

# **Private Plan Change Report**

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# Introduction

## Purpose of the report

This report has been prepared to provide information on the private plan change process, which was a new mechanism introduced under the Resource Management Act (1991) (RMA). Almost 10 years after its introduction the Ministry for the Environment considered it to be timely to look at how the process was working. The report forms part of the Ministry for the Environment's research programme that monitors how resource management processes are working and how practices can be improved.

The information in this report is likely to be of interest to council staff who receive requests for private plan changes, for applicants and their consultants who prepare private plan changes, and for other individuals and groups who wish to understand more about the process.

## Format

The report addresses five main themes. Section 1 begins with an outline of the origins of the private plan change process and its use to date. Section 2 of the report looks at how the private plan change process works and provides a diagram of the process. Section 3 outlines the legal issues that need to be considered in relation to the private plan change process and including the relevant sections of the RMA that apply to private plan changes and guidance from case law which has interpreted those provisions. Section 4 gives an insight on the workings of the private plan change process in selected geographical areas of New Zealand. This section discusses the types of developments that use the process, typical costs and timing for processing private plan changes, problems that arise in the process, the benefits of using the private plan change process, and comments on how effectively it is operating. Conclusions are drawn in the final chapter suggesting good practices for councils and applicants to improve the private plan change process as well as suggesting legislative amendments.

## Acknowledgement

The initial research on the private plan change process, which forms the basis of this report, was undertaken for a Master of Property Studies research dissertation by Pam Johnston in 1998. The 1998 research study was updated in 1999 and additional input for this report was obtained from resource management lawyers at Phillips Fox (Wellington), council officers, Ministry for the Environment staff and other people with an interest in the private plan change process.

## Disclaimer

Pam Johnston prepared this report, with support from the Ministry for the Environment. While this report does not necessarily express the views of the Ministry, we are keen to hear your opinions on this report and the issues raised in it. Although every effort has been made to ensure that this report is as accurate as possible, neither the Ministry for the Environment nor the author will be held responsible for any action arising out of its use. If the reader is uncertain about issues raised in this report then direct reference should be made to the Resource Management Act and further expert advice sought if necessary.

# 1 What was the Origin of the Private Plan Change Process?

## 1.1 Why was the private plan change mechanism introduced under the RMA?

The Resource Management Act (1991) introduced a new mechanism allowing individuals to promulgate their own change to a district or regional plan. Prior to the RMA, a plan change could only be initiated by a council and not by an individual or group. In general, the private plan change mechanism provides for private benefit initiatives that are not a priority for councils. Similar planning tools have been used in Australia and other countries overseas. In America a private plan change request can often expose a project to closer scrutiny by officials and lead to more stringent requirements for amenity and infrastructure contributions. Special interest groups have also found that this process allows an opportunity for participating in decision-making.

A review of the development of resource management legislation in New Zealand was undertaken in order to find the origins of the private plan change mechanism. The first attempt at having private plan changes made part of planning legislation was found in the law society's submissions to the Parliamentary Select Committee in respect of what became the 1977 Town and Country Planning Act. However, the law society's submission was not adopted as part of the 1977 planning legislation. Ten years on, in his review of the Town and Country Planning Act (1987), Tony Hearn found that there were many more people who wished to see legislative reforms allowing for private plan changes. The New Zealand Planning Institute was one of the key submitters seeking this modification, stating in its submission on the reform of the 1977 Act, as quoted in the Hearn report:

*“Initiation of scheme changes:*

*The opportunity should also be provided for Government Departments, State Owned Enterprises, groups and individuals to initiate changes to a district scheme. This would give proponents the right to request a change to a Scheme for assessment without having to rely on a specified departure or alternatively having to convince the local authority that the idea is both good and acceptable. ... This approach would also allow the local authority to be a truly independent arbiter in the process rather than the present system where the local authority is both the proponent and the adjudicator. Scheme change applications should be at the cost of an initiator. The Planning Act would need to establish the process and the scale of information required” (Hearn, 1987).*

The Planning Institute sought a private plan change process that would allow the following plan change options:

- a change of policies or ordinances on a geographic basis
- a floating zone change capable of being applied to any suitable site or area, with such a change being accompanied by pro-forma rules and a development plan
- a change associated with an exceptional proposal not anticipated at the time the plan was drafted.

Tony Hearn in his review also referred to other submissions made relating to the entitlement for privately initiated plan changes. The submission from Wilkins and Davies Limited, representative of a development perspective, supported the extension to allow private plan changes as evidenced in the following quote from the Hearn report:

*“The effect of this would be to involve planning authorities in an on-going series of responses to externally initiated proposals for changes to their planning scheme. It is highly likely that some planning authorities would resent being placed in such a response role rather than being the exclusive initiators of scheme changes but with time it would be hoped they would accept that the private sector is a vital partner in community development and through its internal and consultant resources can provide inputs that are well researched as well as being closely tuned to market/community desires and needs. The developer can be expected to bear the costs of these applications and this will shift cost to the private sector on a user-pay basis” (Hearn, 1987).*

As can be seen from the above extracts there was support from a number of groups for planning legislation reform to allow privately-initiated plan changes. As a result, Tony Hearn in his review report, recommended that the 1977 Act should be amended to allow for private plan changes.

The private plan change issues raised in Hearn’s review report in 1987 were further investigated within the Resource Management Law Reform process that ultimately lead to the drafting of the RMA. Mr Hearn’s proposal to increase flexibility in the planning process by allowing individuals to seek plan changes was seen as being consistent with an increased role for the community in the planning process. The submissions received on the resource management law reform were supportive of widening opportunities for individuals to participate in the planning process provided councils had the ability to control what was actually initiated as a change to the plan. However some concerns were expressed, particularly from planners in local and regional government, about opening up the process of planning to any person and in particular reservations were held about private changes to regional plans. Some parties suggested that all requests for private plan changes to regional plans should be channelled through the district level of government first before they were considered at regional level.

Cabinet adopted the Resource Management Law Reform Core Group’s recommendations relating to private plan changes at a meeting of the Committee on Reform of Local Government and Resource Management Statutes on 3 May 1989. At this meeting the Committee agreed:

*“that any person be enabled to seek changes to a regional or district plan subject to criteria restricting vexatious or trivial requests and a right of appeal on the council’s decision” ... and noted “that the increased flexibility gained by the provision for any person to initiate a scheme change needs to be balanced against the potential administrative burden that this imposes, and that if law drafting shows that this burden is excessive, then the decision to allow any person to initiate a scheme change may need to be reconsidered” (Cabinet minute ALG(89) M10/2, 3 May 1989).*

The Committee also agreed that the ability to initiate changes to regional policy statements should be limited to district and regional councils and to the Crown.

The principal reasons for seeking the creation of the private plan change mechanism were:

- to achieve greater flexibility in decision-making
- to achieve more speed in decision-making
- to allay the perception that the 1977 Town and Country Planning Act was acting as a restraint on worthwhile development
- to provide an alternative means for individuals to depart from the restrictive provisions of the 1977 Act
- to widen opportunities for individuals to participate in the planning process.

## 1.2 How widely has the private plan change mechanism been used to date?

The use of the private plan change mechanism is gaining momentum in New Zealand and in some areas it has become the key tool for determining the location of urban growth, rather than council initiated district plan controls or changes. However, there are also many districts and regions where the private plan change process has had very limited use, mainly where the councils are still at the proposed plan stage of their plan development process.

The only statistical information that has been collected on private plan changes in New Zealand is that recorded in the Annual Survey of Local Authorities conducted by the Ministry for the Environment. Questions on private plan changes were asked for the first time in 1997 in order to obtain base data for monitoring this provision over time. In that survey (published June 1998) the Ministry found that 109 private plan changes had been received throughout all New Zealand local authorities since the RMA was introduced in 1991.

The survey asked whether local authorities had received any requests for private changes to plans and to indicate whether they related to operative regional or district plans prepared under the RMA or to transitional plans prepared under the Town and Country Planning Act. The main trends from the 1997 survey are outlined below:

- 38 out of the 84 local authorities surveyed (45 percent) had received private plan change requests
- 14 of the 109 private plan changes (13 percent) related to plans prepared under the RMA, as at that time not many plans prepared under the RMA were operative
- 95 of the 109 private plan changes (87 percent) related to transitional plans prepared under the Town and Country Planning Act
- three private plan changes out of the total were to regional planning documents
- of the 83 private plan changes made to territorial authorities, 11 were applications made to plans prepared under the RMA and 72 were applications made to transitional plans
- 23 applications were made to unitary authorities, all of which were made to transitional plans.

As can be seen, most of the private plan changes were made to transitional district plans. However, as more plans move through the plan development process to become operative then the number of private plan change requests is likely to rise significantly. Two territorial authorities commented that they had received private changes to proposed district plans.

In the Ministry for the Environment's most recent annual survey (published June 1999) a total of 40 applications for private changes to operative regional or district plans were received during the 1997-1998 year. Most authorities are now in the advanced stage of the plan development process for plans prepared under the RMA. The status of the 85 plans produced by the 74 territorial and unitary authorities as at 1 March 2000 is:

- 9 plans are in draft form
- 14 plans are at notification stage
- 8 plans are at the hearings stage
- 29 plans are before the Environment Court
- 25 plans are now fully operative.

From the Ministry for the Environment monitoring survey of local authorities, the following conclusions can be drawn about the use of the private plan change process:

- most of the private plan changes to date have been made to transitional district plans where the authorities have been slow in preparing their proposed plans
- the use of the private plan change mechanism is increasing with 40 private plan change applications to operative regional or district plans throughout New Zealand authorities received to the year ending June 1998 compared with a cumulative total of 109 applications received in the preceding years
- a total of 149 private plan changes have been recorded by the Ministry as being received since the RMA was introduced
- most plans have now progressed well through the plan development process therefore the number of private plan changes will be likely to increase as more proposed plans attain operative status and changes are sought before the next plan review in 10 years.

## **2 What Steps are Involved in the Private Plan Change Process?**

### **2.1 At what stage can a change be made?**

Private plan changes can only be made to operative planning documents. This means that private changes can only be made to either a plan made operative under the Town and Country Planning Act 1977 (a transitional plan) or to a plan prepared and made operative under the RMA. A transitional plan is a plan prepared under the Town and Country Planning Act that remains in force until a new plan prepared under the RMA reaches the operative stage.

Under clause 25(4)(e) of Part II of the First Schedule to the RMA, a local authority is provided with the opportunity to reject a private plan change request where a policy statement or plan has been operative for less than two years. Uncertainty exists as to whether councils can accept private plan changes to proposed plans. Although the RMA does not provide a process for this case law indicates that some authorities are accepting private plan changes to proposed plans and then completing the processing of the private plan change once the plan is made operative.

