Resource Management Law Association Submission

Housing Accord and Special Housing Areas Bill

June 2013

INTRODUCTION

1. This Submission is made on behalf of the Resource Management Law Association of New Zealand Inc ("**RMLA**").

2. The RMLA is concerned to promote within New Zealand:

   a. An understanding of Resource Management Law and its interpretation in a multi-disciplinary framework;

   b. Excellence in resource management policy and practice;

   c. Resource management processes which are legally sound, effective and efficient and which produce high quality environmental outcomes.

3. The RMLA has a mixed membership. Members include lawyers, planners, judges, environmental consultants, environmental engineers, local authority officers and councillors, central government policy analysts, industry representatives etc. Currently the Association has in order of 1,100 members. Within such an organisation there are inevitably a divergent range of interests and views.

4. While the membership has been consulted in preparing this submission, it is not possible for the RMLA to form a single universally accepted view on the proposed Bill.

It should also be noted that a number of members may be putting in their own submissions and those may represent quite different approaches than the views expressed here.

5. For these reasons, this submission does not seek to advance any particular policy position in relation to the proposed Bill, but rather is made with a view to ensure that its provisions:

   a. Are consistent with the general framework of existing laws and policies of relevance, and work alongside the Resource Management Act 1991 ("**RMA**") where relevant.

   b. Are practicable and workable.

   c. Will assist in promoting best practice.

PRELIMINARY PROVISIONS, HOUSING ACCORDS, AND SPECIAL HOUSING AREAS

Purpose of the Bill

6. **Specific matter:** Clause 4 provides that the purpose of the Housing Accords and Special Housing Areas Act ("**Housing Act**" or "**Act**") is to enhance housing affordability by facilitating an increase in land and housing supply in certain regions or districts, listed in Schedule 1, identified as having housing supply and affordability issues.

7. **Submission:** The RMLA observes that this purpose is narrowly expressed, and does not refer to any countervailing factors such as sustainable management or any of the adverse effects that might occur, which should be considered in achieving the goal of enhanced housing ability through increased land supply. This has significant implications for decision making under the Act, given that the key decision making sections for resource consent applications and plan change requests would give most weight to the purpose of the Act: clause 32 for resource consents requires the authorised agency to "give the most weight to" the purpose of the Act, and clause 61 for plan change decisions requires the authorised agency to "give effect to" that purpose. In both cases the relevant RMA criteria would be a secondary consideration.

8. **Relief sought:** That further consideration is given to how the purpose of the Act is expressed, given its implications for decision making under the Bill. Consistent with the intention of the Bill, a revised clause 4 could, for example, state that housing affordability was to be enhanced "while" achieving other goals (for example, good urban design outcomes or the efficient use and development of infrastructure).

9. In the alternative, consideration could be given to revising clauses 32 and 61 to provide for more balanced decision making by giving greater weight to relevant RMA matters.

Definitions section

10. **Specific matter:** Clause 6(2) of the Bill imports RMA terms that are used but not defined in the Bill. The reference in clause 6(2) is to definitions in section 2 RMA, that in turn would import definitions from sections 43AA to 43AAC RMA, such as the definition of "proposed plan".

11. **Submission:** The RMLA observes that, in terms of the RMA definitions, a request to change a plan (i.e. a "private plan change") only becomes a "proposed plan" at such time as it is adopted by the relevant local authority (section 43AAC(1)(b) RMA). This would have implications for the various references to a "proposed plan" throughout the Bill, including in terms of the substantive decision making on resource consent applications under clause 32 (which enables the authorised agency to disregard provisions of an operative plan if relevant provisions of a "proposed plan" would "give better effect to" the purpose of the Act).

12. In addition, the definition of "proposed plan" in section 43AAC RMA is expressly subject to section 86B of the RMA, which provides that a district rule generally only has "legal effect" at the time that a decision on submissions is publically notified. Under the RMA if a rule in a proposed plan does not yet have legal effect then it is to be disregarded for decision making purposes (refer section 86G RMA). It would be helpful for the Bill to clarify whether these sections of the RMA in relation to the legal effect of rules are intended to apply, and, if so, at what time a proposed plan considered under the Housing Act is to have legal effect.

13. **Relief sought:** That these implications of clause 6(2) are considered further, and any necessary amendments made (or new definitions provided in the Bill, as required) in order to avoid uncertainty or unintended consequences.

Qualifying development definition and criteria

14. **Specific matter:** Clause 14 defines the term "qualifying development", as a development that is "predominantly residential" and meets the criteria prescribed by Order in Council (on the recommendation of the Minister) under clause 15. Clause 17(3) provides for the Minister to recommend varied criteria (in substitution of the general criteria under clause 15) for a district that is covered by a housing accord.

