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Welcome to *Environment in Focus,* Bell Gully's regular update of resource management legal issues, designed to keep you informed on regulatory developments, legislation and cases of interest.

IN BRIEF

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In the Courts

Reminder of care to be taken with public notices and consultation - Mitre 10 Judicial Review

This recent High Court case is a good reminder about the care to be taken with public notices, and has implications for councils' obligations in notifying directly affected residents about plan changes.

Plan Change Summary

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EEZ Bill - Report of the Select Committee and Discussion Document for the Regulations

The Local Government and Environment Select Committee recently released its report on the Exclusive Economic Zone (**EEZ**) and Continental Shelf (Environmental Effects) Bill (**the Bill**). This was followed by the release of a discussion document by the Minister for the Environment, Hon. Amy Adams on the proposed Regulations that will classify activities as permitted, discretionary (allowed with a marine consent), or prohibited (no marine consent can be applied for or granted). The Regulations will guide the overall shape and effect of the new regime.

The Select Committee, comprised of National, Labour, Green Party, and New Zealand First members, was unable to agree that the Bill be passed, however its report recommends several amendments that are agreed by all members. Labour, the Greens and New Zealand First believe that, although an exclusive economic zone and continental shelf bill is necessary, they do not support the bill in its current form. We address some of the proposed changes to the Bill below, followed by a review of the discussion document on the proposed Regulations.

Achieving the purpose of the Bill

The stated purpose of the Bill is to "achieve a balance between the protection of the environment and economic development in relation to activities in the EEZ and on the continental shelf". The purpose statement will be directly relevant to how the legislation is interpreted and applied by the Environmental Protection Authority (**EPA**) and the Courts.

The Select Committee recommended moving the purpose and principles to the substantive decision-making clauses of the Bill (33A and 60A). The Committee considered that these changes will strengthen the connection between decision-making and the relevant considerations, including the need for caution in the event of uncertainty.

Environment vs economic considerations

The Bill as originally drafted provided that consent could only be granted where the economic benefits from the proposed activity outweighed the adverse environmental effects. The Committee has recommended the removal of this threshold, on the basis that it was not the policy intent of the Bill to require a cost-benefit analysis and an overriding economic vs environment test for a proposal. If this amendment is adopted, decision makers will only be guided by the overall purpose 'to achieve a balance' between environmental protection and economic development, with no explicit direction as to how to weigh up the competing interests in the principles.

Transitional periods – providing for committed operations

The Bill includes transitional provisions which apply to lawfully established existing activities. The effect of these provisions is to provide that activities requiring consent under the Act can continue to either 1 May 2013 or six months after the Act comes into force, whichever is the later. If the person carrying out that activity applies for a marine consent within this transitional period, they can continue to undertake the activity until the application is decided and any appeals determined.

The Bill as originally drafted did not provide for operators who have made commitments to undertake activities, but have not started those activities by the time the Act commences. The Committee has recommended that planned activities not yet begun should also be covered by the transitional provisions. This amendment will improve regulatory certainty for companies planning offshore exploration for the 2012/2013 summer. Anyone undertaking discretionary activities under a petroleum permit during the transitional period will be required to submit an impact assessment to the EPA under new clauses 149A or 151A.

International and Treaty of Waitangi obligations

The Committee was divided as to whether the Bill gives effect to New Zealand's obligations under the United Nations Convention on the Law of the Sea (**UNCLOS**). It did, however, recommend amending clause 11 to refer more generally to New Zealand's international obligations regarding the marine environment, rather than solely to UNCLOS. This amendment will give effect to international obligations such as the Convention on Biological Diversity.

Referring to the approach taken under the Climate Change Response Act 2002, the Committee also recommended that the Crown's responsibilities under clause 14 be extended from "taking appropriate account" of the Treaty of Waitangi, to "giving effect to" its principles. It also recommended the Minister and the EPA be required to take into account the effects of activities on existing interests, as opposed to simply "having regard to" them.

