SUBDIVISION IN A WIDER CONTEXT

At its most basic, subdivision is about making changes to legal boundaries to facilitate an outcome; whether that be the creation of a reserve, an apartment development, large parcels of land in anticipation of urban regeneration projects, or simply putting some metres between you and a neighbour from hell. It is, in other words, a mechanism for delivering a wider purpose; a simple device within a wider context.

This paper considers the wider context of subdivision and land development and reflects on some of the tools, requirements and alternative processes which can influence the way projects take shape. It first looks at a number of the alternative legislative schemes set up in recent years to fast track development (including subdivision), and considers some of the lessons from these examples which may usefully inform future legislation including the much touted but not yet here urban development authority approach. It touches on the role of, and tools available to, local authorities under the Local Government Act in relation to subdivisions, including the use of development contributions and development agreements to service growth and asks whether our preoccupation with new tools might prevent us from effectively utilising the tools we already have.

ALTERNATIVE LEGISLATIVE SCHEMES

The Mischief

The future development of New Zealand's urban areas is an important issue for us all. Our towns face a number of economic, environmental, social and cultural challenges. Meanwhile, more New Zealanders are choosing to live in higher-density urban areas, while others are finding it harder to own their own home. These changes mean that how we manage the development of our urban areas is crucial for achieving the nation's sustainable development goals.

These words are not from the pen of Minister Twyford or even former Minister Nick Smith. Rather, they form part of the Ministerial foreword to a proposal advanced in 2008 by the Honourable Trevor Mallard and fellow Ministers of the then Labour Government entitled "Building Sustainable Urban Communities". It is clear that for more than a decade (at least) we have been grappling with the challenge of our increasing urbanisation. How do we efficiently, sustainably and cost-effectively develop land for uses other than the rural purposes which, for so long, have been at the centre of our economy and psyche as a country? In answer to that question, successive governments have commissioned Productivity Commission reports, issued consultation documents and convened working groups in an attempt to find the silver bullet – it is safe to say we are still looking.

In general terms, section 11 of the Resource Management Act 1991 provides the basis for all subdivision. Put simply, subdivision can only be undertaken in circumstances where the activity is either authorised by a resource consent or does not contravene a rule in a district plan or National Environmental Standard.[1] In practical terms, nearly all subdivision is controlled by rules in a district plan and therefore a resource consent is required. With little geographical variation, district plans use subdivision and specifically minimum lot sizes to control urbanisation. Rural land will generally require lots at or in excess of 15ha, rural residential fringe land used for lifestyle blocks may go as low as 4ha, with lot sizes decreasing as the urban density increases. The minimum lot size in the highest density zones in Christchurch is 200m^2.

These patterns are set in place when a district plan is promulgated and it is usually very difficult to obtain a resource consent to change them in anything more than a minor way. Accordingly site specific plan changes are generally required to effect any fundamental change in a zoning pattern

[1] Resource Management Act 1991, section 11(1A). The subdivision must also be shown on a survey plan that is deposited under Part 10 of the RMA, or approved by the Chief Surveyor (for land not subject to the Land Transfer Act 1952). This general rule does not apply to Māori land within the meaning of the Te Ture Whenua Māori Act 1993, unless that Act otherwise provides. No person may subdivide land other than in those circumstances, and the other circumstances set out in section 11(1) of the RMA.

and consequent lot size and land use. Plan changes are often highly contested, and both time and resource hungry – unhappy bedfellows in the pursuit of a more cost effective approach to increased housing and development.

It is within this context that the RMA (and indeed district plans themselves) often comes under scrutiny when the political calls come for a faster, more efficient process in response to the demand for increased areas of development and urbanisation. This is because, within the existing legislative framework it has always proven somewhat difficult to acknowledge and quantify the benefits of thriving urban centres while still appropriately addressing the adverse effects and pressures that population growth places on existing communities.

Recent plan development processes in Christchurch and Auckland demonstrate this challenge all too well. With respect to Auckland's recently operative Unitary Plan, the end result must be acknowledged as a significant achievement given the condensed timeframe and the thousands of submissions from groups and individuals. However as a plan it cannot help but be general in its application. The ability to achieve strategic site specific goals throughout the process was limited (particularly given that very little time was allocated to consider submissions relating to individual sites or precincts), and as such, much is left to subsequent processes, all of which generally still provide for subdivision as an activity requiring further consents. This was true even of very large brownfields and greenfields sites that clearly lent themselves to the integrated, master-planned solutions which politicians continue to cry out for. Even when the outcomes proposed for those sites included many new houses – in direct response to the "housing crisis" – there wasn't scope in the process to seize the opportunity with both hands.

