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For: David Schwartfeger

FAST TRACK APPROVALS ACT 2024 - MANAGEMENT PLANS AND ADEQUACY OF INFORMATION

Introduction

1. The Drury Centre Stage 2 project that is the subject of Kiwi Property Holding No 2 Ltd's ("**Kiwi Property**") fast track application under the Fast Track Approvals Act 2024 ("**FTAA**") concerns a large-scale, complex mixed-use development (including commercial, retail, residential, entertainment, food and beverage activities and supporting earthworks and infrastructure).

2. In accordance with accepted resource management principles and practice, Kiwi Property proposes conditions of consent that require the provision of specified construction and operational management plans. Where available, draft[1] management plans will be submitted with the FTAA application. In all cases:

    (a) Kiwi Property proposes draft conditions of consent with respect to management plans that comply with long-standing caselaw developed under the Resource Management Act 1991 ("**RMA**").

    (b) The expert reports submitted with this application demonstrate how the effects of the activity are to be managed and address the mitigation measures that are to be included in the management plans.

    (c) The experts' conclusions regarding the management of such effects are based on their experience and expertise.

    (d) The objectives and contents of the management plans give effect to and are based on the experts' conclusions as set out in their reports.

3. This memorandum summarises:

    (a) The RMA and FTAA provisions governing the acceptance or rejection of an application for processing.

[1] Providing draft rather than final management plans is an appropriate and lawful approach provided the condition complies with the principles set out at paragraph 11. Management plan-type consenting leaves detail to be included and certified by a Council after the conditions have been set by the consent authority, reflecting the very nature of adaptive management as well as practical realities e.g.: inability to finalise a plan ahead of a contractor being appointed. As noted in paragraph 12, the caselaw does not require a draft management plan to be provided.

(b) The RMA case law relating to management plans.

(c) The RMA case law relating to the acceptance or rejection of applications for processing.

(d) The relevance of the RMA caselaw to fast-track applications under FTAA.

Relevant RMA and FTAA provisions

4. Re a fast-track application under FTAA:

(a) **Section 46(1) FTAA** provides that "*the EPA must, in consultation with the relevant administering agencies and relevant consent authorities, decide whether a substantive application complies with subsection (2) within 15 working days after receiving it*."

(b) **Section 46(2) FTAA** sets out the requirements for an application to be deemed complete and hence to be accepted under FTAA. It requires an application to contain the information set out at **Clauses 5 to 8 of Schedule 5** (section 43(3)(a) FTAA), and provides that the information, "*must be specified in sufficient detail to satisfy the purpose for which it is required*" (**section 44 FTAA**).

5. Re a resource consent application under RMA:

(a) **Section 88(3) RMA** provides that "*a consent authority may, within 10 working days after an application was first lodged, determine that the application is incomplete if the application does not*" include specified information.

(b) **Clause 1, Schedule 4 RMA** provides with respect to the information to be provided with a resource consent application that, "*Any information required by this schedule, including an assessment under clause 2(1)(f) or (g), must be specified in sufficient detail to satisfy the purpose for which it is required*."

6. Thus **section 46(1) FTAA** provides that the EPA "*must*" decide whether a substantive application complies with subsection (2) whereas **section 88 (3) RMA** provides that a consent authority "*may*" determine that the application is incomplete. That does not represent a substantive difference in the quantity and quality of information that is to be provided by the applicant, however:

(a) The words "*must*" and "*may*" impose obligations on the respective decision-makers, not on the applicant. That is, they require or enable (respectively) the decision-maker to decide whether an application should be accepted. They do not affect the adequacy of the information provided with the application that would inform such a decision.

(b) In contrast, in both circumstances the threshold for adequate information is that it, "*must be specified in sufficient detail to satisfy the purpose for which it is required*".

(c) At this early stage of the process, the information needs to be in sufficient detail to enable the EPA or territorial authority, respectively, to determine whether the application should be accepted for processing. That is, have all the statutory "*boxes*" been ticked. In contrast, a greater quantity and / or better quality of information may be needed later in the process to enable a full assessment of the merits of the application.

