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**Is COVID-19 the culture shift we
need to reimagine urban amenity?**



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Te Kahui Ture Taiao

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EDITORIAL

Bronwyn Carruthers, Barrister, Shortland Chambers

It is obviously trite to say that COVID-19 has led to change. One potential change, and the focus of our lead article from Dr Claire Kirman and Emma Fergusson, is in how we evaluate and provide amenity in intensified urban areas. The bias towards the status quo has been displaced, with change now accepted as inevitable where growth is expected to occur, but at the same time the experience of lockdown has likely heightened the need to (at a minimum) maintain amenity at the local level. The challenge of delivering compact urban form with ready access to quality outdoor space clearly lies ahead.

On the subject of change, the climate change constraints in the RMA were removed by 11th hour changes to what is now the Resource Management Amendment Act 2020, with local authorities also required to have regard to the emissions reductions plan and national adaptation plans expected under the Climate Change Response Act 2002. Blair Dickie discusses the implications of these amendments.

Staying on the topic of RMA reform, the NPS on Indigenous Biological Diversity is expected to be released in April 2021, formalising the use of offsets and

compensation to achieve no net loss. Sally Gepp and Madeleine Wright together with Dr Fleur Maseyk and Dr Marie Doole have commented on an audit undertaken by the Australian Audit office of the approach taken in Australia and identified a number of significant issues that have implications for New Zealand. Ideally these mistakes can be avoided with the NPS expected next year.

Jemma Hollis, an LLB Honours student at the University of Waikato contributes to this issue, with her analysis of the time taken to resolve plan appeals looking for a correlation between the time taken and the number of parties involved. She concludes that mediation directed by the Environment Court appears to defy group dynamic theories, with increases in participant numbers not making it more difficult to get the job done. The greater use of mediation and/or pre-hearing meetings at council level is worth considering going forward.

Finally, Joseph Wright, Dentons Kensington Swan, summarises *Bunnings v Auckland Transport*, considering what happens to the lapse period of an unimplemented designation when it is rolled over as part of a plan review.





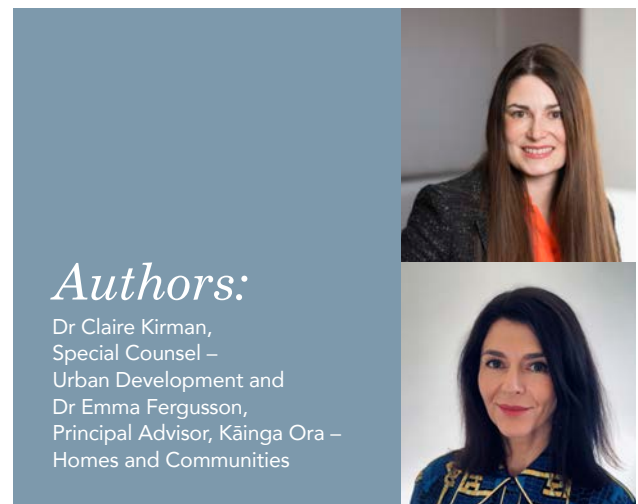
Is COVID-19 the culture shift we need to reimagine urban amenity?

THE IMPETUS FOR THE RE-EVALUATION OF AMENITY

The COVID-19 lockdown period saw many New Zealanders develop new relationships with how they live, play and work within urban environments. Whilst it is unknown at this stage how the pandemic and the attendant economic downturn will impact on the housing system, given the lengthy time horizon of planning instruments, this paper posits that it is unlikely that the pandemic will have any sustained impact on the fundamentals of how we should plan future urban environments. What is likely, however, is that it will generate sustained changes to the amenity values that communities consider important within the compact urban form model, which will have implications for how different housing typologies are delivered and the preferences for quality outdoor and local public spaces within those typologies.

THE 'AMENITY VALUES' PROBLEMATIC

Even before COVID-19, the interpretation of the terms 'amenity' and 'amenity values' in Resource Management Act 1991 (RMA) jurisprudence and the propensity towards protection of the status quo was problematic. Case law had inadvertently cast the consideration of amenity as being



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a maintenance of the status quo. Earlier cases under the Town and Country Planning Act 1977, for example, had the effect of limiting the inquiry as to the effects on amenity to a consideration of whether or not "the proposed use is likely to have a detrimental effect on the existing amenities of the area". This had then spilt into statutory understandings of the concept under the RMA (*Reids Holiday Park v Rangiora Borough* [1979] D B13332(A); see also *Storer v Erye County* [1980] 7 NZTPA 268).

Indeed, this shortcoming in the legislation and its implementation was alluded to in the *Opportunities for Change: Issues and Options* paper released in November 2019 by the Resource Management Review Panel, whom were tasked with considering the opportunities for reform of the RMA. Specifically, that paper made the following observations regarding the innate bias towards the status quo in the current system ([35–36]):

A bias towards the status quo

Decisions made through the resource management system have favoured existing users and uses, and as a result have inadequately provided for future generations, as well as poorer communities and iwi/Māori. Problems that have exacerbated this bias include:

- *an emphasis of the RMA on avoiding or remedying adverse effects*
- *the protection of use rights, for example in relation to land use planning and the right to take water*
- *processes (eg, legal appeals) that favour the well-resourced*
- *the application of 'permitted baselines' in resource consent processes.*

Furthermore, until recently there has been insufficient recognition of the importance of proactive and strategic planning in the system. Over the last decade, some councils have developed strategic plans and joint spatial plans for their regions, districts and communities to help fill this gap. Central government has encouraged this form of planning by requiring Auckland to prepare a spatial plan, future development strategies through the National Policy Statement for Urban Development Capacity, and spatial planning partnerships under the Urban Growth Agenda. However, the lack of legal weight and disconnection with RMA plans means that the full benefits of strategic planning are not being realised throughout the system.

Prior to the Resource Management Review Panel's identification of the statutory conceptualisation of amenity and how it was inadvertently acting as a roadblock to future urban development, the amenity problem had already been earmarked in the Urban Growth Agenda as a matter requiring urgent redress. The discussion documents supporting the

proposed National Policy Statement – Urban Development (2020) (NPS-UD), for example, viewed the statutory conception of amenity as disabling of flexible growth and the development of quality urban environments. Specifically, the Beca Report *Enabling Growth – Urban Zones Research: Key Observations, Findings and Recommendations* (August 2018) concluded (at 2):

the barriers to facilitating development appear to be from the emphasis local authorities put on the 'present state' and built form of amenity, rather than any future environment that would result in an area, and the social and physical infrastructure parts of amenity.

As such, (as notified) the NPS-UD included a proposal which established higher order planning directives which emphasised that amenity values can change over time and that urban development offers opportunities for changes to amenity which can better support communities and their values. The policy intent of such a proposal was to shift the widely held perception that urban development has only negative effects on amenity for individuals.

CONTEXT SETTING – THE AUCKLAND UNITARY PLAN AS A MODEL FOR CHANGING THE WAY AMENITY IS CONSIDERED

The promulgation of the Auckland Unitary Plan in 2016 signalled what the Independent Hearings Panel described in its Overview Report as a "large step-change" in the planning for urban development capacity, creating the establishment of a planning pathway for the ongoing long-term supply of residential, business and industrial capacity in the Auckland Region (Auckland Unitary Plan Independent Hearings Panel Report to Auckland Council *Overview of recommendations on the proposed Auckland Unitary Plan* (Auckland Council, 22 July 2016)). Against significant community opposition, the Auckland Unitary Plan introduced what in the New Zealand planning context must be considered to be a novel response to urban development capacity: the removal of density requirements and the introduction of region-wide graduated intensification around both existing and planned centres, transport nodes and corridors. The Overview Report went on to set out the Independent Hearing Panel's recommended blueprint for dealing with the provision of capacity:

- (i) utilising several planning methods for greenfield development and brownfield redevelopment, thereby providing flexibility in the way the region could respond to growth; and
- (ii) introducing planning controls that most appropriately enable growth, whilst balancing the protection of existing values in significant areas and items of natural and historical heritage and of ecological value, the taonga held closely by mana whenua, volcanic viewshafts and the maunga themselves, air and water quality, the natural character of the coastal environment, and the special character of many places.

The timing of the Auckland Unitary Plan was critical to achieving this outcome. The hearing of submissions came at a time when there was a growing awareness of a significant housing supply issue, leading the Independent Hearing Panel to record in the opening to its Overview Report that the current resource management issue of greatest significance facing the Auckland Region was its capacity for growth.

