Urban Development Bill

DLA Piper has prepared this article as a summary of the content of the new Urban Development Bill. It was introduced on 5 December 2019, had its First Reading on 10 December 2019 and has now been referred to the Environment Committee. Submissions are due on **14 February 2020.**

We have focussed on the new process proposed for urban development and the land acquisition powers. Of note, 'urban development' is defined to include housing for any purpose, development and renewal of urban environments (whether or not this includes housing) and development of related commercial, industrial, community or other amenities, infrastructure, facilities, services or works. We have then identified some of the implications for territorial authorities, regional councils and Māori.

This is a significant piece of legislation that gives central government significant powers in relation to urban development and creates a 'bespoke' resource management process for specified development projects.

General process for development

We have set out in the Appendix a step by step diagram that shows the process for proceeding with a development under this Bill, which incorporates the following steps:

- Selection of an urban development project
- Assessment of an urban development project
- Preparation of a project assessment report
- Decision on whether to establish a specified development project
- Preparation of a draft development plan
- Decision on draft development plan
- Effect of a development plan becoming operative

Land acquisition powers

The Bill gives Kāinga Ora the power to acquire land for 'specified works' that it is initiating, facilitating or undertaking. 'Specified works' are a work for the purpose of urban development and which includes 1 or more of the following:

- housing
- urban renewal
- a transport network
- water, energy, or telecommunications infrastructure
- a community facility
- a facility for emergency services
- a waste disposal or recycling facility
- a reserve or other public space
- a crematorium or cemetery (including urupā)
- a work to avoid, remedy or mitigate the effects of natural hazards or climate change
- the reinstatement elsewhere of a work located on land that is set apart, acquired, or taken pursuant to these provisions of the Bill
- any other work that is a public work within the meaning of section 2 of the Public Works Act 1981

However, where the work is to be used for a commercial or industrial purpose, 'specified work' is limited to where it is for community facilities, it supports the development of housing or it involves urban renewal.

The land that can be acquired for a specified work falls into three main categories:

1. Land containing an existing public work
2. Crown land or a part of the common marine and coastal area
3. Private land and other land

In each case Kāinga Ora may make a request to the Minister of Land Information for the transfer of land whether or not it intends to undertake the development itself or to transfer the land for the purposes of development.

Before making the request, the responsible Minister must consult the Minister for Treaty of Waitangi Negotiations (if the land is potentially needed for any future settlements) and obtain the consent of the Minister of Transport or the Minister of Conservation (as appropriate) if the request is to set apart a part of the common marine and coastal area (except where a development plan already provides for the setting apart).

For existing public works, the Minister of Land Information may, at Kāinga Ora's request, transfer an existing public work and transfer, acquire or take the land on which the public work is located. The transfer will be in accordance with the provisions for acquiring Crown land or other land where the land is owned by a local authority.

Where Crown land or part of the common marine and coastal area is being acquired the Minister may declare that land set apart for the specified work by notice in the Gazette.

Where private or other land is being acquired the Minister must do so in accordance with Part 2 of the Public Works Act 1981, which applies as if the specified work were a government work. The Minister must publish a notice in the Gazette, twice give public notification and serve a notice on the owner and persons with a registered interest in the land.

Where private or other land is acquired then compensation may be claimed in accordance with Part 5 of the Public Works Act 1981 or alternatively the person entitled to compensation can agree the compensation, of any amount and in any form, in writing with Kāinga Ora.

Once acquired, the land will vest in fee simple with Kāinga Ora, rather than with the Crown. The Record of Title for the land must note the specified work for which the land is held.

Kāinga Ora has the power to transfer land taken for specified work to developers. However, any transfer is subject to preconditions relating to a development agreement, consultation requirements, and compliance with particular requirements if the land is former Māori land or right of first refusal land.

The Bill places restrictions on the acquisition of land defined as 'protected land' (or in fact, the exercise of any power in the Bill in relation to this land) which is land that is 'absolutely protected from acquisition and development'. That land is nature and scenic reserves, national parks, conservation areas, wildlife sanctuaries, refuges or management reserves, Māori customary land, Māori reserves and reservations, any parts of the common marine and coastal area in which customary marine title or protected customary rights have been recognised, land that is a natural feature that has been declared by an Act to be a legal entity or person and the maunga listed in the Tāmaki Makaurau Collective Redress Act.