Outside of a once-every-ten-year full plan review process (which, in the Auckland example, didn't necessarily provide the desired response in any event) the RMA's solution to address the generality of plan documents has been the promulgation of bespoke plan changes. However even those take place within a framework where the promotion of sustainable management of resources is the goal, and at the heart of that exercise, "effects" of any given land development proposal - in all their various forms - are king. Although our urban centres are rapidly developing and the complexities involved in consenting strategic projects, flagship buildings, developments that involve multiple landowners, and the like are growing, our collective understanding of what constitutes a true adverse effect has not kept pace. As such, we continue to demand almost unlimited access to views, sunlight and high amenity even in the most urbanised parts of our city centres.

Various amendments to the RMA and the release of the National Policy Statement on Urban Development Capacity have sought to address some of these issues. Beyond these, special purpose legislation has been introduced to offer supplementary tools to accelerate development, including the Housing Accords and Special Housing Areas Act 2013 and, in response to a very unique context, the earthquake legislation in Christchurch – namely the Christchurch Earthquake Recovery Act 2011 and it successor the Greater Christchurch Regeneration Act 2016. Each offers lessons for future legislators seeking to assemble a "tool-kit" of powers to address urban development challenges, as well as those seeking to use them.

Housing Accords and Special Housing Areas Act 2013

The Housing Accords and Special Housing Areas Act 2013 (*HASHAA*) was intended as a short term legislative response to the issue of housing affordability by facilitating an increase in land and housing supply in certain regions or districts, identified as having housing supply and affordability issues.[2] Its legislative life expectancy (initially just four years but now set to expire in 2021) reflected its role as an immediate and short-term response to the housing affordability issues particularly in areas such as Queenstown and Auckland. Its development also came in concert with other mechanisms that were anticipated to deliver lasting solutions in the medium and long term, including reforms to the RMA and the streamlined Auckland Unitary Plan process.[3]

[2] Housing Accords and Special Housing Areas Act 2013, section 4.
[3] Jo Doyle *Housing Accords and Special Housing Areas Bill – Official's Report to the Social Services Committee* (Ministry of Business, Innovation and Employment, 25 June 2013) at 2.

The tool or the carrot offered by the HASHAA to achieve its aims is a streamlined consenting/planning approval process, offering more accelerated timeframes than what is available under the RMA, as well as the prioritisation of the HASHAA purposes over the standard RMA decision making considerations.[4] Achievement of a special housing overlay effectively amounts to a fast-tracked plan change or rezoning with applications for resource consent generally required to be processed within 60 working days.[5] Such consents cannot be publicly notified, and decisions on proposals for developments up to three storeys in height cannot be appealed.[6]

To access this process, developments must meet the requirements of a "qualifying development" in a "special housing area" as declared by the Governor General either on recommendation by the relevant territorial authority (if a Housing Accord is in place) or by the Minister acting alone.[7] Housing Accords specify how the parties (developer, Crown, Council) will work together to achieve the purpose of the Act and set agreed targets for residential developments. Special housing areas are established by Order in Council and, before recommending such an Order, the Minister must be satisfied that:

- there is appropriate infrastructure for the proposed special housing area to support qualifying developments;
- there is evidence of demand to create qualifying development in specific areas of the scheduled region or district; and
- there will be demand for residential housing in the proposed special housing area.[8]

"Qualifying developments" are defined as being predominantly residential and meeting specific criteria relating to:

- maximum height that houses and other buildings may be, or the number of storeys or floors; and
- the minimum number of dwellings to be built as part of the qualifying development, and the percentage of affordable housing.[9]

The criteria for qualifying developments may be amended on recommendation from the Minister.[10]

Since the legislation was passed in 2013, 11 regions/districts now have housing accords in place. However, a review of the development which has occurred under their auspices suggests that in isolation, special housing areas are not the solution many hoped for. Initial targets anticipated some 39,000 homes within 20-25 years of the new legislation. As at June 2017, of the 154 special housing areas that have been identified within the Auckland area, 56 are under development with 5,200 sections created and 5,500 consented dwellings. Under the two housing accords signed with Tauranga District Council, 13 special housing areas have been identified, providing capacity for over 3,000 homes. As at August 2017, 353 dwellings had been completed out of the 697 consented parcels.

The issues in obtaining the sorts of new subdivisions originally forecast appear therefore not to be solely about the perceived weaknesses of the RMA. Rather the issues on review appear to be two-fold – first that of sufficient incentives and secondly, particularly in Auckland, that of timing.

