Proposed Resource Management Amendment Bill draft Cabinet Paper

Date Submitted:	2 July 2018	Tracking #: 2018-B-04667	
Security Level	In-Confidence	MfE Priority:	Urgent

	Action sought:	Response by:
To Hon David Parker, Minister for the Environment	Decision	5 July 2018

Actions for Minister's Office Staff	**Return** the signed report to MfE.
Number of Attachments 2	Titles of attachments: 1. Draft Cabinet Paper 2. Advice from Department of Internal Affairs on applying a development contributions policy
Note any feedback on the quality of the report	

Ministry for the Environment contacts

Position	Name	Cell phone	1st contact
Principal Author	Chyi Sim		
Responsible Manager	Robert McClean	022 067 6655	✓
Director	Jo Gascoigne		
Deputy Secretary	Amanda Moran		

Proposed Resource Management Amendment Bill draft Cabinet Paper

Purpose

1. The purpose of the briefing note is to:
    a. Attach the draft Cabinet paper for the proposed changes to the Resource Management Act 1991 (RMA) to be progressed in 2018 for your comment (Appendix 1).
    b. Seek your agreement to new or amended policy proposals that have arisen since the initial scoping briefing.

Key Message

2. The draft Cabinet paper is now ready for your review, and is in line with your directions. The draft Cabinet paper provides details of each proposed amendment.
3. There are four outstanding matters that require your further direction. We would appreciate your feedback on these matters by 5 July 2018.
4. We will make any amendments to the draft Cabinet paper following your feedback.
5. We will also provide you the Regulatory Impact Statement (RIS) for your information following your direction on the matters in this briefing.
6. The final paper will need to be signed and lodged with Cabinet Office on 26 July, to be considered at the Cabinet Environment, Energy and Climate Committee (ENV) on 31 July, and Cabinet on 6 August.

Recommendations

7. We recommend that you:
    a. **Note** the draft Cabinet paper attached to assist you in consultation with your Cabinet colleagues.
    b. **Provide** feedback on the draft Cabinet paper.
    c. **Direct** officials to progress a proposed amendment to reinstate the use of financial contributions.

    Yes/No

    d. **Agree** to a proposed amendment to enable the Environment Court to consider a challenge and make declarations on a council's notification decision on a resource consent application based on the 2005 amendments, but retaining the ability to seek judicial review provided the declaration option has been exhausted (as detailed in paragraphs 14 to 17 in this briefing note).

    Yes/No

    e. **Agree** to modify the scope of the policy that relates to consent authorities 'stopping' the clock if a fixed fee is payable and withholding the issue of a resource consent if additional fees have not been paid (as detailed in paragraphs 18-25 in this briefing note).

    Yes/No

f. **Note** that the Department of Prime Minister and Cabinet (Policy Advisory Group) suggested the inclusion of provisions to better enable consent authorities to decline development in areas subject to natural hazards.

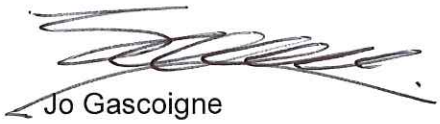
g. **Note** that the Resource Legislation Amendment Act 2017 strengthened the requirements relating to consideration of natural hazards in resource management planning and decision making, and that the Resource Management Act provides local authorities with the ability to prevent or restrict development on areas prone to natural hazards.

h. **Agree** that further consideration of natural hazard management could form part of the wider review of the resource management system, rather than be included in this Bill.

Yes/No

i. **Note** that the draft Cabinet paper does not currently include any provisions relating to natural hazard management, and a decision to progress this topic as part amendments in 2018 will require further policy development and revision of the Cabinet paper.

