SUBMISSION OF ENVIRONMENT COURT OF NEW ZEALAND TO DRAFT REPORT "USING LAND FOR HOUSING"

Introduction

[1] The Environment Court thanks the Productivity Commission for the courtesy of sending it a copy of its draft report dated June 2015. Members of the Court have taken the opportunity to consider that in some detail.

[2] The chapters that have drawn our attention are chapters 4 and 5.

Chapter 4: "Supplying and releasing land"

[3] We have read the introductory paragraphs to section 4.5 "Rezoning," and your record of the comments received from submitters. We have considered also, quotes sourced from earlier studies and the Ministry for the Environment. We have then focussed particularly on section 4.6 "**The costs and benefits of appeals**." before commenting on certain of the Questions, Findings, and Recommendations, in those sections, and the conclusion in 4.7.

[4] We are approaching our comments in this submission from the point of view of access to justice at the resource management appeal level.

[5] In addressing matters through the lens "access to justice," we bear in mind that democracy demands more from the surveillance by the Courts than speed of processing of litigation; nevertheless we, probably like most New Zealanders, recognise that speed of process has been a concern over the years when it comes to regulating the supply side of availability of housing. The Court fully recognises that for developers and infrastructure providers (and others) "time is money", and its processes today, it considers, meet the needs of that in solid measure.

[6] Contrary to numbers of submissions received by you while preparing your draft report, and contrary to information that you cite which we consider significantly out of date, the Environment Court is these days more than conscious of the need for expedition and

processing appeals, and in recent times can justifiably point to a very good record in this regard. We will provide more detail below.

[7] We consider that we are justified in feeling aggrieved about the age and inaccurate content of some of the submissions summarised and reported by you in your draft report. We turn first to comments from submitters listed on page 105.

[8] The Bay of Plenty Regional Council apparently alleges that current timeframes for delivering new land supplies through rezoning processes under the RMA "can take five to ten + years". This is a misrepresentation of the true situation, generalised, and wrong. District Plan Review appeals in the region have been resolved, in their respective sets in recent years, in less than 2 years, and the vast majority within 1 year. (Indeed that has become the norm throughout the country. For more detail, please refer to our **Appendix A** attached to this submission). Appeals on the Bay of Plenty Regional Policy Statement were all resolved very quickly, leaving small pockets of controversy concerning Hazards and Motiti Island cultural issues to be resolved in a disputed context pursuant to a closely managed timetable.

[9] Worse, Queenstown-Lakes District Council has offered you commentary on the processing of its Plan Change 19, we infer by way of suggesting that the example it has chosen is typical of the planning appeal process in the Environment Court.

[10] Unless QLDC has been misreported in your draft report, its commentary on PC19 is totally out of line in apparently baldly stating that five years were taken before the plan change could be made operative in December 2014. PC19 is absolutely not to be taken as representative of plan appeal processes in New Zealand. It is a notable outlier from the norm of such processes. QLDC's commentary does not seem to reveal the existence of 3 other related proceedings also before the Court, impacting on the Plan Change, including Queenstown Airport Corporation's own Notice of Requirement to extend the existing aerodrome designation, PC35 (concerning airport noise management and the management of urban growth to maintain the airport's operational capacity), integrated Notices of Requirement by the NZ Transport Agency and QLDC for work on State Highway 6 and proposed local roads within PC19's Structure Plan. These proceedings as a group are the product of a planning battle that has raged on the outskirts of Queenstown for a quarter of a

century between the Queenstown Airport Corporation, 2 major commercial landowners, and QLDC itself.

[11] In this Court's recent Annual Review by Members, commentary is offered on modern practice in the Court, and the speed of processing of appeals on plan changes and reviews. We will say more about the contents of that Review shortly. We note here for present purposes that we commented that there will always be the occasional outlier that takes longer to process than run of the mill cases, due to the particular exigencies of the case and the needs of the parties. PC 19 was certainly one of those.

[12] We next turn to your commentary relative to council size, and the materials offered in Figure 4.3, Table 4.5, and Table 4.7. These materials have led you to postulate that in some areas of New Zealand, particularly those governed by high-growth councils, appeal processes have taken up more than 40% of the average time taken to conclude all processes and make the instruments operative. This flavour seems to have filtered through to Finding 4.10, and our opinion is unreliable in the current day and age.

