
AUCKLAND UNITARY PLAN

Report To: Unitary Plan Political Working Group

Report Name: Degrees of intervention/regulation

Executive Summary

The purpose of this report is to provide a discussion on the implications of adopting different levels of regulatory intervention in the preparation of the Auckland Unitary Plan. The first matter to be addressed is the establishment of an agreed position on the continuum from a discretionary or market led plan structure to a highly regulated or directive planning regime. The second decision relates to how the plan should address the dual principles of providing certainty of outcomes while enabling flexibility for innovation and change.

Experience with the RMA over the past 20 years has revealed a shift from an effects based approach that focussed on individual sites or areas, toward a more directive approach that focuses on desired outcomes. National policy guidance has become more directive and prescriptive in terms of matters that district and regional documents need to address and how should this be done.

Three options for a suitable unitary plan approach are examined. The first option focuses on the maintenance of the status quo in terms of the current level of regulation versus market intervention. The second option proposes greater use of Council's other legislative and budgetary mechanisms to replace some of the matters currently addressed by the RMA. The third option envisages a unitary plan that is outcome focused and derived from the Auckland Plan's directives. It is more directive in terms of the outcomes to be achieved by its objectives and policies, than is the case in most current district plans, but provides an opportunity for new innovative approaches to be adopted. The level of regulation is based on decisions addressing two important presumptions. The first is that the more important the quality of the outcome sought, the greater the level of direction required. Secondly all matters in the plan need to be evaluated against the test of planning burden relative to positive planning gain.

No specific approach is recommended to balance how to provide planning certainty while enabling flexibility. This will vary by issue, resource or area. The general second order principle for the unitary plan of planning burden relative to planning gain is considered to be equally relevant to determining this balance.

Recommendation/s

- a) That the report be received.
- b) That the Unitary Plan Political Working Party adopt Option 3 – Outcome Led Unitary Plan with more targeted regulation as the preferred model for managing the continuum between a market led or a highly regulatory plan and for providing a balance of plan certainty and flexibility.

Context

What do we mean by levels of appropriate intervention?

The Resource Management Act by its very nature intervenes in the actions of individuals in terms of how they use and develop natural and physical resources. However it also provides considerable flexibility on the level of this intervention. One end of the intervention continuum is the use of the minimum amount of regulation, with reliance being placed on the operation of market forces and other non regulatory actions to identify and deliver the resource management outcomes of the Act. At the other end of the continuum, is the high level of regulatory control, with detailed and directive policies and rules. Regulatory intervention at all levels may also be accompanied or supported by non statutory initiatives of the Council.

Background

The Regional Development and Operations Committee agreed at its meeting on 13 April 2011 that the unitary plan will include the functions of a regional policy statement and the district and regional plans of the Council. This brings together for the first time in Auckland and indeed in New Zealand, the three main statutory RMA instruments of local government. Final decisions are yet to be made on the timing of when all these different policy documents and plans will come into the overall unitary plan umbrella. However the fact that Council envisages a final single unified planning document for the region impacts on how the Working Party should determine the level of appropriate intervention to be taken by the plan.

District Plans

Regional and district policy and planning documents have the same purpose set out in the Part II of the RMA. However they vary in how they undertake their responsibilities. The district plan has a key impact on how private individuals can use and develop their own land and buildings, particularly where an owner wishes to change the use of the land or undertake development on it. The impact from the individual landowners' point of view can be both beneficial – ie when the district plan allows or enables someone to do something, or negative if the plan prevents or restricts what can occur on the land. Conversely the impact of the same district plan rule can be perceived differently by other members of the community, depending on whether they are a neighbour, or have a specific issue or concern (eg local community group), or wish to participate in the outcome of a project.

Because district plan rules impact on private property rights, there always exists a fine balance between imposing rules to achieve a desirable outcome for the wider community (and in recent years rules have often been imposed to prevent a negative impact) and restricting too severely the actions of private land owners on their own properties, by either unreasonable controls or excessive regulation.

