

Plans under the RMA by Judge R J Bollard: RMLA Conference 2002

The title of this opening session for the conference is *Plans are Nothing, Planning is Everything*, and I would like to disclaim it. No one doubts the integral importance of plans as instruments – all the more so with recent case law development involving the permitted baseline doctrine. Perhaps a more apt title might be *All Plans are Something, but Some Plans are Something Again*; or as another suggestion, *To Behold a Rainbow, how far Need the Heavens Open?*

By way of preface, I must record that this address encapsulates my own views, which do not necessarily coincide with those of my colleagues on the Environment Court, or represent a position that might be adopted in an individual case after due argument. I am bound also to signal that I do not intend singling out particular councils as having done better or worse than others in their plans. My object is to underscore matters of general concern that have become evident from my perspective and experience on the Bench, as the RMA plan process has taken shape over the past eleven years.

In May 1978, at a Legal Research Foundation Seminar on the newly-introduced Town and Country Planning Act 1977, Mr P M Salmon, as he then was, spoke on *The Adequacy of Planning Procedures in Relation to our Needs*; and, in the course of his address, he perceptively remarked:

As I see the position in New Zealand a constant tension has existed between the desire for certainty on the part of those owning land and the desire for the retention of discretion on the part of those controlling the use of land.

Under the RMA, that tension has not only persisted but intensified. With the Act's effects-based emphasis, consent authorities have foundered on the horns of a fundamental dilemma - how to embrace the enabling element of the legislation in the context of sustainability, while reserving or maintaining an obvious measure of land use certainty for landowners, neighbouring landowners and other consumers such as public interest groups.

In attempting to allow flexibility to people in selecting their own means to achieve good environmental outcomes, many RMA-based plans have inexorably gravitated towards a high level of dependency upon controlling discretion. The propensity, especially in major districts, to specify daunting lists of widely framed criteria for different zones and activities within zones, some in the form of relatively straightforward performance standards and others containing significant elements of value judgement, is striking, even when examining a small selection of plans at random. Indeed, a mix of both forms of criteria is sometimes encountered as a supposedly satisfactory basis of qualification for a permitted activity. Moreover, criteria are often vaguely worded or at least very general in form. The following provision in an Auckland area plan for subdivision on a controlled activity footing is instructive:

The extent to which each proposed site is capable of accommodating likely building and other development in accordance with other relevant rules of the Plan

The perception of RMA plans as excessively complicated mechanisms of administrative control stems in large measure from the difficulty in attaining a cost effective balance, geared to the Act's purpose of sustainability, between clear direction on the one hand and reasonable flexibility of opportunity for effects-based assessment on the other. Success in achieving that combination is, I believe, the core challenge that the RMA presents to councils without providing any model answer for solving it. The pursuit of general inquiry and public consultation, the gathering of monitoring data, statistical material and other forms of information, the comparative assessment and reasoned selection of efficient means for sustainably managing a district's natural and physical resources, the analysis of objectives, policies, rules or other methods as to their appropriateness in the Act's context— all these responsibilities and more are the lot of a territorial authority in the plan formulation process, however limited its funding capacity and ability to perform.

The Act's prescribed framework is clear enough. As Justice Barker put it in *Falkner v Gisborne District Council* [1995] 3 NZLR 622, 632):

The Act prescribes a comprehensive interrelated system of rules, plans, policy statements and procedures, all guided by the touchstone of sustainable management of resources. The whole thrust of the regime is the regulation of the use of land, sea and air. There is nothing ambiguous or equivocal about this.

But where councils are "on their own" is in determining how to fulfil their responsibilities in such a way that the end product is a well drafted planning instrument, formatted and cross referenced in a user friendly way, and crafted with the rigour necessary to avoid unnecessary repetition, vagueness and confusion.

Plainly, the legislation expects a great deal, some might contend too much in the face of limited resources. Not only does the Act prescribe a clear hierarchical regime, ranging from national standards or policy, through the regional perspective, and finally to the district level, but it demands a high degree of professionalism and insight by council officers, advisory consultants and elected representatives. The intent is for careful research and analysis in determining the major RM issues for a district, and then in devising objectives and policies and the methods or means for implementing them. The process needs to be undertaken without superfluous reworking and elaboration of the Act's purpose and principles through a plethora of provisions, repeatedly expressed in differing ways and in multiple contexts. Plans that fall short are prone to engender an unnecessary degree of legalistic argument in individual cases, thus masking the most direct route to good environmental outcomes.

