Submission

By

THE NEW ZEALAND INITIATIVE

To the Environment Committee

on the

Natural and Built Environments Act exposure draft

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1. INTRODUCTION AND SUMMARY

Thank you for the opportunity to submit on the exposure draft of the Natural and Built Environments Bill (NBA).

This submission is made by The New Zealand Initiative, a think tank supported primarily by chief executives of major New Zealand businesses. The organisation's purpose is to undertake research to contribute to the development of sound public policies in New Zealand. Our goal is to help create a competitive, open, and dynamic economy and a free, prosperous, fair, and cohesive society.

The Initiative welcomes the government's decision to reform the planning system. The Resource Management Act (RMA) has been disastrous. We acknowledge the magnitude of the task that ministers, MPs and officials have taken on with these reforms. We welcome the opportunity to assist.

Given the size, complexity and significance of the planning system, if the reforms are to endure they should be based on:

- Sound legal principles, including equality before the law and predictability.
- An understanding of the drivers of the problems which have emerged from the RMA.
- An awareness of the relationship between property rights and wellbeing, and
- An understanding of the tasks for which land use laws and regulations are well-suited.

Unfortunately, there is little evidence of these foundations in the exposure draft or the Parliamentary paper on the bill. The bill's scope is so broad as to threaten uncertainty about what activities are legal.

We believe the key issue for the reforms is housing affordability because:

- While planning restrictions are not the only reason for the housing affordability crisis, planning has played a significant role.
- Inelastic short run housing supply due to planning and consenting delays increases the vulnerability to a sharp house price correction in the event of an economic downturn, and
- The wellbeing of current and future generations is likely to be materially reduced by prolonged exclusion from home ownership.

New Zealand's housing market is among the worst-performing in the world. Since 1991, the year the RMA passed, real house prices have increased by more than any OECD country. House prices have risen by 30% in the last year. Between December 2019 and March 2021, the net worth of home owners increased $231,000, mostly the result of rising house prices. These staggering outcomes represent vast wealth redistributions and threaten to exclude untold numbers of people from ever owning a home.

The government must come to a view on the core functions of a planning system. In our view, planning's core functions are a) to protect infrastructure corridors to support future growth, and b) to protect urban amenity by separating incompatible land uses (e.g. separate factories from homes).

The goal of the reforms should be a planning system which delivers those core functions without creating the artificial scarcity of serviced land which has led to the housing affordability crisis.

This submission proceeds as follows:

- The next section discusses the key design elements of the draft bill.
- Section 3 outlines what we would have expected to see from the government at this early stage in the reform process.
- Section 4 argues the government can better-protect the natural environment by treating urban and non-urban areas separately.
- Section 5 suggests the government should limit the scope of the NBA to where planning has a comparative advantage.
- Section 6 says that if the government has capped emissions with the Emissions Trading Scheme then it is probably counterproductive to use the NBA for mitigation.
- Section 7 suggests the ambitious but unfunded outcomes for the NBA signals funding by taking from property owners.
- Section 8 makes a case for recognising the link between property rights and prosperity.
- Section 9 notes the conflicting elements of the NBA's purpose statement and outcomes.
- In section 10, we oppose the use of regulation to give effect to the NPF and regional plans, and
- Section 11 concludes.

2. THE PROPOSED REFORM

The exposure draft of the NBA is substantially incomplete, but usefully indicates the government's overall strategy.

Our primary concern is the proposal to give effect to the National Planning Framework (NPF) and regional plans through regulation. The exposure draft suggests the government's strategy for the reformed planning system is to give effect to a set of aspirational statements by decree. The approach vests enormous powers in the Minister for the Environment with only limited oversight by Parliament.

With respect, it is difficult to avoid seeing parallels with the Economic Stabilisation Act 1948. We doubt such a constitutionally dubious approach is likely to work out well for the environment or anyone in it.

