SUBMISSION

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COVID-19 Recovery (Fast-track Consenting) Bill

Local Government New Zealand's submission on the COVID-19 Recovery (Fast-track Consenting) Bill

21 June 2020

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LGNZ is the national organisation of local authorities in New Zealand and all 78 councils are members. 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 submission was endorsed under delegated authority by Dave Cull, LGNZ President.

Introduction

LGNZ supports the purpose of this Bill as set out in Clause 3 but notes that in balancing the 'need for speed' with curtailment of opportunities for public participation, reduced information requirements and truncated decision-making process there is a heightened risk of unintended consequences This applies 'on the ground' in setting conditions of consent that prove inadequate in managing generated effects to acceptable levels. Our submission focuses on minimising that risk.

While we agree there is a need at this current time to provide an alternative consent pathway which provides certainty more quickly than the current requirements the RMA is able to, a consequence of the process provided for in the Bill is to place the expertise retained by local consenting authorities in a '*de minimus'* role. There are people who intimately know the local context of candidate projects and engaging their expertise will greatly assist in achieving the purpose of the Bill.

It is our belief that achieving the purpose of the Bill would be further enhanced by actively engaging the expertise of local consenting authorities early, in a partnering role to the Environmental Protection Agency (EPA) and in a position to meaningfully support Expert Consenting Panels (ECP).

At a time when cost pressures are on local councils, as they are on the nation, there needs to be adequate provision for reasonable cost recovery by councils in these exceptional circumstances to get the best outcomes for communities. Our submission addresses this matter with particular regard to the setting of consent conditions and the monitoring regime for consent conditions that will not be issued by local authorities but become their responsibility.

LGNZ and the local government sector have had very limited involvement in the 'fast track consenting' policy and the consequential Bill before you. We have not been afforded an opportunity to review the detail of the Bill as it was developed and as a consequence we have not been able to develop a submission that is fully informed by the expertise across the sector.

We place on record our concern about this. Local government has a key role in implementing this legislation so why we have not been fully engaged as the Bill has been drafted is perplexing.

The truncated process, from the time an application for a referred/listed project is lodged with the Expert Consenting Panel (ECP) is dependent on the application being very thorough. We therefore anticipate and encourage applicants to engage early and fully with local government as applications are shaped up for presentation to the Minister. In a similar vein, we encourage the Agencies who are able to use the enabling permitted activity provisions to facilitate infrastructure to engage early and fully with the relevant councils as their proposals are developed.

We think it not unreasonable that councils should be able to appropriately recover the costs of doing so, just as would ordinarily be the case. The risk is councils will be less inclined to be engaged because of the significant reductions in revenue that councils are facing at a time of protracted economic downturn. We address this matter more fully in this submission.

We also wish to minimise unnecessary burdens on ratepayers who will become the funders by default, remembering that councils are also advancing their own infrastructure projects as social and economic stimulus in recovery plans so consent teams will be busy. We will resource up if costs can be covered from the applicant.

More specifically, LGNZ is concerned to ensure that decisions made on the projects listed in the Bill and any project referred to the Minister for consideration, are carefully assessed against an appropriate range of matters. Local government and our communities want to ensure that the projects approved won't have significant, long-lasting adverse environmental and cultural impacts.

We seek that additional considerations are added at the various decision-making stages.

General comments

The truncated process, from the time an application for a referred/listed project is lodged with the Expert Consenting Panel (ECP) is dependent on the application being very thorough. We therefore anticipate and encourage applicants to engage early and fully with local government as applications are shaped up. In a similar vein, we encourage the Agencies who are able to use the enabling permitted activity provisions to facilitate infrastructure to engage early and fully with the relevant councils as their proposals are developed.

We think it not unreasonable that councils should be able to recover at least some costs of doing so, just as would ordinarily be the case. The risk is councils will be less inclined to do so because of the significant reductions in revenue that councils are facing at time of protracted economic downturn. We address this matter more fully in this submission. We also wish to minimise unnecessary burdens on ratepayers who will become the funders by default, remembering that councils are also advancing their own infrastructure projects as social and economic stimulus in recovery plans so consent teams will be busy. We will resource up if costs can be covered from the applicant.

Referred projects and listed projects

With regard to referred projects, we note the limited criteria to decline an application to be eligible to use the Order in Council process. We also note the open discretion given to the Minister under clause 19 which states that the Minister may consider at whatever level of detail the Minister considers appropriate the listed matters. We would expect this Bill to contain a greater obligation to consider the matters listed for consideration.

