

NOTICE IS HEREBY GIVEN THAT A MEETING OF THE REGULATORY AND PLANNING COMMITTEE, WILL BE HELD IN THE COUNCIL CHAMBERS, 29 CIVIC AVENUE, GORE, ON TUESDAY 9 FEBRUARY 2010, AT THE CONCLUSION OF THE FINANCE AND POLICY COMMITTEE MEETING

**Stephen Parry
CHIEF EXECUTIVE**

3 February 2010

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1. Report on RMA Amendment Act
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2. Regional Water Plan – Agricultural Effluent Ponds
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5. BUSINESS TO BE CONSIDERED PURSUANT TO THE LOCAL GOVERNMENT OFFICIAL INFORMATION AND MEETINGS ACT 1987:
 - Proposed parking requirements

REGULATORY AND PLANNING COMMITTEE AGENDA

FEBRUARY 2010

1. REPORT ON RMA AMENDMENT ACT

(Memo from Planning Consultant – 29.01.10)

In October 2009 a large number of amendments to the RMA came into force. The Amendment Act itself was some 173 pages long. Many of the amendments were of minor significance, being rewordings and restructuring of sections where some (but not all) planners and lawyers considered there was ambiguity or lack of clarity. The government promoted the Amendment Act as being “simplifying and streamlining”.

1. Issues Significant to the Council

When the amendment Bill was drafted, the Council made a submission to the Select Committee on matters seen as important. Towards the end of the Select Committee consideration of the submissions, Steve Parry, Chief Executive and Keith Hovell, Planning Consultant made an oral presentation to the Select Committee by way of teleconference, expanding on the matters in the submission and responding to issues raised by the Select Committee, some of which went beyond what was contained in the submission. The matters in the Council submission and their outcomes are as follows:

1.1 Discount Policy for late processing of consents

The Council submission indicated this was not required, as there was already a right of objection to costs sought by Council for the processing of resource consents. The submission suggested an alternative approach of expanding the existing provisions to more explicitly refer to late processing as a ground for objection. This was not accepted. The original proposal was adopted and is discussed further below.

1.2 Right of Applicants to Oppose the Preparation of Consultant Reports

The Council submission highlighted that for small Councils there was a high reliability on the preparation of consultant reports prior to considering resource consents and submissions lodged to them, particularly for areas of expertise where there were no or limited in-house skills. This was accepted, and the existing provisions in the Act of allowing the preparation of a recommending report for a Council hearing from either staff or consultants remains. There is however now a right of objection by applicants, if during the hearing, the Hearing Panel requests the preparation of a further report by consultants.

1.3 Role of Council where direct referral of applications to the Environment Court or Board of Inquiry occurs

The Bill did not deal with the role of Councils for these types of hearings. The Bill as drafted provided for “planning reports” to be prepared in the usual way, but by omission did not provide Council with any other involvement. The Council presented argument that Councils should be entitled as of right to a full role in these hearings. That is now provided for.

1.4 Date at which new rules came into effect

The Council submission supported the intent of the Bill to restrict the date at which general rules came into force. The Bill provided a default situation, where rules did not come into effect until the end of any appeal process. It also introduced a muddled set of circumstances under which rules could come into effect immediately. The Council submission drew attention to the lack of practicality in the provisions. The Amendment Act now allows Councils to make rules operative at the time of notification if approved by the Environment Court or if they relate to:

- Protection of water, air or soil;
- Protection of areas of significant indigenous vegetation or habitats of indigenous fauna; or
- Protection of historic heritage

1.5 Notification of Resource Consents

The Council submission opposed the vagueness of the concept of allowing applications to proceed without notification if effects were no more than minor “beyond the immediate environment”. That has been accepted and the Amendment Act now applies that test to “adjoining land”.

In effect, there is little change in the way that most Councils consider the issue of notification. The Act now clearly indicates the need to look at the effects of activities and who could be affected.

1.6 Requests for Independent Commissioners to Consider Resource Consents

The Council submission opposed the ability of an applicant or submitters to compel the appointment of independent Commissioners, rather than elected representatives on hearing panels to consider resource consents. In the alternative, the submission lodged requested that cost recovery provisions be inserted into the Act. The Amendment Act has adopted the alternative approach suggested.

The applicant or any submitter can now ask that a resource consent be considered by a panel of independent persons, not being elected representatives. The party making the request is responsible for any additional costs incurred. For example, if submitters oppose elected members of Council being on a hearing panel, they can ask for all members to be independent persons, but those making the request are responsible to meet the costs additional to those would have otherwise been incurred by Council. No party may have input as to which independent commissioners are appointed.