Other categories of land are protected from compulsory acquisition but may be developed using powers under the Bill if the owners of the land provide their prior consent. This includes Māori freehold land, certain types of general land held by Māori, land held by a post-settlement governance entity, and land held by or on behalf of an iwi or hapū if the land was transferred with the intention of returning the land to the holders of mana whenua. The Marine and Coastal Area (Takutai Moana) Act 2011 (MACA Act), is to prevail over the Bill in the event of any inconsistency, however no specific protection is provided in the Bill in respect of any area that is subject to pending proceedings under the MACA Act. The Bill is also subject to any Treaty Settlement Act or deed, and Te Ture Whenua Māori Act 1993.

Implications for territorial authorities

The specified development project assessment process (which is set out in detail in the Appendix) and short statutory timeframes for a territorial authority to respond to a draft report, highlight the importance of early engagement between Kāinga Ora and territorial authorities and the importance of dialogue on an on-going basis.

The implications of a specified development project being established are that in the transitional period (which starts once the development project is established by Order in Council and generally ends when the project's development plan becomes operative):

- The planning instruments that apply in a project area continue to apply.
- A local authority that has functions in respect of activities to be undertaken in a project area will continue to be the consent authority, unless it decides to transfer consenting functions under the RMA to Kāinga Ora.
- When preparing or changing a plan that would apply in the relevant project area, the territorial authority must have regard to the project area and project objectives to the extent that their content has a bearing on resource management issues in the district.

- When a plan change is being prepared, Kāinga Ora has the power to decide that the plan change or any part of it will not apply in the project area and to give written notice to the local authority of that decision. Kāinga Ora may only do so if it considers that it is reasonably necessary to make that decision in order to achieve the project objectives for the relevant specified development project. There is a right of appeal to the High Court on matters of law only in relation to the Kāinga Ora decision.
- During the transitional period, for an activity within the project area, if a resource consent application or application to change conditions is received for within the project area, then before consent may be granted, or a condition changed, it must give the application and certain information to Kāinga Ora for a decision from it. The application cannot be granted if Kāinga Ora decides it should be declined and conditions cannot be imposed that are inconsistent with that decision. There is a right of objection in relation to the Kāinga Ora decision.

Once a development plan for a specified development project is notified as taking effect there are significant implications for a territorial authority. For example:

- Kāinga Ora becomes the consent authority under the RMA for all resource consent applications in the project area, if a territorial authority would otherwise be the consent authority. The specific steps set out in the Bill apply to the processing of the application.
- By contrast, this is not the case if a regional council, the Minister for the Environment or the Environmental Protection Authority would be the consent authority. Consent authority status remains with those entities, albeit they will need to follow the specific steps set out in the Bill that apply to the processing of the application.
- Kāinga Ora also has monitoring and enforcement functions in a project area for resource consents which it grants, as well as for activities specified as permitted activities in the district plan or development plan.
- A designation in the project area, other than a designation for a defence area or nationally significant infrastructure, ceases to apply in the project area and only designations included in the development plan have effect in the project area.
- Kāinga Ora becomes the territorial authority for Notices of Requirement for designations within the project area.

As well as replacing many of their functions in project areas, territorial authorities need to be aware that the Bill sets out statutory tests for specified development projects, which are different to those under the RMA. This could result in different environmental outcomes to those under the RMA.

For example, similar to Part 2 of the RMA, clause 5 of the Bill sets out specified principles for specified development projects. In promoting sustainable management of natural and physical resources the matters of national importance in section 6 of the RMA must be recognised and provided for and particular regard must be had to the other matters in section 7 of the RMA. However, clause 5 of the Bill specifies that it is to be recognised that amenity values may change. The clause 5 principles, coupled with the requirement for development plans to not be inconsistent with the New Zealand Coastal Policy Statement and other national policy statements as opposed to the requirement to give effect to those instruments under the RMA, could result in a lesser level of amenity and environmental protection for a project area and the surrounding environment.

Territorial authorities also need to be aware that:

- Kāinga Ora may have roading powers for roads within a project area and it has a range of powers to fund specified development projects. These include the power to set rates, if authorised by the Governor General and the power to require development contributions from persons undertaking developments.
- It will need to include in the electronic versions of its planning instruments a map showing the project area and advice on where to access the relevant development plan.
- There are powers given to Kāinga Ora in relation to proposing amendments to existing bylaws, revoking existing bylaws and making new ones within a specified development project area, in relation to roads and non-roading infrastructure that connects or services non-roading infrastructure.

