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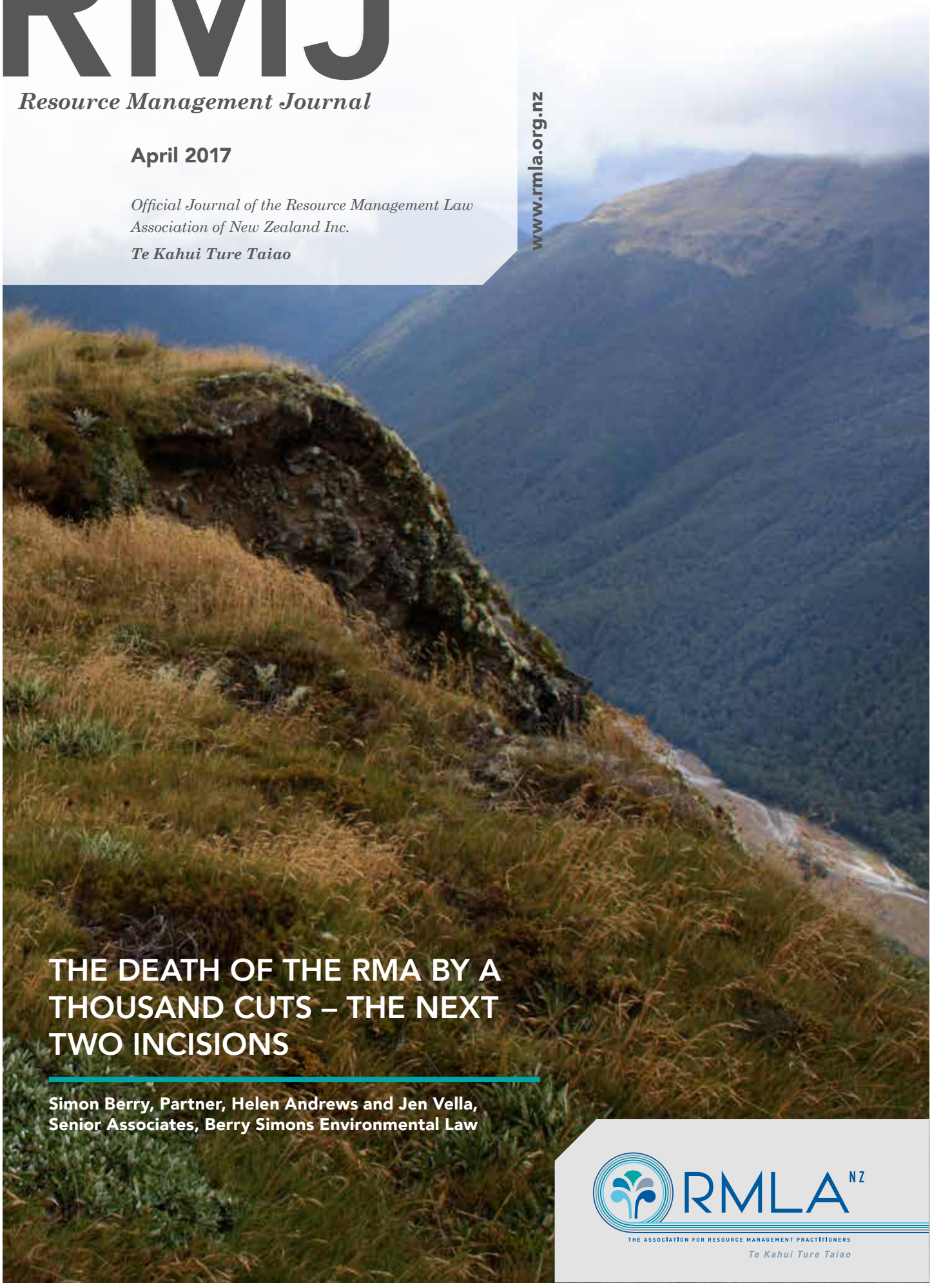

THE DEATH OF THE RMA BY A THOUSAND CUTS – THE NEXT TWO INCISIONS

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Editorial:

INTRODUCTION

Our August 2016 RMJ article entitled "The Final Straw for the RMA? Some shortcomings of the Resource Legislation Amendment Bill" (August 2016 article) addressed some of the shortcomings of the Resource Legislation Amendment Bill 2015 (RLAB) that we were concerned would result in significant additional transaction costs and delays. We surmised that that legislation may transpire to be the straw that breaks the camel's back in terms of the workability of the Resource Management Act 1991 (RMA).