Signature



Jo Gascoigne
Director
Resource Management System

3/07/18
Date

Hon David Parker
Minister for the Environment

Date

Resource Management Amendment Bill draft Cabinet Paper

Supporting material

Context

1. We have provided you with a series of briefing notes (2018-B-04343, 2018-B-04174, 2018-B-04498, 2018-B-04556 refers), and have met with you to confirm the scope of the amendments to the RMA to be progressed in 2018.
2. The draft Cabinet is in-line with your previous direction. After subsequent policy work and limited consultation, modifications and clarifications have been made to the policy package, specifically to enable better consent review, increase maximum infringement fees and introduce a company/individual split for infringement fees.
3. The regulatory impact analysis requirements apply to the proposals in this paper, and the Regulatory Impact Analysis Panel in the Ministry for the Environment is currently reviewing the draft RIS. We will provide you with the RIS for your information along with the final Cabinet paper.

Analysis and Advice

There are four outstanding areas that need your direction

The ability to use financial contributions

4. You requested that officials undertake further policy analysis on whether Western Bay of Plenty District Council (WBOPDC) could use a development contributions policy for the two development examples they gave. You have asked us to consider reinstating the ability to use financial contributions in relation to your meeting with WBOPDC on 18 June 2018.
5. The 2017 amendments to the RMA removed the ability for councils to use financial contributions after 2022 (following a five year phasing out. Financial contributions are contributions of money and/or land that can be required as a condition of resource consent or as a permitted activity standard, and have to be specified in a plan.
6. With the repeal of the RMA provisions relating to financial contributions, city and district councils (and unitary authorities) will have to rely on the development contributions regime under the Local Government Act 2002 (LGA) to address the costs of growth and development on infrastructure and services, and regional councils will not be able to use either charging regime.[1]
7. WBOPDC provided you with two examples (2018-B-04669 refers). Advice on whether a development contributions policy could be used from the Department of Internal Affairs (DIA) is attached in Appendix 2.
8. DIA's view on the road funding example is that WBOPDC may be able to fund its rural roading upgrading programme from development contributions. DIA notes however, that the development contributions policy is strongly oriented to a regime where development is planned and forecast, and it is untested as a tool for funding infrastructure to support intensifying rural land use.

[1] Regional councils are not able to use development contributions.

9. For the Rangiruru business park example, WBOPDC is planning on using a financial contribution regime. DIA notes that while a shift to a development contributions regime may be possible, WBOPDC has advised DIA it would need to borrow a substantial sum of money and meet the financing costs of development. This would expose its community to substantial risks, holding costs and potential opportunity costs. DIA advises that an approach that leaves these risks with the development community seems to have merit and would also incentivise development.

10. More significantly, regional councils cannot charge development contributions so they are not in a position to shift to an alternative contributions model.[2] This means that any funding shortfall or financial means for off-setting the adverse effects on the environment of activities will have to be met through other funding sources, such as rates. This concern was raised in submissions to the 2015 Resource Legislation Amendment Bill by regional councils.

11. The 2017 amendment to the RMA repealing the use of financial contributions from 2022 was intended to meet the policy objective of reducing complexity and overlap between the two contributions regimes. This could be overcome by creating clearer guidance to councils about the appropriate use of each contributions mechanism.

12. We consider that an amendment to reinstate the use of financial contributions would fit the criteria of this bill, and could be added to the scope. We do note that there is wider cross-agency policy work on local government infrastructure funding occurring. The results from this work will be relevant to consider as part of the broader role of planning and infrastructure charging regimes in the future review of the resource management system.

13. We have included preliminary text in the draft Cabinet paper at paragraphs 37 and 38 and paragraphs 34, 35, 36 of Appendix 1 to the draft Cabinet paper.

<u>Enable the Environment Court to review resource consent notification decisions</u>

14. As discussed in the earlier briefing note (2018-B-04498 refers), we consider the declaration powers can be modelled on the provisions that were introduced in 2005,[3] and repealed in 2017. After subsequent policy work, we are recommending some modifications to the 2005 provisions to improve its workability, and to ensure that it meets the proposed bill's objective to restore meaningful public participation in the RMA.