Regional plans

In contrast regional plans deal with the use, development and protection of natural resources that are principally in 'the commons', namely the coastal marine area, air and freshwater. In the case of land management, the regional function relates to soil conservation, protection of water quality and natural hazards management, rather than land use per se. The RMA restriction is that no one can use or develop these natural resources unless a rule in a regional plan or a resource consent allows them. This is the opposite presumption to the enabling presumption relating to the use of private land under district plan management. Debate on the first generation regional plans focused on the acceptable balance to be struck between protection of natural resources and their use and development. For some resources, such as air quality, the beds of rivers and streams and parts of the coastal marine area, the RMA was the first time a comprehensive regulatory regime was put in place.

Changes in the RMA Environment since 1991

Debates on the role of regulation versus the operation of market forces (or minimum regulation) formed part of the enactment of the Resource Management Act in October 1991. Directions from the then Minister for the Environment (Hon Simon Upton) emphasized the management of adverse effects on the natural environment, rather than the management of activities. This approach generally saw the imposition in district plans of controls that were designed to manage the external impacts of a development beyond the site boundaries, rather than managing either internal site impacts, or how a development fitted into the context of the surrounding neighbourhood or area. The role of the district plan was to set the minimum performance standards necessary to “avoid, remedy or mitigate adverse environmental effects” and leave the achievement of quality outcomes to free market mechanisms.

Lessons Arising from First Generation District Plans

Auckland’s current district plans gave effect to this national directive to varying degrees. The operative Auckland Isthmus District Plan was prepared in the early 1990s with the then council wanting to increase flexibility and discretion to the private property owner with the adoption of a minimum regulatory approach sufficient to mitigate adverse effects on the natural environment. This approach led to a number of poorer quality urban developments, particularly apartment blocks and terraced housing, and an emerging political, community and developer concern over the loss of amenity values in residential neighbourhoods and business areas. As a result a number of plan changes have been implemented to address urban design and amenity controls in the plan.

Other district plans such as the Manukau, North Shore and Rodney plans followed similar approaches, focusing on the management of adverse effects and avoiding prescriptive provisions and planning outcomes. The Waitakere City District Plan has the most overtly effects based approach. Instead of focusing on the more traditional activity based zones, the plan is drafted around natural environment based management areas and focuses on adverse effects of activities on the natural and physical values of these areas. This effects-based structure made the district plan complex to understand and use, repetitious in parts and rules rather than policy focused.

Experience with first generation district plans has shown that a minimum regulation approach cannot be relied on to deliver consistently high quality developments and high quality environments, or even to require the types of outcomes the council imagined when it approved the rules. Where a high quality outcome, as defined by the council, is critical, experience has confirmed that intervention is necessary to achieve this. This intervention can be in the form of regulation or incentives. However where incentives are used these need to be attractive to the developer, affordable to the community and effective in achieving the outcome sought.

A common outcome of the first generation RMA district plans was the unexpected use of business zoned land for mixed retail activities, of which the “big-box retail” is the most high profile example. This unplanned take up of business land has compromised the employment capability of local areas and has resulted in a shortfall in the current regional supply of business land. District plans have responded by developing more area specific zones and detailed and prescriptive development controls to provide clear guidance on what should happen in the identified area and how and when this should occur.

Lessons arising from First Generation Regional Policy Documents and Plans

In the case of regional plans, the attainment of natural environmental outcomes was more closely prescribed by the provisions of the RMA itself, including the requirements of Part II and the Minister of Conservation’s approval role for regional coastal plans. There was detailed consideration of adverse effects on ecological values and water quality, with extensive matters to be assessed as part of any development proposal. Initial research was commissioned by central government on the use of market mechanisms such as emissions trading schemes for air

discharges and tradable water permits. However problems with their implementation at a national level have meant that there has been limited uptake of alternative market mechanisms.

The purpose of a regional policy statement (RPS) is “to state the significant resource management issues of the region and the objectives and policies for achieving integrated management.” However the development of an integrated strategy for the management of Auckland’s urban growth within a first generation effects based RPS was not widely accepted. This failure eventually led to the development of the non statutory Auckland Regional Growth Strategy in 1999 and the subsequent enactment of the Local Government Auckland Amendment Act (2004) (LGAAA) to give statutory recognition to the Growth Strategy and its RMA implementation through the regional policy statement and the district plans. The LGAAA process (RPS Change 6) involved the development of more directive and detailed provisions in both the regional policy statement and the district plans for Auckland.