1.7 Further Submission Process

The Bill removed the right of further submissions (supporting or opposing original submissions) to district plans and plan changes, requiring Council staff to consult with persons affected by submissions, within a two week time period. The Council submission highlighted this removed important property rights and was not workable. That has been accepted and the original process provisions still apply. However, while any person may still lodge a submission to a district plan or plan change, only the following may lodge a further submission in support or opposition:

- Those representing some aspect of the public interest.
- Those persons with an interest greater than the public generally.
- The local authority.

The period for lodging further submissions has also been reduced from 20 to 10 working days.

2. Other Matters of Significance in the Amendment Act

2.1 Establishment of Environmental Protection Agency (EPA)

The EPA is responsible for the managing the consent process for developments deemed to be of national significance. Applications may be lodged direct with the EPA, a Council may refer a consent to the EPA, or the Minister may “call in” a consent on the advice of the Ministry for the Environment. The Ministry is required to report to the Minister if any person (including the Minister) requests the preparation of a report.

Where consents are deemed to be of national significance, the Act envisages decisions being made by a Board of Inquiry or the Environment Court within nine months of consents being lodged, although pre-lodging consultation is required with the EPA and affected Councils.

Councils will have a role in the EPA consent process. They have input into the report prepared by the Ministry prior to a decision being made on whether the project is of national significance and they may recommend membership of the Board of Inquiry. The Council also supplies a planning report to the Board of Inquiry or the Court in the same way that reports are prepared on consents processed locally. Given the small number of staff at the EPA it is probable that actual processing of consents, such as notification and associated administrative work, will be passed back to the Council(s) concerned.

An advisory group of local authority staff is working through the practicalities of implementing the EPA process. A key issue being considered is the ability of Councils to recover reasonable costs from the processing of consents using the EPA process.

2.2 Resource Consent Processing Times

The Amendment proposes a financial penalty in those cases where a Council takes longer than the prescribed time to process resource consents, being 20 working days for non-notified consents and 70 days for notified consents. The Amendment requires the Ministry for the Environment to prepare a policy statement no later than July 2010 setting a regime for the refund of fees where consents are not processed in time. A discussion document released mid January indicates a preferred option for refunds to be calculated on a sliding percentage basis as follows:

Table 1: Sliding scale percentage discount (days and weeks over total statutory timeframe)

| | | | | | | | | |
|-------------------------------|-------|-------|-------|-------|-------|-------|-------|-------|
| Weeks (5 working days) | 1 | | | | | 2 | 3 | 4 |
| Working days | 1 | 2 | 3 | 4 | 5 | 6-10 | 11-15 | 16-20 |
| Percentage discount | 5% | 5% | 5% | 5% | 5% | 5% | 5% | 5% |
| Sliding total discount | 5% | 10% | 15% | 20% | 25% | 30% | 35% | 40% |
| Weeks (5 working days) | 5 | 6 | 7 | 8 | 9 | 10 | 11 | 12+ |
| Working days | 21-25 | 26-30 | 31-35 | 36-40 | 41-45 | 46-50 | 51-55 | 56-60 |
| Percentage discount | 5% | 5% | 5% | 5% | 5% | 5% | 5% | 5% |
| Sliding total discount | 45% | 50% | 55% | 60% | 65% | 70% | 75% | 80% |

The majority of resource consents processed out of time are late only by a few days. Planning staff at the Southland Councils are of the view that any regime should apply only a small refund in these cases, compared to consents that are substantially over time. Rather than the 25% being promoted 10% is considered a more equitable level.

Three issues arise from this:

- (a) Council may adopt the default refund policy prepared by the Ministry for the Environment, or it may adopt a more generous policy. At this stage there would appear to be no reason to do more than the default Ministry policy.
- (b) Strict adherence to the processing timeframes will place greater pressure on staff who report on applications. The time allowed for comments will need to be strictly adhered to and priorities of staff will need to be looked at. The two key staff commenting on consents are the Drainage Inspector and Roading Manager.
- (c) Where resources external to Council are used for processing consents and issuing decisions, the provisions of the refund policy will need to be appropriately reflected in engagement contracts.

2.3 Other Resource Consent Processing Issues

- (i) Applicants can now ask that resource consent applications, or requests to change conditions of consent, be referred directly to the Environment Court. The Council makes a decision on that, which if the decision is to decline the request, is it subject to a right of objection by the applicant to the Court. If the application is referred to the Court, the process followed is the same as with consents lodged with Council, but the Court is the decision making body.
- (ii) The approach to whether a resource consent is notified has been changed slightly, with the presumption no longer being that notification is required. Rather consideration now focuses on the environmental effects beyond the immediate area. If affects only impact on adjoining sites, then limited notification is the required process. For limited notification, previously all potentially affected people required notification, but under the Amendment only those who have not give written approval are required to be served.
- (iii) Councils may only seek further information on applications once before and once after any public notification. The previous right of objection to such requests is removed, and any refusal to provide such information is grounds to notify or decline a consent.
- (iv) The level of detail required to be included in decisions on non-notified applications has been formally reduced, and now matches the practices adopted by many Councils, such as Gore.