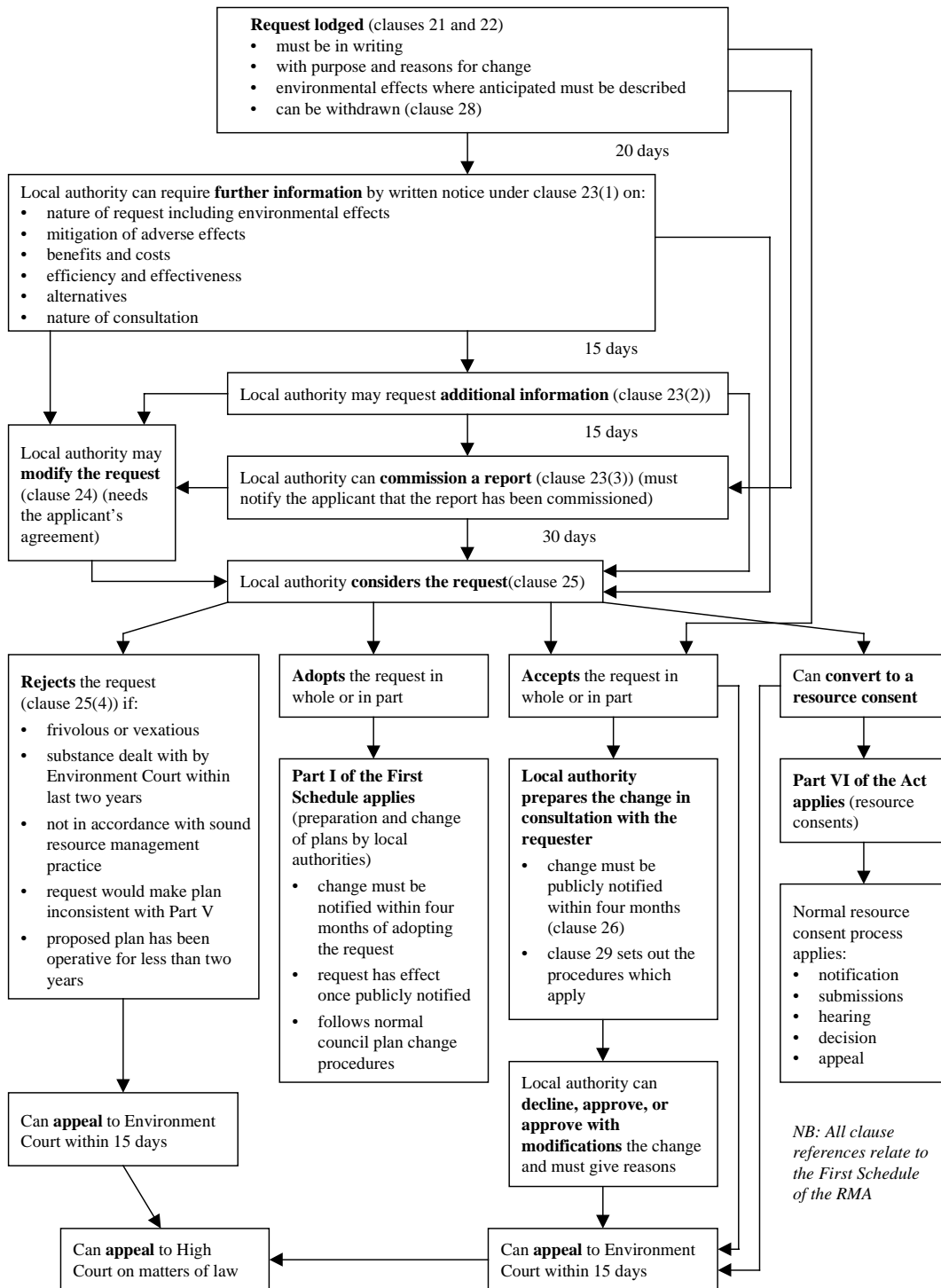
### **2.2 What process does it follow?**

Part II of the First Schedule to the RMA sets out the procedural matters for dealing with requests for changes to a district or regional plan. The full text of Part II of the First Schedule is contained in Appendix I, and a process diagram which shows the path a private plan change progresses through is set out on the following page. Many of the procedural issues relating to private plan changes are discussed in section 3.0 of this report in association with relevant case law that affects the interpretation of those provisions.

The key stages in the private plan change process are:

- preparing and lodging the private plan change request by the applicant or their adviser
- processing of the request by the local authority, including determining the need for further information, additional information and commissioning of reports in relation to the request
- providing more information by the applicant, if required
- local authority deciding on modification of the request (only possible with the applicant's permission)
- local authority considering request to decide whether to adopt the request in whole or part as a council request; accept the request in whole or part; convert the request to a resource consent; or reject the request (applicant may appeal this decision)
- publicly notifying the private plan change request followed by council hearing
- council making a decision on the private plan change request
- applicant or other party appealing the private plan change request if council declines it.

## The Private Plan Change Process



# 3 What Legal Issues Need to be Considered?

## Introduction

This section sets out the relevant sections of the RMA relating to the preparation and processing of a private plan change request. In addition, case law summaries have been provided to help clarify and interpret the RMA's private plan change provisions and identify some of the key issues that arise in the process.

The case law review has been undertaken from a computer database search of Data Services case law. Case notes from law journals have also assisted in the review. The case law is discussed below according to some of the key questions that arise about private plan changes and the corresponding sections of the RMA that apply to those questions. Some of the issues raised below have not yet been directly addressed within case law.

### 3.1 Who can request a private plan change?

- Section 73(2) states that “any person may request a territorial authority to change a district plan, and the plan may be changed in the manner set out in the First Schedule”. Note that “any person” is defined to include companies and incorporated organisations.
- Any person may request a change to a district plan or regional plan, including a regional coastal plan (clause 21(1)).

### 3.2 What form must the private plan change request take?

#### Clause 22

- The change must be in writing.
- The purpose of the change must be explained and reasons for it given. Where environmental effects are anticipated these must be described taking into account the matters listed in the Fourth Schedule.
- The degree of information provided is at the discretion of the applicant.
- A section 32 evaluation is not required to be provided by a private plan change request applicant.
- A council is not required to provide a section 32 evaluation before the plan change is notified unless the council adopts the change as its own.

### **3.3 What are the rules for providing further information?**

#### **Clause 23**

- The local authority can request in writing further information within 20 working days of receipt of the private plan change request.
- The local authority can request further information on matters such as environmental effects; mitigation of adverse effects; benefits and costs, the efficiency and effectiveness, and possible alternatives to the request; or the nature of any consultation undertaken if this information is appropriate to the scale and significance of the environmental effects anticipated from the change request.
- Some section 32 matters can be requested as part of further information under clause 23(1)(c) and also in reports commissioned under clause 23(3).
- If a local authority commissions a report in relation to the request it needs to notify the person who made the plan change request but the requester cannot appeal the decision of the council to commission the report, nor can that person determine the ambit of the report which is at the discretion of the council.
- There is no time limit in which the plan change requester needs to provide the further information requested by the authority.

### **3.4 Can a private plan change request be modified?**

#### **Clause 24**

- The local authority may modify the plan change request but only with the agreement of the person who made the request.

### **3.5 How does a local authority deal with a private plan change request?**

#### **Clause 25**

- The local authority has 30 working days to deal with the plan change request after either:
  - receiving the request or
  - receiving all required information or
  - receiving a report commissioned by council or
  - modifying the request.

- The local authority may either:
  - adopt the plan change request as its own
  - accept the request in whole or part
  - decide to deal with it as a resource consent or
  - reject the request, on certain grounds.
- The local authority must notify the person who made the request of their decision within 10 working days of considering the request under clause 25 and must give reasons for the decision.
- If a proposed plan has been notified and a private plan change is requested to the operative (transitional) plan then the private plan change only affects the operative plan and not the proposed plan. If council does not adopt the private plan change under clause 25(2)(a) then it does not have proposed plan status and would not take effect once publicly notified.

***Cracroft Residents Association Incorporated v Christchurch City Council C28/98***

This case involved a private plan change request to a transitional plan that had been made after the council had notified its proposed plan. The case did not obtain a fixture, as the private plan change had not been adopted by council under clause 25(2)(a) but only accepted under subclause (b) and therefore did not fall within the definition of a “proposed plan” under clause 10(3) of the First Schedule. Although similar to *Muir Park Corporate Ltd v Christchurch City Council C27/98*, in this case the Council had accepted the private plan change under clause 25(2)(b) and following notification had approved the change.

## 3.6 On what grounds can a private plan change be rejected?

### Clause 25(4)

- A plan change may only be **rejected**, in whole or in part, on the following grounds:
  - that it is frivolous or vexatious or
  - that the substance of the change has been dealt with by the local authority or the Environment Court within the last two years or
  - the change is not in accordance with sound resource management practice or
  - the change would make the plan inconsistent with Part V (other policies and plans) or
  - the plan to which the change is being made has been operative for less than two years.
- The grounds on which a plan change can be rejected have been deliberately restricted by Parliament. This raises the presumption that there is a legislative intention that people are entitled to apply for private plan changes and have their applications determined on their merits unless one of the grounds for rejecting the plan change is met.
- Case law illustrates that a private plan change request can also be rejected if services, such as roading, cannot be provided at a rate that the community can physically and economically cope with.

### ***Bell v Central Otago District Council C4/97***

A proposed plan change to rezone land was refused by the Council as the cost of road sealing could not be sufficiently offset by imposing a financial contribution condition on a subdivision consent. Dust nuisance was already a problem for residents on the access road to the subdivision and the dust levels would have increased if the proposed subdivision had proceeded. The subdivider was not prepared to pay for the road sealing and the Court did not wish to put the Council in a position where it would have to pay for the sealing. This decision followed *McIntyre v Tasman District W83/94* which commented that services such as roading should be achieved at a rate with which Council, representing the community, can physically and economically cope.

## **3.7 How long does a local authority have to notify the private plan change?**

### **Clause 26**

- The plan change must be notified within four months of agreeing to accept the plan change or within the period that the Environment Court directs.

## **3.8 What are the rules for appealing a local authority's decision relating to a private plan change?**

### **Clause 27**

- Where a plan change request is agreed to only in part, is refused, or is to be treated as a resource consent by the local authority, the requester can lodge an appeal against that decision to the Environment Court.
- The requester has 15 days from the receipt of the local authority's decision to lodge the appeal.

## **3.9 Who can withdraw a private plan change request?**

### **Clause 28**

- The person requesting the plan change can withdraw it at any time before the local authority notifies its decision.

- The territorial authority does not have the option of withdrawing a requested plan change without the agreement of the requester unless it has sent notice to the requester asking them to confirm they wish to continue, and have had no response within 30 working days.
- If there is a withdrawal of the request this must be publicly notified and reasons for the withdrawal set out.

### **3.10 What procedures need to be followed for private plan change requests?**

#### **Clause 29**

- Clause 29 sets out specific procedures which apply where a plan change request has been accepted under clause 25(2)(b).
- The person who made the request as well as any person who made submissions on the plan or change may appeal the council's decision on the private plan change.
- The local authority may initiate a variation at any time before its decision on the private plan change request, with the agreement of the person who made the request.
- Under clause 29(4) if a council accepts a private plan change request it has more scope to modify the change than if it adopts the request as its own where it is limited to the matters raised in the normal process of submissions.

### **3.11 What matters must be considered when assessing a private plan change request?**

#### **Section 74**

- The key factors that a territorial authority needs to consider when changing its district plan include:
  - the Council's functions under section 31
  - Part II of the Act
  - the duty imposed by section 32 and
  - any regulations.
- Other factors that the territorial authority must have regard to are set out in section 74(2) and include – any matter of regional significance, plans and strategies prepared under other Acts, planning documents recognised by iwi authorities which are affected by the district plan, relevant historic places register entries, regulations relating to taiapure of fisheries conservation or management, and consistency with the plans or proposed plans of neighbouring territorial authorities.
- An amendment to the RMA in 1997 added a subsection to section 74, which stated that a territorial authority must not have regard to trade competition when preparing or changing a district plan.

- The key matters to be considered by the territorial authority in changing its plan are addressed in turn below and case law relating to the respective decision-making criteria is outlined.

## **Section 31 – Functions of territorial authorities under the RMA**

- One of the functions of a territorial authority under section 31 is to establish, implement and review objectives, policies and methods “*to achieve integrated management of the effects of the use, development, or protection of the land and associated natural and physical resources of the district*”. A territorial authority is also responsible for the control of actual or potential effects of the use, development, or protection of land, including hazard mitigation; the control of subdivision of land; the control of noise effects and mitigation of those effects; the control of the effects of activities on the surface of water in rivers and lakes; and other functions specified under the Act.
- One function a council has in giving effect to the purpose of the RMA is the integrated management of effects. The issue of reverse sensitivity arises in assessing whether integrated management of effects is achieved. Reverse sensitivity describes the effect that development of one kind may have on activities already occurring in an area. It usually results from the people involved in an activity that is newly established, complaining about the effects of existing activities in an area. Private plan changes often involve reverse sensitivity issues, for example where new residential development may wish to establish in farming or horticultural areas where noise, odour and chemical effects are already in existence.
- To avoid reverse sensitivity issues, rural-residential land may be more efficiently provided for by rezoning land adjacent to existing rural-residential or residential land.

### ***C J McMillan v Waimakariri District Council C87/98***

This application proposed a private plan change for a rural-residential subdivision near Fernside involving rural land that was adjacent to two pig farming operations. The issue of reverse sensitivity arose as submitters were concerned that if the rural-residential subdivision went ahead residents there would be likely to complain about, and even attempt to prohibit, the existing pig farming operations. The plan change did not propose measures that would mitigate the reverse sensitivity effects which might result from the plan change. In this case the Court concluded that, on balance, the private plan change should be declined because it did not meet the purpose of the Act. One of the overriding factors in the decision was that the rural-residential development would not have been compatible with the existing pig farming operations next door.

