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Dear Committee Members

Housing Accords and Special Areas Bill

Introduction

1. The Legislation Advisory Committee ("LAC") was established to provide advice to the Government on good legislative practice, legislative proposals, and public law issues. It produces and updates guidelines for legislation, known as the Guidelines on the Process and Content of Legislation. These have been adopted by Cabinet.

2. The terms of reference of the LAC include scrutinising and submitting on aspects of Bills that raise public law issues or issues of inconsistency with the Guidelines, and helping improve the quality of law-making and the clarity of legislation.

3. The LAC makes no comment on the policy underpinning the Housing Accords and Special Areas Bill. This submission instead addresses a range of operational matters which affect the clarity of the proposed legislation or its application. Some of these pose a potential inconsistency with the LAC guidelines or raise substantive issues. Others are more minor issues of workability of the legislation or relationships with existing law. The LAC does not wish to be heard in support of this submission.

4. This submission relates to the following issues, presented below in numerical order by clause:

- Clause 9 – criteria for establishing scheduled regions or districts;
- Clause 13 – termination of housing accords;
- Clauses 16 and 17 – selection of a special housing area;
- Clause 23 – consenting role for Chief Executive of the Ministry;
- Clause 29 – notification of consent application;
- Clause 32 – criteria for considering applications within special housing areas;
- Clause 61 – processing plan changes;
- Clauses 76 and 78 – rights of appeal and objection.

Criteria for establishing scheduled regions or districts – cl 9

5. Section 9 provides for the establishment of scheduled regions or districts through an Order in Council. Special housing areas may only be established in scheduled regions or districts. These regions or districts may be recommended by the Minister if he or she is "satisfied that the region or district is experiencing significant housing supply and affordability issues". Section 9(3) provides that the following evidence is sufficient for the Minister to be satisfied:

   (a) according to publicly available data, one or both of the following apply to the region or district:
      (i) the weekly mortgage payment on a median-priced house as a percentage of the median weekly take-home pay for an individual exceeds 50%, based on a 20% deposit:
      (ii) the median multiple (that is, the median house price divided by the gross annual median household income) is 5.1 or over; and
   (b) after consulting with the chief executive, the Minister is satisfied that the information contained in that publicly available data is consistent with other information analysed by the Ministry concerning housing supply and affordability in the region or district.

6. LAC considers that it is desirable to have clear and unambiguous provisions to guide the Minister's decision. However, in our view, the criteria in cl 9(3)(a) are not sufficiently certain in their current formulation, and could be better defined.

7. We have identified the following definitional issues:

   - How is the "weekly mortgage payment on a median-priced house" to be calculated? This will depend on the interest rate and the mortgage term. These assumptions are absent from the clause, but would make a significant difference to the weekly repayment.

   - "Take-home pay" is an ambiguous term, and is not defined. Is the "median weekly take-home pay" exclusive of PAYE and the ACC

earners levy only, or also other regular deductions such as student loan repayments and KiwiSaver? Is it inclusive of the Working for Families allowance?

- Is the "median weekly take-home pay" based on full-time workers only, or based on all wage and salary earners?

- Is the "median weekly take-home pay" the national median, or the median in the district or region for which the housing prices are being assessed? Similarly, is the "gross annual median house-hold income" the national median or the regional/district median?

8. More substantively, the Bill should make clear that the Minister can chose to use alternative statistically sound metrics to identify housing unaffordability, such as one based on a residual income measure.

Termination of a housing accord – cl 13

9. Clause 13 provides that the housing accord may be terminated by either party with notice. There are no grounds specified for termination. LAC submits that the statute should set out criteria to be considered by the Minister before terminating an accord.

Selection of special housing areas – cl 16 and 17

10. Clauses 16 and 17 provide for the establishment of a special housing area on the recommendation of the local authority when there is a housing accord in place. There is no detail about the process which would inform this. It is perhaps implicit in the scheme of the Bill that local authorities who have entered into a housing accord will consider suitable sites. This detail could also be included in the content of an accord. However, there is no requirement for a housing accord to address this matter, and there is also no requirement for the local authority to consult with the community in selecting a site to recommend. LAC submits that these matters should be clarified.

11. Clause 16(2) provides that the Minister "must have regard to existing geographic boundaries, the relevant district plan, and any relevant proposed district plan *to ensure that the boundaries of the proposed special housing area are clearly defined*" (emphasis added). The natural interpretation of this clause is that the Minister is to have regard to the relevant plan and proposed plan *only* to ensure that the boundaries of the proposed special housing area are clearly defined. LAC submits that the Minister should also have regard to the plan(s) to assess the suitability of the proposed special housing area.

12. The Bill contains minimal criteria for the selection of special housing areas by the Minister. Under cl 16(3), the Minister must not recommend a special housing area be created unless:

(a) with the appropriate infrastructure, the proposed special housing area could be used for qualifying developments; and

(b) there is evidence of demand to create qualifying developments in specific areas of the scheduled region or district; and

(c) there will be demand for residential housing in the proposed special housing area.

13. The lack of criteria is of note given the ramifications of creating a special housing area. The decision to create a special housing area can only be challenged through judicial review. In LAC's view, the threshold and criteria should therefore be provided for in the legislation, and could include such matters as those listed in Part 2 of the Resource Management Act (RMA).

