Submission by Planz Consultants Ltd on draft report "Better urban planning" issued by the Productivity Commission

1. As this is a very large document, in the interests of time and efficiency, this submission focuses on the content of:

   Chapter 5 – The urban planning system in New Zealand

   Chapter 12 – Culture and capability

   Chapter 13 – A future planning framework

2. For brevity, in this submission we will refer to the Productivity Commission's draft document as "the report".

Submitter's background

3. Planz Consultants is a planning consultancy established in 1994 with 12 full and part-time planning staff based primarily in Christchurch, and with a branch office in Auckland.

4. Bob Nixon has prepared the submission on behalf of the firm. He has been a planning practitioner for 39 years, including extended periods in both central and local government, and since 2002 as a planning consultant. He has acted as a hearing commissioner in numerous sole and joint hearings for over 10 years, and has presented evidence before the Environment Court in the number of cases, and recently to the Independent Hearings Panel hearing the Christchurch Replacement District Plan. He was one of the original commentators appointed by the government on the McShane review in 1996, and is one of the directors of Planz Consultants.

5. The views in this submission represent those of the firm, and not those of any other party.

Overall comments

6. Although this report relies to some extent on the perspectives of a small number of commentators whose names seem to be repeated frequently, it is a more thoughtful and better researched document than the McShane review in 1996. As discussed below, we agree with many of the points that are made in the review. However we wish to comment on some matters which we consider have been overlooked, matters that have been missed, or which have been inadequately addressed.

7. This submission concludes with a response to the various proposals set out in Chapter 13, Table 13.1, 'Key differences between the current and future planning systems'.

Planning operates within a wider political environment, not a technical one

8. Because planning involves a significant element of regulation and effects private property rights, the extent to which land, air, and water should be regulated unavoidably raises differences of opinion which divide along ideological lines. Planning can never be divorced from the political arena and made an apolitical technical exercise.

9. There are broadly two competing 'models' for planning within this political reality.

10. The first of these holds that left to their own devices, developers will put their economic welfare ahead of the effects on neighbours and on the public generally. Accordingly regulatory processes should put a very high emphasis on consultation, rights of submission and rights of appeal. This is accompanied by the belief that even if these processes are slow and expensive, they will produce a better outcome. Such a process favours discretion over certainty and typically involves significant political and community input. It also aligns with the social sciences and urban design. This can perhaps best be summarised as the 'participative model'.

11. The second of these models holds that necessary economic growth and employment provision is best promoted by procedures which emphasise timeliness and economic efficiency. Such a process favours certainty over discretion, and restricts political and community input. It also favours economics and engineering based sciences. This can perhaps best be summarised as the 'technical model'.

12. The submission does not attempt to pass judgement on which of these models is appropriate, but we do wish to emphasise that these contrasting views will unavoidably continue to influence the nature of planning regimes both now and in the future.

13. The planning approaches taken by different regional and district councils don't simply fit neatly into one or other of these 'boxes' but on a spectrum between them, and illustrate these broadly competing approaches. There can be no escaping the broader political environment in which planning must operate, as the national political environment passes through prevailing ideological cycles favouring greater or lesser government intervention. This is a much bigger issue than the culture of planners and planning – there will never be a political consensus on the extent to which planning processes should regulate the highly contentious subject of property rights.

14. Districts vary significantly in character, and this needs to be recognised. While understandable in some ways, the report is very Auckland focused. Many urban areas do not experience growth problems and some experience problems associated with decline. Peri – urban authorities such as Selwyn District have very different issues facing them compared to Buller or Wairoa Districts for example. Others such as Queenstown Lakes District have unique characteristics deriving from their role with tourism and demands for urban development which are more typical of much larger urban centres. The report exhibits a 'one size fits all' approach to suggested remedies – except to the extent of the proposed 'urban/natural' distinction put forward in the report. This would be of little relevance to the problems – if any - faced by many Councils.

The passage of the RMA led to poor quality policy formulation:

15. The lack of central government guidance following the passage of the RMA in 1991 was not an error of omission. It was a deliberate strategy – the prevailing political climate at that time was very hostile to having any kind of common approach to national issues. This has had significant consequences which continue to be felt even now, and which have finally been acknowledged in the report. This lack of guidance, and a creed of decentralisation, has proved costly.

16. As one example, substantial ongoing costs were imposed on Councils through acrimonious hearing processes before a national standard was imposed on electromagnetic radiation from

cellphone towers. Another example was the "everyone for themselves" approach to financial contributions before this was addressed (albeit unsatisfactorily) in the Local Government Act. One senior council officer described the litigation that occurred over financial contributions by saying that "*we spent a million bucks to make a million bucks"*.

17. This legacy continues. Current examples of costly duplication include the status of military training exercises within district council areas, where the Ministry of Defence turns up to hearing after hearing before different councils. An example from the Christchurch Replacement Plan hearings was the determination of the Council to impose a more restrictive regulatory regime on state integrated schools and private schools, in contrast to state schools, an issue that has arisen with other plan reviews. Other examples include NZTA, KiwiRail, and Transpower routinely turning up at each district plan hearing seeking standard setbacks from their designations/transmission line corridors. Taken together, all of this amounts to a substantial additional cost to both the submitters and the Councils concerned, as well is being monumentally inefficient.

18. Policies are very important because (a) they provide the kind of flexibility (sought by the authors of the report) that a rigid rules framework can't, and (b) they are critical to the assessment of resource consents.

