31 July 2012

CURRENT AND RECENT PAST PRACTICE

OF THE ENVIRONMENT COURT

CONCERNING APPEALS ON PROPOSED PLANS AND POLICY STATEMENTS

By: Acting Principal Environment Judge Laurie Newhook

Introduction

[1] The last decade has seen considerable advances in the approach taken by the Environment Court not only to ensuring resolution of Plan and Policy Statement appeals, but across the board. In particular, reflecting an international trend, case management techniques have been developed and then continually refined. A major restructuring of the staffing and work of the Court's three registries occurred in 2002.

[2] Up to that time, there had been a steadily growing backlog of cases in the Environment Court. Many steps were then taken to address this, including those mentioned above, and the appointment of an extra judge and an extra commissioner.

[3] Since that time the backlog of cases in the Court has steadily reduced, as is demonstrated year-on-year by the annual report of the Registrar of the Court.

[4] Personal impressions have been gained by us that the timeliness of disposal of Plan and Policy Statement appeals have benefited, along with other aspects of the work of the Court. However we considered it necessary to check these things from records of the Court.

[5] What follows must be seen to be within the narrow compass which it is intended it address. The Court is aware of a current debate in the resource management field in New Zealand about whether legislation will continue to provide for plan and policy statement appeals to the Court into the future. The Court takes no part in that debate which concerns matters of possible future Central Government policy on which it would not be proper for us

to comment for constitutional reasons[1]. This paper simply describes current and recent past Court practice, and lessons we believe have and can be learned from that, including case management techniques that have been and are employed, and that can be ordained by the Court going forward.

[6] So what do the figures show? The Court's database, and its current and archived files, are probably the best source of information, so we have turned to those. They appear to confirm many of our impressions, and a sample chosen of sets of plan reviews illustrates a range of approaches taken by the Court and parties, and a commensurate range of outcomes. Not surprisingly, the more assiduous the case management and mediation practices undertaken, the more quickly has resolution been achieved. The approaches that have been less "hands on" have resulted, quite logically, in longer resolution times.

[7] We address several reviews in turn.

Western Bay of Plenty Proposed District Plan Review

[8] Forty appeals were filed in March 2010. They were assigned to the Court's Complex Track (which came into being as part of our revamp of the Court's case management system in the early 2000s). The appeals were managed under one overarching topic, with a number of sub-topics that related to specific appeal points and parts of the Plan.

[9] Five appeals were withdrawn in their entirety.

[10] Three pre-hearing conferences were held for the purpose of identifying issues, setting objectives, and providing a methodology for mediations.

[11] Mediations were conducted between August 2010 and August 2011. The high rate of success with these mediations resulted in Consent Orders issuing between January and August 2011, resolving thirty appeals.

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[1] •Improving RMA Decision Making: Prescription for Reform, Alan Dormer and Vaughan Payne, October 2011
- Enhanced Policy Agility – Proposed Reform of the Resource Management Act, Local Government New Zealand, December 2011
- Briefing paper to incoming Government from Auckland Council http://www.aucklandcouncil.govt.nz/SiteCollectionDocuments/aboutcouncil/governingbody/governingb
- A better approach to improving the RMA plan making process, Russell McVeagh, March 2012 http://www.rmla.org.nz/upload/files/a_better_approach_to_improving_the_rma_plan_process.pdf
- Second Report of the Land and Water Forum, May 2012
- Faster, Higher, Stronger – or just Wrong?, Russell McVeach, July 2012 http://rmla.org.nz/upload/files/response_to_lowf_120712.pdf

[12] An important feature of the mediation work was that the Commissioner commenced by conducting workshops for refinement of issues and settlement methodology. Resolution was achieved on a "top-down" basis, moving from objectives, to policies, to methods.

[13] There was active and constructive participation on the part of all parties, and of importance, particularly by the Council. Parties were represented at the mediations by people with full delegated authority to settle.

[14] Four appeals remain, which are under active case management. The Court is part-way through hearings. The issues that remain are at the more difficult end of the spectrum, including Maori cultural issues, some with a high level of sensitivity.

[15] The great majority of the provisions in the review have been resolved in a little over two years.

Tauranga Proposed City Plan

[16] The Court received 47 appeals on the proposed Tauranga City Plan in stages between the end of 2010 and April 2011. The latter date can be taken as the date upon which the full picture of appeals in the review was revealed.

[17] Issues identification then occurred, leading immediately afterwards to extensive mediations commencing in August 2011, through to March 2012.

