SUBMISSION

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Local councils have an active role to play in getting NZ's laws right

Setting a direct referral threshold and related matters

Local Government of New Zealand submission to the Ministry for the Environment

30 MAY 2014

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LGNZ is the national organisation of local authorities in New Zealand and all 78 councils are members. We represent the national interests of councils and lead best practice in the local government sector. LGNZ provides advocacy and policy services, business support, advice and training to our members to assist them to build successful communities throughout New Zealand. Our purpose is to deliver our sector's Vision: "Local democracy powering community and national success."

This final submission has been approved by Malcolm Alexander, Chief Executive of Local Government New Zealand.

Introduction

In February 2013, LGNZ submitted to the Local Government and Environment Select Committee in the matter of the Resource Management Reform Bill. We opposed the introduction of regulations which would require councils to directly refer resource consent applications to the Environment Court where the value of the investment meets the threshold where the applicant has made a request for direct referral.

The reasoning outlined in our submission was that:

- A key principle of the RMA is that resource management decisions are best made by communities affected by these decisions. Local Government New Zealand continues to support the principle that speedy decisions by parties with no stake in a region do not necessarily result in better decisions; and
- The current provisions (pre-amendment) gave the local authority discretion to either support or decline an applicant's request for direct referral and it was unclear what has prompted this change to be proposed to the RMA.

We sought that the existing s 87E provision should be retained to maintain a council's discretion in respect of requests from the applicant for a resource consent application to go directly to the Environment Court.

Our position on this has not shifted, and the discussion document has reinforced it. The statistics demonstrate that there is no problem with the status quo:

- Since 2009 only 21 applications have been directly referred to the Environment Court.
- 4 requests were declined and one of these was overturned on challenge under section 357 of the RMA.

It is also important to consider context. The number of applications which proceed to a hearing before the Environment Court continues to reduce; the number of applications publicly notified also continues to reduce; engagement between the local authority and the applicant through the pre-application process continues to increase. The statistics bear this out.

What the statistics do not tell us is what the value is of the applications that were directly referred and what type of applications they were. This would be useful information.

We are disappointed that the "do nothing" option is not being considered. Good policy development and analysis should always include the "do nothing option." We encourage the ministry to consider this option in the light of the facts.

This submission is made in the context that regulations will be developed.

Investment thresholds

The discussion document presents a fair summary of the advantages and disadvantages of three possible approaches to determining the investment threshold:

- capital investment value;
- economic impact analysis; and
- net present value assessment.

Local authorities want a system that is not complex and does not pass cost onto councils. Councils and ratepayers do not want to be required to meet the expense of a costly peer review of an assessment of the threshold.

The applicant needs to be absolutely clear on what they have to have to do to meet the threshold. There should be no room for interpretation by either the local authority or the applicant.

The "capital investment value" will be the simplest to administer but is likely to be more applicable to large projects that involve significant building work and less applicable to some applications requiring regional consents. It appears that marine farming, dairy conversions, stormwater and wastewater discharges and associated infrastructure have not been considered.

We suggest giving the applicant the ability to select any of the options presented to determine the value of the investment. This will ensure the method is tailored to the type of activity proposed and be flexible enough to capture those projects that do not rely on the capital investment associated with a building project.

The regulations must give the council the ability to require the applicant to provide an independent peer review of the assessment of the investment threshold. The council won't always require a peer review but when it is needed, ratepayers should not have to meet the cost to verify the authenticity of the value of the investment.

We also submit that the Regulations should specifically exclude certain types of proposal. This is discussed below.

Recommendations:

1. Enable the applicant to choose which method they use to determine the value of their investment.
2. Enable the local authority to require the applicant to provide an independent peer review of the assessment of the value of the investment.

Single vs different threshold amounts

The question to answer is whether to adopt a simple approach as possible (i.e one set threshold) or to work in some filters that recognise that "regional significance" differs across New Zealand. The threshold needs to be set high or a significant proportion of applications in the metro councils' jurisdictions will trigger the threshold.

The questions in the discussion document illustrates just how difficult it will be to devise "filters" for different regions and different sectors. The RMA is becoming unwieldy and ever complex so, on balance, we support an approach that applies nationwide i.e a single threshold value.

It is also important to bear in mind that applicants can request that an application, which does not meet the threshold, is referred directly to the Environment Court. The statistics bear out that the majority of these requests are supported by the relevant local authority.

Recommendation:

- Set a single threshold to apply nationwide and to all sectors.

How high (or low) should the threshold amount be?