15. To avoid doubt, we recommend that the trade competitor restrictions and section 296 of the RMA, which prevents judicial review proceedings being brought unless the Environment Court's appeal or proceedings have been exhausted first, should still apply. This will reduce the risks of any misuse of the declaration powers, and ensure consistency with the provisions of the RMA.

16. The Ministry of Justice (MoJ) has indicated that it does not support any proposals that removes judicial review from the High Court, as this is an inherent role, and that the High Court is better suited to administrative law. Therefore, we recommend that the judicial review to the High Court be retained.

17. MoJ has also provided comments on the implications of the policy change, especially on the operations of the Environment Court. MoJ's feedback is reflected in the draft Cabinet paper.

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[2] Examples of where regional councils use financial contributions include to maintain or improve public access along the coast, rivers and lakes; protecting, restoring or enhancing habitats.

[3] These provisions were never enacted through an Order in Council due to concerns about the Environment Court's caseload.

Allow consent authorities to 'stop' the clock and withhold a consent if a fee has not been paid

18. You have agreed to officials' recommendation to amend the RMA to allow councils to 'stop' the resource consent statutory clock while consent authorities wait for applicants to pay an administration charge, and withhold the issue of a resource consent if additional charges are payable (2018-B-04498). We noted that we would undertake further limited consultation with targeted councils to ensure that our proposal could be implemented effectively.

19. We are no longer recommending the proposal to withhold the issue of a resource consent if an additional charge is payable, due to the complicated nature of charging and invoicing the actual and reasonable costs associated with resource consent processing under the RMA. Not only would the policy be difficult to implement for some consent authorities, it may also unjustly penalise applicants if invoices are not ready at the same time that a decision on the resource consent is made.

20. The original proposal to withhold the issue of a resource consent until the applicant has paid any additional charges was recommended so as to align with similar provisions for building consents under the Building Act 2004. However, building consent processes have a very prescriptive fee structure based on the value of the work rather than the time it takes to process the consent, making it straightforward for building consent authorities to immediately calculate any charges payable by the applicant at the time of issue.

21. In relation to resource consents however, additional charges[4] are usually dependent on the complexity of the particular resource consent and the time taken to process it. The charges are often unable to be fully calculated until the processing of the application is complete and the decision issued. A further complexity is that if the consent authority did not meet the resource consent statutory processing timeframe, the requirements of the Resource Management (Discount on Administrative Charges) Regulations 2010[5] also need to be considered in the final invoice to the applicant.

22. In addition, we recommend that it only apply to resource consent applications, and no other types of RMA applications (e.g. subdivision certifications or existing use certificates). Further analysis of these processes has revealed that they are not aligned with how resource consents are processed in terms of their statutory timeframes and how their costs are recovered. Any changes to these provisions may lead to other unintended outcomes, and could increase complexity to the system.

23. For the reasons above, we have modified the proposal (paragraphs 29 to 33 of the draft Cabinet paper) to only allow consent authorities to 'stop' the resource consent processing clock when a fixed charge is payable at the time of lodgement until it is paid, and also when a decision is made to notify a resource consent application.

24. The overall charging regime under the RMA could be addressed as part of the comprehensive wider review of the resource management system. In the meantime, the modified proposal will still be able to rectify the majority of the cost recovery and statutory processing timeframe issues faced by consent authorities. This proposal will better meet the objectives and criteria of the proposed bill.

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[4] Additional charges are the actual and reasonable costs that are not covered by the charge fixed under section 36(1). They often include officer time and cost, disbursements, and costs of mediators or independent commissioners (when required).

[5] A discount of 1% (of the total administrative charge fixed under section 36(1)) for every working day on which an application remains unprocessed beyond the RMA statutory timeframes.