A crucial element of the bill is the definition of "environment." Under this one term, the bill combines the natural environment, urban areas, and "the social, economic, and cultural conditions". We have at least two concerns with this combined approach. First, the definition is broad enough to encompass every aspect of life inside and outside the home. Nothing appears to be off-limits. Our second concern is the implication that bottom lines designed to protect the natural environment will apply to urban areas. We consider this second issue further in section 4.

The bill imposes no disciplines that constrain judgements about wellbeing other than whatever the decision-maker chooses from one day to the next. The bill has no requirement for any objective assessment of wellbeing using cost-benefit analysis, which treats increases in wellbeing as a benefit and detrimental effects on wellbeing as a cost.

It appears environmental limits can be set without regard to wellbeing. Any limits appear to be permissible provided they "protect or enhance the natural environment." The bill does not define what constitutes an enhancement of the natural environment. For example, people can hold different views about whether a wind farm enhances the natural environment. Presumably, "enhancement" is whatever the government of the day says it is. This is not a credible or sustainable strategy for the reforms.

Considered in combination, the all-encompassing definition of "environment," the decision to give effect to rules through regulation, and a conflicting purpose statement discussed later, the bill proposes to delegate to the Minister for the Environment power over everything. There is no merit in such an extreme approach.

3. WHAT WE EXPECTED TO SEE

The primary goal of the reforms should be to improve housing affordability by removing undue barriers to development.

Housing is not the only casualty of three decades of RMA regulation, but it is the most significant. Much rests on these reforms. New Zealand's sclerotic housing supply threatens economic and even political instability in the medium- to long-term.

Put simply, the reforms must make it easier to build a house.

Accordingly, we expected the government to demonstrate an understanding of what has led to the housing affordability crisis. We expected the government to show it understands of the drivers of behaviours which have led to persistent housing undersupply and consenting delays. We expected the government would show it understands the consequences of an inelastic short run housing supply for price volatility, especially the risk of sharp corrections of house prices in downturns.

With respect to planning, we expected the government to consider the likely drivers of council behaviours including:

- The number and breadth of outcomes in the RMA leading to effectively granting broad discretion to council officers.
- The broad scope for who has standing in RMA proceedings, meaning a large number of potential holders of vetoes over land use.
- The central importance of balancing of appeal rights versus development.
- The absence of any system for internalising costs and benefits – confronting objectors with the cost to the community of forgone land uses and likewise respecting the compensation principle embedded in the Public Works Act, and
- Awareness of the function that property rights can play in resolving conflicting purposes and outcomes by confronting owners and objectors with the opportunity cost of alternative land uses.

The scope of the reformed planning system should be informed by comparative institutional advantage. By this we mean the government should attempt to distinguish the problems that a planning system is best-placed to solve from other problems. A crucial question is where to allocate decision rights. The reforms are an opportunity to narrow the scope of the planning system.

The government should demonstrate it is aware that sound legal principles and secure property rights are foundations for investment in current and future prosperity.

We also expect the government to demonstrate it understands the consequences of restricting land use. For example, the recent draft findings from the Commerce Commission's market study on groceries suggest planning laws may have reduced competition among supermarkets by preventing the entry of competing retailers.[1] These far-reaching consequences are the by-product of overly-

[1] New Zealand Commerce Commission (2021), "Market study into the retail grocery sector," draft report, 29 July. See Chapters 6 and 9. Available from here.

restrictive land use regulations which should lead the government to re-consider whether planning is a suitable vehicle for delivering most of the outcomes in section 8 of the draft NBA.

Unfortunately, we see few if any of these expected elements in the exposure draft of the bill or the explanatory material. We see no credible or enduring pathway to housing affordability. The government has delivered little more than a laundry list of outcomes and signalled its intent to give effect to those outcomes via delegated coercive powers.

If the reforms are to succeed and endure, they must be based on:

- A proper identification the problems which must be solved, and
- An understanding what led to those problems in the current planning system.

