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# DRAFTING DISTRICT PLANS — IS THERE A BETTER WAY?

## LOOKING FOR ANSWERS?

To answer this question we have to consider how outcomes are delivered through plans prepared under the Resource Management Act (RMA). By “better” I mean shorter, simpler, more user friendly, and less costly plans, recognising that trade-offs have to be made to allow this to happen. After nine years of the RMA, it is now timely to ask serious questions about its requirements.

## THE NATURE OF THE PROBLEM

Is there in fact a problem in New Zealand with the way plans have to be drafted? Certainly the level of disquiet with the cost and time involved in preparing plans for larger authorities can no longer be ignored. I suggest there are three main problems – too many instruments required in plans, too many categories of consent, and the operation of proposed and operative plans in parallel. Recent work experience in the UK has provided an opportunity to compare that planning system with ours.

The debate about “planning” performance is ideological and can be seen as having two components. The first is planning principle and ideology – the degree to which regulation should interfere in peoples lives, exemplified by the McShane review, which has dominated the debate.

The second issue is one of process and ideology. This raises contrasting approaches of policy driven, flexible and discretionary plans, versus rules driven, objective, and legally certain plans. It is the rules model that characterises the RMA, and its process provisions are extremely conservative, not only reflecting those of the old TCPA, but reinforcing them.

## GROWING PAINS AND GROWING PLANS

There is no one reason for the increasing volume and complexity of district plans – rather

I suggest it is the result of a combination of numerous interacting factors. These fuel demand for more regulation, or make regulation itself more complex, and include the following:

1. Greater public awareness of environmental issues accompanied by increasing suspicion of developers and their motives, evident to those who have been involved in planning since the 1970s;
2. The increasingly active role of elected representatives in initiating demands for regulation;
3. The incorporation of ever more environmental matters under planning legislation, readily demonstrated by comparing the content of a 1970s district scheme with its 1990s RMA equivalent;
4. Criticism of “crude” but simple regulatory standards and activity lists, and their replacement by ever more sophisticated, selective, but complex “effects based” controls;
5. The method of district plan construction required under Section 75 with its multiplicity of instruments – issues, objectives, policies, rules explanations and reasons, environmental outcomes anticipated, etc. This has major implications for the size of plans, and the ability of ordinary people to understand and make submissions on them;
6. The numerous categories of consent (prohibited, non-complying, discretionary, limited discretionary and controlled) and their implications for plan complexity;
7. The plans of local authorities with large populations, or smaller local authorities with high growth rates, are usually much larger, reflecting development pressures;
8. Demands for special “site specific” exceptions to rules – often accepted to avoid litigation, resulting in plan provisions appearing confusing and inconsistent;
9. “Just in case rules” to close “gaps” to preventing some unexpected use to establish as of right, a major driver of rule preparation;
10. A complete lack of national guidance for plan content or preparation – inconceivable in many national planning systems, and resulting in “variable performance” from Councils;

11. Resourcing Plan preparation by statutory workload – ie the production of draft plan sections, rather than less “tangible” work such as research, Section 32 analysis and consultation. This results in not enough resources at the start of the plan preparation process, and too much at the end, when avoidable mistakes have already been made;

12. Fear of legal challenge and preoccupation with drafting detailed “bullet proof” rules where broader policy principles can easily be lost;

13. Changes to legislation, new issues, and case law inevitably occurring during the long period between plans being notified and becoming operative, leading to demand for variations;

14. Generous submission, further submission, and appeal rights, and increasing requirements for more detailed summarising of submissions with high attendant administration costs;

15. The operation of operative and proposed plans in parallel, often for prolonged periods.

Many of the foregoing trends cannot (and should not) be expected to change. However, we are faced with a serious situation – the current method of constructing plans under the RMA must change, or the system will collapse under its own weight. The complexity of the Act itself is mirrored in the plans prepared under its provisions, and the RMA is getting the plans it deserves. This is a factor that can be changed.

## CONTRASTING THE ENGLISH AND NEW ZEALAND MODELS

Under the New Zealand planning system rules in District Plans determine the status of activities. Those activities which comply with the rules (either in activity lists or through performance standards) are permitted, and the objectives and policies are applied to activities which require consent. Because the status of an activity must be able to be determined with legal certainty, rules (unlike policies) must be objective and hence “measurable” in nature. This can give rise to complaints about arbitrary standards and inflexibility.

The English planning legislation has always required general consent for virtually all activities. Because development generally needs consent (thus resolving the issue of status), rules are not required and Local Plans are much slimmer documents than their New Zealand counterparts. They contain only one statutory instrument – policies – and their attendant explanations. Both the English and NZ planning systems achieve legal certainty in different ways. However, one must observe that the attempt to discipline plan making under Section 75 of the RMA has had entirely the opposite effect, by requiring a multitude of bureaucratic instruments within plans, with a risk of internal inconsistency and increased volume.