Indeed, as the hearings on the Auckland Unitary Plan progressed, the Government was to notify the first national direction on urban development – the National Policy Statement: Urban Development Capacity (2016) (NPS-UDC). Whilst that national direction did not play a part in the outcome for the Auckland Unitary Plan, it required that local authorities throughout the country follow in Auckland's footsteps by introducing new national planning requirements for local authority responses to urban development capacity issues in the short, medium and long term.

The relatively recent decision of *Summerset Villages (St Johns) Limited v Auckland Council* [2019] NZEnvC 173 illustrates that with a more innovative planning instrument such as the Auckland Unitary Plan and with effective national direction, there is scope even within the existing framework to recast the concept of amenity.

By way of background, that case involved an appeal by Summerset Villages (St Johns) Ltd relating to an application to establish a retirement village on a 2.6-hectare site adjacent to St Johns College in Meadowbank. Pursuant to the Auckland Unitary Plan, the bulk of the site was zoned Mixed Housing Urban (MHU) and the application fell to be considered as an integrated residential development.

The application was declined at council hearing stage on the basis of the adverse impact the scale and height of the development had on the amenity of the area.

Summerset appealed the Council's decision to the Environment Court, but for the purposes of the Environment Court Hearing, revised the application so that the development took a more tiered or stacked approach to bulk approach when viewed from within the adjacent Mixed-Housing Suburban (MHS) area surrounding the east and north of the site.

In granting the appeal, the Environment Court held (at [80]):

We have reached the view that the consent as now proposed by the applicant is appropriate and properly balances the interests of intensification with the need for compatibility with the residential environment and impacts on visual amenity. Overall, we are satisfied that the activity constitutes an urban built character of predominantly three-storeys and therefore meets the policy of the Plan and other policies and objectives of the Plan generally.

Importantly, the Environment Court made several key observations regarding how the NPS-UDC (referred to in the decision as the UPS) and the Auckland Unitary Plan should be interpreted. In summary, the Court concluded that (at [17–18]):

Both the National Policy Statement Urban Development (Urban Policy or UPS) and the AUP stress compact urban form in the context of the existing urban areas requires intensification. This Site is appropriate for such intensification for integrated residential development and in particular for a retirement village ...

Fundamentally we do not accept the proposition that the change envisaged under the UPS and AUP can be countermanded by reference to the existing residential amenity without a reference to the plan changes that are envisaged in terms of the UPS and AUP. To determine the residential character without reference to the UPS and the AUP would be a failure to properly administer both the Unitary Plan and the Policy Statement in terms of the requirements under s 104.

The Court also made several important observations regarding how decision-makers should approach the task of interpreting and implementing the Auckland Unitary Plan, noting that the tenor of the Auckland Unitary Plan was to promote a compact urban form in the context of existing urban areas requiring future intensification (at [52]):

... However, we conclude that the apparent and perceptible thrust of the AUP undeniably embraces the philosophy of the UPS: namely a focus on enabled outcomes for intensification rather than the more conventional and traditional preservation of amenity as defined and circumscribed by now-superseded planning instruments.

And earlier in the decision (at [33–34]):

... Compatibility does not mean similarity.

Our conclusion is that the proper meaning of the AUP wording as to compatibility is that there must be some features of the development allowing the residential and MHU zones to interact and relate to one another.

In that regard, the Court was critical of the Council's witnesses who had focused more on existing residential amenity and the surrounding area in its current form rather than the future form brought about by the Auckland Unitary Plan and required by the NPS-UDC, noting with respect to that approach (at [32]):

If this is to be the outcome of the application of these two criteria, we conclude that it must be seen as direct contravention of the imperatives of the UPS and of the AUP to achieve a compact urban form and in particular the intensification along public transport corridors envisaged and reflected in the zoning of this Site as MHU and the zoning along St Johns Road and Remuera Road of both terraced housing and buildings.

Also of interest are the following comments regarding the focus of the MHU zone (at [58]–[59] and [61]–[62]):

*Firstly, the flavour of the zone is established by the zone description **and its unequivocal articulation of change and the resultant creation of a new paradigm of urban growth** (emphasis added):*

"H5.1 Zone Description

The Residential – Mixed Housing Urban Zone is a reasonably high-intensity zone enabling a greater intensity of development than previously provided for.

Over time, the appearance of neighbourhoods within this zone will change, with development typically up to three storeys in a variety of sizes and forms ..."

We conclude that this aspiration creates a context that invites the exercise of development ambitions that are in step with the direction of the UPS as well as confirming an environment more tolerant towards growth and change. As an affirmation of this encouragement, the zone objectives particularise the vision and provide clear guidance in respect of intended outcomes (emphasis added):

"H5.2 Objectives

- (1) Land near the Business-Metropolitan Centre Zone and the Business-Town Centre Zone, high-density residential areas and close to the public transport network is efficiently used for higher density residential living and to provide urban living that increases housing capacity and choice and access to public transport.*
- (2) Development is in keeping with the neighbourhood's planned urban built character of predominantly three-storey buildings, in a variety of forms and surrounded by open space."*

...

This range of opportunities is encapsulated and given validity in terms of the anticipated, future, urban environment as foreshadowed in the objectives set out above and, in particular, articulated in Objective H5.2(2). The term used to describe the resultant physical manifestation of development that may emerge pursuant to the provisions is "predominantly". (Emphasis original)

The Court heard much on the matter of “predominantly” and the meaning, if not the essence, of the word. It was a matter of some tightly-held views as to its meaning and relative importance. The Court is confident that this term was used in the AUP quite deliberately. There is a deliberateness and flexibility to the word. This means the concept is in fact contextual to allow robust and pragmatic assessment on individual applications for consent.

With regards to the NPS-UDC, the Court noted that it was a planning instrument that was at the top of the planning hierarchy and required due consideration by decision-makers when establishing policy frameworks on matters of urban growth and redevelopment (at [44]). Specifically, the Court noted the future focus of the NPS-UDC, commenting (at [46], [49] and [50]):

At this point, we recognise the use of critical language in these provisions of the UPS. Deliberately, it seems to us, the authors of the document have deployed the words ‘change’ and ‘future’. Unarguably, the use of these terms intends a future focus for development planning.

...

*There is a clear commonality of purpose and principle to be found, on the one hand, in the theme of the UPS, set out above, and, on the other, in the particular thrust of the OA3: ‘change’. In our view, **the inescapable conclusion in apparent: the UPS gives direction to decision-makers to have regard to urban growth outcomes which have previously been under-emphasised in favour of local environmental or amenity considerations.***

*The UPS requires evaluation in the context of ‘national significance’ within which planning endeavours are to be undertaken and which will allow ‘(urban) environments to develop and change’. Accordingly, **our conclusion is that a more future-oriented, outcome-focused conclusion than what might have been the case otherwise and common-place before the promulgation of the UPS is envisaged.*** (Emphasis added)

In conclusion, the Court held that the amended development was appropriate in terms of the Auckland Unitary Plan stating that (at [66]–[67]):

*Applying the criteria as suggested by the Council leads to our conclusion that this is an acceptable amended proposal. Thus, it is not necessary for us to consider the wider issues. **We comment that the application of the AUP and UPS cannot be viewed in the context of only allowing activities that are similar to or the same as existing residential character and adjacent zones. In our view, that would be an incorrect application of the provisions and arguably may undermine the very purpose of the AUP and the UPS.*** This decision cannot be taken as an endorsement of the Council’s approach to these provisions generally or even in this case. What it demonstrates is that the amended application is clearly appropriate and anticipated in this zone.