More specifically, LGNZ is concerned to ensure that decisions made on the projects listed in the Bill and any project referred to the Minister for consideration, are carefully assessed against an appropriate range of matters. Local government and our communities want to ensure that the

projects approved won't have significant, long-lasting environmental and cultural impacts. We seek that additional considerations are added at the various decision-making stages.
LGNZ considers the applicant should be required to include information in the application under clause 20(3) that comprises an assessment of the impact of the application on existing infrastructure and/or capacity of that infrastructure. This will be particularly relevant for those applications that may have significant impacts on bulk infrastructure provision.

Clause 21(2)(a) requires that the relevant local authority be invited to provide comments of the referral project. LGNZ seeks that clause 23 is expanded to enable matters associated with the relevant local planning instruments to carry through as grounds for decline. Given the role of the relevant Plans in assessments and decisions under Schedule 6(32) this should be a direct consideration under clause 23 and therefore assist in reducing poor projects being brought forward for assessment.

Further, in light of the extensive process that local government must go through to develop its strategies and plans (evidence-based, public submission, subject to scrutiny from experts, panels and the courts), it is critical that the Bill includes plans and proposed plans as key decision-making considerations for the panel. This is particularly the case with a process that has fewer public participation rights than an ordinary resource consent application or notice of requirement. LGNZ strongly supports the proposal that plans and proposed plans are included as matters for consideration for the ECP, for both listed and referred projects when decisions are made.

LGNZ Is concerned that the grounds on which resource consents and designations may be declined for listed projects are much narrower than the considerations for resource consent applications and notices of requirement (schedule 6(29) and (31). There appears to be little justification for considering a specified list of matters if they cannot then form the basis for decline of the application. If the proposal will not achieve the purpose of the Bill, and the proposal will result in significant adverse effects this should be a grounds for declining an application.

Local government also has a particular interest with regard to referred and listed projects, to ensure that appropriate conditions of consent are imposed as part of the decision, particularly given the obligation on local government to monitor the conditions once a decision is issued. We want the process to be smooth, where everyone understands their responsibilities, and the public maintain confidence in the process from application to the Minister, consenting, and to on the ground completion.

The Bill does not explicitly require a s42A report (or its equivalent), providing comments is the default. The ECP will need corroboration that all consents are sought. This can either happen prior to lodgement with the Minister (for a referred project) or covered in a s 42A report to the ECP. Typically, the council as consent authority ensures all the appropriate consents are granted. More importantly, a formal s 42A report should focus on conditions of consent. This is particularly important, for example, where there are impacts on a council's infrastructure (eg connecting to the roading network or where there are impacts on the three waters networks) or the vesting of reserves (that councils will own and manage).

Critical is that local government is involved in the drafting of the conditions and provides commentary on these to the ECP. Wherever possible multiple benefits to communities should be a feature of this enabling legislation.

Recommendations

1. Reduce the open discretion given to the Minister under clause 19 which states that the Minister may consider at whatever level of detail the Minister considers appropriate the listed matters.

2. Require the applicant under clause 20(3) to include information in the application that comprises an assessment of the impact of the application on existing infrastructure and/or capacity

3. Expand clause 23 to enable matters associated with the relevant local planning instruments to carry through as grounds for decline an application for referral

4. Increase the weight (have regard to) accorded to relevant regional and local planning Instruments as a basis for decline of an application.

5. Add as an following additional grounds for declining an application: the proposal will not achieve the purpose of the Bill, and the proposal will result in significant adverse effects.

6. Require a single, truncated s 42A report to be provided to the ECP. This report should either be provided to the applicant and included in the papers provided to the ECP or directly to the ECP. The s 42A report would confirm the activity status of the project and that all relevant consents are applied for and confirm/suggest appropriate conditions of consent. Critical is that local government is involved in the drafting of the conditions and provides commentary on these.

Deemed permitted activities

Before work commences, a qualifying agency is required to serve notice of its intention on local government. The notice of intention requires contact information and a brief description of the works. There is no process provided in the Bill to determine and confirm that the listed permitted activity (PA) requirements are all satisfied and no requirement to provide plans or any documentation to the local authority.

Given the requirement on local government to undertake compliance monitoring upon issue of a consent, we consider that when the notice of intention is served on the relevant councils, full documentation is provided at that time (plans and conditions).