The four main concerns expressed in the August 2016 article were as follows:

(a) amendments that are based on flawed assumptions or seek to address problems which have not been proven to exist and/or which could be dealt with under the existing framework;

(b) poor drafting coupled with the introduction of entirely novel legal concepts that will introduce further confusion, costs and delay [for which the RMA will inevitably and simplistically be blamed];

(c) further reductions in opportunities for public participation and access to justice; and

(d) the continued aggregation of power to the Minister for the Environment at the expense of planning by cooperative mandate, which has always been one of the cornerstones of New Zealand planning legislation." (August 2016 RMJ at 2)

Given the potentially significant adverse consequences, we suggested that the government should pause for thought before enacting such poor-quality legislation. The rationale for doing so is underpinned by the existence of a number of high-level reports on the future of the RMA and New Zealand's planning system, in particular those prepared by:

(a) the Environmental Defence Society (EDS) – Marie A Brown, Raewyn Peart and Madeleine Wright *Evaluating the environmental outcomes of the RMA* (EDS, June 2016), as commissioned by Property Council New Zealand, the Employers and Manufacturers Association and the New Zealand Council for Infrastructure Development;

(b) Local Government New Zealand (LGNZ) – MartinJenkins *A 'blue skies' discussion about New Zealand's resource management system* (LGNZ, December 2015); and

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(c) the New Zealand Productivity Commission (NZPC) – NZPC *Better urban planning: Draft report* (August 2016) and NZPC *Better urban planning: Final report* (February 2017).

The EDS paper notes, correctly in our view, that the key issues the government is seeking to address via the RLAB lie in the manner in which the RMA is administered, not flaws inherent in the legislation itself. Two of the key themes of the EDS paper are that:

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(a) further regulatory change should only be undertaken on the basis of strong evidence to ensure that solutions "fit" the problems that the reforms are intended to address; and

(b) we should pause for thought to facilitate a mature debate about these issues, potentially via some form of independent inquiry.

Commenting on the release of the NZPC's final report, Gary Taylor of EDS said:

> *"A range of other recommendations including a one-stop shop for planning hearings, with rights of appeal to the Environment Court limited to points of law, need more thought. Public participation rights should not be curtailed.*
>
> *The big question is what's next? EDS contends that while this review establishes a sound basis for reform, we need to think carefully about a process that works for all. Reform of the resource management system will affect all New Zealanders and has constitutional implications. EDS is therefore embarking on its own major review of the system and expects to generate further useful ideas over the next 18 months.*
>
> *In terms of process, we favour the appointment of a Royal Commission on Resource Management. The way forward must be depoliticised, have huge integrity and focus on our country's needs over the next 30 years[.]" (EDS "EDS congratulates the Productivity Commission on urban planning report" (press release, 29 March 2017))*

Unfortunately, the call for mature informed debate of this nature ahead of enactment of the RLAB has not been taken up. The RLAB has passed its second reading and, at the time of writing, is likely to be enacted prior to the General Election in September 2017.

Happily, the Local Government and Environment Select Committee has taken heed of some of the concerns expressed by submitters. Some of the more worrying aspects of the RLAB (particularly in relation to the notification provisions) would be improved if the Committee's recommendations are accepted, although some of the features we were concerned about remain in the version as reported back from the Committee. It is beyond the scope of this paper to address the Committee's recommendations.

Two further pieces of fast-tracked legislation that would override RMA processes and planning instruments and further erode access to environmental justice are currently being promoted by the government. They are:

(a) The Point England Development Enabling Bill 2016 (PE Bill).

(b) Proposed legislation setting out the development of "urban development authorities" (UDAs) as outlined in a recent Ministry of Business, Innovation and Employment (MBIE) discussion document (MBIE *Urban Development Authorities: Discussion Document* (February 2017) (UDA Discussion Document). This initiative cannot be implemented without a significant "carve out" from normal RMA processes.