Given we reach our conclusions in the absence of having to decide this point, we comment only for the purpose of guidance for the future. Clearly, the Auckland Plan anticipates future change. That is not only evident in the Plan but is explicitly stated in the preamble to the Auckland Unitary Plan. In the initial stage, such changes, particularly within or adjacent to residential zones, will be unsettling for existing residential owners. To this extent, we understand the concerns that have been expressed by Mrs Ngata and others at the original hearing. There is no doubt that the degree of intensification envisaged within the Plan is significant. It will bring with it impacts in terms of the construction periods which are now evident through Auckland central and beginning to radiate into the suburbs. (Emphasis added)

This case is important not only because it records the future focus of amenity values incorporated into both the NPS-UDC and Auckland Unitary Plan, but also because it is a current example of a departure from the Court’s traditional approach to consideration of amenity effects within the existing statutory framework (namely that consideration of adverse effects on amenity values is confined to an inquiry as to the potential adverse effect on the existing amenities of an area, rather than the planned future amenities). Indeed, recognition that amenity values develop and change over time is now explicitly recognised in the NPS-UD with Objective 4. Further, Policy 4 requires that when making planning decisions that affect urban environments, decision-

makers have particular regard to the fact that changes to planned urban built forms may detract from the amenity values appreciated by some people, but will improve the amenity values appreciated by other people, communities and future generations, including by providing increased and varied housing densities and types. Policy 4 goes even further to state that such amenity changes are not, of themselves, an adverse effect.

COVID-19 AND ITS POTENTIAL INFLUENCES ON THE HOUSING MARKET

Turning now to the potential influences of the pandemic on the local housing system; whilst the actual impact may not be known for some time, discussions thus far have largely focused on house price effects.

There is considerable variance in the predicted scale and timing of a market shift, but there seems to be consensus among economists that a significant drop in house values is on the horizon (for a summary, see Susan Edmunds "What's really going to happen with New Zealand's house prices?" (28 June 2020) Stuff <www.stuff.co.nz>). A combination of distressed sellers, a smaller number of potential purchasers and general wariness in the face of rising unemployment and market instability is expected to result in house price drops of between five and 15 per cent over the next 12 to 18 months. To put this in perspective, the Global Financial Crisis of 2008 resulted in a national drop of around eight per cent but over a longer period.

Although the post-lockdown market has seen only a 1.5 per cent drop on pre-lockdown values, this may well be the calm before the storm. Indeed, CoreLogic have noted that in the main centres and holiday destinations, prices have already declined significantly: Auckland is down 2.4 per cent and Queenstown 7.2 per cent (Greg Ninness "The worm seems to have turned for property values in the main centres" (16 July 2020) Interest.co.nz). It is widely expected that when the buffering effects of the wage subsidy scheme and the mortgage repayment holiday recede, and as the predicted recession deepens, there will be a significant increase in properties brought to the market by vendors facing financial pressure. The relative buoyancy of the market at present is attributable to a combination of pent-up demand and limited supply, as potential vendors respond warily to market uncertainty (see, for example, Anne Gibson "Economists question house market rally" *The New Zealand Herald* (online ed, Auckland, 14 July 2020);

Susan Edmunds "Property market: were predictions of doom misplaced?" (14 July 2020) Stuff <www.stuff.co.nz>; "House prices rise again but economists expect correction" *Otago Daily Times* (online ed, Dunedin, 14 July 2020)).

Currently New Zealand has about 5,000 people a week returning to New Zealand from other countries and very few New Zealanders are departing – to put this in context, we would typically have a net loss of 10,000 to 15,000 New Zealanders per annum through out-migration. These people may be here permanently, or at least until the global situation stabilises, and they will need places to live. For now, this influx will be partly mitigating the impact of New Zealand's border closure and international travel restrictions more generally, which have effectively curtailed international immigration at present. When the arrivals of returning New Zealanders slows down, we may well see reduced net in-migration over the medium term, and this will reduce pressure on housing supply. It has been noted, however, that New Zealand's comparative success in addressing COVID-19 may also make the country an attractive prospect for potential migrants when the border does reopen.

The rental sector, too, is likely to face changes in the context of COVID-19, and these will have further flow-on effects on house prices. Prior to the pandemic, there were approximately 37,000 short-term rentals marketed through websites such as Airbnb to both domestic and international travellers. While domestic tourism is being promoted as a fillip for the struggling tourism sector now that travel internally is possible again, it seems unlikely that the volume will be sufficient to fill short-term rentals as well as more established accommodation facilities such as motels and hotels if the border closure continues for many months. The potential for these dwellings to be shifted into the long-term rental market is significant, and this could relieve rental supply issues in some areas and put downward pressure on rents.

RE-CONCEPTUALISING AMENITY VALUES IN THE URBAN DEVELOPMENT CONTEXT

The urban efficiencies of a spatial pattern of capacity based on a compact urban form mean that urban development, which intensifies around centres and transport nodes and corridors, will in the authors' view still continue to be

a prerequisite to the efficient and effective functioning of urban environments, including public transport and other significant infrastructure. Whilst that model for urban development is unlikely to change as a result of the pandemic, arguably, delivery of the Terrace Housing and Apartment Buildings (THAB) typology by developers might need to be reconsidered to accommodate new ways of utilising housing (for example, increased demands to work from home necessitating office space within dwellings or communal office spaces in THAB typologies).

Acknowledging that future amenity values are an important consideration in any urban development proposal, COVID-19 has seen a shift in people's housing and outdoor living preferences and, as a consequence, neighbourhood amenity. Such shifts are not unexpected as historically global pandemics have resulted in lasting changes to urban growth patterns. As Kyle Chayka suggests, the experiences of isolating in place, working from home, and having one's sphere of activity reduced to one's immediate neighbourhood is likely to change understandings of home, and shape what people look for in a dwelling, along with changes to the importance and requirements of outdoor and local public spaces (Kyle Chayka "How the coronavirus will reshape architecture" *The New Yorker* (online ed, New York, June 17 2020)). This, therefore, may be an aspect of the delivery of urban development planning that may be permanently changed by people's experiences of the COVID-19 pandemic.

Historically, New Zealanders have also been wary of denser residential typologies, and reports from Australia and elsewhere of the rampant spread of the virus through "vertical cruise ships" may harden these views (Yara Murray-Athfield "Why Melbourne's public housing towers have 'explosive potential' for coronavirus to spread" (5 July 2020) ABC News <www.abc.net.au>; Katrina Raynor, Alan Pert and Catherine Townsend "Vertical cruise ships? Here's how we can remake housing towers to be safer and better places to live" (15 July 2020) *The Conversation* <www.theconversation.com>). Such perceptions may be difficult to change, however, more dense typologies are still capable of delivery as part of a resilient urban form if they are undertaken in a manner which is cognisant of the socio-economic and psychological perspectives of people and communities, and if the design principles incorporated into such typologies respond appropriately to those perspectives.

At the time of writing this paper, the Resource Management Review Panel had not released its system reform recommendations, but the Urban Development Act 2020 can be seen as a likely indicator of the potential change in store, albeit with the potential for slightly different terminology. In that regard, the Urban Development Act modifies the application of the definition of amenity in Part 2 of the RMA by introducing the concept that urban amenity may change over time. This involved specifically recording that in promoting sustainable management of natural and physical resources, recognition must be given to the fact that amenity values may change (Refer to s 5 of the Act).

In a similar vein, Objective 4 of the NPS-UD provides that "New Zealand's urban environments, including their amenity values, develop and change over time in response to the diverse and changing needs of people, communities and future generations". Policy 4 further requires that when making planning decisions that affect urban environments, decision-makers have particular regard to the matter that planned urban-built forms may involve significant changes to an area, and those changes may detract from the amenity values appreciated by some people but improve the amenity values appreciated by other people, communities and future generations, including by providing increased and varied housing densities and types, and are not, of themselves, an adverse effect.

CONCLUDING REMARKS

Since the introduction of the NPS-UDC in 2016, there has been a wave of plan changes and plan reviews notified throughout the country with the objective of addressing intensification and growth issues. As these plan reviews and plan changes continue through the statutory process, and in light of the recently gazetted replacement national direction on urban development, the NPS-UD, the question now exists as to whether or not the COVID-19 pandemic and the ensuing economic downturn should impact on and change our response to urban development in New Zealand in the long term.

Given the long-term horizons of planning instruments, it is the view of the authors that the pandemic is unlikely to have any sustained impact on the fundamentals of how we plan future urban environments, but may change the amenity values that communities consider important both in terms of how different housing typologies are delivered and the

preference for quality outdoor and local public spaces within those typologies. In that regard, the comments of the Independent Hearings Panel regarding the need for long-term resilience in any urban development model adopted are apposite both to this context, as well as in relation to the approach taken in the development of the Auckland Unitary Plan (at 51):

There are compelling reasons to ensure the Unitary Plan enables a development pattern that is capable of meeting residential demand over the long term and does not limit its focus to just the next ten years or so. The first is that housing development is not readily reversible and

generally has an economic life of at least 50 years, so that once an area is developed according to an existing land use plan, future plan changes to that area are unlikely to have any effect on capacity until it once again becomes economic for redevelopment. Thus is important that the Unitary Plan is calibrated to demand over the long term, and not to just immediate concerns.