Powers of the Chief Executive of the Ministry – cl 23

14. Under cl 23, if the special housing area is not within the district of an accord authority, the authorised agency is defined as the chief executive of the administering Ministry. The authorised agency will consider the application for resource consent under cl 32, and under cl 59 will be responsible for monitoring compliance with consent conditions.

15. These functions may be delegated under cl 83 to the Environmental Protection Authority, the local authority, or a government department.

16. There are two issues with these provisions: the role of the Minister, and the scope of delegation. It is unusual for the chief executive of a Ministry to have a consenting role, and it is unusual for this role to be delegable to a government department. The Select Committee could consider whether these functions can be differently allocated. The same issues arise in relation to ongoing functions of the authorised agency such as monitoring compliance with resource consents.

Notification of consent applications – cl 29

17. The Bill limits notification to directly affected adjacent land owner. If these land owners are notified, the local authority will have a right to submit on the consent application under cl 29(4)(a). However, if there are no directly affected adjacent land owners the local authority may not be notified.

18. LAC submits that cl 29(2) should require notification to local authorities who are not also authorised agencies. This would ensure that local authorities are aware of the application, and are able to submit. We note that the term "local authority" is not defined in the Bill, and therefore under cl 6(2), this carries the same meaning as defined under the RMA, so includes both territorial authorities and regional councils. LAC considers that notification to both territorial authorities and regional councils is desirable to ensure that both local and regional planning matters are adequately considered.

Criteria for considering applications – cl 32

19. Clause 32 sets out the criteria for considering applications within a special housing area. The criteria to be taken into account do not include the provisions of a housing accord if one is in place. This seems inconsistent

with the overall scheme of the Bill. LAC submits that the authorised agency should be required to have regard to a housing accord if one exists.

20. Clause 32(1) provides that the authorised agency must "have regard to, and give the most weight to the purpose of this Act". The purpose of the Act is to "enhance housing affordability by facilitating an increase in land and housing supply". Under cl 32(2)(a), authorised agencies must also "take into account" the "matters that would arise for consideration" under Part 2 of the RMA.

21. These interplay of provisions is ambiguous. One possible interpretation is that authorised agencies must give the most weight to the purpose of the Bill, and then give equal weight to the individual matters listed under ss6(a) – (g),7(a) – (j), and 8 of the RMA, ignoring the priority given by that Act. Another possible interpretation is that the whole of Part 2, including the internal hierarchy, applies as if the decision were being made under the RMA, but with the additional prevailing consideration of the purpose of the Bill.

22. It is also unclear how, in practice, a decision maker is to give "most weight" to a particular factor and yet also give due weight to other factors. For example, if a consent application sought permission for 150 houses, and the authorised agency instead granted consent for 100 houses on robust resource management grounds (such as to provide for esplanade reserves), would the "most weight" requirement have been complied with?

Processing plan changes – cl 61, 72 and following

23. The Bill provides for a more permissive plan change process within a special housing area. In particular, under cl 26 of schedule 1 of the RMA, private plan changes must be notified and public submissions received. Under cl 66 of the Bill, only adjoining land owners will be notified of a plan change request.

24. There are some complex provisions relating to the timing of parallel plan change appeals (under cl 72 and following). Because the Bill creates a separate process for plan changes relating to housing developments in a special area, it is possible that a plan change under the standard process will be considered at the same time as a plan change request under the Bill, affecting the same area of concern. In this case, whichever plan change addressing the "same matter" is determined first will be final and the other plan change will be treated as having been withdrawn. This seems an inadequate response to the issue and potentially prejudicial to those engaging in the ordinary appeals process. It is also not clear how "same matter" will be applied in practice. The significance of these provisions for the planning process combined with the ambiguity in the term "same matter" suggests that these provisions are at risk of being litigated.

Rights of appeal and objection – cl 76 and 78

25. The Bill lists matters to be taken into account in deciding an application (cl 32(1)(b)), but does not list grounds for appealing a decision. This suggests

that the grounds for appeal are standard resource management grounds, insofar as they can be applied to the modified process. This could be clarified.

26. Clause 76 and 78 contain the rights of appeal and objection. These are significantly more limited than under the RMA. Because most applications will be non-notified, there will already be a smaller group of potential submitters and therefore fewer potential appellants. It is arguable that further restricting the appeal rights is therefore unnecessary.

Regulation making powers – cl 88

27. The regulation making powers under cl 88 are broad. In particular, the Select Committee may wish to consider whether the provisions in cl 88(a)(ii) should be more tightly constrained. The power to make regulations that rectify "irregularities in procedure" has the potential to undermine rights of due process for applicants and submitters, and it is not clear why this is required given that under cl 73(2)(g), the provisions in the RMA regarding the waiver of time limits and other procedural matters apply to applications under the Bill.

Conclusion

28. While it is not within the scope of the LAC terms of reference to comment on substantive policy issues, we note that the intention of the Bill is to establish a process that will enable resource consents for housing developments to be determined more speedily. To achieve this goal, it is necessary for legislation to be clear and certain, and to minimise the possibility of a judicial review claim based around a lack of statutory clarity in decision making processes.

29. As mentioned above, the LAC does not wish to be heard on this submission.

Yours sincerely

Hon Sir Grant Hammond
Chair