There is an expectation that there will be full engagement with the councils as the projects are scoped and we consider it prudent that qualifying agencies and LGNZ, on behalf of the sector, develop memoranda of understanding in good faith on how this process can best work. While not appropriate for inclusion in legislation we would like to see Government direction to this effect. We note that this engagement with agencies is a further area where cost recovery for local authorities should be provided for.

We assume that where the permitted activity standard is more permissive than, for example, a provision in a regional or district plan that the permitted activity provision in the Bill will prevail. This is the opposite with NESs which enable a plan provision to be stricter.

Detailed comments regarding the permitted provisions

We are concerned that many of the permitted activity provisions, as contained in Schedule 4, lack certainty. This is particularly relevant for determination of whether activities are permitted under Schedule 4. We have done our best to identify those that will be particularly problematic when it comes to both determining compliance with the standard (noting there is no obvious process for this in the Bill) and when it falls to local government to monitor and potentially undertake compliance activity in relation to meeting these standards. We would like the opportunity to work with officials as these standards are finalised for the legislation in an effort to achieve the certainty required. This also needs to be flagged in relation to the new standards that will be inserted for additional activities when new agencies are granted the enabling powers (as already foreshadowed). We would have welcomed the opportunity to work closely with officials on this aspect of the Bill, particularly given the critical implementation role local government has in relation to these projects.

Concern has been raised with the use of the word must in regard to monitoring of Schedule 4 permitted activities undertaken by NZTA and Kiwirail (and others if approved). This doesn't provide for any compliance discretion based on scale and significance and risk of activities. While it is cost recoverable, this is likely to be a significant resource requirement for what may, in many cases, be low-risk activities. Retaining this requirement risks taking limited resources away from the monitoring of higher risk activities due to the lack of discretion in monitoring these PAs and is not consistent with best practice nor what is detailed in the relevant Best Practice Guides for Compliance Monitoring and Enforcement which promote a risk based approach to compliance monitoring. The specific issues with the drafting of conditions is as follows:

- The discharge standards proposed are difficult to enforce. They are very qualitative as opposed to quantitative and would require a reasonable amount of investigation to ascertain compliance. For example, how would we easily prove the effects were more than minor in respect of determining whether fresh water has been made unsuitable for animal consumption and measurement of a 20 per cent change in visual clarity.

- Schedule 4 (7) Management plan for affected or adjacent significant sites
  This provision presumes a requirement for a management plan yet it is unclear where this obligation arises (cl 5 (3)(c) is unhelpful.

- Schedule 4 (12) Earthworks (including diversion, damming and discharge of sediment)

(4)(e) says for to be permitted it cannot have "more than minor adverse effects" on aquatic life. That is not an objective measure and ultimately this is likely to be a matter of expert opinion and is likely to be subject of debate after an activity has occurred. This is not an appropriate PA standard. (Further, the Minister will need to make this determination with regard to effects on the exercise of protected customary rights before deciding to refer an application to the panel cf s18(2)(d)(i) which is likely to be difficult given applications to the Minister need only include a general level of detail.

(6)(c) states that earthworks must not change a natural wetland's median annual water level by more than 0.1 metres. This is impossible to determine without several years-worth of water level information on a specific wetland which is unlikely to exist in reality.

- Schedule 4 (15) Temporary and permanent bridges and culverts
  This clause may obviate the need for a resource consent but not a building consent. Perhaps a deeming provision is required to provide an exemption as if Schedule 1(2) of the Building Act applies.

- Schedule 4 (16) Fish passage
  (16)(1) says works must be undertaken outside of "relevant" fish spawning periods unless "unnecessary" or "impracticable". While this must be determined by a person with a post-graduate degree in freshwater ecology (or similar), this is likely to be subject of debate by different experts. What fish species are "relevant" should be clarified, as should what is considered "impracticable" (i.e. if it costs money to get a fish expert out to electrofish a stream, is it impracticable?). Fish passage should have the term appropriately qualified and experienced person in freshwater ecology of similar rather than the current wording of a person with a post graduate degree. As its currently worded a recent graduate with very little or no on-ground experience could be making calls in relation to not providing for fish passage.

- Schedule 4 (22) Discharge of dust to land and air
  (22)(1) refers to the Auckland Unitary Plan to define "sensitive activity" which seems out of place. An alternative is to use the definition provided in cl 23. Clarity/definition is required regarding a "sensitive activity" for the purpose of section 22. This section needs to refer to the no discharge objectionable or offensive dust that causes an adverse effect beyond the property boundary. At present it just refers to the MfE Best Practice Guide for Dust Management.

