



BRIEFING

Urban Development Authority Legislation – Decision-making framework

Date:	8 February 2018	Priority:	High
Security classification:	In Confidence	Tracking number:	1363 17-18

Action sought		
	Action sought	Deadline
Hon Phil Twyford Minister Housing and Urban Development	Agree to the recommendations	12 February 2018
Hon Jenny Salesa Associate Minister Housing and Urban Development	For your information	N/A

Contact for telephone discussion (if required)				
Name	Position	Telephone		1st contact
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The following departments/agencies have been consulted
The Treasury, Ministry for the Environment, Department of Internal Affairs, Department of Conservation

Minister's office to complete:

- | | |
|---|--|
| <input type="checkbox"/> Approved | <input type="checkbox"/> Declined |
| <input type="checkbox"/> Noted | <input type="checkbox"/> Needs change |
| <input type="checkbox"/> Seen | <input type="checkbox"/> Overtaken by Events |
| <input type="checkbox"/> See Minister's Notes | <input type="checkbox"/> Withdrawn |

Comments



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Purpose

This briefing contains our advice on decision-making under the urban development authority legislation.

Recommended action

The Ministry of Business, Innovation and Employment recommends that you:

- a **forward** this briefing to the Ministers for the Environment, Finance, Local Government, Infrastructure, and Land Information;

Agree / Disagree

- b **note** that you are meeting with the Ministers for the Environment, Local Government and Infrastructure on 15 February 2018 to discuss the core elements of the urban development authority legislation (this briefing and our previous briefing *Urban development authority legislation – fundamental issues* [MBIE 1262 17-18]);

- c **note** that you have a pre-meeting with MBIE officials on 12 February 2018;

- d **agree** that the proposals you adopt will be reflected in the first of the two detailed Cabinet papers to be considered in April 2018.

Agree / Disagree

Di Anorpong
Manager, Construction and Housing Policy
Housing and Urban Branch, MBIE

8, 2, 18

Hon Phil Twyford
Minister of Housing and Urban
Development

..... / /

Context

1. On 20 December 2017 the Cabinet Business Committee agreed in principle to establish the Housing Commission as a national urban development authority, with a process and development powers to:
 - support high quality urban development
 - provide greater coordination, certainty and speed
 - be capable of supporting a wide range of development projects.
2. The Cabinet Business Committee paper described the core elements proposed for the new legislation and signalled that there are a number of critical policy issues that need to be resolved before detailed policy decisions can be made in early 2018. These issues are discussed in the series of briefings outlined below:

1.	Fundamental issues
2.	Decision-making: priorities and principles
3.	Organisational issues
4.	Approach to Māori interests
5.	Land assembly powers, especially compulsory acquisition
6.	Infrastructure and funding powers
7.	Planning and consenting issues
8.	Powers to change reserves

3. This paper addresses the issue of decision-making under the urban development authority legislation. In particular, it addresses what considerations the decision-maker must take into account. It follows our previous briefing *Urban development authority legislation - fundamental issues* [MBIE 1262 17-18 refers] and discusses three remaining questions:
 - How does the legislation resolve competing priorities?
 - Should the Act include principles/considerations that shape the strategic objectives?
 - What elements should shape the development plan?

Introduction

4. In the fundamental issues briefing, we signalled that addressing coordination of the multiple components of complex urban development projects is one of two main factors that point to the need for new legislation (the other being governance issues).
5. To address the coordination issue, we recommended that the new legislation create a separate statutory system for complex development projects that operates independently from other parts of the existing urban development system.

Approach to decision-making

6. A statutory process often prescribes the matters that a decision-maker must take into account before making their decision. For example:¹
 - a. Under the Resource Management Act 1991 (RMA), section 6 states that “in achieving the purpose of this Act, all persons exercising functions and powers under it, ...shall recognise and provide for the following matters of national importance...”; and under section 7 those same persons “shall have particular regard to” a further list of considerations.
 - b. Under the Land Transport Management Act 2003, regional transport committees must prepare land transport plans for their regions; before submitting their plan, section 14 requires each committee to “be satisfied” of two matters, “have considered” two other matters, and “have taken into account” three further matters.
7. The new urban development system will require statutory decisions at different points in the life of a development project. The broad issue is what factors the legislation should require decision-makers to take into account and to what extent. Other briefings have already addressed more specific matters (eg the factors the Minister of Conservation should take into account when considering whether to approve a change to certain reserves). This briefing considers what the default approach should be for decisions in general.
8. Similar to the examples above, we propose that the new legislation include provisions that set out the matters that guide decision-making. While providing for certain exceptions (discussed further below), we propose that these provisions apply to any decision related to the development project.