Both initiatives are being promoted by the Hon Nick Smith in his capacity as Minister for Building and Construction, which seems ironic given that the RMA is the statute that is the centrepiece of Mr Smith's other major portfolio as Minister for the Environment.

SCOPE OF PAPER

The purpose of this paper is to briefly canvass both initiatives, using as touchstones the four concerns expressed in our August 2016 article, to assess the extent to which these measures give rise to similar concerns. We deal first with the PE Bill and then address the UDA proposals, noting that it is beyond the scope of this paper to consider the UDA proposals in a comprehensive way.

THE POINT ENGLAND DEVELOPMENT ENABLING BILL 2016

The PE Bill was introduced to Parliament on 7 December 2016, and submissions closed on 31 January 2017. The Local Government and Environment Select Committee heard submissions on 20 February 2017, and at the time of writing the Bill was being considered by the Committee, which is due to report back on 28 April 2017.

The purpose of the PE Bill is to fast-track the development of a large (11.69 ha) area of the Point England Recreation Reserve in Tāmaki, east Auckland to enable housing development (the development land). The land is owned by the Crown but vested in the Auckland Council as a recreation reserve under the Reserves Act 1977. Under the

Bill, the reserve status of the land will be revoked and it will be rezoned to Residential – Mixed Housing Urban, but without any of the rights to public participation that would normally arise under the Reserves Act or the RMA.

The land was identified in conjunction with Ngāti Paoa under the Crown Land Development Programme, which seeks to identify vacant and underutilised land in Auckland that is suitable and available for housing development to facilitate the construction of dwellings.

If the PE Bill is enacted, the land will be offered to Ngāti Paoa as part of their Treaty of Waitangi settlement, although Ngāti Paoa will purchase the land at an agreed price. The MBIE's Regulatory Impact Statement: Point England Development Enabling Bill (21 October 2016) (PE RIS) records that no public consultation was undertaken prior to the Bill being introduced into Parliament because the Treaty negotiation process is confidential.

Overview of the PE Bill

If enacted, the PE Bill will:

(a) Subdivide a portion of land to be developed from the reserve, exempt the subdivision from the normal RMA processes, and vest the development land in the Crown.

(b) Rezone the development land from Public Open Space to Residential – Mixed Housing Urban by way of a "deemed" amendment to the partly operative Auckland Unitary Plan (PE Bill, cl 6(1)(e)). That is despite the fact that the Auckland Council has just completed its Unitary Plan process, which has rezoned most of the city. That process involved careful consideration by the Independent Hearing Panel of a significant volume of evidence relating to the appropriateness of certain zones in particular areas.

(c) Revoke the recreation reserve status of the development land and exempt the revocation from the provisions of the Reserves Act 1977.

(d) Set the development land aside for State housing purposes so it can be sold on that basis.

The PE Bill does not require the Crown to transfer the land to Ngāti Paoa or limit the provisions coming into force if Ngāti Paoa does not purchase the land as part of the Treaty settlement. If Ngāti Paoa elects not to purchase the land, the land will be able to be offered to other developers.

Details of the proposed development are not contained in the PE Bill and are the subject of ongoing negotiations between Ngāti Paoa and the Crown. It is understood that the shape of the proposed development, including any proportion of social or affordable housing, will be the subject of a separate development agreement with the Crown.

The legislation is being fast-tracked through parliamentary processes so that it can be passed before the 2017 General Election.

Concerns arise in relation to the lack of any assessment of the environmental effects of the proposal, the elimination of rights of public participation, the loss of reserve land, and the appropriateness of the government decision by statute.

Quality of environmental assessment/removal of access to environmental justice

The PE RIS explicitly acknowledges that it does not assess the rezoning aspect of the PE Bill. However, issues have been raised about the suitability of development at the site due to the presence of rare and endangered shore birds. Once the land is rezoned to Residential – Mixed Housing Urban, a subdivision consent will be required; however, that will not present an opportunity for the potential adverse effects on birdlife to be assessed. These issues would ordinarily be considered in the context of a First Schedule process.