19. Following the passage of the RMA, the then Ministry of Commerce, at government instigation, repeatedly submitted on district plans asking that policies be phrased along the lines of *"avoid, remedy, and mitigate XXXXX".* As this merely paraphrases one clause of Section 5(2) of the RMA, it provides no useful guidance whatsoever to council decision-makers, and has been criticised by the Environment Court[1]. Unhelpful policies of this nature to be found throughout first-generation district plans, and even some of the more recent second-generation plans. There are also numerous examples of internally poor alignment within plans, such as strong rules 'supported' by weak policies, and more rarely, strong policies 'supported' by weak rules.

20. Although a rural example, in his capacity as a hearings commissioner, the writer was recently faced with the situation where a rural dwelling approved within land identified as part of an outstanding natural landscape (ONL) had a condition of approval attached so that regenerating indigenous vegetation on the site could not be removed. However as a permitted activity, the applicant could have cleared all of this vegetation and then applied for the dwelling separately. This is just one example of poorly aligned rules.

21. The lack of emphasis in the RMA on urban issues was again quite deliberate. The Minister for the Environment at the time saw urban issues as largely irrelevant and overstated. Unfortunately, this attitude has taken a long time to change. In the meantime, because the vast majority of properties are governed by plans covering urban areas, and these generate the most resource consents, urban planning assessment concentrates heavily on sections 5(2)(c) and sections 7 (c) and 7 (f) of the RMA.

[1] *Refer High Country Rosehip Orchards and Mackenzie Lifestyle Limited and Ors v Mackenzie District Council Decision No. [2011] NZEnvC 387, paragraphs 144 – 145.*

22. By default, a preoccupation with *adverse* impacts, even those of little moment, became embedded in the planning culture, because following the passage of the RMA, any emphasis on positive effects was criticised as "picking winners".

23. Given that background, there are is some irony in seeing a belated recognition that poor government guidance, disinterest in urban issues (where the vast majority of human interaction occurs) and a preoccupation with undifferentiated adverse effects, are now being recognised as 'problems'.

There is truth in the claim that planning lacks a philosophical basis[2]

24. Although most members of our firm have been practising planners for many years, we find it simpler to explain our profession by describing what we do, rather than what planning actually is.

25. Members of the public often think that planning is about designing towns and cities.

26. In New Zealand, and particularly since the passage of the RMA, planning is an environmental auditing system, and the plan preparation process one of designing a regulatory framework to ensure bad things don't happen. This is a much narrower framework than the role of 'planning' in, say, Europe.

27. The report is critical of the planning profession in that it often seeks to justify itself by reference to its role under the RMA. But this is not surprising, and perhaps inevitable because –

    - The RMA was prepared by the government of the time with enormous fanfare, to the point where it was looked upon as the 'holy grail' of environmental legislation. Indeed, such was the aura surrounding the legislation that one of our colleagues working in the United Kingdom at the time was well aware of its reputation even there. It was very much a centrepiece of the then prevailing culture of "reform", and its connotations of noble endeavour.

    - Set against these very high expectations, much was expected of the legislation and undoubtedly of planners administering it. Once passed however, central government moved on to other things and in the absence of any further central government direction or even involvement, the risk of failure and disappointment loomed large, and in large part been described eloquently in the report. The lesson from this is clear – if substantial reform to the RMA is to be contemplated, central government will need to pay a significantly greater role than it has in the past, and its planning function strengthened.

    - Planning and the profession of planning is only legitimised through the real or implied powers under the RMA – this is not the case with many other professions such as medicine, engineering or architecture for instance. <u>This is a unique and significant point of difference with other professions.</u> The role of planners under the RMA as *regulators* rather than *designers* reinforces this point – for example, of the pool of 24 members of the Christchurch Urban Design Panel, not one is a planner. While the profession may have

[2] refer report, paragraph 12.8

originated as a design led profession, they are no longer a design centred profession like architects or engineers.

- There is some justification in the report's findings that (perhaps in the absence of a philosophical basis) the planning profession is prone to follow 'movements' – the new urbanism example being a case in point. In reality, new urbanism is an architecturally led movement in which the planning profession has largely served as an 'amen chorus'. New urbanism contains elements which if applied selectively, could make a useful and beneficial contribution to urban planning. However we believe it has been promoted on a rather indiscriminate basis, often with the support of European or North American 'gurus' without an adequate assessment of how its philosophy might be applied in a uniquely New Zealand setting.

The quality of planning practice

28. One of the comments made by Carolyn Miller concerns the issue of poor planning practice. While we do not consider this is widespread, we do agree that it is an issue and that poor practice contributes to increased cost, poor outcomes and delays. It is ironic that a profession which is so dependent on regulation itself, is not actually well regulated in terms of its practice. Those who are members of the New Zealand Planning Institute are required to meet certain standards to obtain full membership, are all bound by a code of conduct, and are required to meet continuing professional development requirements. This, along with Institute accreditation of New Zealand planning degrees, provides for some level of regulation of planning practice. However there are large number of planners who are not members of the NZPI and who are therefore not subject to, or required to meet, any standards or to continue to develop their knowledge. It is left to them as individuals as to whether they seek to achieve the standards and knowledge or not. The NZPI has often in the past received complaints about planners who are not members, and is therefore unable to initiate any action.