Even if the government believes the goal of the reforms should go beyond housing, the reforms must be based on an understanding of the problems communities really face rather than hypothetical problems such as some lack of "sustainable management." We cannot see how the many problems caused by the RMA will be solved by integrating plans into fewer documents, or by long lists of outcomes, or by concentrating enormous powers in the hands of a minister.

Unfortunately, there little sign of any serious attempt at a problem definition in the current proposal. We fear the government is on track to ignore hard-won lessons from the last 30 years and will end up aggravating the mistakes of the RMA.

4. TREAT URBAN AREAS SEPARATELY

Section 3 of the exposure draft of the bill proposes to treat the natural environment and urban areas under a single category, "environment." Earlier, we noted our concern about the scope of this definition. In this section, we focus on the risk of counterproductive outcomes from treating urban and non-urban areas uniformly.

Bundling urban and non-urban areas into a single category of "environment" will subject urban areas to environmental bottom lines designed to protect the natural environment. The likely outcome of this combined strategy will be a) to stifle urban growth, and b) to water down environmental bottom lines, which will be necessary to allow at least some growth in towns and cities. The government risks repeating the RMA mistake of preventing urban growth while failing to protect the natural environment. Environmental bottom lines are likely to become a political football, satisfying no one.

There is no need for tension between urban and non-urban outcomes. We believe the government has misunderstood the relationship between cities and the natural environment. Cities protect nature. People who live in high density cities have smaller carbon footprints and consume fewer physical resources than elsewhere. Cities also raise productivity and incomes and improve reported wellbeing.

The Harvard economist Edward Glaeser points out the error of opposing urban growth in the name of the environment and wellbeing:[2]

> *Manhattan and downtown London and Shanghai, not suburbia, are the real friends of the environment. Nature lovers who live surrounded by trees and grass consume much more energy than their urban counterparts… Traditional cities have fewer carbon emissions because they don't require vast amounts of driving. [New York] has, by a wide margin, the*

[2] Edward Glaeser (2008), *Triumph of the City: How Our Greatest Invention Makes Us Richer, Smarter, Greener, Healthier, and Happier.* New York: Penguin Press.

least gas usage per capita of all American metropolitan areas… New York State's per capita energy consumption is next to last in the country…

Americans who live in metropolitan areas with more than a million residents are, on average, more than 50 percent more productive than Americans who live in smaller metropolitan areas. The income gap between urban and rural areas is just as large in other rich countries… There is a myth that even if cities enhance prosperity they still make people miserable. But people report being happier in those countries that are more urban…

Good environmentalism means putting buildings in places where they will do the least ecological harm. This means that we must be more tolerant of tearing down the short buildings in cities in order to build tall ones, and more intolerant of the activists who oppose emissions-reducing urban growth.

If urban areas protect the environment by putting many people in one place, then the application of environmental bottom lines in urban areas will harm the natural environment. Granted, urban areas materially disrupt the natural environment. However, people have to live somewhere and having more people in one place works out better overall for the environment.

Thus, the government's proposal to apply standards for the natural environment inside urban areas is likely counterproductive. Environmental bottom lines could stifle urban densification and growth, raising the average citizen's carbon and energy footprint.

Towns and cities are also sufficiently distinct from other land uses as to justify separate treatment in planning systems.

Within urban areas, the essential task of planning is to protect amenity. Property owners demand protection from spillovers from neighbouring properties. Comprehensive planning systems supply that protection. Planning is the promise that factories and high-rise apartment buildings will not go up next door.

Property owners, especially home owners, demand protection from adverse effects from neighbouring properties because there is considerable value at stake. Homes are often the most significant asset on owners' balance sheets. Many property owners cannot avoid or hedge this risk through diversification. A property's value is materially influenced by land uses in adjacent properties.

Accordingly, the demand for amenity protection is a titanic force that any planning system must respond to if the system is to endure. The environmental benefits of densification in cities cannot be accessed under a planning system which fails to protect amenity. Homeowners will overwhelmingly oppose most developments. Arguably, the difficulties developers have endured trying to build higher density accommodation in cities has resulted from the mishandling of urban amenity in the RMA. The government should consider whether its proposed system would allow a London, Paris, or New York to be built in principle, and with it all the environmental and wellbeing benefits those cities bring.