New national policy guidance

Most of the first generation district plans and the regional policy statement were developed in the absence of national policy guidance. In comparison the new unitary plan must now “give effect to” the following national documents:

- New Zealand Coastal Policy Statement (December 2010)
- National Policy Statement on Renewable Energy Generation (May 2011)
- National Policy Statement on Electricity Transmission (March 2008)
- National Policy Statement on Freshwater Management (May 2011)
- National Environmental Standards for Air Quality (2008)
- National Environmental Standards for Telecommunications Facilities (2008)
- Hauraki Gulf Marine Park Act 2000
- Waitakere Ranges Heritage Area Act 2008

The national directives dealing with infrastructure require that as a minimum “regional policy statements and regional and district plans shall include objectives, policies and methods (including rules within plans) to provide for the development, operation, maintenance, and upgrading” of the relevant infrastructure. The Freshwater NPS is more directive in that it requires regional councils to set quality limits for all freshwater bodies (lakes, rivers and wetlands) in their region, establish methods to avoid over-allocation of freshwater and to have targets and implement methods to improve water quality, within a defined time frame. Methods may include statutory rules and non statutory techniques.

The second generation New Zealand Coastal Policy Statement (December 2010) contains lengthy and prescriptive policies on how the unitary plan must manage land and water in the coastal environment. It does for example, require that plans adopt a strategic planning approach to direct where, how and when urban development and other activities are provided for in the coastal environment. Other policies detail how specific activities should be managed (eg renewable energy generation, ports, aquaculture and public open space).

Auckland (Spatial) Plan

The Auckland Plan is being prepared under the Local Government (Auckland Council) Act 2009. Its relationship to the Resource Management Act is still subject to consideration as part of the

second round of RMA reforms. The Auckland Council's position is that its RMA policies and plans should give effect to the Auckland Plan.

The overall purpose of the Auckland Plan is to develop a clear spatial policy direction for Auckland's future growth and for the provision of infrastructure. It is seen as a key driver for other planning documents for Auckland Council and its CCOs, integrating and aligning strategic planning, regulatory control and financial expenditure. The unitary plan is a critical regulatory means by which the Auckland Council implements the Auckland Plan.

The Auckland Plan is focussing on the identification of physical, economic, social and environmental outcomes for the region and their successful implementation. This outcomes focus means that a more directive approach will be necessary in the unitary plan to provide greater certainty that the Auckland Plan outcomes will be achieved. The continuation of a more discretionary focus on the management of adverse effects is unlikely to achieve the same results.

Relevant Issues

There are three inter-related matters that need to be considered in reaching a decision on the level and type of appropriate intervention (or regulatory control) to be included in the unitary plan.

1 Determining the level of appropriate intervention (or regulatory control) in the unitary plan

The key issue to consider is where on the continuum of regulatory intervention from minimum regulation through to highly directive policies and controls, the Auckland unitary plan would be best placed to deliver the highest quality resource management and planning outcomes, and the strategic direction for Auckland as set out in the Auckland (Spatial) Plan, within the legal framework established by the Resource Management Act.

2 Striking a balance between plan certainty and plan flexibility

A related issue is the question of flexibility versus certainty in the development of the unitary plan rules. More detailed and directive provisions provide greater certainty of what is required from an applicant, the matters of concern to the council and the type of outcomes being sought, but reduce the flexibility to deal with new innovations or changes in circumstances as development proceeds. Comments received from land developers suggest that they prefer certainty instead of flexibility in terms of having clearly stated requirements in plans, which are applied equally to all parties. This provides a sound basis for investment decisions.

Other parties concerned with urban design or amenity outcomes often prefer more flexibility to accommodate the development specific details not easily incorporated in district plan rules, or to amend the proposals as implementation proceeds. One technique that has been used to manage large and complex developments has been the establishment of comprehensive development zones or areas, or the issuing of a global resource consent that gives approval in principle to the development, with subsequent details being agreed through non notified consent processes. The advantages and disadvantages of these approaches are still being assessed and legal comment sought. A separate paper will be presented on these techniques.