29. One way forward in this area would be to require NZPI membership in order for a planner to perform various functions under the RMA, such as signing a lodged resource consent application or plan change documentation, preparing a section 42a report, appearing at the first instance hearing or before the Environment Court.

30. Issues have arisen at both council and court hearings as to what the proper role of planners actually is, particularly in terms of their relationship with other experts. While there has been some recent clarification of this in the paper by the RMLA and the NZPI[3], it is our opinion that there would be value in codifying the role of planners in the RMA or in an NPS, so this is clear to the public and developers, and to set a benchmark for central government, local government and public expectations of the profession.

Planning operates in an intensely legalistic framework

31. The report constantly emphasises the extensive rights of the submission and appeal process inherent in the RMA, which has extremely lengthy and detailed prescriptions relating to how plans are to be prepared and how resource consents are to be processed.

[3] The Role of Expert Planning Witnesses

32. Planning practice (again, unlike most other professions) is very strongly influenced by Environment Court decisions and an enormous body of case law. The influences described as forming the foundation of planning in the report are historically interesting but increasingly irrelevant as practice became established under the previous Town and Country Planning Act and under the RMA[4]. The framework provided by the RMA itself is in fact the dominant influence.

33. The Environment Court appeal process, which is ultimately controlled by lawyers, is a major contributor to the risk averse culture that many planners demonstrate. If anything, the Commission's report *understates* the extent to which the profession is conservative and risk averse. Procedural matters under the RMA exercise such a strong influence over planning practice, that there is a real fear of 'getting it wrong' on matters such as notification – with subsequent consequences in the form of criticism by members of the public, senior managers, and the Environment Court. One manifestation of this is a pronounced attachment to requiring neighbours consents as a risk minimisation strategy, albeit 'dressed up' as assessment of effects. This results in a culture founded on avoiding culpability rather than promoting good outcomes.

34. Another contributing factor which is overlooked in the report is a role of the legal profession which we argue has considerably greater impact (particularly on consent planners) than any members of other professions including architects. In-house legal advice is regularly sought by planners in larger councils, and is *always* very cautious and conservative. Once sought and offered, this legal advice becomes a redoubt where planners take sanctuary.

35. Further to this point, the report identifies that there is a dichotomy between policy and consent planners[5], which we consider is a fair observation, particularly for larger councils which have enough planning staff to enable separate functional roles. It is also fair comment to say that consent planning is seen as 'lower status'. Council policy staff and advisers in other specialised fields such as heritage and urban design often exhibit a lesser understanding and acknowledgement of legal restraints on regulatory activities. Instead there is a reliance on consent planners at the 'coal face' to justify the regulatory restrictions that policy planners advocate. This characteristic was exacerbated by corporate policies of the time which sought to separate policy from service delivery, with the perverse outcome of grouping consent planners with liquor licensing officers and building inspectors, rather than with the planners who made policy.

36. We have long observed that policy planners, particularly those that have never had to deal directly with the public, tend to be more idealistic than consent planners who tend to be more practical. However this is qualified by the fact that consent planners are more likely to face the wrath of disgruntled residents groups, councillors, and applicants which can result in them becoming very risk averse and even fatalistic. Accordingly we find ourselves in broad agreement with the report's finding on how the 'culture' can affect planning practices.[6]

[4] Refer report, chapter 12, pages 303-306
[5] Refer report, chapter 12, page 317
[6] Refer report, chapter 12, page 318

There is a misplaced faith in the ability to incorporate complex principles and procedures into legislation – the Section 32 example

37. Perhaps the best example of this is the ongoing saga of amendments to section 32 of the RMA. From the time of its inception, the intention behind section 32 was to require plan drafters to:

    (1) ask first of all whether the particular issue was an *RMA* issue

    (2) if it was, then ask whether it needed to be regulated in the District plan or addressed by some other means; and

    (3) if it did need to be regulated, ask whether the proposed *form* of regulation was efficient or effective;

    (4) consider whether the benefits of the regulation outweighed the costs of the regulation and where those costs and benefits fell e.g. the community v the individual.

38. Section 32 as originally passed into law in 1991 made provision for taking administration and compliance costs into consideration, but this was unfortunately repealed later.

39. These straightforward principles are poorly expressed in the cumbersome wording of Section 32 and a resulting in uneven and often poor performance. Many councils are simply producing crude tables containing "straw men" alternatives along the lines of "do nothing", do what we did before, or make an activity a noncomplying activity. On the other hand, for someone who is being regulated, there is a huge difference between an activity being restricted discretionary and noncomplying in status - but many section 32 assessments don't consider alternatives on this basis at all.

40. Section 32 is also very poorly aligned with respect to 'permissive' changes to plans such as rezonings to allow land to be used for more intensive development. As noted above, the aim of section 32 was to justify the need for regulation, rather than its removal/enablement. This has resulted in a complete misunderstanding on the part of some councils that view section 32 as an environmental impact assessment (EIA) procedure, particularly when considering rezoning proposals. While EIA's are of course necessary to understand the resource that might be protected, they are quite different in character and scope to a section 32 assessment. By way of a recent example, a Council has proposed restrictive rules relating to protected trees, arguing that it is justified under section 32 on the basis of a systematic analysis carried out of trees by their age, species, condition, character etc – and not whether the actual policies and rules *to give effect to* such protection are appropriate.

