A BETTER APPROACH TO IMPROVING THE RMA PLAN PROCESS

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Executive Summary

1. Concerns exist over the time it takes policy statements and plans to go through the Schedule 1 process under the RMA and become operative.

2. "Solutions" put forward by Alan Dormer and Vaughan Payne for regional planning documents, by Auckland Council for its new Unitary Plan, and by Local Government New Zealand for all policy statements and plans, is to extinguish the right of appeal to the Environment Court other than on points of law.

3. They would then change council hearings to "compensate", including the introduction of cross examination, or changes to the hearing personnel.

4. These "solutions" are simplistic. They ignore the significant value to the quality of the plan at the end of the appeal process. Numerous policy statements and plans have been improved significantly through the appeal process, with comparatively few cases having to go to full hearings.

5. The key objective in reviewing the Schedule 1 process must be to deliver the best outcome, which is a quality plan.

6. Rather than removing or limiting the right to appeal to the Environment Court, there should first be a focus on reducing the frequency with which submitters feel the need to exercise their right.

7. In this paper we recommend improvements to the way in which councils go about preparing new plans, both during the critical pre-notification phase and after notification. There must be much greater consultation and discussion of the subject matter of all planning documents and greater collaboration over their content.

8. An objective must also be to ensure that all plan processes at both the council and the appeal stages can be completed within four years; two years at the council level and two years at the Environment Court, unless there are exceptional circumstances.

9. To that end we recommend a series of more rigorous appeal management steps at the Environment Court level to ensure that this timeframe can be met. To pursue these outcomes further and perhaps refine them, we have suggested that the Environmental Law Committee of the NZLS, the National Committee of the RMLA and the Environment Court consider a workshop. There may or may not be a need for changes to the legislation.

10. In our opinion, this alternative "solution" to the concerns over the length of time that policy statements and plans are taking to go through the RMA process will achieve a better quality outcome than the simplistic "remove appeals" alternative.

Introduction

11. It is often said that policy statements and plans take far too long to move through the Schedule 1 process under the Resource Management Act 1991 ("**RMA**"). The temptation is to identify the part(s) of the process that are seen to "add" time, and to suggest they be deleted from the process.

12. This approach is clearly illustrated in the "solutions" proposed by Alan Dormer (barrister) and Vaughan Payne (Waikato Regional Council) in a joint paper circulated at the RMLA Conference in October 2011,[1] by the Auckland Council in a briefing paper sent to the incoming Government in November 2011[2] and in a paper from the Local Government New Zealand Regional Sector Group in December 2011.[3] In their firing line is the general right of appeal to the Environment Court. Significant changes are also proposed to the council-level hearing to compensate for the loss of the appeal right.

13. What such an overly simplistic approach fails to do, however, is to understand that the appeal process adds significant value to the quality of the plan at the end of the Schedule 1 process.

14. We therefore have serious concerns about the suggestion to limit the right to appeal to points of law only and also about the Auckland Council's proposed removal of the further submission process. We are also concerned with the implications of the suggested one-stop hearings which would become the "norm" for all policy statements and plans.

15. In our view, the driving concern for those involved in the planning process should not be the length of time that it can take to resolve appeals; it should be the quality of the plan. Any solutions to the timing of the Schedule 1 process must focus on delivering the best outcome, which surely must be a quality plan that works for the community and enables the creation of a productive and efficient economy.

16. We have proposed an alternative solution which we consider addresses the concerns regarding timeframes, while also retaining the key elements that add significant value to the outcome.

Our approach to the issue

17. While we agree that some (if not most) policy statements and plans take far too long to move through the Schedule 1 process, our concerns with the "solutions" proposed to date have prompted this paper in response.

18. In the paper we have approached the issue in the following way:

    (a) we briefly touch on the role of policy documents and the hierarchy of plans under the RMA;

    (b) recall the proposal and the public response to that same "solution" in the RMA Phase 1 reform in 2009 and consider the previous recommendations put forward by the Technical Advisory Group ("**TAG**") and Ministry for the Environment ("**MfE**") regarding the plan preparation process;

    (c) point out what we see to be the deficiencies in the solutions proposed by Dormer and Payne, the Auckland Council and Local Government New Zealand; and

    (d) propose an alternative solution that we consider more accurately reflects the reality of the current situation and would provide a better outcome.

Why are policy statements and plans important?

19. Policy statements and plans, from national environmental standards to district plans, form the framework for resource management in New Zealand. They have a fundamental role in shaping the requirements for, and assessment of, all future consent

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1 Improving RMA Policy Making: Prescription for Reform, September 2011.

2 Briefing paper to incoming government from Auckland Council, available as the Attachment to Item 16 of the Minutes from the November 2011 meeting of the Governing Body.

3 Enhanced Policy Agility - Proposed reforms of the Resource Management Act: Local Government New Zealand Regional Sector Group, December 2011

applications. They may outline what activities can and cannot be undertaken and where, and provide guidance as to what may, should, or must be taken into consideration by decision makers determining consent applications. Putting the effort in to get the framework right can pay big dividends later in terms of efficiency and in terms of timeliness of processing applications for consent, as well as ensuring suitable environmental protections are in place where required.

20. Since the early days of the RMA it has been recognised that the Act provides a hierarchy of instruments - *Canterbury Regional Council v Banks Peninsula District Council*.[4] Between national policy statements (and standards) and district plans come regional policy statements and plans, and the RMA states[5] the relationships between them. Each planning instrument is bound to some extent by those above.

21. Due to this hierarchical nature, not only is public participation important in local authorities' plans, but it is just as important in higher instruments that ultimately influence (and in some cases direct the content of) the local plans. Without public participation through a proper consultation, submission and hearing process policy makers may unknowingly become divorced from key sectors of society and may develop policy that is fundamentally at odds with those sectors. That is not to say that it is possible, or even desirable, to try and accommodate every perspective in every planning instrument. But in making the decision as to what to include and what not to include, all such viewpoints must be on the table so that they can be properly considered in reaching an informed decision as to what position is ultimately taken in the plan.