No such assessment of these or other effects has been undertaken, nor do the public have the opportunity to be part of that process. How will these effects be considered? Or will they? The apparent upshot is that the land will be rezoned in a complete vacuum in terms of the type of information that would ordinarily be required for a plan change, and in the knowledge that the proposal is likely to have adverse effects on native fauna which have not been assessed.

This approach is not only contrary to principles of sound decision-making, but results in ad hoc planning which is directly contrary to the findings of the NZPC in its *Better urban planning* report with respect to the need for better decision-making and the OECD's recent recommendation to ensure that areas of fast-track development are

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screened against environmental impacts, especially against cumulative and irreversible effects.

Use of reserve land for housing – poor decision-making

Putting aside the process-related issues, the merits of the proposal to take reserve land for housing are also questionable from a resource management perspective.

Auckland is projected to grow by over 800,000 people over the next 30 years (medium growth projection: Statistics New Zealand "Population projections overview" <http://www.stats.govt.nz/browse_for_stats/population/estimates_and_projections/projections-overview/subnat-pop-proj.aspx>). This means that 400,000 additional houses need to be built in Auckland over that period. With such significant population growth projected and the increase in density provided for by the Unitary Plan, few would disagree that sports fields, parks, reserves and other green spaces become increasingly important – and represent finite resources that should be sustainably managed in terms of s 5 of the RMA.

In short, once public open space is gone, it is lost forever; building houses on public open space would seem to be a short-sighted solution to the need for housing.

While the government might not, the Auckland Council recognises the need to maintain public open green space. The Council has already identified a shortage in sports fields across the region, and is in the process of assessing reserve requirements in the Tāmaki area, which is due to be completed in mid-2017.

The PE RIS acknowledges that this assessment would have contributed to the analysis of the impacts of the proposal on local residents' access to reserves, but the government has nevertheless pushed on with the legislation.

Also highly questionable is the appropriateness of the government deciding that Auckland reserve land can be foregone for housing and implementing that decision via fast-track legislation that overrides normal statutory processes, thus stifling the ability for these issues to be fully debated and properly tested.

Commentary

The Auckland Council's Maungakiekie-Tāmaki Local Board submitted that the PE Bill "[s]ets a dangerous precedent by cutting across the existing requirements of the Resource Management Act and the Reserves Act", and "[f]ast tracks development and avoids a robust public consultation process including a right of appeal" ("The submission of the Maungakiekie-Tāmaki Local Board on the Point England Development Enabling Bill" (31 January 2017) at [1.4]). We agree. The government's use of legislative powers to override the Auckland Council's functions is directly contrary to sound decision-making and the devolved decision-making which lies at the heart of New Zealand's local government and resource management regime.

This PE Bill parallels the government's attempt through the RLAB to increase ministerial powers and severely limit opportunities for public participation and access to environmental justice.

Clause 105 of the RLAB received heavy criticism because it enabled the Minister for the Environment to recommend the promulgation of regulations to, amongst other things, permit specified land uses, override existing rules which restrict land use, and prohibit a local authority from making new rules which would restrict land use for residential development. Despite the Local Government and Environment Select Committee acknowledging submitters' concerns about the inappropriate breadth of that power and recommending that the power be removed, the government is proposing to exercise the very type of power that would have been enabled by that clause, via special legislation.

In other words, the PE Bill represents a failure in terms of all four of the concerns we expressed about the RLAB and more of the same in terms of the willingness to override RMA processes.

THE URBAN DEVELOPMENT AUTHORITY PROPOSALS

The government's proposals for the development of UDAs to fast-track urban development projects are outlined in the MBIE's UDA Discussion Document, which is open for public consultation. Submissions close on 19 May 2017. Subject to the outcome of September's General Election, the government is proposing to introduce a bill on the UDA proposals by April–May 2018, with a view to that being referred to a parliamentary select committee by October–November 2018.

To be clear, we do not oppose the concept of UDAs in principle, and several aspects of the UDA proposals are worthy of support. In particular, a lack of coordination between the planning of urban development and the funding and delivery of infrastructure required to support this development has repeatedly been identified as a key impediment to enabling growth of our urban areas, particularly Auckland. The ability to address this via UDAs is welcomed.