Introduce a more explicit ability for consent authorities to refuse development on land subject to natural hazards

25. During consultation with Government agencies, the Policy Advisory Group of the Department of Prime Minister and Cabinet suggested the inclusion of provisions that would better enable consent authorities to refuse resource consent for development in areas prone to natural hazards.

26. We do not consider that such natural hazard provisions are necessary for inclusion in the 2018 Bill. Our view is that the 2017 amendments introduced changes[6] that, together with other RMA provisions, mean Councils already have the ability to prevent or restrict development in areas subject to natural hazards.

27. This view is supported by advice provided by law firm Simpson Grierson to Local Government New Zealand (LGNZ), which specifically addresses Councils' ability to limit development in natural hazard areas.[7] The advice underpins '*Climate change and natural hazards decision-making – a legal toolkit for councils*'[8] published by LGNZ in May 2018, in which it's stated:

> "*The RMA provides councils with a comprehensive mandate to prevent or restrict new development and the extension of existing development in natural hazard areas*".

28. We have no monitoring data from local authorities as to how the new hazard-related provisions of the RMA are working in practice.

29. Anecdotal feedback suggests councils would benefit from guidance on how to give effect to the new provision. For example, what 'significant risk' means for their communities and what level of scientific certainty is necessary on which to base decisions. It is intended that the need for and benefit of such further assistance be considered as part of the '*resilience in land use management (natural hazards and climate change adaptation)*' topic of the 2018-19 Forward Agenda.

30. The Government's future response to actions recommended in the Climate Change Adaptation Technical Working Group's (CCATWG) final report (briefing 2018-B-04564 refers) is another avenue where other non-legislative support, as well as possible legislative changes[9], can be considered to inform and incentivise councils' decision making around risks from natural hazards.

31. Additionally, the Government's proposed National Climate Change Risk Assessment (NCCRA) (contained in the Zero Carbon Bill proposals) [10] will introduce a nationally consistent methodology to assess risk. This will help councils to identify the risks,

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[6] Changes included:

- introducing '*the management of significant risks from natural hazards*" as a matter of national importance (section 6(h) in Part 2). This is a risk-based approach, which articulates the requirement for both the *likelihood* and *consequence* of natural hazard events to be taken into account;
- for subdivisions, introducing the ability to refuse consent, or grant consent subject to conditions, on the basis of there being a significant risk from natural hazards (section 106); and
- broadening the types of natural hazards to be considered in both section 106 and section 220 (conditions of subdivision consent).

[7] http://www.lgnz.co.nz/assets/Uploads/46292-LGNZ-Climate-Change-2-Development.pdf

[8] http://www.lgnz.co.nz/our-work/publications/climate-change-and-natural-hazards-decision-making-toolkit/

[9] Action 7 from the CCATWG Report recommends there be a review existing legislation and policy to integrate and align climate change adaptation considerations.

[10] A National Climate Change Risk Assessment was also recommended as a key foundational action by the Climate Change Adaptation Technical Working Group.

vulnerabilities and opportunities that climate change will bring, and build this information into their decision making.

32. MfE's budget bid for this risk assessment work to be undertaken in the 2018/2019 financial year was approved on a contingency basis. Final policy decisions on the risk assessment are likely to be made in October (along with the rest of the Zero Carbon Bill proposals), however if there is an appropriate opportunity to go to Cabinet to progress the risk assessment work earlier, this will be considered.

33. For the reasons above, we recommend that management of natural hazard risks be considered as part of the wider review of the resource management system. This review could consider how to deal with existing developments in risk prone areas, and consented but as yet unbuilt development in hazard areas.

Consultation and Collaboration

34. With the exception of the suggested inclusion of proposals relating to natural hazard management, we have undertaken consultation on the additional amendments discussed in this briefing with Government agencies. Feedback received has been reflected in the draft Cabinet paper.