Outline of the decision-making framework

9. At its most simple, the framework that will guide decision-making within the development project is as follows:
 - the Act’s statutory purpose
 - each project’s strategic objectives
 - the development plan.
10. We propose that, in making any decision related to the development project, the statute’s purpose would be the paramount consideration, followed by how best to realise the project’s strategic objectives. In contrast, once approved, the development plan would limit the scope of decision-making to powers and works that are consistent with the plan.

Stages of decision-making

11. Prior to the project being established and the development plan being approved, the strategic objectives and the plan are not yet available to shape decision-making. Consequently, we propose that the statutory decisions to establish each development project, set its boundaries and identify strategic objectives would be guided solely by the purpose of the Act and public feedback.
12. Once established, both the statute’s purpose and the realisation of the strategic objectives would shape the decisions about the content of the development plan, together with some other factors discussed below.

¹ See Annex 1 for the full explanation of both examples.

13. Finally, at the end of the development project, when the strategic objectives and development plan have been realised, these matters will no longer be taken into account when making decisions about how to wind up the project and where to vest any remaining assets.

The Act's statutory purpose

14. In the fundamental issues briefing we outlined that the new legislation should have a statutory purpose that reflects the intent of being more enabling of urban development projects, while also referencing social, cultural and environmental wellbeing in an urban context and giving consideration to the needs of future generations. We suggested the following:

The purpose of this Act is to better enable complex development projects by providing more enabling development powers that facilitate urban development to enhance the social, economic, environmental and cultural wellbeing of current and future generations.

15. To maximise the more enabling intent of the new legislation, it would need to be clear that the new statutory purpose takes priority in decisions on urban development projects.

Strategic objectives

16. In our introductory briefing [MBIE 0854 17-18] we proposed that each development project have strategic objectives. These objectives would guide decision-making for all decisions made within the development project. The strategic objectives would define the aims of the development project and guide planning and delivery.
17. We proposed that the draft strategic objectives would be identified as part of the first stage of public consultation (along with other core elements such as the proposed project boundaries). The development plan must then show how the project would realise the strategic objectives.
18. In the fundamental issues briefing we recommended that the new legislation require strategic objectives to reflect the project's circumstances and priorities, and include mandatory subject matter that strategic objectives must address.

