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Scope for building performance provisions to advance building sustainability and environmental performance in NZ

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Executive Summary

This report presents the findings of a research project into sustainable building design provisions in New Zealand law and practice. Such provisions have attracted interest, with the growing concern about sustainability (including carbon footprint) and quality of buildings in recent years. The emphasis has been on voluntary 'green' building codes, but this approach raises some risks, as well as making a contribution. The key question is whether the role and framework of regulation needs to be clarified. The present study examines practitioners' views on the regulation of building sustainability, and in particular how lawyers, planners and government officials see the interaction of the Building Act and the Resource Management Act. Clarifying this has involved a detailed examination of legal cases and the interpretation of legal findings, together with in-depth interviews exploring the views of council officers and government officials. We have three main conclusions:

1. The literature surveyed notes advantages of incentive systems, which can surmount barriers or compensate for the financial or other barriers to developers investing in a greener building; they can act as carrots for early innovation in building and tip decisions towards 'building green'. However, there are potential disadvantages. For example, where there is uncertainty, developers tend to see it as leading to higher cost, or potentially, inconsistency in decision making, and any uncertainty arising from such practices can be unhelpful to developers.

2. The law in this area is not clear. On one hand, the arguments against sustainable design rules point to the purpose of the Building Code, under the Building Act. The policy and legislative history demonstrate a desire to exclude the promulgation of any other performance requirements unless specifically authorised by an Act. Recent case law has emphasised that policy, and it is the position of the Ministry that administers the Act. On the other hand, arguments for the legality of sustainable design rules can point to the wording of the legislation itself. It does not exclude other building performance requirements. The key direct authority for the RMA/BA interface, in the *CIAL v CCC case*, is permissive of building performance requirements outside the Code where created under the RMA for legitimate resource management purposes directed at the environmental effects of land use.

3. The findings from our interviews sit better with the latter part of this legal conclusion. Interviews suggested there was scope for active regulation through District Plans consistent with the purpose of the RMA to ensure a more sustainable built environment or neighbourhood – e.g. streetscape, building integration, and ensuring climate change mitigation through urban form and design. However, updating Plans takes considerable time. Meanwhile, some interviewees noted that a conservative interpretation of the issues around the domain of the Building Act has acted to impede some councils in promoting more sustainable building, and incentives can help fill the gap. In short, interviewees wanted to see councils being more proactive in promoting sustainable building and supported the use of incentive arrangements, alongside stronger provisions in District Plans to ensure more sustainable built environments. Greater clarity on the legal matters would be helpful for progressing more sustainable building design. The interviewees were clear that New Zealand is not at the international edge of sustainable building promotion and design. Fuzzy legislative provisions and an outdated Code were contributory factors.

We conclude that to improve building quality and sustainability, active changes to Plans and clarificatory legislative changes could usefully supplement incentive provisions to provide a more progressive and clear 'architecture of decision making' in New Zealand.

1 Context and literature review

1.1 Introduction

This research project provides an interpretation of the main issues posed by the following research question: what scope is there under existing or amended legislation for building performance assessment tools or other related provisions to advance a goal of sustainable building and associated environmental performance improvement in New Zealand, in the light of the main relevant provisions of the Building Act 2004 and the Resource Management Act 1991.

The question has particular resonance at the present point in time because of the challenges faced in the building sector in New Zealand to improve the quality of buildings, be they residential or commercial, while addressing increasingly pressing issues of environmental sustainability. There is a sense that New Zealand's legislation should be doing all it can to encourage buildings to be designed or retrofitted to be more sustainable and ensure that as a community New Zealand improves upon the often inadequate standards that have prevailed in regard to buildings in decades past.

This research report was produced in response to a request by senior researcher Dr Kay Saville-Smith under the National Science Challenge 11, Building Better Homes, Towns and Cities, for a report on a significant area of concern falling under the general rubric of the Challenge's Strategic Result Area 1, 'The Architecture of Decision Making in New Zealand'.

The general structure of this report is as follows. First, some context on the research question and a distillation of the literature are set out in part 1: this part covers research work undertaken in recent years on the matter of provisions for sustainable design of buildings in New Zealand. Some legal questions are raised, but not treated in detail. This first part also considers the advantages and disadvantages of non-regulatory incentives. Following this context, part 2 provides a detailed legal analysis which focuses on the main relevant provisions of the Building Act and the Resource Management Act, and the interaction between them. In part 3, an analysis is provided of interviews undertaken with a number of local government officers and planners and some central government policy advisers, to provide a sense of their understanding of the issues relating to this topic at hand. Finally, conclusions are drawn.

1.2 Context

For decades, there has been concern in New Zealand about the quality of residential buildings and, along with this, buildings' local environmental performance – for example, their impact on the local neighbourhood, implications for urban form, and so on, attributes which some might summarise as their sustainability. This concern has been highly visible from time to time, such as shortly after the 'leaky buildings' period began in the early 1990s, but has continued to be an ongoing theme voiced by a wide range of housing researchers and commentators interested in various aspects of the quality of housing and its configuration in New Zealand's urban areas (Howden-Chapman, Crane et al. 2004, Chapman, Howden-Chapman et al. 2009, Keall, Baker et al. 2010, Howden-Chapman, Viggers et al. 2012, Keall, Crane et al. 2012, Duncan and Brunsdon 2017, Telfar-Barnard, Bennett et al. 2017, Johnson, Howden-Chapman et al. 2018).

As well as focusing on the evident shortcomings of the residential (and commercial) building stock, there has also been a smaller literature, largely in the planning domain, addressing mechanisms to make buildings more sustainable and of higher amenity, through planning rules.

These issues clearly arise with a range of councils in New Zealand. An early (2006) note in Beacon's newsletter, ***Facing***, concluded that 'Many of the barriers identified [to building a sustainable home in Auckland] were widely applicable to urban councils. These include barriers within district plans and their administration, barriers within codes of subdivision, land development, infrastructure and connection standards, and barriers arising from administration of the Building Act' (Beacon Pathway 2006). Their recommendations included active promotion of current sustainable building rating tools such as TUSC [Tool for Urban Sustainability: Code of Practice[1]] and – among other things – provision of better information and promotion; training; free design review; and dedicated council staff support. None of the recommended measures involved stricter regulation.

A very brief history of incentives provided by district plans was provided by Paetz & Pinto-Delas (2007). They noted that developers face weak market incentives to commission green building design, such as lowering the long-run running costs of a building, as the market (at that time) did not place a premium on green buildings. However, they also noted that councils can incentivise aspects of green building design, and have done so: 'the District Plans for Auckland and Wellington's downtown districts have long included provisions which provide bonus floor area in developments where features such as public artwork, plazas, through site links or cycle facilities are provided.'(p.3). They also noted that these provisions have been frequently utilised.

On the **sustainability** of New Zealand's residential buildings, Trenouth and Mead (2007), and later Trenouth (2007) in *Planning Quarterly*, noted that this was an issue 'that district plans are only just beginning to grapple with.' (p.2). Trenouth and Mead's interpretation of sustainability encompassed aspects such as energy use, water and storm water efficiency, and buildings' relationship to climate change. The focus of district plans, they noted, has to date largely been on spatial issues, such as the 'relationships and effects between different activities', rather than the quality and sustainability of the 'internal' environment involved in buildings. Their research discussed a range of barriers 'created by district plan provisions to implementing sustainable residential buildings and ways to overcome them.' (p.1). Their research aimed also 'to identify ways that district plans can be more proactive in achieving sustainable residential development.' They concluded that sustainable development [building] elements are 'beginning to be addressed with regard to intensive development' and 'district plans are beginning to require site analysis at the beginning of the design process to ensure that development responds to the natural features, opportunities and constraints that exist within a site.'(p.7).

In particular, in regard to **barriers**, Trenouth and Mead concluded that:

- 'District plans did not intentionally set out to discourage the incorporation of sustainable building features, although a number of impediments were identified. (p.7)
- *Barriers* identified included:

Sustainability feature	***District Plan Provision***
Energy efficiency	• Height controls in relation to wind turbines • Network utilities have different rules than those applying to individuals • Building orientation for solar access
Indoor environmental quality	• Maximum internal noise standards for habitable buildings and the need to provide for mechanical ventilation conflicting with energy efficiency aims and the promotion of natural ventilation

[1] http://www.thesustainabilitysociety.org.nz/conference/2007/papers/UTTING-TUSC.pdf

Development controls	• In relation to features such as rain tanks, solar panels, on-site storm water management - bulk and location requirements (yards, etc) • Privacy requirements affecting building orientation • Minimum parking standards increasing impervious surfaces • Low impact approaches to storm water management are restricted to areas of particular environmental sensitivity, or where there are infrastructure constraints
Subdivision / Codes	• Connection of sites to urban services / public infrastructure focus • Minimum lot size / dimensions not taking into consideration orientation for solar access • Traditional engineering practice not recognising sustainable alternatives
Process issues	• Costs, uncertainty and delays in getting consent for discretionary and non-complying activity consents (including the need for written approvals)

Source: Trenouth and Mead (2007)

In regard to **incentives** / **encouragement** of more sustainable elements, Trenouth and Mead concluded:

- '…great gains will come about from rearranging the way cities are laid out.'(p. 3). However, their focus was not on urban form as such.
- Specific provisions potentially *encouraging* sustainability identified from case studies were:

Sustainability feature	***District Plan Provision***
Energy efficiency	• Permitted earthworks within the building platform encouraging slab-on-ground (thermal mass) • Orientation of living courts to north • Policy framework recognising energy efficiency • Recognition of non-network utility operators providing services • Eaves allowance within bulk and location controls assisting with solar gain
Indoor environmental quality	• Acoustic insulation requirements associated with medium density housing • Alternative methods for managing noise from arterial roads and airports, such as building setbacks and implementation of acoustic barriers, as well as varying standards according to room
Storm water	• Requiring on-site management • Allowing stacked parking / reduced access widths • resulting in reduced impervious surfaces • Policy framework recognising impacts of stormwater • Specific requirements for swales, on-site soakage in areas of particular constraints • Allowances for roof rain water tanks to infringe development controls such as height, height-in-relation-to-boundary
Water supply	• Requiring water-saving devices to be installed for medium density housing • Policy framework seeking water recycling (grey water)
General	• Requirements for cycle parking as part of large parking lots • Maximum parking standards in response to location near public transport
Subdivision / Codes	• Provision to assess alternatives

Source: Trenouth and Mead (2007)

Trenouth and Mead also concluded that '[t]here is an opportunity to provide greater flexibility into the [district planning] process to recognise and encourage sustainable building features.' (p.7)

Going beyond the low-key recommendations of Trenouth and Mead, a Beacon Pathway report by Easton, Howell and Birchfield (2008) argued that there is 'clear need for Councils to improve Council practices' (p.2) in regard to sustainable building. They remarked that 'people don't want the added risk, time and cost associated with consent requirements and needing to prove that more sustainable solutions fit with the Council context and administrative requirements.' Perhaps optimistically, they noted that 'this situation is however changing, with more Councils considering more direct approaches to encourage improvements.'

The essential problem outlined by Easton et al. (2008) is that 'currently many more sustainable approaches to building are not included with[in] the Acceptable Solution framework provided by the New Zealand Building Code. This makes the approval of such approaches generally more difficult for both the applicant and the council staff…. This is in essence the greatest regulatory barrier to many sustainable building approaches which Beacon has found in researching case studies…'(p.5).

Despite their optimism (noted above), Easton et al. reiterated what Trenouth and Mead (2007) had concluded, namely that 'the issue of sustainable buildings is one that district plans are only just beginning to grapple with.'(p.5). They did, however, add that 'The task currently facing local councils is how to overlay on the traditional spatial focus of district plans a new layer related to the quality and sustainability of individual buildings and activities. Getting the two layers to interrelate is a challenge.' One strong example cited was codes of practice, such as for 'carparking and manoeuvring requirements, which pushed development, particularly that on smaller sites, to be designed around the car – rather than the optimum orientation for the building.'(p.6). A probable undesirable effect of this stricture is to facilitate car ownership, with downstream impacts in terms of encouragement of carbon emissions from vehicle use.

