Submitters get 'one shot' only at Auckland's unitary plan

STUART RYAN BARRISTER | **www.stuartryan.co.nz**

The Government introduced the Resource Management Reform Bill in December 2012. The bill has now been referred to select committee with submissions on the bill due by **28 February 2013**.

The bill proposes a new process for the Auckland unitary plan which will largely do away with the current full right of appeal (on the facts and the law) to the Environment Court; providing instead for recommendations by a hearings panel chaired by a retired Judge, coupled with a requirement for the panel to make a recommendation on the plan within 3 years of notification. Any appeals would be restricted to rights of law only, unless the Council rejects the hearings panel recommendations, when rights of appeal to the Environment Court would be retained.

The proposals for the unitary plan are driven by the Government's concern about the time and cost of decision-making on proposed plans under the RMA. The Reform Bill proposals follow extensive lobbying by Auckland Council and the local government sector to remove the Environment Court from the plan process.

Separately, Auckland Council has announced that it intends to provide a draft of its unitary plan for public comment and feedback in March 2013, with a target date for notification in September 2013. It is possible these dates may further slip as the Council grapples with the enormity of the task of amalgamating all legacy district plans in Auckland, as well as all regional planning provisions, including the regional policy statement and regional plans dealing with air, land and water, coastal, sediment control and farm dairy discharges.

The Council has announced that the unitary plan will be released as an 'e-plan' available solely online (with hard copies in only limited availability). Council planning managers have promised this will make the unitary plan user-friendly, so that landowners will be able to click on their property to see the activities allowed, or click on a specific activity to see where that activity is permitted in an area.

Process for development of first combined plan for Auckland Council

The key proposals for the unitary plan are:

- An audit by the Ministry for the Environment of Auckland Council's regulatory cost benefit analysis under section 32 RMA prior to notification of the unitary plan.

> "Auckland Council has announced that it intends to provide a draft of its unitary plan for public comment and feedback in March 2013, with a target date for notification in September 2013"

- The Minister for the Environment and the Minister of Conservation appoint a hearings panel. The panel comprises a chairperson and 3 to 7 other members, all of whom the Ministers appoint jointly after consulting Auckland Council and the Maori Statutory Board. The Minister for the Environment's press release indicated an intention that the panel be chaired by a retired judge of the High Court or Environment Court. The hearings panel has power to direct mediation and conferencing of experts to clarify a matter or issue relating to the proposed plan or facilitate resolution of a matter or issue relating to the proposed plan.
- The hearings panel may direct submitters to provide briefs of evidence before a hearing.
- The hearings panel is to make recommendations on the proposed plan after hearing submissions. Recommendations are not limited to the scope of the submissions and may also address any other matters relating to the proposed plan identified by the panel or any other person during the hearing process.
- The hearings panel must provide the recommendations to the Council not later than 3 years from the date on which the Council has notified the proposed plan, unless this time frame is extended by the Minister for up to one year.

STUART RYAN

P + 64 9 357 0599
M + 64 21 286 0230
F + 64 9 280 1110
E stuart@stuartryan.co.nz
www.stuartryan.co.nz

Level 11, Southern Cross Building
59-67 High Street, Auckland
PO Box 1296, Shortland Street
Auckland 1140, New Zealand

> Submitters only have one opportunity, and will need to present a full and proper case to the hearings panel

- The hearings panel must "have regard to" the Auckland spatial plan. This clarifies the weight to be given to the spatial plan prepared under the local government legislation for Auckland.
- The Auckland Council is to decide whether to accept or reject each recommendation of the hearings panel must, no later than 20 working days after being provided with the hearings panel's report, notify its decisions. If the Council decides to reject the hearing panel's recommendation, it must propose an alternative.
- If the Council rejects a recommendation of the hearings panel, then a submitter has a right of appeal to the Environment Court provided the appeal relates to a matter raised in the submission, but it is the submitter who must appeal, not the Council.
- Otherwise, appeals may only be on a question of law to the High Court. There is no limit on judicial review.

It appears the government has largely accepted the position advanced by Auckland Council and Local Government New Zealand that plans are taking too long to become fully operative and reform is necessary, and that restricting or eliminating rights of appeal to the Environment Court is a key part of the solution. This is not the first time restrictions on merits based appeals have been suggested. A proposal to restrict merits based appeals was rejected by select committee during the RMA 2009 amendment process. No announcements have been made by the government to extend the model for the Auckland unitary plan to plan appeals more generally throughout New Zealand, but this will become apparent soon. The government has signalled further RMA reform later for 2013.

A single 'one-shot' process, with limited rights of appeal, will mean that submitters only have one opportunity, and will need to present a full and proper case to the hearings panel. This may well extend time the required for dealing with submissions before the hearings panel and erode some of the time and cost savings which the Council and the government hope to achieve.