Public hearings – cross examination

The EPA is required to give public notice of an application for a marine consent and a hearing must be held if requested by the applicant or a submitter (or if the EPA itself determines a hearing should be held). Acknowledging that the testing of evidence is important, the Committee recommended amending clause 53 to allow the questioning of a party or witness by leave of the EPA. The Bill as originally proposed made no provision for cross-examination by other parties. This is an essential amendment, and we consider that this ability to test evidence is particularly important where a precautionary approach is required.

Regulations – discussion document

On 22 May, Hon. Amy Adams released for feedback a discussion document on the proposed regulations under the Bill: A discussion document on the regulations proposed under the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Bill.

The discussion document sets out various options for matters to be addressed in the Regulations, including the criteria to classify activities, conditions for permitted activities, what activities should be covered by the Regulations as permitted or discretionary, and how the EPAs functions/services should be funded.

It is proposed that the following activities be permitted (subject to compliance with specific conditions):

a. Seismic surveying;
b. Submarine cabling;
c. Marine scientific research; and
d. Prospecting for oil and gas and seabed minerals.

All other activities would require a marine consent from the EPA. This will include activities relating to the exploration, production and decommissioning for oil and gas and seabed mining, and permitted activities that do not comply with the permitted threshold controls. Given the limited ambit of permitted activities, we consider that further consideration should be given to providing a discretion regarding notification where an activity is proposed to be carried out in accordance with best practice and the decision maker is satisfied that environmental harm would be less than minor and risk can be appropriately managed.

Currently no activities are proposed to be prohibited because of the limited information available on the environmental effects of some industries. We consider that the prohibited activity status should only be used sparingly, as is the case under the Resource Management Act (RMA).

The Regulations may also prescribe standards, methods, or requirements in relation to activities carried out in the EEZ or continental shelf, the effects of those activities, or for assessing the state of the environment.

It is also anticipated that following the enactment of the EZZ Bill and Regulations, further regulations will be developed as more information becomes available, particularly in respect of:

- Sensitive ecosystems and habitats;
- New and emerging activities in the EEZ;
- Closures of areas in the EEZ to activities regulated by the Act; and
- Standards terms and conditions for discretionary activities.

A copy of the discussion document is available at: http://www.mfe.govt.nz/publications/oceans/managing-our-oceans/index.html. Feedback on this document closed on 20 June 2012.

Concluding comments

The recommendations of the Committee address some of the inadequacies of the Bill in its current form. The Labour Party and the Greens share the opinion that there needs to be consistency between the EEZ regime and the RMA; that the Bill should allow the public, iwi and other users of the marine environment to appeal EPA decisions de novo to the Environment Court (currently appeals are only allowed on points of law to the High Court); and implement greater penalties for breaches of the Act. Whether an appropriate balance between the protection of the environment and enabling economic development will be achieved as envisaged by the Bill will likely depend on the specific controls and standards set out in the subsequent Regulations and how the Bill is implemented and enforced. Uncertainty for investors and delay arising from processing applications and bedding down of the new regime will be key areas that require focus.

Bell Gully will continue to follow the progress of the Bill and Regulations.

Better Local Government - Amendment Bill

The Better Local Government reforms seek to refocus the purpose of local government, introduce financial prudence requirements and stronger governance for local authorities. The Local Government Amendment Bill, which recently passed its first reading in Parliament by 61 votes to 59, is a step forward. Further reforms, both statutory and non-statutory have been indicated as forthcoming.

The Local Government Amendment Bill (the **Bill**) contributes to the Government's broader agenda to build a more competitive and productive economy, and improve the delivery of public services, by focussing councils on operating more efficiently and "doing things only councils can do".

New Zealand's 78 councils make up 4% of Gross Domestic Product, spend $7.5 billion per year of public money and manage $10 billion of public assets. The Bill anticipates that councils will play their part in creating an environment conducive to sustained economic growth by reducing red tape, minimising rates burdens on households and businesses, limiting debt and providing cost-effective, good quality infrastructure.