Note: The views expressed in this paper are those of the authors and not Kāinga Ora – Homes and Communities. The authors would also like to acknowledge the helpful comments received from Jessica Phillips, Ministry for the Environment.



Rethinking
Resources

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The district has developed a brand that embraces its longstanding reliance on cultural and geothermal resources together with the development of significant tourism, agriculture, energy and forestry initiatives that have all flourished under the umbrella of the RMA. This conference will canvass the many and varied ways in which rethinking resources can result in revitalisation of a community for local, regional and national benefit.

Tūngia te ururoa kia tupu whakaritorito te tutū o te harakeke.

In order to change we must be prepared to do things differently.



Climate Change Implications for Local Government of the Resource Management Amendment Act 2020

SUMMARY

This note outlines the recent climate-change-related amendments to the Resource Management Act 1991 (RMA) and discusses the implications of these changes for existing arrangements and for local government implementation agencies. It notes that the repealed sections will possibly have the most effect and will target regional councils' consideration of discharge applications from point sources, with little effect on emissions from land use changes. The additions relating to considerations for policy statements and plans confirm existing requirements, but by being explicit, provide much needed linkages between legislation and co-ordination between central and local government.

BACKGROUND

The RMA is constantly being amended, reformed and added to, and in some cases elements are repealed. In 2004, following the enactment of the Climate Change Response Act 2002 (CCRA), and with the expectation that, in future, greenhouse gas emissions would be managed by central government through a financial mechanism, changes were made to the RMA as part of the Resource Management (Energy and Climate Change) Amendment

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Act 2004. Regional consent authorities were expressly prevented from addressing greenhouse gas emissions as a contaminant to the environment.

This position was intended to prevent "double jeopardy" situations arising from the joint imposition of regulatory and financial controls on the same activity, since, at the time, there was no integrating climate mitigation plan to align the financial and regulatory levers operated by central and local government respectively. Additionally, the financial levers were rendered ineffective for almost a decade though amendments to the CCRA in the wake of the Global Financial Crisis. As a result, both central and local government were left powerless to influence development decisions, and greenhouse gas emissions increased.

The recent RMA reforms have focused on process elements and freshwater management, but at the 11th hour changes were made that will have a bearing on the way the RMA addresses climate change, and the role of those agencies administering it.

CHANGES

There are seven sections in the Resource Management Amendment Act 2020 creating two changes. The first change removes constraints on the ability to treat greenhouse gases as a contaminant. Two sections of the parent Act (ss 70A and 104E) that specifically excluded the consideration of greenhouse gas discharges to air in relation to climate change have been repealed. This has been achieved by amending ss 19 and 35. Additionally ss 20 and 36 repeal ss 70B and 104F, which are exceptions to the primary sections and therefore no longer relevant.

The second change creates alignment between central government's (in development) national climate change plans for emissions reductions and adaptation, and local government's RMA policy statements and plans.

These changes have been made through ss 17, 18 and 21, which insert the following wording into s 61 (Matters to be considered by regional council (policy statements)), s 66 (Matters to be considered by regional council (plans)), and s 74 (Matters to be considered by territorial authority) when preparing or changing policy statements and plans. Amongst other things the authority must have regard to:

- any emissions reductions plan made in accordance with s 5Z1 of the Climate Change Response Act 2002; and
- any national adaptation plan made in accordance with s 5Z5 of the Climate Change Response Act 2002.

These changes come into force at various times. The repealed sections that allow consideration of greenhouse gas emissions and the requirement for councils to have regard to central government's emissions reduction plans and national adaptation plan do not come into force until the end of next year (31 December 2021). This will ensure that the national instruments have been completed and are in effect.

By contrast the requirement that a Board of Inquiry or the Environment Court must "take into account" climate change, when a matter is called in as a matter of national significance on the basis of its greenhouse gas emissions, is

already in force (from 30 June 2020). This is an astute move as it effectively prevents a rush of entities seeking regulatory approvals for large high-carbon-emitting activities in the interim.

EXISTING SITUATION

It is worthwhile noting the current requirements of the RMA with respect to climate change so that the implications of the recent changes can be explored. The RMA already provides clear direction for decision-making concerning the allocation of natural resources, the location and construction of physical resources and the allocation of space in both terrestrial and coastal marine areas with respect to climate change adaptation. This comes from pt 2 s 7(i) and is reinforced by the New Zealand Coastal Policy Statement 2010 with respect to coastal developments (Policies 24, 25 and 27, covering natural hazards and sea level rise more than 100 years out), and the National Policy Statement for Freshwater Management (NPSFM) requiring regional councils to consider the reasonably foreseeable effects of climate change when setting objectives for quality and quantity in each Freshwater Management Unit (Policies A1 and B1). This will change with the latest version of the NPSFM to come into force later this year, referring to setting target attribute states, but still only relating to adaptation.

Climate mitigation in the context of emissions reductions or biological offsets are not specifically covered in the RMA. The benefits to be derived from the use and development of renewable energy is included in pt 2 s 7(j) and is supported by the National Policy Statement for Renewable Electricity Generation. These provisions can be considered as supporting greenhouse gas emissions reductions, but only insofar as fossil fuels are replaced by renewable natural resources containing energy. Reducing emissions does not appear to be the primary purpose of these; rather climate mitigation can be considered a co-benefit.

A proposed National Policy Statement for Indigenous Biodiversity (Ministry for the Environment, November 2019 ME 1472) does include reference to both climate adaptation and mitigation in policies and proposed implementation mechanisms. The objectives are to maintain and restore

indigenous biodiversity, and there is recognition that the future climate will be different. Proposed Policy 3 focusses on the resilience of indigenous biodiversity to the effects of climate change (adaptation), and proposed Policy 14 requires the development of regional scale biodiversity strategies. It is this policy that brings together the need to promote resilience to a changing climate by among other things maintaining and promoting connectivity between habitats to allow species migrations in response to climate change (adaptation) and to also recognise and consider promoting landscape-scale restorations for co-benefits including for water quality and freshwater habitats, carbon sequestration (mitigation) and hazard mitigation.

IMPLICATIONS FOR LOCAL GOVERNMENT

The two key changes identified are discussed starting with the opportunity for councils to consider discharges of greenhouse gases to air.

At first glance, this may seem to be limited to regional councils and unitary authorities, having the control of *point source* discharges to the environment. However, certain land uses can contribute to an increased release of greenhouse gas emissions (coal mining, mining or drainage of peat soils for agriculture, location and design of subdivisions and developments that potentially lock people into high carbon lifestyles) as diffuse discharges. However, control of these emissions is not a regional function. There is no equivalent to s 30 of the RMA, which allows regional councils to manage the diffuse impacts of land use on water quality. Therefore, diffuse greenhouse gas emissions would be more appropriately covered by territorial authorities in their district plans under s 31 as an effect of the use of land. A further complication is that land use derived greenhouse gas emissions would only be regulated (require a resource consent) if the relevant district plan addressed the matter and required it.

The change removes a barrier and opens the opportunity up for both regulatory and financial policy levers to address greenhouse gas emissions. Without seeing the policy design of the national emissions reduction plan there is no way of knowing which lever should be applied and for what type of discharge. Within the RMA sphere, diffuse discharges of greenhouse gases emanating from land use can only be addressed through district plans, should the relevant authority give itself that function, whereas point source discharges will be a regional council role.

Currently, not all greenhouse gas discharges are covered by the Emissions Trading Scheme (for example, fugitive emissions from land use change are not), but it is starting to influence land use change with respect to afforestation. At the current price of around \$32/tonne, carbon farming has increased but the price is considered insufficient to transition remaining high carbon electricity generation or change transport fuels (“NZUs Firm – But What does \$32 Do?” Carbon Match, 30 June 2020) and to drive the economic transformation to low-carbon activities. Something else will be required. Will this be the RMA and is this what the changes have set up?