Some plans appear to display a reluctance to carry through an identified basic objective or thrust (eg for a particular zone) and associated policies by readily applicable requirements or performance standards within a clearly circumscribed compass - that is to say, by as of right provision, or on a controlled activity footing with an incisive band of

discretion. Perhaps it is because the root objective is insufficiently focussed or defined. Or perhaps in some cases there is a lack of confidence to pursue the objective in a robust manner for fear of criticism of undue prescriptiveness in the implementation sphere. Whatever the reason, the familiar scenario in many major urban plans is a highly detailed planning framework, with a substantial range of reserved discretion based upon numerous guiding criteria, designed to cover many aspects of layout and design that a consent application could conceivably give rise to. Hence, several elements of an individual development proposal may well fall into a range of categories ranging from permitted through to non-complying.

Many resource consent applicants naturally seek to explore with the council as a first port of call whether their proposal can be dealt with on a non-notified footing. A process of “over the counter” negotiation often ensues, leading to trade-offs which an applicant proves willing to accept in order to achieve certainty and avoid additional expense and delay. In other cases, an applicant’s aspiration is rather greater, with a correspondingly more significant hurdle emerging as a mix of pertinent RM considerations and controls becomes apparent.

Given that plans are often complex and difficult for lay people to construe and apply to particular fact situations without expert advice and assistance (which in turn may prove to lack expected clarity and assurance), it is understandable that the cost and uncertainty of the consent process has become an issue of concern to many within the general community. In short, the high-minded statute that was introduced as a leader of its kind, and designed for great things in terms of efficient decision-making and good environmental outcomes, has become the source of widespread criticism stemming from the form in which RMA plans have emerged and their practical application. Perhaps if there were more national policy input there would be greater clarity borne from top level impetus, and an improved consistency of approach to resource management between different regions and districts.

In speaking of plans generally, two cases with which I was involved come to mind. First, in *Becmead Investments Limited v Christchurch City* [1997] NZRMA 1 this was stated (p.16):

Clearly the Act contemplates that, by fulfilment of the comprehensive duties incumbent upon relevant bodies in the pre-steps to and formulation of plans and other instruments, coupled with the wide opportunity available for public submission and input, every region and district will fulfil its role in achieving the Act’s purpose. But the widely differing nature of plans, policy statements and so on that are emerging and will continue to emerge are testimony of the many methods of approach which those concerned have been moved to adopt in promotion of the same end. Some plans may be thought to be distinctly reminiscent in their control mechanisms and general formula to the transitional plans that they were designed to supersede. Others may be thought notably more innovative. Others again may appear excessively wordy and lacking in clarity.

And more recently in *St Lukes Group Limited v North Shore City Council* [2001] NZRMA 412, at p.427:

“Management” is a term to which public expectation attaches certain preferred standards such as clarity of outlook and expression. Ideally a district plan should be a straightforward document which sets forth clearly specified objectives and policies (cross-referenced as need be), with rules or other means of implementation that are likewise readily understandable and practical to comply with. Here the plan is lengthy and detailed. It goes to considerable length in seeking to deal with the complex framework of effects that the City’s manifold activities generate or may potentially generate. The Council acknowledges that it is a plan that actively seeks to manage the effects of many different land uses, principally by the use of zoning and associated means.

Trite though it is, to criticise is easier than to create, and worthwhile criticism needs to be constructive. From my experience of plans that have come under the Court’s scrutiny, various salient factors have emerged warranting priority attention for bringing about change and improvement in plan quality. Basically, they devolve down to two heads, which tend on analysis to overlap, shade into each another, or have an interactive compounding effect. They are –

- Excessive wordiness, poor drafting, lack of clarity, and impeded ease of reference
- Overblown framework of applicability and control, including problems of internal inconsistency

Addressing each in summary:–

Excessive wordiness, poor drafting, lack of clarity, and impeded ease of reference

Particularly important in the drafting process is the framing of rules and, where applicable, the provision of associated criteria, whether qualifying or guiding. First and foremost, rules must meet the fundamental standards expected for subordinate legislation in terms of rationality, certainty and conformity with the statutory powers conferred. In addition, they should be reasonably understandable to the ordinary person – whether in relation to one’s own land or that of someone else where (say) a proposed development is thought likely to produce adverse effects. To that end, various basic reminders can be recited – easy perhaps to bring to mind, but all too often overlooked in practice.