15. **Submission:** The RMLA considers that on its own, the term "predominantly residential" would be uncertain and difficult to apply. On one view "predominant" is

more than 50%. On another view it would be much more, such at 80-90% or more. Accordingly, it would be desirable for the more specific criteria recommended by the Minister to provide guidance on when a development should be deemed "predominantly residential". The RMLA does not have a position in terms of how that is specified, but observes that it could, for example, be by reference to the percentage of gross floor area of the development that is used for residential purposes.

16. The RMLA also observes there does not appear to be any guidance provided to the Minister in recommending either the general or varied criteria, although the latter must also be consistent with the territorial authority's recommendation under clause 17(3)(b).

17. The kinds of criteria anticipated by cl 15 are also very limited, relating only to parameters such as height and number of dwellings. Given that the decision making clauses give significant weight to be given to the single-focus purpose of the Act, the RMLA suggests further consideration be given to other criteria that could be applied to developments before they are able to access the streamlined resource consent process as a qualifying development under the Bill.

18. **Relief sought:** That further consideration is given to these matters, and amendments made to address the concerns raised.

RESOURCE CONSENT PROCESS

Notification of affected persons

19. **Specific matter:** Clause 29 effectively provides for limited notification to selected affected persons, but adopting a "more than minor" threshold test, which is higher than the equivalent threshold for affected person status in section 95E RMA (minor or more than minor, but not less than minor). The only persons who may be notified are the owners of adjoining land, or the NZ Transport Agency where the subject land adjoins a State highway.

20. **Submission:** The RMLA considers that the same threshold as applied under RMA would be appropriate (minor or more than minor, but not less than minor), so that the experience of threshold application can be drawn upon, and to avoid confusion over what if any differences are otherwise intended.

21. Restricting notification to these categories of persons is potentially too narrow, and in particular that affected person status should be extended to occupiers as well as landowners. Occupation can be on a long term basis, and, in the RMLA's view, occupiers may have legitimate concerns about nearby development and should be

afforded the opportunity to make a submission if they otherwise meet the threshold test for affected party status.

22. In addition, the RMLA queries whether it is appropriate to exclude infrastructure providers (other than the NZTA) from notification, even in circumstances where effects on them are "more than minor". Clause 32(5) allows the authorised agency to direct affected infrastructure providers to provide certain information, however this appears to be entirely at the authorised agency's discretion and there is no other ability for affected infrastructure providers to provide input on a resource consent application.

23. Clause 29 also states that the authorised agency "may" notify the specified persons if effects are more than minor. This is in contrast to section 95B(2) RMA, which states that a consent authority "must" give limited notification to affected persons (unless notification is otherwise precluded by a plan or national environmental standard). The RMLA suggests the "may" in clause 29 be changed to a "must". In the alternative, if it is intended that the authorised agency have a discretion to exercise in deciding whether to notify sufficiently affected persons, then criteria should be provided in clause 29 to guide the authorised agency in exercising that discretion.

24. Finally, the RMLA observes that the resource consent processes do not provide for written approval to be given, while the plan change processes do (clause 62 of the Bill). It would be helpful to provide a mechanism for written approval to resource consent applications considered under the Bill, because written approval can usefully narrow the matters to be considered and would be a relevant consideration under section 104(3)(ii) (which the authorised agency is required to "take into account" under clause 32).

25. **Relief sought:** Amend clause 29 to address the concerns raised above, and provide for written approvals to be given by potentially affected parties.

Requirement to hold a hearing

26. **Specific matter:** Clause 30 provides for a hearing to be held if any person who has "made a submission in accordance with 29" wishes to be heard.

27. **Submission:** The notice required under clause 29(4) contemplates that the relevant local authority may make submissions, but clause 29 does not seem to require notice to be served on that local authority. It is thus unclear whether the local authority should be included in the reference in clause 30 to a person who has "made a submission in accordance with clause 29", and consequently whether a local authority can trigger a hearing. The RMLA considers that it would be appropriate for the relevant local authority (defined in the RMA as either a regional council or territorial authority) to have

a right to be heard at a hearing, given it is that local authority's role to represent community interests and to administer the consent once it is granted.

28. In addition, the RMLA suggests that the applicant should also have the ability to request a hearing, if they so desire (for example, to enable them to address matters that had been raised in opposing submissions).

29. **Relief sought:** Amend clause 30 to provide that an applicant or local authority can also trigger a hearing, or in the alternative clarify which persons are able to do this and which are not.