[13] Our principal criticism of these figures, tables, and your discussion, is that they are in the main drawn from materials created in 2008. That is seven years ago. The picture concerning timeframes for appeal processes on plans and policy statements has altered considerably during that time, and was reported on in some detail in our recent Annual Review by Members. We will return to that shortly.

[14] Turning to your Section 4.6 "**The costs and benefits of appeals**," our first observation again concerns the age of some of the submissions and other materials you appear to rely on. The quote from LGNZ when it issued a policy position recommending removal of such appeals to the Environment Court, was 2011. The Ministry for the Environment's Technical Advisory Group issued similar observations, and suggested that the Court was guilty of delays and consequent costs, when it reported in 2009.

[15] We have two criticisms of these documents. First, they are again "ancient history." Secondly, as has been written about in numerous papers published by the Principal Environment Judge, and again in the 2014 Annual Review, the allegations made in those

documents are considered by us to have been inaccurate even at the time of publication of them.

[16] At the top of p111 you note views by persons named Ellis and Kelly in 2002 and 2011 respectively, that third party appeals are often used to stymie development, particularly in wealthier suburbs. We comment that if ever that was the case, the speed with which this Court now processes appeals has very largely removed such a lever; that is if, as we say, it ever existed.

[17] In a further section on p111 "**Arguments in favour of appeals**," we note favourable comments by LGNZ, Nolan et al, and we have also picked up one very brief reference to our 2014 Annual Review. Unsurprisingly, the matters noted in that section are very much our view today.

[18] It is an impression held invariably by our Members that earlier engagement by councils with potentially affected groups and persons, can usually assist the quality of instruments promulgated, and the efficiency and speed of processes. We therefore comment favourably on your Finding 4.13 and Recommendation 4.5 on p112. We have a concern that many planning instruments are rushed in the drafting and suffer poor quality as a result. Considerable time (at great cost to all involved) can ensue when appeals are brought and worked towards resolution through mediation and hearing processes. In other cases, notably when review appeals have not been brought and the instruments have been finalised without the benefit of input from the Court, enormous time can be taken in Court hearing argument about badly drafted provisions. This occurs in the main during appeal hearings over resource consent applications. We have no doubt it also occurs to a huge extent before regulatory authorities' hearing commissioners. The economic cost of this problem taken nationally in aggregate must be huge. We believe there is a problem with education processes for people who write plans, as a result of which the Principal Environment Judge will be leading an education seminar "road show" around NZ towards the end of the year.

[19] A further observation is that the bigger cities use district plans as their primary method of dealing with traffic congestion. This often seems to us to be inefficient, but as the councils lack pricing controls and other economic instruments, they have little choice.

[20] We next consider the section that commences on p112 "**Do viable alternative arrangements exist?**"

[21] You have recorded in a little detail descriptions of the processing of submissions to the Auckland Unitary Plan and the Christchurch Replacement District Plan. You offer some praise for the abilities and experience of the members of the two hearing panels, we consider with justification. You also note the tight timeframes within which they are required to operate.

[22] What concerns us, however, is that you do not appear to have consulted members of those panels, or obtained other commentary on how they are getting on. We are aware anecdotally of considerable concern about the quality of the instruments (having been prepared in great haste) and the speed with which the hearing processes are occurring in order to meet the tight timeframes set by government. Strong concerns are being expressed by individuals (who have allegedly almost completely departed the processes because of the amount of time they would otherwise be required to appear time and again on mediations, conferences, and hearing); also NGOs; and even businesses and business groups.

[23] Your Recommendation 4.6 suggests that two Ministries should evaluate those processes after they are complete, with a view to deciding whether they should become a permanent feature of the planning system. We agree in part with that draft recommendation, but add that we have recently expressed matters more strongly to Ministers. We have recommended that the concepts embodied in those two processes be spread no further into the planning system by reforms in the near future, until there has been thorough analysis of the costs, benefits and disbenefits of them after they are concluded. We say costs, because the councils themselves are said to be concerned, as are submitters including major corporate submitters who need to ensure involvement in order to protect investments and the like. Disbenefits that we understand exist include enormous stresses placed on all participants including members of the panels.