Implications for regional councils

The implications for regional council's are more limited, but potentially still significant:

- It remains the consent authority within specified development project area during both the transitional period and once a specified development project becomes operative, unless it chooses to transfer consenting functions to Kāinga Ora in the project area.
- During the transitional period, if a resource consent application or application to change conditions is received for within the project area, then before consent may be granted, or a condition changed, it must give the application and certain information to Kāinga Ora for a decision from it. The application cannot be granted if Kāinga Ora decides it should be declined and conditions cannot be imposed that are inconsistent with that decision. There is a right of objection in relation to the Kāinga Ora decision.
- When preparing or changing a plan that would apply in the relevant project area, the regional council must have regard to the project area and project objectives to the extent that their

content has a bearing on resource management issues in the region.

- When a plan change is being prepared, Kāinga Ora has the power to decide that the plan change or any part of it will not apply in the project area and to give written notice to the local authority of that decision. Kāinga Ora may only do so if it considers that it is reasonably necessary to make that decision in order to achieve the project objectives for the relevant specified development project. There is a right of appeal to the High Court on matters of law only in relation to the Kāinga Ora decision.
- Once a development plan for a specified development project is operative the specific steps set out in the Bill apply to the processing of resource consent applications.
- There are amendments to regional council's functions where there are joint hearings.
- It will need to include in the electronic versions of its planning instruments a map showing the project area and advice on where to access the relevant development plan.

Implications for Māori

The Bill complements the Kāinga Ora–Homes and Communities Act 2019. A function of that Act is to understand, support, and enable the aspirations of Māori in relation to urban development. It also provides that one of the operating principles of Kāinga Ora is that it will partner and engage early and meaningfully with Māori communities when undertaking urban development. The Bill sets out in more detail the obligations of Kāinga Ora to Māori in urban development.

Clause 4 of the Bill states that in achieving the purpose of the Bill, all persons performing functions or exercising powers under it must 'take into account' the principles of Treaty, imposing a legal duty on decision-makers to consider the Treaty principles in the same way as under the RMA. The principles of the Treaty are woven throughout the Bill.

As part of the specified development project process, Kāinga Ora will be required to engage with Māori entities and the former owners of, and the hapū associated with, any former Māori land within a proposed project area, when assessing a proposal to establish a specified development project. This includes seeking expressions of interest from Māori entities to develop, as part of the project, any land within the project area in which they have an interest. It is intended that this will provide an opportunity for Māori to shape the project area and project objectives. Notably, in seeking engagement with Māori, Kāinga Ora must allow adequate time for engagement, taking into account tikanga Māori.

The Bill may create opportunities for Māori developers. The Bill sets out a new approach to rights of first refusal (RFRs), designed to support Māori aspirations in urban development and to enable participation in development opportunities. Where Kāinga Ora wishes to undertake an urban development project on RFR land it holds or controls, it would be required to engage with the RFR holder and offer the opportunity to undertake the development on specified terms. A development may not proceed unless the RFR holder agrees to participate in the development on those or other terms or to the development going ahead without its involvement. In such a case, the RFR would continue to apply, meaning the RFR holder will (subject to any offer back requirements) be offered the first opportunity to purchase the land and improvements if they are sold.

Requiring authorities

As part of its planning and consent powers under the Bill, Kāinga Ora will have the ability to act as a requiring authority under the RMA to create designations inside and outside of project areas. Kāinga Ora is recognised as a requiring authority within a project area, as if it were a network utility operator, subject to the conditions in clause 137(3) being met. The conditions that apply are that the activity:

- is necessary for, or related to, the project objectives for a specified development project, and
- is an activity in which Kāinga Ora:
  - is in a significant contractual relationship with the developer, operator, or service provided; and
  - has a direct financial interest in the outcome.

It may also operate as a requiring authority outside the project area if the conditions in clause 137(4) are met. Namely that the activity is one that distributes water for supply, including irrigation; operates a drainage or sewage systems; constructs or operates a road or a railway line and is intended to connect to or support, the development of a specified development project and is necessary for or related to, achieving the project objectives for a specific development project and is work in which Kāinga Ora is in a significant contractual relationship with the developer, operator, or service provider, and has a direct financial interest in the outcome.