In the management of natural resources such as water quality, there are often different techniques to deal with contaminant management. One approach is for the plan to specify the environmental outcomes to be achieved and leave the decisions on how these can be technically achieved to the applicant. This approach has been used with mixed success in the regional plan dealing with the management of air, land and water. Debates often arise over what is a satisfactory technique to use to achieve the outcomes sought by the rules. The National Policy Statement on Freshwater Management supports the use of water quality standards, which is a prescriptive approach. How these standards are to be achieved is left to the council to determine.

Amendments to the RMA have provided greater flexibility to determine when an application for a resource consent should or should not be publicly notified. The presumption towards notification or non-notification is no longer tied to the status of the activity. This means greater certainty can be provided in the unitary plan on the consent assessment framework.

3 Ensuring Planning Gain exceeds Planning Burden

The decision on the level of appropriate regulatory intervention to be adopted by the unitary plan also needs to consider the issue of planning burden relative to planning gain. One of the on-going criticisms of the RMA has been the complexity of obtaining resource consent approvals and the time and costs associated with this. The last round of RMA amendments dealt with streamlining the consenting process. The development of the unitary plan provides an opportunity to review the level of regulatory control imposed, relative to the planning outcomes achieved through the plan process, both in terms of resource consents and plan changes and variations.

A first generation plan focus on the management of adverse effects resulted in rules in both district and regional plans identifying long lists of matters that needed to be assessed as part of any resource consent. Experience with these plans has shown that in practice not all matters are relevant, and there is often overlap and repetition. The preoccupation in dealing with all adverse environmental effects has meant that the planning burden generated from the myriad of plan requirements has in many cases outweighed the resultant environmental benefits.

Examples of how the planning burden relative to the planning gain can be reduced are:

- Ensuring the assessment requirements for a complex multiple use and multiple unit development are demonstrably different from those relating to simple projects such as the erection of garage or a house extension in an established residential zone.
- Using tools such as comprehensive development plans to address strategic alignment and broad environmental effects in an integrated way at the first stage and providing an easier consent path for consequential consents.
- Distinguishing between new development and maintenance, repair and extension activities to ensure that the latter activities are not unintentionally caught up in unnecessary consenting requirements.
- Using best practice guidelines (eg for sediment control) to permit activities such as earthworks, where previously a resource consent was required.

Options

Three options are identified as examples of how the council could implement different levels of intervention/regulation in the development of its unitary plan. They are:

Option 1: The Status Quo

This option sees the continuation of regulation in the unitary plan at similar levels and relating to similar matters as those existing in the current district and regional plans. While there would be a move to make the plans more consistent in their overall approaches, and to harmonise their current regulatory provisions, regulation would continue to operate in a mix of prescriptive controls and laissez-faire land use choices. This is likely to see a hotch-potch of enabling or prescriptive provisions in different areas of the region.

The rules would continue to be fairly prescriptive and lengthy in terms of the adverse effects to be addressed and how this should be done. There would continue to be a focus on management at the local site level. There would be few if any prohibited activities and there is flexibility for non-complying activity consents to be sought and obtained, either by the initial decision maker or by appeals to the Environment Court. There would be the on-going ability to apply for private plan changes to address new or site specific developments. New rules would be introduced to address the new provisions required by the national policy statements and national environmental standards as required.

This option provides the most certainty in terms of minimal change to current planning controls, including the public notification provisions.

Option 2: Reliance on greater Auckland Council action through its other legislation and approaches

This option would still require a unitary plan, but the Auckland Council would take a more active role in terms of its Local Government Act responsibilities to achieve sustainable management outcomes, rather than just relying on its regulatory powers under the Resource Management Act. This could involve a diversity of actions including:

- Council acting as land development agency, solely or in conjunction with the private sector
- Greater use of incentives, advocacy, education, private development agreements and bylaws.