5. PLANNING CANNOT DELIVER MOST OF THE OUTCOMES IN SECTION 8

The planning system cannot deliver most of the outcomes listed in section 8 of the NBA. Outcomes include the natural environment, culture, the Treaty of Waitangi, urban growth, and climate change mitigation and adaptation.

A guiding principle of the reforms should be to give the planning system the tasks for which it holds comparative institutional advantage. We think the government has superior alternatives besides planning to deliver most of the outcomes in section 8.

The exception is urban amenity. In urban areas, planning's core function is to separate incompatible land uses – to keep the six-storey apartment block away from homes, for example. This was the original task for the first comprehensive planning systems early in the 20th century.[3]

Our concern is that the worthy outcomes of section 8 of the bill will not be delivered if planning is the wrong mechanism to deliver most of those outcomes.

Planning is especially unsuited to reducing greenhouse gas emissions, for example. For planning to reduce emissions, authorities must have access to information they cannot obtain. Specifically, planners must be able to understand what land uses will emerge in the alternative to any plan or consent. Without that information, planners will have no way to know whether their plan or resource consent will ultimately raise or lower emissions.

Nor can planning protect wellbeing if planners do not have access to tradeoffs between emissions and non-emissions objectives. Even if a particular project reduces emissions, wellbeing is harmed if each tonne of avoided emissions consumes many times more resources than other mechanisms besides planning would have required. We will miss our emissions targets with a planning system that reduce emissions in isolation, without regard for opportunity costs.

Emissions reduction is a *co-ordination problem*. The fundamental problem for society is to work out a way to avoid spending, say, $1,000 to reduce a tonne of emissions when there are opportunities elsewhere in the economy to reduce emissions for $10 per tonne. (Cost effectiveness matters because our emissions targets are ambitious enough that reducing emissions at a high cost per tonne will bankrupt too many households and businesses before we reach our targets.)

Consents are particularly unsuitable as a means of reducing emissions. The reason is there are so many consents and every consent is its own silo which sets its own implicit carbon price. As a result, consents are an arbitrary and ineffective way to reduce emissions. Vetoing a development or demanding changes to a development based on greenhouse gas emissions, regardless of opportunities to lower emissions elsewhere in the economy, guarantees spending more to reduce emissions, jeopardising emissions targets.

It is important to separate emissions from things which reduce emissions. Planning is an essential input for the supply of public transport, for example, and public transport can reduce emissions. However, that does not make planning fit for purpose for reducing emissions *per se*.

There is no reason to press planning into action on a problem it cannot solve when the government already has a mechanism in place that is fit for the purpose of reducing emissions: a carbon price.

Whether it is in the form of cap-and-trade or a tax, a carbon price confronts emitters with the cost of greenhouse gas emissions. Carbon pricing affects the costs of goods and services in proportion to their carbon content.[4] Emissions come down as consumers respond to higher prices for emissions-intensive products by switching to greener alternatives.

[3] For a history of zoning see William Fischel (2004), "An Economic History of Zoning and a Cure for its Exclusionary Effects," Urban Studies 41(2). Available here.

[4] "Carbon" refers to all greenhouse cases.

A carbon price will also influence consumer demand for different land uses if it is credible and sufficiently comprehensive. Other things being equal, a carbon price will raise demand from property buyers and tenants for land uses with smaller carbon and energy footprints. Developers will anticipate a greater willingness to pay for lower emissions housing and work spaces if buyers and tenants are confronted with an emissions fee in the form of a carbon price.

It is a common misunderstanding that the emissions benefits of a carbon price depend on buyers and tenants making advanced calculations of the cost of living effects of current and future carbon prices. This is not correct. Emissions come down as consumers respond to the prices in front of them. As the carbon price changes the relative prices of electricity, petrol, public transport, and so on, it will raise the rewards for living within walking distance of work or a train station. Consumers and businesses will respond to changing prices due to the ETS just as they would to other price signals in the economy.