[18] Twenty appeals have been resolved by Consent Orders issued between November 2011 and July 2012. Three appeals have been withdrawn.

[19] Two appeals have been substantially resolved by decisions up to June 2012, primarily concerning the waterfront area of Tauranga.

[20] Of the 22 live appeals, five are subject to Consent Orders that have resolved parts of them.

[21] Case management is leading to hearings for the balance of issues to the extent that further settlements do not occur, and hearings are currently scheduled for August 2012.

[22] A high percentage of the issues in the appeals have been resolved in approximately fifteen months.

Far North District Council Proposed District Plan 2000

[23] Having promulgated its proposed district plan in mid-2000, this Council issued decisions on submissions in July 2003. 95 appeals were lodged with the Court covering 800 topics, in August 2003. All except one appeal were resolved in three years, with the Council resolving in September 2007 to declare the plan substantially operative.

[24] The Court conducted mediations in 2004 and 2005, covering a large range of issues including flora and fauna, landscape, definitions, rural environment, soil and minerals, natural hazards, heritage, hazardous substances, subdivision, transportation and recreational activities.

[25] Large scale callovers were conducted by the case managing Judge, which tended to tie many people up for the greater part of a day or 2, and which could have been more targeted. They succeeded nevertheless in getting the attention of the parties, and real action towards resolving the appeals.

[26] Many of the appeals were site-specific, so resolution of them needed to await progress on overarching topics. The Court conducted a hearing on one significant sticking point, coastal subdivision lot sizes, and issued a decision that allowed mediation work to continue on the bulk of remaining cases.

[27] The one site-specific case remaining after the plan was declared operative in part, was resolved by Consent Order after difficult negotiations and mediations, in mid-2009. The plan was made fully operative in September 2009.

[28] The review appeals were notable for their number and complexity, but also for the willingness of all parties, particularly the Council, to resolve them through active mediation, producing consensus. The bulk of the work was achieved in 3 years, and in significant part in just over 2 years.

Manawatu-Wanganui Regional Council – "One Plan"

[29] This plan is called "One Plan" because it amalgamates six previously separate plans and a regional policy statement. The Manawatu-Wanganui Regional Council released its decisions on submissions in late 2010, and the Court received 22 appeals in November 2010.

[30] After detailed work by the parties directed by the Court to identify the issues, Court-sponsored mediations were held between June and October 2011. While draft Consent Orders are waiting in the wings with the parties, the mediator has reported concluded agreements on 60 topics, being the greater majority. Included in the hard work by the mediator was a series of conferences of groups of experts which produced agreements on many technical issues. The Judge who presided in the subsequent hearings advises that the outputs from these conferences had the effect of shortening the hearings by many weeks.

[31] Hearings have been conducted by the Court on landscape and natural features, indigenous biological diversity, sustainable land use/accelerated erosion, and surface water quality (non-point source discharges) between March and June this year. Decisions are expected very shortly.

[32] Resolution of the entirety of the Plan appears likely in a timeframe of less than two years.

Hauraki Gulf Islands section of the Auckland City District Plan

[33] 41 appeals were filed concerning this review, in June and July 2009. The appeals raised many hundreds of topics.

[34] This review is notable for being an example of the Court not initially being adequately hands-on with case management.

[35] In the early stages the parties were directed to consult and consider the groupings of topics and sub-topics given the complex pattern then apparent.

[36] It then transpired that many appellants had not served copies of their appeals on numerous persons and entities who had been submitters on topics with which they were

involved. In order to avoid a minefield (and commensurate delay) of having to determine numerous applications for waiver for late service, the Court took the unusual step of directing the Council to place a large public notice in local newspapers notifying the shortcomings with service, the need for waivers, and making directions overcoming the problems.

[37] Another source of delay for approximately a year was a series of requests for the Council to have time to negotiate solutions with appellants and other parties. The Court eventually realised that resolution was not occurring, and indeed that a more likely outcome was instead polarisation of views amongst parties. The Court immediately directed everything to mediation. 31 mediation sessions, conducted by several mediators, occurred between March 2010 and October 2011.

[38] The great majority of issues in the review appeals were resolved by Consent Order in that time, a little over two years after the appeals were filed. Even without the waiver difficulties the extent of which was an unusual feature of this particular review, resolution could and should have nevertheless occurred earlier. The message would appear to be that, if respondent councils wish to negotiate solutions, Court processes should not be left to await their outcome, but should be occurring in parallel.