(d) That distinction is apparent from the statutory provisions under both FTAA (**section 67 FTAA**) and RMA (**section 92 RMA**) that enable the substantive decision maker to request that the applicant provide further information relating to the application once the application has been

accepted for processing. In short, the statutes anticipate that the information that is adequate for the purposes of accepting an application may need to be augmented for the purposes of assessing it on the merits.

7. In terms of what information must be provided with an application, **clauses 5 to 8 of Schedule 5 FTAA** largely mirror **Schedule 4 RMA**. Notably:

   (a) An FTAA application must include the conditions that the applicant proposes for the resource consent and must provide information around existing resource consents, if there are any (clauses 5(1)(k) and (l)(ii), Schedule 5 FTAA). That same requirement does not apply to an application under the RMA.

   (b) The RMA requirement for the assessment of environmental effects to include such detail as corresponds with the scale and significance of the effects that the activity may have on the environment (clause 2(3)(c), Schedule 4 RMA) does not apply under the FTAA.

   (c) Under the FTAA, there is no requirement to include additional information that a district or regional plan specifies as necessary for an assessment of environmental effects.

   (d) Under the RMA, an assessment of environmental effects must include possible alternative locations or methods for undertaking the activity where it is likely the activity will result in significant adverse effects. That same requirement does not apply to an application under the FTAA.

   (e) Both the RMA and the FTAA contain a requirement to include, "*a description of the mitigation measures (including safeguards and contingency plans where relevant) to be undertaken to help prevent or reduce the actual or potential effect of the activity*" (clause 6(1)(e), Schedule 4 RMA and clause 6(1)(d), Schedule 5 FTAA).

   (f) The matters to be covered in assessments of environmental effects are largely the same (for the purposes of this assessment). The one additional matter under the FTAA is that an assessment of environmental effects must cover, "*any unreasonable emission of noise*" (rclause 7, Schedule 5 FTAA).

8. **Clause 18, Schedule 5 FTAA** provides that, "*When setting conditions on a consent, the provisions of Parts 6, 9, and 10 of the Resource Management Act 1991 that are relevant to setting conditions on a resource consent apply to the panel, subject to all necessary modifications*."

9. In the circumstances, the statutory frameworks governing the two processes and the imposition of conditions of consent are very similar:

   (a) In each case, the applicant needs to provide with its application information specified in the statute, but only in sufficient detail to satisfy the purpose for which it is required.

   (b) In practice, the required information is similar, particularly with regard to potential adverse environmental effects that might be generated by a project and which management plans are designed to address.

   (c) The RMA provisions governing the imposition of conditions of consent are explicitly incorporated into the FTAA process.

RMA Caselaw governing Management Plans

10. As resource consents and accompanying conditions have become more complex over time, decision makers have increasingly had recourse to conditions of consent that, rather than seeking to specify in detail all actions to be undertaken to mitigate effects, identify overriding principles in terms of the management of such effects and require the subsequent development and certification of management plans to incorporate detailed mitigation measures.

11. The caselaw governing such conditions is settled and confirms that management plans are an appropriate means of managing environmental effects.[2] In that regard, to be acceptable and lawful, management plan conditions, *inter alia*, must be certain and must not delegate substantive decision making to the management plan process. To that end:

    (a) Where management plans are proposed, it is imperative that conditions of consent identify the performance standards that are to be met and that the management plans identify how those standards are able to be achieved.[3]

    (b) While a management plan can provide information as to how parameters or limits can or will be met, the parameters or limits themselves need to be specified in conditions rather than being left to the management plan.[4]

    (c) Conditions must specify the objective(s) of the management plan and summarise the contents of the management plan (i.e.: the matters it must address).[5]

    (d) Conditions must not require Council *approval* for measures, although conditions will typically provide for the council to *certify* that the management plan addresses all matters specified in the condition.[6]