## **Part II – Purpose and Principles of the RMA**

### **Section 5 – Purpose**

- Private plan changes must meet the purpose of the Act. The purpose of the RMA as set out in section 5 is “*to promote the sustainable management of natural and physical resources*”. Section 5(2) defines the meaning of sustainable management and includes:
  - sustaining natural and physical resources for future generations and
  - safeguarding the life-supporting capacity of air, water, soil, and ecosystems and
  - avoiding, remedying, or mitigating any adverse effects of activities on the environment.

### ***Boon v Marlborough District Council [1998] NZRMA 305***

In this private plan change for a specific forestry industry activity zone the Court looked at whether the functions of the council achieved sustainable management through the zoning in a proposed plan change. The Court held that the proposed zoning did not meet sections 5(2) and 7(b) of the RMA. In doing so the Court considered whether the proposed zoning achieved integrated management of the effects of the use, development or protection of the land and whether it controlled the potential effects.

### ***McIntyre v Tasman District Council W83/94***

A relevant factor to be assessed in considering a plan change that would allow for increased subdivision is the provision of services such as water, sewerage and roading. These services should be achieved at a rate that the council representing the community can physically and economically cope with, otherwise the purpose of the RMA is not fulfilled. Extension of services should be carried out in a co-ordinated progression. Developments proceeding on an ad hoc basis could not be sustainably managed and would not therefore meet section 5 of the Act.

## **Section 6 – Matters of national importance**

- Section 6 sets out the matters of national importance which must be recognised and provided for and includes:
  - preservation of the natural character of the coastal environment, wetlands, lakes and rivers from inappropriate subdivision, use and development
  - protection of outstanding natural features and landscapes from inappropriate subdivision, use and development
  - protection of areas of significant vegetation and indigenous habitats
  - maintenance of public access to coastal areas, lakes and rivers
  - the relationship of Maori and their culture and traditions with ancestral lands, water, sites, waahi tapu and other taonga.
- The need to protect land of high value for agriculture is not a matter of national importance under the RMA as it previously was under the Town and Country Planning Act 1977.

### ***Weatherwell-Johnson v Tasman District Council W181/96***

In this case the Environment Court noted that the need to protect land of high value for agriculture is no longer a matter of national importance under the RMA and that the matters in section 6 take precedence. This appeal was refused on the grounds that the proposal to allow for a residential, service and recreation zone at Motupipi Hill would not preserve the natural character of the coastal environment as required under section 6(e) and would not protect an outstanding landscape and natural feature from inappropriate development as required under section 6(b). In addition, what was proposed was not considered to be an efficient use of natural resources under section 7(b) as the site, Motupipi Hill, is isolated from any nearby settlement and was not at that time serviced by a sewer or water main.

### ***Canterbury Regional Council v Selwyn District Council W142/96***

This decision related to a private plan change that sought to rezone a block of rural land that is contiguous with the residentially developed township of Lincoln. In this case the Court noted that section 5 does not place primacy on the protection of high quality soils, and that soil quality is just one of the factors to be considered under section 5. Although section 5(2)(a) can relate to food production it must also relate to the provision of homes, shelter and so on. Section 5 provides for the protection of the environment for human beings as well as the protection of resources for human beings.

The Minister for the Environment filed submissions and appeared as a party to this appeal where the Minister opposed the stance of the Regional Council, which was seeking to protect land of high versatility for the production of food.

### ***Becmead Investments Limited and others v Christchurch City Council A88/96***

Section 5 of the RMA does not require the protection of high quality soils as such, although that may be the outcome that is most consistent with the RMA's purpose in some cases. Section 5(2)(b) relates to the life supporting capacity of air, water, soil and ecosystems in a general sense and not soil quality specifically.

- Even if there is no physical presence of archaeological sites but the land is considered by Maori to be tapu or contain burial sites of other taonga then this is enough to prevent subdivision of land under section 6(e).

### ***CDL Land New Zealand Limited v Whangarei District Council A99/96***

This case involved a private plan change that sought to subdivide a rural block of land near Kamo for low-density residential development. Council had declined the change on the grounds of inadequate consultation with tangata whenua. However, the Court rejected the claim that the plan change should have been cancelled on the grounds of inadequate consultation, even though the consultation had not been successful. They ruled that in the absence of a response from tangata whenua, despite numerous attempts, an applicant was entitled to presume tangata whenua had no matter they wished to discuss. Despite this ruling, the private plan change appeal failed as the Court ruled that if land is tapu or contains burial sites, sacred trees or creeks, this is enough for the subdivision of land to be prevented under section 6(e), even if there is no physical evidence of archaeological sites.

## **Section 7 – Other matters**

- Section 7 sets out other matters which must be taken into account in decision-making and includes:
  - kaitiakitanga
  - efficient use and development of natural and physical resources
  - maintenance and enhancement of amenity values
  - intrinsic values of ecosystems
  - recognition of heritage sites, buildings, places and areas
  - maintenance and enhancement of the quality of the environment
  - any finite characteristics of natural and physical resources
  - protection of trout and salmon habitats.

## Section 8 – Treaty of Waitangi

- Section 8 requires that the principles of the Treaty of Waitangi shall be taken into account in relation to managing the use, development and protection of natural and physical resources.

## Other factors to be considered by the territorial authority in making a decision on a private plan change

- Under section 74 the territorial authority when considering a plan change does not have to take into account the transitional or proposed plans.

### ***Kennedy’s Bush Road Neighbourhood Association v Christchurch City Council W63/97***

In this case the Court ruled that when a territorial authority is considering plan changes it does not have to take into account the transitional or the proposed plans. As the provisions of section 74 are mandatory but not exhaustive, the proposed plan’s provisions can be considered but do not have to be. If it is a transitional plan that is being changed then what is more important is if the change is appropriate in RMA terms and whether the plan should be changed.

## Duty imposed by section 32

- Section 32 of the RMA sets out duties to consider alternatives and assess benefits and costs which need to be considered before a plan change is adopted in order to help determine whether it achieves the purpose of the Act.
- Section 32 is concerned with:
  - the extent to which the change is necessary in achieving the purpose of the Act
  - other means which could be used to achieve the same end
  - reasons for and against adopting the proposed plan change
  - evaluating the benefits and costs of the principal alternative means to the plan change
  - showing satisfaction that the proposed plan change is necessary in achieving the purpose of the Act and is the most appropriate way of exercising the function having assessed the efficiency and effectiveness of the plan change compared to other means.
- In the case of a privately initiated plan change a local authority does not have to address section 32 duties until it makes a decision on the plan change under clause 29(4) of the First Schedule. Under clause 29(4) a council may decline, approve, or approve with modifications its decision on a plan change. However, council-initiated changes must have a section 32 record available at the time the plan change is publicly notified in accordance with section 32(5).

### ***Marlborough Ridge Limited v Marlborough District Council C111/97***

The Court in this case ruled that a plan change only needs to be preferable to the existing plan in resource management terms to be “necessary” and most appropriate for the purpose of the RMA to pass the threshold test set out in section 32(1)(c).

### ***GUS Properties Limited v Marlborough District Council W75/94***

This appeal involved a private plan change to relocate an existing supermarket to a new site with a fast food outlet in Blenheim. The Tribunal dismissed the appeal and sent a clear message to potential appellants that the Act cannot work unless a robust approach is taken to it. Section 32 was raised in this case and Judge Treadwell observed that section 32 is concerned with the method of the plan change rather than the activities.

The Tribunal held that section 32 does not contemplate that the consent authority should compare one site with another, nor proposed ordinances with existing ones. Rather this section obliges the authority to consider whether the plan change is necessary to allow the applicant to carry out the proposed activities that are currently prevented by the present plan. The private plan change should be considered as an enabling device.

### ***Imrie Family Trust v Whangarei District Council [1994] NZRMA 453***

This appeal involved rival shopping centres in Tikipunga, Whangarei. The owner of the smaller shopping centre sought to rezone two adjacent residential properties to extend the shopping centre by way of a private plan change. The other shopping centre owner was located 500 metres from the site. The Tribunal accepted that there was a need to change the district plan but ruled that the proposed private plan change did not meet the section 32 requirements. The Tribunal considered that the change failed the section 32 tests because it was not necessary, nor the most appropriate means, having regard to its efficiency and effectiveness relative to other means, to extend the retail business. A Council review of the district plan's provisions for retail activities was suggested as the best means of achieving a change.

The Tribunal further ruled that private plan changes may not have objectives as broad as providing for the social wellbeing of communities and that the broader scope of a plan review would allow commercial interests and residents to participate in the change.

- Economic analysis has been found to be relevant in the assessment of efficiency under section 32 for some private plan changes.

### ***Boon and others v Marlborough District Council [1995] NZRMA 305***

In this case the Environment Court accepted the relevance of economic analysis of a proposed plan change in terms of section 32 requirements and also the relationship with sections 5(2), 7(b), and section 32. The Court held that the proposal for a special zone for forestry industry activities would encourage productive inefficiency by hindering competition from non-zoned activities and discouraging forest processors from selecting their optimal site. It held that the proposed zoning did not meet sections 5(2), 7(b) and 32 of the RMA as the proposal was not the most efficient and effective means of exercising council's functions. The Court referred to *Wellington International Airport Limited v Wellington City Council W102/97* where it had accepted the relevance of considering economic efficiency, where market forces were relied upon to encourage the most productive use of resources.

### ***Marlborough Ridge Limited v Marlborough District Council C111/97***

The Court noted that all aspects of efficiency are "economic" by definition as economics is about the use of resources generally. However, the Court expressed some doubts about whether the benefits of a private plan change proposal for its promoters are an irrelevant consideration in terms of section 7. Parliament must have intended that the advantages of "efficient use" be considered by introducing section 7(b).

## Section 74(3) – Trade competition not a matter to be considered

- The 1997 amendment to the RMA introduced a new subsection (section 74(3)) under the matters to be considered by a territorial authority which states that in preparing or changing any district plan the territorial authority must not have regard to trade competition.

### ***Queenstown Property Holdings Limited and others v Queenstown Lakes District Council C11/98***

In this case a developer (Aeneid) had applied for a private plan change so that a supermarket on a site outside Queenstown's CBD would become a controlled activity under the transitional plan. A supermarket was provided for as a permitted activity on the site in the proposed district plan which was at the stage of submissions being heard. The Council adopted the plan change and granted consent to it as well as a resource consent for the same proposal, both of which were subsequently appealed and were confirmed on appeal subject to minor modifications. In this case the appellants were all trade competitors (apart from the applicant who was also an appellant) and the Court held that competing property owners are just as much trade competitors as shop operators are.

## 3.12 At what stage can a plan be changed?

- The RMA permits a change to a plan at any time.

### ***Countdown Properties (Northlands) Limited v Dunedin City Council and others [1994] NZRMA 145***

In this significant case the High Court confirmed that the RMA permits a change to a district plan at any time. The Tribunal had made a declaration that any person can request a change to an operative plan and that the Council may promote the change even if it only has a transitional district plan in place rather than a district plan prepared under the RMA. In this case the Court noted that plan changes which had more than minimal planning worth should be dealt with on their merits unless they were sought within a limited time period before a review.

- Proposed plans can only be varied not changed.

### ***Kennedy's Bush Road Neighbourhood Association v Christchurch City Council W63/97***

In this case the Court noted that a privately initiated plan change does not come within the ambit of section 74(1) which relates solely to the functions and powers of the local authority as initiator. The Court noted that section 74 provides for a situation where a district plan is being prepared or an operative district plan is being changed. It states that section 74 cannot apply to a proposed plan as a proposed plan can only be "varied" not "changed".

- There is some uncertainty as to whether councils can accept private plan changes to proposed plans. The RMA does not provide a process for this but case law indicates that some authorities are accepting private plan changes to proposed plans and then completing the processing of the private plan change once the plan is operative.

***Prospectus Nominees v Queenstown-Lakes District Council [1996] NZRMA 552***

The Planning Tribunal in this case held that the provision for privately requested changes to district plans can only apply to an operative plan and not to a proposed district plan.