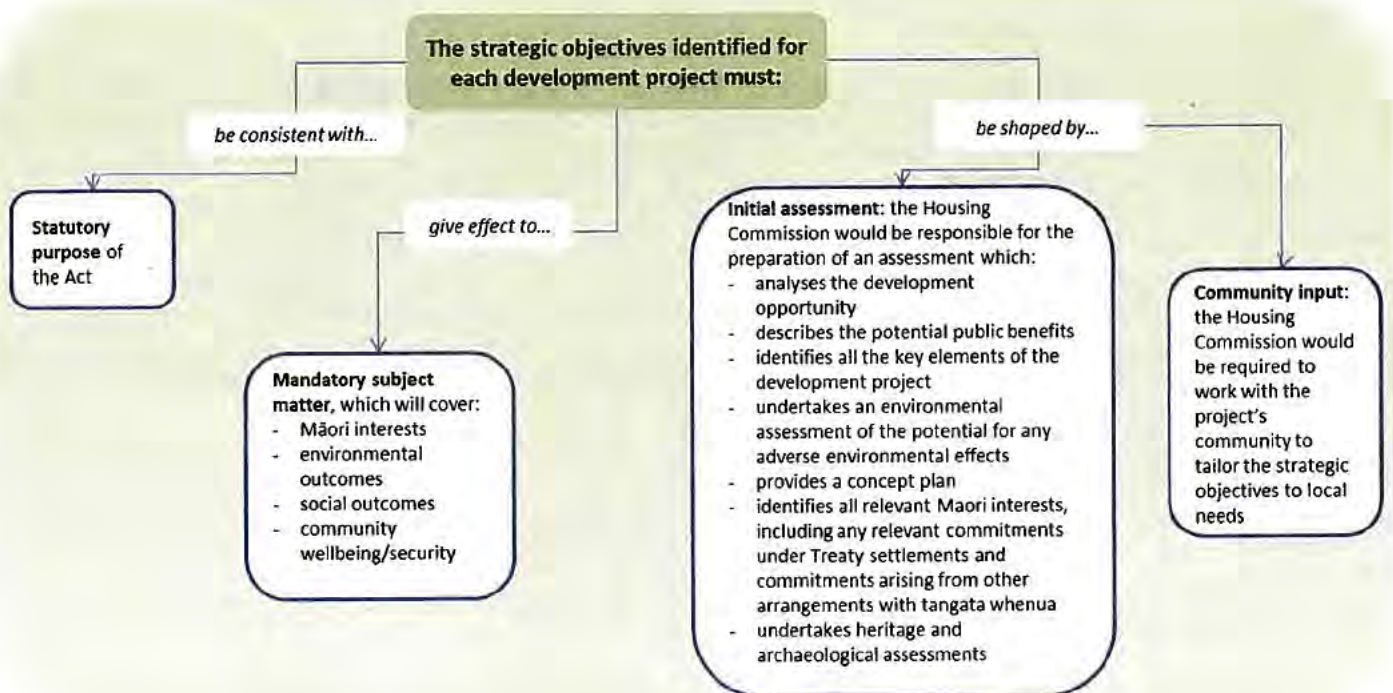
Mandatory subject matter

19. Our intention is for the mandatory subject matter to be stated in the abstract and in each case be translated into more specific strategic objectives that are relevant to the nature of the particular development project.
20. In our briefing *Urban Development Authority Legislation: Approach to Māori Interests* [MBIE 1235 17-18 refers] we recommended that the following example of mandatory subject matter be provided for in at least one of the strategic objectives of all development projects.

Recognise and provide for the relationship of Māori and their culture and traditions with their ancestral lands, water, sites, wāhi tapu and other taonga.

21. Some further examples of mandatory subject matter are set out below:
 - environmental: protect, maintain and enhance the environment
 - economic: strengthen the local economy and unlock the potential of the project area
 - social: support the project area residents to gain skills and employment opportunities that will improve their lives
 - community: enable the creation of safe, healthy and connected communities.
22. The key to forming the mandatory subject matter statements will be to get the balance right between guiding appropriate strategic objectives that reflect the statutory purpose of the new legislation, without being so prescriptive that they could *become* the strategic objectives for individual projects. We would want to avoid this situation to preserve the ability of local interests to be reflected in the strategic objectives.

23. A summary of the elements that would shape the strategic objectives is illustrated below:



Development plan

24. The third element of the decision-making framework is the development plan. The development plan is the planning document that would describe the programme of urban development for the particular development project. It would show how relevant development powers would be exercised in the project area to achieve the strategic objectives.
25. The development plan is intended to be enabling. However, it will also define the limits of what has been approved for the project area. If the Housing Commission subsequently wants to do something that has not been approved in the plan, we propose that it could only do so by following the same process through which the plan was approved in the first place.

Remaining questions about the decision-making framework

Question 1: How does the legislation resolve competing priorities?

26. The key issue underlying the decision-making framework is how to resolve competing priorities that may arise between two or more strategic objectives (or the values underpinning them). The ultimate goal would be to find solutions that achieve all of the various strategic objectives of a development project without needing to prioritise any one objective over another. However there may be cases where priorities must be identified, while ensuring that the negative effects on the lesser priorities are minimised.
27. As a mechanism, we recommend that strategic objectives can be used to resolve competing priorities at the project level (in addition to their primary purpose of ensuring that projects deliver on a broad range of outcomes). As we advised in the fundamental issues briefing, we envisage there being a requirement to express the objectives at two different levels of detail:

- high level objectives for the project as a whole
- specific objectives for realising those high level objectives. It is at this level where competing priorities are more likely to need to be resolved.

28. The advantage of using the strategic objectives to resolve competing priorities is that the objectives are not prescribed in advance – they are project-based. Some projects will have important considerations that other projects will not and some projects would need to consider a wider range of issues for certain matters than others. For example, while considering the environment would always be relevant, the range of environmental issues that would need to be addressed in a highly urban context like downtown Auckland would be different to those that would need to be addressed when constructing a new development on the coast in Canterbury.
29. The lack of prescription in this approach is also a disadvantage. Stakeholders would not be able to see that their interest is recognised in the legislation, nor what priority it would be given (although the mandatory subject matter would overcome this problem for the subjects that are covered). Stakeholders would need assurance that the process outlined in the legislation to identify the strategic objectives would be sufficient to ensure that stakeholders' interests would be given appropriate recognition.
30. An alternative approach would be to add an additional layer to the decision-making framework by including principles or considerations that would elevate the status of particular areas of concern, along the lines of the examples noted earlier and in Annex 1.

