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Te Kokiringa Taumata

NZPI Position Paper: Consenting under the new system

Introduction

This position paper is one of four in a series on RM Reform, prepared by NZPI in preparation for the introduction to Parliament of the Natural and Built Environments Bill and the Spatial Planning Bill. The four papers address outcomes-based planning, spatial planning, NBA planning, and consenting under the new system and should be read together. They reflect NZPI's position as at 9 November 2022, before the Bills have been introduced and the detail reviewed. Other position papers, including one on digital transformation, will be added to the series in due course.

Overall position

NZPI supports changes to the consenting system that seek to reduce complexity, create a less adversarial process, and place more focus on the outcomes achieved by a proposal than the procedural requirements of an application. Reducing the number of activity categories in the new system and shifting the majority of notification decisions from case-by-case assessments to decisions made in plan-making will achieve these things, but reform should go further than currently proposed to bring about meaningful change.

What we know of what's proposed in the new system

There will be four activity categories under the new system: permitted, controlled, discretionary, and prohibited, and the scope of permitted activities is to be broadened. We understand this to mean greater use of performance conditions for permitted activities, with applicants potentially required to prove compliance. The Government's expectation is that with a heavier focus on plan development, achieving outcomes, and providing certainty, there will be more permitted and prohibited activities identified in plans, and fewer resource consent applications overall.

There will be just two types of resource consent application: controlled and discretionary. Controlled activities will be able to be declined in some circumstances. As we understand it, controlled activities would be those anticipated to comply with limits, meet targets, and achieve outcomes, but which need consideration on how best to manage effects. Discretionary activities would be those that require closer consideration of whether they achieve outcomes and how effects should be managed.

We also understand that the new system will reduce the number of case-by-case notification assessments, as notification requirements for discretionary activities are expected to be clarified in NBA plans or the NPF. The Government proposes an alternative disputes resolution process for resolving boundary infringements, as an alternative to a full hearing, but it is not clear how different this might be to the similar process currently available under the RMA.

How is this different to the current system?

There are four types of resource consent applications under the RMA[1]. The new system will remove the restricted discretionary and non-complying activity categories. The removal of the non-complying category removes the 'gateway test' for assessment of activities not contemplated by the plan.

[1] Controlled, restricted discretionary, discretionary, and non-complying.

The RMA already provides for plans to specify which activities must and must not be notified, although this is not a mandatory requirement and is used to varying degrees in plans. Our observation is that this tool is relatively well used in more contemporary RMA plans. We understand the new legislation would be more directive on notification requirements being included in NBA plans and the NPF, with the intention of greatly reducing the need for case-by-case notification decisions on resource consent applications. This would change the status quo, providing more certainty for applicants and changing the focus for consent planners onto substantive assessments and decisions. We do not know if the 'special circumstances' test for notification, which can override notification rules in plans under the RMA, will be retained or not.

The Government intends more weight be given to outcomes, targets and limits in the consent process under the new system. Contribution towards achieving outcomes and targets, and compliance with limits, will be a consideration for the notification of applications (rather than just consideration of effects under the RMA), as well as for the granting or declining of applications. Consideration against outcomes is intended to take priority over consideration of adverse effects, which has been the focus under the RMA.

How does the proposed new system measure up?

The proposals for consenting under the new system do not go far enough to improve the system. We support the reduction to two types of resource consent application as this will help to simplify the consenting process. We also support the idea of most notification decisions being made at plan development rather than at consent stage, as this is more efficient and provides more certainty, and allows for an increased focus on how applications achieve outcomes than on process. However, we consider notification procedures, the 'special circumstances' test, and the status of Māori as affected parties, need further review. We discuss these issues further below.

While more certain plans and extending the scope of permitted activities may result in more permitted activities, we do not agree that there will be fewer applications made to Council overall under the new system. There are two reasons for this. One is that more permitted activities are likely to result in more applications for certificates of compliance (or the equivalent in the new system). And if there are more performance conditions on permitted activities, there will be a heavier load on assessment and compliance monitoring. The other reason, discussed in more detail in our NBA Planning position paper, is that to create more permitted activities, more data and analysis in plan development is required, and where this is not possible in the time constraints or because data is contested, discretionary activities are likely to be used as a substitute.

What improvements can we make?