Substantive decision on resource consent applications

30. **Specific matter:** Clause 32 provides for substantive decision making on resource consent applications. The decisions to grant consent and impose conditions must be reached on a basis that gives effect to the purpose of the (Housing) Act (clause 32(1)). The authorised agency must also "have regard to, and give the most weight to, the purpose of the Act", before going on to consider relevant RMA provisions and the Ministry for the Environment's *New Zealand Urban Design Protocol* (2005) (clause 32(2)). The one clear restriction on granting consent is that the authorised agency must be satisfied that sufficient and appropriate infrastructure will be provided to support the qualifying development (clause 32(3)).

31. **Submission:** The RMLA queries whether the decision making criteria provided are sufficient to achieve results consistent with the sustainable management purpose of the RMA, or to otherwise secure high quality environmental outcomes. This is in particular due to the purpose of the Act (clause 4), which as noted above does not provide countervailing factors for consideration alongside the goal of increasing housing supply. In light of that purpose and the lesser weight to be given to relevant RMA provisions, the RMLA perceives a risk that decisions made under clause 32 would not be required to be consistent with sustainable management or good urban planning.

32. The RMLA does not have a strong position on what the precise criteria in clause 32 should be, as it considers this to be largely a policy matter. However, it is suggested that where a Housing Accord is in place, the position recorded in that Housing Accord might also be a useful consideration in considering resource consent applications within a particular district. Similarly, consideration could be given to whether the affordability of dwellings within the proposed qualifying development should be a relevant factor, given that housing affordability is a major driver behind this Bill.

33. As a more minor point, it is not clear how section 104D RMA, which sets an additional test for non-complying activities before they can be considered under s 104 RMA, is intended to be applied given the requirement in clause 32(2) is only to take it into account.

34. Finally, it would be useful to clarify the order of decision making where a resource consent application is lodged at the same time as a related plan change request. For example, the Bill could specify that the plan change should be considered first and then the resource consent application considered against the plan as modified by the authorised agency's decision on the plan change request, if that were the intention.

35. **Relief sought:** That further consideration be given to how the purpose of the Act and the decision making criteria in clause 32 are expressed, in order to make decision making more consistent with sustainable management and provide better long term outcomes, while still enhancing housing affordability through increased land and housing supply.

36. That the approach to "taking into account" section 104D RMA be clarified in the context of clause 32, and that the order of decision making for concurrent resource consent applications and plan change requests also be clarified.

"Regional" consents

37. **Specific Matter:** Clause 33 provides that for certain activities sections 105 to 107 RMA apply. Those sections relate to discharge or coastal permits that would ordinarily be granted by a regional council under the RMA, and it appears to be intended that under the Bill such consents would be granted by an "accord territorial authority" (i.e. a district council, rather than regional council) if the proposed qualifying development is within a district covered by a Housing Accord.

38. **Submission:** This is an unusual transfer of the usual decision making roles and functions of regional and district councils. It is not clear that it would be appropriate, given that a discharge or coastal consent (or other "regional" consent) would be administered by the regional council once granted, and also because the district council may not possess the expertise to properly assess such applications.

39. **Relief sought**: That consideration be given to whether those types of resource consent (refer section 87 RMA) that are ordinarily determined by regional councils should continue to be determined by regional councils under the Bill. Alternatively, a mechanism should be provided for the regional council to have input into the

determination of such consents, if they are to be determined by the territorial authority (as the authorised agency).

PLAN CHANGE PROCESS

40. **Specific Matter:** Clause 61 provides for requests to be made to change an operative plan or vary an existing plan change in order to facilitate the consideration of a resource consent application for one or more qualifying developments. One of the prerequisites to this is that the plan does not "provide for any residential development in the relevant special housing area" (clause 61(1) and 61(2)).

41. In considering such a plan change request, the authorised agency (being in this case an accord territorial authority) must give effect to the purpose of the Act.

42. **Submission:** The RMLA considers that the reference to the plan "not providing for" residential development is not sufficiently clear, and may not reflect the intention behind this provision. For example, on a literal reading a plan could be said to "provide for" residential development if it provides for it as a non-complying activity, or in a very limited location, subject to strict density requirements. Greater certainty needs to be provided in determining when residential development is not (adequately?) provided for, and criteria to specify this could include matters such as the activity status and applicable density or height restrictions.

43. The criteria for decision making used here are similar to those in clause 32 for resource consents, and the RMLA again queries whether the decision making criteria, weighted heavily towards the purpose of the Act, are sufficient to ensure sustainable or optimal planning outcomes. Again, more weight could be given to the relevant RMA provisions (including section 32 RMA, which is omitted from decision making under clause 61(4)), and consideration of other matters such as the relevant Housing Accord or housing affordability issues could also be required. The RMLA considers it would be possible to consider these matters without significantly detracting from the Bill's goal of enhancing housing affordability.

44. **Relief sought**: That clause 61 is amended in order to address the concerns raised above.