A detailed review of the UDA proposals is beyond the scope of this article, which only focuses on those aspects of the UDA proposals that impact on RMA processes. To that extent, our key focus is on the powers being proposed for UDAs in relation to planning and resource consenting, namely:

> *"… powers to override existing and proposed district plans and regional plans, and streamlined consenting processes." (UDA Discussion Document at 2)*

The UDA Discussion Document also states:

> *"The planning, land-use and consenting regime proposed for urban development projects will shift the balance of matters that must be considered in decision-making towards the strategic objectives of the development project." (at 59)*

This refers to the intent to shift decision-making away from consent authorities to UDAs, to provide UDAs with the ability to override existing planning instruments, and to relegate pt 2 of the RMA as secondary to the "strategic objectives of the development project" for the purpose of decision-making.

Before turning to those issues, we set out an overview of the UDA proposals to provide context for that analysis.

The UDA Proposals – Overview

The UDA Discussion Document states:

> *"The proposed legislation will provide government with a range of development powers that support urban development; provide greater coordination, certainty and speed; and are capable of supporting a wide range of development projects, including for housing, commercial and economic development purposes." (at 19)*

The proposed new legislation would enable local and central government to:

(a) empower nationally or locally significant development projects in urban areas (or on land that is sufficiently close to an urban area to be serviced or become part of that area) to access more enabling development powers and land use rules; and

(b) establish new UDAs to support those projects where required.

Under the proposal, the government (in consultation with the relevant territorial authority) would identify qualifying projects to be planned and facilitated by publicly-controlled UDAs, potentially in partnership with private companies and/or landowners. UDAs can be either new or existing entities, provided they are publicly controlled and willing to take on the role.

Once the project is identified, the government has the power to: set the "strategic objectives" of the project; select which of the development powers that project can access; determine who can exercise the development powers for the project; and determine who is accountable for delivering the project's strategic objectives. There is no right to appeal the decision to formally establish a development project.

UDAs would be established by Order in Council, which would include details of:

(a) the development project(s) that the UDA will be responsible for;

(b) the area covered by the development project;

(c) the strategic objectives for the development project;

(d) the development powers that will be available to the UDA as determined by the responsible minister (expected to be the Minister for Building and Construction); and

(e) any conditions imposed on the UDA, including on the use of its powers.

The proposals include a "tool-kit" of development powers that could be granted to particular projects (UDA Discussion Document at 2), which may include powers to:

(a) assemble parcels of land, including via existing compulsory acquisition powers under the Public Works Act 1981;

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(b) override existing and proposed district plans and regional plans, and use streamlined consenting processes;

(c) plan and build infrastructure such as roads, water pipes and reserves;

(d) buy, sell and lease land and buildings;

(e) borrow to fund infrastructure; and

(f) levy charges to cover infrastructure costs.

Once established, a UDA is required to develop a draft development plan, which:

(a) states the "strategic objectives" the government has set for the project;

(b) identifies how each of the development powers the UDA has been granted will be exercised (including the nature and location of new land use regulations);

(c) shows how the UDA's use of the development powers will contribute to delivering the development project's strategic objectives;

(d) shows how the UDA will comply with any conditions attached to the development powers it has been provided;

(e) includes an assessment of effects on the environment, including cumulative effects; and

(f) identifies any further development powers the UDA has not been granted but proposes to apply for.

The minister would be responsible for making the final decision approving the development plan, and the UDA is required to exercise its powers in accordance with that plan. There will be public consultation (but no formal hearing) on the draft development plan, and an opportunity to object to a recommended development plan before it is put forward to the minister. However, there is no right to appeal the minister's decision on the development plan.