There is more to unpack than we can cover in this submission. While we acknowledge there is general scepticism about carbon prices, we ask MPs and officials to consider the possibility that using carbon prices to influence land uses may be a more coherent, effective, scalable and sustainable way to reduce emissions. The model is in two parts:

- A carbon price, which raises consumer demand for green alternatives.
- A planning system which responds to consumer demand.

6. PLANNING CANNOT DIRECTLY REDUCE EMISSIONS UNDER AN EMISSIONS CAP

The reference to climate change mitigation in the NBA is mostly futile because the government has already capped emissions from most of the economy via the Emissions Trading Scheme (ETS). The main exclusions from the ETS are livestock emissions and international flights. Both are significant sources of emissions, but are likely to enter some form of an emissions cap in the next few years. The ETS covers nearly all emissions from urban areas.

The ETS is a cap-and-trade scheme. The government sets the cap according to the number of tradeable emissions permits it issues. Emitters must purchase and surrender permits back to the government, one permit for each tonne of emissions. The government has committed to only issue a limited number of emissions permits and issues a declining number of permits each year. Effectively, the ETS is a sinking lid on emissions.

Thus, if planners were to successfully lower emissions by one tonne, that frees up one emissions permit for somebody else to use. The NBA cannot reduce overall emissions under a binding emissions cap. To the extent that the NBA forces a given quantity of emissions to come down via high-cost rather than least cost channels, the NBA detracts from our emissions targets.

But this does not mean a reformed planning system has no role in reducing emissions. Planning can indirectly assist emissions reduction by removing barriers to changing land uses. A more flexible planning system will give households and businesses greater opportunities to respond to the carbon price by reducing emissions.

The principle for the treatment of emissions in planning which provides the best opportunity to lower emissions is **a level playing field for emissions**. This means equal treatment of each tonne of emissions from all sources and for all land uses. A level playing field best supports the discovery of the most effective ways to reduce emissions under the ETS cap.

Accordingly, given planning can only indirectly support emissions reductions under a cap, we suggest the government strike all references to mitigation in the NBA, or place the burden of proof on the Minister for the Environment and planners to show any rule or consenting condition reduces emissions taking into account the effects of the ETS.

7. FUNDING BY TAKING

The exposure draft of the NBA shows the government wants to do more than just restrict land uses to maintain existing outcomes. The bill includes positive terms like "restore," "improve" and "promote."

Without any identified funding source, the only apparent way to fund improvements will be by taking. That is, by parlaying a veto over changes in land use to fund public goods. Another term for this type of funding is expropriation.

Taking will naturally arouse opposition that could end up being counterproductive to the government's goals for the reforms. For example, there has been resistance to Special Natural Areas (SNA) designations. Had local or central government purchased habitat maintenance and wetland restoration, they might have seen a different public response.

Public goods including environmental protection should be funded legitimately, transparently and by rule of law. Regulatory taking is none of those things.

Accordingly, we suggest either reducing the scope of the NBA to exclude improvements, or amending the NBA to add a principle of compensation for the taking of property.

8. NO RECOGNITION OF THE ROLE OF PROPERTY RIGHTS

The reform of the planning system must be built on an understanding of the relationship between property rights, the environment, and wellbeing. Security of property is fundamental for investment, a significant driver of long-term wellbeing. Whatever form the new planning system takes, it will be overlaid on a system of private and state property rights. The interface between the two systems is crucial given the purpose statement.

We note that in the 87 pages of the exposure draft and explanatory note for the NBA, property is mentioned only twice. Both times, this is in relation to managed retreat from climate change, which implies taking.

The government cannot hope to succeed with its reforms if they are not based on an understanding of the relationship between property rights and wellbeing.

9. CONFLICTING PURPOSES AND OUTCOMES

The NBA has conflicting elements, which is acknowledged by the Parliamentary paper. It is not clear how the NPF can resolve these conflicts.