[39] Thirteen appeals remain, which involve some significant topics mainly raised by the owners of some very substantial landholdings. One landowner in particular owns most of the eastern half of Waiheke, and the majority of the land on Ponui Island. Issues of subdivision density, landscape, and rural residential development are being prepared for early hearing. Some hearings and judicial settlement conferences have indeed already been held along the way.

[40] Another concern arose in the early stages. The former Auckland City Council arranged its legal representation in-house in what appeared to the Court to be circumstances of inadequate resource. Consequences included inadequate attention to issues identification, a preference on the council's part for negotiation over mediation, and a diversionary tendency to apply to strike out parts of appeals on an interlocutory basis rather than seeking resolution through mediation. Another issue was parties, particularly the Council, not being represented in mediation by persons with delegated authority to reach settlements contrary to the Court's Practice Note, an issue the Court has had to take up with the Council.

[41] All in all against that background, there has been surprisingly quick resolution of the majority of the appeals, but some significant lessons learned about how things could be done more expeditiously.

Auckland City Council Proposed Plan Modifications 4, 33, and 119, several Notices of Requirement, and Auckland Regional Council Proposed Plan Change 3: Coastal – Wynyard Quarter

[42] This group of cases concerned a complex inter-woven series of Plan modifications, Notices of Requirement, and a Regional Plan modification concerning the Wynyard Quarter on Auckland's waterfront, an area adjacent to the CBD regarded as ripe for redevelopment in large measure.

[43] At the outset, confusion arose amongst a number of parties, including the prime landowner, as to dates by which appeals were required to be lodged. The Court issued a blanket direction authorising submitters to lodge appeals up to 20 February 2009 in the interests of avoiding procedural delays that would have arisen out of a need to consider waiver applications.

[44] The complexity of the interlocking plan modifications produced the need for much hard work on the part of the parties and the Court, to identify issues and topics. This major work concluded with Court approval for the topics' structure in September 2009. The 77 topics identified included overarching ones, general and miscellaneous topics, and site-specific issues.

[45] Mediations were undertaken in February 2010, following which the majority of topics were either resolved or heading for resolution, but requiring the completion of a complex web of draft Consent Orders to be prepared. Some topics became further subdivided.

[46] Meantime, a pre-hearing conference had been held in March 2010. Preparation for hearing the last remaining issues was to a degree dependent on satisfactory conclusion of draft Consent Orders for placing before the Court. Ultimately 19 draft Consent Orders were filed, leaving one minor issue relating to a handful of disputed "character" buildings. The latter was resolved by decision in June 2012, but the Plan provisions had been able to be declared operative some months before, about two and a half years after the proceedings commenced.

[47] Lessons learned included the desirability of robust case management and mediation, and a need for all parties to participate in alternative dispute resolution with full delegated authority to settle.

Rodney District Council Plan Change 55

[48] This plan change is sometimes offered as an example of one that took many years to fully resolve. Close examination reveals another picture.

[49] 38 appeals were filed in early 1998. Remarkably perhaps for the times, the majority of the appeals were resolved by mid-1999. Many appeals were withdrawn, and all but three appeals were resolved by consent.

[50] The three appeals that remained to be resolved concerned some relatively major issues within relatively confined geographic locations. One of the three was resolved as to the majority of its issues in 2002, and the remaining portion adjourned and managed with appeals filed in relation to a change to the adjoining North Shore City District Plan (Okura).

[51] Tensions at the interface of regional and district governance created significant delays, with new ARC provisions emerging in late 2003, and an application being made by ARC under s 293 RMA in mid-2004. Mediations were scheduled and continued until April 2005. Major difficulties continued amongst parties, until, as the result of robust case management, Consent Orders were issued in March 2006.

[52] The main picture, often overlooked, is that the provisions of Plan Change 55 were largely resolved, very early on. Subsequently, the process provides an example of tensions and litigation activity amongst councils, constant requests for adjournments on the part of the respondent council (which increasingly attracted written criticisms and stronger directions from the Court), and a need for robust case-management and a firm mediation style in order that resolution of the "exceptions" did not rate a low order of priority with the councils involved.

Conclusion

[53] In the preceding paragraphs we have chosen, deliberately, some examples of groups of Plan Change appeals which have been processed to resolution through the Court with varying degrees of efficiency. It is worth remembering that it is the last decade that has seen

significant development and refinement of case management techniques in courts worldwide. It has also been the time during which mediation has become established and refined, the technique having been instituted in the court not long before that period commenced. (Added to that, Section 79 RMA was amended in 2009 to remove the requirement for full review of plans every 10 years, so the potential for large "waves" of appeals to be filed in the Court on a regular basis from local authorities throughout the land, has gone).