Easton et al. also commented that one of the key concerns is the relationship between the Building Act 2004 and the RMA 1991. Section 18 of the Building Act appears to imply that building work is not required by the Building Act to achieve performance criteria (under the RMA) that are beyond those prescribed in the building code. However, Ceri Warnock of the University of Otago is cited as arguing:

> '*a territorial authority will be free to promulgate conditions and rules concerning the* use *of a building even if those rules affect the construction of buildings, provided of course that such rules are "appropriate and necessary" to "promote the sustainable management of natural and physical resources".'*

In short, any rules must conform with and be necessary to achieve the purpose of the RMA. Moreover:

> '*Carefully drafted rules, emphasising their valid resource management function, are likely to be safe from legal challenge despite s 18 BA04. To further safeguard any rules, local authorities would be well advised to tie or to link the rule to the* use *of the building if possible.'* (Warnock 2005, p.361).

An additional and less optimistic conclusion of Easton et al. is the 'recognition of how little is still being done to incentivise people to go further with both new-build situations and renovations. Those councils that are making an effort are only managing to do so in a fragmented manner.' (p.14).

Easton and Saville-Smith (2008) argued that a primary factor in new houses being unnecessarily costly and not designed for sustainability was that they were larger (and thus more costly in both capital and operating terms) than they needed to be in order to meet living needs of households. This is borne

out by other studies (Viggers, Keall et al. 2017). They also noted that consumers were not seeking high performance (including better sustainability performance):

> '*Currently consumers in the new home market are not asking for high performance from their homes, despite the fact that it is relatively easy to design and construct homes which perform significantly better than the norm. Instead they appear to accept increasingly large, poorly performing houses, with associated high upfront capital and operating costs. Where affordability is a consideration, the default response appears to be to deliver cheap low quality housing, rather than to design to high quality, but smaller dwelling sizes.' (p.7)*

They also noted that without greater engagement from the consumer with the performance of their home, there was 'likely to be limited uptake' of opportunities to induce the building industry to provide more sustainable and better quality houses.

Kirpensteijn (2017), in a Master's of Planning thesis, examined various requirements for rating of buildings in district/unitary plans such as Auckland Council's requirement in its Proposed AUP. This included a rule applying to new developments of five or more dwellings, that the dwellings should be designed and constructed to achieve 'a minimum 6-star level from the NZGBC Homestar Tool (2013) or certification under the Living Building Challenge (2013).' Importantly, the Council argued that the reason that the provisions are reasonable is that, with the exception of insulation standards, 'the Building Act addresses health and safety rather than the environmental performance of buildings.' (p.35). Moreover,

> *'since Homestar measures tend to address the environmental performance of building rather than the health and safety aspects of buildings and provide no conflict with the requirements of the BA [Building Act], the provisions can be better linked with the RMA which addresses the effects of activities on the environment (Auckland Council, 2013).'* (p.35)

However, the Auckland Unitary Plan Hearings Panel recommended that the provisions including rules for sustainable design be deleted, for three reasons covered immediately below in this document. Kirpensteijn concluded, on the basis of her research, including interviews with relevant stakeholders, that standards above the code are undermined by developers wishing to see a 'level playing field', and the government wanting to enable easier and faster development (p.37). Consequently:

> *'to get around Section 18 of the BA [Building Act], the most effective methods that planners could use include the use of height and density bonuses, and reduced consenting timeframes and costs for consents that specifically provide for green building design and technology. In other words, in the current regulatory environment, planners cannot effectively implement mandatory green building provisions, however they can effectively manage nonmandatory provisions for increasing green building uptake.'* (p.49)

Incentives include those described above, and extend to others such as providing for higher density or building heights (as in Queenstown, for example); a subsidy to add solar PV panels to a building; or providing 'timing' incentives by either prioritising green building developments in the consenting process above conventional buildings, or fast tracking consenting times for the use of green technologies.

In the matter of regulation for sustainable residential building design in the AUP in 2016, Auckland Council had taken the view that 'relying on the Building Code would not deliver the necessary sustainable design outcomes it is seeking to achieve.'(Independent Hearings Panel on the Auckland Unitary Plan 2016, p.4). This was on the basis that the Code set minimum rather than 'optimal'

standards, and that 'it does not require compliance with other criteria that deliver sustainable design outcomes that the Council considers to be important.' (*ibid*).

But submitters on this matter generally took a different view; these views ranged from those who considered that the Council was unable legally to introduce standards for buildings when standards are already provided for in the Building Act 2004; to those who generally supported sustainable design provisions but considered that the standards should not be mandatory and should instead be provided in the form of incentives. An additional practical issue was the way in which a building performance assessment tool was to be incorporated into the AUP by reference. The IHP recommended that the AUP 'should not be controlling the manner in which a building is constructed.' (p. 5), and therefore recommended 'against the inclusion of the rules relating to sustainable design in the Unitary Plan.' It noted that 'Council has a range of non-regulatory mechanisms and other methods available which could be used to promote the adoption of the [Green Building Council] tools.'

The New Zealand Productivity Commission (NZPC) (2017) noted in its *Better Urban Planning* final report that 'Some councils have also used the RMA to impose controls on the internal design or construction of buildings that exceed the standards set by the Building Act. This may be unlawful.'(p.110). In their earlier 2015 report, the NZPC had also noted that 'such overlaps between regulatory regimes create uncertainty for developers.' (New Zealand Productivity Commission 2015), They concluded, in light of a Supreme Court commentary on an earthquake strengthening case in 2014, that:

> *'…it would seem that territorial authorities probably do not have the power to impose requirements that are more stringent than those provided for in the Building Code, unless the Building Act 2004 or Code has an explicit provision to the contrary. This is likely to include requirements for energy efficiency or environmental standards (such as Homestar) that are more stringent than the Building Code's standards.'*(p.121).

Consistent with the incentives approach, Eagles (2018) has identified 'numerous levers' with which local government can incentivise the production of more sustainable buildings, either commercial or residential. Eagles, who heads the NZ Green Building Council, an industry lobby group for sustainable construction, identifies the following additional methods:

- Reducing development contributions (under the Local Government Act)[2]: an example is Wellington City Council, which gives a 50% discount on contributions for commercial projects that gain a Green Star rating[3];
- Encouraging the use of building rating tools: Christchurch City Council worked with the NZ Green Building Council to develop and institute a voluntary tool (BASE: Building a Sustainable Environment) for post-earthquake Christchurch.[4] This is said to 'provide a

[2] The Local Government Act 2002 Amendment Act 2014 changed development contribution provisions – see Fact Sheet (July 2014) at https://www.dia.govt.nz/Better-Local-Government#proposed1

[3] Green Star is a voluntary rating scheme to assess the environmental design, efficiency and performance of New Zealand's buildings; it is managed by the NZGBC.

[4] https://www.nzgbc.org.nz/Category?Action=View&Category_id=225

moderate increase in green building practices over standard industry practice and Building Code requirements.'[5] However, as at April 2013, this tool had not been used[6].

1.3 Advantages and Disadvantages of Incentives

Kirpensteijn (2017) notes advantages of incentive systems, which include that they can surmount barriers or compensate for the financial or other barriers to developers investing in a greener building. She cites Paetz (2008) in noting that incentives can act as carrots for early innovation builders and tip decisions towards building green. The mechanisms most within the control of planners are extra floor space (height/density bonuses) and reduction of time or charges for consenting, and these have the advantage that they do not affect the council financially. But correspondingly, she notes (p. 48) that financial incentives – as used in Australia – are unlikely to be mechanisms that planners use in New Zealand.

However, a significant disadvantage which Kirpensteijn does not identify is that monetary incentives (such as extra floor bonuses for commercial buildings) can make the management task of local government trickier, sometimes involving judgements that may not be clear-cut, and may be open to challenge. In regard to timing, one consent applicant may be commercially disadvantaged by being shuffled down the priority queue compared to another applicant. Moreover, where there is uncertainty, developers tend to see it as leading to higher cost, or level charges of inconsistency in decision making (Duncan and Brunsdon 2017). The New Zealand Productivity Commission also takes the view that any uncertainty arising from such practices can be unhelpful to developers.

The practices could also impinge on the integrity of particular urban planning rules such as building height restrictions which may have had a good reason behind them. The relaxation of the restriction could be viewed as arbitrary and in some cases impose significant non-pecuniary harm, which might exceed the sustainability benefit of providing the incentive.

Paetz and Pinto-Delas (2007) framed the issue in a similar way when they stated: 'The fundamental and most complex issue in devising a development incentive scheme is the inherent tension in seeking to balance the requirement for tangible, profitable development gains with the need to avoid adverse impacts on residential character and the environment…. Without the latter [requirement to limit adverse local impacts], the cost of the incentives will be perceived by the community to be greater than the benefits.'(p.8).

1.4 Conclusion

The main question this paper seeks to address is the scope under existing or amended legislation for building performance assessment tools or (other related) provisions to advance a goal of sustainable building and environmental performance improvement in New Zealand.

An initial assessment of the work of the Independent Hearings Panel into the Proposed Auckland Unitary Plan suggests that section 18 of the Building Act 2004 may be an impediment to the inclusion of building performance assessment tools in district or unitary plans under the RMA. The Panel decided that Auckland-wide objectives, policies and rules for sustainable design and the information requirements and provisions requiring mandatory design statements were not matters for a

[5] http://www.sustainablesteel.org.nz/christchurch-base-tool/ . See also Auckland Council's review of the BASE tool, at https://www.aucklandcouncil.govt.nz/plans-projects-policies-reports-bylaws/our-plans-strategies/unitary-plan/history-unitary-plan/documentssection32reportproposedaup/appendix-3-8-2.pdf

[6] http://www.stuff.co.nz/the-press/business/8575190/Tools-available-to-build-greener-city

regulatory response, and instead concluded that such goals could be 'better achieved through non-regulatory methods such as design guidance and support and through Council's Auckland Design Manual.' (Independent Hearings Panel on the Auckland Unitary Plan 2016, p.3).

This is partly a legal conclusion, and to that extent needs to be further considered in part 2 of this study. But there appears to be a distinction between building controls (i) aimed mainly at the quality of the building itself – the realm of the Building Code – and (ii) those that are put in place to regulate the use of the building for particular purposes – e.g. residential use – and which have environmental impacts, or simply are put in place to mitigate the environmental impact of building, which relate to RMA purposes.

However, any conclusion is also clearly a matter of judgement, turning on the efficacy of alternatives and, in particular, incentives such as extra floor space or reductions in consenting time. Such alternatives have their pros and cons. Moreover, the legality of controls on the design of buildings has not been well tested in the Courts and may provide some scope for innovation favouring sustainable design.

The literature reviewed so far suggests that there is a gap in the recent New Zealand literature on the scope for (and merits of) non-regulatory mechanisms or instruments to improve the sustainability of residential building under the RMA, aside from the question of regulatory provisions potentially intruding on the scope of the Building Act. Some significant studies were carried out around 2008-2010 but few contributions to the literature have been made since, as Kirpensteijn's review suggests.

The last part of this study analyses an investigation of the opinions and experiences of selected planners, local government officers and central government officials on these matters, and establishes the nature of current opinion on non-regulatory provisions to advance goals of environmental performance improvement in regard to New Zealand buildings.

2 Scope for regulatory provisions to advance sustainable building performance: Legal analysis

2.1 Introduction

This part analyses the scope under the Resource Management Act 1991 for the provision of a tool or framework to require, via a rule under a district plan, actions by builders or property developers, which could encourage, or result in, a 'higher than code' level of building performance (e.g. more environmentally sustainable performance), as desired by particular district councils. This legal analysis sets out and discusses the existing legal framework under the relevant legislation, as interpreted by the courts.

The main ways in which local authorities can create binding legal norms are (i) through the creation or amendment of rules in a District Plan, within the framework of the Resource Management Act ('RMA') or (ii) the enactment of local by-laws. In the case of mandatory requirements for building quality, these are likely to be put in place only for new builds through District Plan requirements.

However, as the following analysis will make clear, there is a widely held view that such sustainable design requirements (SDRs) for new buildings would be ultra vires – outside of territorial authority planning powers – due to restrictions that the Building Act (the Act) places on any rules that would institute performance requirements for buildings that are more stringent than the requirements of the Building Code (the Code). The argument is that such SDRs would be building performance criteria that are additional to and more restrictive than those found in the Code, and which the Act arguably prohibits.