Changes to ss 61, 66 and 74 are additional to the existing requirement in the same sections for regional and territorial authorities to have regard to any management plans and strategies prepared under other Acts. It would seem that the new provisions merely reinforce what could be expected to occur, as the existing requirement is not limited in scope and the direction to agencies is to “have regard”, meaning to “have a look” – the weakest requirement for consideration, in contrast to the “give effect to” relationship between regional policy statements and plans.

The additional requirement for this consideration reinforces the relationship between central government plans and strategies and makes explicit the link between the government’s climate change directions for both adaptation and mitigation and all levels of RMA policy and plans. An element of urgency has been injected into the process with the clear message that climate change matters addressed by central government are to be considered by local government when reviewing and changing RMA policy statements and plans. This is additional to the existing trickle-down relationship between policy statements and plans that can create delays through sequencing of individual reviews and changes.

The current hierarchical relationship of local government plans creates the opportunity to regionalise national directions by providing two stages for sub-national interpretation. This occurs with the design of regional policies and then the crafting of regional and district rules. The direct relationship to all local government policy and plans required by this amendment not only has the potential to create faster subordinate policy and rules but may also improve consistency between central direction and local implementation. This design may have real advantages

for emissions reductions which are sector-based (not so geographically determined), but these may not be as clear for adaptation responses where the local cross-function alignment role of Regional Policy Statements will be critical.

CONCLUSION

Given that climate change adaptation is clearly identified as a primary consideration when exercising powers and functions under the RMA (in pt 2) and greenhouse gas emission reductions are not (not mentioned in pt 2), it is reasonable to consider that the relationship between RMA policies and plans may be different for each climate change response. This asymmetry is further compounded by the fact that central government has recently updated and strengthened the settings of the Emissions Trading Scheme (mitigation) and to date has not created for itself alternative policy levers for national adaptation.

With the “have regard to” relationship between central and local government policies and plans it would seem that the intention is to bring the policy levers and the agencies together, potentially for local government (RMA) to support the central government (CCRA) direction for emissions reductions and that central government will rely on local government to address adaptation matters as these will play out locally and differentially across the country. This type of issue is ideally suited to regional-scale spatial planning.


Effective policy implementation requires many things to go right including the alignment of public policy levers. This is often difficult when the responsible agencies have different foci (international/national and regional/local), capacity and resources. This amendment has created the links between financial and regulatory policy levers for emissions reductions, but it is a weak one and on the

surface would seem to be one way – the RMA regulatory instruments are to have regard to the national direction. The opportunity exists for the national emissions reduction plan to do more than signal direction and the central government role, by also creating an integrating role and identifying ways local government’s RMA policies and plans can contribute to the national effort. This will enhance the ability of local government (at all levels) to have regard to the plan as required by the amendment.

A similar opportunity exists in the climate adaptation space, only in this area there is a paucity of policy levers, currently limited to regulations applied by local government under the RMA. In this situation we are not talking of policy alignment – we need more tools to do the job. The opportunity exists for central government to not only identify national priorities for adaptation efforts such as critical strategic infrastructure, but also to create financial mechanisms and consistent national messaging that will allow community and land use transformations. This would assist resilience to projected climate impacts and help to identify alignment opportunities for local regulatory support.

Only time will tell if this is the direction that central government will pursue in its design of the National Emissions Reduction Plan and the National Adaptation Plan. The RMA changes discussed may, on the surface, seem in isolation to merely reinforce the status quo, but depending upon the policy design of emerging national instruments they may prove to be valuable additions, at least until the wider RMA reforms.

Note: The author is employed by the Waikato Regional Council as Principal Strategic Advisor. Views expressed in this note are those of the author and are in no way to be interpreted as representing a position of that Council.



Possum in the Headlights: An Audit of Australia's Biodiversity Offsetting Conditions and Some Lessons for New Zealand

INTRODUCTION

The Australian Government's Department of Agriculture, Water, and the Environment (DAWE) has just been grilled by the Australian National Audit Office (Report No 47 2019) (Audit) for its approach to managing biodiversity offsetting. The Audit focused on assessment, approval, monitoring and enforcement of offset conditions attached to approvals for activities affecting matters of national environmental significance under the Environment Protection and Biodiversity Conservation Act 1999 (EPBC Act).

New Zealand's experience with biodiversity offsetting and environmental compensation has been variable. With the use of offsets and compensation set to become formalised when the National Policy Statement for Indigenous Biological Diversity (NPSIB) is released (likely April 2021), the Audit provides an opportunity to learn from Australia's mistakes and avoid some of the most serious outcomes that result from poor exchanges and poor implementation (including non-compliance with consent conditions). A New Zealand audit of current practice may also be warranted.

THE AUSTRALIAN CONTEXT

The EPBC Act is Australia's primary national environmental legislation. Its object includes (s 3):

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- (a) to provide for the protection of the environment, especially those aspects of the environment that are matters of national environmental significance; and
- (b) to promote ecologically sustainable development through the conservation and ecologically sustainable use of natural resources; ...

The “matters of national environmental significance” include wetlands of international importance; listed threatened species and ecological communities; listed migratory species; the Great Barrier Reef Marine Park and protection of water resources from coal seam gas development and large coal mining development (ch 2 pt 3). A person must not take an action that has, will have, or is likely to have a significant impact on a matter of national environmental significance, unless approved by the Minister or their delegate under the EPBC Act (ch 2 pt 3). Such approvals are administered by DAWE.

The process for approval comprises referral to the Minister of an activity that the applicant considers will have, or be likely to have, a significant impact on a matter of national importance, and a decision by the Minister as to whether that is accurate (pt 7), assessment of the activity (pt 8), and then a decision whether to approve the activity and if so on what conditions (pt 8).

The Minister’s decision whether to approve the activity is subject to several obligations and mandatory considerations (pt 9 div 1 subdiv B). Although the EPBC Act does not expressly refer to biodiversity offsetting or compensation conditions, offsets have been used as a condition of approval since 2001 (Miller and others, 2015).

In 2012 DAWE released the *EPBC Act Environmental Offsets Policy* which applies to any proposed action that impacts on a protected matter, and the *Offsets Assessment Guide* which implements the requirements of the Policy by calculating the equivalence of biodiversity trades.

THE NEW ZEALAND CONTEXT

Biodiversity offsetting or compensation measures are relevant considerations in New Zealand resource consent decisions. Section 104(1)(ab) of the Resource Management Act 1991 (RMA) codifies a requirement for consent authorities to consider, subject to pt 2, any measure proposed or agreed to by the applicant for the purpose of ensuring positive effects on the environment to offset or compensate for any adverse effects on the environment

that will or may result from allowing the activity. Even prior to the enactment of that provision, offsetting or compensation could be considered under s 104(1)(c) (*Clearwater Mussels Ltd v Marlborough District Council* [2018] NZEnvC 88 at [11]).

Although there is as yet no operative national direction relating to biodiversity offsetting, incorporation of biodiversity offsetting into planning instruments and improving their design and implementation has been greatly assisted by international work programmes and publications, particularly the Business and Biodiversity Offsets Programme (BBOP), and local publications including the *Guidance on Good Practice Biodiversity Offsetting in New Zealand* (New Zealand Government, 2014) and *Biodiversity Offsetting under the Resource Management Act* (Maseyk and others, 2018).

There has also been judicial consideration of biodiversity offset and compensation. Early case law focussed on the distinction between mitigation and offsetting (*Day v Manawatu-Wanganui Regional Council* [2012] NZEnvC 182 at [3-63]; *Royal Forest and Bird Protection Society of New Zealand Inc v Buller District Council* [2013] NZHC 1346). More recent jurisprudence has considered the parameters within which offsetting and compensation should be applied in New Zealand, in response to modern regional policy statements and plans incorporating biodiversity offsetting and compensation principles. For example, the Environment Court recently considered the principles that determine whether a proposed programme of action is a valid biodiversity offset and the circumstances in which biodiversity compensation should be permissible (*Oceana Gold (New Zealand) Ltd v Otago Regional Council* [2019] NZEnvC 41; *Oceana Gold (New Zealand) Ltd v Otago Regional Council* [2020] NZHC 436).

In reaching its decision to approve limits on the circumstances in which biodiversity offsetting and compensation can be used, the Environment Court cited with approval concerns raised in M Christensen *Biodiversity offsets – a suggested way forward* (Resource Management Journal, April 2010), that offsets can allow “developments to proceed that have a very significant impact on biodiversity that in many

cases would be judged unacceptable”, and that there are some ecosystems, habitats and species in respect of which offsetting is inappropriate or impossible (at [147]–[148]).