22. It is important that there are processes in place to ensure the final document represents the community's aspirations. While the notified version of a policy statement or plan reflects the initial aspirations of the regional council or territorial authority, the intention is that the final version of the plan reflects the wider community's aspirations. This is the purpose of having public participation in the plan, and the reason why there is no presumption in favour of a council's position at the appeal stage.[6]

What has the Government indicated it is looking to do?

23. Readers will be aware that this is not the first time this issue has been raised. Phase 1 of the RMA reform, which occurred in 2009, initially proposed to restrict appeals on plans to points of law unless an appellant successfully applied for leave from the Environment Court to appeal on the merits. The grounds for seeking leave to appeal a plan on the merits related to impacts on property rights, the clarity of local authority decisions and whether a decision fails to give effect to Part 2. After hearing from many parties in opposition to the Proposal, the Select Committee recommended deleting the relevant clauses, noting:

> On balance, we are not satisfied that the proposal, in its current form, will work as intended and deliver fairness and natural justice.

24. Further detail on the concerns raised in submissions at that time and on the improvements to the plan making process that were introduced by the 2009 Amendment Act are set out in **Appendix A**.

25. We have also looked to the statements of policy position, press releases and briefings given to the incoming Government on these issues to see whether a heavily reduced appeal right and the removal of the further submission process is still on the Government's mind. This can be found in **Appendix B**. There is a wish evident in that material to simplify and improve planning processes generally and avoid duplication, as well as a focus on exploring the potential for collaborative processes. But only the 2010

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[4] [1995] NZRMA 452, 457 (CA)
[5] Sections 62(3) and 75(3) of the RMA.
[6] *Leith v Auckland City Council*, Decision A34/95; *Gisborne District Council v Eldamos Investments Ltd*, HC Gisborne, CIV-2005-485-001241.

TAG report proposes some changes to appeal rights on policy matters and only with Ministerial approval and not where matters are highly contentious.

26. It is clear from our review of what occurred in 2009 and from the more recent Government thinking that any reform of the Schedule 1 process should be seeking to deliver both quality planning outcomes and a shorter period of time. It should not simply abandon one or other phases of the current process in its entirety. To do so would be an overly simplistic response to a broader and more complex issue surrounding the quality and efficiency of both the participation process and the resultant outcome.

What are the "solutions" that have been proposed?

27. Dormer and Payne, Auckland Council and Local Government New Zealand would simply remove Environment Court appeals. Dormer and Payne appear to restrict their axe to appeals on regional policies and plans, Auckland Council to appeals on its new Unitary Plan, but Local Government New Zealand predictably wields its axe more widely and would remove de novo Environment Court appeals to all regional policy statements, all regional and district plans, and to all changes and variations.

28. The alternative solution proposed by Dormer and Payne is a one-stop hearing process that involves a panel chaired by a Minister-appointed independent person. The chair would then decide with the council the necessary composition of the panel based on the issues under consideration, with a presumption that the majority would be elected members. There would be full cross-examination at this local authority level. Appeals are available only on points of law to the Environment Court.

29. The solution proposed by Auckland Council involves a panel with a retired High Court or Environment Court judge as an independent chair, four independent commissioners and four elected councillors. The panel's decision would be final, except that points of law could be appealed to the High Court. In addition, the Council proposes to remove the further submission process, on the basis they are "unnecessary as they only provide an opportunity for submitters to relitigate matters in other submissions".

30. Local Government New Zealand appears to contemplate limited cross-examination occurring at all council hearings and there might be some scope for use of commissioners who are not councillors.

31. We discuss our concerns with these "solutions" below, but first we consider the circumstances that led Dormer and Payne to propose their solution.

What is the problem Dormer and Payne were trying to solve?

32. Their solution has been put forward with the aim of speeding-up the currently costly and time consuming plan preparation process.

33. The three examples given by Dormer and Payne as the primary basis for their proposal are the appeals to Variation No. 2 (Geothermal) ("**Variation No. 2**"), Variation No. 5 (Lake Taupo Catchment) ("**Variation No. 5**") and Variation 6 (Water Allocation) ("**Variation No. 6**") to the Proposed Waikato Regional Plan ("**Proposed Plan**"). Our review of these three examples can be found in **Appendix C**.

34. In summary, our review demonstrates that Dormer and Payne are misguided in using Variations No. 2, No. 5 and No. 6 as examples of why the costs and delays should be avoided through reducing the appeals process. To the contrary, these cases reveal a particular emphasis on the need for extensive research and the collation of a broad range of evidence to make balanced and informed findings. In all three situations, the appeals dealt with complex issues and involved multiple parties. For those parties who participated in the above proceedings it is clear that the Court's principled approach during the hearings actively encouraged the parties to carefully weigh the merits of potential issues and arguments. This resulted in significant inter party resolution during

the hearings and the ultimate determination by the Court of a narrowed set of issues. Significantly, in all cases the Variations which the Court ruled on included substantial changes from the version of the Variation introduced to the Court at the inception of the hearings.

35. The time taken to gather and examine the evidence of experts provided the Court with an array of better information upon which to base their judgments and allowed a balanced and informed decision to be reached at the end of a fair process. The quality of the outcome achieved through the appeal process at the Environment Court level was clearly superior to the outcome at the local authority level. It has also put in place a framework that is enabling applicants to obtain consent in an efficient and cost effective way.

36. All three of these cases were undoubtedly complex and lengthy. While they have been used as the basis for advocating the removal of appeal rights, the opposite is in fact true. These cases clearly demonstrate the benefit of a thorough and robust appeal process for setting policy frameworks over highly significant resources to ensure future social and economic wellbeing.

Why is it so important to retain the right to appeal to the Environment Court?

37. We expressed our concerns with the single hearing procedure from which appeals are available only on points of law during Phase 1 of the RMA reform. In essence, our concerns remain the same.