Given that SDRs are aimed at remedying the perceived insufficiencies of the Code in respect of sustainability requirements, this legal argument is crucial to the legality of any proposed SDR put in place under a District Plan under current law. However, this section shows that the law in this area is not clear. A number of territorial authorities and other parties have undertaken the present legal analysis of SDRs during the development of a number of recent District Plans with conflicting legal conclusions. This analysis will use the development of the Proposed Auckland Unitary Plan (PAUP) by the Auckland Council (the Council) as a case study, because the Council proposed putting in place SDRs and other requirements that required buildings to meet performance standards greater than those in the Code, which meant this legal question has been closely analysed.

2.1.2 Sustainable design rules

SDRs would require new buildings to meet sustainability standards, relating to matters such as energy and water efficiency of housing. The PAUP SDR proposals used the New Zealand Green Building Council tool – the Homestar scheme[7] – as the key requirement.[8] However, an alternative list of requirements was also proposed,[9] which developments not meeting the Homestar standard would have to comply with. These features included high levels of insulation, thermally broken double

[7] https://www.nzgbc.org.nz/homestar

[8] Statement of Rebuttal Evidence of Anthony Horton on Behalf of Auckland Council, Chapters C7.7 and H6.4 (Planning - Sustainable Design) 24 August 2015 https://hearings.aupihp.govt.nz/online-services/new/files/FG6E873TvzIyUiiAcH9zSJd5oXLXjQxWyobtMSwynYQF ['Rebuttal Evidence of Anthony Horton – Sustainable Design'].

[9] Auckland Council Closing Statement – Sustainable Design https://hearings.aupihp.govt.nz/online-services/new/files/bXvFwu0MrjO8epC078s320b85kJGVd5dAGsZVUoSwCbX.

glazing, special ventilation, water efficient shower, toilet and tap fittings, low energy lighting capability, and no non-FSC tropical hardwoods to be used – as set out in the table below.

Feature Sustainable Building Standards Requirements	
Ceiling insulation.	Insulation R value 3.5
Windows.	Double glazing insulation R value 0.26.
Wall insulation.	Insulation R value 2.2.
Floor	Insulation R value 2.2, Concrete floors must feature continuous insulation underneath and at edges.
Ventilation.	Dedicated extraction installed in kitchen and bathrooms. Provision to vent a clothes drier to the outside of the residential unit or an external washing line..
Water efficiency	WELS 3 Star Shower; WELS 4 Star Toilets; WELS 6 Star Taps
Recessed down lights	No recessed down lights penetrating the thermal insulation envelope. LED or CFL for a minimum of 75% of all light fittings.
Materials	No non FSC certified tropical hardwoods for structural framing.

2.2 The Process of Putting SDRs in District Plans

2.2.1 District plans controlling the use of land

The fundamental framework of the RMA is that land may be used in any way unless such use is contrary to either a national environmental standard, or a rule in an operative, or proposed district or regional plan. This follows from the restrictions noted in section 9 of the RMA. However, there are exceptions for uses that do not so comply but have been allowed under a resource consent, or if the use is protected as an existing activity.[10]

Rules restricting the use of land and buildings may be created by territorial authorities under District Plans, under the RMA. Despite the focus of the RMA on environmental protection and use, territorial authorities are able to address wider social and economic matters through District Plan Rules.[11] For example, Queenstown was found to be within its power to bring in affordable housing rules in its District Plan.[12] For this to be within the local authority's RMA powers, the rule must assist the territorial authority to carry out its functions to achieve a purpose of the RMA,[13] for example regulating the use and development of land.[14]

2.2.2 Creation and change of District Plan rules; Section 32 Reports

Local authorities are required to consider a number of factors and obligations in creating a new district plan. They must consider their functions under s 31 of the RMA, including to establish, implement and review objectives and policies "to achieve integrated management of the effects of the use, development, or protection of land and associated natural and physical resources of the district"[15] while at the same time ensuring "that there is sufficient development capacity in respect of housing

[10] Resource Management Act 1991, Section 10.
[11] Nolan et all *Environmental and Resource Management* (Online Looseleaf, LexisNexis NZ) at 3.13.
[12] *Infinity Investment Group Holdings Ltd v Queenstown Lakes District Council* [2011] NZRMA 321.
[13] Resource Management Act 1991 s 72.
[14] Section 31(1).
[15] Section 31(1)(a).

and business land to meet the expected demands of the district".[16] When proposing a new district plan, local authorities must prepare and publish an evaluation report in accordance with s 32 of the RMA. "The purpose of s 32 is to provide a check on the necessity for including policies and rules in a plan, to ensure that over-regulation does not occur, costs and benefits are considered, and that the controls are justified."[17]

The s 32 report process requires a rigorous analysis of the appropriateness of the objectives of the proposal, and of the appropriateness of the specific provisions that are aimed at achieving these objectives. Under s 32(1), this report must:

> (a) examine the extent to which the objectives of the proposal being evaluated are the most appropriate way to achieve the purpose of this Act; and
>
> (b) examine whether the provisions in the proposal are the most appropriate way to achieve the objectives by—
>
> > (i) identifying other reasonably practicable options for achieving the objectives; and
> >
> > (ii) assessing the efficiency and effectiveness of the provisions in achieving the objectives; and
> >
> > (iii) summarising the reasons for deciding on the provisions; and
> >
> > (c) contain a level of detail that corresponds to the scale and significance of the environmental, economic, social, and cultural effects that are anticipated from the implementation of the proposal.

Furthermore, there are significant requirements to "identify and assess the benefits and costs of the environmental, economic, social, and cultural effects that are anticipated from the implementation of the provisions, including the opportunities for economic growth that are anticipated to be provided or reduced; and employment that are anticipated to be provided or reduced" (s 32(2)(a)), and to provide a quantitative analysis of their extent if possible (s 32(2)(b)). Where the s 32 report has failed to properly make the required assessment, the proposed rules may be disallowed.[18]

2.2.3 The PAUP – a unique process

The Auckland Council was established as a territorial authority in 2010, after a major amalgamation of local government in the region.[19] Its priority was then to create a Unitary Plan to replace the prior plans in place in the separate territorial authorities.[20] This Plan process included an extraordinary aspect: there was a request for the Government to put in place a special process to expedite the new Unitary Plan, including an Independent Hearings Panel (the Panel).[21] The Panel made recommendations, which the Council was not bound to give effect to.[22]

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[16] Section s 31(1)(aa).
[17] Environmental and Resource Management Law Online [3.84]. The nature of a s 32 report is usefully set out in the Harrison Grierson and NZIER report on the s 32 Report for the PAUP Harrison Grierson and NZIER *Section 32 RMA report of the Auckland Unitary Plan Audit* report to the Ministry for the Environment (November 2013)
[18] *Independent Māori Statutory Board v Auckland Council* [2017] NZHC 356; [2017] NZRMA 195 at [98]
[19] Local Government (Auckland Council) Act 2009 Sections 6 and 2(1).
[20] The background to the Auckland Unitary Plan is set out clearly in *Albany North Landowners v Auckland Council* [2017] NZHC 138 at [10]-[33].
[21] Local Government (Auckland Transitional Provisions) Act 2010, ss 123, 136 and 164.
[22] Local Government (Auckland Transitional Provisions) Act 2010, s 148.

The PAUP process and arguments provides useful evidence for the policy and legal analysis of whether SDRs can be created by local authorities. It is an example where the territorial authority proposed mandatory SDRs, provided s 32 evaluations that justified them, and then argued for the proposals in depth in a detailed and adversarial way against objections put forward by many submitters before IHP. Despite the SDRs not ultimately becoming part of the final Unitary Plan as mandatory requirements, the legal question was thoroughly aired.

2.2.4 The Auckland Council's s 32 Report

In relation to the proposed SDR, the s 32 analysis ran to 19 pages. The subject matter of the rules was identified as "sustainable design provisions" relating to "the council's response to climate change and the outcome of a quality and sustainable built environment".[23] The report justified objectives and rules that included SDRs that would apply to all new development containing five or more dwellings and office and industrial buildings over 5000m^2.[24]

The Report identified two resource management issues that the proposed SDR aimed to address. The first related to the poor design and construction quality of homes being built in Auckland:[25]

> Poorly designed and constructed homes are inefficient to operate, create unhealthy living and working environments and therefore can negatively impact on the amenity of development and its surrounds. By improving the sustainability of new homes and commercial development, such buildings will be more comfortable and healthier to live in. Running costs are reduced therefore improving affordability and economic performance.

The other issue related to the environmental impact of new homes, particularly relating to their efficiency in energy and water use:

> New development can create adverse environmental effects and contribute to the causes of climate change. By designing building to incorporate best practice sustainable design, such as the use of water efficiency devices or thermal insulation, the effects on the environment can be minimised. In particular, efficiencies in energy use can assist in reducing greenhouse gas emissions.

While these SDRs would cause higher build costs initially, these would eventually be offset by reduced energy and water usage, as well as the increased value of the building.[26]

The Report argues that current sustainability practices are insufficient to create a quality built environment in buildings, which would reduce environmental impacts in relation to energy use, carbon emission, waste volume, and water use.[27] These objectives are linked with Part 2 of the RMA, which seeks the "sustainable management and development of land and resources".[28] The Report argues that the performance of the built environment is "intrinsically linked to how natural and physical resources are managed and effects on the environment", because a sustainably designed and

[23] Auckland Council 2.8 – Sustainable Design - section 32 evaluation for the Proposed Auckland Unitary Plan https://www.aucklandcouncil.govt.nz/plans-projects-policies-reports-bylaws/our-plans-strategies/unitary-plan/history-unitary-plan/documentssection32reportproposedaup/2-8-sustainable-design-v2-2013-09-17.pdf at 2.
[24] At 2.
[25] At 3.
[26] At 10.
[27] At 6.
[28] At 6.

constructed building will use less energy and water resources.[29] The Report therefore argues that the objective and the proposed SDR are consistent with sections 30 and 31 of the RMA.[30]

The Report also notes that its proposed SDR were developed with reference to international best practice examples of jurisdictions that have "specific planning regulations on sustainable design, many of which employ the use of an assessment tool" particularly those found in the UK, the US, and Australia.[31] Further research was reported to have been undertaken into whether the use of sustainable design planning rules and an assessment tool were the most efficient way of meeting the sustainability objectives of the Auckland Plan, including the cost-benefit analysis.[32] This included a comparison with the Council creating its own development rules or assessment tool from scratch, or taking a non-mandatory ("non-regulatory") approach through education.[33]

The costs and benefits of the proposed SDR were quantified by modelling the requirements for property developments and gaining advice from quantity surveyors.[34] The Homestar 6-star standard proposed was estimated to increase the capital costs of an industry standard 3 bedroom house by around $6,500 or 2.2%.[35] This was offset by 50% energy savings and 40% water savings that paid back this cost in 5.5 years.[36] This payback time was compared with 2.5 years for 5-star rated buildings, and 10 years for 7-star buildings. These savings would also continue over the life of the building and contributing to lower environmental effects.[37] Further, the Report identified similar economic benefits for office buildings, as well as increases in asset value and rental returns.[38] In addition, sustainable buildings had non-economic benefits to people's "quality of life, health, and well-being", with the Report identifying a cost-benefit ratio of 1 to 2.[39]

The Homestar assessment tool was said to be a "very simple and consistent framework" for sustainable design that avoids "extensive and complex list of rules covering all aspects of a building's design".[40] The s 32 Report noted that the Homestar standard awarded credits: "to design features that cover multiple aspects to sustainable design (water, waste energy etc), thereby giving a holistic and integrated assessment of a building. There is an inherent flexibility in the tools whereby the developer has ability to decide what sustainable design features are used."[41] Furthermore, the tool's standards have minimal subjectivity or discretion in determining whether they are met.[42]

Dealing with 'effectiveness', the Report claims that research work undertaken by the Council has shown "a 50 per cent reduction in energy use could be expected with minimal upfront cost".[43]

[29] At 6.
[30] At 7.
[31] At 5.
[32] At 5.
[33] At 15-16.
[34] At 12.
[35] At 12.
[36] At 12.
[37] At 12-15.
[38] At 13.
[39] At 14.
[40] At 10.
[41] At 2.
[42] At 11.
[43] At 7.