The basis for notification and identifying affected parties

Under an outcomes-based system, our view is that notification directions in NBA Plans and the NPF should be based on how well an application achieves an outcome, and who is affected by a proposal should be based on who is impacted by an outcome not being achieved. Whether an application will contribute to a fair and equitable outcome for those who may be impacted should be a crucial part of the assessment.

The assumption underlying this is that it is reasonable for the public to expect the outcomes identified in a NBA Plan to be achieved, and if they are not to be achieved by a particular proposal, there should be consideration of whether the alternative outcome is supported or not. Those who should be provided an opportunity to express a view on whether the alternative is supported or not are those

who would be affected by not achieving the outcome, or by the alternative outcome, as well as tangata whenua as Treaty partners.

We consider this focus on outcomes may result in a wider range of people/organisations being considered as affected parties under the new system than when adverse effects are considered, depending on how holistic and how specific the outcomes are. Well drafted, specific outcomes that incorporate te ao Māori perspectives will be essential to ensuring it is possible to identify, in NBA Plans and the NPF, who would be impacted by an outcome not being achieved.

We expect guidance on identifying notification requirements and affected parties based on outcomes will be required alongside the legislation, either in the NPF or separately, as this is a new approach. Guidance on which tangata whenua groups to include as affected parties will also be needed, and consideration should be given to using an external body such as the Māori Land Court to resolve disputes related to this. Statutory acknowledgements and any Treaty settlement-specific legislation will also need to be addressed. We also note that managing adverse effects is still part of the new system, and we expect consideration of the scale of adverse effects will need to factor into notification directions in plans in some manner.

We are uncertain as to whether it is intended to retain the ability to notify an application when special circumstances exist. The ability under the RMA to have rules that preclude notification does not override a council's requirement to consider special circumstances that may warrant notification. If the Government wishes to reduce the focus on case-by-case notification assessments, then consideration needs to be given to removing this test.

Assessment of applications against outcomes

We are optimistic that the change to an outcomes-based system will allow for a more holistic approach to decision-making on consent applications. However, the legislation needs to be clear and directive on the requirement to consider outcomes and their interconnectedness, along with requiring clear and specific outcomes to be set in NBA Plans. Under the RMA, section 104 already requires us to have regard to objectives and policies in plans and policy statements, and to national environmental standards, just as we are required to have regard to any actual and potential effects on the environment. For outcomes to take priority consideration over effects, the legislation needs to clearly set out this priority.

Outcomes for notification and consent decision-making

A requirement to provide notification directions in NBA Plans and the NPF based on whether types of activities will achieve outcomes, and a requirement to assess applications for how well they achieve outcomes, requires clear and specific outcomes in NBA Plans and the NPF. For consenting, clear and specific outcomes means not using subjective terms such as 'significant' or 'appropriate', unless there is accompanying direction on what the term means and/or how to determine it.

There must be a requirement in the legislation for the NPF and NBA Plans to include outcomes. Currently, the Exposure Draft of the NBA (as recommended to be amended by the Select Committee) lists outcomes, with NBA Plans being required to *provide for* those outcomes, but there is no explicit requirement to translate them into regional or local outcomes or to include 'bottom-up' outcomes. High-level, broad outcomes such as those in clause 13A of the Exposure Draft will provide no guidance for setting notification requirements in plans or for resource consent decision-making.

Notification procedures

Notification procedures under the RMA play a disproportionally significant role in shaping the behaviour of those involved in the system than they should. For example, applicants often want to

avoid notification because of the time and costs involved, including the possibility of appeal. This can have perverse outcomes, such as proposals being modified to avoid notification but at the same time not achieving beneficial outcomes, and in some instances applicants can put significant effort into challenging notification decisions made by councils. Conversely, the threat of challenges to notification decisions often drives councils to act conservatively and focus heavily on procedure.

Reducing the costs of notification is an important change needed in the system, so cost is less determinative of behaviour. In an outcomes-based system, there is a public good element to assessing how well proposals achieve outcomes, and this could be reflected in the fees charged.

Changes should also be considered that reduce the adversarial nature of notification and affected party input. Clear notification direction in NBA Plans is essential to helping reduce the effort that goes into contesting notification decisions. Options for decision-making that do not require a full hearing should be available at council level hearings, such as decisions 'on the papers', decisions made following informal hearings, greater use of pre-hearing meetings, mediation, and other alternative dispute resolution processes where applications can be amended to take account of affected party concerns, and tikanga Māori dispute resolution processes. The Environment Court uses these processes already (except for tikanga) and other examples can be found in the Victorian system in Australia. Less formal, less expensive and less time consuming processes than full resource consent hearings would make the system less adversarial and more inquisitorial in nature and help remove the focus on avoiding notification.