In a decision on the West Coast Regional Policy Statement, a slightly different approach was taken to incorporation of limits (*Heritage New Zealand Pouhere Taonga v West Coast Regional Council* [2020] NZEnvC 80). Biodiversity offsetting and compensation may only be used where the activity first avoids particular adverse effects.

Information about the outcomes of biodiversity offsets or environmental compensation (such as the extent to which conditions are complied with, and whether stated outcomes are achieved) is not compiled in New Zealand. Nor have these matters benefited from Environment Court consideration or formal audit. A review of compliance of offsets and environmental compensation several years ago demonstrated a significant proportion of conditions were not met (32%), with levels of compliance being uneven across sectors from 100% for renewable energy generation projects to just 4.5% for agriculture (Brown and others, 2013). Brower and others (2018) also demonstrated similar trends with respect to compensation conditions on public conservation land.

THE AUDIT AND IMPLICATIONS FOR NEW ZEALAND

There are good reasons for restricting the use of biodiversity offsetting and compensation including inadequacy of exchange (across type, amount, space and time), ability to provide additional gains, and inappropriateness (ecological, technical, social or cultural) of trading in terms of the ecosystem, habitat or species that an offset or compensation is proposed to apply to. These concerns form the basis of biodiversity offsetting principles.

The Australian experience provides an additional reason for New Zealand to approach biodiversity offsetting with caution. By taking heed of the Australian Audit findings, New Zealand may succeed in avoiding some of the most serious outcomes that result from poor design of biodiversity offsetting policies and proposals and related implementation issues (for example, compliance with biodiversity offsetting consent conditions).

The Audit found that the DAWE’s administration of the EPBC Act was “ineffective”, the governance arrangements supporting administration were “not sound”, that regulation is “not supported by appropriate systems and processes”

and that the DAWE “is unable to demonstrate that conditions of approval are appropriate”. In making this last finding, the Audit was scathing of the DAWE’s assessment, approval, monitoring and enforcement of offset conditions (s 4).

The Audit’s specific findings, and possible implications for New Zealand, are discussed below.

First, the Audit found that DAWE does not identify desired environmental outcomes as a means of determining the level of acceptable environmental impact. As a consequence, there is no method for determining whether approval conditions are proportionate to the environmental risk and ultimately, or whether the approval itself is appropriate.

New Zealand biodiversity offsetting policies are typically premised on a “no net loss or preferably net gain” objective. Beyond this broad scale objective, specific goals (for example, no net loss of what, compared to what, by when), and desired outcomes (for example, regional targets for habitat extent or population targets) are less commonly explicitly defined. The lack of national direction on specific goals and outcomes means New Zealand is likely to face similar inadequacies to the Australian situation.

Second, the DAWE was criticised for not having established internal guidance for reviewing environmental offsets beyond the EPBC Act *Environmental Offsets Policy* and the supporting *Offsets Assessment Guide* and had no “quality assurance process for sampling or reviewing offset plans.” As a result, there was no way of ensuring “that offsets are assessed consistently, in line with the offset policy and in a way that achieves the objectives of the EPBC Act”.

Both of New Zealand’s offsetting guidance documents are non-statutory documents and offsetting policies remain inconsistent across different regional policy instruments. Against that background, it is safe to assume that deviation from New Zealand’s guidance documents is common.

Third, the DAWE was found to have no agreed method for estimating risk of loss averted – being the risk that the biodiversity at the proposed offset site would be lost at some defined point in the future if not for the offset. Risk of loss estimates need to be accurate so that “the conservation gain delivered by the offset is correctly calculated and ... is ultimately greater than or equal to the negative impact.” Despite demonstrable inconsistencies in its risk of loss assessments (for example, two offsets being approved for the same project at the same property with differing

risk of loss scores of 100% and 0% entered into the Offset Assessments Guide; and see also Maseyk and others, 2017), DAWE had taken no action to adjust its processes.

In New Zealand, averted loss offsets are used infrequently, at least overtly. However, the principle that robust, defensible, and transparent methods for estimating biodiversity gains are needed to reduce the risk of negative consequences is equally applicable to New Zealand. This highlights the importance of continued development of tools and methods for designing adequate and appropriate offset proposals and guidance for their correct and transparent use.

Fourth, the Audit found that DAWE does not have a system for mapping offsets for internal or external use. Risks relating to this include the possibility for land already protected as an offset to be accepted as an offset site again, or conversely for an offset site to be developed.

New Zealand similarly lacks a central offset register or mapping database. Issues with this identified by the Audit are therefore equally applicable to New Zealand. This suggests that investing in and developing supporting technical infrastructure (database; GIS mapping etc) is crucial. This will equally be an important requirement as policies and proposals for providing offsets in advance of effects become more common.

Fifth, it was noted that offsets for some matters of national significance are becoming increasingly unavailable in Australia due to a lack of locations where the matter is present or poor data. This has resulted in "difficulty satisfying offset conditions". However, instead of declining an activity due to unacceptable effects in this situation the DAWE has instead varied or extended offset conditions and increased its acceptance of "indirect offsets" (offsets that do not result in a measurable conservation gain, for example funding a PhD). This increases the risk that environmental gains will not be achieved. Again, despite this issue being raised with the DAWE previously, actions to address it have not been pursued.

New Zealand also has a narrow market for "like-for-like" exchanges, especially so for lowland habitats and ecosystems and in light of the high proportion of species at risk of extinction. The Australian situation demonstrates the risks with increasing flexibility in offset exchanges. It also highlights the need to identify specific offset locations and detail offset actions within consent conditions and not approve proposals "in principle". New Zealand does not

currently have the information to know whether decisions of this nature are routinely being made. Actions that in Australia are termed "indirect offsets" are unlikely to meet offsetting principles used here, but can be considered as environmental compensation (for example, a financial contribution for semi-related purposes such as research) and do occur for large projects. Australia's experience reveals that if this becomes commonplace, there is major risk of significant biodiversity losses, in particular in relation to rare and threatened ecosystems and species.

Sixth, the DAWE's records of when pre-commencement conditions, like offsets, are completed and of when a project commences, were found to be incomplete and suffer from integrity issues. This compromises DAWE's ability to monitor and enforce approvals.

Typically in New Zealand pre-commencement conditions of this nature are paired with a requirement to advise the relevant local authority the condition has been completed. However, the extent to which this is an issue has not been assessed here. This emphasises the importance of pairing pre-commencement conditions with a reporting requirement and of the local authority having a subsequent verification protocol.

Seventh, the Audit found DAWE does not have a process for verifying completion of offset conditions, and it has not assessed the risks of systematically failing to do this.

The New Zealand local government guidance document highlights the importance of ensuring offset and compensation proposals are explicitly captured in consent conditions, including monitoring and reporting conditions specific to the proposal. This is supported by the general compliance, monitoring, and enforcement (CME) functions under the RMA. So, unlike Australia, we do have a system in place to verify completion of offset conditions. However, we nonetheless have issues with poorly crafted consent conditions and implementation of CME. Further, we do not have recent data regarding offset compliance or the environmental implications of poor compliance.

CONCLUSION

The issues the Audit has identified with offsetting and compensation in Australia are significant. There are some indicators we do or may face similar issues, although

at present, we generally do not have the data available to confirm this either way. What this emphasises is the importance of approaching a surge in the use of offsets and compensation, and entrenching them in the NPSIB, with caution. It may be appropriate for an audit of existing practices to be undertaken here, to inform future processes. Australia's experience shows that if these tools are used in the wrong context, or without the supporting technical infrastructure, environmental outcomes will be poor and biodiversity will continue to decline.

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Mediation in the Environment Court: Do the Numbers Matter?

When thinking about the number of participants in Environment Court mediation, the old saying “too many cooks spoil the broth” comes to mind. But is there any truth to this preconception? Analysis of group interaction theories, as well as those related to mediation, and plan change documentation for numbers involved and time taken to resolve a dispute, may hold the answer.

WHY DO THE NUMBERS MATTER?