Please contact Kerry Anderson or any of the team if you would like to discuss the Bill, its implications or the submission process in further detail.
Submissions close on 14 February 2020.

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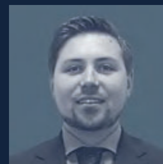

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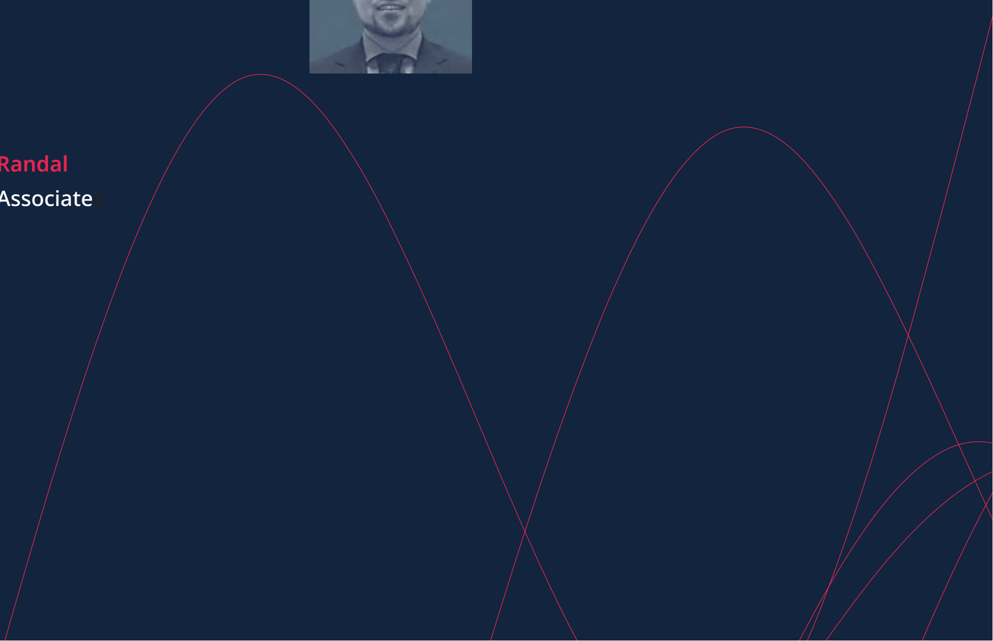

Appendix - process for specified development projects

Urban development project selected by:

- Kāinga Ora assesses the project, or
- Joint Ministers direct Kāinga Ora to assess the project
- Can be a potential project or one already being carried out

'Key features' of specified development project are identified by Kāinga Ora, which must be:

- Project objectives (key outcomes and outputs that the project aims to deliver)
- Defined project area (which does not need to be contiguous)
- Project governance body

Kāinga Ora assesses project:

- Identifies constraints and opportunities listed in clause 34
- Seeks engagement from Maori and identified stakeholders and expressions of interest from Māori in developing any land within the project area
- Considers the identified constraints and opportunities, feedback from engagement and anything else it considers relevant
- Refines 'key features' if necessary
- Publicly notifies the assessment and considers any feedback received
- Determines whether to recommend the project be established and if so, the key features to recommend

Kāinga Ora prepares project assessment report:

If recommending not establishing project the report must 'broadly' describe and assess project

If recommending it is established, then report must include:

- Summary of the project assessment
- Recommendation that it is established, together with recommended key features
- Concept plan showing general layout once project is delivered
- Confirmation from Minister of Conservation (if conservation-related area included)
- If governance body is not Kāinga Ora, confirmation that the governance body has agreed to be appointed
- Responses from each relevant territorial authority (they are required to indicate whether they support it and any conditions)

Joint Ministers make a decision whether to establish specified development project (discretionary, even if the criteria are met):

The following criteria apply to the decision:

- Appropriate for a project to be established with the key features recommended (having regard to clauses 3-5)
- Project objectives are consistent with the purpose and principles in clauses 3-5 and consistent with national directions under the RMA
- The project area contains only land that is generally suitable for urban development and if it contains conservation-related land, that the Minister of Conservation has provided approval
- The boundaries of the project area are clearly defined and identifiable
- If the governance body is not Kāinga Ora, be satisfied that the governance body has agreed to be appointed
- That engagement was appropriate
- That there is general support from relevant territorial authorities *or* the project is in the national interest

If joint Ministers decide to establish, an Order in Council is issued

Kāinga Ora prepares a draft development plan

For the purpose of preparing, amending or reviewing a development plan, Kāinga Ora has the following functions:

- Establishing, implementing and reviewing the objectives of any planning instrument and the policies, rules and methods to achieve the project objectives
- Controlling the actual or potential effects of the use development and protection of land to achieve the project objectives, ensure there is sufficient land for residential and business development, avoid or mitigate risks from natural hazards and to develop or provide for development of infrastructure.
- Ensuring that there are rules to control the emission of noise and mitigate its effects, about any actual and potential effects of activities in relation to the surface water in rivers and lakes and to control subdivision.