- Adopt plain English so that the plan’s provisions, especially rules, are readily understood according to the ordinary meaning of the words used.
- Avoid unnecessary definitions of words or phrases; and, where it is necessary to attach a particular meaning to a term under a definition, ensure that the defined meaning is not only clear, but that it will fit the contexts intended in different parts of the plan. Also ensure that the reader’s attention is readily alerted to the particular meaning imported in those parts of the plan where the defined term is employed.

- Avoid ambiguity, look for simplicity, and maintain orderliness of thought and expression – that is to say, in the sequence of sentences and in their individual construction. Also use bullet points, numbering and other like aids to break down involved subject matter and assist readability and understanding. Good drafting and layout will often point up uncertain factors that require to be addressed through better conciseness or suitable elucidation.

A good illustration is usually worth many words so I proffer one now. It comes from a proposed change to a plan in Auckland and is appended. As may be seen there is a definition of the term “storey” which is both confusing in its wording and layout. The definition has been redrafted with a more lucid style and layout. In the process, two uncertainties have become apparent that ideally require attention.

Overblown framework of applicability and control, including problems of internal inconsistency

Plans are prone to become swollen and excessively complicated as councils seek to deal with all manner of perceived potential effects in many contexts. On this score I question whether various plans throughout the country have purposefully chosen to approach sustainable management with an eye to regulatory control on a detailed all-embracing front. In essence, this factor sheets back to the question whether the form of the plan properly reflects the “tightness” that the Act intends via s.32, incorporating in the process lucidity of thought and expression and avoidance of unnecessary repetition.

Recent cases before the Environment Court have underlined various key points. First, the need for integrated consistency within the hierarchical structuring that the Act predicates is critical when viewing a plan’s content and scope, not only at the early gestation stage but over its entire existence. Secondly, plan variations and changes must be conceived and drafted as to blend coherently, both with the parent instrument, and within the wider hierarchical structure. Again, one must remember that the purpose of rules is to implement and achieve objectives and policies. Therefore the plan should set forth the interrelating provisions in an orderly fashion, clearly indicating those contexts or areas of the plan where the relevant provisions are to apply. The linkage between provisions needs also to be apparent, so that the content of rules (or any other implementing approach) is seen to follow logically upon the objective and policy provisions that precede and lead to the means of implementation or achievement.

Another important factor is for decisions on submissions, and indeed on appeal, to avoid uncertainty or inadvertent conflict through the introduction of amendments that meet a particular perspective or facet of argument, but carry a greater import or flow-on consequence than anticipated.

The claim is often made that inconsistency is inherent in resource management because relevant considerations bearing on actual and potential effects characteristically give rise to competing or conflicting issues. Hence, it is said that an issue or issues might have to yield to the need to accommodate one or more aspects of greater importance in the circumstances. I have no quarrel with any of that. Such “inconsistency” inevitably

presents itself in many cases where an overall value judgement is required. What is of concern is needless inconsistency within plans where a lack of coherence becomes evident through a failure to indicate satisfactorily how and in what circumstances one part of a plan relates to and needs to be taken account of when considering another. Cross-referencing often assists, but there may well be a need to go further in a given instance by stating positively how one provision or set of provisions is to be interpreted or applied in the face of another.

The repetitive specification of criteria for a multitude of zoning situations, not only contributes to plan size but often produces interpretative difficulty. A noticeable technique in parts of the Auckland region is to preface multifarious assessment criteria with the words “the extent to which” – a phrase that lends no assistance to determining what degree of compliance or effort to comply will pass muster. In general, a criterion may be of the kind where a standard, or level, or measurement is clearly ascertainable by a recognised mode of calculation or assessment. Alternatively, it may be of a kind where an obvious area of discretion is present. Unfortunately, plans exist which import unwanted problems by failing to distinguish those circumstances where one form of criterion is apt and the other form is not. In essence, where a criterion is intended to be invoked on a qualifying basis (eg for an activity to qualify as discretionary), the criterion should fall into the first category. If the criterion is intended to assist by way of guidance in assessing the merits of a proposal where discretion is exercisable, then the criterion may be of either category – provided of course it pertains to the lawful ambit of discretion within the plan’s contextual framework (eg for a controlled activity).

