underlying assumptions.
60. For example, it is not clear from the NPS where the readers can obtain maps of the geographic boundaries of the urban areas and zones listed in Appendix A2. A number of the secondary urban areas listed in Appendix A1 are not included in A2.
61. In practice, it appears that the NPS-UDC is seeking to incorporate relevant Statistics NZ materials (including population projections, and urban zone or area boundaries in accordance with which these projections have been calculated) by reference. Section 46B and Schedule 1AA of the RMA provide for this, however it is important that the requirements of Schedule 1AA are met.
62. To the extent that the NPS-UDC relies on decision makers using future population projections to be provided by Statistics NZ, then it is submitted that the process set out in schedule 1AA needs to be applied. Effectively, this provides that any amendment to or replacement of material incorporated by reference into an NPS, only has legal effect following publication of a notice in the *Gazette* which updates the material incorporated into the NPS by reference.

63. In the interests of clarity and certainty, the NPS-UDC should clearly reference the current Statistics NZ growth projections, and urban area/zone boundaries which decision makers are required to work with in the initial implementation of the NPS. As Statistics NZ releases updated or amended projections, or three yearly as envisaged in PB1, then the process set out in Schedule 1AA of the Act should be utilised to update that referenced material.
64. Furthermore, it is also not clear whether the growth projection figures in A2 include combined resident and visitor population numbers, (which are essential for assessing the high growth urban area definition in relation to secondary urban areas), or only resident population.
65. In addition, there is a need for clarity about what is meant by “residential development” in relation to assessments of “demand”. Local authorities that experience high tourism or visitor demand may face demand for housing stock for reasons not explained by statistical population growth projections in Appendix A2. In some places (Queenstown Lakes District being an example) significant residential development capacity may be taken up through the utilisation of houses as visitor accommodation. Technology change (through the use of tools such as AirBNB) significantly blurs the traditional distinction between commercial and residential accommodation. The NPS-UDC does not assist local authorities to understand what account should be taken of these factors when performing assessments required by policies PB1-PB5.
66. Policies PA1-3 apply regardless of current or forecast urban growth demand, and even where local authorities are experiencing no difficulty in making adequate land available to meet demand. Against that background, is it a correct inference that local authorities are placing inadequate weight on the matters listed in policy PA3, and in future such matters should be given greater emphasis ahead of other considerations, such as the adverse effects of urban growth?
67. Medium-Growth Urban Area: the same comments above relating to ‘High Growth Urban Area’ also apply to this definition.

Recommendation

68. That the NPS-UDC utilise the process set out in Schedule 1AA of the RMA to reference relevant material from Statistics NZ, and amendments to that material from time to time.
69. Make clear what change in behaviour is anticipated of local authorities that do not have medium or high growth urban areas – or restructure, so that Policy PA3 falls within the PB group (i.e. applies to local authorities with medium and high growth urban areas).

Infrastructure

(See use of the term in “Implications for Infrastructure” section of the NPS and the definition of “Development Capacity”)

70. The definition of infrastructure focusses exclusively on network infrastructure for water supply, wastewater and storm water, and transport services. Other infrastructure relevant to urban development is likely to include electricity, and telecommunications (including fibre-optic/broadband). Similarly, community infrastructure, as defined in section 197 of the Local Government Act 2002 (which includes community centres and halls, play equipment, and toilets which are owned, operated or controlled by a territorial authority) are also relevant to the successful development of urban areas.

Recommendation

71. That the definition of infrastructure be broadened to include other infrastructure needs of urban residential and business communities.

Social Exchange

(See use of the term in “Implications for Infrastructure” section of the NPS and the definition of “Development Capacity”)

72. A similar but less problematic issue to that outlined in paragraph 55 (“economic exchange”) above, arises from the meaning of “social exchange”. Although urban designers use that term to describe urban environments, the use of the term in an NPS requires a degree of precision to enable decision makers to know when they have given effect to the policy. The Law Society has not been able to discern from the NPS what characteristics of urban form are thought to give rise to social exchange in ways that might satisfy policy PA1.

Recommendation

73. Provide guidance about what “social exchange” is, and what characteristics of urban form maximise the potential for social exchange.

Sufficient

74. The issues with the definition of “sufficient” and the changes sought are set out at paragraphs 30 – 33.

Urban area

(See use of the term in OA1-OA3, OC1, PA1, PB5, and within other definitions)

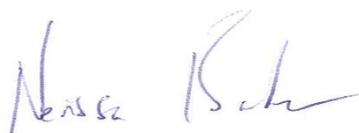
75. This definition is circular and lacks certainty. To say an urban area means an area with urban characteristics, begs the question, what are urban characteristics? A preferable approach may be to list the type of activities or uses which are anticipated within an urban area, for example, residential, commercial, industrial, retail, business etc. Similarly, reference to ‘moderate or high concentration of population’ is itself a relative standard. A small rural service town is likely to have a ‘moderate to high concentration of population’, relative to surrounding rural areas in a district. It may be preferable to specify, in terms of average population density per hectare, what is to be regarded as ‘a moderate to high concentration’.

Recommendation

76. That this definition be amended to provide greater clarity and certainty.

If you wish to discuss this submission further, please do not hesitate to contact the convenor of the Law Society’s Environmental Law Committee, Phil Page, through the committee secretary Karen Yates (04 463 2962, karen.yates@lawsociety.org.nz).

Yours faithfully,



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Vice President