Similar observations have been made in *Shell Oil New Zealand Limited v Lower Hutt City Council W70/91* and in *Hall v Rodney District Council [1995] NZRMA 537*. However, under clause 25 of the First Schedule the territorial authority was not able to reject the request because the grounds for doing so are strictly limited to those specified in clause 25(4). Council was found to be correct in proceeding to notify the change but could not actually “change” the plan until it became operative. The Tribunal also considered that it was common-sense for councils to postpone submissions on a private plan change until after the district plan had been made operative. The Tribunal held that the request for the plan change had been premature in this instance as the proposed plan was not operative when the request was made.

- Should the plan change be dealt with in an upcoming district plan?

***Kaitiaki Tarawera Incorporated v Rotorua District Council A7/98***

In this case the appellant had sought extensive changes to the proposed district plan which related to lakes within the council’s jurisdiction. The council preferred to leave the plan change until the plan had become operative. However, the Court held that because the matters of concern to the appellant went to the heart of the purpose of the RMA, that the proposed district plan should be varied to give effect to the purpose of the Act before the plan became operative.

***Hall v Rodney District Council A78/95***

This appeal related to a private plan change to enable a landowner to develop 200 houses on the property in accordance with a concept plan. The council publicly notified the plan change but decided not to implement it. The Auckland Regional Council opposed the appeal as it considered that the proposal should be dealt with in the upcoming district plan, regardless of the merits of the proposal itself and relying on *Imrie Family Trust v Whangarei District Council [1994] NZRMA 453*.

The Tribunal concluded that the plan change should be dealt with in the context of the appeal and subsequently upheld the change. In its decision on whether the plan change should be considered the Tribunal in this case held that:

*“... on a privately-promoted plan change a judgement needs to be made whether the most appropriate means of achieving the statutory purpose is by the proposed change or by some other method such as on a forthcoming review. A relevant consideration in making the judgement is that the Resource Management Act provides (as the former regime did not) for privately-initiated plan changes, so a general attitude of refusing such changes on the basis of a forthcoming review could frustrate the opportunity that Parliament has deliberately made [cf Countdown Properties v Dunedin City Council [1974] NZRMA 145]. Other relevant considerations are relative efficiency and effectiveness (see section 32(1)(c)); extent of implications for a wider area [Foodstuffs v Dunedin City Council (1993) 2 NZRMA 497 and Imrie]; possible prejudice to other interests (Foodstuffs); and the need for general review (Imrie). That is not necessarily an exhaustive list; nor will all those considerations necessarily be relevant in very case” (page 12).*

- Private plan changes can be made to transitional plans.

***Kennedy’s Bush Road Neighbourhood Association v Christchurch City Council W63/97***

A transitional plan can be changed and if the change is appropriate in RMA terms, then what is relevant is whether the plan should be changed and not the content of the transitional plan.

- When a private plan change request is very near to the timing of the proposed plan notification and is not consistent with the proposed plan then appeals will not be heard.

***Muir Park Corporate Limited and Another v Christchurch City Council C27/98***

This case related to the decision on an application for a fixture at the Environment Court. The Court refused the application because the private plan change had been sought to the transitional plan and that plan had been overtaken by the proposed plan process. The private plan change was for a rezoning proposal but the proposed plan did not support the proposed change. In addition, as the submissions on the proposed plan were due to be heard in the very near future, the Court held that it was not appropriate to hear the reference at the time of the request.

- Private plan changes are intended to avoid the review paralysis involved in the plan development process and applicants for private plan changes are entitled under the RMA to rapid determinations.

***Kennedy’s Bush Road Neighbourhood Association v Christchurch City Council W63/97***

The RMA provides for a person who has commenced proceedings under the RMA to receive a decision as soon as is practicable as the private plan change process is intended to avoid “review paralysis”. This provides a lesson to councils in that they should not be slow in processing private plan change requests as they are a legitimate tool provided by the RMA.

### **3.13 What is the difference between “adopting” and “accepting” a private plan change?**

#### **Section 72 Resource Management Act Amendment 1997**

- The difference in the meaning of the wording adopt versus accept was clarified in an amendment to clause 25(2) of the First Schedule of the RMA in 1997. This amendment sought to clarify the distinction between “adopting” and “accepting” a plan change request.
- The term “adopt” means the private plan change becomes a change or plan made by the local authority itself which must be publicly notified and is subject to Part I provisions of the RMA.

- The term “accept” is used where a private plan change is made and the local authority agrees that the plan change can proceed to notification and follow the private plan change decision-making procedures set out in Part II of the First Schedule of the RMA.
- It is not clear under the legislation whether a private plan change can be modified by a local authority if the local authority adopts the private plan change as its own and no submissions have been received.
- If a local authority decides to adopt a private plan change rather than accept it this limits the involvement of the person making the private plan change request in the process. There is no obligation for the local authority to consult the requester if it adopts the plan change but the local authority does need to consult with the requester, when preparing the change, if it accepts the private plan change.

### 3.14 When are costs awarded by the Environment Court in relation to private plan changes?

A number of cases relating to private plan changes have now had cost awards made, a few examples are provided below:

- Councils should be aware that if they accept a private plan change then they bear some responsibility for it and cannot expect an award of costs if it is later turned down at appeal.

***CJ McMillan Limited v Waimakariri District Council C70/99***

In this case a private plan change was declined as it did not propose any measures to mitigate adverse effects and would not have adequately met the purpose of the Act. This plan change had been promoted to pursue the referrer’s private interests. The Council had to bear its own costs as it had accepted the private plan change and therefore had some responsibility for it. The appellant was ordered to pay costs to the submitters who won on appeal.

- Councils should not involve themselves with planning trivialities of a private plan change and then use the hearing and appeal forums for full-scale arguments of RMA principles.

***Canterbury Regional Council v Selwyn District Council W57/97***

In this case the Regional Council was ordered to pay the applicant costs of \$15,000 and the district council costs of \$7,000 (compared with the costs of \$20,859 and \$33,943 respectively incurred). The Regional Council had concerned itself with planning trivialities and chose to use a private plan change application involving a small parcel of land at Lincoln as a forum for a full-scale argument of high quality land as it relates to the principles of the RMA.

- If an appellant withdraws an appeal very close to a hearing date and other parties have already prepared their evidence the appellants may be ordered to pay part of the cost of the preparation of the evidence.

***Humphrey RJ & MJ and Humphrey Trust No 2 v Whangarei District Council A75/98***

In this case the appellants withdrew their appeal very close to the date of the hearing. The appeal was to a private plan change that had been granted by council. Both the council and the applicant had prepared their evidence by this late stage and consequently the appellants were ordered to pay both parties part of the costs they had incurred.

### ***Gallagher v Banks Peninsula District Council W31/94***

The respondent council had withdrawn their opposition to a private plan change appeal four days before the hearing date and the appellant seeking the change sought costs. The Tribunal held that section 285(2) allowed the discretion to award costs where proposed changes had not proceeded to a hearing. The implications of this case were that councils should deal with private plan change proposals swiftly, despite uncertainties as to the proper approach. Otherwise councils could be liable for appeal costs unless they are prepared to proceed to a hearing.

## **3.15 When is a private plan change the appropriate tool to use?**

- An applicant can apply for both a private plan change and a resource consent at the same time for the same proposal. The RMA allows both private plan changes and resource consents and does not display a preference for one procedure over the other.

### ***Queenstown Property Holdings Limited v Queenstown-Lakes District Council [1998] NZRMA 145***

In this case the developer sought and was granted both a plan change and a resource consent. As the application was made 10 months after the proposed plan had been notified the Court did not consider the development was an ad hoc grant of land use consent, particularly as the proposal would have been a permitted activity if the proposed plans provisions were confirmed. In this case a private plan change and a resource consent were both applied for to provide for the proposed development and the resource consent application was considered as if the proposed private plan change was not applicable.

### ***New Zealand Rail v Marlborough District Council [1994] NZRMA 70***

This case involved a major port development that had significant implications beyond the site and was dealt with by way of a resource consent application for a non-complying activity. In this case the High Court indicated that the RMA expresses no preference for either plan change or resource consent process and that the applicant is free to choose its procedure. However, this case differed from others such as *Campbell v Southland District Council* as New Zealand Rail's proposal for a resource consent was not contrary to the relevant planning instruments and the same level of information was made available that would have been advanced for a plan change. The Court also noted that if the application had failed to meet the section 105(2) criteria then the applicant would have been free to pursue a private plan change.

- Where there is a major policy change between a transitional and a proposed plan then the change should be dealt with at the plan review stage and not by way of a resource consent.

### ***Hodges v Dunedin City Council W25/97***

In this case the Court commented that where there is a major policy change between a transitional and a proposed plan then the policy change should not be dealt with by way of an intervening resource consent decision but should wait until the policy is determined by the plan review.

- Where a private proposal is contrary to several objectives or policies in a district plan or departs significantly from the provisions of the plan then a private plan change is considered to be a more appropriate tool than a resource consent.

***J A Campbell and Cross Air Spread Limited v Southland District Council and B W Walker (W114/94)***

The applicant sought a resource consent to establish an international airport in rural Southland. The Tribunal ruled in this case that the proposal should have proceeded by way of a private plan change as the proposal was contrary to number of objectives and policies in the district plan and further information may be made available through the plan change process.

***R G Hamilton, P J Hamilton and E J Thomson v Queenstown Lakes District Council (C79/94)***

In this case the Tribunal made it clear that proposals which depart significantly from the provisions in the plan should be dealt with by way of a plan change request rather than a resource consent in order to ensure the integrity of the plan. This case was followed in the *Campbell* case above.

- Where a private proposal would have significant effects on a locality then a private plan change is considered more appropriate than a resource consent application.

***Robinson v Ashburton District Council W92/94***

In this case the Tribunal stated that a plan change, rather than a resource consent, is the most appropriate course of action where the proposal has the potential for significant effects on the locality in general, and therefore the existing provisions of the district plan. This is irrespective of whether the proposal is initiated by a council or an applicant.

# 4 How is the Private Plan Change Process Operating?

## Introduction

The following section provides an insight into the workings of the private plan change process in selected local authorities around New Zealand. A total of 50 private plan change requests were investigated across six local authorities in the Canterbury and Nelson/Marlborough areas. Data sheets recording information about the private plan changes were completed. These geographical areas were selected because the number of private plan changes in these areas was higher than in other local authority areas across the country. Interviews were also conducted with council staff and with consultants who prepare private plan change requests on behalf of applicants. The research was undertaken in 1998 and discussions were held with council staff to see if trends in the areas of study had changed during 1999.

### 4.1 What types of developments are private plan changes being used for?

The research found that almost all of the private plan change requests (94 percent) related to some form of rezoning of a particular parcel of land, with the other plan changes involving an alteration to a development plan, a change to zone rules, and a road re-alignment.

The largest proportion of private plan changes involved the rezoning of land from rural to residential (40 percent) followed by rezonings from rural to rural-residential (26 percent). The remaining private plan changes related to rezoning of industrial sites, provision for new activities such as industrial processing in rural areas and bulk retail in commercial areas, alterations to development plans, a new town, a road realignment and changes in the densities for site development.

In Selwyn and Waimakariri Districts most of the rezonings were from rural to rural-residential or rural to residential. Christchurch City had a mix of rezonings with the majority being rural to residential for urban expansion of the city, and others including rezoning of industrial to residential and some commercial to residential. Marlborough District also had a mix of rezonings including changes from industrial to commercial, rural to residential to allow for urban expansion of Blenheim and rezoning of rural to tourist development. Tasman District's private plan change requests were mainly for non-complying subdivisions seeking rezoning from rural to rural-residential or rural to industrial/mixed-use zoning. Nelson City's private changes related to rezoning of industrial to residential or commercial and one rezoning of a coastal reclamation area to industrial.

Some examples of the types of developments that used the private plan change process given by the consultants interviewed were:

- a subdivision to provide for residential expansion of a small rural town which used a structure plan approach and involved a range of residential lot sizes, as well as apartments and community facilities
- the conversion of a former freezing works site to allow for residential expansion

- rural zone changes to provide for tourist activities and accommodation and residential lots
- the creation of a business park to include light industry, servicing, warehousing, bulk retailing, offices and a motorway service centre
- a new town development to accommodate 5000 people
- a wide range of rural-residential developments.

## **Were the plan changes site-specific or policy-wide?**

Almost all private plan changes sought site-specific changes rather than policy-wide changes in a plan. This was the case for both the council records reviewed and for private plan changes which consultants had dealt with.