41. There are other examples of tortuous legal drafting. Section 95 relating to notification is a critically important part of the legislation, but its complexity and cumbersome wording has reached the point where it is unintelligible to members of the public and cannot be readily explained to them.

42. Complex principles and procedures are better explained through well targeted policy formulation (NPS or equivalent) issued through central government, similar in concept to the UK system of planning policy guidance. Unfortunately much national policy guidance from central government tends to be in an 'essay' form, is poorly focused, and is often open to varied

interpretation. There is a thundering need for greatly improved skills at the central government level in succinct policy drafting.

Plan construction in New Zealand is extraordinarily complex

43. The current system for preparing and approving plans is incredibly slow and enormously expensive – for the large urban authorities such as Christchurch, the cost can exceed $30 million even where there is an Independent Hearings Panel with special powers. This cannot go on.

44. There is one simple reason why New Zealand plans are long and complex. It is because –

    (a) plans are required to differentiate between activities which are permitted and those which are not, in a legally certain manner;

    (b) those activities which are not permitted are further differentiated into categories (e.g. noncomplying, discretionary, etc) again in a legally certain manner.

45. This means rules specifying quantifiable standards are required in order to determine activity status– and this uses up a lot of space. In contrast, plans in the UK contain only policies (no objectives and no rules) and are consequently far shorter and simpler. The price paid for that simplicity is that all activities effectively require consent, and approval involves the exercise of discretion through the application of policies.

46. Some, but not all plans prepared following the inception of the RMA, adopted a so-called "effects based" approach, whereby a more broad-based zoning system was used. Instead of identifying and listing activities, the status of an activity was determined by reference to a cascade of standards (e.g. building height, noise levels, traffic generation etc), whereby they would be categorised as permitted, discretionary, noncomplying etc, according to various threshold levels. Such an approach was specifically sought by the government at that time, as noted in the report[7]. That said, central government had no idea whatsoever as to how such a model might be implemented, but were supportive (at that time) of the approach adopted by the Christchurch City Council in its 1995 District Plan.

47. Second-generation district plans have reverted to listing activities, with an alternative cascade model making reference to activity standards and built standards, and a heavy reliance on a large list of definitions. This recent trend to long lists of activities (which then have to be defined) has not necessarily provided the much desired user-friendliness or certainty. A recent example arising from the new Christchurch Replacement Plan illustrates this point. An activity in an industrial zone was approved by the Council on a non-notified basis. The grant of this consent has now been challenged by a neighbouring industry, and has been argued by the various protagonists as falling under any one of *three* activity categories, each having different activity status.

48. Neither of these plan drafting approaches will make any significant difference to the complexity of plans, and attempts to make the current system work better within those constraints are doomed to failure.

[7] Refer report, pages 99 – 100

49. A possible alternative is a government imposed 'template' type plan, but even that is only a partial solution. If simpler, less costly, and more streamlined plans are an imperative, improvements must involve all of the following:

- a significant containment of submission and appeal rights;
- a major simplification of plan drafting requirements under section 75;
- directive National Policy Statements;
- imposing national standards on matters such as hazardous substances, noise etc.

Councils are presented with incentives to charge high processing fees

50. Although there are procedures in place to enable applicants to challenge the cost of Council processing, the uncertainties and delays in doing this mean it is rarely used. This is because while the number of *hours charged* can be challenged on individual resource consents, the *hourly rates* at which officers are charged out are set through the Annual Plan processes which individual consent applicants seldom become involved with. Because councils are under intense pressure to contain rate rises, there is an irresistible incentive (for council bean counters rather than planners) to maximise revenue – or at least to reduce costs – through other means, such as charges.

51. We deal with numerous councils, and it is apparent that hourly rates vary considerably across the country. We are aware of examples where the hourly charge – out rates for Council staff (particularly in large metropolitan councils) are well in excess of those of Hearings Commissioners or experienced consultants, even though the latter have to take account of the need for a profit margin. There is also a marked tendency for some councils to call in other technical experts to prepare specialist reports in support of section 42a reports, even when the subject material is only peripherally relevant.

52. Although perhaps a radical suggestion, we are in no doubt that if Councils were required to bear the costs of their own staff time, there would be a marked cultural change from the current tendency to require superfluous information at the cost of applicants.

53. Quite apart from the issue of plan content and resource consent processing, the issue of processing costs in themselves are a major issue that justifies further investigation, as it has the potential to damage the reputation of the planning process and of the RMA itself.

There is an enormous gap between public expectations and the reality of consent processes

54. As five members of this firm act from time to time as Hearings Commissioners, we are aware that many members of the public firmly adhere to the following beliefs:

(1) if an application doesn't comply with all of the rules in the district plan, then it must be contrary to it and should be declined forthwith;

(2) if a majority of submitters oppose an application, then it should be declined;

(3) if an applicant supports their case with expert evidence, rather than being seen as thorough and careful, the applicant is seen to have an unfair advantage over submitters who don't have the resources to produce their own evidence.

55. There is no simple solution which resolves these conflicts, which is not helped by the complex nature of plans and activity status. We seek to comfort ourselves by saying that if disgruntled submitters think that they have had a 'fair hearing' then all is well – but this is a far from universal reaction.