[24] A matter of some further concern for us regarding the age and tenor of some of the information that you have quoted in your draft report, is that your Commission took a more positive view of things in its reports released in 2012 and 2013, particularly by reference to information that our Principal Environment Judge supplied you during the submission

process on that occasion. Our 2014 Annual Review by Members takes note of what you said in 2013, and then provides information about further progress in this area in 2014. We are a little disappointed, noting that you have had access to our 2014 Report (because you quote from it on p111), so we want to draw to your attention the whole of the section of our Annual Review that deals with this topic. Please find that attached as **Appendix A**

Chapter 5

[25] We recognise that it is a matter of central government policy as to what regulatory processes will be put in place in the future for urban areas and housing. We simply reiterate that we see issues of quality of plan provisions, and access to justice, needing to be considered. We also make the very general observation that availability of housing appears to be a hugely complex issue, with many supply side and demand side aspects that no doubt others will comment on.

[26] We will simply offer some commentary about the availability of electronic tools for processing aspects of planning, because your draft report focuses only on information from Australia, and some general comment (we suspect very much in summary) on electronic work in planning at the council level in NZ. We wish to offer you some up-to-date material about this Court's approach to electronic innovations to assist with speed and efficiency of processing, and reducing cost. The material is taken from our previously mentioned Annual Review. We attach as our **Appendix B** the section of that which describes electronic initiatives and innovations in the Court, particularly in 2014.

Conclusion

[27] We thank the Commission for seeking our input on its draft report. We would be very happy to meet with your personnel to discuss any aspect of this submission or any topic you might wish to raise.

Laurie Newhook
Principal Environment Judge
Environment Court of New Zealand
July 2015

Appeals about policy statements, plan reviews and plan changes

It is notable that alternative dispute resolution in the Environment Court has, with the full support of the judges, been lifted to another level so as to import, when necessary, greater robustness of process. This is because, unlike private civil disputes, environmental disputes invariably have an element of public interest in them that calls for promptness of resolution. Members of the Court consider that the concepts of access to justice and efficiency do not collide in this respect, in fact they coincide. ADR provides a far more cost-effective way of resolving many cases, and the reported results have been speaking for themselves in recent years.

This has been particularly evident concerning the resolution of appeals about plans and policy statements. Gone are the days when a council would be granted a year or two by the Court to endeavour to negotiate solutions, often with no outcome to show for it, and only then to find that much mediation and/or hearing work remained necessary to resolve cases.

In recent sets of such appeals, mediation has been undertaken commencing as soon as all parties have been identified under s274, and brought to a conclusion about 10 or 11 months after the cases have been filed, with a high degree of success. Some councils have been able to resolve to make large parts of the proposed instruments operative in short order, leaving the Court to move quickly to resolve remaining issues through hearings, facilitated conferences of experts, and pre-hearing and settlement conferences.

This was a feature of the work of the Environment Court commented upon by the NZ Productivity Commission in its 2012/2013 reports. Particular reference is made to a section in the 2013 report commencing at p 158 and concluding at the top of p 164. The Commission records that it accepted examples provided to it by the Principal Environment Judge during the submission process, for instance concerning resolution of district plan review appeals in the Western Bay of Plenty district in 2010 and 2011.

This pattern has continued through 2014, for example with a set of plan review appeals in the Ruapehu District. In February 2012, eighteen appeals were lodged, involving 32 topics. The vast majority of them were settled in mediation within about 10 months (before the end of 2012), with almost all of the rest being settled by mid-2013, about 15 months after initial lodgement. There was one outlier where the parties had difficulties that were ultimately resolved by mediation without the need for

a hearing. All appeals in this set were then fully resolved. The proposed plan was capable of being made operative 15 months after the appeals were first lodged.