Although this option operated in previous district and regional councils, the resources given to non regulatory functions varied significantly from year to year according to council's budgetary decisions, with funding stopped to some non regulatory functions in some years. Replacing regulatory methods imposed through district and regional councils with more non-regulatory methods will require a consistently available and adequately sized budget for this work. The role of public participation would be changed significantly, with less reliance on RMA processes and greater use of Council's powers and the consultative processes under the Local Government Act.

Option 3: Outcome led unitary plan with more targeted regulation.

This option recognises and gives effect to the Auckland Plan's strategic directives within the legislative framework of Part II of the RMA. It also incorporates the national guidance set out in the new national policy statements, which involves greater levels of prescription than was previously required. The unitary plan policies specifically address the details set out in the higher planning documents and are drafted to be outcome focussed.

The need for a rule and the level of that rule (permitted v discretionary activity) is determined on the basis of whether it is critical that the outcome be achieved, or whether it is merely a matter that may be nice to have, but not essential. Where an outcome is identified as critical, a higher level of rule control is to be preferred. A second test for a rule is whether it is necessary to give effect to the Auckland Plan, or whether other mechanisms outside the unitary plan can do this better.

When outcomes are clearly identified for the planning issues in Auckland, then the unitary plan provisions to enable their achievement can be more targeted to these outcomes and assessed against clearer criteria. This will mean a move away from an adverse effects management focus to the identification of outcomes sought for an area and managing the factors that will achieve these outcomes. A separate issues paper on outcomes based planning will be presented to the Political Working Party, which will provide more detail on this approach. An outcomes approach also provides the opportunity to remove redundant or repetitive conditions or assessment standards attached to rules. There is a reduced need to have a broad range of general rules addressing every possibility or potential effect, thereby reducing the burden to plan users. This option provides a good opportunity to consider more innovative approaches to land use control.

The establishment of a regional strategic framework for the management of Auckland's natural and physical resources, derived from the overall direction stated in the Auckland Plan, will require a level of prescriptiveness in terms of regional outcomes, including the identification of areas for protection and for development and the discussion of potential tradeoffs between the achievement of different outcomes in different areas. Having a more directive regional framework should provide fewer opportunities for private plan changes. Greater use would be made of the non-notification provisions of the RMA to reduce time and costs associated with the resource consent process.

Evaluation of options

Option 1: Status Quo – Continuation of existing plan approaches

Benefits/Advantages	Costs/Disadvantages
<ul style="list-style-type: none"> • The focus is on getting greater consistency amongst plans, rather than changing the overall level of regulation. • Easiest to implement, because dealing with tested approaches. • Still enables high levels of local flexibility through use of non complying activities and private plan changes. • Participants are already familiar with the current rules and approaches. 	<ul style="list-style-type: none"> • There is no consistent status quo among district and regional plans, so some realignment of existing approaches is necessary. • Emphasis continues to be on the local site, rather than dealing with cumulative effects and region wide matters. • Difficult to implement regional consistency in face of private plan changes. • Opportunities now presented to remedy defects evident in current approaches to district and regional plans will be lost.

Option 2: Use of other regulations and mechanisms

Benefits/Advantages	Costs/Disadvantages
<ul style="list-style-type: none"> • Opportunities for joint public-private sector partnerships • Nature of public participation likely to reduce as more decisions made through LGA mechanisms. Removes appeal rights to Environment Court. This is likely to speed up decision making. • More direct investment will result in remedying known deficiencies in community infrastructure such as parks, roads etc. 	<ul style="list-style-type: none"> • Still have to have a minimum level of RMA control. • Longer roll out time for non regulatory approaches. • Greater risk of disconnect of various tools, so lesser certainty of outcomes being achieved • Public participation role likely to reduce as more decisions made through LGA mechanisms. Likely to be unfavourably viewed by public.

