2013

Plan Development

Making Decisions on a Plan

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The Local Government (Auckland Transitional Provisions) Amendment Act 2013 introduces a streamlined plan-making process that only applies to the development of the first Auckland Unitary Plan (AUP). This guidance note has not been amended to include changes to the AUP plan-making process, rather it focuses on plan-making prescribed by the Resource Management Act 1991. For information about the process for the first AUP, refer to the Ministry for the Environment's Fact Sheets.

Making decisions on proposed plans (including plan changes) entails making complex assessments and applying statutory and policy evaluations against a background of competing requests, variable information, time and resource pressures, and issue 'overload.' It is important to engage decision-makers in what can be a technocratic, politicised, time-consuming and lengthy process.

Guidance note

Preparing Decision Makers

- While hearings are guided by the Local Government Official Information and Meetings Act 1982, as well as the Local Government Act 1974, the Commissions of Inquiry Act 1908, and the NZ Bill of Rights Act 1987, the RMA imposes its own analytical and statutory requirements on decision-making that differentiates the process from others - thus, decision-makers should be well prepared for hearing submitters and making decisions on plans (refer to Keeping it fair: a guide to the conduct of hearings under the Resource Management Act 1991).

- Decision-makers should have a clear understanding of their role and responsibilities: at the least, training may be required (even experienced persons may need refreshing and updating). Above all, the common law principles of natural justice should prevail.

- Decision-makers must understand they need to attend all meetings and hear all submitters relevant to the matter at hand - for example, they cannot leave a hearing, even briefly. When decision-makers do have to leave unexpectedly (for example, sickness, bereavements etc) they cannot deliberate on the issue/s they have missed hearing submissions on.

- The appropriate use of independent commissioners should be identified at an early stage: for example, in matters of perceived conflicts of interest, such as council designations. However, the delegation of decision-making powers in relation to plans is subject to the restrictions under section 34 of the Act.

- Provide appropriate background information to the decision-makers in advance of the hearing, particularly if there are technical issues of relevance. If a meeting or mediation is held on any matter relating to a proposed policy statement or plan, then the meeting's chairperson must prepare a report to be given to the local authority no later than 5 working days before the hearing. The report, must identify matters that were agreed between the local authority and the submitters and those that were not. The report may also identify the nature of the evidence, the order in which the evidence shall be heard, and a proposed hearings timetable. When making their decision, the local authority must have regard to the report under clause 10 of the Act. (Clause 8AA)

- A local authority may require the preparation of a report on any matter relating to a hearing on a proposed policy statement, plan, or change or variation to a policy statement or plan (s42(A)).

Section 32 Rigour

- The decision-making process is part of the plan development process, and must follow the analytical rigour established by ss32 and 32AA evaluation reports (which require a robust analysis in preparing Plans) comparing alternative methods for achieving the same objectives and policies. There is no single recipe to achieving s32 compliance in a cost and time-effective manner. However, there are some good practice techniques:
    - The requirements of ss32 and 32AA must be fully integrated with the process of making decisions on submissions - this requires careful and considered planning, particularly as to how to record the process.
    - Preparation is essential: as well as having decision-makers read all relevant material, briefing sessions before hearings are another good method for defining and analysing issues.
    - A clear analysis of issues and options should be available to assist a focused and rigorous debate, particularly with the larger, controversial or more complex issues (a function usually served by reports).
    - Minimise the time between hearings and decision-making.
    - Some documentation of the decision-making process needs to be made, particularly over areas of controversy and/or disagreement with report recommendations. This could be achieved as minutes and/or as part of the written decision.
    - Debate should be managed well, under a chair who can impose some rigour on the direction of debate and analysis

The Perennial Trienniel Problem

- Making decisions on a plan typically spans more than one electoral cycle (sometimes several), with the resultant loss of experienced councillors with knowledge of the process and earlier decisions. There are some techniques used to address this problem:
    - When developing the framework for the preparation of a plan, recognise the triennial election cycle in programming the decision-making cycle.
    - Retain experienced councillors as hearing commissioners once they leave the council, especially to continue partly heard or undecided issues.
    - Analytical rigour and councillor training should help balance any lack of continuity over time. Commit some resources toward the training of councillors involved in the process, with refresher training as needed. It is particularly important councillors understand their governance role, including that of collective responsibility, as well as their quasi-judicial role.
    - Establish a protocol for hearing submissions and making decisions that can endure the time of the process and any changes in committees and staff

Hearing Powers

- Sections 41A to 41C give decision makers certain powers when conducting hearings. These powers can be exercised if the scale and significance of the hearing makes the exercise of the power appropriate. These powers include directing submitters to provide their evidence within time limits (at least 5 working days before a hearing).
- Section 41C provides the decision making authority with powers to give directions and make requests before or at hearings. Directions can be given regarding the order of business and how evidence is presented. The authority can also direct the applicant or a submitter to present evidence within certain timeframes and submissions can be struck out. Further information can be provided via a commissioned report.