## **Land area involved in the private plan changes**

It was found that private plan changes generally involve large areas of land, not just because of the nature of the change but also because of the costs associated with the process. There was a tendency for more private plan changes in rural areas than in urban areas, primarily because wider ranges of activities are permitted in urban areas. The cost of a private plan change also meant that it was generally only economic for larger scale developments.

Of the 50 private plan changes reviewed on council records, only 14 percent of the changes involved sites less than one hectare, 20 percent covered sites between 1 and 5 hectares in area, and 16 percent were on sites between 5 and 10 hectares in area. Fifty percent of the private plan changes were for sites of 10 hectares or less. Approximately one quarter of the plan changes were on sites between 20 and 50 hectares in area. On a larger scale 5 plan change sites (10 percent) were larger than 50 hectares in area, with the site of 1 of those changes being larger than 300 hectares. Two examples were given by consultants of large sites which were subject to private plan changes, one being the Pegasus Bay new town development at Woodend which involved a 400 hectare site and the other a residential subdivision at Rolleston comprising 530 hectares.

## **4.2 What are the main reasons for using the private plan change process?**

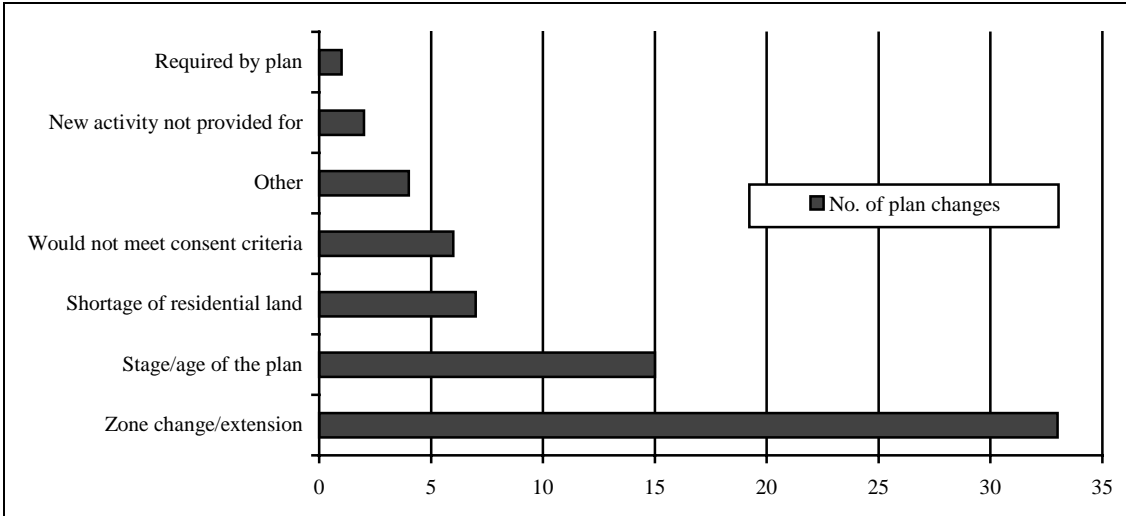
Reasons for use of the private plan change process were discussed with consultants and assessed from council records on private plan changes.

A principal reason given by consultants for use of the private plan change process was that the activities were often non-complying and they would not have met the section 105 tests under the RMA, in many cases being contrary to the objectives and policies of outdated transitional district plans. In addition, if a resource consent cannot be obtained for the proposal, the private plan change mechanism is seen as the only alternative. Consultants also commented that in some cases a risk assessment is conducted at the outset and the private plan change mechanism is found to be less risky than the option of having a resource consent declined. In some instances, resource consents are pursued in the first instance and councils may direct the applicant that a private plan change request is a preferable option from their perspective. The need for a zone change or extension of an existing zone, usually to provide for additional

residential or rural-residential development, was the driving force behind many of the private plan changes mentioned by consultants.

Some of the principal reasons provided on the council files for applicants to use the private plan change process are set out in Figure 1 below. In some cases there was more than one reason for using the private plan change process. The plan change record sheets show two thirds of the changes (66 percent) were changes seeking a change to a zoning or an extension to an existing zoning, while others were new activities requiring a new zone to be created. Other important reasons for use of the process were the stage/age of the plan, the inability of the proposal to meet the criteria for granting a resource consent, and the need for additional residentially-zoned land.

**Figure 1: Reasons for private plan change**



### What are the other options to the private plan change process?

Consultants were asked if they thought there were any alternative options to the private plan change process that could have achieved the same end result for their client. The main responses were that if a resource consent could have been successfully achieved then the consent process would have been used. However, there were usually factors involved in the proposals such as the intensity of the development or environmental issues, like flooding problems, which would preclude the proposal from gaining a resource consent where it was a non-complying activity.

Another option for some private plan changes was for the applicant to wait for the proposed plan to be notified and make a submission seeking to provide for the proposed development. Some consultants found that by undertaking a private plan change more favourable treatment of the proposal was allowed when it came to the proposed plan process. Others noted that they had to proceed with a private plan change because they could not wait for the proposed plan submission process. In other cases, where the private plan change was lodged near to the time of the proposed plan being notified consultants found that councils sometimes carried the proposal forward into the proposed plan.

It is evident that a continuum of opportunities exists for developers and individuals to achieve their desired development aims. At one end the easiest option would appear to be lodging a submission on a proposed district plan, with the next easiest option being to undertake a private plan change and the most difficult option being to attempt a resource consent for the development. However, this scale may vary depending on the nature of the proposal. One example was given of a development proposal in the Canterbury area where the rezoning of a large block of land was achieved by way of a submission on a proposed district plan. The benefit for the applicant of using the submission process was that, although the proposed plan was publicly notified, affected parties were not identified and therefore not alerted to the zone change. In addition, very little information was required to be provided for the submission on the proposed plan compared with the information requirements for a private plan change or a resource consent application.

## **Was timing a key factor in choosing the private plan change process?**

Consultants were asked if timing was a key factor in choosing to use the private plan change process. Several consultants commented that the private plan change process takes a long time, is more onerous than the resource consent process, and is more costly. In addition to the time it takes to get through the private plan change process, proposals often require additional consents for such things as earthworks which can add to the overall time taken to obtain approvals. The private plan change process is not regarded as a quicker process than the resource consent procedure. However, some benefits of the private plan change process are that with larger developments ideas change over time and a new zoning rather than a resource consent allows flexibility, and the developer can have more control over the process.

Timing was seen as a key factor in terms of the stage of the plan, the decision to use the private plan change process was often made in relation to when the proposed plan was to be released. In some cases applicants are waiting for proposed plans to become operative before a decision can be made on their private plan change request and the “change” can be made to the plan.

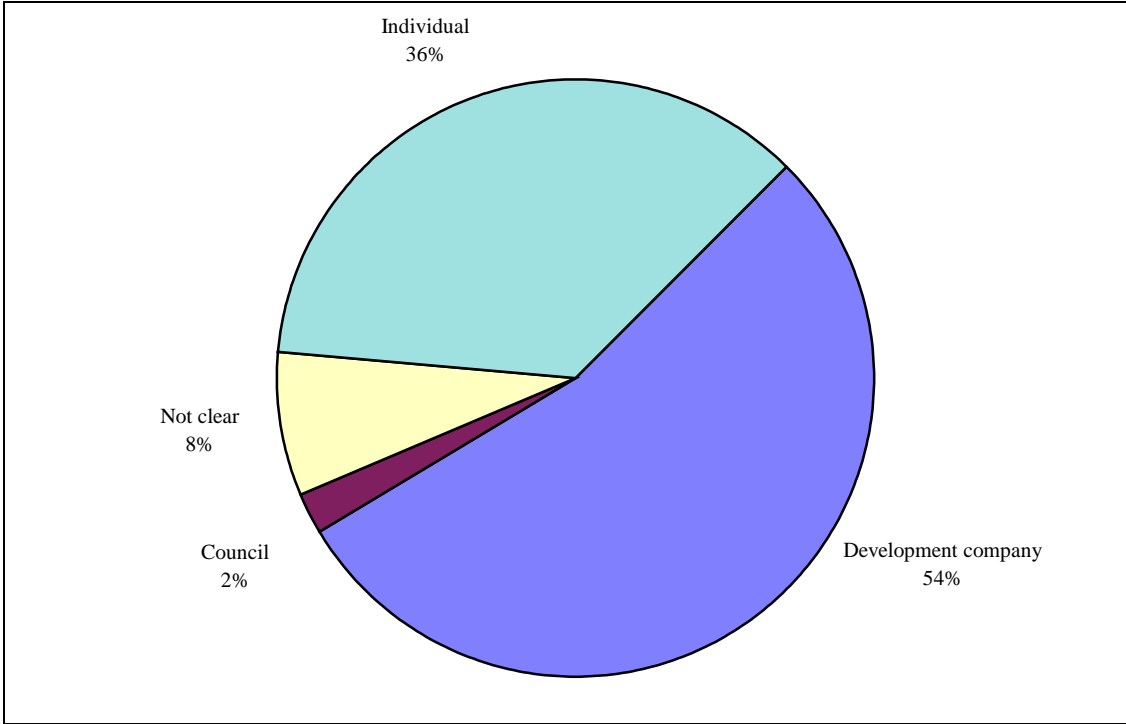
## **4.3 Who is a typical applicant?**

In order to provide a profile of the private plan change request applicants information was provided from the plan change data sheets and the interviews with consultants. Information from the consultants showed that there was a mix of developers and individuals undertaking private plan change requests, with a higher proportion of developers. Developers were generally considered to be persons who operated a company specifically for the purposes of property development and individuals were either landowners undertaking a private plan change on their own property or people who did not generally undertake property development as an occupation. It was generally left up to the consultant to determine what constituted a developer as opposed to an individual.

A significant number of the applicants were landowners, some of whom had not undertaken any development before. Landowners had often seen their neighbours undertaking a private plan change for rezoning of their land and had followed suit.

From the data sheet records, 27 of the applicants (54 percent) were found to be companies and 18 (36 percent) were individuals (Figure 2). In one instance the property section of a council had been the private plan change applicant and in the remaining four cases it was not clear from the council records exactly who the applicant was.

**Figure 2:** Profile of the applicant



### 4.4 How much does a private plan change cost?

Information about the costs associated with private plan changes was principally gained from the consultant interviews. In a few instances there were some records relating to costs incurred by council staff on council files but this was not generally the case.

From the consultant interviews, it was evident that the private plan change process is an expensive one. However, comment was made that although the costs of private plan changes are high so are the benefits.

**Information on costs** provided from the consultant interviews suggested that:

- the minimum costs to an applicant for a private plan change tended to be around \$10,000
- most private plan changes were not less than \$20,000
- on average costs ranged from \$30,000 to \$50,000 (for a rural residential subdivision with minimal opposition)
- for large scale developments costs can be up to \$1 million.

The level of information required by councils was cited as one of the main reasons costs were so high for private plan changes. The level of detail required for some private plan change requests was seen as excessive by several consultants, for example where detailed design of a whole subdivision was required, even when subdivision consent was required at a later stage.

One consultant considered that requests for such detailed information are losing some of the advantages of the process and making it only accessible to the wealthy.

Another consultant commented that the private plan change process is only useful for an instant development where sections might be quickly taken up but the costs of the private plan change are harder to bear in some rural areas where all of the sections in a subdivision may not be taken up for 20 years.

## 4.5 How long does it take to process?

All of the consultants interviewed highlighted the length of time it took to get through the private plan change process.

**Experiences of timeframes** to get through the process ranged as follows:

- the shortest timeframe was six months which included consultation, preparing drafts of the plan change and a hearing
- for large developments, such as the Wharekauhau lodge and residential blocks and the Kaikoura Peninsula development, the process spanned about three years
- on average, private plan changes have taken about 1–2 years from lodging the change to receiving the final decision.

Information from the council records shows that of the 30 private plan changes that had been completed a good proportion is completed within one year. However, a slightly higher proportion (17 plan changes or 57 percent) took longer than one year to complete. When the processing times are looked at in more detail the following trends are apparent:

- one plan change was completed in less than six months
- the majority (12 plan changes) were completed in six months to one year
- 20 percent had taken between one year and 18 months
- three plan changes had taken between 18 months and two years
- three plan changes had taken between two and three years
- five had taken longer than three years to complete.