Lastly, a word on the permitted baseline in relation to plans:–

Virtually all plans now in force were devised before case law revealed the baseline doctrine. Consequently, in the preparation of those plans, an unawareness existed of the potential inferences to be drawn from hypothetical effects able to be generated by unlikely, but not fanciful, as of right developments. More specifically, the way in which those hypothetical effects would affect, as a matter of law, the assessment of discretionary and non-complying activity proposals, was not appreciated.

The precise extent of the doctrine is not yet settled. In a recent case (*Ohope Beach Protection Society Inc v Whakatane District Council* (Decision A136/02)), these views were advanced for myself and those who sat with me:

In recognising the permitted baseline by way of hypothetical comparison, the Court of Appeal has not, in our view, postulated that its application is paramount to the point of inducing a discretionary activity consent outcome that fails to conform with Part II. Not only does s104(1) require one to have regard to a broad range of matters additional to a district plan or proposed district plan, but Part II is assigned primary standing in the consideration process. Whatever contrary claim may be made, in reality the formative process of district plans does not guarantee implicit consistency of reasoning, let alone perfection, in the permitted activities provided for within a zone. It has been known, for instance, for a council to move to change or vary a plan in consequence of unsatisfactory

or controversial development on a permitted activity footing. It thus appears to us that invocation of the permitted baseline for assessing effects cannot be claimed as a sure basis for ensuring that the Act's purpose and principles will be met or complied with in each discretionary activity evaluation. We apprehend that in some such cases, depending on the circumstances, the primacy to be afforded Part II may prove the ultimately determinative factor.

And later:

...we note that in a recent decision...(in which two of the present panel sat), the observation was made that the permitted baseline "is to be applied to those activities that are permitted under the relevant plan – that is, permitted without the need to obtain a resource consent". While that is so, it is open to contention that application of the permitted baseline extends to at least some controlled activity situations. Of particular import in that context is the type of situation where the matters over which a council has reserved control lie within a plainly limited compass with little discretion available. With the scope for imposing consent conditions being thus confined, the nature and content of any conditions that could be imposed are readily identifiable. In such an instance, the consent outcome can perhaps be described as so apparent in its terms as to amount effectively to a permitted activity.

Whether those dicta are supported by higher Court authority in due course remains to be seen. Whatever eventuates, however, the baseline is sufficiently understood at this point to awaken Councils to its importance in the decision-making process in reference to as of right provisions and their interrelating effect in discretionary consent cases. Judicial endorsement of the baseline effectively means that the need for competence and diligence in the fulfilment of a council's functions and duties under ss.31 and 32 of the Act is all the more critical. It would be an unfortunate consequence if plan quality were to suffer through a reactive wave of conservatism in relation to permitted activities because of the baseline.

In the recent *Kapiti Coast* case (Decision A60/02), a panel of the Court headed by Judge Sheppard observed that –

...there may be some activities that the Council wishes to encourage for their value in enabling people and communities to provide for their social, economic and cultural welfare, or for their health and safety accepting that the environmental effects of those activities are outbalanced by that public value. Similar environmental effects are not necessarily acceptable when caused by other activities that are not considered to have equivalent public value.

Where such an activity is provided for as of right against a background of the kind discussed, the Council should I suggest explain the position clearly in the plan, so that when the permitted baseline is invoked in the context of a discretionary or non-complying activity proposal, an appropriate hypothetical comparison can be made by

reference to the rounded basis of consideration that led to the relevant activity's permitted status.

Final Comment:- May I conclude with the hope that those councils that are yet to promulgate their first RMA plan will gain assistance in the recognition of others' shortcomings, and that those who are looking towards their first review will strive for a lessening of plan size and complexity. Few would question the pressing need for a boost of public confidence in the content and administration of plans. If I have struck a positive chord by successfully pinpointing various pertinent (if not crucial) factors in the quest for improvement, the aim of this paper will have been thankfully realised.

Addendum: The remarks on p.6 in reference to criteria do not overlook the views expressed by Justice Blanchard, sitting in the High Court, in *Stark v Auckland Regional Council* [1994] NZRMA 337 at 341-345. There His Honour concluded that a list of qualifying criteria specified in the plan before him, including elements of value judgement, were appropriate at law for consideration in determining whether the relevant development proposal in fact qualified. In practice, however, the prescription of a mix of qualifying criteria, (or, as described in *Stark*, classifying criteria), which includes value judgement considerations, tends to generate concern, particularly for would-be applicants. That is so because the activity status itself (eg discretionary as opposed to non-complying) is open to argument during the consent application process as an undetermined if not central issue, additional to other issues that the application may involve.

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