The Balance of Time

- A local authority must make its decision on a proposed policy statement or plan within 2 years of publicly notifying the statement or plan.
- It is important to keep staff and councillors refreshed:
    - Spread the hearing process out - it is better to avoid cramming too many hearings together (although note the hearings process must be completed within two years of notification).
    - Ensure that the decision-makers reconvene as soon as possible after hearing the submissions - preferably set a time straight afterwards.
    - Find ways of maintaining 'team spirit' (for example, hold social events for the committee and/or some event to recognise achievement).
    - Use discussion sessions to focus on some issues and to clarify thinking.

Making Decisions

- Broader issues should be addressed first, prior to making decisions on specific points.
- Allow for some iteration in decision-making for complex and contested issues: a hearing does not have to be a one-time only. Other possible methods for resolving issues include the issuing of interim/draft decisions, or preparing further reports to council after the hearing. Both of these should allow opportunity for all interested submitters to comment by reconvening the hearing.
- It is usually preferable to release decisions at one time, rather than stage them over time, as the provisions of a plan are usually not readily separated from each other. While a single decision release date may cause frustration if the decisions are released a long time after the original hearings of submissions (for example, a problem with a rule cannot be amended until the decision to correct it is released), the approach allows all decisions to be reviewed and amended for consistency. Partly, how decisions are released will depend on the structure of the plan, and whether its constituent parts are severable.
- If the sections of a plan are independent from each other, a sequenced series of decisions may be appropriate. However, this approach may still cause difficulties if there are common provisions (for example, hazardous substances rules) that require changing as a result of a later decision on one section of the plan.
- Providing clear decisions is critical to reduce misunderstanding and possible appeals. In particular, accepting or rejecting decisions in part needs careful explanation, with the reasons set out logically to clarify what is being accepted or rejected and why.
- It is good practice to create 'changes-highlighted' versions of proposed plans as the decision-making process proceeds, and, in particular, in conjunction with the release of decisions. This technique can help in ensuring decisions are consistent, as well as helping submitters understand the effect of the decisions. It also helps those trying to apply the district plan on a day-to-day basis. While it can add to the costs, it is relatively simple to issue sections of the plans with changes highlighted to relevant groups of submitters.
- Clauses 9-13 of Part 1 of the First Schedule direct the process of making and releasing decisions on plans, whilst Clauses 14-16 direct appeals to the Environment Court.

Appeals to the Environment Court

- Never underestimate how much time is involved with resolving appeals.
- Be proactive in attempting to resolve appeals - never rely on the apellant (or their advisors) as it may not be in their interest to resolve the matter speedily.
- Establish a process to manage appeals right from the beginning. This should include:
    - Defining the types of appeals, and identifying the likely path of resolution and the priorities (note: sometimes apparently intransigent cases may actually be mediated to a solution - don't write anything off!);
    - Using a case manager approach, particularly for dealing with multiple submissions. A case manager can act for the council in dealing with the appellant and associated parties in resolving their allocated appeals, as well as being part of the plan project team and working with other case managers. Case managers must be good at organising and chasing up;
    - Establishing a database to monitor progress (either a separate "purpose-built" database, or, as some local authorities have done, adapting the submissions database to deal with appeals as well); and
    - Establishing a delegated authority process (for example, a small council subcommittee) to monitor progress and make decisions as required.
- It is not always easy to predetermine which appeals may be mediated to a resolution and which are irreconcilable and will end up before the Environment Court. Regular re-assessments may therefore be needed to review which route to pursue - mediation or hearing. At some point, a council may reach a "policy threshold", beyond which it is not willing to change any further. However, assessing the other parties' thresholds is not always possible. Such policy thresholds may also change over time: for example, a council may agree to a resolution that it initially refused, so that it may get a plan operative.
- Work closely with the Environment Court in managing appeals - a good working relationship should be established from the beginning in organising and progressing appeals.
- Ensure that correct and adequate mandates have been sorted out early - i.e. who is responsible for negotiation and who has the mandate to make decisions on behalf of Council (noting the restrictions on the ability to delegating decision-making powers under s34). If the two roles are separate, ensure regular liaison so that negotiated resolutions do not run the risk of being rejected by the decision-makers.
- If there are difficulties in maintaining progress on resolving appeals, sometimes direct communication with the appellant rather than their advisors can assist.
- Mediation is often the preferable way to resolve appeals rather than through Environment Court hearings. Court-appointed commissioners (drawn from the Court) are usually used to help mediate appeals.

- While council officers (and their advisors) normally have the authority to deal with the parties involved with appeals, it is often useful to involve councillors in the resolution of appeals, particularly the more significant ones with important policy implications. The final agreement on a resolution, however, should always rest with the council (or some delegated authority thereof) before it goes before the Environment Court.

- If the Court considers that an appealed provision needs amending, the Court can direct a local authority to redraft the provision. The council must redraft the provision in consultation with other parties, and then submit the final draft to the Court for confirmation. Occasionally, the resolution of an issue by the Court may have implications for other parts of the plan as well. For this reason, it is important the Court is fully aware of the wider policy context of some appeals, and the cross-linkages with other provisions and matters of consistency.