Similar processes commenced in 2014 and are currently being followed, with similar degrees of success, in Hamilton City, Waipa District, Otorohanga District, South Waikato District, and Northland Region. It is considered that this is now a strong pattern in the Court's work. There will always be the occasional exception where cases involve difficult technical or legal issues, but the Environment Court's robust case management system now moves these along to prompt resolution by hearing, (and sometimes settlement prior to a hearing being needed).

It should be recorded that there are occasional cases where delays are unavoidable, almost invariably requested by parties. Examples are given in another section of this Review that describes the use of the Hold Track.

In its 2013 Final Report the Productivity Commission expressed a view that it might be desirable to consider the feasibility of making the Environment Court's mediation capability available to support local authority plan making processes earlier. This could indeed be desirable, and in fact is being undertaken to some degree in the important and urgent circumstances of the proposed Auckland Unitary Plan and the Christchurch Replacement District Plan.

While obviously desirable, there is an issue of resource. The Environment Court Commissioners constitute a small group of extremely experienced mediators and facilitators of expert witness conferencing. They do this in the context of being fully in tune with the nature of the work of the Court in resolving appeals, and they approach the task in a principled and highly skilled fashion, bringing appropriate robustness in order to quickly resolve matters of public interest. There is considerable time required for Commissioners to be trained in this work and gain experience. Hence they presently comprise a rather small pool of practitioners who can produce the good outcomes. Remembering that only about 1% of council decisions are appealed to the Environment Court, then to extend mediations and expert facilitations across all council regulatory hearing processes would require effectively a 100% greater level of ADR activity than that presently undertaken in the Court.

It has been the experience of members of the Court that one cannot simply apply a label to a person and expect good outcomes. It has been observed that where such processes are conducted by persons without the necessary experience, the results do not flow. Cases are not settled in mediation, and groups of experts produce

reports that do not contain scientific agreements, but rather serial and unhelpful reiterations of aspects of their statements of evidence prepared for the case.

It is considered by members of the Court that there is another benefit to be obtained from the skill brought by its members to these tasks. There have been some notable improvements in quality of instruments brought about as a result of appeal processes (in mediation, expert facilitation and hearing). One example was a Waikato Region plan change concerning the use of geothermal energy in the Taupo area. The document contained many drafting difficulties and was considered by many parties to be incapable of efficient application for future consenting purposes. A series of improvements made to the instrument during court processes resulted ultimately in an operative document of sufficient quality that, subsequently, numbers of applications have been processed with relative ease, short timeframes, and reduced cost.

The Court constantly experiences problems with poor drafting of planning instruments - not only during the processing of plan appeals, but also consent appeals. Speed of preparation and promulgation of instruments appears to be one factor, and the problems include prolixity, inconsistency, illegality, and objectives and policies lacking rules or other methods.

Late in 2014 the Court commenced an exercise with the Resource Management Law Association of preparing a series of workshops that will occur in the coming year, on the subject of plan drafting. While the Government may soon legislate to offer councils templates for such things as format and structure, there are, in the view of members of the Court, many aspects of plan and policy statement writing that could be significantly improved by study and implementation of best practice, just some of which include succinctness, clarity, legality, logical structure, consistency, and approachability. The Court is intent on assisting good practitioners in these “arts” to lead workshops that can unlock clear thinking and improvements in practice. This initiative is further discussed in the section of this Review concerning community involvement.

Finally on this topic, it is recorded that one possible factor in the lessening of numbers of plan appeals coming to the Court, might be the greater extent to which National Policy Statements and National Environment Standards have been promulgated by central government in recent years. It has been suggested in some local government quarters that it is inappropriate for “unelected” people, the members of the Court, to alter local government policy. We reject the criticism. The policy as first drafted by the council must be in accordance with the purpose and

principles of the Act in Part 2, increasingly and more firmly guided by these National Policy Statements and Environmental Standards now being promulgated by Government. The work of the Court on appeal is equally defined and constrained. In any event the independent hearing commissioners on Council hearing panels are as “unelected” as members of the Environment Court. All must stick within the parameters set by the Act and higher order instruments.

Initiatives and innovations

Electronic developments

It is trite that we live in an electronic age. Also, that we find ourselves working with "the good, the bad, and the ugly". Unfortunately many platforms and systems assume vast proportions and come at great cost – and some work and some don't. Many again however are in the "cheap, cheerful and effective" category, and it seems fair to observe that there is an increasing trend worldwide, in tight fiscal times, to explore the latter.