Option 3: Use of more Targeted Regulation

Benefits/Advantages	Costs/Disadvantages
<ul style="list-style-type: none"> • Approach aligns Auckland Plan and RMA documents more closely. • Needs legislative link between Auckland Plan and RMA plans to fully function. • Opportunity to specify clear regional priorities and tradeoffs, rather than leaving policy decisions to Environment Court. • Use of policies and/or assessment criteria to determine outcomes provides flexibility to use different approaches to achieve these, rather than relying on single approaches prescribed by rules, provided consents are needed. • Opportunity to reduce repetition and 	<ul style="list-style-type: none"> • Some higher level outcomes reliant on determination of Auckland Plan. • Needs good policy writing and specification of desired outcomes. • Need to be able to “let go” of some rules or approaches previously thought to be essential.

consideration of unnecessary detail.	
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Summary of evaluation

Problems with effects based plans achieving anticipated outcomes of high quality has resulted in a move towards more prescriptive provisions in second generation plans and plan changes. New national policy documents anticipate a more prescriptive and outcomes focussed approach. Giving effect to the Auckland Plan points the unitary plan towards being a more strategic and outcomes focussed document that identifies areas and resources for use, development and protection.

Reliance on non-regulatory approaches as a significant alternative to the use of the RMA (Option 2) is not considered timely or feasible within the timeframe for the production of the first generation unitary plan.

Continuation of the status quo (Option 1) by the patching together of existing district and regional plan approaches is unlikely to implement the outcomes envisaged by the Auckland Plan. It would be difficult and time consuming to bring region wide consistency to all district plans.

Option 3 is considered to be the most pragmatic approach to make the plan more simple and innovative. It gives greater recognition to the evolution of national and regional documents and district plans in the past 5-8 years. It is considered the best means of ensuring that planning burden is relative to planning gain.

No specific recommendation is made on the degree to which the unitary plan should provide certainty, while at the same time enabling flexibility. This balance is likely to vary depending on the issue, resource or area under consideration and the implementation techniques available under the RMA. Where a desired outcome is critical to the Council, then greater certainty should be prescribed in terms of the purpose and type of rule control. Where particular outcomes are less critical a more flexible control regime is appropriate. However decisions on the level of certainty versus flexibility also need to be made with reference to the second order principle of planning burden relative to planning gain.

Impact on Maori

First generation district and regional plans were often developed with greater emphasis on lower levels of regulation, a focus on-site environment effects management and non-notification of resource consents. This had implications in terms of the impacts on the more holistic Maori world view of resource management and their desire for greater involvement in the decision making process. Iwi groups often sought a level of consultation on resource consents that was at odds with district and regional councils' requirements for processing efficiency.

Preferred option 3 for the unitary plan is expected to facilitate a more holistic view of resource management in the region. The development of a unitary plan that combines regional and district planning functions together should enable better consideration of the inter-relationships between all parts of the natural world. It is also anticipated that some of the higher level governance relationships and strategic decisions will be addressed through the Auckland Plan process. If clear directives emerge from the Auckland Plan, the unitary plan can implement these through appropriate policies. It is likely that these provisions will assist the protection of important natural areas (land and water).

There is however potential conflict between the desire for the unitary plan to be user-friendly, innovative and outcome focussed by the use of more targeted regulation, and the potential aspiration of iwi authorities to have a greater involvement in resource consent decision making. Greater use of the non-notification provisions of the RMA to manage resource consent proposals may be seen by iwi as restricting their level of participation.

Implementation Issues

- 1 The development of an outcome focussed Unitary Plan is reliant on clear outcomes coming from the Auckland (Spatial) Plan to provide an agreed strategic direction. This is particularly important where there are clear trade-offs to be made between different growth management options or resource uses.
- 2 The Unitary Plan has to be developed within the framework set by the Resource Management Act, with its purpose of sustainable management of natural and physical resources. Not all matters addressed in the Auckland Plan can be successfully implemented through the Unitary Plan. For example, giving effect to social welfare outcomes is difficult through the RMA.
- 3 The Unitary Plan would be assisted by the delivery of clear outcomes from area spatial plans and precinct plans. However it is unlikely that all these local plans will be completed within the timeframe necessary for the first draft of the Unitary Plan.
- 4 Support from resource consents staff is necessary to apply a more outcomes focussed approach, rather than focusing on avoiding, remedying or mitigating adverse effects.
- 5 There is a significant workload to develop a draft Unitary Plan by December 2012.

Attachments

N/A

Signatories

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