At the heart of the Bill are the three principles approved by Cabinet in October of last year: that local authorities should operate within a defined fiscal envelope; focus on core activities; and its decision-making should be clear, transparent, and accountable.

A clear and focussed purpose statement was considered essential to define the role of councils and assist them to plan and prioritise activities. The Bill's purpose statement is "to meet the current and future needs of communities for good quality local infrastructure, local public services, and performance of regulatory functions in a way that is most cost-effective for households and business".

The Bill:

- Reframes the scope of council's role, gives them stronger tools to contain costs, and provides options for efficiency gains from council reorganisation.
- Provides for establishment of financial prudence requirements for councils, setting benchmarks for councils' performance in respect of income, expenditure, and prudent debt levels.
- Streamlines local government reorganisation procedures.

Earlier this year the Government intervention to assist a local authority battling with unmanageable debt highlighted the limited options Government has to intervene to assist councils under the current regime.

Key mechanisms to strengthen council governance provisions include:

1. Providing for simpler and graduated mechanisms for Crown assistance and intervention in the affairs of individual councils;
2. Extending the powers of mayors; and
3. Enabling an elected council to determine policies on remuneration and staff numbers and requiring reporting of these in council annual reports.

Public submissions have been called for on the Bill, with a closing date of **26 July 2012**.

Land and Water Forum Report

On 18 May the Land and Water Forum released its second report about freshwater management. The Forum consists of major stakeholders with interests in water and land management including iwi, electricity generators, environmental and recreational interest groups, tourism and primary industry. The Government welcomes the report, noting that the Forum has made excellent progress on finding agreement on complex issues, and will help establish clearer national direction.

The report is based on the recommendations in the Forum's first report, and in response to a request from Government to make recommendations on setting objectives for the state of water bodies and related limits on takes and discharges; on improving decision-making processes at the national and regional levels; on managing within those limits including through better practices and better means of allocation; and on a possible Land and Water Strategy. The latter two topics will be addressed in the

Forum's third report expected to be released in September this year.

Setting Objectives and Limits

The Forum recommended that the Government should, through a national instrument, direct regional councils to give effect to national objectives at a catchment scale taking into account the variation in biophysical characteristics of their water bodies and their current state, by expressing objectives at a regional level as measurable states and where possible stated numerically.

The national objectives are contained in the National Policy Statement for Freshwater Management (the **NPS**), although the Forum recommends expanding these to include managing the risks to human health from micro-organisms and toxic contaminants (along with defining the meaning of "maintained or improved"). The Forum recommends that the Government should establish a national framework under which regional councils set objectives to give effect to these. In particular, the Forum recommends that this national framework should include the following:

a. Define minimum numeric state objectives (bottom lines) for a limited range of freshwater state parameters;
b. Provide narrative objectives and technical guidance on all other parameters for which regional councils are to set numeric objectives;
c. Calibrate parameters as a series of bands (fair, good and excellent) above bottom lines, to support regional decision-making in balancing local values for waterbodies; and
d. Provide guidance and options for regional councils to set numeric objectives within the fair, good and excellent bands for particular waterbody types and situations.

The Forum recommended that the freshwater objectives and related limits set at a regional level must comply with relevant national objectives except in exceptional circumstances. In its opinion these should be defined nationally, and the criteria should be the inability to meet a minimum state objective due to natural conditions of a waterbody or a regional decision to set a numeric state lower than the current state because an exceptional economic benefit and a net environmental gain will result.

The NPS requires that regional councils set freshwater quality limits and environmental flows and/or levels for all bodies of freshwater in its region. These must be set to meet the relevant freshwater objective. The Forum concluded that to control cumulative effects, limits must be binding and this means once a limit is fully allocated additional resource use should be a prohibited activity. The Forum proposes that regional councils should retain discretion to set timeframes for the adjustments required in land use, the use of water, and the discharging of contaminants appropriate to the circumstances of each case, within the bounds of reasonable economic practicality.