Earthquake/natural hazard policy reviews

A number of reviews are underway over the management of earthquake prone buildings and natural hazard management generally. Contemporaneous with release of the Canterbury Earthquakes Royal Commission's report the Government has announced its own proposals *(see http://www.dbh.govt.nz/consultingon-epbp-consultation-document)*. Consultation closes on the **8th March 2013** and will inform Government's response to the Royal Commission report. The Government's proposals are:

1. Local authorities will be required to undertake a seismic capacity assessment of all non-residential and multi-unit, multi-storey residential buildings within 5 years and to provide the seismic capacity rating to building owners. An owner can have their building's seismic capacity rating changed by commissioning their own engineering assessment.
2. Assessments and strengthening requirements will be faster for certain buildings (i.e. Buildings critical in an emergency).
3. Building information will be entered onto a publicly accessible register.
4. The current earthquake-prone building threshold (one-third of the requirement for new buildings, often referred to as 33% new building strength) will not be changed.
5. All non-residential and multi-unit, multi-storey residential buildings will be strengthened to be no longer earthquake prone, or be demolished, within 15 years of the legislation taking effect (allowing 5 years for local authorities to complete seismic capacity ratings, with up to 10 years for owners to strengthen or demolish buildings).
6. Owners of buildings assessed as earthquake-prone will have to submit a plan for strengthening or demolition within 12 months.
7. Certain buildings could be exempted or be given longer time to strengthen, e.g., low-use rural churches or farm buildings with little passing traffic i.e. with lower debris risk.
8. Central government will have a much greater role in guiding and supporting local authorities and building owners, including public education and information.

The consultation paper seeks views on how important heritage buildings can be preserved while also being made safer. Views are also sought on whether the current fire escape and disability upgrade requirements in the Building Act and regulations are operating as a disincentive to building owners carrying out

> All non-residential and multi-unit, multi-storey residential buildings will be strengthened to be no longer earthquake-prone, or be demolished, within 15 years of the legislation taking effect

earthquake strengthening work. The cost to strengthen all earthquake prone buildings under the current system, which has a timeframe of 28 years, is $933m. It is estimated to be $1.68b under the government's proposal of 15 years.

In addition the following reviews are progressing:

Review of the Earthquake Commission:
The Treasury is leading a review of the Earthquake Commission Act 1993. The review is looking at disaster insurance arrangements to determine what changes to policy are needed. The review is focused on the types of property EQC insures, how EQC prices its insurance, the institutional structure and design of the EQC, and the financial management of the Crown's exposure. A public consultation document will be released in March 2013 with legislative amendments expected to follow later in the year.

Review of the RMA:
A Technical Advisory Group has recommended the RMA be amended to include the management of natural hazard risks in section 6 as a principle that decision makers must "recognise and provide for" in the judgement of what constitutes sustainable management. The Royal Commission made a similar recommendation that management of natural hazards be included in sections 6 and 7 of the RMA as a matter to be considered by councils when exercising powers and functions under the RMA.

Local authority liability: an update

• Leaky Building Duty Extended to Commercial Buildings

In *Body Corporate No 207624 v North Shore City Council (Spencer on Byron)* [2012] NZSC the Supreme Court held that councils owe a duty of care to all owners of buildings whether they are residential or commercial. The duty is to ensure that those buildings comply with the building code and is currently restricted to the Building Act 1991.

Whether Councils owe a duty of care in relation to commercial buildings constructed under the Building Act 2004 has been left open. Because of the 10 year longstop limitation under the 1991 Act, commercial building owners check now whether they have a case for leaky buildings under the law as restated in Spencer on Byron.

• Duty of Care Upheld for LIM Reports

The *Supreme Court confirmed in Marlborough District Council v Altimarloch Joint Venture Limited and Others* [2012] NZSC that councils owe a duty of care to the recipient of a Land Information Memorandum (LIM) if the LIM negligently misstates information it must contain.

LIMs contain two types of information: mandatory information under section 44A(2) of Local Government Official Information and Meetings Act 1987 and optional information under section 44A(3). The duty of care upheld by the Supreme Court is in relation to mandatory information only.

• Possible Liability for Advice at Pre-Lodgement Meeting

In *Oteha Investments Ltd v S* [2011] the High Court declined to strike out a developer's claim in negligence against the former North Shore City Council (NSCC). The claim related to advice given by NSCC at pre-lodgement meetings. The Court found there is an arguable case that local authorities owed a duty of care in relation to pre-lodgement advice.

• Possible Liability for incorrect issue of section 224(c) certificate

In *Swordfish Co Ltd v Buller District Council* [2012] the High Court upheld the decision not to strike out the plaintiff's claim in negligence. The council issued a section 224(c) certificate for a subdivision plan when the conditions of the plan had not been complied with. Swordfish purchased land in the subdivision and suffered loss when the necessary earth-fill and flood mitigation conditions had not been fulfilled.

STUART RYAN

P + 64 9 357 0599
M + 64 21 286 0230
F + 64 9 280 1110
E stuart@stuartryan.co.nz
www.stuartryan.co.nz

Level 11, Southern Cross Building
59–67 High Street, Auckland
PO Box 1296, Shortland Street
Auckland 1140, New Zealand

What's in the pipeline?