35. In summary, the agencies are generally supportive of the proposed amendments.

36. Treasury raised a concern about the potential impact some of the changes could have on the provision of housing and certainty and efficiency of development, and the need to ensure alignment with other work programmes such as the Urban Growth Agenda. MBIE also raised that the changes should be aligned with any review of Housing Accords Special Housing Areas Act 2013.

37. The Ministry of Education (MoE) has raised a concern regarding the removal of the regulation making power to remove or prohibit plan rules that duplicate other legislation. They consider this regulation making power is critical to the accurate presentation and application of New Zealand law. This power is also considered by MoE to be an appropriate check and balance on councils' plan-making practice.

38. MoE also raised a concern regarding the change to allow for appeals on a resource consent on matters not raised in a submission. MoE believes this could result in new evidence/information prejudicing proceedings, and submitters deliberately holding back points for appeals, rather than raising these at the submission stage.

39. We have addressed agencies' concerns in paragraphs 62 and 63 of the draft Cabinet paper.

40. It is also noted, that the Department of Prime Minister and Cabinet (Policy Advisory Group) suggested potential inclusion of changes relating to the RMA around natural hazard management, to better enable consent authorities to decline development in risk prone areas. We consider that this matter relates to the need for better alignment between different housing, building and local government legislation and is more suitably addressed in the comprehensive longer term review of the RMA, as well as through Government's response to CCATWG recommendations.

41. We have not had the opportunity to discuss the additional proposals which relate to financial contribution and enabling the Environment Court to review resource consent notification decisions with council officers.

Risks and mitigations

42. The risks associated with the package of proposals for a Resource Management Amendment Bill are reflected in the draft Cabinet paper.

43. Due to limited consultation on these amendments, you may wish to consider publicly releasing the final Cabinet paper and final RIS once Cabinet decisions have been made.

Legal issues

44. No legal issues have been identified in respect of this paper.

Financial, regulatory and legislative implications

45. The next steps for progressing the proposed bill are outlined in Table 1 below.

Next Steps

46. You may choose to meet with your colleagues between 16 to 20 July, before the lodgement of the final Cabinet paper, if necessary.

47. The following process will apply to seeking Cabinet approval to commence drafting instruction before introduction to the House.

Table 1. Cabinet Process for the proposed bill

Milestone	Date
Ministerial consultation	Ongoing
Final Cabinet paper and Final RIS to your office	Monday, 23 July
Cabinet paper lodged for consideration by ENV Committee	Thursday, 26 July
ENV Committee	Tuesday, 31 July
CAB	Monday, 6 August
Parliamentary Counsel Office for drafting	10 weeks period, by mid-October
LEG Committee	2 November
Introduction to the House	Post 2 November

Appendices

Appendix 1

Draft Cabinet paper

The final version of this paper, entitled *Proposed Resource Management Amendment Bill: Stage 1 of a resource management system review,* is available at https://www.mfe.govt.nz/more/briefings-cabinet-papers-and-related-material-search/cabinet-papers/proposed-resource

Appendix 2

Advice from Department of Internal Affairs on applying a development contributions policy

The Department of Internal Affairs (DIA) has been asked to provide advice on the situation faced by the Western Bay of Plenty District Council (the Council) in its letter to the Minster for the Environment dated 18 April 2018. Specifically, DIA has been asked for its view on whether the Council could fund the activities outlined in that letter from development contributions. The letter referred to two situations:

- the funding of improvements to rural roads in response to intensifying rural land use
- the development of the Rangiuru business park.

DIA's view is that the Council may be able to fund its rural roading upgrading programme from development contributions. However, the development contribution system is strongly oriented to a system where development is planned and forecast. It is untested as a tool for funding infrastructure to support intensifying rural land use.

The Council could use development contributions for the Rangiuru business park's infrastructure, but would expose its community to substantial risks, holding costs and potential opportunity costs also. An approach that leaves these risks with the development community seems to have merit and would also incentivise development.

