Submission to Planning Standards Select Committee

mfe.govt.nz

Submissions for the Environment Court

1. Introduction

1.1 Written submissions have been requested in respect of the draft National Planning Standards, to be filed by 17 August 2018. The Environment Court has not been separately consulted relating to this standard, or the earlier reports identified as Discussion Papers A to G. The Environment Court has particular experience dealing with planning documents on a regular basis throughout New Zealand. It uniquely has an overview in respect of all of these documents.

1.2 The concept of a draft national planning standard has been in discussion for some considerable period of time, commencing around 2010, but has largely taken place without any contextual discussion with the Court or any explicit consideration of the numerous Court decisions that have had to consider planning documents both in terms of plan appeals, individual resource consents, and enforcement proceedings in the District Court.

2. What is a plan?

2.1 The consultation document does not discuss either the purpose or status of a Plan under the Resource Management Act. Many councils have adopted a whole series of documents, aspirational statements, plans and the like that have no status under the Resource Management Act. Many of these have been promulgated at significant cost to the local authority, and considerable time on the part of the various parties. The question of their status before the Court has been discussed in a significant number of decisions, and effectively they have no particular status in planning matters, and none at all in respect of enforcement matters.

2.2 In addition, many councils have developed internal policies as to how they will approach matters relating to the environment. These have been the subject of a number of decisions by the Court, particularly where they modify or alter the statutory documents that apply.

2.3 Key to a plan promulgated under the Resource Management Act is that A PLAN MUST BE ENFORCEABLE. Any aspect of a plan that is not achieving this end is otiose to its primary purpose. The tendency over the last two decades to include more and more aspirational or explanatory material into the plan has diluted its primary purpose as a document to compel certain outcomes.

2.4 Although it may also contain aspirational incentives and explanations, its primary purpose within the resource management regime is a regulatory one.

3. Purpose of national planning standards

3.1 This matter is discussed within the MfE discussion document at pages 7-11 (it is unfortunate that no numerical system was used so we could identify the various paragraphs). This picks up, in part, on some of the earlier reports such as discussion papers A and B.

3.2 Nevertheless, we submit that there are three primary purposes to having a national planning document. This could be expressed in two alternative ways:

(a) the Plan must be Enforceable, Effective and Efficient (Triple E);

(b) the Plan must be Compulsive, Clear and Certain (the 3 Cs).

3.3 To that end, while we agree with a number of the statements made in pages 10, 11 and 12 of the discussion document, we submit that the primary reason for national planning standards relates to limiting the drift to the explanatory and aspirational, which complicates plans without improving them.

3.4 We would add to this that there has been a tendency towards significant repetition of the same issues, often with very slight differences in the way the statement is put, both in different portions of the plan and in comparison with the statutory requirement. Many plans restate (or mistake) statutory provisions, particularly from Part 2, as objectives or policies, without linkage to particular issues within the region or district. Thus, there is no development of policy at a local level in the Plan. Simple examples may be taken from the requirements in s 6 for the protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna. The restatement of that to identify outstanding indigenous vegetation and high value indigenous vegetation introduces further levels of complexity given that

the levels of protection seem to vary for each. Similar comments can be made in respect of the natural character of the coastal environment (identifying that as outstanding or high value) and the various levels of identification under s 6(b) outstanding, high and significant.

3.5 Similarly, issues such as the identification of the Coastal Environment, which is essential to the operation of the New Zealand Coastal Policy Statement, are often not addressed at all in plans (see AUP), while the policies or objectives in question may be mandatory (see *King Salmon*). Other examples relate to infrastructure such as coverage and importance.

4. Primary submission – the need to identify matters by issue and spatial extent

4.1 Throughout the various reports, there seems to be a recognition that zoning itself is a spatial approach, yet it has still been dealt with separately to other issues of a spatial nature. The reports themselves recognise that the various issues (for some reason identified as "matters" through the reports) such as heritage, cultural, natural values and the like may apply over the entire district or may have spatial limitations. The same can be said about effects, which may result in similar constraints over an entire area or be constrained to certain areas, depending on their nature. For example, earthworks, which may be controlled both through volume throughout the entire district and/or just to significant slopes in respect of other activities, (ie much lower volumes of earthmoving).

4.2 At its heart, the report recognises these issues but goes on to adopt a hybrid approach, trying to deal both with the topics and their spatial extent, while still utilising mechanisms such as zoning and overlays. The end result, as demonstrated in the Auckland Unitary Plan (**AUP**), is a level of complexity that makes the plan both difficult to operate (see *London Pacific*, with some 27 overlays plus zoning, and subject to application by way of Council policy) and which may be unenforceable or even actionable. Such a hybrid approach may result in less clarity and more complexity when preparing both regional and district planning documents. Our submission is that any national policy statement or national planning standards should aim to assist to create an appropriate plan by utilising techniques nationally.

4.3 We consider that, in descending order of importance, the techniques that would significantly assist the administration and interpretation of plans would be:

4.3.1 standardised formatting, particularly chapter layout, headings and chapter numbering;

4.3.2 a set of standard definitions that can be used nationwide;

4.3.3 a standardised arrangement of content; and

4.3.4 exemplars as guides to plan content.

4.4 We deal with each in turn.

5 Format

5.1 Although this issue may seem somewhat trite, the experience of the Court has been that the approaches to sub-chaptering and numbering of the plan is so varied that it is difficult for anyone, including the Court and members of the public, to find their way around documents. While some plans may have issues, objectives, policies, rules and other methods, the arrangement of content is less critical than the ability to find the content in the plan. For example, use of chapter heading letters – *NH* for *Natural Heritage* – and the like create immense difficulty in finding relevant provisions, especially when these are distributed through the plan. We strongly recommend a system contain a chapter heading, sub-chapter heading and contents, with each of those utilising a numerical system, .ie chapter 6, part 4, point 10, paragraph 14 would be represented as 6.4.10.14.

5.2 Although the sub-numbering below this, still using numbers, has been criticised as resulting in very long numerical strings, we submit that this is preferable to any other alternative. This has become particularly pointed since the move to electronic plans has begun, as re-ordering of parts of the plan can result in different numbering on different days for the same provision. While parties were frequently relying on the page number to identify the relevant provision, page numbers have become a less effective method of identifying the relevant provision. We believe that the better system to identify the particular part of the plan in discussion is to use the numerical subdivision system identified.

5.3 We suggest utilising numbers throughout, i.e. no alphabetical, roman numbers or bullet points.

6 Definitions

6.1 We submit that, as far as possible, reference should be made through the document to defined words rather than creating new words for the same issue. An interim solution to this has been to use nesting tables, which give a group of meanings to a particular word, such as residential or business. Two difficulties have been experienced with this:

6.1.1 often the range of activities covered by the nesting table is far wider than may be intended in the particular context of the plan provisions, e.g. permitted residential activity may include retirement villages;

6.1.2 The term used in the nesting table may be used in unexpected places in the plan, with (arguably) unintended consequences. Care needs to be taken in utilising a nesting table word in the Plan. For example, many plans consider a mix of business and residential areas and industrial and residential activities.

7 Arrangement of content

7.1 In short, we consider that the current suggestion of zones is too prescriptive, and leads to a complexity between the overlays, general controls and zone controls. A more direct spatial management approach has the potential to be simpler and more direct.

7.2 Although the Court has no particular preference for the way matters in the plan are addressed, we would agree that a standard format setout is likely to lead to a significant improvement in the usability of the plans on a national basis for several reasons.

7.3 Many practitioners practice over large portions of New Zealand. This is likely to lead to better and more consistent advice.

7.4 Transferability of concepts will lead to a more uniform approach through application of case law and local government experience.

7.5 Education and training around the use of plans for the public can be based upon the standard format. Whether the format is based upon an activity focus, or an issues focus, is a matter of policy decision. Both have their advantages and disadvantages.

7.6 We suggest that the following principles should apply to such formatting:

7.6.1 the outcome should be concise (avoid repetition);

7.6.2 identification of issues, objectives, policies, rules and other methods should be clear and enforceable;

7.6.2A the relationship or connection between an objective and its related policies, and between those provisions and the rules or methods that give effect to them, should be explicit and easy to follow;

7.6.3 the document should be accessible both to expert and lay users, whether in hard copy or electronic form; and

7.6.4 the structure should guide access to the relevant portions (on electronic documents, described as navigable).

7.7 As to whether provisions are set out in text or tables there are, again, advantages and disadvantages to all approaches. In some situations, a combination of approaches may work best. This is a choice that could be left for the determination of the individual council.

8 Exemplars of content

8.1 Some decades ago there was a model plan that was utilised widely by many smaller councils throughout New Zealand. To the extent that there may be aspects of a plan that should be discretionary, it seems to us that rather than have a whole series of discretionary guidelines, a template or exemplar plan might assist councils in understanding how to approach issues beyond those that are the subject of mandatory requirement. In our view, this would give potential to address the issue of spatial (overlays/zoning) in context.

8.2 It has become clear through the recent plans that the wide use of overlays and zoning has led to public and Council misunderstanding, and potential conflicts between the objectives of the plan. Could we suggest that this is based upon an assumption that a zoning is something different to an overlay or any other form of spatial control (such as precincts in the AUP).

8.3 As the report itself makes clear, zoning is simply a spatial planning mechanism over an area smaller than the entire district. The same is true of overlays, and in fact both perform similar functions. Could we suggest that greater clarity might be obtained by addressing spatial planning on this basis. In a case where there are multiple overlays for such things as historic or natural heritage, cultural values, flooding etc, identification of all of these overlays (including any that would be conditionally considered zoning, ie building style, size, type etc) could be identified and then the management areas identified as a result.

8.4 We suggest that moving away from zoning as exclusively rural or residential and the like has the advantage of avoiding difficulties with dealing with the highly mixed zones that are occurring throughout New Zealand. Even within rural zones, there are significantly different constraints within areas of those zones. If there is to be any dichotomy (such as in Auckland between rural and urban), then all particular spatial controls could be subsets of the overall spatial control for rural or urban. Within that, special management zones might consist of things such as general, mixed, special.

8.4 A possible approach is to start by identifying the particular constraints in an area based on the requirements in sections 6 and 7 in Part 2 of the Act, and any that may be directed by any relevant national or regional policy statement. Then to use mapping to show the relevant affected areas or sub-zones. Spatial areas could be addressed as sub-zones of the standard categories of Residential, Business, Industrial, Open Space and Special.

8.5 Accordingly, although we generally agree with Discussion Paper B, we consider that there has been a tendency to rely on the structures used to date, without re-addressing spatial management in the broader context of spatial controls and activity controls.

8.6 Nevertheless, the issues have been identified within that paper, but should be left for decision by Councils. What is critical with any approach is to show the overall impact of the overlays within spatial areas. In the AUP, the infrastructure issues (region-wide) were addressed by special chapters bringing together the various overlays. We suggest such an approach could provide a limit to spatial mapping controls.

9. E-plans

9.1 Electronic plans have been in development in New Zealand for some considerable time, with early versions of online plans being available from early 2000s. We submit that, unfortunately, little thought has been given to the movement from online copies of the plans to e-plans in terms of their:

9.1.1 authenticity;

9.1.2 updating; or

9.1.3 enforceability.

9.2 Two recent cases highlighted difficulties with e-plans: *London Pacific* and *Cabra Developments*, both dealing with the Auckland Unitary Plan. The Court has been advised that the Auckland Unitary Plan, if printed, would occupy some 3,500 pages, and the maps themselves cannot be printed.

9.3 Issues then arise as to how one can be sure that the particular plan one is looking at is the valid plan, either at the current time or at the time in the past that is applicable for the purposes of examining, for example, a prosecution. The requirements of the Electronic Transactions Act 2002 also appear to apply.

9.4 Practical difficulties in relation to authenticity include where changes have been made by a staff member to “clarify” a document changing the meaning of the paragraph or sentence, difficulties with understanding the plan that applied on a particular date, which is relevant not only for prosecutions but for many appeals, and difficulties with understanding how the update has been authorised under the Act to become an enforceable document.

9.5 As we highlighted at the commencement, the enforceability of the plan is its distinguishing feature. Without it, any aspirational or other statements of the council cannot be enforced. Arguably, it would be difficult to oppose the issue of a

building consent if there were no enforceable planning provisions within an area. In this way, the question of a valid and enforceable plan becomes a critical issue for the rule of law, the reputation of not only the Courts but the local authorities.

10. Conclusions

10.1 We support national planning standards and consider that they should specify:

10.1.1 formatting;

10.1.2 definitions;

10.1.3 general content layout.

10.2 Beyond this, we consider that a template for content would give a guide to councils that would be non-mandatory in nature, but would assist with uniformity of documentation.

10.3 Although we agree there is significant potential for e-plans, we consider that it should not be used as a substitute for conciseness and clarity, given the significant extra length these documents are occupying. Furthermore, there are issues as to enforceability and accessibility that would need to be addressed.

10.4 We consider the imposition of national planning standards would assist in this process, but does not necessarily address directly the issues relating to e-plans.

10.5 Finally, we wonder whether a working group, involving representatives for the Courts and other user groups, might not usefully monitor and report on the application of the National Policy into the future to ensure it remains fit for purpose.