For a developer to deliver a qualifying development under a special housing area, there is a lengthy list of requirements before progress can be made. Suitable land must be acquired, in a location with proven demand and with no infrastructure constraints. Beyond that, in order to reap

[4] See for example Resource Management Act 1991, section 104.
[5] Housing Accords and Special Housing Areas Act 2013, section 41(1)(c).
[6] Housing Accords and Special Housing Areas Act 2013, sections 53 and 78.
[7] Housing Accords and Special Housing Areas Act 2013, sections 16 and 17.
[8] Housing Accords and Special Housing Areas Act 2013, section 16(3).
[9] Housing Accords and Special Housing Areas Act 2013, section 14(1).
[10] Housing Accords and Special Housing Areas Act 2013, section 15.

any benefit from the special process, developments must be capped at a specified maximum height, they must be delivered within extremely tight timeframes, and they must contain an affordable housing component. The reward for doing so is a "streamlined" process with non-notification and an absence of appeal rights as the key incentives.

Assuming that a developer can deliver the goods in respect of a qualifying proposal, the question then becomes an issue of feasibility. Consideration has to be, and in our experience is, given in each instance to optimising the project. The streamlined process must be sufficiently attractive to justify forgoing a potentially greater return by restricting height, providing an affordable component or otherwise meeting the parameters of the special housing area. In other words, if a developer holds a suitable parcel of land in a market attractive location that can easily be serviced by necessary infrastructure, why not make the most of that opportunity? Forgoing the affordable component and height limits for the sake of an additional six months negotiating with Council may not seem such a bad trade for an experienced applicant, especially one with the knowledge that a housing crisis might be more than enough reason to grant consent for a quality development promising additional units.

The second issue which has been particularly noticeable in Auckland – arguably the location where special housing areas could have served their purpose most effectively – is that of timing. Introduced as a stop gap to ignite the market while the city waited for the promulgation of the first Unitary Plan, there was an unfortunate (or fortunate depending on perspective) overlap with special housing areas coming on-line just as intensive new zoning was applied wholesale across the entire city.

While special housing areas came hand in hand with a host of constraints in respect of affordable components and (on reflection probably far too conservative) maximum heights, suddenly Terrace Housing and Apartment zones featuring 4-6 storey permitted heights, and Mixed Housing Urban zones featuring 3 storey permitted heights, appeared everywhere at the stroke of a planner's pen. Developments significantly larger than those grudgingly handed out in special housing areas were able to be undertaken as of right, or as a result of similarly straightforward consent applications. Meanwhile, the intention of including affordable housing provisions in the Unitary Plan itself failed at the first hurdle – with none of those responsible for advocating for such provisions able to produce workable and enforceable rules. Developers seeking consent under the Plan were therefore free to offer their projects to the market as they saw fit without the constraint a special housing area would impose. It is little wonder then that the tool proved generally ineffective.

Variations on this example have played out in other parts of the country. In Canterbury, district councils faced with a new "product" have struggled to process the necessary HASHAA consents in the timely and efficient manner the streamlined process requires to provide benefit. The provisions which allow council's discretion to notify "adjacent" owners have often been expansively interpreted with the result that the development becomes as contested and protracted as a standard consenting process, albeit without the appeal risk. A failure to exercise the discretion to notify of course also carries with it risk – that of judicial review. For many councils struggling to understand what is being asked of them by central government this simply becomes another area of jeopardy and one in which the best response is to be conservative, in many instances defeating the purpose and intent of the legislation.

For these reasons, while not a complete failure, the special housing experiment has delivered only a portion of what was promised. Its greatest contribution therefore may be in the lessons that might usefully be carried forward into the new urban development legislation currently under consideration.

Recovery and Regeneration Legislation – Lessons from Canterbury

Though responding to a different kind of crisis, the special purpose legislation passed in response to the devastating sequence of earthquakes in Ōtautahi/Christchurch offers even more pertinent lessons for those looking to assemble legislative toolkits to accelerate development.

The Canterbury Earthquake Response and Recovery Act 2010, the Canterbury Earthquake Recovery Act 2011, and the Greater Christchurch Regeneration Act 2016 all granted extraordinary powers to the Crown particularly to enable the expedited recovery and regeneration of greater Christchurch. From demolition of buildings, compulsory acquisition, road stopping, and subdividing without resource consent, through to fast-track amendments to RMA documents to facilitate large developments, just about every "tool" that has been flagged for potential urban development authorities has been granted, tried and tested in the Canterbury context.