38. Public participation is a fundamental aspect of the RMA.[7] Planning documents, including policy statements and plans, both inform and lay down the rules governing the operation and future development of all industries, infrastructure and other activities in New Zealand. It is crucial that they be in an appropriate form. If they are not, the New Zealand economy and employment in this country will be severely impaired, or the quality of the environment may be at risk.

39. While the objective of reducing delay and costs associated with planning processes is supported, restricting the right to appeal policy statements and plans is strongly opposed. This will result in unsatisfactory outcomes and not necessarily reduce delays and save costs in any event. Being left with unsatisfactory council policy statements and plans, where appeals to improve the provisions have not been possible, will significantly impair business activities and opportunities and ultimately lead to far greater costs and delays. There is no point having a more "efficient" process for making the plan if it simply leads to greater overall costs through excessive and inappropriate constraints on permitted activities or on the consideration of consent applications.

40. The reality, which many participants in the RMA process would attest to, is that councils often make unsatisfactory decisions on many aspects of their policy statements and plans. This can be on major aspects, but in many occasions it is in areas of detail that can have significant impacts on business. In almost all cases such appeals are worked through and resolved by way of mediation and negotiation. Only occasionally do key issues ever have to be heard by the Environment Court. Almost without exception, and there may be no exceptions, the policy statements and plans have been significantly improved through these appeals on the merits. This is fundamental to this discussion.

41. Readers of this paper (especially submitters and appellants on planning provisions, including many public authority submitters on planning documents and numerous industries and infrastructure operators, environmental groups and ordinary members of the public) will know from their own experience of numerous examples where this is true. It is, however, difficult to quantify or to provide clear statistics on the point, as the only decisions released by the Environment Court relate to the few key issues that end up going to hearing. Innumerable consent orders are issued by the Court recording the

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7 See for example *Westfield (New Zealand) Limited v North Shore City Council* [2005] NZSC17

agreements reached through mediation or negotiation, reportedly in the vicinity of 90%. In all of these situations, the provisions have been amended and approved as a result of the appeals on the merits. That is the "proof of the pudding" of the appeal process working.

42. A recent example well-known in the Auckland region is the former Auckland Regional Council's proposed Regional Plan: Air, Land and Water. A vast array of organisations, including many of the leading public and private infrastructure providers, major businesses active in the region, as well as a number of the territorial authorities, regarded that plan as particularly poorly drafted as notified and still in an entirely unsatisfactory shape following decisions on submissions. In the time since appeals were filed, and through the normal negotiation and mediation process, literally hundreds of amendments have been made. It would have been an unthinkable outcome under the RMA for the Regional Council's decisions version to have been the final version of that plan, subject only to appeals on points of law.

43. A related major concern is that unquestionably, the fact that councils know that their decisions can be appealed to the Environment Court means that they take a much more responsible approach to their decision making. They are more inclined to put politics aside, or at least partly aside, and determine submissions on policy statements and plans by and large under the RMA provisions. Even then as explained above, many aspects of their decisions still need improving by way of appeals. That discipline or knowledge of Environment Court review, delivers some quality of decision making at present. This would be greatly reduced with a loss by submitters of a right to appeal on the merits. It may be expected that decisions will be much more political in nature as councils would be aware that there would be much less opportunity for their decisions to be challenged. As an example in a different context, there is a marked difference in the extent to which councils accept submissions made under the RMA, with its right to appeal, compared to the much lower extent to which they accept submissions on development contributions policies or LTCCPs or other proposals with public rights of participation under the Local Government Act 2002 where there is no right of appeal.

44. Many, if not most, decisions on regional and district plans and plan changes are also not policy decisions or policy decisions alone. Almost all decisions directly affect what can be undertaken on land or in the coastal marine area. For example, the Auckland Regional Policy Statement directs where development can occur in accordance with the metropolitan urban limits. Similar approaches are taken by regional councils in other parts of the country, such as Canterbury. Policy statements may also specify which landscapes are outstanding natural landscapes or areas of heritage. These types of decisions imposing urban limits, and exactly where such limits should lie, and decisions on landscapes and heritage areas, etc are not policy decisions. They are judgments under the RMA involving factual findings which the public must have a right to test. Many can involve complex issues with detailed evidence and the outcome can have significant economic and other impacts. A distinction may also be drawn with national policy statements, for which no right of appeal exists. These documents are much broader and more "policy" focussed than district and regional plans and regional policy statements, which create the legal framework under which people must order their lives.

45. In addition (and crucially), objectives and policies themselves are a fundamental part of the assessment of many resource consent applications. It is a contradiction to allow appeals on the merits of decisions on resource consents as of right, but not of the critical planning framework that will determine what consents are required and guide those future resource consent decisions.

46. Likewise many developments, particularly those of a larger nature, effectively get their approval for everyday operations through the zoning framework they obtain in regional plans or district plans. They secure a wide range of permitted activities and development controls that mean they never need resource consent applications, or only low level consents (such as controlled activities). Removing the right of appeal would result in some industries and other activities being treated quite differently. Those that

rely on permitted activity status would have no right to challenge the council's key decisions on those plans governing their day-to-day business; whereas those that need substantive resource consents would have a full right of appeal. This is unfair and actually discriminates against those activities that seek to comply with plans and order their affairs accordingly.

47. As discussed earlier, most appeals on proposed policy statements and plans are resolved through negotiations between the interested parties and formal court assisted mediation. This is a very effective process. As the Ministry of Justice report dated 23 January 2009 records, approximately 90% of plan appeals do not involve a formal court hearing. This does not mean that 90% of appeals are ineffective and do not raise valid issues. It means that 90% of appeals raise valid or legitimate concerns that are capable of resolution through further discussion, negotiation or mediation. Cutting out the role of the Environment Court will reduce the effectiveness of policy statements and plans as the issues will not have been fully ventilated, considered and the most appropriate provisions arrived at. There is also likely to be reduced public "buy-in" to planning provisions, because people have not been able to get them right and know they have no legal ability to easily improve the plans. In short, the policy statements and plans will have much less credibility than they do at present with the Court oversight.