Whether these savings were actually achieved would be evaluated once developments are completed and occupied, likely on a two-yearly basis.[44]

Consultations on the proposed SDR were said to have been thorough, although these were not described in a way that is clear to a layperson.[45] The draft rules were presented to a Political Working Party, elected members, the Auckland Plan Committee and Chairs of Local Boards.[46]

The section 32 Report also directly addressed the interaction of the proposed SDRs and the building performance requirements of the Building Code, under the Building Act. Its position was essentially that the SDRs are largely different kinds of building quality requirement, and are put in place for a different purpose, under the RMA:[47]

> The Building Act is aimed more at addressing health and safety rather than environmental performance (with the exception of the insulation standards) of new buildings. A breakdown of the Building Act and comparison with Homestar and Greenstar tools reveal that tools address aspects of a building's design which relates directly to environmental performance (inclusive of economic and social performance) and therefore do no conflict with requirements of the Building Act which relate to the health and safety aspects of a building's construction. Although more onerous in certain aspects, such as thermal performance, the purpose of these provisions can be directly linked to the purpose of the RMA.

The outcomes sought by this method are clearly aimed at ensuring that new buildings of a medium to large-scale minimise environmental effects and maximise social and economic efficiencies. Therefore it is addressing a different purpose than the requirements of the Act.

Although it ultimately removed the SDR from the PAUP, the Council continued to propose their inclusion during the Independent Panel Hearings. Its closing statement emphasised the Council's belief that the cost-benefit analysis was robust, and that a prescriptive regulatory approach was needed.[48] This was supported by the Council's expert witness[49] and its former Principal Planner.[50] The latter emphasised that "many of the design aspects that the Homestar tool assesses are absent in their entirety from the Building Code."[51]

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[44] At 8.
[45] At 5.
[46] At 5.
[47] At 11.
[48] Closing Remarks on Behalf of Auckland Council in Relation to Topic 077 Sustainable Design Proposed Auckland Unitary Plan Sections C7.7 and H6.4 https://hearings.aupihp.govt.nz/online-services/new/files/bXvFwu0MrjO8epC078s320b85kJGVd5dAGsZVUoSwCbX // ['Auckland Council Sustainable Design – Closing statement']. See also https://hearings.aupihp.govt.nz/online-services/new/files/2QG0jZmSqVlVuyBnOXOV3jyzXQ9jtkVtYUl5N0HT8i2Q and Summary Statement of Timothy Robinson on Behalf of Auckland Council, Chapters C7.7 and H6.4 (Sustainable Design) 1 September 2015 https://hearings.aupihp.govt.nz/online-services/new/files/z2cr8tIwPqN7QvVX9DNB1mZVYjlXP1UP0itw6bWguz2c
[49] Statement of Evidence of Timothy Robinson on Behalf of Auckland Council (Sustainable Design) 27 July 2015 https://hearings.aupihp.govt.nz/online-services/new/files/CezLWfGhz7FMTY3lKkmZGCvyxhppcHhiEloma8E2kELC
[50] Statement of Evidence of Anthony Horton on Behalf of Auckland Council, Chapters C7.7 and H6.4 (Planning - Sustainable Design) 27 July 2015 https://hearings.aupihp.govt.nz/online-services/new/files/OIX5kP3C62QDvTnvejpuZlQNWlIOqEGzDaEZE0oxOIX5 ['Statement of Evidence - Horton']
[51] At [7.13].

2.2.5 The Independent Hearings Panel

The Panel hearings were the main chance for the policy rationales for the PAUP, including the SDRs contained in the Sustainable Design proposals, to be discussed. Significantly, it was also the forum for sustained legal argument about the legality of SDRs, within the general context of the legal relationship between the Building Act and Code and territorial authority planning power under the RMA.

In contrast with the Council's position, many submitters argued that the sustainable design rules should be deleted from the PAUP. Significantly, this included the evidence of Mr Bruce Klein, on behalf of the Ministry of Business, Innovation and Employment.[52] Although noting that MBIE supported the Homestar initiative,[53] Mr Klein stated that MBIE had "grave concerns around the provisions in the proposed Auckland Unitary Plan which make compliance with Homestar level 6 mandatory."[54] This was because he characterised the Council's cost/benefit analysis as inadequate – "significant over-estimation of benefits and an under estimation of costs" as well as the exclusion of some costs.[55]

Mr Klein further argued that because the SDRs would be building requirements going beyond the Building Code, they were contrary to the Act.[56] He noted that the Code was a uniform minimum performance-based standard for new buildings that represented a governmental choice to "move away from a prescriptive system which was seen as overly complex (particularly because each Council applied different standards) and stifling progress in building design, materials and techniques."[57] To have the Auckland Council put in place SDRs would be a return to the old approach:[58]

> One of the reasons the national performance based Building Code was introduced was to avoid having different prescriptive building standards for each Council. … Using the proposed Auckland Unitary Plan will re-introduce another layer of regional building standards on top of Building Act requirements. It may open the door for widely disparate variations to occur between regions without central oversight to ensure reasoned modifications.

Mr Klein therefore characterised the SDRs as "incompatible with the Government's objectives to reduce red-tape and compliance costs that increase the cost of housing."[59] He also noted the legal issue that the Act states, that "no one is required to comply with performance criteria additional to or more restrictive than the performance criteria contained in the Building Code, unless there is an express provision to the contrary in any Act."[60]

In its closing remarks before the Panel hearing, the Council submitted that at the mid-to-low end of the market, sustainable design requirements are necessary to ensure that dwellings are built according to sustainable design principles.[61] Although there was an increase in new dwellings being constructed according to Homestar standards, this was largely because the Council's notified

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[52] Statement of Evidence of Bruce Trevor Klein on Behalf of The Ministry of Business, Innovation and Employment (Submitter No. 6319) 11 August 2015 https://hearings.aupihp.govt.nz/online-services/new/files/Winfr8YMorLgE9TW6U3mZuMnrkRiGEFkhzfuuCNYyWin ['Statement of Evidence - Klein'].
[53] At [4.2].
[54] At [4.2].
[55] At [6.2]-[6.3].
[56] At [4.8].
[57] At [5.4].
[58] At [8.4](b).
[59] At [6.5].
[60] At [8.1].
[61] Auckland Council Sustainable Design – Closing statement, above n 48, at [2.1]-[2.8].

sustainable design rules were operational in Special Housing Areas, where 40% of these compliant houses were located.[62] The Council also reaffirmed its belief that the SDR were justified on a cost/benefit analysis, observing that many submitters to the hearing including the Auckland Regional Public Health Service and the expert witnesses of Fletcher Building and Housing New Zealand, supported this view.[63] It also reiterated its view that the SDR "achieve the statutory criteria of the RMA and do not raise jurisdictional issues under the Building Act 2004".[64]

This latter position was argued fully in the Council's legal submissions, written by national law firm Simpson Grierson.[65] This legal argument is set out below in the substantive legal analysis.

The Panel ultimately recommended that the Sustainable Development rules should be deleted.[66] This recommendation was primarily due to the Panel's view that the Council was legally unable to put in place such rules that regulated building performance. The Panel did not undertake any significant analysis of the SDRs' policy desirability, although the it did state that "The Council has a range of non-regulatory mechanisms and other methods available which could be used to promote the adoption of the tools without making that a mandatory requirement under the Unitary Plan."[67]

2.3 The Legality of SDRs in District Plans

2.3.1 The key legal issue

As noted above, the major issue for any proposed amendment to District Plans, that would put in place sustainable design requirements for new buildings, is the legal risk that such requirements are not legally valid. This risk arises due to the Building Act, which has a general purpose of prescribing (through the Code) the standards which building work must meet.[68] In the setting of building performance standards, the Act specifies four aims:[69]

(i) people who use buildings can do so safely and without endangering their health; and
(ii) buildings have attributes that contribute appropriately to the health, physical independence, and well-being of the people who use them; and
(iii) people who use a building can escape from the building if it is on fire; and
(iv) buildings are designed, constructed, and able to be used in ways that promote sustainable development.

The Act also contains a provision stating that a person who carries out building work is not required to achieve performance criteria additional to, or more restrictive than, those specified in the Code.[70] In full, s 18 states:

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[62] At [2.7].
[63] At [3.1]-[3.3].
[64] At [7.2].
[65] Legal Submissions on Behalf of Auckland Council in Relation to Topic 077 Sustainable Design Proposed Auckland Unitary Plan Sections C7.7 and H6.4 https://hearings.aupihp.govt.nz/online-services/new/files/V6KZlU2XU10p0Ncq5hUyHcr2VqDGZZDd3wIjr9JR4AV6 ['Auckland Council Main Legal Submissions'].
[66] IHP Report to AC Topic 077 Sustainable Design 2016-07-22 https://www.aucklandcouncil.govt.nz/plans-projects-policies-reports-bylaws/our-plans-strategies/unitary-plan/history-unitary-plan/ihp-designations-reports-recommendations/Documents/ihp077sustainabledesign.pdf ['IHP SDR Recommendation'] at 2.
[67] IHP SDR Recommendation at 6.
[68] Section 3.
[69] Section 3(a).
[70] Section 18(1).

18 Building work not required to achieve performance criteria additional to or more restrictive than building code

(1) A person who carries out any building work is not required by this Act to-

(a) achieve performance criteria that are additional to, or more restrictive than, the performance criteria prescribed in the building code in relation to that building work; or

(b) take any action in respect of that building work if it complies with the building code.

(2) Subsection (1) is subject to any express provision to the contrary in any Act.

The legal analysis of s 18 and the general relationship between the Building Act and the RMA – henceforth, the "BA/RMA" relationship – is reasonably complex, as the legislation is not clear and there are few judicial decisions that have interpreted these Acts and come to conclusions about this relationship. The main judicial interpretation of the section, *Christchurch International Airport Ltd v Christchurch City Council* ('*CIAL v CCC*'),[71] is fairly permissive of territorial authorities having the power to put in place building performance requirements additional to those found in the Act, so long as they are put in place for a resource management purpose. This decision was made in 1997, on the basis of a slightly differently worded version of s 18 in the previous Act (1991), by a strong High Court (two judges, including Tipping J, later a Justice of the NZ Supreme Court). However, although the reasoning in *CIAL v CCC* is quite clear in favouring a permissive approach, it is often interpreted as only allowing territorial authorities to put in place building performance requirements in areas that the Code does not already regulate with such requirements.

The unsettled nature of the law in this area is reflected in the legal arguments made during the development of the PAUP. Many submissions made to the IHP considered how the BA/RMA relationship affected the proposed SDR. On 8 October 2015, after receiving initial evidence and legal submissions on the sustainable design rules, the Panel issued a Direction asking for views of parties on the relationship between the RMA and the Building Act.[72] The Direction asked what it termed the 'jurisdiction' question: "Can the PAUP include a rule requiring building work to be undertaken to a standard higher than that required by the Code"?[73] The Panel identified that "Section 18 BA limits the extent to which other regulatory provisions can affect building work, so there may be a jurisdictional bar to such rules in the PAUP".[74] If that question was answered in the affirmative, the Panel asked a further question: "Where the PAUP seeks to impose a higher standard, are there limits on the nature of such a rule or the extent to which such a rule can exceed building code standards?"[75] A further question was not about the legal validity of such rules, but was instead the policy question of whether it is appropriate for the PAUP to impose higher building performance standards than the Code.[76]

The main submissions on this 'jurisdiction' or legal issue came from the Auckland Council and major institutions with a stake in the PAUP, such as Housing New Zealand Corporation (HNZ), Carter Holt

[71] *Christchurch International Airport Ltd v Christchurch City Council* [1997] 1 NZLR 573 (HC).
[72] Direction of the Independent Hearings Panel of 8 October 2015 https://hearings.aupihp.govt.nz/online-services/new/files/Ob6wEito3Sk39XTcXElMzuSmulNXQZluCMJpMzP28uOb ['IHP Direction']
[73] At [2].
[74] At [4].
[75] At [3].
[76] At [3].