Provision for concurrent plan change under RMA

45. **Specific matter:** Clause 72 sets out how concurrent plan change or variation processes (under the Act and under the RMA) are to be reconciled, and applies if a

Housing Act plan change or variation "relates to a matter" in a plan change that is being progressed under the RMA.

46. **Submission:** The RMLA considers that the test of whether the two processes relate to the same matter is somewhat uncertain, and more guidance is required in this area.

47. As a minor drafting point, it is noted that clause 72(1) and (2) refer to plan changes and variations to proposed plans, but does not refer to "proposed plans" themselves. The RMLA presumes the intention is for clause 72 to also apply to proposed plans (such as the Auckland Unitary Plan). If that is the case, then a separate reference to "proposed plan" is also necessary, because while a "proposed plan" includes a "change" or "variation", those terms do not capture a proposed plan if notified as a whole.

48. Finally, clause 72 provides that submissions on a losing process (ie, the process which is not the "deciding process") are deemed to be withdrawn, and no further action to be taken. It would also be useful to specify what happens to the affected provisions, for example, whether they are deemed to also be withdrawn or abandoned, or whether they are put on hold until such time as the Act ceases to be in effect.

49. **Relief sought:** That clause 72 is amended to address the issues raised above.

RIGHTS OF APPEAL AND OBJECTION

50. **Specific Matter:** Clause 76 provides for Environment Court appeals on resource consent decisions under the Act to be brought by the applicant and any person who made a submission on the application (which would include a territorial authority if it made a submission), but only if the qualifying development in question is 4 or more storeys high. No Environment Court appeal rights are provided in respect of plan change decisions.

51. Clause 77 provides that a person who has a right of appeal cannot initiate judicial review proceedings unless that right of appeal has been exercised.

52. **Submission:** In previous submissions, including on the *Improving our Resource Management System* Discussion Document, the RMLA has expressed concerns with law reform proposals seeking to remove merit appeal rights in relation to plan change decisions.

53. Consistent with these concerns and its position in previous submissions, the RMLA considers that if appeal rights are not to be available under the plan change process provided in the Bill (or in respect of consent applications for developments of less than 4

storeys), then the Bill should provide for full rights of cross examination of all evidence presented. That would not be possible under the Bill as drafted, because clause 73(2)(h) applies sections 39-41A RMA (and other sections), and section 39(2)(d) RMA precludes cross examination for council hearings.

54. In respect of appeal rights on resource consent applications, the RMLA considers the adopted threshold of 4 storeys to be somewhat arbitrary, and notes in particular that it would not apply to any application where the qualifying development in question was a subdivision rather than an apartment building. A more sophisticated threshold might also take into account, for example, the total number of dwellings.

55. For those cases where merit appeals to the Environment Court would be available, it would be helpful for the Bill to clarify the Court's jurisdiction on appeal, given that the decision making criteria under the Bill are very different to those which would normally apply under the RMA (including on appeal).

56. Finally, for those cases where merit appeals are not available, the RMLA recommends that appeals on points of law are able to be made to the High Court. Points of law appeals (as opposed to judicial review, which would be the only alternative) would generally provide more certain timeframes for all parties.

57. **Relief sought:** That clause 76 is amended to address the concerns raised above.

REGULATION MAKING POWERS

58. **Specific matter:** Clause 88 provides very broad regulation making powers, including to prescribe procedures, requirements and other matters in respect of the resource consent and plan change processes under the Bill, and also to prescribe which other provisions of the Resource Management Act apply in respect of those processes. Clause 4(2) of Schedule 2 of the Bill also allows regulations to be made as required to ensure an orderly transition (either to or from the Housing Act regime).

59. **Submission:** The RMLA notes that clause 88 would enable primary legislation (the Bill, once it becomes law) to effectively be amended by subordinate legislation (regulations made under clause 88), without further Parliamentary scrutiny. In addition, the prospect that the applicable RMA provisions could change through regulation would cause uncertainty for applicants and submitters engaging in the Bill's processes.

60. While there may be some need to address transitional matters by regulation, the RMLA considers that the majority of transitional matters could be addressed now. For

example, the Bill could provide that when the Housing Act ceases to have effect the relevant local authority is deemed to be the consent authority in respect of resource consents granted under the Housing Act as if it had granted the consent itself (refer section 149X in relation to consents granted by a Board of Inquiry).

61. **Relief sought:** That consideration is given to whether the scope of clause 88 could be narrowed, and further transitional provisions provided at this stage.

Signature of Blair Dickie (President) on behalf of the Resource Management Law Association

Date: 30 May 2013

Address for Service: RMLA, C/- 4 Shaw Way, Hillsborough, Auckland 1041

Telephone: (9) 626-6068 or 027 272 3960

Email: karol.helmink@xtra.co.nz

Contact Person: Karol Helmink