56. However as the report acknowledges, the situation is not helped by the legislation not adequately differentiating between prioritising adverse effects[8] . This is illustrated by the disproportionate leap in costs if a proposal is deemed to have 'minor' effects on a neighbour or neighbours. It is the leap in costs associated with the consequent formal submission process, rather than neighbour input per se, which is of concern to applicants. An interesting contrast is provided by this system and that in the UK where the Council writes to neighbours advising them of the application, and incorporates any of their feedback into their reports.

57. However this is the reality that needs to be acknowledged in reforming the legislation – the changes being proposed through the report, while undoubtedly assisting economic growth and efficiency, do not sit at all comfortably with public expectations – or certainly of those that choose to participate in the process.

The role of the planner has diminished since the RMA, not increased

58. Two factors – the first being the substantial growth of the number of specialists in the areas of landscape architecture, noise management, urban design, heritage, and traffic assessment for example, and the second being a very strong direction from the Environment Court on specialist evidence, has resulted in a distinct narrowing of the planner's role. This is particularly the case in larger urban authorities where a larger pool of specialist urban design and landscape architects and other technical staff (or consultants) is available.

59. This is a trend which we think the report has overlooked, and which is certainly understated in terms of its significance. Many planners, and particularly less experienced ones, are loath to question the technical reports they receive from specialist experts. In the case of landscape architecture, urban design and heritage in particular, this advice is often very conservative and reflects the passionate but narrowly focused views of the practitioners in these fields. Commonly section 42a reports contain lengthy quotes from other experts, followed by the phrase *"I accept this opinion".* This may not be appropriate because a technical expert may not fully understand the context of the objectives and policies, or apply the wider requirements of Part 2 of the RMA, but confine inquiry to their own professional 'bubble'. In the Environment Court this can lead planners into the situation where they fear criticism of straying outside their field of expertise, but alternatively appearing to be just waffling generalists who are adding little of value.

60. All of this is encouraging a box ticking mentality and the widespread use of report templates which do not encourage inquiry or creative thinking. This is compounded by the statutory timeframes imposed which reinforce these practices. It also reinforces the environmental auditing approach required under the current planning regime, whereby if a particular 'box' (e.g. heritage, urban design, traffic etc) is *not* ticked, then the application is recommended for decline. This creates a regulatory environment where in order to be approved, an application

[8] Refer report chapter 13 page 332

has to demonstrate that there will be no adverse effects on anything, which significantly compromises larger infrastructure or housing proposals for example.

Lies and statistics

61. It is common practice to measure resource consent processing performance by the number of applications that are notified or processed within 20 working days. With respect, such crude statistics are not helpful and grossly oversimplify reality because:

- they take no account of the nature and scale of the application;
- they take no account of different practices between councils;
- they may reflect the fact that activities being processed as non-notified should perhaps be permitted under the plan anyway;
- they do not reflect proposals that have not proceeded through fear of notification.

62. The latter point is very important for what might otherwise be small or medium-scale proposals. The prospect of having to pay Council processing fees, hiring experts and/or legal representation, costs which balloon if there are submissions following from notification are from our experience, a very real concern to anybody contemplating applying for consent. It would not be unusual for the quantum of money involved (assuming the applicant was successful) being completely beyond a prospective applicant's capacity to pay. Hence these oft – quoted statistics need to be treated with considerable caution.

63. Similarly, statistics on processing[9] within statutory time limits have to be treated with a high degree of caution for much the same reason - proposals frequently stall while responding to requests for further information (RFI's) during which time the 'clock is stopped'. Another significant source of delay is that once receiving an RFI, council planners circulate it around internal technical experts and don't 'restart the clock' until they have heard from all of these, even if this process takes a couple of weeks to complete. Furthermore, proposals are placed on hold by the applicant or at the request of the Council in order to address concerns raised in meetings with Council officers, or even on hold to fill out timeframes. Other tactics have included sending an RFI at 4:55 PM which if responded to immediately at 8:30 AM the following morning, is called two days on hold; and holding the clock while taking several days to issue an invoice for the fee deposit.

64. In fairness to Councils, some applications are poorly drafted and need further work. Issues of this nature need to be given greater focus at the lodgement stage, and poor applications rejected. This raises the issue of the quality of planning practice which NZPI has a role to address. However as referred to above we do not believe this is a widespread problem with professionally prepared applications.

65. Before leaving this particular topic, we have observed that some in the planning profession – and if anything to a greater extent among specialist experts as well as submitters – hold a stereotype of 'applicant '. 'Applicant' can be easily equated with 'developer' and this conjures

[9] Refer report, chapter 12, page 325

up images of an Armani suit and this year's BMW. Many applicants (and prospective applicants that see the processes to be daunting and are too afraid to proceed) are more in the nature of 'mum and dad' people.

The role of elected representatives

66. The role of elected representatives has substantially diminished in recent years notably in the case of resource consent hearings, but even to some extent as part of the plan formulation and hearings process. Those that do take part are expected to have undertaken training as hearings commissioners. The primary problems with councillor involvement are that they may have partisan views as a result of positions taken in election campaigns, they may be easily intimidated by residents groups and prominent submitters, and very few have the skills (and even fewer the time) to actually draft decisions.

67. However the need for councillor involvement in hearings is something that has to be carefully balanced, particularly when it comes to plans and plan changes (as opposed to resource consents) otherwise it runs the risk that the Council may consider that the plan is not 'theirs' and not be committed to upholding or enforcing it. One reasonably successful model is to have councillor participation on panels, in addition to appointed commissioners.