Harvey, Ryman Healthcare Limited and Todd Property Group.[77] These legal submissions provide the key arguments relating to the BA/RMA relationship that would likely be raised in any legal justification or challenge to sustainable design rules in a District Plan, and they therefore affect perceptions of legal risk held by local authorities.

2.3.2 The Position in the IHP's Direction

After setting out the purposes of the RMA and the Building Act, the Panel observed that although the purpose of the RMA is wide enough to "encompass" measures relating to the purpose of the Act, so that "RMA rules could arguably therefore supervene in the field of the BC and extend control over building work", s 18 of the Act places limits on RMA measures.[78]

The Panel noted the arguments from the Council outlined above, but argued strongly against them. It was concerned that if councils could put in place building performance criteria directed at achieving RMA purposes, this would render s 18 ineffective in relation to the RMA, which it said to be contrary to "orthodox jurisprudence" concerning the binding force of acts:[79]

> That would mean that s18 BA would have no effect at all on the RMA. That interpretation would therefore nullify (at least in relation to the RMA) the general provision in s18(1) and render pointless the requirement for specificity in s18(2). In orthodox jurisprudence, a decision of a Court cannot overrule or nullify an Act of Parliament.

Such a categorical statement that the Council's legal analysis would have a court nullify an Act of Parliament is hyperbolic, because there is a plausible interpretation of the Building Act itself that accords with the Council's interpretation of *CIAL v CCC*. Of course, this was not the interpretation of that case given by the Panel's Direction, which argued that *CIAL v CCC* decided that it is only in respect of areas that the Code does not cover building performance requirements that local authorities may make District Plan rules to achieve RMA purposes:[80]

> the RMA can address the control of effects of activities (including building work which will be used for such activities) that may or may not occur in certain locations, or may address the control of effects where the BC does not regulate building work for that purpose, but cannot duplicate or exceed any BC controls on building work itself.

This approach was further supported by referring to the fact that *CIAL v CCC* and earlier case law including was decided under the previous Building Act, which had a narrower purpose provision and focussed on the structural performance of buildings, whereas the Act 2004 included wider purposes, including those relating to the promotion of sustainable development.[81]

Against this legal background, the Panel characterised the proposed SDR as resulting in requirements that control the "effects on the person undertaking the activity and those who were on the same site, rather than dealing with the effects of that activity on other people or sites, or the environment generally".[82] This led the Panel to identify a distinction between the RMA as "properly concerned with

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[77] Relationship between the Resource Management Act 1991 and the Building Act 2004 - Legal Submissions https://hearings.aupihp.govt.nz/online-services/new/files/5UXKdfYpXbluojWJ2cr7ITsGZgXaUXHTYldLPlQla4y5 (This is a collated set of legal submissions in response to the IHP Direction) ['RMA/BA Legal Submissions'].
[78] IHP Direction at [10] .
[79] At [13].
[80] At [13]-[14].
[81] At [15].
[82] At [16].

area-wide controls on development (which may consequentially limit the construction of buildings for certain types of development)" as compared with the Act that is "concerned with building work in respect of a specific building."[83] In summary, the Panel stated:[84]

> a fundamental basis for identifying the distinction between RMA controls and BA controls seems to be that the RMA provides for, and the Plan should be focussed on, controls on the use and development of sites within areas (usually identified by zones, precincts or overlays) in order to control the effects of such use or development on the environment while the BA provides for how building work should be undertaken within the scope of the BC.

The Panel reiterated its interpretation of the law as meaning that to be consistent with s 18 BA and therefore valid, District Plan requirements relating to buildings must relate to "matters which are not already addressed by the Code and are not covered within the purposes of the Act."[85] Thus:[86]

> in relation to individual buildings on existing sites, the Panel's preliminary view is that the design and construction of such buildings should be controlled by the BA and the BC and not by the Plan. The focus of the RMA is on dealing with the effects of a person's activity on other people and the surrounding environment and not on that person and their own site. On a fundamental level, the Plan should not extend to regulating on-site activities, which have no external effects.

This interpretation would significantly limit territorial authorities' ability to impose mandatory SDRs under the RMA.

2.3.3 Main Legal Arguments for the validity of RMA-based SDRs

It is evident, since they initially proposed the SDRs in the notified PAUP and defended them at the Panel hearings, that the Council believed that their proposed rules would not have been legally invalid or 'ultra vires' their rulemaking powers under the RMA. The relationship between the BA/BC and the RMA was discussed in relation to a number of areas in the PAUP,[87] and was the subject of a legal submission relating to the SDR.

In its SDR-specific legal submissions, the Council noted that the SDRs gave effect to sustainable design and energy efficiency objectives in the PAUP regional policy statement.[88] It responded to legal arguments given in submitters' evidence in chief that the Act meant that SDRs could not legally be put in the PAUP, noting that the RMA/BA legal relationship had been discussed in legal submissions on other topics.[89] The Council argued that:[90]

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[83] At [17].
[84] At [24].
[85] At [26].
[86] At [27].
[87] See in particular Topic 022 Natural Hazards and Flooding and Topic 026 General – Closing remarks on behalf of Auckland Council relating to flooding at [2.10] to [2.31]. https://hearings.aupihp.govt.nz/online-services/new/files/WusZskpRMnEVcpv7xqS7TOUVnuCtkiuTMPAJjB6v0IWu ['Auckland Council Topic 22 Closing Remarks']
[88] Auckland Council Main Legal Submissions, above n 65, at [3.3].
[89] At [5.4]. The other legal submissions are found in the hearings relating to Topic 013: Section B2.2 A quality built environment; Topic 022 Natural Hazards and Flooding; and Topic 050 City Centre in relation to the City Centre zone development controls such as minimum dwelling size, daylight to dwellings, and ground floor and entrances at street frontage level. See https://hearings.aupihp.govt.nz/
[90] At [5.7].

> There are two categories of exception to section 18. The first is the statutory exception set out in subsection (2) of section 18 that states subsection (1) is subject to any express provisions to the contrary in any Act. The second category of exception, established by case law, is where the additional or more restrictive performance criteria are imposed in a plan for a legitimate RMA purpose, rather than a Building Act purpose. / The Council's position is that to the extent that there is any overlap with matters addressed by the Building Code (see discussion below), the PAUP sustainable design rules in H6.4 are not contrary to section 18 of the BA04 as they fall into the second category of exception.

The Auckland Council identified *CIAL v CCC*[91] as the leading precedent on the interaction of the RMA and the BA/BC.[92] The legal issue in the case concerned whether the Christchurch City Council could legally impose a condition that required higher noise attenuation requirements on a resource consent for dwellings located near Christchurch airport. This depended on the interpretation of the equivalent provision of s 18 found in the BA 1991, s 7(2). The AC simply noted Chisolm J's statement in *CIAL v CCC* that:[93]

> Section 7(2) will only prevent the exercise of powers under the Resource Management Act if the consent authority under that Act is attempting to impose building controls in respect of the physical structure of the building which are not attributable to the legitimate exercise of powers [under the Resource Management Act]

As the legal basis for these rules was challenged by the Panel's Direction, the AC provided further, more detailed legal submissions setting out arguments for their validity.[94] It identified the key issue as being whether s 18 prohibits the Council promulgating performance standards in the PAUP additional to or more restrictive than those found in the Code. Its legal argument was that there was no 'jurisdictional' reason against this,[95] based on an analysis of the legislation and the relevant case law. This legal analysis was also set out in the Council's main legal submission on the SDR.

The AC's further submission argued that the High Court's decision interpreted the Act and RMA as allowing rules prescribing such additional or more restrictive performance criteria where they "are imposed for a resource management purpose".[96] To support this interpretation, the submission set out a number of passages from the *CIAL v CCC* decision. In the first, Tipping J argues that the Act (then through s 7(2), and now through s 18) does not place a "total embargo" on any other performance standard, because the Act has different purposes than the RMA and the council may prescribe additional performance standards under the RMA to achieve its purposes:[97]

> the Building Act allows a council to control building work in the interests of ensuring the safety and integrity of the structure, whereas the Resource Management Act allows the council to impose controls from the point of view of the activity to be carried out within the

[91] *Christchurch International Airport Ltd v Christchurch City Council* [1997] 1 NZLR 573 (HC).
[92] Auckland Council Main Legal Submissions at [5.8].
[93] At [5.8].
[94] Relationship between the Resource Management Act 1991 and the Building Act 2004 - Legal Submissions 3 November 2015 https://hearings.aupihp.govt.nz/online-services/new/files/5UXKdfYpXbluojWJ2cr7ITsGZgXaUXHTYldLPlQla4y5 ['Auckland Council RMA/BA Direction Legal Submissions'].
[95] Auckland Council RMA/BA Direction Legal Submissions, above n 94 at [3.2].
[96] Auckland Council RMA/BA Direction Legal Submissions, at [4.3].
[97] *CIAL v CCC* at 576.

> structure and the effect of that activity on the environment and of the environment on that activity.

This led Tipping J to conclude that the council could impose structural requirements if they are "appropriate and necessary for resource management purposes", in which case "the fact the requirement could not be imposed under the Building Act does not vitiate it."[98] Therefore, although the Christchurch Council's requirement for enhanced noise attenuation for houses near the airport was a requirement that affected how dwellings were built, this was legitimate because the requirement was imposed as a condition of the particular use of the building; "It was a requirement imposed for the regulation of the activity within the proposed building."[99] Tipping J contrasted this resource management purpose with a requirement focused on any building work, and he found that the Council's requirement was only "incidentally and indirectly" a regulation of the undertaking of building work.[100] This argument was restated as follows:[101]

> The Council was not prepared to allow the building, once built, to be occupied and used for residential purposes unless it had sufficient noise control insulation. Thus the council was not imposing the requirement on the relevant person in undertaking the building work but rather the requirement was imposed as a precondition to the use of the building for its permitted activity, ie residential occupation.

While the distinction referring to the Council's purpose for creating the requirement is compelling, one might take issue with the idea that the regulation of building work was indirect and incidental.

The Council's submission also set out a long quote from the decision of Chisolm J in *CIAL v CCC*, in which he agreed that the Act was concerned with regulating building work, but did not seek to limit regulation of the use of buildings under other legislation such as the RMA. This meant that s 7(2) was focussed on excluding other requirements only in the "narrow context" of building work as defined by the Act. Thus, "It was not part of the statutory intention that building controls concerning the use of buildings or controls arising from the management of natural and physical resources under the Resource Management Act should be circumscribed by the building code".[102]

On the basis of their interpretation of this key precedent, the Council submissions went on to forcefully contest the analysis found in the Panel Direction. It disagreed with the position that plans may include requirements constituting building performance criteria, only where the Code does not cover the effect that the requirement seeks to control.[103] As evident from its interpretation of the *CCC v CIAL* decision, this was not the Council's view on its 'jurisdiction' under the RMA to make such rules. Instead, it argued that "the key inquiry is whether the RMA regulation has a legitimate resource management purpose."[104]

In relation to the Panel's view of the wider purpose of the BA, which extends into sustainable development and therefore (on the Panel's analysis of the previous point), precludes territorial authorities making Plan rules in this area, the Council distinguished the purposes of the Act as "focussed on the performance of buildings from the perspective of the people who use them", as

[98] At 576.
[99] At 579.
[100] At 579.
[101] At 579.
[102] At 594.
[103] At [4.6].
[104] At [4.6].

compared with the broader RMA purpose of "sustainable management" of resources and the environment.[105]

In addition, the Council argued against the view that the Act meant to prevent any rule-making under other enactments that functionally ("indirectly" in Tipping J's terms) put in place building performance criteria for building work. This was based squarely on statutory interpretation, by pointing to the difference between s 7(2) of the BA 1991 and s 18 of the BA 2004. The latter states that, "A person who carries out any building work is not required by this Act to… achieve performance criteria that are additional to, or more restrictive than, the performance criteria prescribed in the building code in relation to that building work". This adds the words "by this Act", which are not found in s 7(2) of the BA 1991. The Council argued that this addition makes clear that s 18 is aimed at "limiting decision-making under the Act… [and] does not limit decision-making under other statutes".[106] Perhaps to pre-empt the argument that this makes s 18(2) ("Subsection (1) is subject to any express provision to the contrary in any Act.") redundant, the Council argues that this means that other statutes can modify a council's decision-making under the Building Act to impose different criteria to the Code".[107]