The purpose statement has two elements. One is to uphold Te Oranga o te Taiao, the other to support current and future wellbeing. The bill defines wellbeing as including social, economic, environmental, cultural, and health and safety outcomes. Te Oranga o te Taiao includes environmental health and interconnectedness, and the "intrinsic relationship between iwi and hapū and te taiao".

No land use can deliver all of these purposes. Equally, no activity can achieve all of the outcomes in section 8. The fundamental question is what process will manage the unavoidable conflicts between these purposes and outcomes.

The government's answer is the National Policy Framework, which will be drafted by the Minister for the Environment. We have no details about how the NPF will work. However, it is difficult to imagine any way for a planning document to make sense of the conflicts and tradeoffs between so many outcomes.

There is no principled way to optimise for two objectives, in this case the twin purposes of Te Oranga o te Taiao and wellbeing. Multiple purposes threaten to make planning decisions arbitrary. There can be no accountability for decisions against multiple objectives. Purposeful management through time is impossible.

The conflicting elements in the NBA's purpose statement will effectively grant to the Minister, Planning Committees and consenting officers an open-ended license to impose costs and restrictions on property owners regardless of the costs or benefits, or the desirability of well-defined and protected property rights. Again, the NBA seems on track to repeat or aggravate the mistakes of the RMA.

10. REGULATION IS INAPPRORPIATE

> *We should never forget in this House that those broad regulation-making powers that were given to the executive just after World War II sat on the books for decades and were not abused until Muldoon came along about three decades later and used the regulation to impose a price freeze, a wage freeze, and a rent freeze through taking executive action by regulation, not through this House… I ask again: who in their right mind would be handing those powers across to a Minister?*
>
> *– Hon David Parker, 14 March 2017, at the second reading of the Resource Legislation Amendment Bill*

> *… if you are Minister of the Environment, you are eventually Minister of Everything.*
>
> *– Professor Aaron Wildavsky, Berkeley School of Public Policy*

As it is presently drafted, the NBA will delegate open-ended executive powers to determine how land is used in this country. The Minister and Planning Committees will be empowered to change or amend the NPF and plans by decree without Parliamentary debate or approval.

The New Zealand Initiative strongly opposes the use of regulation to give effect to the NPF and regional plans.

As Hon Parker said in March 2017, there is a tendency for those proposing such powers to assume that it is people like themselves that will be exercising them. That view is short-sighted and unconstitutional. The test of the quality of constitutional safeguards is how well they protect the people from those who would abuse the powers conferred upon them. New Zealand's constitution was tested by the events leading up to the 1984 General Election. Successive governments had preserved draconian wartime powers in the Economic Stabilisation Act 1948, which delegated

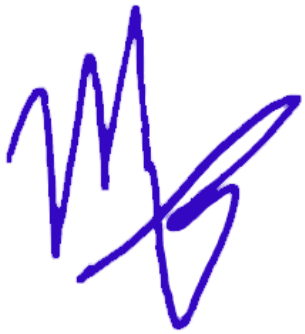
sweeping executive powers by order in council. It was only a matter of time before that power was abused. The Act was repealed in 1987.[5]

Our submission is that regulation is an inappropriate way to give effect to the NPF and regional plans. It is an accepted constitutional principle that Parliament should not delegate the power to tax. The taking of property rights without compensation or consent is the power to tax. There is no possible justification for the sweeping executive powers contemplated in this bill.

11. CONCLUSION

The proposed arbitrary and potentially all-encompassing powers to be conferred on executive government are draconian, unconstitutional and utterly unjustified as a response to any identified problem to do with land use. The NBA proposes to give the current and future Ministers for the Environment the power to regulate everything – every aspect of how we live, work and play. The Natural and Built Environments Bill is unconscionable in a democracy.

Thank you for considering this submission. We would welcome the opportunity to discuss the reform further with the Select Committee, ministers and officials.



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[5] https://teara.govt.nz/en/constitution/page-8