In relation to subdivision in particular, the legislation has also authorised the Crown to direct the Surveyor-General to approve any survey plan even where the cadastral survey dataset does not comply with the Cadastral Survey Act 2002 standards. In a region where land movement has caused havoc with property boundaries, tools like this (and those granted under the Canterbury Property Boundaries and Related Matters Act 2016) have provided streamlined, practical regulatory solutions which can avoid potentially significant delays to vital projects.

In addition to the tools, a version of an urban development entity itself is also currently established in Christchurch. Labelled an "urban development authority" by then Minister Gerry Brownlee, Regenerate Christchurch is an independent statutory entity charged to lead the regeneration of the Christchurch district. While the ultimate authority for the exercise of power still sits with the Minister for Greater Christchurch Regeneration, Regenerate Christchurch has been granted the role of "gatekeeper", assessing proposals which relate to the regeneration of the city and determining whether fast-tracked changes to the District Plan to facilitate them should proceed to the Minister for approval.

Like some of the submissions on the UDA proposal in 2017, the earthquake legislation has attracted significant disquiet (particularly initially) regarding the breadth of powers afforded to the Crown. Participation rights in decision making were - and continue to be – truncated from those the standard processes under the RMA would otherwise allow; most significantly, through the removal of appeal rights. While the majority of the Crown's actions under the legislation have passed without criticism or comment, on several occasions judicial review proceedings have followed with the Court's finding against the Crown on each occasion.

On the other side of the coin, much has been achieved under the legislation. Just over a year after the February 2011 earthquakes, a blueprint for the future of Christchurch central city was developed, drawing on over 106,000 submissions received from the "Share an Idea" engagement platform run by Christchurch City Council. The spatial framework outlined in the blueprint (centred around the public sector led delivery of significant anchor projects) was accompanied by a series of significant amendments to the Christchurch City District Plan which were announced one day and operative the next. No hearings, no appeals. These amendments (directed through the vehicle of the Christchurch Central Recovery Plan (*CCRP*)) have sought to create a particularly enabling planning environment in which the delivery of the blueprint and the broader vision of the CCRP can occur. Alongside the CCRP, various other recovery and regeneration plans have been approved to facilitate a wide range of actions, including the acquisition and clearance of 700ha of red-zoned land, the planning of the urban form of greater Christchurch through to 2028, and the repair, rebuild and reconfiguration of significant assets including Lyttelton Port. More targeted exercises of power have facilitated the expedited designation of the new Acute Services Building of Christchurch Hospital, and enabled the relocation and construction of schools, sports facilities and retail developments. Again, while public input was part of the process of developing these proposals, once they were approved and notified, they became operative, with no appeals.

The overwhelming lesson from the Canterbury experience is however that while regulatory issues certainly contribute to the failure of large scale development, they are by no means the only hurdle. The failed "Breathe" exemplar housing project in Christchurch provides perhaps the clearest example of this. Despite owning the land and having access to all of the fast-tracking powers available (including a particularly enabling designation), the Crown was unable to offer a sufficiently "de-risked" proposal to attract the investment required. The proposal, which was supposed to be the showcase for medium density living, has not advanced and the site has sat empty ever since.

Pleasingly, the UDA proposal by the previous National government and the recent actions of the current government indicates that the lessons of the earthquake legislation and the HASHAA have not gone un-noticed. The "Buying off the Plans" initiative launched by the Ministry of Housing and Development earlier this year involves the Government underwriting or purchasing new homes off the plans to de-risk suitable developments led by the private sector in exchange for accelerating a greater number of affordable "KiwiBuild" dwellings. On its own, this initiative is no panacea to many of the challenges that the public and private sector face in leading large scale development. However alongside a number of the other actions taken/proposed it would indicate a positive shift towards meaningful collaboration and partnership between the sectors.

LOCAL GOVERNMENT ACT 2002

When struggling to address issues such as housing demand that persist even as the political climate changes, the temptation is to look constantly for the next new idea, to develop new tools rather than polishing the old ones and re-examining them in the light of current circumstances. Instead of identifying new tools (which in and of themselves require time to promulgate, understand and apply), can we then make better and more efficient use of the legislation we already have in place? Beyond the RMA, does the Local Government Act 2002 already contain powers that might be better utilised to respond to projected growth?

The Local Government Act 2002 is the primary legislation governing the structure of local government, the corporate nature and powers of local authorities, and the purpose and objectives for which those powers may be exercised. It provides, in essence, the terms on which central government has determined to devolve power to local bodies to make decisions which can have significant impacts on the lives of their communities, including how urban growth is managed and supported. Tools including ability to require development contributions to service growth are not therefore granted to local authorities in isolation. The way these tools and others are used must accord with the statutory role and functions of local authorities as prescribed by the legislation, consistent with the purpose for which they are granted.