Collaborative Decision-Making

The Forum recommended that there should be a presumption that a collaborative approach will be used for the development of or change to freshwater-related national instruments and components of regional policy statements and plans. It is proposed that there would still be the option for regional councils to determine to use the Schedule 1 process under the RMA after public notification of its intention and consideration of comments.

There was an emphasis on iwi being enabled to participate throughout the freshwater objective and limit-setting process including the decision on commencing a collaborative process, the selection of panel members for any hearing, participation in the process, and the final decision of the statutory decision-making authority. In particular, the Forum notes that iwi values and interests should be addressed on a catchment-by-catchment and relationship-specific basis.

The Forum recommended a number of process steps for the design and implementation of a collaborative process for the development and implementation of freshwater-related regional policy and plans. These include the processes to set up the collaborative group transparently with balanced representation of interests, development of policy with input from independent experts and scientists, notification of the plan and a submissions and hearing process by an independent panel with Environment Court rigour, draft decision from an independent hearing panel, and final decision by the regional council. The Forum did not reach consensus on the nature and scope of appeal rights.

Apart from the above process steps the Forum emphasised that there should be flexibility in the regulatory framework to allow participants to develop protocols and adapt procedures to suit the context. The Forum did highlight principles of collaborative freshwater management that should be conformed to during the process, including that it should be impartial, participatory and representative, adaptive, and empowered. It noted that judgments on different values and interests during the setting of freshwater objectives should be guided by methods, models and tools that reveal the complexity of the interaction between different values and interests in the given context and translate information into easily understandable scenarios.

Plan Agility

There were a number of recommendations from the Forum about plan agility, many designed to ensure efficiency and flexibility in a planning regime with binding limits. For example, the Forum recommended that planning instruments should identify processes for involving the collaborative stakeholder group and the community in the on-going evaluation of plan effectiveness and in decisions on whether possible plan changes are consistent with objectives, have a localised effect, or are likely to have a material effect on objectives. The Forum recommended that the level of subsequent consultation or collaboration should reflect the degree of consistency with the original objectives.

The Forum was relatively specific in terms of matters that a planning instrument should identify. These include key assumptions and areas of uncertainty, characteristics of the freshwater resource that need to be monitored or tacked, triggers that would prompt a

regulatory intervention, and the parameters within which minor and technical changes can be made in an efficient and timely manner without the need for formal consultation or collaboration.

It is envisaged that the collaborative process will move from plan-making to plan-implementation, and that the members of the collaborative stakeholder group should consider the capacity needed to implement, review and adapt the relevant policy or plan. The Forum recommended that in deciding whether to change the membership of the group during this transition it should have regard to the importance of facilitating an agile planning response to new information or contextual change, and retaining and deriving maximum benefit from the trust and confidence and institutional knowledge developed through the process.

Next steps

The Forum is expected to release its third report in September about managing within limits through better practices and better means of allocation (including transfer of permits), and on a possible Land and Water Strategy. Bell Gully will continue to watch this space, and provide an update once the report has been released.

Following the release of this third report, the Government has indicated it will then be in a position to develop durable policies on freshwater management, based on the complete package of recommendations. If the Forum's proposals are adopted this will require amendments to the RMA and development of further national instruments and guidance.

A full copy of the second report of the Land and Water Forum can be viewed at: http://www.landandwater.org.nz/

Hydroelectricity or Wild and Scenic Rivers?

On 31 May 2012, in the wake of the announcement from Meridian that its proposed hydroelectric scheme on the Mokihinui River was not going ahead, the Parliamentary Commissioner for the Environment (the **PCE**) released a report called *Hydroelectricity or wild rivers? Climate change versus natural heritage*.