UDA proposals in relation to planning, land use and consenting

The extent to which the development plan and the UDA can override normal RMA processes and institutions is neatly captured in proposal 98 of the UDA Discussion Document:

> *"98. To the extent it is necessary to achieve the strategic objectives of the development project:*
>
> *(a) the development plan can override one or more of the existing and proposed: district plan, regional plan and the applicable regional policy statement that would otherwise apply to the development project;*
>
> *(b) the Government can choose the extent to which one or more of the district plan, regional plan and regional policy statement can be overridden in each case;*
>
> *(c) an urban development authority can be granted the planning and consenting powers of a regional council and territorial authority;*
>
> *(d) the Government can impose conditions on the use of any planning powers that are granted (such as a condition to comply with a rule concerning discharges in a regional air plan, notwithstanding that the Government is granting a power to override the regional plan more generally); and*
>
> *(e) the urban development authority can take on the compliance and enforcement responsibilities and powers of a territorial authority and regional council, for breaches of the development plan and associated development consents (except where the authority is the developer and a development consent has been required, in which case compliance and enforcement will rest with the relevant local authority)." (at 61; emphasis added)*

Other aspects of the UDA Discussion Document worthy of comment in this context are as follows:

(a) In preparing the development plan, the decision-maker must have regard to a hierarchy of relevant considerations in which the government-set "strategic objectives of the development project" must be given the greatest weight, followed by pt 2 of the RMA, with matters that are relevant under ss 66 and 74 of the RMA bringing up the rear. The project's strategic objectives are therefore of central importance, as they become the

key yardstick against which the planning framework for the development area is to be prepared – thus setting up something of a "self-fulfilling prophecy".

(b) This hierarchy also applies in considering resource consents for activities taking place within the project area, with the third matter being ss 104–107 of the RMA.

(c) The development plan can provide for development activities that can "automatically proceed" (UDA Discussion Document at 64–65) without the need for a development consent (ie the equivalent of a permitted activity, with no rights of submission or public input), as well as controlled, restricted discretionary and prohibited activities (but not discretionary or non-complying activities).

(d) Consent applications within the project area for land use and subdivision will generally be processed on a non-notified basis. Where applications are notified, submissions can be made but no hearing will be held.

(e) There will be significantly reduced processing time frames for development consents, with decisions on non-notified consents made within 15 working days of receipt. Such short time frames are unlikely to be conducive to thorough consideration of the issues which arise and may well lead to poor decision-making.

(f) Only the applicant will have the opportunity to appeal decisions on development consents to the Environment Court, and even then only in respect of conditions where the consent is granted.

Obviously, these proposals involve a very significant override of the most basic elements of our RMA system, including quality assessment of proposals and access to environmental justice. The combination of speed, centralised decision-making and the severe limits on public participation has the significant potential to give rise to disenfranchised local communities.

To explain why UDAs may require access to such extensive planning and consenting powers, the MBIE's *Regulatory Impact Statement: Urban development authorities* (1 December 2016) (UDA RIS) relies on conclusions of the NZPC rather than undertaking its own robust research and policy analysis, but nevertheless acknowledges that "existing powers and processes can overcome at least some of the issues faced by urban development" (at 3).

Why the hurry?

If UDAs are going to be effective, the devil will be in the detail; the legislation will need to be drafted carefully if it is going to achieve its purpose. If the UDA legislation transpires to be as poorly drafted as the RLAB was, uncertainty and process delays will continue to arise. On that basis, we have serious doubts whether it is appropriate to move as quickly as the government is intending on legislation of this complexity and importance, particularly in advance of assessing the effectiveness of the amendments to the RMA to be made by the RLAB.

The UDA RIS notes that, in order to address the issues perceived to be precluding urban development, and as an alternative to the introduction of bespoke legislation for UDAs:

> *"There is scope to rely on currently or soon to be available tools and processes of the RMA, Resource Legislation Amendment Bill 2015 (RLAB) and the NPS on Urban [D]evelopment Capacity to deliver positive urban change." (at [159])*

The RLAB was aimed at "making development easier in urban areas" (Nick Smith (Minister for Building and Housing) *Discussion document on urban development legislation* (Cabinet paper, December 2016) at [131]). If the RLAB is as effective at facilitating urban development as the government hopes, there may be no need to provide UDAs with the ability to override regional and district planning instruments or "shift the balance" of matters that must be considered for identified urban development projects (at [132]; see also UDA Discussion Document at 59). The alternative of waiting to assess the effectiveness of the RLAB is discounted in the UDA RIS as follows:

> *"While these initiatives would all make a difference at the margin, they are unlikely to provide the speed of outcomes, especially with respect to housing supply projects.*
>
> *It is difficult to predict with certainty that any of them will deliver focused improvements to urban development outcomes." (at [165]–[166])*

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Commentary

Assuming that the RLAB is passed prior to the 2017 General Election, the UDA legislation could be enacted less than two years after the RLAB. This will be well before there has been any opportunity to assess whether the amendments introduced by the RLAB have adequately addressed concerns regarding the speed and responsiveness of the RMA's consenting and plan-making processes, particularly for urban development. Both the UDA Discussion Document and UDA RIS note that the UDA proposals are potentially premature given the likely enactment of the RLAB, and neither adequately explains the need for such haste.

On the basis of the UDA Discussion Document and the UDA RIS that have been released to date, we have concerns that the UDA proposals will suffer from many of the same issues as those expressed in relation to the RLAB and PE Bill, namely:

(a) By having the ability to grant UDAs extensive planning and consenting powers, central government is continuing the trend of aggregating power to itself.

(b) These powers are conferred at the expense of local decision-making and further reduce opportunities for public participation/access to environmental justice.

(c) Quality decision-making will be sacrificed for speed, without adequate justification for doing so.

In our view, the explanations provided by the government do not provide sufficient justification for the significant imposition on democratic and private property rights that the UDA proposals could entail. If UDAs are to be provided for, a more appropriate balance will need to be struck.

CONCLUDING COMMENTS – MORE OF THE SAME, BUT WORSE

What we have seen in the RLAB is symptomatic of the continuing decay of New Zealand's resource management framework and institutions, and the sheer quality of decision-making in that space, as a result of:

(a) an ongoing assault on the workability and integrity of the RMA via legislation which is poorly drafted and rapidly enacted, giving rise to uncertainty, unforeseen consequences and the need for further amendments;

(b) a steady erosion of access to environmental justice via restrictions on notification and the introduction of novel concepts (eg deemed permitted activities) designed to limit public participation;

(c) the sidelining of existing structures and institutions, including the Environment Court, in favour of ad hoc decision-making structures such as Boards of Inquiry and Independent Hearing Panels;

(d) a trend toward fast-track, bespoke legislation to provide "solutions" to (sometimes largely imagined and unquantified) "problems"; and

(e) an ongoing aggregation of power to Wellington, rather than to the institutions created by legislation and mandated by local and regional communities to carry out the task.

We indicated in our August 2016 article that the government's attitude towards notification and access to justice had:

> *"… spawned proposed reforms of a nature never seen before – amendments that represent a difference in kind rather than degree that if enacted would strike at the very heart of the RMA." (August 2016 RMJ at 2)*

Analysis of the PE Bill and the UDA proposals demonstrate that what we have before us is more of the same – but worse.

The principles of local decision-making and public participation/access to environmental justice have always been the cornerstones of New Zealand's planning legislation. In our view, these principles should only be restricted in a transparent manner and with sound justification.

Some features of the UDA proposals demonstrate not only a lack of understanding of, but also apparent contempt for, the RMA and RMA processes. The mere existence of the PE Bill demonstrates that.

One must ask: when is the erosion of the RMA, RMA processes and RMA institutions going to stop? Access to environmental justice and quality decision-making are not luxuries; they represent democratic rights that we are entitled to rely on and that should not be dispensed with when the government thinks that RMA processes might cause inconvenient delays.

In short, if the RMA is in the process of suffering "death by a thousand cuts", these two initiatives can be seen as the latest two incisions.

The PE Bill and the UDA proposals also demonstrate that there is a readily apparent conflict between the objectives of the Minister for Building and Construction to facilitate rapid development of housing and (what should be) the objectives of the Minister for the Environment to ensure that the environmental effects of such developments are properly assessed in accordance with due process.

What both measures demonstrate is that the motivation to achieve rapid housing development, both now and in the future, are overriding the need for good decision-making, proper environmental assessment and access to environmental justice. It is clearly contrary to sound administration for both portfolios to reside with the same minister, and the existing government – or any new government following the 2017 General Election – should address this issue.

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