Local authority resource management plan and policy documents are required to be reviewed every 10 years under s 79 of the Resource Management Act 1991 (RMA). In practice this involves “rolling reviews” with plan change or variation processes addressing discrete plan issues arising during the 10-year “life” of the plan. As part of the RMA Schedule 1 process, interested persons may be consulted by the council at the document pre-notification stage and can continue their involvement through the notification, submissions and hearings parts of the process. In practice, councils facilitate plan development discussions and forums for the community at many junctures of the process, including pre-notification, through the submissions on notified provisions process, the publication of submissions and then the further submissions process, and the hearing of submissions themselves.

As a result, there is a continuous cycle of resource management document redevelopment, review and change, with the processes involving significant public



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input at different stages and across different authorities. Often the time between policy conception and completion can be measured in years. Clearly, this is an incredibly time-consuming and resource-intensive process in its own right.

Following release of decisions on submissions and completion of the council side of proceedings, persons involved can appeal to the Environment Court. The Court mediation process aims to reduce the scope of or fully resolve appeal matters. By the time mediation is embarked upon, parties to proceedings have often already been through a lengthy and costly council process, possibly locking horns at various junctures with other participants holding opposing views. How do the numbers of people still standing on a matter, and the social dynamics associated with their interactions, affect the time taken for a resolution to be mediated?

GROUP BEHAVIOUR – WHAT MAKES PEOPLE TICK?

The key driver behind group processes and efficacy is the interactions between individuals in groups and their relationships. An increase in group size leads to an exponential increase in the number of relationships ongoing at any one time, with their various inclusions, exclusions, positions, jealousies, backgrounds, and so on. This is why problems arise in the output productivity of large groups; the number of relationships ongoing are more than the group members are comfortable with (Maggie Kindred and Michael Kindred *Once upon a Group: A Guide to Running and Participating in Successful Groups* (2nd ed, Jessica Kingsley Publishers, London, 2011) at 20).

Group performance has also been found not to be linked to how competent each member is on the subject topic, but by how those members interact with each other (Anita Woolley and others “Evidence for a collective intelligence factor in the performance of human groups” (2010) 330 *Science* 686 at 688). As such, expertise and depth of knowledge in a particular topic of discussion is not important, but how the individual group members relate to each other is. Applying this concept to an environmental issue for example, an engineer being technically correct about a design element for a dam may not be as important to the ultimate discussion outcome as how that engineer discusses these design elements and approaches other issues with the parties around the table.

In a situation where parties are seeking different outcomes, which is often the case in environmental matters, some participants may see mischief-making as a means to achieve their own goals if the resulting group response is perceived to enable this. Recognising and understanding group interactions creates an opportunity to reroute discussions when behaviours seem to be leading down unproductive tracks not consistent with the overall goals of the group's work.

THE ROLE OF MEDIATION AND MEDIATORS

Resolving conflict related to environmental matters is uniquely difficult, with the involved parties' positions on an issue's risks and priorities, and where costs and benefits should lie, being at times very far apart.

Mediation arose as an alternative to the traditional adversarial model of dispute resolution, and it attempts to prevent an escalation of the dispute and achieve a “win/win” or “all gain” result. As mediation proceedings are

confidential and less formal than full court proceedings, participants can feel more comfortable to air grievances and problems, thus moving beyond them and focusing on issues and solutions.

Mediation is not a panacea however. As with getting any job done, negotiation becomes exponentially more difficult as the number of participants, and relationships involved, increases (Christopher Moore *The Mediation Process* (Jossey-Bass, San Francisco, 2014) at 557). Even if agreement is not reached, meeting face to face to discuss issues can improve relationships between parties, which is particularly important on environmental matters where it is often the same parties clashing over different topics over time.

Mediators play a critical role in proceedings. For multi-party issues, mediators facilitate a forum which allows the focus to be on group problem-solving rather than their individual interactions. Mediators play a key role in ensuring clarity of comments and commitments, and de-escalating tense discussions and comments by reframing them in a more neutral manner. Their role is particularly important when dealing with parties with negative attitudes, where the mediator must identify the motivation behind the behavior and deal with it in a manner appropriate to the circumstances (Jean Poitras and Pierre Renaud *Mediation and recognition of interests in public disputes* (Carswell, Ontario, 1997) at 95).

DO MORE PEOPLE EQUAL MORE TIME?

To analyse this issue, I identified the number of parties involved in Court mediation processes for the plan change documents of 30 local authorities.

Plan change documents were selected for analysis as the process followed is generally more discrete and comparable than appeals related to whole plans. Furthermore, cases were only used where the number of s 274 parties was recorded in the Court decision, as without this information clearly stated it is impossible to tell how many parties were actually involved in a dispute resolution without access to notices of the Court.

Although the plan change documents of 30 local authorities were analysed, once policy development processes lacking available appropriate information were excluded, the actual dataset of suitable cases was relatively small (n = 19). Most of the suitable cases involved fewer than 10 parties (n = 16). The number of months between the council notice of decisions on submissions and Court consent order or decision date gives the dispute resolution period.

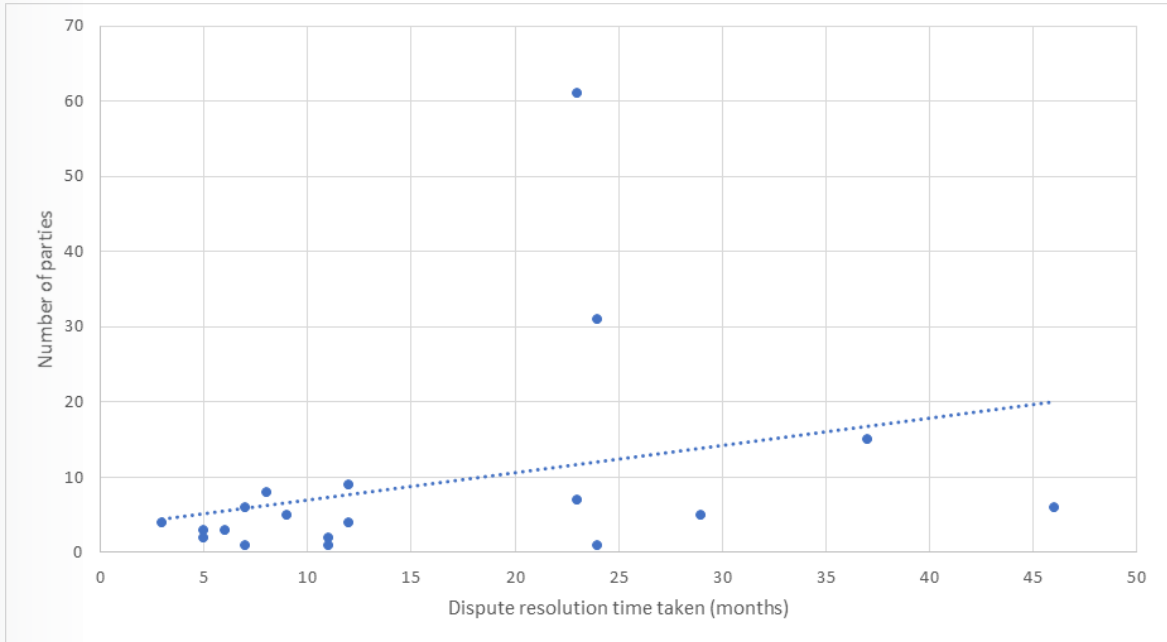


Figure 1 – Dispute resolution time taken vs number of parties involved.