48. There is a suggestion in some background papers that, from an economic perspective, the wide scope for participation is discouraging investment by creating too much uncertainty for applicants. While that may be the case for resource consents, as applicants do get frustrated by submitters appealing, that is irrelevant to the issue of appeals on policy statements and plans. In many cases it is businesses and property owners who are appealing the provisions governing the planning framework applying to their own businesses or land. The removal of the ability to appeal policy statements and plans will only exacerbate the uncertainties.

Why are further submissions a necessary part of the process?

49. The Auckland Council proposes to remove the further submission process, on the basis they are "unnecessary as they only provide an opportunity for submitters to relitigate matters in other submissions".[8]

50. With respect, this statement is completely misguided. Further submissions are the very first opportunity that people have to comment on changes to a plan being sought by other people. These can include requests to rezone areas, to introduce new zones altogether, or to amend the provisions applying throughout a zone. Such submissions may directly impact the zoning of someone else's land, where the owner of that land was quite happy with the notified plan provisions. They may also directly impact on the use or enjoyment of your own land, by requesting that a new activity be encouraged in the vicinity. The further submission process is the only chance that people affected by, or otherwise interested in, original submissions have to let the council know what they think of those changes and is a vital step in order to create a document that reflects the wider community's aspirations. The further submission process also improves the odds of all issues being adequately covered and explored by all submitters, ie. an issue raised by one submitter may have been overlooked by another submitter. It also allows submitters to work together collaboratively and minimise duplication of effort.

51. The statement also seems to overlook the fact that the further submission process was amended as part of Phase 1. Prior to 2009, any person was able to make a further submission in support of or opposition to the original submissions. Clause 8 of Schedule 1 was amended in 2009 so that the only persons able to make a further submission are:

(a) any person representing a relevant aspect of the public interest; and

[8] Briefing paper to incoming government from Auckland Council, available as the Attachment to Item 16 of the Minutes from the November 2011 meeting of the Governing Body.

(b) any person that has an interest in the proposed policy statement or plan that is greater than the interest that the general public has; and

(c) the local authority itself.

52. This has already significantly reduced the opportunity for members of the public to respond to what can sometimes be significant changes sought in an original submission. Any further reduction would seriously impede the public's participation in the process and undermine the quality of the outcome from the community's perspective.

What does the new "one stop" hearing mean for submitters?

53. A wide range of members of the community lodge submissions on planning documents. Most lay submitters feel comfortable attending the local authority hearing and presenting their submissions. The process can be relatively informal and is often conducted in a way that puts lay submitters at ease, while making them feel like they have been heard. Questions are only from the panel members and are generally aimed at clarifying the point rather than challenging it. Other submitters do not have the opportunity to attack or criticise, and must instead wait their turn.

54. The proposal by Dormer and Payne and by Local Government New Zealand to introduce cross-examination will completely change this process, to the obvious detriment of the numerous lay submitters who have a legitimate right to be involved in the process. To substitute for their being no appeal rights on the merits the process would necessarily require:

(a) the submitters (including experts) to be cross-examined by the council and any original submitters on the same provisions and any further submitters in opposition;

(b) lay submitters having the opportunity to cross-examine expert witnesses called by other submitters;

(c) all submitters having the same opportunity to cross-examine the council officers / consultants.

55. In order for this to occur, there would need to be pre-circulation of all evidence in advance of the council hearing.

56. There is no doubt that this proposal would significantly increase the length of time of every council hearing, which will increase the cost incurred by every party. The vast majority of submitters at first instance do not either appeal nor join appeals as s274 parties. Those parties, who just want to participate in the first instance hearing, will be put to significantly greater cost and will have their usually single straightforward hearing completely changed.

57. The submission process is often the first opportunity for the public to comment on the detail of the document and to suggest amendments or different approaches. The first instance hearing is the opportunity to expand on those suggestions. It would not be in the spirit of the process for it to become highly contested, with the council (among others) cross-examining submitters rather than listening to their views.

Does the solution reflect the original reason for removing the right to appeal?

58. The TAG's primary driver in 2010[9] for suggesting some potential removal of the right of appeal to the Environment Court was to remove the ability to challenge the policy established by the local authorities. This supposedly reflected their role as the primary policy makers. It was said that the elected councillors have this role, not independent

[9] The report of the Ministry for the Environment's Urban Technical Advisory Group, prepared in June 2010.

commissioners or technical specialists. Local Government New Zealand puts forward similar views.

59. Under the Dormer and Payne proposal, there is a requirement for a minimum of 1 elected councillor on the panel. Under the Auckland Council proposal, there will be 4 elected councillors on a panel of 9. Local Government New Zealand is not specific with its proposals.

60. This means that in both the Dormer and Payne and Auckland Council proposals, the policy maker is not the local authority, but an independent panel in any event. There may be some merit in having these decisions made by panels comprised of independent commissioners or technical specialists. This could reduce the likelihood of decisions being coloured by "local politics", and could also lead to more efficiently run hearings by overcoming the difficulty of trying to get councillors together to attend long hearings which is a frequent cause of delay. But, if that is so, the Council is not acting as the primary policy maker, and TAG's reason for originally suggesting the limited rights of appeal no longer stands.

61. In addition, as discussed earlier, many provisions of policy statements and plans are not strictly policy in any event. The evidence in support of approaches being taken ought to be able to be tested on appeal, given the significant impact such decisions can have.

What do we suggest as an alternative?

62. The objective must be to get the best outcome at the end of the Schedule 1 process. Removing important elements of the process altogether jeopardises the outcome. Given the important role of planning documents, a suboptimal outcome is not desirable from anyone's perspective, including central Government's.

63. The focus should not be on removing, or limiting, the right to appeal to the Environment Court; instead we should first be focusing on reducing the frequency with which submitters feel the need to exercise that right.