It must have regard to:

- Regional policy statements, regional plans and district plans
- Regional land transport plans
- Long term plans of local authorities
- Urban Design Protocol (2005)
- Relevant planning documents recognised by an iwi authority and lodged with a TA
- Emissions reduction plan or national adaptation plan

It must take into account:

- Matters set out in section 101(3)(a) and (b) of the LGA 2002 if it considering including development contributions, targeted rates, or an administrative charge as a funding source
- A development plan must not be inconsistent with an NPS, NZCPS, NES or other regulations, the National Planning Standards and any national land transport policy

It must consult with:

- Owners and occupiers of land within the project area
- Maori and key stakeholders set out in clause 35(2) and (3)
- Reserve administrators
- Members of a standing committee in the project area, who were appointed under iwi participation legislation (it must also have particular regard to any comment given)
- Any Minister of the Crown affected

It may choose to consult with any other person who has an interest.

The development plan must enable the project objectives to be achieved and make provision for any Treaty settlement obligations applying in the project area.

The draft development plan must:

- Include a structure plan
- Include conditions, if imposed by the Minister of Conservation, on the use of a specified reserve or the coastal marine area, acquisition of land

Transitional period commences

Local authorities are notified of the establishment order and specified development projects are published on the internet

The transitional period means that plan changes, new resource consent applications and changes or cancellations of conditions of existing resource consent in the project area are subject to the powers and process changes in the Bill and other requirements, as follows:

- A map of the project area must be included in all electronic versions of planning instruments, without using a Schedule 1 process
- Consenting functions can be transferred to Kāinga Ora
- During any district or regional plan change the Council must have regard to the project area and relevant project objectives
- Any plan change must be notified to Kāinga Ora 20 working days prior to approval/adoption of the plan change
- Where a plan change applies to a project area, Kāinga Ora can decide that the plan change will not apply to the project area, provided notice is provided within 15 working days of receiving notice of the proposed plan change. This decision can be appealed to the High Court on matters of law only
- Any resource consent application for an activity within the project area or change to conditions

subject to a conservation interest and the use of any other land integral to those conditions

- Describe of any relevant participation arrangement or redress under any iwi participation legislation
- Set out any modifications to be made to objectives, policies, methods and rules in planning instruments to enable the project objectives to be achieved
- Set out any applicable statement of resource management issues of significance to a Māori entity within the district or region as required by iwi participation legislation
- Set out the rules for public notification of a controlled or restricted discretionary activity (unless the evaluation report justifies not doing so)
- Set out any designations that apply in the project area
- State whether Kāinga Ora has or does not have the roading powers for the project, the relevant date from which it has those powers, the extent of non-roading infrastructure and whether bylaw changes are proposed
- Set out the sources of funding and if they include a development contribution or targeted rate, administrative charges the draft policies/details of those mechanisms, including any remissions
- Identify any material incorporated by reference

Kāinga Ora prepares supporting documents to the draft development plan:

An evaluation report that addresses:

- Whether the proposals in the draft development plan are the most appropriate way to achieve the project objectives
- Costs and benefits (quantified, if practicable)
- The risk of acting or not acting
- Consistency with a relevant NES
- Summaries of the responses from key stakeholders
- Information on specific land within the project area
- How environmental constraints and opportunities will be managed, a broad assessment of the likely effects and if relevant, how heritage values have been provided for

An infrastructure statement that:

- Describes the infrastructure proposed and the effect of the proposed infrastructure on existing infrastructure
- States whether Kāinga Ora has entered into any binding agreements with any infrastructure provider
- Discloses whether Kāinga Ora proposes to construct new infrastructure on land not controlled by Kāinga Ora and whether it has obtained the consent of the owner of that land
- States where further information will be available about the progress of the construction of the proposed infrastructure
- Identifies the expected total costs of construction of the proposed infrastructure

application must be provided by the Council to Kāinga Ora

- Kāinga Ora can then decline to grant all or part of the consent or modify conditions of the consent. The applicant or consent holder may object to this decision