The English system also has a very strong emphasis on central government direction through Planning Policy Guidance which is similar to the function that National Policy Statements could perform. This has the advantage of removing uncertainties over policy and process matters which have caused major controversy in New Zealand, where clarifying case law emerges at a glacial pace.

Despite its considerable strengths, the English planning system has serious shortcomings if hypothetically applied in a New Zealand context. There is an absence of a “culture of justification” – intervention (often on a grand scale) is deemed to be “good planning”. There is a weak linkage between the exercise of planning power, and accountability for the consequences of exercising that power.

Whereas New Zealand has sought to pursue the extremes of the “free market” model, the English system appears to be almost “economically illiterate” – development is seemingly regarded as a license to print money. There is effectively a charter for economic and social planning in its own right; the concept of “enabling” people to make their own choices (as under Section 5 of the RMA) is an alien concept. Consequently regulation often appears to be a first, rather than a last resort.

An emphasis on Council discretion makes the planning process more vulnerable to political influence. The formal rights of applicants and submitters are desultory, particularly at the consent level. Finally there is a lack of a “purpose and principles” section in the English legislation. Part II of the RMA, for all its ambiguities, at least gives the Act a focus independent of the day to day whims of government policy.

I suggest stifling bureaucracy in the English system derives primarily from its regulatory culture and content of its policy (PPG) framework, rather than the method of plan construction.

The problem with the New Zealand system is that the advantages of legal certainty at the detailed rule level are now being submerged by policy vagueness at a national level and the complexity of a rules/effects based system of plan drafting. The RMA locks us into a rules based system of resource management, regardless of what some might think. If a District Plan is to be enforceable under the RMA, then there must be rules. This is because objectives and policies are not enforceable in their own right, given the presumption under Section 9. People can do what they like (regardless of objectives and policies) unless their activities are contrary to a rule in a plan.

## AN ALTERNATIVE SYSTEM OF PLAN MAKING?

It would be possible, by combining some of the best features of the New Zealand and English systems, to produce an improved plan making system. Such a system needs to be designed to:

- Make plans shorter
- Make plans easier to use/understand
- Reduce the cost and time of plan preparation
- Facilitate easier participation by submitters
- Retain a strong culture of justification.

Adopting purely policy based plans would be too much for our planning culture to stomach, for all its advantages of simplicity. In order to simplify plans, it is suggested that:

1. District Plans should contain only two instruments – policies and rules;
2. That the effects based emphasis be retained;
3. There be only one category of consent, thus strengthening the role of policies. Plans would allow for permitted and discretionary activities only;
4. There be a selective adoption of national policy statements and of national standards;

In order to prevent regulatory excess, the following measures are suggested:

1. A reinforced and simplified Section 32 test;
2. Retention of a legislative emphasis on managing the effects of the use of natural and physical resources, although the social and economic effects of the use of resources could still be taken into account;
3. Maintaining a strong emphasis on formal

rights of submission and retention of the current system of non-notification with neighbours consent.

All of the above should apply to plans notified in the future – to apply it to existing plans would be highly disruptive.

Contrary to folklore, the RMA as it stands does not provide much protection against the possibility of greatly increased regulation. No legislation is proof against changes in prevailing political ideology (witness the ECA).

Finally, there is an issue of procedural reforms. The prolonged period where both operative and proposed plans operate side by side, with associated confusion and cost is a major issue. I suggest that proposed plans have no regulatory effect until they are operative (fully or in part). To answer potential critics concerned about unforeseen “crisis” activities that might arise in the meantime, I suggest that changes to operative plans prepared under the RMA should still have legal force from the time they are notified. A compromise alternative could be to “have regard” to the provisions of proposed plans. The RMA Amendment Bill is moving in this direction, albeit in an ad hoc and timid way.

Reforms along these lines would greatly simplify plan administration and offer a breathing space that can be devoted to enhancing plan quality, and undertaking “real” S32 analysis. Furthermore, the proposals outlined would not require drafting changes affecting large parts of the Act. It would also make the task of submitters simpler, by reducing the bewildering array of regulatory instruments and consent categories.

These ideas are only one perspective on how to improve our district plan making process. There may be other or better ones. Hopefully, this paper might help to stimulate debate on this subject.

*I have been involved in progressing an “effects based” District Plan for Christchurch City since 1992. I was also directly involved in the debate on possible amendments to the RMA both during and following the McShane review in April 1998. Subsequently, during 1999 I was employed on a planner exchange to England which provided me with an opportunity to contrast the systems for plan formulation under the English and New Zealand planning systems. This Paper is a greatly summarised version of one produced for the Christchurch City Council.*