The wide spread of the dots around the trend line is indicative of a weak relationship between the two variables. The scatterplot shows no correlation – the time taken to resolve a matter does not increase or decrease with an

addition to the number of parties involved. This held true even when the minority datapoints of 15 or more parties were excluded and the more numerous 10 or fewer parties dataset was analysed:

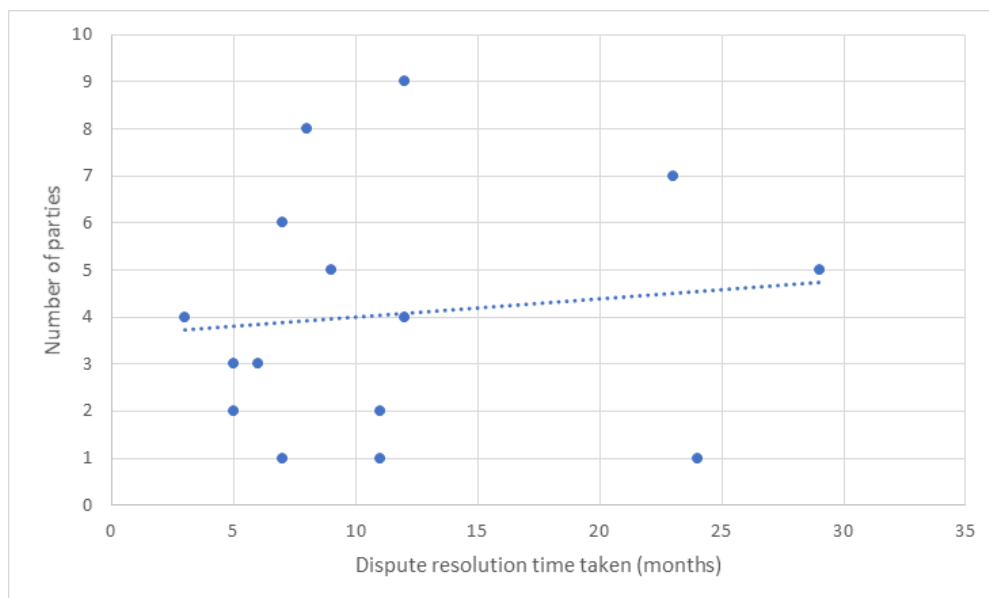


Figure 2 – Dispute resolution time taken vs number of parties involved for processes involving fewer than 10 parties.

WHAT DOES IT ALL MEAN?

It may be that the small dataset is the reason that there is no correlation between time taken to mediate an appeal to resolution and the number of parties involved. However, a 1986 American study of mediation groups (n = 95, sized two to 40 parties, averaging four parties) found that there was no evidence that the number of parties involved in mediation affected the success in reaching agreement (Gail Bingham *Resolving environmental disputes: a decade of experience* (The Conservative Foundation, Washington, 1986) at 99). This finding would seem consistent with the fewer than 10 parties dataset showing no correlation between party numbers and time taken to resolve an appeal (Figure 2). Although many plan change processes investigated had to be discarded ultimately for the purpose of this study (for lack of information availability), it was observed that the vast majority of processes were resolved through mediation, and only a small number proceeded to a Court hearing. It may be that there is no correlation because mediation is working effectively to resolve disputes, regardless of the number of people involved.

If there is indeed no correlation between mediation numbers and time taken to achieve resolution, why is that? Certainly, group dynamics and interaction theories as described above back up the original assumption of increases in the number of participants increasing the difficulty in achieving resolution.

One possible explanation is that the New Zealand Environment Court mediation process, and the mediators themselves, are very successful in achieving the goal of

reaching resolution. Although there is no set process or timeframes for mediation, the Court provides excellent guidance in suggested flexible methodologies as well as its skilled and trained Environment Commissioners to facilitate. The theoretical importance and influence of the mediator's role, as set out in the literature, certainly seems to be borne out in practice in the Court's mediation of appeals.

In the almost 30 years since the RMA came into force, it is likely the public has become generally familiar with the idea of resolving disputes prior to and outside of a full court process, particularly parties that have wide-ranging resource management interests and engage regularly with planning processes. This increased awareness of and engagement in alternative disputes resolution processes by parties involved may also be contributing to their success. In 2017 participation in mediation went from voluntary to mandatory, and this change seems to underline the value placed on mediation by the Ministry for the Environment as a successful way to resolve disputes.

Mediation directed by the Environment Court of New Zealand appears to defy the group dynamics theories around increases in group size making it more difficult to get a job done. As such, mediation should continue to be the primary vehicle for resolving appeal disputes for the Environment Court. Thought could be given to the place in the process where mediation occurs, and whether it could be utilised earlier, perhaps as part of the council process, to bring disputes to a resolution sooner.

BUNNINGS LTD V AUCKLAND TRANSPORT [2020] NZENVC 92

INTRODUCTION

The Environment Court's recent decision in *Bunnings Ltd v Auckland Transport* [2020] NZEnvC 92 concerned an application to the Environment Court for declarations that a road widening designation contained in the Auckland Unitary Plan (AUP) had lapsed, that Bunnings was not restricted in its use of the land by the designation, and that the inclusion of the designation in the AUP was an error.

Bunnings submitted that the designation had lapsed in November 2015 under s 185 of the Resource Management Act 1991 (RMA), prior to the Proposed Auckland Unitary Plan (PAUP) becoming operative in March 2017. As such the inclusion of the lapsed designation in the PAUP did not revive it and it was therefore included as an error in the AUP. The Environment Court should therefore exercise its powers under s 292 of the RMA to remove the designation from the AUP.

Auckland Transport, supported by Auckland Council, took the position that there was a submission, evidence and hearings process to confirm whether or not the designation should be included in the AUP, resulting in its inclusion.

BACKGROUND

The designation had been included in successive Waitakere City Council district plans to allow for road widening. Under the Local Government (Auckland Transitional Provisions) Act 2010 the designation was included in the district plans of Auckland Council and the lapse date of the designation was deemed to be 1 November 2015. During this time, responsibility for the designation was transferred from the New Zealand Transport Agency to Auckland Transport.

Bunnings purchased land to which the designation applies in January 2015 and in December of that year applied for, and was granted, land use consent to construct and operate a major commercial building on the site. Auckland Council granted the consent, which included an advice note that "the consent holder is responsible for obtaining all of the necessary consents, permits and licences".

In August 2016, the Auckland Council notified the decisions version of the PAUP and the Independent Hearings Panel recommended including the designation

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without modification. On 30 September 2016 Auckland Transport issued its decision on the designation, rejecting it in part by making Auckland Transport the requiring authority for the part of the designation in the former Waitakere City Council area and the NZ Transport Agency the requiring authority for the designation in the former Rodney District Council area. No appeals were lodged and on 10 March 2017 Auckland Council notified the decisions version of the AUP and the designation was included in this plan. Auckland Transport advised Bunnings in 2019 that it intended to proceed with the road widening, requiring the full width of the designation. Bunnings disputed the validity of the designation.

DECISION

In relation to the declaration that the designation had lapsed, the Court noted that it was required to weigh competing public policy principles. On the one hand section 184 of the RMA prevents designations unfairly blighting property indefinitely, where the requiring authority does not make substantial progress or effort toward giving effect to the designation. On the other hand section 83 of the RMA, which provide that operative plans shall be deemed to have been prepared and approved in accordance with sch 1, is important in order to achieve finality within the provisions of the operative plan.

The Court considered the decision of *Wylie v Clutha District Council* HC Dunedin CIV-2004-485-1839 and concluded it was bound by that decision. Section 83 operates together

with s 316(3) of the RMA to severely limit the time within which a challenge can be made about the plan processes, and the subject matter of that challenge.

The second declaration sought by Bunnings was that during the period AUP was in its proposed form (1 November 2015 to 10 March 2017) there was no designation which applied to Bunnings land because the challenge to the validity of it was not barred by the operation of s 83. Bunnings argued that the default lapse period of five years runs from the day the designation was first included in a district plan, and the roll-over into subsequent district plans of an unimplemented designation does not restart the lapse period. Auckland Transport, supported by Auckland Council, argued that the lapse date was not reset when the designation was rolled over into the PAUP, rather there was a submission, evidence and hearings process to confirm whether it should be included in the operative AUP.

The Court considered the intention of Parliament in drafting s 178(1) and in particular whether subs (1)(e) provided interim protection to requiring authorities wishing to carry over designations without modification into a proposed district plan (or only to the territorial authorities' own proposed new designations).

The Court agreed with Auckland Transport's view, that subs (1)(e) should be read in its plain language, meaning that when a territorial authority decides to include a requirement

for a designation in its proposed district plan, the requiring authority is provided with broad interim protection from third party activities. In support of this view, the Court pointed to s 181 where alterations to designations are to be processed as if they are a requirement for a new designation. In addition, if Parliament had intended subs (1)(e) only to apply to new designations, it would have explicitly referenced this intention as is clear when looking at the other subsections of the provision.

Having come to this conclusion, the Court concluded that there was no room for the operation of s 292 (remedying defects in plans). While there is a discretion to remedy defects in a plan which are faults, flaws or imperfections and are unintentional, the designation in question was intentionally and overtly included.

COMMENT

This case confirms the position that both modified and unmodified designations that are rolled over into a proposed district plan have interim protection until the date the proposed district plan becomes operative. The decision also serves as a reminder of the limits on revisiting provisions within an operative plan where they have been included using the Schedule 1 process.

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