68. One issue that has been clearly identified in the report[10] is the gross imbalance (which is not an exaggeration) between the background of people who participate in consultation processes and in our view – in submission hearings. As noted in the report with respect to the demographic characteristics of submitters, it is very easy for public participation processes to be captured by people who may only represent a spectrum of opinion 'extending from A to B'. Although the example cited in the report relates to an annual plan process, our experience as a hearings commissioners supports a distinct impression that it is disproportionately dominated by older conservative people who are characteristically resistant to anything they perceive as change.

Improvements that might be made

69. We wholeheartedly agree with the report that the process of ongoing amendments to the RMA has adversely affected its coherence and failed to provide the kind of "reform" that governments have been trying to achieve[11]. Worse than that, it has also undermined the credibility of the legislation itself by giving rise to an unfair public perception that the whole thing is a real mess. However, with the notable and important exception of Part 2, it is starting to resemble grandpa's axe, which is still the same axe, even if it has had two new heads and six new handles.

70. The first thing that must be accepted is that what one person might call an 'improvement' or 'reform' might be a backward step to another. Any move to what was described earlier as a participatory regime, or alternatively a technical regime, will inevitably antagonise some people. Accordingly changed to a legislative framework is inescapably a political process, and will not be perceived as simply an academic exercise in the name of efficiency. The point we are making is that this has to be accepted as a reality, and the necessary changes ('reforms') made without diluting the changes to the point where they are simply an attempt to please everyone

[10] Refer report, Table 5.2
[11] Refer report, Chapter 5 page 88

at the same time. Compromise for its own sake – in the form of ambiguous policy – produces results which inevitably fail to please anybody.

71. Allowing for the qualifications above, what we have suggested below are the kind of improvements that might accompany a movement towards a more technical regime, that is, one that seeks to prioritise efficiency in terms of both time and cost.

Responses to 'future' planning systems proposals under Table 13.1 of the report

Proposal: Scope of planning legislation

Planning legislation distinguishes between the natural and urban environment

For urban planning, legislation clearly prioritises enabling flexibility in land use, providing sufficient development capacity to meet demand and supporting the mobility of residents.

For the natural environment, central government issues are Government Policy Statement that lays out which environmental issues and standards take precedence over others, and must be given effect to in local plans and decisions.

Response

While we support a long overdue emphasis on the urban environment, this does not necessitate creating an arbitrary distinction in legislation (even if that were possible) between what is "natural" rather than "urban". Does natural mean rural? It is absolutely inevitable that any attempt to separate urban and natural will result in the creation of an inflexible fixed boundary between what is urban and what is not. The suggestion in the report that urban development be subject to a separate piece of legislation outside the RMA is unnecessary, and worse, counter-productive. There is no point in moving from one extreme of having all our regulatory eggs in one basket (as in the RMA 1991) and then 'going to the opposite extreme' by having them scattered over other pieces of legislation which collectively turn out to be of greater length than the RMA provisions which they replace or duplicate[12]. It also runs the inevitable risk of potential overlap and statutory conflict – such as the traditional conflict between what happens within and outside the 'urban' boundary.

Flexibility in land use would be greatly assisted by upgrading section 7 (b) to a section 6 matter and refining the scope of "efficient use and development" to embrace the need for development capacity.

In light of the above comments, any more directive Government Policy Statement(s) should apply to the specified environmental issues generally, whether or not they are within the realms of whatever might be defined as natural, rural or urban.

In summary, we agree with the need to place greater emphasis on the urban environment, but this does not require creating an artificial distinction between 'urban' and 'natural'.

Proposal: Consultation

Councils have more flexibility to select the consultation and engagement tool that is most appropriate to the issue at hand. Councils face clear obligations to encourage and enable participation by people

[12] refer report paragraph 5.11, page 121

affected, or likely to be affected, by decisions. And councils understand the perspectives and interests of the full range of the community, not this those who take part in formal consultation processes.

Response

Leaving the extent and nature of consultation to the Council to determine with respect to plan preparation (or the in the case of privately initiated plan changes and resource consents) is broadly supported. However defining better targeted consultation in legislation is challenging, and is suggested that the consultation and notification requirements under the First Schedule and for resource consents are specifically re-drafted so as to require an *emphasis* on consulting those who are directly affected. Excluding parties who are *not* directly affected could be difficult in the case of major environmental groups – for example, such as Fish and Game and Forest and Bird. Also, some plan provisions may extend over large geographical areas.

Proposal: Recognition and protection of Maori/iwi interests

The proposals in the report are broadly supported.

Proposal: Rezoning/changes in land use rules

Councils are able to set objective thresholds in Plans that, when met, would automatically trigger changes in land use rules.

Response

The proposals in the report with respect to this issue (such as land price triggers) are fraught with potential problems of definition and enforceability. Instead, Councils (including through private plan change requests) should have the discretion to 'limited notify' plan changes and variations where these are confined to a restricted geographical area using a process similar to a resource consent, rather than the extensive submission, further submission, and appeal process currently required. The ability to undertake such changes should be underpinned by a National Policy Statement setting out the appropriate criteria for the use of this process. We consider these methods would work with more certainty and effectiveness than the potentially ambiguous 'trigger' mechanisms proposed.

Proposal: Appeal rights

Appeal rights are narrowed to those directly affected by decision. All plan changes or new plans may be reviewed by a permanent Independent Hearings Panel. Where councils have accepted the recommendations of the permanent Independent hearings panel on a plan provision, no merits appeal is available.