Question 2: Should the Act include principles/considerations that shape the strategic objectives?



31. In addition to the statutory purpose, initial assessment and community feedback, the Act could include principles/considerations that shape the strategic objectives.
32. The advantage of including principles/considerations in the legislation and requiring them to be an additional factor in shaping the strategic objectives is that it would overcome the concerns outlined in paragraph 29 above by providing for stakeholders' interests. It would allow stakeholders to see that what is important to them is protected by the legislation.
33. The disadvantage would be greater prescription and less flexibility. The legislation would be less flexible and the community would have less ability to shape the strategic objectives as the objectives would be more pre-determined by the legislation.
34. On balance, we consider that ensuring a robust process of obtaining community input to identify the strategic objectives is preferable to adding more prescription to the legislation. Building sufficient flexibility into the design of the legislation is important to ensure it can be applied to a broad range of development projects.

Recommendation

Officials recommend that:

1. the strategic objectives can be used as a mechanism to resolve competing priorities

Agree / Disagree

2. the statutory purpose, initial assessment and community feedback are sufficient to strike the right balance between strategic objectives that achieve the purpose of the legislation, while being specific to individual development projects, meaning that no further principles/considerations be included in the legislation.

Agree / Disagree

35. If you **disagree** with recommendation 2, there are two further questions to consider:

Question 2b: Where should any principles/considerations come from?

36. **Option one** would be for the Act to have its own set of principles/considerations. These may duplicate principles/considerations from other legislation, such as the RMA, but they would stand alone in the new Act.

37. **Option two** would be for the Act to apply the principles/considerations of other existing Acts, for example by stating that Part 2 of the RMA applies to setting the strategic objectives, or that the considerations in Part 2 must themselves be considered when decisions are made (ie separate and additional to the strategic objectives). We consider that this option would cause complications, for example by subsuming other principles/considerations under the purpose of the new Act.

Question 2c: Should there be a hierarchy that makes trade-offs between competing priorities?

38. Any principles/consideration included in the legislation could be described in a hierarchy that makes trade-offs between competing priorities.

39. Under **option one**, all of the principles/considerations in the new legislation would be ranked. This option would force trade-offs to be made when enacting the legislation, resulting in less flexibility, and losing the advantage of being able to make project-based trade-offs.

40. An example of ranking is used in the RMA, where decision-makers are required to either:

- "Give effect to"
- "Recognise and provide for"
- "Not be inconsistent with"
- "Have particular regard to"

41. **Option two** would be for the legislation to include a long list of considerations that are all equal (ie not ranked between themselves). This option would mean that any trade-offs would be made at the project-level, allowing greater flexibility and community input into making the decisions.

42. We consider that option two is preferable, as listing without a hierarchy would allow the consideration of relevance based on local circumstances, which in turn should encourage greater community input.

Recommendation

If you **disagree** with recommendation 2 (above), officials recommend that:

3. the new legislation would have its own set of principles/considerations (that may duplicate principles/considerations from other legislation, but they would stand alone in the Act).

Agree / Disagree

4. any principles/considerations in the new legislation should all have equal weighting, allowing trade-offs to be made at the project level.

Agree / Disagree

Question 3: What elements should shape the development plan?



25. In addition to the strategic objectives, a number of other elements would influence the shape of the development plan. These include technical and environmental assessments of the area (eg, a full environmental assessment is required as part of preparing the development plan), RMA planning documents, iwi/hapu planning documents, and regional land transport plans.
26. The development plan would also need to be consistent with national direction. These are legislative tools that sit under the Resource Management Act 1991 (RMA) to set a consistent direction on topics of national importance. They include national policy statements, national environmental standards and regulations for administrative matters. For example, where a National Environmental Standard triggers a resource consent requirement, this would continue to apply.
27. If you would like the new legislation to include principles/considerations (ie if you **disagree** with recommendation 2), you may wish to also require those principles/considerations to influence the development plan.
28. The disadvantage of this approach, however, is that it may cause confusion in development plan preparation. We therefore recommend against also requiring principles/considerations to influence the shape of the development plan.