- **Resource Management Reform Bill**

  The bill has passed its first reading and has been referred to the Local Government and Environment Select committee, with submissions closing 28 February 2013. In addition to the 'one-shot' process for Auckland's first unitary plan, a six-month time limit is proposed for processing consents for medium-sized projects, and easier direct referral to the Environment Court for major regional projects. The Bill also includes stronger requirements for councils to base their plan decisions on more robust cost-benefit analysis, including assessing how jobs and employment will be affected.

- **Phase 2 RMA reforms**

  Phase 2 RMA reforms are expected to be introduced to Parliament in 2013. These reforms will address more complex issues related to planning and decision-making in the wider resource management system, including freshwater reform and a review of sections 6 and 7 RMA.

- **Heritage New Zealand Pouhere Taonga Bill**

  This bill replaces the Historic Places Act 1993. The bill has passed its first reading and been referred to the Local Government and Environment Select Committee. The Select Committee will report back on 29 March 2013.

- **Building Amendment Bill (No 4)**

  The Local Government and Environment Select Committee reported to Parliament in October 2012. The committee has suggested various changes to better give effect to the intent of the bill. The bill proposes to introduce:

  - new consumer protection measures to help New Zealanders who are building or renovating their home to hold those responsible for their building work to account
  - mandatory written contracts for all residential building work over a prescribed value
  - new information disclosure requirements for building contractors about their skills, qualifications, licensing status and track record
  - changes requiring building contractors to fix any defects in their work that are reported within 12 months of completion.

Dairy and horticulture land use limited by nitrogen regimes

If involved in the purchase of dairy farms or land for horticulture you need to be aware of the potential for different nitrogen leaching regimes to apply around the country. These regimes apply in the Bay of Plenty (Rotorua Lakes), Canterbury, Manawatu-Wanganui, Otago and Waikato (Lake Taupo), and are soon to follow in the Auckland region. If advising on the purchase of land, there is a need to be certain as to whether the current or proposed rules restrict the intended use of land, whether rights can be traded, and whether any necessary resource consents for the intended land use are likely to be granted. Expect more regional councils to adopt nitrogen leaching regimes driven by the government's anticipated freshwater reforms due in 2013.

Auckland

The proposed unitary plan is expected to contain controls on nitrogen leaching when notified in 2013.

Bay of Plenty (Rotorua Lakes)

Rule 11 of the Bay of Plenty Regional Council's Water and Land Plan targets the Rotorua Lake catchments (Lakes Rotorua, Rotoiti, Okareka, Rotoehu and Okaro). Nitrogen leaching is capped based on a historical benchmark. Activities complying with the cap are permitted. In most cases, the benchmark is an average of the annual nitrogen and phosphorus losses between mid-2001 and mid-2004. The Bay of Plenty Regional Council is considering implementing a trading regime.

> "Expect more regional councils to adopt nitrogen leaching regimes driven by the government's anticipated freshwater reforms due in 2013"

STUART RYAN

P + 64 9 357 0599
M + 64 21 286 0230
F + 64 9 280 1110
E stuart@stuartryan.co.nz
www.stuartryan.co.nz

Level 11, Southern Cross Building
59-67 High Street, Auckland
PO Box 1296, Shortland Street
Auckland 1140, New Zealand

Canterbury

Until 1 July 2017 the proposed Canterbury Land & Water Regional Plan requires all farms to record their nutrient loss using a computer programme and provide the record to the council on request in order to be a permitted activity. Farms within the Lake Zone must also prepare a farm environment plan for annual audit to be permitted. After 3 consecutive complying audits, the audits occur at three year intervals. After 1 July 2017 leaching limits will apply.

Manawatu-Wanganui

The One Plan for the Horizons (Manawatu-Wanganui) Regional Council is the first in the country to reduce the amount of nitrogen allowed to leach from properties into waterways from current levels. It requires farmers to meet decreasing nitrogen leaching limits over the next 20 years, using a software model to monitor nitrogen losses from the soil. All dairy, irrigated sheep and beef, cropping and vegetable farmers will require resource consent to discharge contaminants from their soil into lakes and rivers.

Discharge limits vary according to land classification. The classification system takes account of soil type, geology, slope, vegetation cover and climate to give land a score from 1 (the flattest and most productive land) to 8 (steep, mountainous land). The One Plan sets higher leaching allowances for the best land, and lower limits for steeper country. The horticulture industry has challenged these rules by a High Court appeal, which is currently pending.

Otago

The Otago Regional Council has proposed Water Plan Change 6A (water quality) which aims to maintain good water quality. New controls will allow discharges that meet limits for nitrogen, phosphorus, E.coli, and sediment.

Waikato (Lake Taupo)

The Waikato Regional Council has rules (Variation 5) which aim to maintain the water quality of Lake Taupo at its current level by monitoring and capping nitrogen leaching. Variation 5 requires landowners in the Lake Taupo catchment to use of a software model to determine maximum annual nitrogen loss and a nitrogen management plan to show this limit will not be exceeded. Landowners/users are able to trade unused discharge rights under on a lease or sale basis. Activities that comply with discharge limits do not require resource consent.