Preconditions to public notification of the draft development plan

Kāinga Ora must be satisfied the requirements of clauses 62-74 have been met, and it must:

- Advise the responsible Minister and the Ministers for the Environment, Māori Development, Māori Crown Relations—Te Arawhiti and Treaty of Waitangi Negotiations of the draft development plan
- Have confirmation from the Minister for Māori Crown Relations—Te Arawhiti that any participation arrangement or redress having effect in all or part of the project area has been identified in the draft development plan; and the draft development plan provides adequately for those matters
- If any Māori land is included in a project area, have confirmation from the Minister for Māori Development that the plan is consistent with the principles set out in the Preamble to Te Ture Whenua Maori Act 1993

It must also have:

- Approval from the Minister of Conservation for any provisions which suspend or override a regional coastal plan
- Land owner agreement to any revocation or cancellation of conservation interest in land that is not owned by Kāinga Ora
- If a coastal marine area, reserve, or land subject to conservation interest is affected, approvals are required from the Minister of Conservation

Kāinga Ora publicly notifies the draft development plan and calls for submissions and then considers and makes recommendations on them to the IHP

Minister appoints IHP to consider draft development plan and submissions and provide recommendations to the Minister

IHP must consider and provide recommendations with 9 months of the close of submission to the Minister. It must have regard to:

- All information provided by Kāinga Ora
- Any information obtained by the IHP in response to an information request
- The purpose and principles of the Act in clauses 3-5
- Any relevant matters in a NPS, NZCPS, NES, national planning standards, regulations, any national land transport policy, regional policy statements, regional plans, district plans, regional land transport plans, regional public transport plans, long term plans, Urban Design Protocol (2005), any relevant planning documents recognised by an iwi authority and emissions reduction plan or national adaptation plan)
- The project objectives

Kāinga Ora provides advice to the Minister on IHP's recommendations

Minister decides on development plan and must consider the planning documents referred to above that the IHP must consider and give reasons for decision

If Minister accepts the development plan, notified as operative in the Gazette

Appeals to High Court on questions of law only

Effect of development plan becoming operative:

From the date of notification Kāinga Ora has the following powers:

- It is the consent authority for resource consent applications and it must follow the decision making framework in the Bill (see below)
- It is the territorial authority for notices of requirements for designations in the project area
- Only designations included in the development plan have effect in the project area - any other one ceases to apply
- It can set apart reserves or create new ones and can also revoke or cancel conservation interests
- It can exercise infrastructure powers and may use funding mechanisms

Planning instruments continue to apply in the project area, unless overridden by, added to, or suspended by the development plan. In the event of inconsistency, the development plan prevails. However, the development plan does not override or have any effect on an iwi planning document.

Kāinga Ora also takes on the functions of monitoring, enforcing and promoting compliance in the in the project area for resource consents granted by Kāinga Ora, and permitted activities in the district plan or development plan. Kāinga Ora may authorise enforcement officers.

Review of development plan

Kāinga Ora may review a development plan at any time.

A development plan must be reviewed not later than 10 years after notification, unless a different time period is specified in the development plan

Amendment of a development plan

Kāinga Ora may amend a development plan, provided the appropriate process is followed, and the amendment is required to achieve the project objectives.

A private plan change may be made to request the way in which a planning instrument is modified by a development plan, subject to limitations, including that the request must be two years after the development plan became operative and must be made in writing and include the purpose and reason for the change, together with an evaluation report.

The resource consent decision making framework:

The Bill includes a process that:

- addresses the form of the application and what amounts to a complete application
- applies certain provisions of the RMA (sections 88A-88E, 89, 89A, 91, 91A-91C, 92, 92A and 92B) and provisions relating to making submissions, hearings, conditions and commencement
- applies the RMA notification provisions, unless the development plan either requires or precludes notification
- requires a decision within 10 working of lodgement on non-notified consents that are controlled or restricted discretionary land use or subdivision activities and within 20 working days for all other application. For notified applications, it is within 15 working days of the hearing or 20 working days after the close of submissions if no hearing
- provides for appeals to the Environment Court, as if it were an appeal under section 120 of the RMA

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