Recommendation

Officials recommend that:

5. the statutory purpose and the strategic objectives would be paramount in shaping the development plan.

Agree / Disagree

6. the development plan would also be influenced by technical and environmental assessments, RMA planning documents, iwi/hapu planning documents, and regional land transport plans, and consistent with national direction **only** (no further principles/considerations would need to be considered).

Agree / Disagree

Exceptions to the decision-making framework

29. In general, decisions relating to the development project will be required to follow the decision-making framework described above. There are three exceptions:

Regional plan resource consents

30. In our briefing *Housing Commission Legislation: Planning and Consenting Issues* [MBIE 1307 17-18], we recommended that decisions for regional plan resource consents within the development project would continue to be either the responsibility of the relevant regional authority or (if the Housing Commission had resource consenting powers for regional functions) the Housing Commission would be required to delegate consent decision-making powers to the relevant regional authority where the Housing Commission is itself the applicant.
31. When making decisions on regional consents within a development project, the regional authority would be required to apply the RMA, but with the purpose of the new legislation and the development project's strategic objectives having greater priority. A similar approach was taken in the Housing Accords and Special Housing Areas Act 2013, where the purpose of that Act ("to enhance housing affordability by facilitating an increase in land and housing supply") was elevated above the considerations set out in Part 2 of the RMA.²

Compulsory acquisition powers

32. In our previous briefing *Urban Development Authorities: Compulsory Acquisition and Land Assembly* [MBIE 1297 17-18], we proposed that the Housing Commission be able to ask the Minister for Land Information to use the Public Works Act 1981 (PWA) to acquire land on its behalf by compulsory acquisition. We recommended that any application would be subject to the standard processes of the PWA, including rights of appeal to the Environment Court for the landowner to challenge the taking.
33. We propose that the decisions made under the statutory process in the PWA continue to be governed by the considerations required under that legislation and that the approach discussed earlier in this briefing does not apply.

Powers over Scenic, Historic and Government Purpose Reserves

34. Scenic, historic, and government purpose reserves are likely to contain values that contribute to New Zealand's heritage (eg particular fauna, flora, or historic features) with regional, national or in some cases international significance, particularly for some of our historic reserves.
35. We therefore recommended in our briefing *Urban Development Legislation: Powers over Reserves* [MBIE 1260 17-18], that before powers can be exercised over these types of reserves that the agreement of the Minister of Conservation be required (this may include the Minister imposing certain conditions). We propose that the Minister of Conservation be free to make this decision without being subject to the strategic objectives.

² Section 34 provides that, when considering resource consent applications, the decision-maker must "have regard to the following matters, giving weight to them (greater to lesser) in the order listed: (a) the purpose of this Act; (b) the matters in Part 2 of the Resource Management Act 1991; (c) ..."

Annex 1: Examples of principles/considerations in the existing legislative environment

Legislation	Purpose	Principles/considerations
<p>Resource Management Act 1991, Part 2, Purpose and principles.</p>	<p>The purpose of this Act is to promote the sustainable management of natural and physical resources.</p> <p>2) In this Act, sustainable management means managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural well-being and for their health and safety while—</p> <ul style="list-style-type: none"> a) sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and b) safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and c) avoiding, remedying, or mitigating any adverse effects of activities on the environment. 	<p>Matters of national importance</p> <p>In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall recognise and provide for the following matters of national importance:</p> <ul style="list-style-type: none"> a) the preservation of the natural character of the coastal environment (including the coastal marine area), wetlands, and lakes and rivers and their margins, and the protection of them from inappropriate subdivision, use, and development; b) the protection of outstanding natural features and landscapes from inappropriate subdivision, use, and development; c) the protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna; d) the maintenance and enhancement of public access to and along the coastal marine area, lakes, and rivers; e) the relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga; f) the protection of historic heritage from inappropriate subdivision, use, and development; g) the protection of protected customary rights; h) the management of significant risks from natural hazards. <p>7 Other matters</p> <p>In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall have particular</p>