The PCE has commented that, although the Mokihinui project was not the focus of its report, it did provide the impetus for a review of the issues around hydroelectricity generation, a form of generation that has unavoidable and generally irreversible impacts on its immediate environment. Sometimes those environments are our increasingly-scarcer wild and scenic rivers. However, a hydroelectricity project is not a pure case of economic interests versus conservationist interests. The PCE has pointed out that the environmental benefits of hydroelectricity generation are manifold, it being a non-fossil fuel, renewable energy option. In our efforts to halt global climate change, the Government has set an ambitious goal: that 90% of electricity generation be from renewable sources by 2025. We question whether that goal is achievable under our current environmental regime, with several large scale hydroelectric schemes, such as the Mokihinui and Project Aqua on the Waitaki River, failing to achieve consent in recent years.

The PCE report raises, discusses, and makes recommendations on the following issues:

- The balance between hydroelectricity and wild and scenic rivers;

  The Resource Management Act 1991 (**RMA**) and the National Policy Statement on Renewable Electricity Generation (**NPS**) both stress the importance of renewable energy. The PCE is concerned that the importance of wild and scenic rivers is not recognised in the same way, and has therefore recommended that work be done to consider how the NPS on Freshwater Management might be amended to better recognise their value.

- The water conservation orders scheme;

  The PCE has noted that the water conservation order scheme in the RMA is expensive and slow, and is rarely utilised unless an imminent threat to a river is presented. A more proactive approach is suggested to create greater certainty for both developers and conservationists about which rivers should be open for hydroelectric schemes and which should not be, and that the Land and Water Forum could play a leadership role by using existing data to draw up a list of important wild and scenic rivers that should be considered for protection. Greater efficiencies could be gained by the Environmental Protection Authority (**EPA**) administering the water conservation order scheme.

- Stewardship land through which wild and scenic rivers flow;

  Currently, about a third of the conservation estate falls within "stewardship land", on which development is assessed through a land-swap process, rather than the concessions process. The former is much easier to achieve, but does not have a formal mechanism for public participation. The PCE has recommended that important wild and scenic rivers running through stewardship land should be identified and the land reclassified if the rivers need protection.

- The administration of riverbeds;

  The riverbeds of many rivers that run through the conservation estate are administered by Land Information New Zealand (**LINZ**) rather than by the Department of Conservation (**DOC**). The PCE points out that the effect of this is that such rivers are not part of the conservation estate, so cannot be considered in land exchanges. To correct this, the PCE has recommended that the administration of this land be transferred to DOC.

- Streamlining the resource consent and conservation concession processes;

  The PCE has highlighted the inefficiency and uncertainty involved in the parallel processes of obtaining resource consents under the RMA, and a

concession under the Conservation Act 1986 (**CA**). To address this, the PCE has suggested two options for commercial operations on conservation land:

- that the operation must have approval under the CA before resource consents can be sought; or
- that a proposal for an operation is considered at a single concession−consent hearing, and that the concession and consent decisions are made separately.

This is perhaps the recommendation that will be of most interest to operators and environmental advocates, with this dual process being the source of numerous complaints, and part of the current review of the RMA. However, the PCE's recommendation is still for a parallel, albeit more integrated, regime. The difference proposed is that the sequence of the applications would be prescribed.

A full copy of the report is available at: http://www.pce.parliament.nz

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Auckland Plan − The Urban Intensification vs Greenfield Debate

The Auckland Plan was adopted by Auckland Council's governing body on 29 March 2012 and was officially released to the public on 29 May 2012.

One of the key issues of debate by submitters and within the Council was the divide between urban intensification and the availability of greenfield land for future development. The 75:25 split for dwellings within the existing urban areas (defined by the 2010 MUL) and growth in new greenfield areas and satellite centres has been revised in the Auckland Plan to 60-70% in, and 30-40% outside the 2010 MUL.