64. More time consulting with the community prior to preparing the wording of the plan and active engagement on the actual draft wording of the plan during the pre-notification process, would reduce the number of appeals. While most councils usually consult or inform the public on broad concepts or issues, many are particularly poor at sharing draft rules, draft planning maps or proposed wording of objectives, policies and rules and at seeking feedback during the preparation of policy statements and plans.

65. In particular, the **plan preparation process** at the council stage could benefit from:

(a) engagement with key stakeholders at a very early point in the process, to discuss the intended scope of the plan and the issues to be addressed;

(b) establishing working groups to discuss ideas and issues during the initial drafting phase;

(c) providing draft provisions to interested parties for rigorous assessment by those likely to use the provisions on a regular basis;

(d) hosting caucusing sessions with interested parties to debate the provisions in an informal setting, and flush out any obvious errors, omissions or difficulties;

(e) holding pre-hearing meetings / mediations before council hearings with all who have submitted on certain provisions to see if consensus can be reached. Any revisions to the provisions can then be circulated in advance of the hearing, with submitters able to comment on the proposed changes and outline any remaining concerns; and

(f) the retention of the current requirement in Schedule 1 that decisions on submissions be issued within 2 years from the date of notification of the policy statement or plan.

66. There is also merit in the suggestions made by Trevor Daya-Winterbottom in his article "Blue Horizons"[10] regarding negotiated rule making and adopting the two stage approach used for land use planning in Victoria, Australia. A paper prepared by the Legislation Committee of the Resource Management Law Association of New Zealand Inc "Alternative Collaborative Plan Making Process" in 2011 also has some useful ideas for better plan preparation and seeks to encourage greater collaboration than is usually the case at present. (We have reservations over some aspects of that paper, however.)

67. At the **appeal stage**, delays generally arise at present because of one or more of the following:

(a) there is a need to approach the appeals in a systematic way, with the higher level strategic issues resolved before the objectives and policies, which in turn need to be resolved before the rules are addressed;

(b) further information is required or studies need to be undertaken on the various options put forward by stakeholders;

(c) there is inadequate resourcing or motivation within the council to resolve the appeals;

(d) speedy resolution is not a high priority item for one or more of the parties; and

(e) the time taken on occasions by the Environment Court itself (eg through pressure of other work, delays in scheduling hearings, issuing a series of interim decisions, etc).

68. These could largely be addressed by a more aggressive appeal management process to reduce the length of time taken to resolve what should be a reduced number of appeals that may still be lodged. The Environment Court already has, and is using, the tools to keep things moving once the appeals are filed with the Court. While there is no general practice across the divisions, it should be fairly straight-forward for the Court to take a much greater hands-on approach with plan appeals and to keep them moving, when this is what most parties want to happen.

69. Any more rigorous appeal management regime ought to be aimed at seeing all appeals being disposed of by settlement, withdrawal or decisions delivered, within two years, apart from exceptional circumstances. This could include such steps as:

(a) an initial period allowed for normal negotiation and settlement, only if the parties are willing and consider there is likely to be benefit from doing so (many appeals, or aspects of appeals, on straight forward matters can be easily or quickly resolved if there is an early focus on them);

(b) a formal and probably mandatory mediation process where:

(i) both the council and appellants/s274 parties are required to circulate proposed amendments or provide comment within fixed deadlines, so weeks or months do not go by (as is often the case now) while parties wait for others to respond (an omission to respond should have adverse consequences, so as not to allow delay); and

[10] T Daya-Winterbottom, “Blue horizons” August 2011 RMJ pp21-24.

(ii) the council is required to have the appropriate delegation in place to settle the matter at mediation, without reporting back to a committee for approval;

(c) perhaps after no more than 9 months, evidence exchange timetables should be set for any remaining matters, with the intention that all evidence is exchanged within 12 months of the appeals being filed;

(d) the second 12 months should be used for hearings and the issuing of decisions.

70. There will still be some cases where it becomes clear the matters provided for in policy statements and plans were not sufficiently considered or investigated by councils at the outset and time must be allowed for further investigative or other work to be undertaken. In those situations the Environment Court must be able to direct a different path in order to achieve the right outcome under the RMA. More often than not, that will be when the council has prepared a new policy statement or plan with insufficient consultation and public input into the detail before notification. But, in all situations, a maximum 4 year path from notification should still be the clear objective. That will require better consultation by councils before and during their plan preparation and processing, a much more rigorous and universal approach taken to case management by all divisions of the Environment Court, and better resourcing, motivation and adherence to deadlines by all involved in the appeal process.

71. To advance our suggestions for a faster and more rigorous Environment Court process, we recommend that the Environmental Law Committee of the New Zealand Law Society and the National Committee of the RMLA approach the Environment Court and consider a joint workshop of some sort to see how best to deliver these outcomes. Legislative changes may or may not be required to give effect to the steps identified.

Does the Auckland situation justify a different approach?

72. Auckland Council is in a relatively unique situation where the amalgamation has resulted in multiple plans (both regional and district) as well as a regional policy statement and created an expectation that a combined plan will be prepared to simplify the planning environment in the region. It is also desirable that the combined plan achieve operative status in reasonable time (we have suggested 4 years).

73. In the case of the Auckland Council's proposal, two other factors need to be mentioned.

74. First, it must be recalled that many of the provisions of the existing policy statement and plans are well out-of-date and were last reviewed over 10 years ago. They apply to substantial areas of land and to major business activities of critical importance for the region and the country. Owners of such land and businesses and the public generally have been waiting for these older provisions to be reviewed and updated, so they can exercise the opportunity to have their say on what ought to apply going forward. Their public participation rights should not be reduced, compared to those enjoyed by citizens outside Auckland, just because local government in their region was amalgamated. That was also never put forward as a consequence of amalgamation when the Auckland Governance issue was debated.