Response

In making major changes to the RMA, or replacing it fully or in part, the government must bear in mind appeal rights. If significant changes are made to the RMA, and extensive appeal rights continue to be provided, this will make subsequent plan preparation and consent processing prolonged and difficult because an entire body of case law will be rendered redundant, and take years to re-establish through lengthy and costly litigation. As the report itself points out, 'reform' itself (notably repetitive reform along with all its associated disruption and uncertainties) can become the norm[13].

[13] Refer report chapter 5 page 122

We see merit in the proposal to confine rights of appeal on plans to points of law – as noted in the report, rights of appeals on plans under other national or state jurisdictions are uncommon[14]. For those who may be anxious about the removal of the Environment Court process, the necessary safeguards can be provided through (1) comprehensive policy guidance through NPS and (2) central government involvement as a submitter or compulsory consultation party on proposed plans. The Crown was an active participant in submissions on the Christchurch Replacement District Plan – while this entailed a significant commitment, one could reasonably expect that only a modest commitment would only be required for the review of many small District Council plans. An efficient hearing process does however necessitate an experienced pool of commissioners. In terms of the reforms proposed, this reinforces the hard reality that if governments want to influence planning performance, they will have to play a more active role than in the past and resource it accordingly.

Proposal: Participation in planning decisions

Public participation in the preparation of new plans continues, but appeal rights are narrowed. Site-specific plan changes have limited notification. Urban notification requirements more tightly focus on those that a proposed development that will directly, or highly likely affect.

Response

It is important that the resource consenting process not be overlooked as part of considering the future planning framework, because this is the other side of the same coin. Confining necessary changes to plan formulation reduces the effectiveness of any proposed reforms.

The widespread notification provisions for resource consents under the RMA would be difficult to constrain given their long-standing application. Alternatives for changing the notification test would be to change it to *more than minor* for directly affected parties (e.g. neighbours) and *significant* for other parties; or for limited notified applications, to provide for written submissions to be decided on the papers by a Hearings Commissioner without the need for a hearing.

Another potentially useful reform would be to provide that where a party has been served formal notice of an application and has not submitted on it, no account should be taken of the effects on that party.

Turning to plans and plan changes, where rules in a proposed plan or plan change apply specifically to individual properties – in the form of protected building or tree listings, direct notification of the owner/occupiers should be required. Submissions seeking such listings should be required to be served on the affected owner, with the opportunity to lodge a further submission. This is justified because rules of this nature have a potentially much more onerous effect than general rules commonly affecting large numbers of properties – for example, those relating to residential setbacks or building heights. Other than these exceptions, provision for further submissions could be removed from the legislation, or alternatively that a requirement be reintroduced so that submitters have to establish affected status in the first place. This was of course the case under the former Town and Country Planning Act in relation to planning applications.

Proposal: Land release

The commitment to release land and control land price inflation is credible. Central government sets threshold outlining maximum differential between the price of urban and non-urban land. Central

[14] Refer report, chapter 5 page 105

government has also empowered to direct Council infrastructure units when land price thresholds are breached and the Council does not respond.

With respect to the availability of land and land prices, enquiry needs to extend beyond the influence of planning and land use restrictions, which while one important factor, can be overrated, as the issue is much more complex. For example, the cost of building and building materials is a significant issue that needs to be explored parallel to land supply; the purchase of properties for investment purposes without these being available for rent or purchase; and Council charges and development contributions.

The supply of land is one important influence on inflation in housing prices, but it's influence as a factor varies both through time and by location. Simply providing zoned 'land' in itself is not enough. Firstly, it is essential that there be sufficient *serviced* land available for the issue of titles and for building. Secondly, especially in areas of high demand there is an incentive for relatively small numbers of landowners to indulge in land banking of undeveloped land while waiting for further increases in land prices. There is much greater profit and far less risk accruing from *rezoning* land from rural to urban, than there is for the subsequent process of *developing* that land. Thirdly, where land is held in piecemeal multiple ownership, achieving a high standard of coherent development can be a very lengthy process, be it greenfield or brownfield land.

Although politically unpalatable, in areas of high demand and land price inflation, there is a strong case for the Crown or Councils to compulsorily acquire both greenfield and brownfield development land, or even for large housing developers to apply for designation powers for this purpose.

Proposal: Central government's involvement in planning

Central government more clearly signals the national interest in planning decisions and provides avenues to work through the implications of these interests with councils. The planning system's desired outcomes (i.e. flexibility, sufficient development capacity, accessibility, environmental priorities) are monitored.

Response

As noted under "Appeal rights" above, central government has no alternative but to provide greater resourcing at central government level (Ministry for the Environment?) if it wishes to have an effective role in the content and quality of district and regional plans. Rather than a large and cumbersome "Government Policy Statement" as suggested, we consider it would be more beneficial to have specific and targeted National Policy Statements addressing particular issues that need to be prioritised. A key issue is that these NPS need to be short, highly focused, and directive rather than in the form of rambling essay type documents.

National guidance should be provided in the form of either model rules or *limited* plan templates for the management of effects such as hazardous substances, noise, light spill, electromagnetic radiation etc. The aim of this exercise is to set out standards that will apply nationally, thus avoiding the need to repeat the same case on a council by council basis.