With that in mind, the question might be asked, are local authorities making the most of the tools available to facilitate growth in their districts? If not, what avenues are available to challenge the decisions that are made, for example in respect of the quantity and location of land earmarked for growth, the timing of infrastructure upgrades to service that growth, or the equity of contributions to infrastructure projects from individual applicants who are eager to get development underway ahead of district-wide land release strategies?

The Mandate

Sections 10 – 12 provide the overarching framework for local government decision making. Giving effect to the purpose of local government, as set out in section 10, is one of two statutory roles of local government, with the second being to perform the duties, and exercise the rights, conferred on it by or under the Local Government Act 2002 and any other enactment.[11]

The purpose of local government is two-fold; firstly to enable democratic local decision-making and action by and on behalf of communities, and secondly, to promote the social, economic, environmental and cultural wellbeing of communities in the present and for the future.[12] In performing its role, local authorities are also required to have particular regard to the contribution that a range of identified "core services" makes to its community, including network and public infrastructure, transport services and waste collection and disposal.

Section 12 then confers on local authorities what is known as the "general power of competence" or more precisely "full capacity…rights, powers and privileges" for the purposes of performing its role. This general power of competence is not unlimited; it is subject to the terms of the Local

[11] Local Government Act 2002, sections 11(a) and (b).
[12] Local Government Act 2002, section 10(1).

Government Act 2002, any other enactment, and the general law. Further, authorities must exercise their powers wholly or principally for their benefit of their respective region or district.[13]

Among the constraints within the Local Government Act 2002 are general principles which a local authority must act in accordance with in performing its role. These include (relevantly for present purposes): [14]

- Conducting its business in an open, transparent and democratically accountable manner.
- Undertaking its commercial transactions in accordance with sound business practices.
- Ensuring 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.
- Accounting for the reasonably foreseeable needs of future generations.

In addition to these general principles, subpart 1 of Part 6 of the Local Government Act 2002 also contains requirements and principles applying to decision making and consultation.[15] In short, in making decisions, local authorities must seek to identify "all reasonably practicable options" for achieving the objective of the decision, and assess the options in terms of their advantages and disadvantages.[16] Where it is a significant decision relating to land and water, the local authority must also take into account the relationship of Māori to the resource(s) in question.[17] While those are mandatory requirements, the way the local authority achieves compliance with those requirements (in a manner that is proportionate to the significance of decision) is a matter for the local authority to determine.[18]

Development Contributions and Development Agreements

Against that background, the ability to levy development contributions and the ability enter into private development agreements are examples of "hard tools" under the Local Government Act 2002 that local authorities can leverage to finance infrastructure and support growth, both of which are critical components in enabling greater urbanisation.

Development Contributions

The purpose of development contributions is to enable territorial authorities to recover from those persons undertaking development a fair, equitable, and proportionate contribution to the total cost of capital expenditure necessary to service growth over the long term.[19]

Development contributions may be required where the effect of development is to require new, or to provide additional, assets or increased capacity, and where as a consequence, the territorial authority incurs capital expenditure.[20] Importantly development contributions may not be used for the maintenance of those assets.[21]

Levying of development contributions is triggered on the granting of a resource consent (including subdivision), a building consent, or on the authorisation of a new service connection.[22]

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[13] Local Government Act 2002, section 12(2).
[14] Local Government Act 2002, section 14(1).
[15] Local Government Act 2002, sections 76 – 87.
[16] Local Government Act 2002, section 77(1)(a) – (b).
[17] Local Government Act 2002, section 77(1)(c).
[18] Local Government Act 2002, section 79.
[19] Local Government Act 2002, section 197AA.
[20] Local Government Act 2002, section 199(1). "Network infrastructure" means the provision of roads and other transport, water, wastewater, and stormwater collection and management. "Community infrastructure" means community centres or halls for the use of local community or neighbourhood, and the land on which they will be situated; play equipment located in a neighbourhood reserve; toilets for use by the public; where those assets are owned, operated or controlled by the territorial authority.
[21] Local Government Act 2002, section 204(1)(a).
[22] Local Government Act 2002, section 198(1).