Of the plan changes that were still in progress, two were over three years in the process, three were between one and five years, five were between six months and one year and six had been in progress for less than six months.

There was no trend amongst the six councils contacted of a case where the private plan change process was any faster than the other. Having to provide detailed further information on the private plan change and the appealing of a plan change were two of the main causes for some of the changes taking so long to get through the process.

## Further information requests

Information provided from the private plan change data sheets showed that around two-thirds of the private plan changes researched had been subject to a request for further information. The types of information that were most often requested by councils related to engineering services (effluent and stormwater disposal, water supply, soils, roading, and traffic), the results from any consultation including tangata whenua consultation, and the relationship with regional policy statement issues. In some cases further information was sought about the site including information on contamination, a certificate of title, a concept plan for the site, and more detail about the site. Further information was also sought on planning issues such as the buffer between zones, visual and landscape issues, the purpose of the plan change, reverse sensitivity, section 32 matters, and mitigation measures.

One of the council officers commented that developers often do not provide enough information at the request stage because they believe the private plan change will proceed to the Environment Court and they choose to leave their major effort until that stage. This practice is not considered to be fair on council or on submitters. Another council officer commented that the levels of further information required are inconsistent between councils.

## 4.6 What are the main problems arising in the private plan change process?

Consultants, council staff and other parties in the research, raised a number of concerns about the private plan change process; these are outlined below:

- **Complexity of the process.**

The complexity of the private plan change process was an issue raised by consultants. Most of the consultants interviewed believed that applicants will always require professional assistance to prepare their private plan change request and see it through the process. One consultant commented that expert assistance is required as the private plan change needs to be framed to fit within the context of the plan and meet the section 32 requirements.

- **Too much information is required**

The huge effort and amount of information required for a private plan change has tended to make the process too complex for individuals to contemplate. Several consultants commented on the high level of detail and amount of information which is required to be provided for a private plan change compared to a council plan change which was considered to have lower level information requirements. The high levels of information required may result in the loss of some advantages of the private plan change process. One consultant commented that the onus was on the applicant to provide the necessary information and that the role of the council was more of an audit role, even if the council wished to adopt the change as its own.

- **Costs are too high**

Some applicants consider the costs are too high because a high level of information is required to be provided for a private plan change request. Costs associated with private plan changes for rezonings may only be recouped in areas where sections are taken up quickly not where they are absorbed over longer timeframes or staged developments.

- **Small councils may face resourcing problems**

Some smaller councils may face resourcing issues when presented with the processing of private plan changes for private interest issues sponsored by large corporates. The private plan changes can involve issues that are not a priority for the council, that they may not be interested in, and/or may not be opposed to. However, the processing of these changes can involve significant staff time, particularly where large-scale developments are the subject of the private plan change. Even though the council has the power to charge for processing under section 36, not all costs may be recovered. The cost of devoting planning resources to private issues rather than public issues also needs to be considered where councils have limited resources.

- **Process takes a long time**

In the research it was found that the shortest time frame for getting through the private plan change process was six months, with six months to one year being average, and some plan changes taking over three years to process.

- **Community have concerns about cumulative effects of private plan changes**

Not all parties are in support of the private plan change mechanism. While land developers are increasingly realising the development benefits that can be obtained from using the private plan change process, some sectors of the community are voicing their concern about the mechanism, in particular about the cumulative effects of separate private plan changes which rezone parcels of land in the same locality. In one local authority a planning officer commented on the general uneasiness felt in the community about how anyone can request a private plan change. This officer considered that there is a lack of understanding in the community about how the private plan change process operates and that people get confused with processes, especially when a new district plan is in preparation.

**Key problems with the private plan change process identified in the research included:**

- the process is too complex for applicants to prepare their own private plan change and see it through the process
- the “packaging” needed to fit the change within the context of a plan often means applicants require expert assistance
- the level of information required is too high
- costs are too high
- small councils may face resourcing issues in processing private plan changes for large scale developments
- requests for further information are considered a key factor in causing delays in the process
- further information requirements and processing procedures vary between councils
- public concern about cumulative effects and the lack of integrated management of effects where several private plan changes are taking place in close geographical proximity.

## 4.7 What are the benefits of using the private plan change process?

Although criticism of some aspects of the private plan change process was received in the research, equal if not more, comments were made highlighting the benefits associated with the process. Some of these benefits are outlined below:

- **Development proposals can be tailored exactly to the change requested**

A private plan change allows an applicant to tailor their development proposal exactly to the change requested. The process allows the developer to choose the site, negotiate with neighbours, set the rules to suit themselves and the Act, and to tailor the plan change to their proposal.
- **Avoids review paralysis of plans**

The private plan change mechanism allows applicants to have their development proposals considered within a shorter time horizon than waiting for a plan to be reviewed. The private plan change mechanism was also considered very useful from a council perspective because the district plan horizon of ten years is too long to make demographic census decisions on growth.
- **Allows for innovation and expression of community aspirations**

One planning officer considers the private plan change process to be an ideal mechanism and one of the best things in the RMA stating that “*if it can’t happen by the market it won’t happen*”. This officer sees the private plan change process as a mechanism by which community values and aspirations can be kept ‘up to the minute’ and one that allows for innovation.
- **Provides a consent mechanism for matters of limited public interest**

The private plan change process provides a mechanism for private benefit initiatives to obtain approval. Such proposals may be single interest issues that are not a priority for council.
- **Provides a consent mechanism for a major proposal which might not meet resource consent criteria**

The private plan change process provides an applicant with an alternative consent mechanism to a resource consent. In many cases an applicant may not have been able to obtain a resource consent for the proposal because the section 105(2) threshold tests could not be met.
- **Private plan changes have additional benefits when compared with resource consents**

Compared to a resource consent, the private plan change offers the benefits of being more on-saleable because of its longer life and lack of attached conditions of consent.
- **Is a process which is often better suited to the scale of the projects involved**

The private plan change process is better suited for large-scale developments than the resource consent process. It allows for integrated management of effects over time that cannot always be achieved through the resource consent process.

- **The process allows flexibility for changes in development**

The private plan change process allows for a range of activities to be provided within a new set of criteria. Therefore the development proposal does not have to be fixed in concrete at the time the private plan change is applied for and changes can be accommodated further along in the process. The process also allows better security for staged developments and gives the market an opportunity to take up development.

- **Provides a policy framework that adopts a whole-plan approach**

The private plan change process provides a policy framework for the change that is more appropriate as it adopts a whole-plan approach.

**Benefits associated with the private plan change process include:**

- allows applicants to tailor their development proposal exactly to the change requested
- avoids the review paralysis of plans
- allows for innovation and expression of community aspirations
- provides a consent mechanism for matters of limited public interest
- provides an alternative consent mechanism for development proposal that cannot meet the section 105(2) criteria for resource consents
- offers the benefits of being more on-saleable because of their longer life and lack of attached conditions of consent compared to a resource consent
- is a process which is often better suited to the scale of the projects involved
- allows flexibility for changes in development and better security for staged developments
- provides a mechanism that gives the market an opportunity to take up the development
- allows for integrated management of effects over time which cannot always be achieved through the resource consent process
- provides a policy framework that is more appropriate as it uses a whole plan approach.

## **4.8 What do applicants think of the approach councils' take to private plan changes?**

The consultants interviewed considered that councils' positions on private plan changes tended to range from hesitant to resistant. Councils tended to be resistant to private plan changes where their proposed plans were well through the plan preparation process. Where the timing of plan preparation was not near to the proposed plan being ready then councils tended to be neutral on private plan changes. Consultants found that if the homework has been done, the effects of the proposed plan change request have been well thought through and the concept is right then councils tend to be more supportive of the private plan change request.

From an applicant's perspective, the approach councils take to private plan changes can be summarised as follows:

- in most cases councils adopted a neutral stance on the plan changes
- in only a few cases did the councils express support or opposition to the plan change
- the stance a council takes with respect to private plan changes tends to be affected by the volume of change requests they receive as well as the position the council is at in the plan preparation cycle.

## 4.9 What do councils think of the private plan change applications they receive?

Of the six councils contacted, Christchurch City, Selwyn District Tasman District and Nelson City stated that their councils took a neutral stance on private plan changes. Waimakariri District commented that their council was enabling with respect to private plan changes. Selwyn District may also adopt an enabling approach to private plan changes in its new district plan. Marlborough District Council were discouraging private plan changes because of the stage of their proposed plans. However, if applicants had been persistent in requesting a private plan change, the change was processed. Applicants were also encouraged to prepare a submission on the proposed plan. A planner at Tasman District also commented that their council had used the two-year rule to turn down one private plan change request.

## 4.10 Is the mechanism working effectively?

From the research it is clear that the private plan change mechanism may have some teething problems with process issues but overall it is providing great flexibility for individuals and developers to achieve their planning and development aims as intended by the enabling provisions of the Resource Management Act.

Information gained from the perspectives of council staff, plan change records, consultants, lawyers, and Ministry staff provided an insight into the effectiveness of the private plan change process and some of the key points raised are listed below.

- **The use of the mechanism is growing**

There is growth in the use of the private plan change mechanism as evidenced by the Ministry for the Environment's annual survey statistics which show 40 private plan changes being received across New Zealand authorities during 1997-1998, and a cumulative total of 109 private plan changes received in the preceding years since the RMA was enacted.

- **Although costs are high so are the benefits**

Although costs associated with private plan changes are high so are the benefits. Many private plan changes are for large-scale developments that have the cost of the private plan change factored into the development margins of the project. Some applicants apply for both a private plan change and a resource consent for the same development at the same time so the cost must not be too excessive. In addition, most large-scale resource consent applications are also expensive. If a private plan change is the only feasible way to gain approval for a proposal then for some it is worth the cost.

- **Private plan changes are an effective tool in avoiding plan review paralysis**

Private plan changes have been an effective tool in locations where authorities have been slow in preparing their proposed plans. High numbers of private plan changes have been received to transitional plans and although it takes a long time to get through the process the private plan change process was seen as a preferable option to waiting for a proposed plan to be prepared and made operative.

- **Councils' attitudes to private plan changes varies**

Although most councils contacted considered their council took a neutral stance on private plan changes, consultants interviewed considered that some councils were more conservative with respect to private plan changes while other councils actively facilitated them. Some councils, such as Waimakariri District, recognise the private plan change mechanism as a legitimate tool, and have provided for its use as part of its proposed plan process to direct future urban growth. In some areas very high numbers of private plan changes are received while others have none. The number of private plan changes is often related to the stage/age of the plan.

- **Private plan changes are a popular tool to facilitate rezoning**

From the research it is evident that the private plan change mechanism is proving to be a popular tool, particularly for developers undertaking rezonings for rural-residential and residential developments. In some geographic areas it is more widely used than others, with the levels of use being higher in the areas that have older transitional plans with particularly outdated provisions.

**Effectiveness indicators:**

- the use of the private plan change mechanism is growing
- although the costs of private plan changes are high so are the benefits
- private plan changes are effective in avoiding plan review paralysis
- councils' attitudes to private plan changes varies from conservative to proactive
- private plan changes are proving to be a popular tool for rezoning.

## 4.11 Additional comments from the research

One consultant commented that most individuals and developers don't understand the private plan change process and some see it as synonymous with the resource consent process. Some clients query why the process takes so long.

One council officer commented that it would be helpful if there were some encouragement for plan changes to be integrated, rather than having numerous applications for spot-zoning in one area, for example in Prebbleton there were six examples of spot zoning. This officer highlighted the fact that with private plan changes it is sometimes a matter of timing in application and council processing of the change as to who gets in first for the spare capacity in services and in terms of cumulative effects. Another officer from a different council noted that before a council adopts a private plan change it is responsible for looking at the integrated management of effects. Concerns relating to a lack of integration between nearby private plan changes and inadequate assessment of cumulative effects of the private plan changes have been matters brought to the attention of Ministry for the Environment by members of the public.

Although the private plan change process is sometimes criticised for leading to ad hoc market-lead development, one council officer commented that centralised planning is not always the best option. Other parties expressed concern that the future pattern of development could become developer-driven by way of the private plan change process rather than community-driven through the district plan process.