2.3.4 Main Legal arguments against the validity of RMA-based SDRs

Many of the legal submissions relating to the Panel's Directive supported the general view of the legal invalidity of any requirement under the PAUP that would put in place performance criteria for building work in areas that were already covered by the Code. Major reasoned legal submissions to this effect were made by the legal counsel of Housing New Zealand Corporation (HNZ), Ryman Corporation, the Ministry of Business, Innovation and Employment, and Federated Farmers. These arguments were ultimately accepted by the Panel, which affirmed the view it expressed in its Direction that the Panel "should not be controlling the manner in which a building is constructed" because such regulation "addresses the function of the building rather than its effects on the environment around it and is not appropriate to be included in a district plan which is concerned with land use planning."[108]

The fullest legal arguments against the legality of the Sustainable Design rules were made by HNZ, through their counsel from Ellis Gould, a law practice that specialises in resource management law. Although HNZ's legal submissions initially indicated agreement with the Panel's Direction's legal analysis,[109] they argued for an even more restrictive approach to territorial authority powers to impose building performance requirements. It rejected the idea that authorities may regulate an area of building performance under the RMA if the Code does not regulate it in relation to some purpose (such as sustainable development), because this did not take into account the efforts to update the Code to give effect to the new sustainable development purpose.[110] Therefore, HNZ argued that "even where a resource management purpose… can be established, that is in itself not sufficient to bring it outside of the restrictions in section 18. That is, it must be for a resource management purpose that

[105] At [5.1].
[106] At [5.4].
[107] At [5.4].
[108] Independent Hearings Panel *IHP report to AC Topic 077 Sustainable Design* 2016-07-22 https://www.aucklandcouncil.govt.nz/plans-projects-policies-reports-bylaws/our-plans-strategies/unitary-plan/history-unitary-plan/ihp-designations-reports-recommendations/Documents/ihp077sustainabledesign.pdf at page 5.
[109] Housing New Zealand "Further Legal Submissions" in 'RMA/BA Legal Submissions', above n 77, at [3].
[110] At [3]-[7].

is not a purpose of the Building Act."[111] This goes further than the Panel Direction, which would not prevent Councils imposing building controls for an RMA purpose if the Code does not currently include rules in the relevant area. The HNZ view on this issue was based on a number of decisions at the High Court / Environment Court level.[112]

In further arguments, the HNZ submission argued that the Act was not just directed at regulating building work for individual buildings, but also regulated buildings in a "collective sense" by considering how multiple buildings might interact locally and regionally to achieve social objectives.[113] This is contrasted with the Act's 1991 focus on the safety of individual buildings for those using them and neighbouring properties.[114] The Building Act 2004 now included a sustainable development purpose, in order to allow for new Code rules such as energy and water efficiency standards.[115] This purpose is reflected in the principles that decision-makers must apply in exercising a power under the Act, which include reference to heritage values, the efficient and sustainable use of building materials, and efficiency in water use.[116]

These observations about the collective social purposes that should be achieved under the Act 2004 and regulated by the Code lead to the HNZ Submission's argument that these purposes show that s 18 of the Act makes the Code a total code – a complete and exclusive statement of performance standards – for building work in New Zealand, therefore excluding the possibility of territorial authorities being empowered to impose any building performance standards under the RMA.[117] This view is supported by reference to the development of the Building Act 2004 and Code, which was in part desired because of the differences between existing building controls and those developed by councils in local by-laws.[118] In addition to the case law mentioned above, HNZ cited the *Insurance Council of NZ Incorporated* case that found that the Christchurch City Council could not use building consent requirements to require building performance higher than that required by the BC.[119] The submission argues that this case supports HNZ's firm view of the Code being an exclusive code for building performance standards.

MBIE supported the submissions filed by HNZ. It argued that although in some circumstances a District Plan may include a rule requiring performance criteria higher than the Code, this can "only occur where there is a resource management purpose for the rule that is not a purpose of the Building Act. Given the alignment of the purpose between the two Acts there is very little scope for implementing Building Controls via the RMA".[120]

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[111] At [7]-[8].
[112] *Re Portmain Properties (No 7) Ltd* [1998] NZRMA 56 and *Department of Survey and Land Information v Hutt City Council* [1997] NZRMA 378.
[113] Housing New Zealand "Further Legal Submissions" at [10].
[114] At [11]-[12].
[115] At [14].
[116] At [16].
[117] At [8]-[9] (paragraph numbers repeated in error, page 14).
[118] Housing New Zealand "Further Legal Submissions" at [19]
[119] Housing New Zealand "Further Legal Submissions" at [20], citing *Insurance Council of NZ Incorporated v CCC* [2013] NZLR 51 at 40 and 43.
[120] MBIE Legal Submissions on Behalf of the Ministry of Business, Innovation, and Employment Hearing 077 Sustainable Design 3 November 2015, in 'RMA/BA Legal Submissions' (page 83), above n 77, at [3].

2.3.5 Evaluating the legal arguments

The Auckland Council's Decisions Report shows that it did not ultimately accept the interpretation of the RMA / BA interface as set out by the Panel and the legal submissions set out above. This can be seen in relation to Topic 022: Natural hazards and flooding, where the Panel's report stated that building standards greater than those set out in the Act in relation to flood risks could not legally be included.[121] In response, the Council's decisions report rejected the Panel's recommendations because its proposed rules dealt with "matters that go beyond the Building Code" and were not "in conflict with the Building Act in respect of controlling specific aspects of building works."[122]

Similarly, restrictions on "controls on minimum dwelling size, daylight to dwellings and universal access for residential buildings" were seen by the Panel Report as contrary to the Act section 18,[123] as analysed above, and were recommended to be deleted. However, the Council's decision report retained them, stating that "The Building Act does not address social or design quality effects associated with small dwellings. It is therefore necessary to manage these through the District Plan".[124] The question of minimum dwelling sizes was broached in Topics 059-063 Residential Zones, with the Panel making similar recommendations,[125] and the Council making the same response.[126]

In relation to the Sustainable Design rules, the Council accepted the Panel's recommendations, and deleted the proposed SDRs.[127] This cannot be because it accepted the Panel's general arguments against the Council's ability to make rules under the RMA that put in place building performance characteristics, because that was rejected in the Council's decisions noted immediately above. Although no reason is given in the Council's Decisions report, the Panel's Decision report states that "It is notable that the Council withdrew its proposed provisions for sustainable development for commercial buildings in Topic 077 Sustainable design on the basis that there was no need for regulation given widespread implementation of the principles of sustainable design by the market."[128]

The idea that the Act, and particularly s 18, means that territorial authorities may not include any rule that constitutes a building performance requirement is evidently widely held in government and planning practice. This was strongly argued in many legal submissions to the Panel hearings, and was the position of MBIE. As noted above, the argument against territorial authority power to put in place

[121] IHP Report to AC Topics 022 and 026 – 2016-07-22 https://www.aucklandcouncil.govt.nz/plans-projects-policies-reports-bylaws/our-plans-strategies/unitary-plan/history-unitary-plan/ihp-designations-reports-recommendations/Documents/ihp022026naturalhazardsflooding.pdf at 10-11.
[122] Decisions of Auckland Council – 19 August 2016 https://www.aucklandcouncil.govt.nz/plans-projects-policies-reports-bylaws/our-plans-strategies/unitary-plan/history-unitary-plan/docsdecisionreport/ac-decisions-report.pdf at 18-19
[123] IHP Report to AC Topic 050-054 City centre and business zones 2016-07-22 https://www.aucklandcouncil.govt.nz/plans-projects-policies-reports-bylaws/our-plans-strategies/unitary-plan/history-unitary-plan/ihp-designations-reports-recommendations/Documents/ihp050to054citycentrebusinessz ones.pdf at 16.
[124] Decisions of Auckland Council – 19 August 2016 at 44.
[125] IHP report to AC Topic 059 Residential zones 2016-07-22 https://www.aucklandcouncil.govt.nz/plans-projects-policies-reports-bylaws/our-plans-strategies/unitary-plan/history-unitary-plan/ihp-designations-reports-recommendations/Documents/ihp059to063residentialzones.pdf.
[126] Decisions of Auckland Council – 19 August 2016 at 50.
[127] Decisions of Auckland Council – 19 August 2016 at 59.
[128] IHP Report to Auckland Council Hearing topics 050-054 City Centre and business zones July 2016 https://www.aucklandcouncil.govt.nz/plans-projects-policies-reports-bylaws/our-plans-strategies/unitary-plan/history-unitary-plan/ihp-designations-reports-recommendations/Documents/ihp050to054citycentrebusinesszones.pdf at [16].

building performance requirements under the RMA was justified mainly by reference to statutory purpose - the policy to make the Building Code a true code of all building performance requirements – and case law that supported this approach.

However, as the Council's legal arguments demonstrated, there is a legally plausible argument that territorial authorities may create rules that constitute building performance requirements under their RMA planning powers. The *CIAL v CCC* decision, although concerning the earlier Act regime, still provides a clear line of argument that points to the legality of territorial authorities' giving effect to resource management purposes in District Plans through SDRs.

In coming to their decisions, both Chisolm J and Tipping J argued that the Council was not prevented by s 7 of the BA from putting in place building performance criteria for resource management purposes.[129] Tipping J argued that there was a difference between creating performance criteria for Act purposes and imposing them for purposes under the RMA.[130] He stated that the limitation on additional or more restrictive performance criteria related only to the direction of "the achievement of performance criteria by persons… undertaking any building work" by local authorities, by reference to the purposes of the Act.[131] This regime is meant to be coordinated and have a "harmonious existence" with the RMA.[132] When a local authority is administering the Act it cannot put in additional or more restrictive performance criteria than those found in the Code.[133]

However, this is not a "total embargo" that prevents local authorities putting in place performance criteria relating to the RMA – and the only "sensible and effective way to harmonise the potentially conflicting provisions" of the Building Act and the RMA is to "focus on the different purposes of each statute".[134] Tipping J thought the simplest statement of Act's purposes would be to allow local authorities "to control building work in the interests of ensuring the safety and integrity of the structure", whereas the RMA's purpose is to allow local authorities "to impose controls from the point of view of the activity to be carried out within the structure and the effect of that activity on the environment".[135] Another way of putting it, adopted by Tipping J from counsel's arguments, is that:[136]

> a requirement that goes beyond the building code is not permissible at the behest of the building inspector but is permissible at the behest of the planner, provided always that it is appropriate and necessary for resource management purposes.

Thus, Tipping J found that the general authority under the RMA to create performance criteria to further resource management purposes did not violate the prohibition on additional performance criteria found in the Act. Specific statutory authority within the RMA for creating performance criteria additional to those in the Code were regarded as "avoidance of doubt" provisions, rather than indicating that any performance criteria were ruled out except through specific statutory authorization.[137] The RMA is focussed on the regulation of activities that have an effect on the environment, and the particular activity in this case was residential occupation and use of land and

[129] At 595.
[130] At 576.
[131] At 576
[132] At 576
[133] At 576
[134] At 576.
[135] At 576.
[136] At 577.
[137] At 577-578.

buildings.[138] The requirement was imposed due to the use of the building, and it was really this use that was being regulated, not the building work:[139]

> It was a requirement imposed for the regulation of the activity within the proposed building. It was not imposed, other than incidentally and indirectly on the intended occupier "in undertaking any building work" within the meaning of s 7(2) of the Building Act. While the activity of building is no doubt activity for resource management purposes, it is not that activity which, by imposing the noise insulation requirement, the council was seeking to regulate. … [T]he council was not imposing the requirement on the relevant person in undertaking the building work but rather the requirement was imposed as a precondition to the use of the building for its permitted activity, ie residential occupation.