The Auckland Plan also acknowledges that providing for residential intensification is going to be a generational change, with the first decade about building capability and confidence in intensive development, the second decade to encourage greater demand, and the third decade focussing on delivery to meet the targets. There is currently capacity for around 60,000 dwellings in the development pipeline (greenfields land), with 2/3rds of this within the current baseline 2010 MUL. The greenfield areas for urban expansion outside the MUL are to be released on a staged basis over the next 30 years to the new Rural Urban Boundary (RUB) that will define the extent of urban development to 2040. The area within the RUB will need to cater for approximately 400,000 new dwellings over the next 30 years, an average of over 13,000 dwellings per year. The greenfield areas are indicated on Maps D1 and D2 Development Strategy as 'greenfield areas for investigation'. Although there is already capacity for 40,000 dwellings within the 2010 MUL, and the direction from the Auckland Council that the Unitary Plan is going to support the strategy for intensification, we still anticipate that there will be some additional greenfield areas identified for urban development in the Unitary Plan. This will continue to be a point of interest and debate.

Another change from the draft Auckland Plan is that rather than identifying 'development areas' for residential intensification which extended over large parts of Auckland, residential intensification is now directed to occur largely within the Auckland City Centre and Metropolitan Centres (as areas of most change) and Town Centres (as areas of significant change). Outside of these centres, some areas are shown as moderate change, while areas with existing heritage character and the Waitakere Ranges Heritage Area are areas of least change. Botany and Henderson are also now elevated and identified as Metropolitan Centres. The Auckland Plan has largely done away with the 'intervention categories' for growth centres, while retaining the emergent and market attractive classifications. The focus of development and intensification within centres better supports these centres as places to live and work, and the establishment and operation of an efficient public transport system.

The Auckland Plan also provides further clarification for major business areas, with clearer identification on Map D2 Development Strategy (Urban Core) of existing major business areas, future urban business areas (pipeline). The 'greenfield areas for investigation' are also for future business land, where an anticipated 1,400 hectares of additional business land will be required over the next 30 years. The Auckland Plan has further supported a centres based strategy by no longer identifying "economic corridors" along specific transport routes, and instead identifying on Map 6.1 Auckland's Economy a "regional economic corridor" that broadly encompasses major business areas and the linkages between them. Map 10.1 Auckland's Network of Urban Centres and Business Areas (Urban Core) also provides a new classification for business areas of heavy industry, light industry, special activity and business parks. These classifications and the clearer focus of residential intensification within existing centres in the Auckland Plan alleviates some of the concerns with the draft Auckland Plan of ensuring that residential development did not encroach on or impede existing business and industrial activities.

Although the status of the Auckland Plan under the Resource Management Act 1991 (RMA) is still up in the air, the Auckland Council has made it clear that the Unitary Plan will be one of the main tools to integrate and prioritise the spatial development envisaged in the Auckland Plan across the region. This signals that we can expect some significant changes to development controls in the Unitary Plan, which is going to incorporate the Regional Policy Statement, Regional and District Plan provisions. Following on from the swift timeframes to prepare and adopt the Auckland Plan, the Council is moving just as fast to prepare the Unitary Plan. Stage one of direction setting and big policy issues has been completed; the Council is currently working on the text of an earlier draft, and will start working on the maps later this year. As the Unitary Plan is starting to take shape, it is important that key stakeholders start engaging with the Council now to make sure their interests are provided for.

Bell Gully is following the preparation of the Unitary Plan closely and can be contacted for further information.