2.4 Plan Reviews and Changes

The Amendment now provides:

- (i) There is no need to undertake a formal review of the district plan after ten years, however, all provision must be reviewed at a period of no longer than ten years. This enables a plan to be reviewed over time in sections (a revolving review).
- (ii) The Minister for the Environment can direct a Council to review its District Plan. This is likely to be used if the ten year provision is not adhered to, or if the Minister considers Council needs to respond to some important local issue.
- (iii) The issuing of decisions on submissions to a district plan is simplified with people having to request actual copies of decisions. In many cases this will substantially reduce costs of photocopy of decisions.
- (iv) An appeal cannot seek withdrawal of a District Plan, although withdrawal of a plan change can still be sought.
- (v) Consultation under other enactments (LGA) within the previous three years can remove the need for consultation under the RMA
- (vi) General rules protecting unspecified groups of trees (e.g. groups of more than 500 square metres) or trees of certain sizes (eg more than 500 mm thick at breast height) are deemed “illegal” from 1 January 2012. This merely confirms what has been the position adopted by the Courts for many years, but not acted on by all Councils. This has no impact on Gore.

2.5 Enforcement

These provisions have been strengthened, with

- Maximum fines for individuals increased from \$200,000 to \$300,000, while prison terms and company fines remain unchanged.
- Where prosecution is successful, the Court can order a review of resource consents, and on review that consent can be cancelled or modified by the Council.
- The Crown can now be prosecuted.

2.6 Trade Competition

The Amendment gives apparent strength to the intent of the Act to “shut out” consideration of the effects of trade competition and prevents the use of surrogates to oppose developments. Punitive fines may be imposed if anti-competition practices are discovered.

3. Implications for the Council

3.1 Review of Internal Consent Processes and Reporting Procedures

To avoid late processing of resource consents a review of processes and procedures is required. That will be undertaken with affected staff over the next few months. Resolution and implementation is required by September.

3.2 Review of Delegations

The following new delegations are required, and in each case it is considered the delegations should be to the Regulatory Committee and the Chief Executive.

- Making decisions on requests by applicants to directly refer applications to the Environment Court.
- Making recommendations to the Minister on projects of national significance (whether they should be processed by a Board of Inquiry, the Environment Court or Council) and composition of any Board of Inquiry.

The warrants of Enforcement Officers also require review to ensure compatibility with minor changes of wording in the Act. This includes the range of information warrant holders can demand from any person.

A report will be submitted to Council for approval of the new delegations. Changes to the warrants of Enforcement Officers will be signed off by the Chief Executive.

3.3 Update district plan provisions contrary to National Environmental Standards or in conformity with National Policy Statements

Various National Standards have been implemented which require changes to the rules in district plans. For the Gore District Plan these changes have been noted, with the intent of updating all copies of the Plan when the next series of plan changes is finalised. The Amendment Act is a reminder to Councils to take this action.

4. Future Amendments

4.1 Integrating RMA and Building Act Consents

MfE is assessing whether “simple consents” such as non-compliance with height planes and yards can be provided for through the building consent process. MfE is looking at streamlining the resource consent requirements in the RMA for “minor consents” to reduce the range of information required to be submitted.

4.2 Integrating RMA and DoC Concession Processes

The DoC concession process tends to duplicate the RMA processes, with the Minister of Conservation having final sign-off. This has resulted in frustration where the Minister's decision has been different to the RMA outcome. Integration of processes is being examined.

RECOMMENDATION

THAT the report be noted.

2. REGIONAL WATER PLAN – AGRICULTURAL EFFLUENT PONDS

(Memo from Planning Consultant – 29.01.10)

In March 2009 Environment Southland introduced a variation to the Regional Water Plan to better manage the adverse effects associated with agricultural effluent ponds. Problems with the design and performance of ponds treating dairy shed effluent are ongoing. Poor design results in discharges into the ground and nearby waterways and offensive odours. Arising from that, Environment Southland introduced the variation so as to require resource consent approval for all effluent treatment ponds.

As advised to the Council in April 2009, the general regulatory approach was supported, but a number of errors and omissions in the proposed rules and associated policy provisions were noted, and a submission was lodged by Council seeking changes to these. A hearing to consider the submissions lodged to the variation was held in October, and immediately prior to Christmas, Environment Southland released its decisions on those submissions. A right of appeal to the Environment Court was available until 7 February 2010, but no appeal was considered necessary.

The following is a summary of the key issues raised in the Council submission and the outcome.

(1) Policy Framework

As advertised Policy 41 only referred to managing the effects of design and construction. While seeking to avoid adverse effects on water quality, it only sought to minimise other environmental effects. The submission lodged requested that the policy should apply to “future operation and maintenance” and seek to avoid all adverse effects.