Holding a joint hearing for private plan changes which were in close geographical proximity to each other and were relatively close together in the terms of processing time was a suggestion given by a Ministry for the Environment official to help with the problems of cumulative effects and integrated management. However, the RMA is neutral on whether joint hearings can be held and the plan hearing process is more in the nature of an inquiry rather than a strictly adversarial contest between submitters. The potential flexibility which a joint hearing might introduce would need to be balanced through the use of clear procedures and agreements to ensure the process was fair to all potential submitters and private plan change applicants.

With respect to the private plan change process, one council officer believed there were practice issues rather than legal issues that may need addressing. The officer commented that the planning profession is precious and do not like their plans being challenged by the private plan change process.

Delays can arise in the process where a council uses a commissioner to hear a private plan change request. The commissioner cannot make a decision on the plan change under section 34 but can only make a recommendation to council who then have to meet to decide to accept or reject the recommendation. In the review of the private plan change records held by councils this issue had arisen a number of times and was viewed as an unnecessary delay.

# 5 How can the Private Plan Change Process be Improved?

## 5.1 What improvements can councils make to their processing of private plan changes?

From the research a number of lessons emerge for councils processing private plan changes that might improve the process.

### Knowledge issues

- **Make the process easier to understand for applicants and the general public**

A higher level of information needs to be provided on the workings of the private plan change process as a lack of understanding was evident both among developers and some council officers. Therefore, councils have work to do in making the private plan change process more effective for private plan change applicants and making it more transparent so that the local community understands exactly how the process works and how decisions are reached on private plan changes.
- **Council officers need to understand the private plan change process clearly**

Council officers also need to clearly understand the private plan change process themselves so that they can advise applicants correctly, ensure that information requests are fair, and that processing of the request is correct. Officers need to keep up to date with case law relating to private plan changes so that RMA provisions can be correctly interpreted. Some of the terminology has been confusing in the past for private plan changes, such as the words accept and adopt, but amendments to the Act are helping to clarify such terms and officers need to be aware of these amendments.

### Attitudinal issues

- **Accept the private plan change process as a legitimate tool provided by the RMA**

Councils need to be receptive to private plan changes as they are legitimately provided for under the RMA and should not see private changes as a criticism of their own planning strategies.
- **Recognise that private plan changes are often sought because of the stage of the plan**

It is often the stage of a plan, for example where the provisions have become outdated, that results in the private plan change approach being the most appropriate tool for an applicant seeking changes in a time horizon which is shorter than waiting for a proposed plan to become operative.

- **Understand that a private plan change cannot be made to a proposed plan**

A proposed plan can only be varied not changed. Although in some cases councils have accepted a private plan change to a proposed plan this is not provided for under the RMA. In some cases the private plan change has been notified before the proposed plan becomes operative but submissions have been postponed until after the plan becomes operative and the change can be made.

## Process issues

- **Agree to an informal pre-lodgement process with the applicant**

In the research study a number of consultants mentioned the fact that councils can be very non-committal about giving any indication of support for a private plan change which is a concern particularly as the stakes are very high for developers or individuals. Councils could provide some comments at an early stage to the plan change proponent on the likelihood of the plan change being successful or not. One of the council officers agreed that this was necessary and that an informal pre-lodgement process was needed to discuss the private plan change with council staff.

- **Involve developers in district growth strategy discussions**

Council officers should ensure that developers are involved in growth strategy discussions and reporting in a district so that the potential for private plan changes for rezonings can be identified and long-term infrastructure planning can be effective.

- **If Council adopts a private plan change as its own it may only be able to modify it to the extent sought by submissions**

The legislation is not clear on the extent to which a local authority may modify a private plan change if it adopts it as its own change, particularly if no submissions have been received.

## Timing issues

- **Councils need to process private plan changes quickly**

The courts have directed that councils should deal with private plan changes quickly and that applicants are entitled to rapid determinations. One of the reasons the private plan change mechanism was introduced was to avoid review paralysis of plans. Applicants should not be made to wait for an upcoming plan review to make their private plan change request.

## Decision-making issues

- **Take account of integrated effects**

Councils have a responsibility to ensure that integrated effects of private plan change are taken into account when deciding on private plan change requests, especially where several requests are received affecting parcels of land in close geographical proximity. It may help to map all private plan changes for rezonings as council will soon get a picture of where development pressures in the district are occurring.

- **Protecting high value land for agriculture is no longer a matter of national importance**

As a lot of the private plan changes involve rezonings it is important for councils to note that the protection of land which has high value for agriculture is no longer a matter of national importance under the RMA as it was under the Town and Country Planning Act.

- **In making a decision on a private plan change the transitional and proposed plans do not have to be considered**

When making a decision on a private plan change what is important is whether the plan should be changed or not. Where a proposed plan exists the provisions can be taken into account but do not have to be.

- **Understand clearly the requirements of section 32**

Section 32 obliges the council to consider whether the plan change is necessary to allow the applicant to carry out the proposed activities that are prevented by the existing plan or if there is an alternative means that would better achieve the end result sought. The focus should not be on comparing sites or ordinances. In some cases economic analysis has been found to be relevant in assessing efficiency under section 32.

- **The effects of trade competition must be ignored**

In assessing a private plan change request trade competition must not be considered and property owners are considered to be trade competitors as much as competing commercial operators.

## Monitoring issues

- **Be aware of private plan changes taking place in neighbouring authorities**

Council officers should monitor private plan changes, as well as council plan changes, affecting land near in neighbouring local authorities, especially developments which are close to the territorial boundaries between two authorities as this has implications for integrated management of effects and infrastructure planning.

- **Monitor private plan change trends for cumulative effects**

Councils may need to monitor trends of private plan change applications, particularly where several private plan changes are taking place in close geographical proximity.

- **Monitor overall use of the mechanism in the district or region**

Monitor the overall use of the mechanism to see if growth in the district is being primarily driven by the private plan change process rather than by district plan policies and decide whether council is comfortable with that approach. In addition, if there are a growing number of private plan changes being received by council then resourcing issues need to be addressed to ensure that adequate staff is available for processing the changes.

- **Monitor timeframes and costs for private plan changes**

Each council may need to monitor the timeframes and costs of processing the private plan changes to find out if they are taking too long and costing too much. Councils should check what fees they are charging private plan change applicants and compare those fees to those charged by other councils.

## Awarding of costs

- **In some cases councils are more open to having to pay costs following an appeal**

Councils should be aware that in some cases they might make themselves more open to have pay costs following an appeal, for examples where:

  - the council has accepted the private plan change and therefore bears some responsibility for it
  - the council uses an appeal for a full-scale argument of RMA principles as the plan change could have initially been rejected if it were not consistent with sound resource management practice under clause 25(4).

## 5.2 What improvements can applicants make in preparing their private plan change requests?

From the research a number of lessons emerge for applicants and their agents who prepare the private plan changes that might improve the process.

### Knowledge issues

- **Understand council and legislative requirements for the private plan change request**

Understand clearly what is required by council and the RMA in terms of information requirements and processing for the private plan change. If good information is provided in the first instance then delays caused by requests for further and additional information and commissioning of reports can be avoided and the plan change can be processed more quickly.

### Mechanism issues

- **An applicant is free to apply for a private plan change and a resource consent for the same proposal at the same time**

The RMA does not express a preference for the private plan change process over the resource consent process and an applicant is free to apply for a development proposal under both processes at the same time. However, the two processes are not synonymous and one is often a better course of action than the other is when circumstances differ. For example, information requirements differ between the two processes, with more information being required for a private plan change.
- **In some instances a private plan change is a better mechanism to use than a resource consent**

Some situations where a private plan change might be a preferable mechanism to use include:

- where section 105(2) criteria cannot be met for a resource consent
- where the proposal is contrary to several objectives or policies or departs significantly from plan provisions
- where the proposal would have significant effects on the locality.

## Location issues

- **Avoid sites where reverse sensitivity conflicts where possible**

If the private plan change involves a rezoning proposal for residential or rural-residential development then attempt to find sites that are adjacent to existing rural-residential or residential land. If this is not possible, propose mitigation measures to improve the existing effects of adjacent land uses, such as buffer strips or easements.

- **Avoid sites which are considered tapu or have other taonga**

It is best to avoid private plan changes for development proposals on sites that are considered tapu or have other taonga present. The plan change may not gain approval, as it is not likely to be consistent with the principles of the RMA.

## Servicing issues

- **Ensure that services can be provided for the development**

The provision of services for a private plan change proposal involving rezoning is a key issue in that water, sewerage and roading services need to be extended in a co-ordinated progression otherwise the purpose of the RMA is not met and the private plan change can be declined. In some cases the applicant may have to pay for the extension of services if council cannot justify extending the services within its current infrastructural commitments.

- **Be aware of what other private plan changes have been requested or approved in close geographical proximity to any new plan change being requested**

An applicant needs to be aware of what other private plan changes, council plan changes and major resource consent applications have been approved or applied for in close geographical proximity to the site of any request site. The principal reason is that new development needs spare capacity in infrastructure systems. Service provision is a prerequisite for any rezoning unless council has programmed extension of services in the very near future or the applicant is willing to pay for service provision. In addition, an applicant can learn from other applications nearby what the community reaction to the proposed plan change was and identify early on what key issues might be likely to arise.

## Process issues

- **Have informal discussions with council prior to lodging the plan change request**

Meet with council officers prior to lodging the plan change request for an informal meeting to discuss the private plan change and find out whether or not it is likely to be acceptable/be approved. Although council officers cannot provide any guarantees at the outset they should be able to give some constructive guidance to the applicant as to what sort of chance they might have of having the private plan change approved and what sort of opposition they might face. As most of the private plan changes involve high stakes in

terms of costs and timing, the applicant is wise to weigh up the chances of success of the plan change before getting too far into the process and finding out it will not succeed.

- **Undertake early and effective consultation**

Most private plan changes are for larger scale developments and are likely to have significant impacts. It is most important that applicants are aware at an early stage who needs to be consulted with and what the issues of concern might be in regard to the proposal so that adequate time is provided for the issues to be able to be worked through.

- **Assess potential impacts early on**

At an early stage of the proposal an applicant needs to identify what the potential impacts of the private plan change will be, who will be affected, and how potential effects can be mitigated.

- **Provide further information as soon as possible**

To avoid delays in the process provide further information to council as soon as is possible even though no timeframes are specified in the RMA.

- **Consider the matters raised in section 32 of the RMA**

The applicant needs to understand section 32 matters and make sure they have been considered. Although a section 32 report is not required to be submitted with the private plan change request application some section 32 matters may be sought as part of further information requested by council.

- **If the local authority adopts the private plan change then the applicant's participation in the process is limited**

If a local authority adopts the private plan change request as its own change it does not have to consult the private plan change requester but if the private plan change request is accepted then the requester does have to be consulted. Therefore an applicant should be aware that their participation in the process is limited if a council adopts a plan change as its own.

## **Awarding of costs**

- **If an appeal is withdrawn close to a hearing date then the appellant may be ordered to pay costs already incurred**

If an appellant decides to withdraw an appeal very close to an appeal hearing date then that appellant may incur payment of part of the costs already incurred by other parties preparing for the hearing, particularly where expert evidence has already been prepared.

## **5.3 What legislative amendments might assist the private plan change process?**

During the course of the research a number of suggestions were put forward for amending the RMA to attempt to make the private plan change process operate more effectively. Some of these the suggestions are provided below:

- One council officer suggested **more flexibility was needed to modify a private plan change once it was through the submission process** as, if council adopts a plan change, alterations can be discussed at a hearing but the change cannot be modified unless modifications are sought in the submissions. A consultant also noted that the extent to which a council can modify a private plan change depends on what the submissions say and that councils have limited ability to modify a private plan change compared with their ability to impose conditions on a resource consent.
- Some **ambiguity exists in light of case law regarding clause 21(1) of Part II of the First Schedule** as some councils are accepting private plan changes to proposed district plans. Under clause 21(1) private plan changes can only be requested to a district or regional plan which under the RMA definitions means an operative plan and not a proposed plan. This ambiguity may need to be clarified.
- **Limit timeframes for the provision of further information**  
In the research study both consultants and council officers agreed timing was a problem and suggested limiting further information timeframes could tighten up the process. At this stage clause 23 does not prescribe any time limits for the applicant providing further information or for completing council commissioned reports on the private plan change.
- **Remove the further submissions stage from the process**  
It was suggested that the further submissions stage be removed from the private plan change process as it was not seen to be necessary as it did not add anything to the process.
- As the developer was asking for exactly what was desired through the private plan change request, the **need for section 32 information was questioned** by one consultant. Other parts of the RMA could be used for the decision-making than section 32.
- A council officer suggested **guidelines from the Ministry for the Environment on private plan changes** would help clarify the duties that apply to private plan changes with those of council plan changes, especially with respect to effects beyond the site. A planning officer from another council suggested clarification of section 32 requirements was necessary with respect to private plan changes.
- The criteria specified under **clause 25 of Part II of the First Schedule** were considered by lawyers **to require clarification**, in particular the meaning of clause 25(4)(c) which relates to a private plan change request or part of it not being in accordance with sound resource management practice.

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## **Appendix I: Part II of the First Schedule to the Resource Management Act (Clauses 21-29)**

### **21. Requests –**

- (1) Any person may request a change to a district plan or a regional plan (including a regional coastal plan).
- (2) Any person may request the preparation of a regional plan, other than a regional coastal plan.
- (3) Any Minister of the Crown or any territorial authority in the region may request a change to a regional policy statement.
- (4) Where a local authority proposes to prepare or change its policy statement or plan, the provisions of this Part shall not apply and the procedure set out in Part I shall apply.

### **22. Form of request –**

- (1) A request made under clause 21 shall be made to the appropriate local authority in writing and shall explain the purpose of, and reasons for, the proposed plan or change to a policy statement or plan.
- (2) Where environmental effects are anticipated, the request shall describe those effects, taking into account the provisions of the Fourth Schedule, in such detail as corresponds with the scale and significance of the actual or potential environmental effects anticipated from the implementation of the change, policy statement, or plan.

### **23. Further information may be required –**

- (1) Where a local authority receives a request from any person under clause 21, it may within 20 working days, by written notice, require that person to provide further information necessary to enable the local authority to better understand –
  - (a) The nature of the request in respect of the effect it will have on the environment, including taking into account the provisions of the Fourth Schedule; or
  - (b) The ways in which any adverse effects may be mitigated; or
  - (c) The benefits and costs, the efficiency and effectiveness, and any possible alternatives to the request; or
  - (d) The nature of any consultation undertaken or required to be undertaken –if such information is appropriate to the scale and significance of the actual or potential environmental effects anticipated from the implementation of the change or plan.
- (2) A local authority, within 15 working days of receiving any information under this clause, may require additional information relating to the request.
- (3) A local authority may, within 20 working days of receiving a request under clause 21, or, if further or additional information is sought under subclause (1) or subclause (2), within 15 working days of receiving that information, commission a report in relation to the

request and shall notify the person who made the request that such a report has been commissioned.

**24. Modification of request** – As a result of further or additional information, commissioned reports, or other relevant matters, the local authority may, with the agreement of the person who made the request, modify the request.

**25. Local authority to consider request** –

- (1) A local authority shall, within 30 working days of –
  - (a) Receiving a request under clause 21; or
  - (b) Receiving all required information or any report which was commissioned under clause 23; or
  - (c) Modifying the request under clause 24 –whichever is the latest, decide under which of subclauses (2), (3), and (4), or a combination of subclauses (2) and (4), the request shall be dealt with.
- (2) The local authority may accept the request in whole or in part and either –
  - (a) Adopt the request or part of the request as if it were a proposed policy statement or plan made by the local authority itself and –
    - (i) It shall thereupon be notified in accordance with clause 5 within 4 months of the local authority adopting the request; and
    - (ii) The provisions of Part I of this Schedule shall apply; and
    - (iii) The proposed plan shall have effect once publicly notified; or
  - (b) Proceed to notify the request or part of the request under clause 26.
- (3) The local authority may decide to deal with the request as if it were an application for a resource consent and the provisions of Part VI shall apply accordingly.
- (4) The local authority may reject the request in whole or in part, but only on the grounds that –
  - (a) The request or part of the request is frivolous or vexatious; or
  - (b) The substance of the request or part of the request has been considered and given effect to or rejected by the local authority or Planning Tribunal within the last two years; or
  - (c) The request or part of the request is not in accordance with sound resource management practice; or
  - (d) The request or part of the request would make the policy statement or plan inconsistent with Part V; or
  - (e) In the case of a proposed change to a policy statement or plan, the policy statement or plan has been operative for less than two years.
- (5) The local authority shall notify the person who made the request, within 10 working days, of its decision under this clause, and the reasons for that decision.

**26. Notification timeframes** – Where a local authority accepts the request or part of the request under clause 25(2)(b) –

- (a) The local authority shall prepare the change to the policy statement or plan in consultation with the person who made the request under clause 21; and
- (b) The local authority shall publicly notify the change or the proposed policy statement or plan –
  - (i) Within four months of agreeing to adopt the request; or
  - (ii) Within the period that the Planning Tribunal directs under clause 27.

**27. Appeals** –

- (1) Where a local authority agrees to the request only in part, or refuses the request, or decides to treat the request as an application for a resource consent under clause 25, the person who made the request may, within 15 working days of receipt of the decision, appeal to the Planning Tribunal against the local authority's decision.
- (2) The Planning Tribunal may make such decision on any such appeal as it thinks fit.

**28. Withdrawal of requests** –

- (1) Where any person has made a request under clause 21 that person may withdraw the request at any time before the decision by the local authority under clause 29 is notified.
- (2) Where any local authority has reasonable grounds to consider that a person who made a request under clause 21 no longer wishes to continue with the request, the local authority may send a notice to that person at their last known address.
- (3) A notice sent under subclause (2) shall state that if the person who made the request does not advise the local authority within 30 working days of their wish to continue with the request, the local authority shall deem the request to have been withdrawn.
- (4) If the local authority receives no response to its notice sent under subclause (2), it shall deem the request to have been withdrawn under subclause (1).
- (5) Where notice of withdrawal is given under subclause (1) or is deemed to be given under subclause (4), preparation of the policy statement or plan or change shall cease, unless the local authority determines to proceed with the request itself under this Part.
- (6) The local authority shall ensure that, within 15 working days of receiving a notice of withdrawal under subclause (1) or deeming it to be withdrawn under subclause (4), public notice of the withdrawal, including the reason for the withdrawal, is given, unless the local authority determines to proceed with the request itself.

**29. Procedure under this Part** –

- (1) Except as provided in subclauses (2) to (9), Part I of this Schedule, with all necessary modifications, shall apply to any plan or change requested under this Part and accepted under clause 25(2)(b).
- (2) The local authority shall send copies of all submissions on the plan or change to the person who made the request.

- (3) The person who made the request has the right to appear before the local authority under clause 8B.
- (4) After considering a plan or change, the local authority may decline, approve, or approve with modifications, the plan or change, and shall give reasons for its decision.
- (5) In addition to those persons covered by clause 11, the local authority shall serve a copy of its decision on the person who made the request under clause 21.
- (6) The person who made the request, and any person who made submissions on the plan or change, may refer the decision of the local authority to the Planning Tribunal.
- (7) Where a plan or change has been referred to the Planning Tribunal, clauses 14 and 15 shall apply, with all necessary modifications.
- (8) Where a plan or change has been referred to the Planning Tribunal, the person who made the request under clause 21 has the right to appear before the Planning Tribunal.
- (9) With the agreement of the person who made the request, the local authority may, at any time before its decision on the plan or change, initiate a variation under clause 16A.

## Appendix II: Cases cited

- CJ McMillan Limited v Waimakariri District Council* C70/99.
- Boon and others v Marlborough District Council* [1998] NZRMA 305.
- Cracroft Residents Association Incorporated v Christchurch City Council* C28/98.
- C J McMillan v Waimakariri District Council* C87/98.
- Queenstown Property Holdings Limited v Queenstown-Lakes District Council* [1998] NZRMA 145.
- Kaitiaki Tarawera Incorporated v Rotorua District Council* A7/98.
- Muir Park Corporate Limited and Another v Christchurch City Council* C27/98.
- Humphrey RJ & MJ and Humphrey Trust No 2 v Whangarei District Council* A75/98.
- Bell v Central Otago District Council* C4/97.
- Kennedy's Bush Road Neighbourhood Association v Christchurch City Council* W63/97.
- Marlborough Ridge Limited v Marlborough District Council* C111/97.
- Hodges v Dunedin City Council* W25/97.
- Canterbury Regional Council v Selwyn District Council* W57/97.
- Weatherwell-Johnson v Tasman District Council* W181/96.
- Canterbury Regional Council v Selwyn District Council* W142/96.
- Becmead Investments Limited and others v Christchurch City Council* A88/96.
- CDL Land New Zealand Limited v Whangarei District Council* A99/96.
- Prospectus Nominees v Queenstown-Lakes District Council* [1996] NZRMA 552.
- Foodstuffs (Otago Southland) Properties Limited v Dunedin City Council* A6/96.
- Hall v Rodney District Council* A78/95.
- McIntyre v Tasman District Council* W83/94.
- GUS Properties Limited v Marlborough District Council* W75/94.
- Imrie Family Trust v Whangarei District Council* [1994] NZRMA 453.
- New Zealand Rail v Marlborough District Council* [1994] NZRMA 70.
- Gallagher v Banks Peninsula District Council* W31/94.
- J A Campbell and Cross Air Spread Limited v Southland District Council and B W Walker* W114/94.
- R G Hamilton, P J Hamilton and E J Thomson v Queenstown Lakes District Council* C79/94.
- Robinson v Ashburton District Council* W92/94.
- Countdown Properties (Northlands) Limited v Dunedin City Council and others* [1994] NZRMA 145.
- Shell Oil New Zealand Limited v Lower Hutt City Council* W70/91.

## **Appendix III: List of organisations and individuals consulted**

### **Ministry for the Environment**

Tim Bennetts, Christchurch

Craig Mallett, Wellington

Erica Sefton, Wellington

### **Council Officers**

Aneta Hansbury, Christchurch City Council

Linda Craighead, Marlborough District Council

Mark Lile, Nelson City Council

Nina Boyes, Selwyn District Council

Brent Vivian, Selwyn District Council

Linda Weastell, Selwyn District Council

Dennis Bush-King, Tasman District Council

Richard Johnson, Waimakariri District Council

### **Consultants**

Marc Baily, Boffa Miskell, Wellington

Sara Dawson, Boffa Miskell, Christchurch

Robert Schofield, Boffa Miskell, Wellington

Greg Dewe, Connell Wagner, Christchurch

Jackie McNae, Staig & Smith, Nelson

### **Lawyers**

Helen Atkins, Sally Dosser and Chris Mitchell, Phillips Fox, Wellington

Sara Giles, Ministry for the Environment, Wellington

# About the Ministry for the Environment

Making a difference through environmental leadership.

The Ministry for the Environment advises the Government on policies, laws, regulations, and other means of improving environmental management in New Zealand. The significant areas of policy for which the Ministry is responsible are: management of natural resources; sustainable land management; air and water quality; management of hazardous substances, waste and contaminated sites; protection of the ozone layer; and responding to the threat of climate change. Advice is also provided on the environmental implications of other Government policies.

The Ministry monitors the state of the New Zealand environment and the operation of environmental legislation so that it can advise the Government on action necessary to protect the environment or improve environmental management.

The Ministry carries out many of the statutory functions of the Minister for the Environment under the Resource Management Act 1991. It also monitors the work of the Environmental Risk Management Authority on behalf of the Minister.

Besides the Environment Act 1986 under which it was set up, the Ministry is responsible for administering the Soil Conservation and Rivers Control Act 1941, the Resource Management Act 1991, the Ozone Layer Protection Act 1996 and the Hazardous Substances and New Organisms Act 1996.

## Head Office

Grand Annexe Building  
84 Boulcott Street  
PO Box 10362  
Wellington, New Zealand  
Phone (04) 917 7400, fax (04) 917 7523  
Website <http://www.mfe.govt.nz>

## Northern Regions Office

8-10 Whitaker Place  
PO Box 8270  
Auckland  
Phone (09) 307 7093, fax (09) 377 9521

## South Island Office

Level 3, Westpark Towers  
56 Cashel Street,  
PO Box 1345  
Christchurch  
Phone (03) 365 4540, fax (03) 353 2750