CERA − Earthquake Recovery Strategy Launched

The CERA Recovery Strategy for Greater Christchurch has now been launched. The development of this document was required under the Canterbury Earthquake Recovery Act 2011. Other documents affecting the Canterbury region, including the regional policy statement, and regional and district plans, must now be read in a way that is consistent with the Recovery Strategy. The Recovery Strategy document is subject to review by CERA and reports detailing the progress towards the milestones set out below will be notified on the CERA website. The report identifies six components of recovery and goals for each of these areas. The six components and some of the goals are:

1. Leadership and Integration: CERA, the public and private sector and communities coordinate with each other to contribute to the recovery and future growth of greater Christchurch;
2. Economic Recovery: Revitalise greater Christchurch as the heart of a prosperous region for business, work, education, and increased investment in new activities;
3. Social Recovery: Strengthen community resilience, safety, wellbeing, and enhance quality of life for residents and visitors;
4. Cultural Recovery: Renew greater Christchurch's unique identity and its vitality expressed through sport, recreation, art, history, heritage and traditions;
5. Built Environment Recovery: Develop resilient, cost effective, accessible and integrated infrastructure, buildings, housing and transport networks; and
6. Natural Environment Recovery: Restore the natural environment to support biodiversity and economic prosperity and to reconnect people to the rivers, wetlands and Port Hills.

The Recovery Strategy then sets out the phases in which the recovery process will take place as immediate, short term and medium to longer term. The recovery milestones for the short term recovery stage are indicated as covering the period from 2012-2014, whilst medium to longer term recovery is forecast to take place from 2015 to 2020 and beyond.

The short term recovery phase focuses on rebuilding, replacing and reconstructing. Activities planned to occur within this phase include:

- Restoring access to and transportation networks in the central city;
- Finalising the Recovery Plan for the CBD (which provides the framework to guide the redevelopment of the Central City, including more than 70 projects and initiatives to be implemented during the next 10 to 20 years);
- Commencing building of the CBD;
- Completing decisions on land zones and geotechnical issues;
- Finishing demolition of larger commercial buildings;
- Completing settlements and land clearance for residential red zone properties;
- Establishing new residential subdivisions; and
- Constructing temporary buildings for entertainment and retail.

In accordance with these aims, a Christchurch consortium of businesses, led by Boffa Miskell, has recently been given just 78 days to develop a new plan for the city's CBD. This design document is due to be delivered to the Canterbury Earthquake Recovery Minister, Hon. Gerry Brownlee, on 27 July 2012.

Activities recorded as not occurring until the medium to longer term phase include the completion of residential repairs and rebuilds by EQC and insurers and the construction of major sporting and cultural facilities. Rebuilding and construction generally are also recorded as continuing until 2020 and beyond.

In the Courts

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Reminder of care to be taken with public notices and consultation - Mitre 10 Judicial Review HC Wellington [2012] NZHC 644 CIV 2011-485-2438

The High Court has set aside three decisions of the Wellington City Council relating to the rezoning of a former landfill and depot site and an associated resource consent application for earthworks. The Creswick Valley Residents Association Inc had notified the Council of its interest in any rezoning or land use application for the site several years earlier. The Residents Association then became aware of the change in zoning of the site to Business 2 Zone and the earthworks consent after some of the residents were notified about a resource consent application to allow the development of a Mitre 10 Megastore on the site. The Residents Association sought judicial review of the Council's earlier decisions on the basis that the Council acted unlawfully in the processes by which it rezoned the land and issued the earthworks consent.

Public notice and consultation

The rezoning of the site was part of the wider Plan Change 73 (Centres and Business Areas) and notified at the same time as Plan Change 72 (Residential Area). The Residents Association submitted that the consultation material released by the Council failed to meet the requirements for proper consultation under the Resource Management Act (**RMA**) and was misleading in stating that the rezoning of the land was "to better reflect existing uses" which could not apply to the site given it was not currently used for business purposes. The Residents Association contended that the Council was required to give notice to affected parties of the rezoning.

The Council submitted that all the information required by clause 5(2) of the First

Schedule was included in the public notice, and is mechanical rather than substantive because there is no specific requirement to describe the plan changes or specifics of what it addresses. Further, the Council contended that in the context of a full review of all Residential and Suburban Centres chapters in Wellington it would not be practical to identify all the relevant changes in the public notice. The Council had mailed the public notice and a summary guide to all residents and ratepayers informing them about the major review of the plan provisions.