[54] Groups of plan and policy statement appeals vary considerably in their size and complexity. It is clear that no one size fits all in connection either with case management or mediation. However, it seems that while some groups in the recent past have proceeded efficiently, there are also some lessons to be learned, and practices and procedures that can be improved upon. Of some note might be the following:

- As soon as groups of appeals are filed, a case managing judge (or more than one judge in large groups of appeals) must commence working with the parties to identify issues and topics. This appears to be a growing practice in the Court. The work should proceed right from the start, unless seriously held up by interlocutory processes that hinder the identification of all relevant parties. This work can take a few weeks, but good quality of work on issues-setting should produce benefits for the efficiency of the process and the ultimate substantive outcome.

- Requests by councils to be allowed time to negotiate solutions with parties prior to any court activity being undertaken, are best resisted. They can instead take place in parallel with court processes getting under way. Significant time can otherwise be lost.

- In the better examples, issues once identified have been best tackled in a "top down" basis, from objectives, to policies, to methods and explanations. It is worth however being alert to being able to resolve a log-jam by tackling a sticking point, such as occurred by the Court conducting a hearing on a subdivision lot size rule in the Far North District Plan, enabling mediation of many related issues to continue after that.

- Close attention to the use of conferences (telephone or face-to-face) by the case managing Judge, and/or by mediators can assist in setting mediation methodology and the order within which issues will be tackled.

- Use of the emerging technique (in which NZ is something of a leader in the environmental field) of conferencing of relevant groups of the parties' expert witnesses, alongside the mediations.

- Much time, and even the need for hearings, can be saved by parties meeting the requirement in the Practice Note that parties are represented in mediation by agents having delegated authority to settle. The Court needs to resist the wish of some councils to depart from this and instead refer potential settlements to a regulatory body within the council, often only to find that there is a need for further mediation (sometimes more than just one more session), or for the impetus towards settlement to be lost and the case headed for hearing.

- The best examples invariably involve a willingness for high level engagement in the mediation process by elected members and senior officers of councils attending mediation with full delegated authority to settle, and the councils engaging sufficient resource (primarily in terms of personnel and hours committed to the process). This has occurred in some of the better examples above, and is presently occurring in the case of mediations of appeals in the Kaipara District Plan and Ruapehu District Plan reviews which are producing swift settlements, and in which overall resolution is potentially indicated within a very short period of time, around 12 to 18 months.

- Early warning from councils about prospective dates of release of plan appeal decisions (especially in relation to significant groups) would allow the Court proactively to marshall its resources.

- It is thought that if the Court demonstrates agility at all levels, judicial, commissioner, and registry, appeals over plans and policy statements of varying sizes and complexities can be handled in the various ways that may be demanded. For instance in a very large review, after identification of issues, caseload might be assigned to several judges, and mediations to numbers of commissioners. Division of topics could occur geographically, or by topic, or howsoever, with the emphasis usually being "top down."

[55] We reiterate that it is not the place of the Court to engage in debate about matters of possible future central Government policy, for instance whether or not plan and policy statement appeals should remain provided for in the Act. The Court deliberately refrains from expressing opinions about these matters. Rather, this paper has been designed to collate

and present information that is in the public domain, but (beyond the records of the Court) scattered and often anecdotal, concerning recent past and present Court practices in connection with the resolution of such appeals.

[56] In recent times the Court has taken the opportunity to consult with the many professions engaged in the work of the Court, for instance the Law Societies, the Resource Management Law Association (which is a very effective umbrella for the many professions), the NZ Planning Institute, and the NZ Institute of Landscape Architects. Ideas about Court practice and procedure, and how practitioners can more effectively represent their clients and assist the process cost-effectively, are received by the Court and considered with care. Ideas to come forward in recent times include the use of more directory ADR at times, variation of mediation styles, better preparation for mediation and conference sessions by parties and members of the Court, the use of varying numbers of members of the Court in some cases, the holding of a greater number of Commissioner-alone hearings, greater emphasis on multi-disciplinary approaches, and other steps designed to speed the overall process. In addition, members of the Court have recently been encouraging the professions through workshops run under the aegis of the RMLA, to refine processes for the conferencing of groups of experts to agree facts and to narrow issues so as to shorten hearings, and where possible reduce or remove the need for hearings.

LJ Newhook
Acting Principal Environment Judge