In addition to the requirements and limitations within the primary legislation, a council's development contributions policy provides the critical mechanism for controlling how, and on what basis, development contributions are imposed. In particular, a territorial authority may only require a development contribution as provided for in a development contributions policy which meets the requirements of the Local Government Act 2002.[23]

A summary of the mandatory content for a development contributions policy is set out in **Appendix A**, along with the principles councils must take into account when exercising their powers.[24] These principles provide a useful starting point when navigating the regime, highlighting the important considerations that relate not only to how development contributions are calculated and imposed and the policy that governs them, but also how they are to be applied. At a high level they provide that:

- development contributions should generally be determined in a manner that is consistent with the capacity life of the assets for which they are intended to be used and in a way that avoids over-recovery of costs allocated to development contribution funding;[25]

- cost allocations used to establish development contributions should be determined according to, and proportional to, the persons who will benefit from the assets to be provided (including the community as a whole) as well as those who create the need for those assets;[26]

- development contributions should be used:

    - for or towards the purpose of the activity or the group of activities for which the contributions were required; and

    - for the benefit of the district or the part of the district that is identified in the development contributions policy in which the development contributions were required.[27]

- sufficient information should be made available to demonstrate what development contributions are being used for, and why they are being used;[28] and

- territorial authorities should ensure that development contributions are predictable and consistent with the methodology and schedules of the territorial authority's development contributions policy.[29]

The Local Government Act 2002 also prevents levying of development contributions in particular instances, specifically where:

(a) it has already imposed a requirement for a financial contribution under the Resource Management Act;

(b) the developer will fund or otherwise provide for the same reserve, network infrastructure or community infrastructure;

(c) the territorial authority has already required a development contribution for the same purpose in respect of the same building work, whether on the granting of a building consent or a certificate of acceptance; or

[23] Local Government Act 2002, section 198(2).
[24] Local Government Act 2002, sections 201 and 197AB.
[25] Local Government Act 2002, section 197AB(b).
[26] Local Government Act 2002, section 197AB(c).
[27] Local Government Act 2002, section 197AB(d).
[28] Local Government Act 2002, section 197AB(e).
[29] Local Government Act 2002, section 197(f).

(d) a third party has funded or provided, or undertaken to fund or provide, the same reserve, network infrastructure, or community infrastructure.[30]

It is fair to say that despite these clear parameters, the development contribution policies of many councils remain entirely impenetrable, unfathomable, and as such often unchallengeable. And yet, if this regime were to work fairly and effectively, it has the ability to be a game changer. The provision of suitable infrastructure is a critical feature of increased urbanisation.

Fast-tracking new zonings or consent pathways through any of the accelerated options outlined earlier in this paper will only be effective if the land in question can be appropriately serviced. Without the critical infrastructure required, such measures are simply lines on a map or words on a page, ineffective at providing actual development for real communities.

Despite this, little effort has been put into ensuring this legislation and the policies promulgated under it are working effectively. A review in 2014 lead to some amendments, best described as "tweaks" with no discernible shift in practical effect.

Development Agreements

Of particular interest in this regard is the use (or lack thereof) of development agreements.

The Local Government Act 2002 Amendment Act 2014 introduced a specific mechanism for territorial authorities to enter into development agreements with developers where the territorial authority has been approached by the developer or vice versa. "Development agreement" is defined in the Local Government Act 2002 as a legally enforceable, voluntary contract made under sections 204A – 204F for the provision, supply or exchange of infrastructure, land or money to provide infrastructure or reserves.

A development agreement must be in writing, signed by all parties and must include a description of the land to which it relates, and the details of the infrastructure that each party to the agreement will provide or pay for.[31]

Importantly, if there is conflict between the content of a development agreement and the application of a relevant development contributions policy in relation to that agreement, the content of the development agreement prevails.[32] While a developer may agree to provide infrastructure of a nature or scale that is additional to, of greater capacity than, or of a different type to the infrastructure that would have been provided if the development had been required to make a development contribution, a development agreement must not require them to provide this.[33]

Critically, development agreements are intended to provide flexibility in assessing how a developer's liability for contributions may be apportioned and enforced. Both the case law and the Local Government Act 2002 would suggest development agreements are not however an opportunity to increase or decrease the level of liability a developer has according to the whim of either party. A local authority must be able to justify a claim to a particular development contribution (whether obtained via private agreement or requirement) by reference to the authority given to it under the Local Government Act 2002.[34]

Used to great effect in many overseas jurisdictions, development agreements create opportunities to incentivise front-end funding for councils looking to invest in significant growth stimulation projects, but with limited means of covering the initial cost. While development agreements suffer from many of the same constraints as more traditional levy or taxation methods in that they are

[30] Local Government Act 2002, section 200(1).
[31] Local Government Act 2002, s 207(2).
[32] Local Government Act 2002, s207D(5).
[33] Local Government Act 2002, s 207E.
[34] *Neil Construction Ltd v North Shore City Council* [2008] NZRMA 275 (HC); see also *Ballintoy Developments Limited v Tauranga City Council* CIV-2007-470-410 at [14].

linked to development already in motion and rely on individual private investment, they can play a bigger role in funding infrastructure that stimulates and supports growth rather than simply playing catch-up.