Our position paper on Regional-Level NBA Planning describes our recommendation for a national body to oversee the training, accreditation and appointment of independent commissioners, with the overall intention of ensuring high quality hearing processes and recommendations. We consider such a body would be well placed to administer the decision-making on resource consents with affected party involvement (fully notified or otherwise), including the alternative decision-making processes discussed above. Independent oversight of the process of considering affected party and submitter input, including the alternative decision-making processes identified above, should increase the robustness of decision-making.

We support the retention of the objection processes currently in the RMA, and we support the retention of the current limitations on who can appeal decisions.

We still see a role for appeals to the Environment Court on consent decisions, where not all parties are satisfied with the outcome of the first-level decision making. Given the emphasis on outcomes in the new system, there is a public interest element to the Court considering the merits of a consent that will not achieve the desired outcome.

Te Tiriti o Waitangi and te ao Māori

In a system where notification directions are provided in NBA Plans and the NPF based on achieving outcomes, it is essential that tangata whenua perspectives are incorporated into outcomes in order to give effect to Te Tiriti o Waitangi and te ao Māori worldviews[2]. Our position papers on Outcomes-based Planning and NBA Planning address this issue in more detail.

Our position is that the role and process for iwi and hapū involvement as affected parties and in notified applications will need to be worked out within each region during the development of NBA

[2] The SPA and NBA propose to give effect to *the principles* of Te Tiriti o Waitangi, whereas NZPI's position, in alignment with the position of Papa Pounamu (NZPI Special Interest Group) on the Exposure Draft, is that Te Tiriti itself should be given effect to.

Plans. A one-size-fits-all approach will not be appropriate, and the legislation needs to allow for flexibility. In situations where there is dispute over which tangata whenua group is affected, consideration should be given to using an independent body such as the Māori Land Court to resolve these disputes.

We recommend consideration is given to making a distinction between tangata whenua and other affected parties, as a way to recognise the Te Tiriti relationship. As Te Tiriti partners, the role for tangata whenua in notified consent applications should be stronger and different to that of other parties. This would recognise the unique ability of tangata whenua to apply Te Oranga o te Taiao in a consent context.

Terminology

We see confusion arising from the use of RMA terms in the new system, when the term means something different in the new system. For example, if controlled activities can be declined under the new system, they should be called something else in the new system. As a means to help with a change in practice under the new system, we suggest new labels for resource consent application types should be considered. For example, a simple 'type 1' consent and 'type 2' consent could avoid confusion with the consent categories under the RMA.

Process efficiencies

We make the following points about consent process efficiencies:

- Timeframes for processing consents should be realistic and reflect the scale and significance of the application. For example, applications for discretionary activities should have longer timeframes than applications for controlled activities; and applications that are more complex overall should have longer timeframes that more simple applications.
- Council reporting on how well timeframes have been complied with, and a punishment approach such as refunding of application fees when timeframes are exceeded, causes a focus on process over substance and outcomes. More realistic and reasonable timeframes should lessen the focus on process and enable good decision-making.
- With a broader scope for permitted activities, digital tools will improve the efficiency and effectiveness of certification and compliance processes. The Government should provide leadership on this.
- The Government should also provide leadership on a standardised digital system for managing consent applications. This should include a national metadata standard so that information provided through consents is in the same format and is useable for benchmarking and monitoring.
- The new system needs to be able to deal with 'poor applications' through incentivising pre-application and post-lodgement processes that allow applicants and councils to work together on information requirements.
- Friend of the Submitter roles should be required for submitters on notified consent applications, to ensure submissions are effective and to assist submitters with ADR processes.
- There should be investment in digital templates that guide users through the process and analyse problems and issues as they develop for self-improvement of the system.
- Standardised conditions that are measurable and easily monitored and complied with should be set in the NPF where possible, with allowance for local conditions.

- A funded increase in the capacity and capability of all actors in the system, including applicants, councils, and affected parties/submitters, will make a significant contribution to an efficient and effective consent system.

The future for consenting

We are optimistic that a strong NPF and NBA Plans with clearly drafted and specific outcomes, together with a less adversarial consent process, will allow applicants and councils to focus on how best to achieve the outcomes identified, rather than focusing on the procedural requirements of consenting.