A comment on monitoring is appropriate at this point. Councils are compelled by law and their ratepayers to carry out certain functions, and the reality is that for many councils monitoring is seen as a low priority – something to be done during periods when staff workloads are low. If there is to be a requirement to undertake monitoring of specific topic areas (e.g. housing supply) in contrast to general state of the environment monitoring, this should perhaps be required by statute or NPS on a case-by-case basis.

Proposal: Spatial plans

Spatial plans are a mandatory and integrated component of the planning hierarchy, tightly focused on issues closely related to land use (i.e. the provision of sufficient land for development and water, transport and community infrastructure) and natural hazard management.

Response

Overall, this proposal is supported, and such plans are already a common feature in district plans, particularly for future development areas under the title of 'Outline development plans'. However, as stated in the report, it is important to make efficient provision for (among other things) future utility services, transport, and recreation in new development areas and setting aside specific powers to enable this to be done by local government or even major developers would be beneficial. The ability to undertake comprehensive development has in the past been frustrated by "holdout" landowners, and legislative provision should be provided to facilitate comprehensive development in identified locations, accompanied by a clear ability to use designation powers where necessary.

Care has to be taken that spatial plans can be subject to ongoing refinement without consent processes, because with changing circumstances and demand, ongoing amendments can be required (for example, to roading patterns, or the sequencing and date of development may need to change). If the land has already been through a process to confirm its zoning for residential development, there is no need to revisit this issue (intentionally or by default) through later resource consent requirements if spatial plans have to be changed.

Proposal: Infrastructure funding and procurement

The use of user charges and targeted rates is increased to capture value uplift. Infrastructure pricing better reflects the actual cost of provision and use of assets. Sophisticated procurement (e.g. public – private partnerships) increases. Processes in place for central and local government to assess and agree on large-scale 'city shaping' projects with spillover benefits.

This proposal is supported, but given it is rather subjective in nature, needs considerable additional development in order to be implemented successfully. A note of caution – Councils are well aware of the incentive to use "user charges" to tax development and simultaneously reduce the burden on rates.

Proposal: Management of the natural environment

Economic and market-based instruments are used more widely. The data and assumptions on which to base the strategies to adapt to climate change are commonly known and cohesive. The approach to cumulative effects is more flexible and adaptive. A stronger multilevel governance is in place based on productive interaction between central and local government.

Response

Although the proposals are supported, this is a very broad topic which has a far wider ambit than is suggested by this proposal. It is also incomplete in many respects.

One of the disadvantages under the RMA is the manner in which plans are prepared – notably the requirements of Section 75 of the RMA for district plans. There should be only two activity categories – permitted and discretionary. Guidance as to whether discretionary activities should be granted should be determined by reference to far better drafted and targeted policies in district plans. While

the removing the category of permitted activities and their associated rules would simplify plan construction even more (as in the UK), the price to be paid in terms of loss of certainty would be too high. In this regard, we consider the alternative of improving the quality of policy drafting at both central and local government level needs to be made a priority. It is simply too important to be left to its own devices.

There seems to be a somewhat simplistic view that there is a consensus among economists as to the nature of what an efficient planning system should look like. We have heard evidence from a range of different economists over time during hearing processes, who have presented a very wide spectrum of views ranging from support for strong regulatory intervention to a totally free market perspective. Furthermore, ideological evidence in the nature of 'Economics 101' is unhelpful to decision-makers, and evidence needs to be focused specifically on land development economics, the operations of the property market or in the case of heritage for example, costings associated with the restoration and economic use of buildings. In some cases this may fall more within the expertise of a structural engineer or valuer.

Proposal: Culture and capability

Technical capabilities are more developed with increased knowledge in both local and central government. Greater emphasis on rigorous analysis of policy options and planning proposals and on strengthening soft skills such as communication, mediation and facilitation. Those in central government have a greater understanding of the local government sector.

Response

Skills in policy drafting should form an explicit part of planner training, emphasising both clarity and meaning as well as content. At present there is still a tendency to prepare aspirational statements, and a failure to differentiate between objectives (outcomes) and policies (actions). These can lead to situations where the planner who drafted the policy holds a view that it is more directive than it actually is.

We agree with the report that many (albeit not all) managers and policymakers in central government have a limited understanding of local government and the fundamental tension between local democracy, and efficient plan administration.

There would be benefit as part of a legislative amendment to specifically set out what the role of planners actually is - if for no other reason that planners play a central regulatory role which inevitably affects many people.

There is a tension between the role of universities – and their emphasis on academic theory with respect to planning – and the role of planning in conjunction with other disciplines in the 'real world'. One of the consequences has been a distinct tendency by the Environment Court to whittle down the moderating role planners should perform, in favour of a creed that slavishly emphasises rigid divisions between different areas of 'expertise'. As an example, a report may be prepared by a landscape architect to accompany a section 42a report. Without wishing to be critical of landscape architects, we note from experience that such reports can reflect a partisan view which ignores social or economic consequences. Rather than insist that the planner necessarily signal unqualified agreement with the content of reports like this (in deference to that person's expertise in their field), a planner should have the ability to at least *qualify* what a technical expert says in the face of contradictory evidence, or that expert's failure to address the broader matters that are required to be applied under

the RMA. We consider that the role of a planner includes that of moderating and weighing evidence, a responsibility that would be usefully spelt out by defining the role of planners.

We thank the Commission for the opportunity to comment on this report.

Bob Nixon

Planz Consultants

29 September 2016