The initiatives described below certainly come within the latter category, and have been in the main, Judge-led. We acknowledge the support received from the Special Jurisdictions arm of the Ministry, but otherwise have had our concerns that simple, cheap solutions that make our work more efficient and cost-effective, take much time and hard work to achieve.

iPads

Not long ago three divisions of the Environment Court trialled iPads in conducting hearings in large cases, namely ***Buller Coal*** (a proposal for a moderate sized mine for the extraction of coking coal on the West Coast of the South Island), ***Hurunui Windfarm*** (Canterbury) and ***Hagley Park Cricket Ground*** (Christchurch). Parties and counsel were given good advance notice, important given that hearings have a tendency to move at a fast pace when such equipment is employed. In consequence, not only were members of the Court equipped with iPads and an appropriate document management application, but so too were counsel and key witnesses.

Each of the three panel members on the Court, and their hearing manager, were equipped with iPads carrying the GoodReader App. All case materials were uploaded to the devices.

Surveys were subsequently conducted of members of the Court and the parties, the overall responses being that the trials had been a great success, such that all members of the Court and their Hearing Managers have now been similarly equipped and are regularly conducting hearings using the devices. In the surveys, approval was particularly offered about hearings having proceeded at a significantly faster pace, with all pre-lodged evidence and submissions uploaded to the iPads

being pre-read by all participants. Counsel found themselves quite confidently cross-examining witnesses from notes, references, and cross-references contained in the electronic materials. They advanced submissions to the Court wielding iPads instead of floundering through piles of paper contained in countless folders. New materials becoming available during the course of the trial included the transcript, which was steadily uploaded to the iPads and again could be easily referenced by members of the Court and parties.

Some difficulties have been experienced around the uploading of materials and backing up of the iPads. The Ministry of Justice has not been keen on File Transfer Protocol programmes and Cloud services often employed to achieve these things. Ultimately, the Court was introduced to a programme called “Box,” which is understood to be encrypted and secure. The recommendation came from some senior commercial litigators who had represented parties in a High Court trial where the protection of commercially sensitive material had been particularly important to them and their clients. The need for a high level of confidentiality is much less significant in proceedings before the Environment Court, but is of course helpful on the rare occasions when confidentiality orders are made. By the end of 2014 the operations of uploading case materials to multiple devices, and backing them up, was working relatively seamlessly using Box.

Another advance has come courtesy of the Ministry of Justice National Transcription Service, which during 2014 significantly upgraded its services to Courts around transcription work. Enhancements offered have included capabilities of annotation, key word indexing, merge, and navigation functions, which are proving most useful for collaboration amongst panel members and drafting of decisions.

Through the Court’s Judicial Resources Manager, the Court has commenced to offer some simple training in the use of iPads and GoodReader to outside participants. The equipment is found by all to be refreshingly intuitive.

There remains an issue around synchronisation and integration with Ministry of Justice systems, including files and folders maintained by judicial officers. We are hoping this can be worked on. It is thought that when the time comes for a second generation of tablets to be issued, a future iteration of the Microsoft Surface tablet might provide some answers.

Wi fi

The Court succeeded in 2014 in having wi fi services installed in all 3 registries and most judicial and commissioner chambers areas. This has proved most helpful in the uploading of materials to the iPads and for backing them up, and generally for connectivity of mobile devices in our work.

Website

The Environment Court website has a somewhat old-fashioned look and feel, but has recently been adapted to allow the exchange of evidence amongst parties and to assist lodgement in Court, all to lessen the need to create and manage very large volumes of paper. This approach was initially taken in one large multi-party, multi-issue Auckland plan change case. The experiment was quite successful, particularly given that the issues for interested parties varied considerably amongst them, and not all parties required to receive all evidence.

The approach has more recently been extended to some of the large direct referral cases discussed elsewhere in this Review, including the Waiheke Marina case involving 310 parties. The use of the website has been expanded in this instance beyond the filing and service of materials, and is being used for many other types of communication as well. For instance, Minutes issued during the course of case management, and Memoranda received from parties, are routinely lodged and exchanged electronically.