The Court considered that in order to determine whether the Council has met its wider administrative law obligations it is necessary to go further than considering whether the mechanical requirements of clause 5 of the First Schedule have been met. It noted that the Council's discretion as to what further information it supplies is very broad, but having decided to supply that additional information it had an obligation to ensure it was not materially misleading. The Court held that the information was materially misleading in respect of the site as it failed to identify the rezoning of the land was being motivated by different considerations than to reflect its existing use. The Council was required to consider whether any ratepayers were likely to be directly affected by the rezoning of the site, and that no specific consideration was given to this question. The Court noted that the Council ought to have anticipated a level of interest from neighbouring landowners and taken that interest into account.

The Court considered that the giving of notice to ratepayers generally, was not sufficient to comply with the obligation to give notice to the ratepayers likely to be directly affected by the rezoning of the site. It rejected the argument that the scale and complexity of the plan change alters this obligation. Councils are required to send to any such rate-payers information sufficient to draw the relevant part of the plan change to their attention. The Court held that the information sent to the residents did not satisfy this requirement, and therefore the Council had not complied with its obligations under clause 5(1A) of the First Schedule of the RMA in respect of the rezoning decision.

Decision to re-zone the site

The Residents Association argued that the rezoning was outside the scope of the land rezoning contemplated by the plan change, and the rezoning did not have proper regard to the rezoning principles that the Council had decided to apply or the relevant principles of the RMA. The Council submitted that the developer's request to include the rezoning of the site in the plan change was not made in a formal submission but feedback in the initial consultation phase, and that the Council only had to undertake a section 32 analysis of the proposed rezoning not apply the criteria.

The Court accepted the Council's submission that the rezoning was within scope of the plan change as the feedback from the developer was before the plan change was notified and the process for making submissions had not commenced. However, it concluded that the rezoning was not assessed against the criteria fixed by the Council for rezoning. It held that this meant the Council failed to have regard to relevant considerations, and had regard to irrelevant considerations, in reaching its decision to rezone the site. In light of this and the failures around consultation the Court set aside the Council's decision to include the re-zoning of the site in Plan Change 73 and consequently the Council's decision to re-zone the site.

Earthworks consent related to re-zoning

The Council had also granted a resource consent for earthworks and vegetation clearance on the site on a non-notified basis. The proposal was to form an earthworks platform to enable further development on the site, which would be applied for at a later stage.

The Residents Association submitted that the Council was required to give notice to affected parties of the earthwork consent application but failed to do so, in breach of a promise made to residents in 1999. Further, it contended that under section 91 of the RMA the earthworks consent should not have been processed separately from the pending resource consent application for the Mitre 10 Mega Store. It sought that the earthworks consent should be set aside because it had been materially influenced by the rezoning.

The Court held that the correspondence with the Council by the residents in 1999 did not create a legitimate expectation giving rise to an administrative law obligation on the Council to consult with residents over the rezoning. The relevant assessment was whether the planning law applicable at the time required consultation, although the correspondence was held to be relevant to the Council's consideration of whether the neighbours were directly affected.

The Court considered that it was not possible to examine the issues of whether the earthworks consent application should have been dealt with ahead of an application for the development of the site, and whether the application should have been publicly notified, in isolation from the zoning of the site. It held that the validity of the rezoning in Plan Change 73 was of such importance as to affect the validity of the decision making process for the earthworks consent. In light of this the Court set aside the Council's decision on the earthworks consent.

Our comments

This decision reinforces that care must be taken with the wording and content of public notifications. However, in the context of a wide plan change proposal the implication that a council must also directly notify any ratepayers likely to be affected by a specific provision, as well as general public notification, is of concern. This would give rise to an onerous obligation on a council to identify potentially numerous directly affected parties for a raft of specific changes proposed by a plan change.

This decision has been appealed to the Court of Appeal and may be heard later this year.

NEED MORE INFORMATION?

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