    (e) Overall, the decision maker must be satisfied that the management plan can operate in a way that can serve the purpose of the RMA.[7]

12. The case law does not require an applicant relying on a management plan as a method of avoiding, remedying or mitigating effects, to provide a draft management plan (let alone a final management plan) when lodging their application for consent, although that approach is available to an applicant. Having said that, for particularly complex or novel proposals, the Court has on occasion used draft management plans as part of the evidence to satisfy itself that sufficient detail is provided in the conditions.[8]

RMA Caselaw regarding the Acceptance / Rejection of Resource Consent Applications

13. For completeness we also briefly summarise the case law which addresses the level of information required for an application:

    (a) The cases draw a distinction between the level of information required when an application is lodged, and the level of information which may be required when a decision maker is considering the substance of the application (all emphasis added):

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[2] See for example, *Final Report and Decision of the Board of Inquiry into the Transmission Gully Proposal (June 2012)* – see in particular paras [179] – [194].
[3] *Re Canterbury Cricket Association Inc* [2013] NZEnvC 184 at [125].
[4] *Wellington Fish and Game Council v Manawatu-Wanganui Regional Council* [2017] NZEnvC 37 at [175].
[5] *Final Report and Decision of the Board of Inquiry into the Transmission Gully Proposal (June 2012)* at [194].
[6] *Re Canterbury Cricket Association Inc* [2013] NZEnvC 184 at [126].
[7] *Crest Energy Kaipara Limited v Northland Regional Council* EnvC Auckland, A132/09, 22 December 2009 at [229].
[8] *Remediation (NZ) Ltd v Taranaki Regional Council* [2024] NZEnvC 213 at [331] and [468].

(i) As set out by the High Court in *Wakatu Inc v Tasman District Council* [2008] NZRMA 187:

> *"…What will be relevant for potential submitters is whether the information is sufficient to enable them to ascertain the effect of the application on them. The question at this stage is whether the application has sufficient information to enable potential submitters to make that assessment. It is not whether the information is sufficient to enable the consent authority to determine the effect on the environment. That comes later …"*

(ii) This distinction between information sufficient to be accepted for lodgement, and information sufficient for evaluating an application's substance was reinforced in *Aspros v Wellington City Council* [2019] NZHC 1684 where Cull J found that:

> *"[29] Thus, the discretion to decide whether an application is complete is an administrative decision to be made in the light of that particular application. It is not a merits-based consideration, which comes later in time. There is therefore a critical distinction between the time at which an application is made and the time at which the resource consent decision is made. This is borne out by s 92, which gives the consent authority, once it has accepted the resource consent application, an opportunity to request further information related to the application. The wording of s 92(1) is instructive …*
>
> *[30] The information at the time the application is made must conform with the requirements of sch 4, in order for the application to be accepted as complete. At the time of the decision to refuse or grant the application, however, the question then arises whether the Council had adequate information to make its decision. This second inquiry has no place in the s 88 consideration of completeness of the application."*

(b) In terms of the level of information that needs to be provided with an application, the cases confirm that the AEE must provide enough detail as to the scale and significance of the potential effects to enable the proposal to be fully understood.[9] This goes to the ability of the Council to identify potentially affected parties, and to the ability of the potentially affected parties to assess their position in relation to the application and decide whether or not they wish to make submissions.[10]

(c) While section 92 RMA enables the substantive decision maker to request that the applicant provide further information, where an application does not include fundamental elements, it is not acceptable for a council to fill the gaps using section 92.[11]

14. In summary:

(a) The information provided should be sufficient to enable an adequate assessment of the proposal's elements. That is, it should be sufficient to enable the EPA to understand the proposal and enable invited parties to ascertain its effects on them.

(b) Any decision to reject an application as incomplete must be fair and reasonable.