At the hearing I suggested two alternatives for rewording the policy and the decision issued has adopted one of these (which was my preferred approach). The policy now reads:

Avoid adverse effects on water quality, and minimise avoid as far as possible other adverse environmental effects associated with the location, design, construction, operation and maintenance of agricultural effluent ponds.

(2) The Rule

The submission stressed that Rule 49 did not provide adequate protection from the adverse effects of agricultural effluent ponds for the reasons that:

- (i) A number of vague words were used that would result in arguments as to their meaning. The decision rewords the “offending” provisions.
- (ii) The proposed buffer distances of 200 metres to residences and 50 metres to property boundaries may be inadequate in some cases. The decision retains the numbers in the rule, but clarifies that the numbers are of significance in determining the status of the application lodged, being “restricted discretionary” for being outside the stated buffers and “discretionary” otherwise. The explanation to the Rule also indicates that greater buffers may well be required and each site will be assessed to determine the appropriate buffer distances. It also provides that in certain cases a reduction may also be warranted.
- (iii) Buffer distances did not recognise the need to protect water takes, other than for residential purposes. The decision rewords the Rule so that there is now protection for all water takes, including explicitly for industrial use and municipal supply.
- (iv) Inadequate provision was made for monitoring potential contamination arising from leaks and other discharges from the ponds. The decision adopted the staff report in this regard, indicating the provisions did refer to monitoring and each site should be assessed on its merits. While more specific requirements for monitoring would have been desirable, this is not a major issue.

Rule 49 was notified with the status of “restricted discretionary”. That means the Council in deciding any application can only consider matters referred to in the rule. The submission lodged sought a change in status to “discretionary”. In discussions with staff during preparation of their report it was apparent that such a change would be strongly opposed, and it could result in some problems (which I do not understand) with regard to the status of existing consents already issued. At the hearing therefore I did not pursue this matter on the proviso that other changes requested were made to the rules. Those changes (particularly in listing more detailed information that must be submitted with an application) effectively widen the effect of the rule to have a similar effect as if the status was discretionary. Where any buffer distance is not met then discretionary status applies in any case. The decision retained the “restricted discretionary” status.

Concern was expressed by the Building Inspectors that territorial authorities do not have expertise in the building of associated pond structures and there were concerns at potential liability should a structural failure occur. As a consequence,

the submission lodged sought a post construction certification of the standard of design. The decision notes that construction is required to be supervised by an appropriately qualified person, and that provides some level of protection. The issue of most concern to Environment Southland is ensuring adequate design and installation of pond lining material and provisions have been amended to give that greater recognition. The issue of concern to the Building Inspectors has not been adequately responded to, nor can it realistically be taken further as part of the current process. It has been raised however, and when the opportunity next arises it will be raised again.

(3) The Code of Practice

The submission expressed the view that the *Environment Southland Code of Practice for Design and Construction of Agricultural Effluent Ponds* is a guideline document and not one that can be considered like a rule. The explanation to Rule 41 referred to the document and indicated that undertaking activities in conformity with the Code of Practice was required. The Council decision effectively accepts the criticisms made, but then cleverly elevates the document to part of the rule, requiring resource consents to be prepared having regard to that document. That overcomes the key criticisms raised. It may however be of greater concern to other submitters such as Federated Farmers.

The prime objective in lodging the submission was to gain greater recognition of the need to protect the water quality within underground aquifers, particularly where they are the source of municipal supplies. That has been achieved. No further action (ie appeal) is recommended.

RECOMMENDATION

THAT the report be received.

3. PLAN CHANGE NO. 5 – GORE MIXED USE ZONE

(Memo from Planning Consultant – 29.01.10)

In October 2009 Plan Change No. 5 was notified. The plan change seeks in effect adds commercial uses to the list of permitted activities within the area in central Gore between the railway line and River Street. Submissions closed on 30 November 2009. Three submissions supporting the plan change were lodged. No submissions commenting on or opposing the provisions were received.

As a consequence, the Council is able to adopt the plan change without the need for any hearing or other action. This requires adoption of a formal resolution by Council and a public notice in the Southland Times, as soon as practicable after the full Council meeting. The Act requires public notice prior it being operative. The date of the public notice will determine the date when the plan change is operative.

RECOMMENDATION

THAT the Council adopt Plan Change No. 5 Mixed Use Zone,

AND THAT the Plan Change become operative as soon as practicable after public notification of its adoption.

4. REGULATORY BULLETIN

(Memo from Chief Executive – 01.02.10)

Attached is a schedule of building consents issued for December 2009 and January 2010, together with comparisons with the previous two years.

A schedule of resource consents issued to 15 December 2009 is also attached.

RECOMMENDATION

THAT the information be received.