75. Secondly (and conversely), some of the provisions of the existing plans have only recently been finalised. If it wasn't for the amalgamation, those provisions would not be subject to review for at least 7 years. It might be that those elements that have recently become operative ought not to be able to be subject to submissions seeking amendments, or only at the discretion of the Auckland Council. Clause 25(4) of Schedule 1 to the RMA provides the option to reject a private plan change request on the basis that the policy statement or plan has been operative for less than 2 years, or on the basis that the substance of the request has been considered and either given effect to or rejected by either the council or the Environment Court within the last 2

years. There may be merit in introducing a similar mechanism for rejecting submissions on provisions that have been operative for less than 2 years and are simply caught up in the process of preparing a combined plan. If such a power were to be introduced for Auckland, it may need to be subject to an overriding discretion (as the Council may be willing to accept sensible refinements or minor updates etc) and to a right to make a submission on any aspects that have been changed or where other provisions have somehow altered the status or effect of those provisions or the intended outcome.

76. We are uncertain how appropriate such a suggestion may be, however, in light of recent Auckland Council indications that it is proposing quite substantive redrafting of existing plan provisions to produce a more consistent and slimmed down single combined document. Combined with their previous statement that the Council is adopting a principle of "simple, fast and bold" for all planning, it seems that the combined plan is likely to represent the most far-reaching changes Auckland has ever seen. In such a situation presumably almost everything may be changed in some form. That underscores the need for Aucklanders to enjoy the same public participation rights (including appeals) as citizens elsewhere. We raise the idea, however, as many parties including Auckland Council may prefer not to re-litigate or open-up, at a further cost, provisions which have only recently been debated, settled, litigated or whatever. They may prefer that they be "ring-fenced" in some manner, subject to scrutiny only to the extent they have been altered. This will only be an option, however, if there is no material change - both in terms of outcome and in the detail.

Conclusion

77. It is in everyone's interests that the outcome at the end of the process is a top quality planning instrument that can deliver the desired outcomes moving forward. We must not lose sight of this objective.

78. It is also in everyone's interests that the planning environment is relatively certain and simple. There is no dispute that being governed by one plan is a far more desirable outcome than having an operative plan, a proposed plan and a variation all to contend with. It is clear that the only way to achieve this is to reduce the length of time between when a proposed plan has legal effect and when it becomes operative.

79. Any solution must ensure that the process includes the necessary steps, and provides the appropriate tools, for ensuring the desired outcome is delivered. For the reasons outlined above, the ability to lodge a further submission and the right to appeal to the Environment Court are both necessary steps that should not be removed from the process.

80. The best way to shorten the process is, in our view, to create a quality product as early as possible in the process, but backed up by a new Environment Court appeal management regime. The solution we have proposed above is designed to achieve this.

Derek Nolan/Bal Matheson/James Gardner-Hopkins/Bronwyn Carruthers

APPENDIX A: PHASE 1 REFORM

1. Phase 1 of the RMA reform occurred in 2009. As introduced, the bill promoting these changes sought to reduce the time involved in developing and adopting plan documents and to reinforce the role of local authorities as the primary policy-making bodies. It proposed to restrict appeals on plans to points of law unless an appellant successfully applied for leave from the Environment Court to appeal on the merits. The grounds for seeking leave to appeal a plan on the merits related to impacts on property rights, the clarity of local authority decisions and whether a decision fails to give effect to Part 2.

2. The many submissions on this proposal focussed on three key issues:

   (a) the potential for greater costs and delays;

   (b) the effect on access to justice; and

   (c) the limited breadth of the grounds for appeals on merit.

3. The Select Committee recommended the deletion of the clauses after noting:

> We agree that the policy proposal poses some difficulties regarding the way the Environment Court would determine applications for leave to appeal on merit. We consider that such difficulties need to be addressed properly to ensure that significant savings in process time and cost are realised, and to reinforce the role of local authorities as primary policy-makers. However, we accept that there are real difficulties in devising criteria to guide the court. **On balance, we are not satisfied that the proposal, in its current form, will work as intended and deliver fairness and natural justice**. The only exception to this arises in the context of giving effect to national policy statements, where it is appropriate to limit such appeals to points of law to maintain consistency in the way the national policy standards are applied in planning documents. (emphasis added)

4. The Government did, however, introduce a number of changes through Phase 1 that were intended to drive policy statements and plans through the Schedule 1 process faster:

   (a) with a few exceptions, the rules in proposed plans no longer have legal effect from the time the proposed plan is notified. Instead, they only have legal effect once the decision on submissions is released. This is a strong incentive for councils to move quickly through the submission, hearing, deliberation and decision stage;

   (b) instead of requiring a *minimum* of 20 working days for further submissions, there is now a *maximum* of 10 working days for further submissions;

   (c) further submissions can now only be made by persons representing a relevant aspect of the public interest, persons with an interest greater than the general public and the local authority itself;

   (d) the local authority decision does not need to address each submission individually and may group them according to the provisions or matters to which they relate.

5. Together with the requirement introduced in 2005 for decisions to be issued within 2 years of the notification of the plan, these further changes have addressed a number of the reasons for delay with plan making at Council level.

APPENDIX B: INDICATIONS FROM GOVERNMENT

1. The National Party issued their policy position on 2 November 2011. It flags an intention to:

   (a) simplify planning processes in line with the *Competitive Cities*[11] discussion paper;

   (b) improve the plan-making process between resource management, transport and local government, with a much simpler planning and consultation process based on the TAG Reports.

2. In relation to plan making, the TAG Report[12] recommends:

   (a) the scope of s292 should be broadened so that rules which are drafted with a greater degree of prescription than is necessary to achieve their objective can be changed by Order of the Court without using Schedule 1.