[9] *Mawhinney v Auckland Council* [2017] NZEnvC 162; *Country Lifestyles Ltd v Auckland Council* [2022] NZEnvC 247.
[10] *Wakatu Inc v Tasman District Council* [2008] NZRMA 187.
[11] *Wellington Fish and Game Council v Manawatu-Wanganui Regional Council* [2017] NZEnvC 37 at [149].

(c) The enquiry at this stage is not about whether the information is sufficient for the Panel to determine the effects on the environment, because the decision-making process enables the Panel to obtain any further information necessary to determine the application.

Application of RMA caselaw to FTAA

15. The EPA rejected the Winton Sunfield application for processing under section 46 of the FTAA, in part because no draft management plans were submitted with the application. It is unclear whether that rejection reflected a departure on the part of EPA from the established RMA caselaw regarding management plan conditions or was, instead, a consequence of the overall quality of the Winton application.

16. For completeness, Kiwi Property summarises below the reasons why it considers that the RMA caselaw relating to management plans remains relevant to applications under FTAA:

(a) Clause 18 of Schedule 5 FTAA applies to the FTAA process the RMA provisions imposing conditions of consent, and there is no explicit requirement in FTAA for draft management plans to be provided with applications for consent.

(b) The caselaw governing conditions of consent under RMA, and in particular conditions concerning management plans, is therefore equally applicable to the conditions on which a resource consent required under RMA can be granted under FTAA.

(c) For the reasons set out in the RMA caselaw summarised above, requiring a management plan as a condition – provided it meets the criteria set out in paragraph 11 above – is a legitimate technique for managing potential adverse effects of a development.

17. Kiwi Property's application relies on provision of a significant number of management plans. In most cases, draft plans have been attached to the application. In all cases, however:

(a) The expert reports submitted with this application demonstrate how the effects of the activities are to be managed and address the mitigation measures that are to be included in the management plans.

(b) The key parameters and limits that are to be complied with are specified in proposed conditions of consent. These have been informed by the expert's conclusions regarding the management of effects.

(c) The objective(s) and required contents of the management plans are specified in proposed conditions. The objectives and contents of the management plans give effect to, and are based, on the experts' conclusions as set out in their reports.

(d) The conditions require Council certification that the management plans address all matters specified in the conditions (as opposed to delegating approval functions to the subsequent process).

18. With regard to the EPA's obligation under section 46 FTAA to accept or reject an application for processing, for the reasons set out above, it is not appropriate to reject the Kiwi Property application on the grounds that it does not include drafts of all proposed management plans.

19. More broadly, there is a distinction to be drawn between matters which render an application incomplete, matters that could be resolved by an information request, and matters which go to whether the substantive consent should be granted:

    (a) Both FTAA and RMA:

        (i) First, require a determination as to whether an application is complete (section 46 FTAA);

        (ii) Secondly, provide an ability for the decision maker to request further information (section 67 FTAA); and

        (iii) Thirdly, provide for the decision maker to make a substantive decision in reliance on all the information then available to them.

    (b) That framework anticipates and enables a more detailed analysis of the project as it moves through the FTAA process. Thus, the extent and nature of information that is necessary for the "*purpose*" for which it is required is likely to change and develop as the application moves from:

        (i) The initial EPA assessment of its adequacy for the purposes of acceptance; to

        (ii) The Panel's assessment of the project on its merits and its determination of whether consent can be granted; to

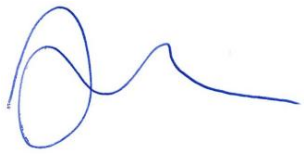
        (iii) The Panel's determination as to the wording of the conditions that are to be imposed on a consent and in particular:

            - Whether matters can be addressed via a management plan; and

            - If so, whether the Panel needs to see and approve the management plan text or can address that issue via a detailed condition of consent.

    (c) Accordingly, whether the Panel ultimately considers that a management plan is the appropriate approach (or considers it requires further information to make that determination) is not a matter which goes to the completeness of the application, but rather goes to the merits of the proposal to be decided under the substantive decision-making sections of the FTAA.

Yours faithfully
ELLIS GOULD



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