The Government's $1billion Housing Infrastructure Fund is also step in that direction, offering 10 year interest free loans to high growth councils to support housing development. The largest portion of that fund (some $339.2 million) has been allocated to improving water and roading infrastructure in Redhills and Whenuapai in Auckland;[35] however that sum represents a drop in the estimated $110 billion bucket required for capital infrastructure projects nationally over the next 10 years.[36] The challenge for local authorities is that while they are largely responsible for the provision and maintenance of infrastructure to support the wellbeing of their districts and regions, their funding tools do not easily allow them to discharge that responsibility. That is particularly the case where, in high growth regions, the infrastructure deficit is significant, and urgent action is required. Debt ceilings in particular (imposed on local authorities through various mechanisms (including financial strategies, credit ratings and Local Government Funding Agency agreements)) constrain local authorities from taking on further debt to finance infrastructure projects.

These challenges are well known to both industry and the Government, which is currently investigating alternative methods to finance infrastructure projects.[37] Value capture mechanisms in particular (a form of financing which seeks to capture the future uplift in value of assets generated from public investment) appear to be gathering traction. Unlike development contributions, value capture through the likes of targeted rates allows the costs (and benefits) of long term assets to be spread through time, rather than imposing the burden on the first-in-time developers. Until those mechanisms (and the regulatory framework for delivering them) are in place however, development contributions and development agreements remain in place as the principal methods of funding infrastructure.

Non-Statutory Documents

As previously outlined, the growing focus on urbanisation (and the implications of poorly managed urban development) has placed increasing pressure on central and local government to develop both policy and regulatory responses to managing growth. In the last few years particularly, this has resulted in the proliferation of various growth strategies and vision documents developed by councils under their general power of competence. These documents do not have any formal legal effect (in the sense that other statutory documents are required to give effect to them or have any regard to them); however they are often used to inform the development of legal instruments which do dictate how land development and growth, and infrastructure to support that growth, is planned and funded.

The "informal" (in a legal sense) nature of these strategy documents has created a dichotomy. On the one hand, the relative lack of prescription (both in terms of content and process) provides local authorities with the freedom to think innovatively about how to tackle problems related to growth and land development – and how to engage with the community in identifying solutions. It also provides the community with the opportunity to engage with local authorities on those issues in a setting which is not dictated to, or constrained by, the sustainable management framework of the RMA, and its accompanying (often daunting) processes. This can have the effect of generating outcomes that are more integrated and holistic in focus, and which have been informed by a wider range of interests.

Without the prescribed process and a formal legal status however, these strategies/visions can be very difficult to challenge if, after engaging in the process, the "outcome" is unfavourable for any particular stakeholder. As there is no general right of appeal for decisions made by a local

[35] "Next step for housing infrastructure" (23 September 2016) Beehive.govt.nz <https://www.beehive.govt.nz/release/next-step-housing-infrastructure-fund>.
[36] National Infrastructure Unit, *Thirty Year New Zealand Infrastructure Plan 2015* (The New Zealand Treasury, 12 March 2015).
[37] Hon Grant Robertson "Productivity Commission to investigate Local Government funding and financing" (15 July 2018) Beehive.govt.nz <https://www.beehive.govt.nz/release/productivity-commission-investigate-local-government-funding-and-financing>.

authority under its general power of competence, aggrieved parties are heavily reliant on being able to point to some form of deficiency in the process in order to make a case for judicial review, the only form of judicial intervention open to them.

Despite the "informal" nature of these documents, they do however inform planning and funding decisions which can have significant financial implications for the local authority and the wider community. Not only do they provide the opportunity to obtain policy backing for preferred growth and funding options, a favourable outcome can also reduce the need for (and cost of) involvement in the development/review of the documents which then deliver that policy direction, such as district plans or long term plans. If, for example, a growth strategy envisages higher density residential development in certain areas, then the proposed second generation plan which is intended to be informed by that strategy may well notify zoning for areas to enable that purpose. While of course that may have happened anyway, the consultation process for the growth strategy provides an initial opportunity to influence where and how land development occurs.

With the introduction of the National Policy Statement on Urban Development Capacity, and the various monitoring and planning requirements which arise out of that, we may well see less of these Local Government Act 2002 growth strategy documents appearing. However they do provide a good example of how the broad discretion conferred on local authorities to achieve its purposes can be utilised more effectively, to address the housing challenge. Better and earlier input into crucial framework and policy documents is an existing option available to all interested parties – both public and private – and will deliver more streamlined plan promulgation and consenting outcomes in due course if properly used. Once again, the development of new tools is not necessarily always the answer.