   (b) the right of appeal on policy matters (objectives and policies) should be removed, but the right of appeal on the rules should be retained. A suggested solution is described as follows:

> That is an approach where councils must obtain Ministerial approval of any policy proposals in an RMA document. This could include approval to embark on the plan change process or simply an approval at the conclusion of the submissions and hearing process. In the event the Minister is satisfied the proposal is not ultra vires, has passed the s32 tests, then Ministerial approval could be provided. This would then make the change operative. **In the event that the Minister is not confident the change meets RMA requirements, or is highly contentious, it may not be signed off. This would allow submitters to appeal to the Environment Court.**

   (c) The way to better integrate and align the plan making requirements under the RMA, LGA and LTMA is to:

      (i) amend the LGA and LTMA to confirm that consultation undertaken under other Acts can be regarded as meeting the consultation requirements under those Acts (consistent with the 2009 Amendment to the RMA);

      (ii) amend the processes for plan making under the RMA (as outlined above).

3. However, there is no mention in *Competitive Cities*[13] of removing, reducing or constraining the right of appeal to the Environment Court. Again, its focus is on reducing the number of plans and avoiding duplication of processes under the RMA and other statutes. Nor does the TAG Report recommend removing the appeal right, other than on clear expressions of policy that have the prior approval of the Minister.

4. This is consistent with the press release by Rt Hon John Key on 2 November 2011:

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[11] Building competitive cities: Reform of the urban and infrastructure planning system, a discussion document prepared by the Ministry for the Environment following receipt of the TAG Report.
[12] The report of the Ministry for the Environment's Urban Technical Advisory Group, prepared in June 2010.
[13] Building competitive cities: Reform of the urban and infrastructure planning system, a discussion document prepared by the Ministry for the Environment following receipt of the TAG Report.

> We want to build on the work from the Technical Advisory Groups on urban design, so we do the planning only once and then get on with the work.

5. It is also consistent with comments made by the Dr Nick Smith on the release of the policy when he was the National Party Environment Spokesman:

> We also want to simplify the plan making process as it is too slow and cumbersome. Auckland will not prosper if, as predicted under the current Act, it takes 15 years to complete a new Unitary Resource Management Plan for the city. These changes will include simplifying the planning processes of the Resource Management, Land Transport and Local Government Acts as well as tighter timeframes for plan making.

6. As an aside, we challenge the advice given to the Minister that the Auckland Unitary Plan could take 15 years to complete under the current system. That is an excessive prediction in the light of current practices.

7. There are also two comments of interest in the briefing given by the Department of Internal Affairs to Dr Nick Smith as the incoming Minister of Local Government:

   (a) that more collaborative planning and governance processes through the resource management reform has the potential to impact on local government functions, planning, governance and decision making processes;[14] and

   (b) that there is an issue with communities having few means to affect local authority decisions:[15]

> Despite a generally strong local government commitment to consultation, people with an interest in their council can sometimes struggle to get clear information about issues it faces and the potential impact on ratepayers and residents.
>
> Even if the issues are clear, individuals and communities can find it hard to influence local authority decisions or hold those bodies to account. Elections are infrequent and are blunt accountability mechanisms. Seeking judicial review is expensive and addresses decision-making processes, rather than the substance of decisions. Providing more direct tools for people to review or influence local authority decisions could be useful, and could build on other measures to improve transparency, accountability and financial management on local government.

8. The Ministry for the Environment's briefing for the incoming Minister for the Environment focuses on the potential for collaborative processes and collective action to decrease the overall cost and time normally seen with adversarial planning processes.[16] It notes:

> Overseas experience shows that collaborative institutions emerge if there is a suitable enabling environment, though are likely to fail when they are forced. Participants must be able to see that there are gains to be made over the existing regime.
>
> This suggests that communities could be given the option of a collaborative regime as long as certain conditions such as sustainability and democracy are met, but that existing regulation must be a backstop. Incentives for participation are important. If adversarial RMA processes remain the end-game, there is little incentive to collaborate and an incentive to defect from anything that is started.

9. In light of the above, it is clear that any reform should be seeking to deliver quality planning outcomes in a shorter period of time, rather than effective abandonment of one

[14] Figure One, page 8.
[15] Pages 11-12.
[16] Pages 8-9.

or other phases of the current process in its entirety. To do so would be an overly simplistic response to a broader issue about the quality and efficiency of the participation process and the resultant outcomes.

APPENDIX C: EXAMPLES GIVEN BY DORMER AND PAYNE

Variation No. 2 (Geothermal) to the Proposed Waikato Regional Plan

1. To provide some background, the Waikato Regional Policy Statement ("**Policy Statement**") was publicly notified in October 1993 and became fully operative in October 2003. The Proposed Plan was notified in September 1998 and decisions were released in October 2001. Amongst others, Contact Energy and Mighty River Power challenged the consistency between the Proposed Plan and the earlier Policy Statement, citing significant differences. The Waikato Regional Council then reviewed its Policy Statement and Proposed Plan in relation to geothermal policy. Variation No. 2 to the Proposed Plan was notified in August 2003 with decisions released in June 2004.

2. The first Environment Court appeal dealt with two major issues with Variation No. 2 raised by Geotherm Group Limited, Taupo District Council, Mighty River Power Limited, Contact Energy Limited and Watercare Services Limited. These were whether regional policy should:

   (a) require reinjection of the extracted geothermal water back into the same geothermal system; and

   (b) provide for a single operator (or single tapper) for each geothermal system;

   with a subsidiary issue being:

   (c) whether discharges of geothermal water to ground or surface water be prescribed in the Geothermal Module or the Water Module of the proposed plan.

3. It was held by the Court, led by Judge Whiting, that there should be a strengthening of the reinjection policy, that limitation to a single operator for each system was inappropriate and that discharges of geothermal water should remain in the Geothermal Module. However in his summary, the Judge reiterated the difficulty in only dealing with two of the issues and highlighted the need to resolve outstanding issues which had been raised by the findings in the appeal.

4. Following the interim decision, the parties entered into negotiations and mediation which resolved many of these outstanding issues. The second Environment Court hearing dealt with two unresolved issues at the end of this process:

   (a) the threshold for the discretionary activity rule for surface discharges from geothermal systems; and

   (b) the setback distance from significant geothermal features for small and medium sized takes and associated discharges.