Development contributions framework

Development contributions are provided for in Subpart 5 of Part 8 of the Local Government Act 2002 (LGA02). Their purpose is to "enable territorial authorities to recover from those persons undertaking development a fair, equitable, and proportionate portion of the total cost of capital expenditure necessary to service growth over the long term" (section 197AA, LGA02).

To apply development contributions, a council must adopt a development contributions policy after public consultation. A development contributions policy must be reviewed every three years. Although not formally a part of a council's long-term plan, most policies are prepared and reviewed in conjunction with the long-term plan to maintain consistency with approved council capital works programmes.

There is no appeal right against a council development contributions policy, other than the right of judicial review. Developers may object to the assessment of development contributions to a particular development, but only on grounds specific to the application of the Council's policy to the development (section 199D, LGA02).

Road funding

We are not entirely convinced by the Council's arguments in respect of road funding. A development contributions policy must be accompanied by a schedule that lists "each new asset, additional asset, asset of increased capacity, ***or programme of works*** for which the development contributions requirements set out in the development contributions policy are intended to be used or have already been used" (s201A(1)(a), LGA02). It appears to us that the council would have the ability to describe a rural road upgrading programme in reasonably broad terms and still comply with the LGA02.

The Council's statement "development contributions legislation requires Council to specify the nature and location of capital works proposed for development contributions funding and publish them in a schedule in its Long Term Plan" is not a complete reflection of the LGA02. The Schedule is part of the development contributions policy, not the long-term plan. The LGA02 permits the Council to make changes to its schedule at any time (so long as that doesn't increase the level of charges), or to use a development contribution for assets other than those set out in the schedule, provided the assets are for the same general function and purpose as those for which the contribution was required (s 201A(5),(7), LGA02).

However, we accept that the development contributions system is oriented strongly to a system where development is planned and forecast. It has an urban infrastructure orientation and is untested in the area the Council is affected by – growing intensification of rural land use, driven by the land owning community rather than council plans.

Rangiuru business park

We have considered two options provided under the LGA02 – development contributions and development agreements. The Council's financial contributions policy itemises infrastructure for the following services to be recovered from financial contributions – roading, stormwater, reserves, water and wastewater. We note that the infrastructure planning for water and wastewater disposal is uncertain. The Council has published two scenarios for its financial contributions policy which depend upon whether water and/or wastewater are treated on site or connected to the Te Puke water supply and wastewater treatment systems. The lower cost option amounts to $96.5 million and the higher cost option to $123.9 million (in 2015 dollars) for all five services.

The Council would never be required to fully fund these options. The lead developer (currently Quayside Properties) owns approximately 35 per cent of the developable land in the business park, all of which would be developed in stages one and two of the project. Under a development contributions system it would likely meet its share of the costs upfront. Some of the work would be staged, which might ease the funding load on the Council.

In our view the Council would be well able to apply a development contributions approach to the business park, and because planning is well advanced, could implement such a policy quite readily.

However, under a development contributions approach, the Council would need to borrow a substantial sum of money and meet the financing costs until such time as development occurred. It is likely the costs to the Council would be in the order of $80 million. To place that in context, the Council's draft long-term plan has its total borrowing at $120 million at the end of 2019, falling to $105 million by 2028. Therefore, for the Council to fund the project it would need to increase its total debt by about 67 per cent. Apart from the risk and direct cost to the community, this could create a significant opportunity cost to the Council and community because it would constrain the Council in borrowing for other community needs that may emerge. An approach, such as the financial contributions approach, that leaves these risks with the development community seems to have merit.

Sections 207A to 207F of the LGA02 also provides for developer agreements. These are private contracts between one or more developers and a Council to provide the infrastructure for an area to develop. We consider it unlikely that the Council could achieve a development agreement with all 14 property owners in the area zoned for development. Aside from Quayside Properties there are four other significant landholdings in the area zoned. A development agreement with Quayside Properties and the four other major landowners may provide an alternative funding path that could greatly reduce the Council's risk exposure.