

Project Auckland



Ways to spread the burden

Late 2019 saw the Government up its pace in addressing the country's housing and infrastructure issues through the introduction of a number of proposed legislative reforms.

The long awaited amendments to the Resource Management Act 1991(RMA), Kāinga Ora's new urban development powers and the proposed Infrastructure Funding and Financing Bill were all flagged as part of the Government's new tool kit to transform our urban environments and facilitate urban growth. How effective will these tools really be in addressing Auckland's burgeoning population and historic underinvestment in infrastructure?

Striking the right balance between environmental protection and fast paced housing development will not be easy.

A "comprehensive" review of the RMA is underway but is still in its early stages. The expert panel tasked with developing the proposals for reform is due to report back to Government in May 2020. The panel's terms of reference and the initial issues and options paper it produced signal the likelihood of at least some new provisions that may assist in facilitating housing and infrastructure development. However, the RMA has also been criticised for failing to protect environmental bottom lines. There is a long way to go before we see a bill introduced to Parliament which is now looking unlikely before the September election.

Kāinga Ora was created last year by amalgamating Housing New Zealand, HLC and parts of the KiwiBuild unit. This new Crown agency is tasked with initiating, facilitating and

Are new tools the solution to Auckland's housing and infrastructure crisis, ask **Christina Sheard** and **Marija Batistich**



Christina Sheard

undertaking urban development, but its enabling legislation does not give it the functions and powers necessary to carry out comprehensive urban development at scale. The Urban Development Bill currently before Parliament will provide Kāinga Ora with the power to undertake complex urban development projects by itself, or in partnership with iwi, local government or the private sector.

The process will involve the establishment of a specified development project (SDP) and then a development plan outlining the development powers and funding arrangements that will be used for the SDP. The development plan process will involve a public consultation and submission process but submitters will



Marija Batistich

have very limited appeal rights. Importantly, the Urban Development Bill will provide Kāinga Ora with a comprehensive suite of powers that would allow it to act as a consenting authority in relation to the specified development project area, compulsorily acquire land, build infrastructure or require network utility operators to install assets, set targeted rates and levy development contributions.

If effectively used, the new powers will enable Kāinga Ora to partner with councils, communities, mana whenua and private developers to build much-needed homes and infrastructure at pace and scale. However, early indications are that specified development projects will only be

used in a dozen or so areas. So what is there for everyone else wanting to get on with housing development outside SDP areas?

Years of underinvestment means that Auckland is faced with the challenge of servicing new areas with infrastructure but also rectifying years of underinvestment in existing areas. Local government has the tools to finance and provide new infrastructure but is struggling with debt levels and the pressures of population growth, climate change, tourism and other responsibilities passed down from central government. The Infrastructure Funding and Financing Bill, at select committee stage, provides some new tools for developers desperate for new infrastructure to service their developments.

Developers who need new infrastructure for housing development currently need to shoulder the costs up-front through development contributions, construct the infrastructure themselves and/or convince council to take on debt to build it. The Infrastructure Funding and Financing Bill proposes a new way of financing infrastructure that spreads the burden of paying for it over time among those who benefit from that new infrastructure. The bill will enable Special Purpose Vehicles (SPVs) that will be responsible for financing and the construction of the infrastructure assets and will service the financing via a levy on future owners. Once constructed, the infrastructure

will vest in the relevant local authority.

The Infrastructure Funding and Financing Bill drew heavily on the model successfully used for the Milldale development, north of Auckland. Crown Infrastructure Partners, in partnership with Auckland Council, established an alternative financing model for the Milldale development to enable the delivery of infrastructure to support the construction of 9,000 new homes. The infrastructure levy that is required to be paid by the new home owners each year for the next 30 years is secured by an encumbrance on the title of each section. As a result, Auckland Council was able to bring forward its investment in the infrastructure required to support the project.

Of all the Government's recent announcements it is the Infrastructure Funding and Financing Bill that offers the most promise to solve Auckland's problems in the short term. The devil will be in the detail as the bill progresses through to law and this will influence the level of uptake from developers. The new funding model, combined with Kāinga Ora's new powers and the RMA overhaul, provide a promising new toolkit to enable the delivery of new housing. Whether the scale and pace of delivery of housing and infrastructure has a real impact on the delivery of new housing and the infrastructure required to support it will depend on the extent to which the market capitalises on the new tools available to it. Watch this space.

● *Christina Sheard and Marija Batistich are partners in Dentons Kensington Swan's environment and planning team.*

Whose risk is it? Progress on the Construction Sector Accord

Katrina Van Houtte

With Auckland a big winner in the Government's \$12 billion infrastructure programme, there is a real opportunity for the region to accelerate progress on the Construction Sector Transformation Plan.

The Plan, released last month, is the first major deliverable from the Construction Sector Accord signed in April 2019.

It explains how the lofty Accord goals of increasing productivity, raising capacity, improving resilience and restoring confidence, pride and reputation in the sector will be achieved.

The Plan refers to a need to address the poor understanding of risk and who should bear it, poor procurement skills, and distrust between the parties.



We should be asking whether it represents good public value for the risk to be transferred to the contractor and then priced, or should the public sector retain the risk and pay for it only if it eventuates.

This is consistent with the findings of the Treasury's Infrastructure Transactions Unit in their August 2019 report examining the issues associated with the use of NZ standard conditions of contract in the public sector.

To address the issue, the Accord leadership group plan to work with the Infrastructure Commission to promote and refine the Construc-

tion Procurement Guidelines on an ongoing basis.

The Guidelines are peppered with Abrahamson's well-known statement that risk should sit with the party best able to manage it. Little detail is provided on how exactly this achieves a fair risk allocation.

Unfortunately this statement has historically been used to justify an unfair risk transfer to the contractor, because of course the owner, for whom construction is not their core business, is not best placed to manage the risk, as they do not have the necessary specialist expertise.

The question we should instead be asking is whether it represents good public value for the risk to be transferred to the contractor and then priced, or should the public

sector retain the risk and pay for it only if it eventuates.

It does not further the other Accord goal of building resilience in a fragile sector for all risks to be transferred away, even if the contractor (and specialist subcontractors) may have the skills to manage them.

The Plan asks that all participants in the sector take ownership for calling out behaviours that are not consistent with the Accord.

It remains to be seen whether participants feel sufficiently safe to do so in the practical reality of a competitive tendering market.

● *Katrina Van Houtte is special counsel in the construction and major projects team at Dentons Kensington Swan.*