5. There is a distinct emphasis in both these judgments on the importance of hearing detailed evidence and establishing appropriate thresholds based on that evidence. The gathering of such information is time-consuming and may frustrate the appeals process. But for certain matters, such as geothermal activity, the Environment Court deemed the collection of expert evidence to be crucial to being able to make the correct decisions. At paragraph 47[17], Judge Whiting recorded that the Court felt that the exhaustive evidence on many related matters satisfied the Environment Court that a balanced and informed judgment was able to be reached with regard to the provisions of the RMA.

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[17] *Geotherm Group Limited & Ors v Waikato Regional Council* (EnvC, Auckland, A 151-06, 19 Nov 2006).

6. In the High Court appeal regarding Variation No. 2, the appellant contended that the Environment Court had made an error of law on several grounds, one being that the Environment Court regarded itself as being in a position to make a balanced and informed judgment with regard to the Act. Woodhouse J reinforced the Environment Court point that assessments of the geothermal water and its disposal involved a wide range of evidence, and detailed information was required to reach accurate conclusions.

7. In addition, Woodhouse J found that there was no error of law in the Environment Court's decision on the basis that it should have given the matter a more detailed analysis. The depth of reasoning required to make a decision will vary depending on the subject matter, but here it was clear the Environment Court, faced with conflicting expert opinions, made its decision on the evidence they heard and its own expertise. Information on the geothermal effects was so diverse and wide-ranging that the Environment Court had to draw the line at some point, in terms of how much information it could analyse.

8. It is readily apparent that substantial value was derived from the Environment Court appeal process. It allowed the collation of a wide range of information on issues which have a diverse impact on the environment and the correct decisions are much more likely to have been made.

Variation No. 5 (Lake Taupo Catchment) to the Proposed Waikato Regional Plan

9. The Proposed Plan including Variation No. 5 addresses the additions to the nitrogen cycle in the Lake Taupo catchment as a result of changing land use. The proposal is for a regulatory regime, introduction of a nitrogen trading scheme and a public fund to reduce nitrogen inputs.

10. Of note in the interim decision of the Environment Court in *Carter Holt Harvey Limited v Waikato Regional Council* [18] there is a similar focus to Variation No. 2 in regards to the complex nature of the subject requiring a vast array of evidence and analysis in order to come to the correct conclusions. The nitrogen regulatory scheme affects a large number of users in the catchment area and therefore the interests of iwi, the agricultural sector, industry and residents all had to be taken into account. The interim decision of the Environment Court and the three year delay until the final decision, reflect the lack of up-to-date information which was required to be collated before the final decision could be made. At paragraph 28[19], it was noted that there was a distinct lack of directly relevant monitoring or research data available regarding nitrogen losses in the Taupo basin. In addition, the data that was subsequently collected and reviewed by a number of experts had differences in estimates of nitrogen loss and had to be resolved.

Variation No. 6 (Water Allocation) to the Proposed Waikato Regional Plan

11. Variation No. 6 to the Waikato Regional Plan was introduced to address the adverse effects of the taking and use of freshwater, other than geothermal water, from ground and/or surface water resources within the Waikato region. The Variation attempted to afford priority to certain categories of use.

12. The variation was publicly notified in October 2006 with recommendations adopted by the full Council two years later in October 2008. Thirty-seven appeals were filed by 26 parties covering the whole of the Variation. The Environment Court hearings commenced in February 2011, concluded in August 2011 and were followed by the release of the Court's decision in November 2011. The Court received evidence from 68 witnesses.

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[18] *Carter Holt Harvey Limited & Ors v Waikato Regional Council* (EnvC, Auckland, A 123-08, 6 Nov 2008).
[19] *Carter Holt Harvey Limited & Ors v Waikato Regional Council* (EnvC, Auckland, A 123-08, 6 Nov 2008)

13. The variation raised complex factual and legal issues, particularly relating to the issue of priority to the water resource. Substantive legal challenges occurred and were resolved prior to the commencement of the hearings. The Court observed that:[20]

> That version was changed quite considerably from the decisions version. These changes came about as a consequence of the meetings and discussions of the parties, including their experts. Since the hearing started, that document has been through at least 12 iterative changes in response to matters raised during the hearing; further discussions between the parties and their experts; and the promulgation of the National Policy Statements on Renewable Electricity and Freshwater."[21] And later, "the Council made numerous amendments to the Variation in an endeavour to meet many of the valid concerns of the appellants.

Summary

14. The final decisions of the Environment Court on both Variation No. 5 and No. 6 in 2011 directed substantial changes to the original variations. In the Variation No. 5 case, the Court highlighted the value in taking five years to collate data and hear the relevant evidence, in order to produce a quality outcome for all parties involved.

15. In summary, Dormer and Payne are misguided in using Variations No. 2, No. 5 and No. 6 as examples of why the costs and delays should be avoided through reducing the appeals process. To the contrary, these cases reveal a particular emphasis on the need for extensive research and the collation of a broad range of evidence to make balanced and informed findings. In all three situations, the appeals dealt with complex issues and involved multiple parties. For those parties who participated in the above proceedings it is clear that the Court's principled approach during the hearings actively encouraged the parties to carefully weigh the merits of potential issues and arguments. This resulted in significant inter party resolution during the hearings and the ultimate determination by the Court of a narrowed set of issues. In all cases the Variations which the Court ruled on included substantial changes from the version of the Variation introduced to the Court at the inception of the hearings.

16. The time taken to gather and examine the evidence of experts provides the Court with an array of information upon which to base their judgments and allows a balanced and informed decision to be reached at the end of a fair process. The quality of the outcome achieved through the appeal process at the Environment Court level was clearly superior to the outcome at the local authority level. It has also put in place a framework that is enabling applicants to obtain consent in a very efficient and cost effective way.

[20] 2011 NZEnvC 380 at [101]
[21] 2011 NZEnvC 380 at [11]