A similar distinction was made by Chisolm J.[140] In this way, Tipping J distinguished between the regulation of the building work and the regulation of the activities that might happen in the building when it was built. The buildings could be built according to the Code – the council must grant the building consent if the plans and specifications met the requirements of the Code.[141] But, if the further requirements relating to the RMA are not conformed with, then the building will not be able to be used for the purposes the requirements related to.[142] As it was put by Tipping J:[143]

> The council, under the guise of resource management control, may not impose a requirement affecting the structure unless such requirement is appropriate and necessary for resource management purposes. If it is, the fact that the requirement could not be imposed under the Building Act regime does not vitiate it.

The Council's interpretation of the Act and the *CIAL v CCC* decision keeps very close to the Judges' reasoning. The decision in *CIAL v CCC* seems a plausible interpretation of the legislation, and indeed under the current legislation the idea that the Act does not rule out RMA building performance requirements is bolstered by the changes to the legislative text: now the provision states that "A person who carries out any building work is not required by this Act" to meet building performance requirements greater than found in the Building Code; but this only means that the Act does not put in place further requirements, and it says nothing about requirements put in place under the RMA.

The Council's more permissive analysis is also supported by a 2005 article on the topic by legal academic Ceri Warnock.[144] Warnock considered that increased building sustainability should be achieved through mandatory SDRs, particularly energy and water efficiency requirements. Considering the question of whether territorial authorities were prevented from putting in place such requirements by the Act, Warnock noted the reasoning in *CIAL v CCC* and observed that:[145]

> the efficient use of water and energy is clearly both a resource management issue and also an end to be fostered by methods of sustainable construction. How an occupier's use of a building affects water and energy consumption is not solely related to the "performance of a building in the isolated context of it being a structure"; it is a valid resource management

[138] At 578.
[139] At 578.
[140] At 594.
[141] At 579.
[142] At 580.
[143] At 576.
[144] Ceri Warnock "Sustainable Construction in New Zealand" (2005) 9 New Zealand Journal of Environmental Law 337-376. https://ssrn.com/abstract=3263858
[145] At 356.

> concern and arguably any resource management rule influencing this matter would not therefore be caught by s 18 of the BA04.

Furthermore, on the basic of *CIAL v CCC*, it would not even be ultra vires for territorial authorities to put in place greater building performance requirements for resource management purposes, even where the Code already regulated the matter:

> What would be the position if the Code had contained performance criteria covering precisely the same subject matter as that RMA-imposed rules sought to regulate? Could the territorial authority impose a higher standard? Although one would have thought not, this is not the gravamen of the *Christchurch* decision. In concluding, Chisholm J stated: "If the controls imposed by way of condition/rule under the Resource Management Act are more stringent than those imposed under the Building Act, the more stringent condition/rule will apply." This conclusion only appears to make sense if one presupposes that the RMA condition/rule and Code clause are concerned with controlling the same issue. This point is important because the present (and probably the future) Building Code includes a clause relating to the energy efficiency of buildings. Would local authorities be able to impose higher energy efficiency standards than the Code?

Warnock notes that both Tipping J and Chisolm J in *CIAL v CCC* emphasised that what determines whether a requirement that goes beyond the BC is ultra vires is whether there is an appropriate resource management purpose.[146] She concludes that:[147]

> To date, in the absence of clear authority to the contrary, it is apparent that local authorities will be able to introduce rules to ensure the sustainable management of natural and physical resources even if these directly influence the construction process. Carefully drafted rules, emphasising their valid resource management function, are likely to be safe from legal challenge despite s 18 BA04.

Furthermore, the case law subsequent to *CIAL v CCC* does not categorically support the arguments against territorial authority power to put in place SDRS: such a strong point cannot be drawn from *Insurance Council*, or from the Supreme Court's decision on appeal in *University of Canterbury v Insurance Council of New Zealand*.[148] These cases did not analyse the relationship between the RMA and the Act, because the authority for the Council to regulate earthquake safety was drawn from the Act itself, which in itself creates the limited role for territorial authorities in "the setting of standards under the Building Act" as stated by the Supreme Court.[149] This can be compared with the interface between the RMA and the BA/BC, where territorial authorities are given a large role to regulate for environmental purposes and these can include building performance requirements that they conceive of, rather than simply giving effect to a role under the BA/BC as in the case of earthquake prone buildings. Similarly, the Council's own analysis of the other relevant case law on this matter provides a plausible interpretation in favour of its own legal position, supporting authority to put in place SDRs under the RMA.[150]

Yet this does not mean that the Council's position is unassailable. The counter view was strongly put by the Panel, which included Judge Kirkpatrick, an Environment Court Judge, as well as by MBIE and

[146] At 358.
[147] At 360.
[148] *University of Canterbury v Insurance Council of New Zealand* [2014] NZSC 193
[149] At [56]
[150] 'Auckland Council Topic 22 Closing Remarks' at [2.13] to [2.31].

other submitters. Their arguments point to the purpose of the Code as an exclusive code for building performance criteria for building work, and give a purposive interpretation of s 18.

2.4 Conclusion

There are plausible legal arguments either way on whether territorial authorities may enact mandatory sustainable design rules under District Plans under the Resource Management Act, despite s 18 of the Building Act. The legislation and case law do not clearly settle the issue. There would be legal risk for a territorial authority to proceed with SDRs, and the two recent proposals ultimately did not result in SDRs.

The arguments against SDRs point to the purpose of the Code, as set out in the Act. The policy and legislative history demonstrate a desire to make the Code a true code for building, excluding the promulgation of any other performance requirements unless specifically authorised by an Act. Recent case law has emphasised that policy, and it is the position of the Ministry that administers the Act.

On the other hand, arguments for the legality of SDRs can point to the wording of the legislation itself, which does not exclude other building performance requirements, and the key direct authority for the RMA/BA interface, *CIAL v CCC*, which is permissive of building performance requirements outside of the Code where they are created under the RMA for a legitimate resource management purpose directed at controlling the environmental effects of land use.

3 Interview analysis

3.1 Introduction to the interviews

This empirical analysis is based on five interviews conducted with council officers/planners from Wellington City Council (WCC), Auckland Council (AC), Queenstown Lakes District Council (QLDC) and Christchurch City Council (CCC), complemented by an interview with two officials of a central government ministry, the Ministry for the Environment (MfE). Altogether eight planners/officers were interviewed.[151] Interviews were conducted in person with one exception (a skype call to QLDC), and took place between mid-February and mid-April 2019.

3.1.1 The wider issues around sustainable design of buildings

We asked respondents in general terms about what sort of issues exist with the sustainable design of buildings in New Zealand, with reference to both the Resource Management Act and the Building Act. They gave a range of answers, including noting what aspects they understood to be encompassed by 'sustainable building'. The predominant response was two-fold: to question the role and efficacy of the RMA in this domain, and to note that the Building Code, under the Building Act, is very outdated.

The first, uncontroversial aspect was the matter of what is meant by sustainable building: this was qualified in the questionnaire title to mean 'environmentally sustainable building design and environmental performance of buildings', but this left the scope wide.

The MfE officials interviewed noted that, for them, the key aspects of sustainable building were around urban form, i.e. the pattern of buildings in a neighbourhood, including how they related to each other, rather than consenting for individual buildings, etc. In their policy role, in the context of the transition to a low carbon economy, they were considering the wider issues around the speed and efficiency with which land is made available for residential development, including reducing the cost and complexity of consenting decisions but mainly focusing on the better use of land within existing boundaries and the effects of urban form on environmental outcomes such as carbon mitigation. An example of this wider view was the comment:

> '…something that we're pretty certain of is that there's definitely a role for mitigation in urban form and spatial planning…' - MfE official

Council officers noted the distinction between the roles of the RMA and the Building Act, for example:

> 'So the Resource Management Act obviously deals with *effects,* and the Building Code deals with building in a safe and sanitary [way], so they kind of cover different… terrains; so the *effects* [are] in the sense of perhaps noise or use of energy... [the RMA's] more about the effects of… development on neighbouring properties; it's about… rather than climate change per se, it wouldn't take that into account…. it's more about what impacts you're having on the surrounding environment whereas the Building Code is about 'Is the building safe and sanitary to use?' - CCC officer

[151] Interviewers were Ralph Chapman and/or Philippa Howden-Chapman, accompanied in Wellington by Lydia Hamer.

This point was underlined by another:

> '…we are at the initial stages of a full review of the district plan…. It's an opportunity to get things up to speed and to deal with current issues and through that process we will be looking at the sustainability of buildings. But what I would say there is that it has to be linked back to a direct effect. We can't say 'We want to have sustainable green buildings'; under a District Plan, you have to say 'We want them because of x y and z.' In other words, what issues are we trying to address? And that's where the RMA comes into it; it's all about the effects.'
>
> - WCC planner

A planner from QLDC had a somewhat different perspective: the RMA was not particularly well fitted to achieve more sustainable building design, in his view, but District Plans did have potential. The same planner stated that QLDC planners did not currently give much attention to energy efficiency, water efficiency and so on: it was not their priority.

A WCC planner saw the RMA as having quite a limited scope, currently, for encouraging or enforcing sustainable building. He commented:

> 'If you look at our District Plan [from 1995] now, I don't think it has the word sustainable in it anywhere.… There's nothing in our plan at all that requires sustainable design. We've got some fluffy stuff in design guides, about 'nice to haves', but there is nothing in there that says "You must design your building in a sustainable way", at all.' – WCC planner.

Another WCC planner distinguished the wider sustainable building questions under the RMA from the more specific issues under the Building Act as follows:

> 'At a higher level, we are making sustainability decisions about where we're going to put new houses and we're not going to put them out there where more people are going to have to drive, so overall sustainability decisions on how a city grows is part of the RMA and the decisions you make, but that nitty gritty green building stuff is just at another level.'
>
> - WCC planner.

There were clearly issues with regard to the quality and currency of the building code, in the view of one respondent:

> '…obviously we have concerns, … I think it's fair to say that most people who know about the Building Code have concerns about its performance standards. It's well and truly behind other comparable countries. It's well behind Australia, it's probably half what's in Europe so …yes the thermal performance of the New Zealand Building Code is truly appalling.'
>
> 'standards [the Code] tend to be dealing with the worst practice, saying 'We want to eliminate worst practice," whereas Homestar and a lot of our aspirations for climate change are around encouraging best practice and saying we want good outcomes.'
>
> – CCC officer

There was some concern about where New Zealand stood internationally, in terms of making an effort to encourage sustainable building:

> 'I think New Zealand's probably ten years or more behind the rest of the world in this area. Ah, and it certainly hadn't been a priority for the previous government. I think it seems fairly clear that it wasn't something that they wanted to do. ' -- AC officer

'From our point of view, the Code sets a low bar, and we only get to enforce that.'

- WCC officer

But equally, there was some impatience about how long it took to update District Plans under the RMA:

'…coming back to the review of our DP, starting now, it's 8-10 years in reality before we have a full Plan that will include things like water sensitive design being a must for development,… – the legislation takes too long to respond, so we're going to have 10 more years of consenting development under an out-of-date regime….. - WCC planner

3.1.2 Sufficient powers

A more specific question addressed in the interviews is whether local authorities have sufficient powers under the RMA to promote sustainable building. One response was that local government has sufficient powers, but may lack central government direction:

'…under the RMA, I think they have sufficient powers but maybe they're lacking some national direction… and also [there is] the cost in promoting sustainability… it's expensive for councils… to implement a lot of that stuff….to promote sustainable buildings and to monitor and enforce that through their plans and strategies. – MfE official

Some respondents took the view that Councils did ***not*** have sufficient regulatory powers, and were therefore forced to use incentives:

'"No" for [sufficient power to use] regulation, definitely not. We find it very very hard… but [to] incentivise, I think that's the only thing we ***can*** do and we are trying to do it…'

'Yeah, [we can] encourage… I'm aware that there are other incentives which we could look at… there's a suite of incentives around commercial buildings, maybe offering bonuses of floor heights or you know, a fast track process or a graduated sort of development contribution so if… the more green features you put in a building, the lower your development contributions. Those sorts of mechanisms… we could incentivise, we certainly could do those things.'