Conclusion

The last decade has been characterised by mounting pressure to urbanise some areas of New Zealand. As demand has increased, many of our existing tools and processes have come under immense scrutiny and have been found wanting, either because they are no longer suited to the new circumstances we find ourselves in or as a result of political expediency. New approaches and ideas have been wheeled out on a consistent basis with few of them (with the exception perhaps of the earthquake legislation) offering the "game changing" cut through needed to deliver the desired results. Despite our desire for improvement, most development is still undertaken in accordance with the provisions of the RMA enacted nearly 30 years ago. Many of the operative district plans which control subdivision are 15 or more years old and may be 20 years old before their replacements are finalised. Our largest development proposals still struggle to fit within plan provisions designed many years earlier and site specific plan changes take considerable time and resources to pursue, all of which adds to the cost of development.

At the same time, councils are grappling with infrastructure requirements, either for new or replacements assets, all of which require funding. With councillors often elected on a platform of keeping rates low, development contributions are sometimes erroneously looked to as the panacea, neglecting the very specific controls that are in place to determine how such contributions can be levied and spent. Against this background, it seems clear that there is need for change. The urban development authority may provide that answer in some places but its mere existence also tells us that in many instances the existing interplay of legislation is not working in the ways our current development aspirations require. Whether more tweaks or wholesale change is the answer remains to be seen. In the interim we need to at least effectively use the tools we have got.

Appendix A – Development Contributions – Policy Content and Principles

Policy Content

Under the Local Government Act 2002, a development contributions policy must contain the following content:

(a) a summary and explanation of the total cost of capital expenditure that the local authority expects to incur to meet the increased demands for community facilities;[38]

(b) an outline of the proportion of the total cost of capital expenditure that will be funded by development contributions, financial contributions, and other sources of funding;[39]

(c) an explanation of why the local authority has decided to use the funding sources to meet the expected total capital expenditure;[40]

(d) identification of each activity or group of activities for which the development contribution will be required and the total amount of funding sought by development contributions;[41]

(e) an explanation of, and justification of, the way in which development contributions are calculated;[42]

(f) the significant assumptions underlying the calculations;[43]

(g) any conditions and criteria for the remission, postponement or refund of contributions or return of land;[44] and

(h) the basis of valuing land for the purposes of assessing money contributions for reserves.[45]

Section 111 of the Local Government Act 2002 also requires all development contribution policies to be prepared in accordance with generally accepted accounting practices.[46]

Principles

The Local Government Act 2002 sets out the following principles that all persons exercising functions and duties under the subpart must take into account when preparing a development contributions policy or requiring a development contribution:

(a) development contributions should only be required if the effects or cumulative effects of developments will create or have created a requirement for the territorial authority to provide or to have provided new or additional assets or assets of increased capacity:

(b) development contributions should be determined in a manner that is generally consistent with the capacity life of the assets for which they are intended to be used and in a way that avoids over-recovery of costs allocated to development contribution funding:

[38] Local Government Act 2002, section 106(2)(a).
[39] Local Government Act 2002, section 106(2)(b).
[40] Local Government Act 2002, section 106(2)(c).
[41] Local Government Act 2002, section 106(2)(d).
[42] Local Government Act 2002, section 201(1)(a).
[43] Local Government Act 2002, section 201(1)(b).
[44] Local Government Act 2002, section 201(1)(c).
[45] Local Government Act 2002, section 201(1)(d).
[46] Local Government Act 2002, section 111.

(c) cost allocations used to establish development contributions should be determined according to, and be proportional to, the persons who will benefit from the assets to be provided (including the community as a whole) as well as those who create the need for those assets:

(d) development contributions must be used—

(i) for or towards the purpose of the activity or the group of activities for which the contributions were required; and

(ii) for the benefit of the district or the part of the district that is identified in the development contributions policy in which the development contributions were required:

(e) territorial authorities should make sufficient information available to demonstrate what development contributions are being used for and why they are being used:

(f) development contributions should be predictable and be consistent with the methodology and schedules of the territorial authority's development contributions policy under sections 106, 201, and 202:

(g) when calculating and requiring development contributions, territorial authorities may group together certain developments by geographic area or categories of land use, provided that—

(i) the grouping is done in a manner that balances practical and administrative efficiencies with considerations of fairness and equity; and

(ii) grouping by geographic area avoids grouping across an entire district wherever practical.