We seek a threshold amount that is above the value of a standard residential subdivision, large format retail and a supermarket. If the approach is adopted that these regulations should be simple and that a single investment threshold will apply nationwide, then the threshold needs to be higher rather than lower. This will also help to set expectations of what may be regional in significance in order to avoid requests of locally focused projects. The metro councils attract a greater share of investment and to be significant regionally, the threshold should not be set too low.

Furthermore, subdivision applications of even a modest number of allotments would be very difficult to value. We also note that resource consents are applied for before building consent so getting a value for the actual works involved when possible would be highly speculative.

We believe that the majority of notified resource consent applications should be determined locally where a more inclusive local decision-making process works well whether by elected representatives or independent commissioners. Any thresholds set need to be at an appropriately high level to ensure this.

We seek a threshold upwards of $40 million to reflect this.

On balance, we consider that simplicity should prevail over trying to calculate an investment threshold that will truly be significant regionally. If the value is set too low there is a danger the Court might have more applications than it can manage and it may cover applications that are reasonably dealt with at the local level.

Again, it is important to take into account that applicants can request that an application which does not meet the threshold be referred directly to the Environment Court. The majority of these requests are supported.

Recommendation:

- Set a threshold that is upwards of $40 million dollars.

The “exceptional circumstances” matters

We consider it is problematic that the matters are prescribed in the regulations and draw a parallel with section s95A(3) of the RMA which deal with “special circumstances.” These are not prescribed in the law but local authorities routinely are required to determine whether special circumstances exist. If they do then public notification of an application for resource consent may be required. Case law developed over the years has prescribed some guidance but is not essential.

If the matters are to be prescribed then we consider that all the matters proposed in the discussion document should be prescribed in the regulations.

We also consider there are other matters that should be included:

1. whether an application might require significant public investment of infrastructure to support it;
2. whether the proposal is on public land (and the local authority is the land owner);
3. whether an application is “out of zone” and may undermine the integrity of the plan;
4. whether the matter has aroused widespread public concern or interest regarding its actual or likely effect on the environment (including the global environment);

5. whether the proposal is "out of zone" – such proposals, if approved, have the potential to undermine the integrity of a plan; and
6. whether there has been a lack of consultation (with the local authority) before lodging the application.

Further, we agree with the submission of Auckland Council that the "Business as Usual" some categories of proposal should not be subject to automatic direct referral because they meet the investment threshold. Auckland Council suggests that the following types of developments should be prescribed as exceptional matters in the Auckland urban area only given the large number of "Business as Usual" proposals that Auckland Council considers in these categories:

- Residential developments – Despite the investment, these types of developments are primarily local in nature. Auckland Council considers a large number of these types of development each year. Given the localised nature of these proposals, residential developments are not good candidates for a first hearing at the Environment Court.
- Retail and office developments – Within the Auckland context these proposals are quite local in their direct impacts on neighbouring properties, transport networks and natural environments.

Recommendations:

1. Do not prescribe in the regulations the exceptional circumstances "matters" and instead provide some guidance, based on the matters listed in the discussion document and the additional matters suggested below.
2. If matters are to be prescribed, then include the matters identified in the discussion document in the Regulations that are grounds to decline a request for direct referral.
3. Add four other matters to the list that are grounds to decline a request for direct referral:
    - whether an application might require significant public investment of infrastructure to support it;
    - whether the proposal is on public land and the local authority is the land owner;
    - whether the matter has aroused widespread public concern or interest regarding its actual or likely effect on the environment;
    - whether the proposal is "out of zone;" and
    - whether there has been a lack of consultation (with the local authority) before lodging the application.
4. Add two matters to the list that are grounds to decline a request for direct referral for Auckland only:
    - residential developments; and
    - retail and office developments.

Other matters

We also seek a provision in the regulations that the Environment Court can determine that an application is returned to the consent authority.

Conclusion

Local Government New Zealand submits that regulations do not need to be set that prescribe a threshold for direct referral. It is unnecessary. The status quo is working i.e most requests for direct referral are supported by the local authority and proceed to the environment court when a request is made. There is a process in place to challenge the council's decision.

In the event that regulations are set:

1. Keep the approach simple and set a threshold that applies nationwide.

2. Set the value of the investment threshold upwards of $40 million.
3. Give the applicant the flexibility to determine the approach they use to determine the value of their investment.
4. Give local authorities the ability to require an independent peer review of the measurement of the value of the investment, the cost of this to be met by the applicant.
5. Do not prescribe the matters that are “exceptional circumstances”. In the event they are, then include the additional “matters” we have suggested above as grounds to decline a request for direct referral.
6. Include additional matters as “exceptional circumstances” that are specific only to Auckland.
7. Include a provision enabling the Environment Court to refer/return an application to the relevant local authority.