The Court has been conscious that not all parties are likely to have access to computers, and/or be computer-literate. In the Waiheke Marina case, this disadvantage for a small number of parties was overcome by persuading the Auckland Council to install a computer terminal at its Waiheke Island service centre, and arrange for a member of its staff to assist with its use when called upon.

The Resource Management Act gives the Environment Judges considerable powers and discretions about process, for instance in relation to such things as waivers. The Waiheke case has accordingly been the subject of judicial directions for the use of the Court's website on an interactive basis amongst parties, using these discretions. With the numbers of people involved, the savings in generation of paper can immediately be seen. One need only imagine in contrast, a registry process of preparing, copying, stuffing envelopes and mailing, a five page Minute to 310 parties. Then extrapolate to the lodgement and service amongst 310 parties, of many lever arch folders-worth of evidence!

Another recent initiative has been to make greater use of the Court's website to disseminate decisions of the Court that are of greater than normal public interest. Steps in this direction will be increased in 2015.

Electronic filing pilot

In 2006 the Environment Court was selected by New Zealand Courts' Heads of Bench and the Ministry of Justice to run a pilot electronic filing system on behalf of all Civil Courts and Tribunals. Unfortunately, what was then commenced proved to be a cumbersome, process-laden and ultimately unaffordable project, and was cancelled (with justification) in the 2011 Government budget round. It appeared to be taking on the character of a large, expensive, home-grown project whose ultimate success could not be guaranteed.

The basis of selection of our Court for the project was in part its relatively small size, its agility, and ability to use statutory discretions to govern process. It was also thought helpful that the Court maintains a clear geographical "docket" system for case management.

The Court was selected again in 2013, this time to pilot a small electronic filing system on behalf of all Civil Courts and Tribunals. Our Court had at that stage been introduced to some "cheap and cheerful" examples of the art in Australia. In particular, in 2013, the Supreme Court of Victoria Australia was running an inexpensive pilot to manage cases bearing some similarity with those of the New Zealand Environment Court (in the Victorian Court's Technology, Engineering and Construction List). In 2014 that pilot, having been very successful, became business-as-usual, and was rolled out to a number of Lists (the ultimate intention being, to all of them). The system is now described on the website of that Court as its "electronic case management system for use in all new judge-managed proceedings that fall under the Commercial, TEC, IP, and Corporations Lists". It is stated to be hosted in a secure Cloud-based environment which allows parties to electronically file and manage documents related to their proceeding from any location with access to the internet, 365 days a year. Access to case files is securely limited to appropriate parties. Practitioners can electronically lodge, process and retrieve court documents relating to civil cases through the Court's electronic lodgement service, at a fee.

Unfortunately in our view, the apparent intention of the NZ Ministry of Justice as at early 2014, to have the Environment Court commence a similar pilot on behalf of Civil Courts and Tribunals, seems to have stalled.

The ultimate goal

Visitors to the Registries and Judges' chambers are invariably flabbergasted at the quantities of paper that confront them in our premises. There seems to be no disagreement that it is important to wage war on paper, and the visitors take no persuading that there are significant efficiencies to be gained from the use of electronic systems, for instance the saving of many days of hearing time, the ability to avoid lugging mountains of paper around the country, and all the copying and transmitting of those mountains of paper that has traditionally taken place.

The ultimate goal in the view of members of this Court is to get its various electronic systems (iPads, website, and e-filing) to "talk to each other" as an integrated system in the quest to become as paperless as possible. Security issues are steadily being overcome – for instance "Box" or other FTP (file transfer protocol) technology could be applied across all parts of such system, and/or other security measures taken.

Nevertheless, as at 2014/15, the Environment Court as a Court of Record must for the meantime maintain at least one paper trail. Under present legislation, a move to a paperless environment would require permission from the Chief Archivist under the Public Records Act 2005. Also as of late 2014, it is noted that there is a Judicature Modernisation Bill before Parliament. The Bill in its current form contains a number of provisions which could be helpful in bringing New Zealand Courts more easily into the electronic age.