		<p>regard to—</p> <ul style="list-style-type: none"> a) kaitiakitanga: <ul style="list-style-type: none"> (aa) the ethic of stewardship: b) the efficient use and development of natural and physical resources: <ul style="list-style-type: none"> (ba) the efficiency of the end use of energy: c) the maintenance and enhancement of amenity values: d) intrinsic values of ecosystems: e) [Repealed] f) maintenance and enhancement of the quality of the environment: g) any finite characteristics of natural and physical resources: h) the protection of the habitat of trout and salmon; i) the effects of climate change: j) the benefits to be derived from the use and development of renewable energy. <p>8 Treaty of Waitangi</p> <p>In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall take into account the principles of the Treaty of Waitangi (Te Tiriti o Waitangi).</p>
<p>Local Government Act 2002, Part 2, Sections 10 & 14</p>	<p>Purpose of local government</p> <ul style="list-style-type: none"> 1) The purpose of local government is— <ul style="list-style-type: none"> a) to enable democratic local decision-making and action by, and on behalf of, communities; and b) to meet the current and future needs of communities for good-quality local infrastructure, local public services, and performance of regulatory functions in a way that is most cost-effective for households and businesses. 2) In this Act, good-quality, in relation to local infrastructure, local public services, and performance of regulatory functions, means infrastructure, services, and performance that are— 	<p>Principles relating to local authorities</p> <ul style="list-style-type: none"> 1) In performing its role, a local authority must act in accordance with the following principles: <ul style="list-style-type: none"> a) a local authority should— <ul style="list-style-type: none"> i. conduct its business in an open, transparent, and democratically accountable manner; and ii. (give effect to its identified priorities and desired outcomes in an efficient and effective manner: b) a local authority should make itself aware of, and should have regard to, the views of all of its communities; and c) when making a decision, a local authority should take account of—

	<ul style="list-style-type: none"> a) efficient; and b) effective; and c) appropriate to present and anticipated future circumstances. 	<ul style="list-style-type: none"> i. the diversity of the community, and the community's interests, within its district or region; and ii. the interests of future as well as current communities; and iii. the likely impact of any decision on the interests referred to in subparagraphs (i) and (ii): <ul style="list-style-type: none"> d) a local authority should provide opportunities for Māori to contribute to its decision-making processes: e) a local authority should actively seek to collaborate and co-operate with other local authorities and bodies to improve the effectiveness and efficiency with which it achieves its identified priorities and desired outcomes; and f) a local authority should undertake any commercial transactions in accordance with sound business practices; and <p>(fa) a local authority should periodically—</p> <ul style="list-style-type: none"> i. (assess the expected returns to the authority from investing in, or undertaking, a commercial activity; and ii. satisfy itself that the expected returns are likely to outweigh the risks inherent in the investment or activity; and <ul style="list-style-type: none"> g) a local authority should ensure prudent stewardship and the efficient and effective use of its resources in the interests of its district or region, including by planning effectively for the future management of its assets; and h) in taking a sustainable development approach, a local authority should take into account— <ul style="list-style-type: none"> i. the social, economic, and cultural interests of people and communities; and ii. the need to maintain and enhance the quality of the environment; and
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		<ul style="list-style-type: none"> iii. the reasonably foreseeable needs of future generations. <p>2) If any of these principles conflict in any particular case, the local authority should resolve the conflict in accordance with the principle in subsection (1)(a)(i).</p>
<p>Land Transport Management Act 2003, Part 1, sections 3, 4 and 14</p>	<p>Purpose</p> <p>The purpose of this Act is to contribute to an effective, efficient, and safe land transport system in the public interest.</p>	<p>Treaty of Waitangi</p> <p>In order to recognise and respect the Crown's responsibility to take appropriate account of the principles of the Treaty of Waitangi and to maintain and improve opportunities for Māori to contribute to land transport decision-making processes, sections 18, 18A, 18G, 18H, and 100(1)(f) provide principles and requirements that are intended to facilitate participation by Māori in land transport decision-making processes.</p> <p>Core requirements of regional land transport plans</p> <p>Before a regional transport committee submits a regional land transport plan to a regional council or Auckland Transport (as the case may be) for approval, the regional transport committee must—</p> <ul style="list-style-type: none"> a) be satisfied that the regional land transport plan— <ul style="list-style-type: none"> i. contributes to the purpose of this Act; and ii. (is consistent with the GPS on land transport; and b) have considered— <ul style="list-style-type: none"> i. alternative regional land transport objectives that would contribute to the purpose of this Act; and ii. the feasibility and affordability of those alternative objectives; and c) have taken into account any— <ul style="list-style-type: none"> i. national energy efficiency and conservation strategy; and ii. relevant national policy statements and any relevant regional policy statements or

		<p>plans that are for the time being in force under the Resource Management Act 1991; and</p> <p>iii. likely funding from any source.</p>
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