'But what's happened in Christchurch unfortunately, because there's 2000 commercial buildings gone out of the CBD, we've waived all of our development contributions, we just want buildings put back in and the opportunity was there to include quality but the Council said that that would be effectively a disincentive for development. So the decision was made not to link the waiver of any development contribution to a quality factor.' – CCC officer

The comment was also made that the RMA was a fairly cumbersome regulatory vehicle compared with that in some other countries:

'I worked in London for a few years, and they don't have the RMA, they just have a London Plan that said 'If you're building a building you must have so much renewable energy, and you must meet that target', and it's kind of inherent, and that was the planning rules, they were much more relevant because …. to meet 25% of that development's energy needs.'

- WCC planner

While sustainable design provisions could be written into District Plans, in the view of a QLDC planner, 'it's not always that easy to fit a sustainable more modern design into our District Plan framework.' But this planner too remarked that in specific cases, concessions could be made (vis a vis the District Plan) in terms of floors or height breaches in return for a better designed streetscape and neighbourhood. So planners in practice did have the power to work with developers to shape higher density, and better designed neighbourhoods.

In addition, the District Plans – which are being reviewed at present -- are seen as potentially having a significant impact in terms of sustainable design through more targeted provisions:

> 'So when our policy planners are looking at writing the provisions for that [new development] zone, they're looking to include things like high density, more walkability, closer bus stops. You know, all that sort of stuff: to try and reduce carbon footprint. More on a neighbourhood level rather than a building level I'd probably say.' – QLDC planner

3.1.3 How the interaction between the RMA and BA is seen

There were strict limits under the previous government as to how far councils could go in requiring sustainable building standards under the RMA, given the provisions of the Building Act, according to one interviewee:

> 'the advice from the Ministry … passed onto us was that it's illegal to go above the Building Code; using the District Plan is not the right mechanism for that – it is an RMA mechanism (we worked out how that would work anyway, the process it would follow) – but this is a Building Code matter and therefore you cannot go above and beyond the Building Code.
>
> 'So what I've got is what they sent to us which was that it's 'ultra vires'… and I'm pretty sure that the same advice was given to the Auckland City Council when they did the same with their Homestar… so what happened following that is we got the Green Building Council to do some further work and the Green Building Council found that our mechanism would've worked if we'd said that you only need to be certified, …not necessarily whether it's third party certified or even just Homestar certified, and not specify a level.' – CCC officer

Moreover, builders could go above the Code but in practice they do not do so:

> 'So in terms of sustainable design… I think that it's clear to say that if anybody wanted to go above the Building Code, they could, but the reality is that nobody does, almost nobody does, it's virtually, it would be 98% of homes would be built to the Building Code if you're lucky, you know, 'cause some wouldn't even meet the Building Code.' - CCC officer

3.1.4 Are 'acceptable solutions' under the Code working?

We posed the question of how medium density housing typologies were being addressed through developing existing 'acceptable solutions' under the Building Code. An Auckland planner felt that while big developers such as Housing New Zealand / HLC (Housing, Land, Community)[152] had utilised

[152] https://hlc.co.nz/

this system, it did not necessarily work well for others: it was difficult for councils to give sustainable design guidance on medium density housing to developers, as 'they're the experts.'

However, in Wellington it was seen that improving the standard on medium density housing could be helpful:

> '… raising the bar on medium density housing, to a higher level than existing solutions…. that would be helpful. We don't have heaps of medium density here. We have a bit of infill housing out in the suburbs and then we start to get more medium density – that might be in the scope of….[whatever is] coming through….
>
> 'a lot of the Council places are medium density…. [there are] limited ones going through in the private sector. A couple a year, really. Which means you get 3 or 4 lots, remove something and build something there….
>
> 'And that's not generally what's happening. New Zealanders, they generally want their four separate walls and space between them, we are seeing more detached and terrace housing being built, but I don't think that's anything to do with regulation, that's more about… if you're building together you've got better insulation and … not having different walls….'
>
> - WCC planner

3.2 Use of incentives, and their pros and cons

A key question we put to interviewees was what non-regulatory incentives their council utilised (e.g. faster consenting, for achieving a certain rating in terms of a green building assessment tool) to help ensure buildings are sustainably designed, and what were the merits (or otherwise) of their council adopting further incentives for higher levels of building sustainability in the future.

At Auckland Council, there was use of flexibility over height limits as an incentive for better quality design of buildings:

> 'You know If you want to put additional development on this site, we will consider it. But you'll, we will expect it to be high quality… whatever sort of requirements you want to link to it, whether it's Homestar, Greenstar or some other requirement.' - AC planner

This planner also noted that in the UK, under the equivalent of New Zealand's district plans, there was provision for a more directive approach with a minimum standard that developments were expected to reach" 'And developers get on board with it, once they know that they have no choice.'

The Christchurch situation has been more difficult and exemplifies the tensions which can exist between local and central government:

> '…immediately after the earthquake we were asked to revise our District Planning rules and we were told by the community they wanted a greener city, that was a very clear shout from the public,… So we tried a few things… We did a Homestar 6 requirement in our District Plan for all new households. We also created a simplified green building Council tool called BASE, 'Building A Sustainable Environment'… and the Green Building Council helped us shape them but based on the Green Star [system]'; we said… let's get the key elements of energy performance, of water conservation, of indoor comfort, you know some key aspects of high performing commercial buildings and require it within our District Plan. … we asked industry…

> probably 40 different building developers and owners to come to a meeting and we said 'Look, this is what the public have asked for, this is their city, we're building this city for them, what would you like us to do?' and we talked about some scenarios and they gave us a resounding 'If you want us to do it, make us all do it, give us a level playing field, so make it a standard, so that we all have to meet it, nobody's disadvantaged and it's a requirement and we will deliver the green city according to that standard.' So we developed this BASE standard which was in the District Plan as a draft which needed to be approved by Gerry Brownlee [the Minister for Earthquake Recovery] … it then didn't get approved.'
>
> - CCC planner

In terms of future developments, one possibility envisaged was that New Zealand would follow international trends. Several council officers/planners had worked overseas, and their experience informed their views:

> '…[where I've worked]…a lot of those [building consent] applicants were running their applications through, you know, relevant building sustainability schemes such as… BREEAM in the UK; LEED from the US; Estidama in Abu Dhabi. … And they focus, not just on the building generally, but I mean there is a building-only element but they also focus on the wider context of transport and natural resource depletion and a whole lot of other areas depending on the scheme. But they all cover the same set of issues.'
>
> - Auckland Council planner

However, this interviewee noted that demand for housing and office buildings was at present so high in Auckland that customers were not discriminating on the basis of a building's sustainability, in contrast to the situation in leading countries overseas, where building rating processes were widespread:

> '…the demand is so high in Auckland anyway, that, you know you don't need to have the best design and the best sustainability credentials to… be able to sell office space or houses or whatever. People will still buy it…
>
> 'In [some countries] I think they basically required everyone to do an… assessment of their developments. They don't want to have anything shoddy, so they've said, "You know, everyone can go through this scheme." I don't think it was optional. The other ones, the UK and the US schemes, are, I might be wrong… but certainly you know pretty much everything I recall working on in that part of the world seemed to be using it.'
>
> - Auckland Council planner

3.3 Conclusion

Planners and other local government officers we interviewed had a pragmatic view on the respective domains of the RMA and the Building Act, and how each could contribute to the sustainability of building development in New Zealand. A key finding was that all council interviewees felt that either the regulation for sustainability of building or the incentives for it could usefully be strengthened. For example, the Building Code was felt to be out of date in terms of sustainable building quality.

There was no clear consensus about whether to rely on regulation or incentives, in terms of achieving higher standards of sustainability of building. Interviewees took the view that for building quality, regulation made sense, but the Code needed strengthening. But incentives could also contribute: they might take a variety of forms, such as councils granting consent for more height for buildings that

attained higher quality standards or better ratings against an accepted tool; or a reduction in development contributions for buildings that incorporated more sustainable building features. The interviewees did not comment on related issues, such as subjectivity of rating judgements, that this might involve.

For ensuring a more sustainable built environment or neighbourhood, i.e. streetscape, building integration, and ensuring climate change mitigation through urban form and design, the interviewees suggested that there was scope for better regulation through district plans (although this would take a long time), but the use of incentives was not ruled out.

The interview process did not set out to clarify the legal niceties of the relationship between the Resource Management Act and the Building Act. Nevertheless, some interviewees did suggest that a conservative interpretation of the issues around the domain of the Building Act had acted to impede some councils in promoting more sustainable building. At the same time, they wished to see councils being more proactive in promoting sustainable building and so, pragmatically, they supported the use of incentive arrangements in carrying forward such promotion, alongside stronger provisions in District plans to ensure more sustainable built environments.

4 Conclusion

Sustainable building design provisions in New Zealand currently centre on design advice and exhortation, plus the use of green building rating systems or 'incentives'. There has in recent years been greater interest in strengthening provisions to reflect a greater social concern about sustainability of buildings, including means to contain buildings' carbon footprint and minimise waste and water use. The emphasis in much practice on voluntary 'green' building codes raises some risks including that it may lead to heterogeneous performance, and possibly, in some cases, perverse side effects. The approach rests on an assumption that the market for building performance works well, that there is an ongoing informed demand for better quality and more sustainable buildings, and a responsive supply side; and that regulation of building performance is therefore not warranted.

Voluntary incentive-based arrangements can and do make a contribution. The key question is whether regulation has a significant role to play, and if so, whether the legal framework of that regulation is currently appropriate, or needs to be clarified. The present study has therefore been on how practitioners such as lawyers, planners and government officials see the regulatory landscape shaping New Zealand's building sustainability, and in particular how they see the roles of the Building Act and the Resource Management Act, and the interaction of these laws. Clarifying this picture has involved a detailed examination of legal cases and the interpretation of legal findings, together with an investigation and interpretation of the pragmatic views of council officers, collected by interview.

Our main conclusions are three. First, the literature surveyed notes advantages of incentive systems, which include that they can surmount barriers or compensate for the financial or other barriers to developers investing in a greener building; they can act as carrots for early innovation in building and tip decisions towards 'building green'. However, there are potential disadvantages. For example, where there is uncertainty, developers tend to see it as leading to higher cost, or potentially, inconsistency in decision making, and any uncertainty arising from such practices can be unhelpful to developers.

Second, our findings are that the law in this area is not clear. On the hand, the arguments against sustainable design rules point to the purpose of the Code, under the Building Act. The policy and legislative history demonstrate a desire to make the Code a true code for building, excluding the promulgation of any other performance requirements unless specifically authorised by an Act. Recent case law has emphasised that policy, and it is the position of the Ministry that administers the Act.

On the other hand, arguments for the legality of sustainable design rules can point to the wording of the legislation itself, which does not exclude other building performance requirements, and the key direct authority for the RMA/BA interface, *CIAL v CCC*, which is permissive of building performance requirements outside the Code where they are created under the RMA for a legitimate resource management purpose directed at controlling the environmental effects of land use.

Third, our findings from the interviews conducted for this project are mixed. For ensuring a more sustainable built environment or neighbourhood -- i.e. streetscape, building integration, and ensuring climate change mitigation through urban form and design -- the interviewees suggested that there was scope for better regulation through district plans (although this would take some time), consistent of course with the purpose of the RMA. Meanwhile, some interviewees did suggest that a conservative

interpretation of the issues around the domain of the Building Act had acted to impede some councils in promoting more sustainable building.

But the use of incentives was not ruled out. Interviewees wished to see councils being more proactive in promoting sustainable building and so, pragmatically, they supported the use of incentive arrangements in carrying forward such promotion, alongside stronger provisions in District plans to ensure more sustainable built environments.

Lastly, it is clear that greater clarity on the legal matters would be helpful for progressing more sustainable building design in New Zealand. It is evident from the interviews that New Zealand is not at the international edge in terms of sustainable building promotion and design. Fuzzy legislative provisions, as well as an outdated Code, no doubt contribute to this. Assuming New Zealand wishes to improve the quality and sustainability of its building, we conclude that further policy development and possibly legislative changes could make a positive contribution to a more progressive and clear 'architecture of decision making' in New Zealand.

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Annex A: A note on the literature review approach used in Part 1

A search of the post-2010 literature was carried out, focusing on a New Zealand setting, and using the search terms illustrated below (e.g. 'incentives for….sustainable residential development'). This was conducted using Google Scholar with links to the library of Victoria University of Wellington, Te Waharoa.

The search strategy can be visualised as a restricted scan for the following: