

17 August 2018

By Email

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Dear Sir / Madam

Feedback on Draft National Planning Standards notified June 2018

The Ministry for the Environment has invited public feedback by **17 August 2018** on the first draft set of National Planning Standards.

This feedback is made on behalf of the following clients of Ellis Gould (collectively “**the Submitters**”):

1. **CDL Land NZ Limited**, a land development company with a particular focus on greenfields residential development. CDL has undertaken significant residential development throughout New Zealand including most notably in Auckland, Hamilton and Christchurch.
2. **Kiwi Property Group Limited**, New Zealand's largest diversified property company with a property portfolio throughout New Zealand valued at \$3.1 billion. Kiwi has a particular focus on creating town and metropolitan centres and has extensive investments in shopping centres and landmark office towers. Kiwi has assets in the Auckland and Wellington regions, Christchurch, Hamilton and Palmerston North. Kiwi has extensive experience with national, regional and local planning instruments.
3. **The National Trading Company of New Zealand Limited**, being the property holding and development arm of Foodstuffs North Island Limited which is the cooperative through which New World, Pak'n Save and Four Square supermarkets are established and operated in the North Island. NTC has responsibility for developing, maintaining and upgrading supermarkets throughout the North Island and has extensive experience working with national, regional and local planning instruments.
4. **Ngati Whatua Orakei Whai Rawa Limited**, which is the commercial arm of the Ngati Whatua Orakei Group, responsible for protecting and building the asset base of Ngati Whatua Orakei. The company has landholdings in the Auckland Region and is currently redeveloping and intensifying urban landholdings that have historically been developed at a relatively low density but which are now earmarked under the Auckland Unitary Plan (Operative in Part) for significantly more intensive urban development.
5. **Tramco Group Limited**, a property investment entity with extensive assets in urban and rural areas of the country (e.g.: Viaduct Harbour and Wynyard Quarter, Central Auckland). Tramco has worked with and submitted on planning instruments over many years.

6. **The Waitakere Ranges Protection Society Incorporated**, an incorporated society that was founded in 1973 and has a particular interest in the legislative and planning framework applying to the Waitakere Ranges, on the western edge of Auckland. The Society has extensive experience with national, regional and local planning instruments and considers that the Waitakere Ranges Heritage Area Act 2008 appropriately identifies the unique characteristics of the Waitakere Ranges.

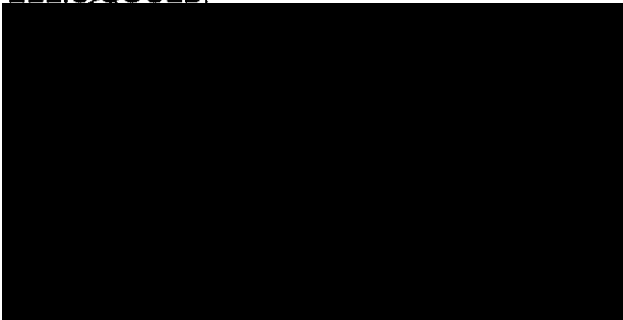
The Submitters' feedback is **annexed** to this letter. The feedback is intentionally high level in nature rather than being a detailed analysis of the content of the draft national planning standards. In summary:

1. National planning standards regarding the format and content of district and regional planning instruments are likely to be a useful resource for smaller councils with extensive districts but which lack the resourcing required to develop effective plans.
2. It is unnecessary and counterproductive to impose such documents on all councils, however, and in particular on larger councils that face district or region specific issues and have the resources needed to develop appropriate provisions and planning instruments. The Submitters ask the Ministry:
 - (a) To introduce national planning standards that councils may elect to adopt but are not required to use.
 - (b) Alternatively, to exempt large councils and those facing distinctive local issues (eg: Auckland Council, Hamilton City Council, Tauranga City Council, the Greater Wellington Region, Christchurch City Council and Queenstown Lakes District Council) from complying with the standards.
 - (c) In any event, to exempt Auckland Council from complying with the standards given, in particular, the exhaustive Auckland Unitary Plan process which is only now coming to an end and has transformed the planning framework for New Zealand's largest and most complex urban area.
3. The Submitters consider that national planning standards are best suited to addressing structural issues rather than the substance of rules. The first set of draft national planning standards is primarily concerned with structural matters but notably includes a standard regarding definitions which will have significant substantive implications (discussed below). The issues that arise throughout parts of New Zealand differ markedly and, accordingly, the planning provisions and outcomes sought will also differ. There are sound practical reasons why resource management issues are appropriately addressed at a local or regional level and endeavouring to draft substantive planning provisions with universal application is likely to create practical difficulties for councils.
4. The introduction of standard mandatory definitions is unnecessary and fails to recognise the purpose for which terms are defined in planning instruments. While the national planning standards could contain definitions that councils would have a discretion to adopt, mandatory definitions will alter the meaning of provisions and require councils to either amend provisions or develop specific additional definitions in order to ensure that provisions are written in an efficient and clear manner.
5. The Submitters consider that, in addition to introducing national planning standards, the Ministry should endeavour to develop expertise within central government on elements such as the landscape, coastal and cultural matters that are relevant under Part 2 of the Resource Management Act. These are areas in which rural territorial authorities with smaller rating bases but extensive districts, in particular, are struggling to meet their statutory obligations. That expertise might usefully be made available to local authorities so that these aspects of plan preparation are robust and consistent around the country.

6. The Submitters consider that, if the national planning standards are either to contain substantive provisions (eg: definitions) or to be mandatory, they should be the subject of rigorous testing and the decision makers must be fully informed. In that case, the provisions should, pursuant to section 58D(3)(d) of RMA, be subject to a public hearing process that enables parties to speak to their submissions and the provisions to be tested through cross examination before an independent panel. That approach would increase the probability that errors can be identified and corrected.

The Submitters would be pleased to meet with Ministry staff to discuss this submission in greater detail.

Yours faithfully
ELLIS GOULD



ANNEXURE

Detailed Feedback on First Draft National Planning Standards

Function of Template

1. National planning standards regarding the format and content of district and regional planning instruments are likely to be a useful resource for smaller councils with extensive districts but which lack the resourcing required to develop effective plans:
 - (a) Under New Zealand's resource management legislation, significant responsibility is devolved to territorial authorities. While central government has made increasing use of the National Policy Statement and National Standard mechanisms, the administrative load on councils has remained high. That is particularly true of rural councils that have a limited rating base but have extensive regulatory and legislative responsibilities over physically extensive parts of the country, which in many cases contain landscapes or resources that raise challenging issues in terms of Part 2 of the RMA.
 - (b) Those legislative responsibilities require territorial authorities to undertake extensive analyses of the resources in their district and to fund the preparation of planning instruments together with the related hearing and appeal processes. In that context, it would be beneficial to such councils if there could be guidance from the Ministry as to the form and structure of planning instruments.

2. It is unnecessary and counterproductive to impose such documents on all councils, however, and in particular on larger councils that face particular issues and have the resources needed to develop appropriate provisions and planning instruments:
 - (a) It is important that the national planning standards function as useful tools and sources rather than act as straight-jackets into which councils must fit their local issues and responses, regardless of the extent to which the national planning standard model is suited to the local response.
 - (b) These issues are particularly apparent in the larger centres such as Auckland, Hamilton, Tauranga, Wellington and Christchurch, where unique geographical conditions apply in the context of specific growth and environmental pressures and populations have differing expectations as to how their community should develop. Such councils have the resourcing and technical support required to develop their own plans (although they should be free to adopt or integrate ideas found in national planning standards).
 - (c) Accordingly, the Submitters ask the Ministry to introduce national standards that councils may elect to adopt but are not required to use. That is, the templates would be a resource available to councils that lack the capacity or funding to undertake their statutory obligations but will not be forced on larger, more capable councils. Councils should be able to amend and refine the provisions as they think fit in order to fit them to the particular circumstances and objectives of their district.
 - (d) Alternatively, large councils and those facing distinctive local issues (eg: Auckland Council, Hamilton City Council, Tauranga City Council, the Greater Wellington Region, Christchurch City Council and Queenstown Lakes District Council), should be exempted from complying with the standards.

- (e) In any event, Auckland Council should be exempted from compliance with the standards given:
- The fact that it is only now completing an exhaustive five year Unitary Plan process which has comprehensively changed and reformatted the planning structure for the area.
 - The size and extent of the Auckland Council area and its unique geographical setting and growth pressures, which give rise to regionally specific and unique issues and, as a consequence, unique planning solutions.
 - The challenges inherent in trying to devise national planning standards that suit a city and region as complex as Auckland while remaining useful for smaller councils that face very different issues.
3. The Submitters consider that national planning standards are best suited to addressing structural issues rather than the substance of rules. The first set of standards is primarily concerned with structural matters but notably includes a standard regarding definitions which will have significant substantive implications (discussed in detail below). The Submitters make the following general observations regarding why resource management issues are appropriately addressed at a local or regional level and why drafting substantive planning provisions with universal application is likely to create practical difficulties for councils:
- (a) During the Ministry's briefing sessions with the public, comment has been made regarding the possibility of further national planning standards being issued to deal with substantive matters such as the content of rules. The Submitters ask that no such substantive national planning standards be introduced.
- (b) The Resource Management Act devolves responsibility for land use and resource planning to regional and local authorities because of the variability in issues, conditions and responses throughout the country. Those regional and local differences also militate against the ability of central government to develop a single template governing substantive planning matters that could or should apply universally throughout the country. By way of example, territorial authority areas in New Zealand can differ markedly in terms of:
- The presence or absence of landscapes and ecological resources that would warrant consideration in terms of section 6 of the RMA;
 - The sensitivity of land and waterspace and the risk of particular problems or adverse effects (eg: nitrification of water bodies; erosion) arising from activities or land management techniques;
 - The extent and prevalence of public land;
 - The nature of predominant land uses;
 - Population and population density and distribution;
 - Urban form and matters that influence and constrain that;
 - Population growth pressures; and
 - Local visions and aspirations.

- (c) That variability poses real risks if the provisions are mandatory, particularly where expectations as to planning outcomes, and hence the content of planning instruments, differ. The most obvious example is Auckland where the newly operative Auckland Unitary Plan proposes a significant intensification of development, accompanied by reduced standards in terms of matters such as carparking, side yards and height in relation to boundary controls. Furthermore, ongoing population growth and intensification will allow some adverse effects to be absorbed faster in Auckland than in other areas of the country (where a more conservative approach to activities might be warranted). As a consequence, outcomes that are effectively required to manage, say, the Auckland urban area in a sustainable manner are outcomes that may be an anathema to residents of smaller, regional centres with lower growth such as Whanganui and simply irrelevant to areas such as Westland.
- (d) Planning provisions require careful drafting to ensure that they balance competing interests appropriately within a district, zone or neighbourhood. That process is challenging enough in the context of a single district plan. It is not possible for a national planning standard drafter to include in a template substantive provisions that account for all circumstances in all zones in all parts of New Zealand. A template that endeavours to address substantive issues will inevitably do so incompletely and without taking sufficient account of local characteristics, circumstances and objectives.
- (e) There is no need for template residential, commercial or rural zones given that such provisions have been developed over decades and, in areas with little growth, do not need to alter notably over time. In contrast, the aspects of plan making that are proving most challenging for councils relate to Part 2 RMA issues in respect of elements such as landscape, ecology and cultural values. The Submitters' observation is that many councils are struggling to determine how best to identify areas that are subject to those Part 2 issues and, having done so, how best to manage and protect those areas. Central government guidance might most appropriately and usefully be applied in those areas and in particular with respect to the process through which that analysis is undertaken.
- (f) In summary:
- It is not feasible for a single document to take a sufficiently nuanced approach to the issues in each district. As a consequence, a mandatory document is unlikely to produce provisions that work ideally throughout the country.
 - If such a template is mandatory, councils will have limited ability to avoid any aspects that are inappropriate for the district or to disregard or repair inherent flaws in the document.
 - Provisions in the template may fail to give effect to the purpose and principles of the RMA in terms of particular matters in particular parts of the country. That is, imposing a substantive outcome through a template may inevitably render provisions unlawful in terms of the RMA as none of the template provisions on offer will be the most appropriate in that circumstance. Whether particular provisions are unlawful will depend upon the local circumstances. Thus provisions that are unlawful in the Auckland urban area may be entirely appropriate in South Canterbury.

None of these problems need arise if national planning standards are optional rather than mandatory for councils.

4. The proposed introduction of mandatory **definitions** of commonly used terms is unnecessary, will be problematic, and fails to recognise the purpose for which terms are defined in planning instruments. While the national planning standards could provide definitions that councils would have a discretion to adopt, mandatory definitions will alter the meaning of provisions and require councils to either amend provisions or develop specific additional definitions in order to ensure that provisions are written in an efficient and clear manner:
- (a) Providing a list of definitions that councils may elect to adopt may prove useful, provided councils have a discretion regarding the use of those definitions. In contrast, imposing definitions on councils is innately problematic and fails to recognise the purpose for which definitions are developed.
 - (b) Words and phrases are defined in planning instruments as a means of reducing the quantum of text required in that document. The definitions are developed in conjunction with the relevant rules, with the definition being shorthand for a longer expression that would otherwise need to be inserted repeatedly into the rule. Accordingly, it is the rule that determines the content of the definition, not the reverse.
 - (c) Typically different councils adopt different definitions for the same term because the relevant rules will be different in their districts (e.g.: rules that apply in Auckland will, logically, differ from those that will apply in Westland). Accordingly, imposing standard definitions without reference to the content of rules will require councils to invent additional definitions or draft plans in a more complex form in order to ensure that the rules function as intended.
 - (d) There is no adverse consequence that arises from different councils using different definitions for different purposes. In each case, the definition should be tuned to the issues that are relevant to the particular council and district or region. Professional advisers and consultants dealing with planning instruments are familiar with the need to review definitions when interpreting provisions and many of them have decades of experience doing just that. Similarly, members of the public are able to refer to and rely upon definitions provided that the structure of the planning instrument is sufficiently clear.
 - (e) By seeking to impose mandatory nationwide definitions, the national planning standards discount and discard a drafting technique that has been used for centuries in legal and regulatory documents, namely the express definition of terms to provide clarity in regulation. There is no legal or planning rationale for taking such a radical and unnecessary step.
 - (f) As the mandatory definitions are inserted into operative plans, the implications for the interpretation of existing rules will need to be considered and addressed in each district or region with respect to each of the defined terms. Altering the definition or meaning of a word will inevitably alter the meaning of provisions that use the word in random, inconsistent and unpredictable ways. That will generate a need for extensive and potentially contentious and complex plan changes in every affected region or district and will unnecessarily open up the relevant provisions for debate. The costs of those unnecessary plan changes will be borne by councils, their ratepayers and landowners. By way of illustration, it took almost a year to resolve appeals relating to the definition of "*height*" in the Auckland Unitary Plan because of the need to ensure a suitably flexible and nuanced definition. That issue will be reopened if the definition of "*height*" in the national planning standards is made mandatory and additional definitions will be needed or large numbers of rules will need to be changed.

5. The Submitters consider that, in addition to introducing national planning standards, the Ministry should endeavour to develop expertise within central government on elements such as the landscape, coastal and cultural matters that are relevant under Part 2 of the RMA. These are areas in which rural territorial authorities with smaller rating bases but extensive districts, in particular, are struggling to meet their statutory obligations. That expertise might usefully be made available to local authorities so that these aspects of plan preparation are robust and consistent around the country:
- (a) The Submitters' observation is that even relatively small councils are capable of preparing and implementing zones that provide for residential, commercial, industrial, rural and open space activities. In many cases district plan reviews simply roll-over existing provisions that have been refined over many decades. That is particularly the case with councils that are facing relatively low growth pressures.
 - (b) In contrast, many councils struggle to deal with the increasing obligations placed upon them under the RMA with respect to Part 2 matters. In particular, the requirements to recognise and provide for the matters of national importance in section 6 impose on councils obligations to identify factors such as the natural character of the coastal environment, wetlands, lakes, rivers and their margins; outstanding natural features and landscapes; areas of significant indigenous vegetation; significant habitats of indigenous fauna; places of particular importance to Maori; and historic heritage. Those are often complex and very expensive tasks involving specialists in a number of disciplines. In addition, there is no relationship between the prevalence and complexity of these features in a given district and its population. In practice, relatively low population regions and districts often contain extensive features of relevance under section 6.
 - (c) Accordingly, the Submitters' observation is that smaller councils require far more assistance with and funding in respect of the categorisation and identification of these section 6 matters than with the drafting of relatively straightforward provisions in regional or district planning instruments.
6. The Submitters consider that, if the national planning standards are either to contain substantive provisions (eg: definitions) or to be mandatory, they should be the subject of rigorous testing and the decision makers must be fully informed. In that case, the provisions should, pursuant to section 58D(3)(d) of RMA, be subject to a public hearing process that enables parties to speak to their submissions and the provisions to be tested through cross examination before an independent panel. That approach would increase the probability that errors can be identified and corrected.
- (a) Collectively, the national planning standards, to the extent that they are mandatory and touch upon substantive matters (eg: definitions), will be the single most important planning instrument in the country. They will render tracts of existing planning regulation redundant. In that context the Submitters consider it essential that the Ministry proposes a process for this exceptionally important planning instrument that involves at least the same level of public scrutiny and independent analysis as a district plan.
 - (b) At this stage the Ministry proposes to produce its template documents through a public participation process that does not appear to involve cross party mediation, a hearing before independent commissioners or any cross examination. As a consequence, decisions regarding the role, structure and content of the template would be made:

- Without input from independent adjudicators with experience and expertise in plan drafting (e.g.: Environment Court judges or commissioners);
 - Without presentation of detailed evidence from independent expert witnesses and interested parties such as the Submitters on the implications of provisions and the range of options available;
 - Without the proponents of the provisions having to explain to that independent body why they consider those provisions to be appropriate in terms of the relevant legislation;
 - Without evidence in support of the provisions being tested, either by the independent commissioners or by other parties through cross-examination and rebuttal; and
 - Without the legal implications of the proposed provisions being tested publicly (including the potential for provisions to conflict with obligations under Part 2 of RMA for the reasons discussed above).
- (c) In summary, the drafting of the most important planning instrument in the country will be subject to less formal and independent scrutiny than is the simplest resource consent application put before independent expert commissioners.
- (d) In the event that a mandatory/substantive national planning standard is introduced, parties who disagree with it will have no alternative but to issue judicial review or declaration proceedings regarding the lawfulness of the provisions, whether generally or in the context of particular districts and circumstances. The problem with that circumstance is that decisions regarding the lawfulness of the provisions will only be made after those provisions have been given effect to. If such proceedings are successful then the national planning standard may need to be altered along with district plans that give effect to any problematic parts of the template. Such alterations will need to be drafted in such a way as to avoid creating new issues in respect of other locations.
- (e) Thus omitting a hearing process for the national planning standards through which the legality of the provisions can be determined before they are introduced will produce ongoing uncertainty and potentially additional long term cost and delay. In contrast, a hearing process for the template would enable the appointed commissioners and/or Environment Court on appeal to assess the lawfulness and appropriateness of provisions. That would enable the refinement and documentation of a document that, as a consequence of that hearing process, should be both lawful and of broader relevance.