- Schedule 4 (23) Construction noise and vibration
  This provision needs to refer to a dust management plan

- Schedule 4 (25) Lighting and (27) Use, storage, and handling of hazardous substances
  These provisions both need to require preparation and submission of management plans. One assumes they will be prepared to an adequate standard by a suitably qualified person? What happens (as it always does under adaptive management regimes) when management plans change over the course of construction?

- Schedule 4 (30) Stormwater management
  In relation to (30) (3), how will this treatment quality threshold be measured and monitored to demonstrate compliance and by who. This is not a one-off requirement, but will have to be demonstrated on an on-going basis to show compliance is being achieved.

- Schedule 4 (33) Existing structures, reclamation, or drainage system in CMA
  This provision states that changes to existing structures or reclamations in the CMA must be as "small as practicable and have no additional effects on coastal processes". What is "practicable" is subject to differences of opinion, and therefore is likely a subject of challenge. Equally, the significance of effects on coastal processes may not be clear without a detailed assessment of those effects. What level information will have to be in place to demonstrate compliance.

- Schedule 4 (34) Dredging within CMA
  (34)(3) what does the term contaminate mean in this Instance? The RMA has a definition for contaminant and contaminated land, both of which are problematic in this instance. How does a person determine whether contamination has or hasn't occurred

  (34(4) what do "best practice methods" for dredging look like?

- Schedule 4 (36) Monitoring
  We support the agency undertaking the work to self-monitor but to whom does it provide evidence of compliance and clarity is needed regarding what information/evidence needs to be provided. Providing a report at the end of the project may be appropriate in some cases (e.g. culvert installation), but may not be appropriate for works that are on-going (earthworks etc). Also provision of the report needs to be timebound (e.g. within xxx working days of works being completed shall provide a report).

As a general comment, the ambiguity these provisions breaks the drafting conventions for rules and conditions of consent that have developed under the RMA. Permitted activity standards and conditions of consent are required to be certain, enforceable, reasonable, practical. If conditions do not achieve this applicants and regulators (local authorities) will be in a difficult position and will leave the regulator with no option but to abate any adverse effects arising. The purpose of a permitted activity is to allow activities with *de minimus* effects, to be undertaken.

The ambiguity raises an evidential issue in that the line which cannot be crossed is very hard to determine and therefore hard to enforce. For example, what the agency may consider practical etc may different from the regulator. This issue is being faced currently in implementing the NES for Plantation Forestry due to differences of opinion in relation to how standards are applied.

If NZTA roading activities can benefit from the prescribed permitted status (as covered in Schedule 4), appropriate local authority roading activities should likewise be enabled to use these provisions rather than having to go through a separate Order in Council process to either be added to the schedule or to use the referred fast track process. Thus we seek that local authority roading activities are added to Schedule 4.

In addition, LGNZ asks that consideration be given to local authority work to maintain existing flood protection infrastructure being made eligible for permitted activity status. The regional councils have made a specific submission on this matter.

Recommendations

1. Expand Part 2 and Schedule 4 of the Bill to include appropriate work on local government infrastructure, as undertaken by local authorities, as a 'permitted activity.'

2. Expand Part 2 and Schedule 4 of the Bill to include work on upgrading existing flood protection infrastructure along river corridors and coastlines, as undertaken by local authorities, as a 'permitted activity'

3. Provide a formal process that requires the agencies to lodge full plans and documentation to the relevant councils as part of the Notice of Intention.

4. Work with local government to remove ambiguity and confirm the permitted activity standards in Schedule 4 before they are finalised and before any new provisions are added for other agencies' works.

Local Authority Cost Recovery

We are pleased that provision is made for cost recovery for: monitoring of the Schedule 4 permitted activities and for providing the EPA with information (Schedule 6 (7)(4)).

Generally, under the Bill there is an expectation that local authorities will provide a range of services and advice but there is no express provision for them to recover the costs of all such services and advice. There is a mix within the Bill of local authorities must do certain things and local authorities may be requested by an ECP to provide advice, technical advice etc.

Specifically, local authorities are expected to engage at multiple points of the process as a standard matter (e.g. before the Minster refers an application to the ECP, in response to the ECP as a standard requirement (separate to the Schedule 5 (12)(2) request), and potentially in regard to draft conditions.

Schedule 5 (14) contains an explicit provision for the EPA recover costs from the applicant but there is no corresponding provision for local authorities. The success of this fast track process, with respect to meeting truncated timeframes, is fully dependent on frontloading of the process and early and comprehensive engagement by the parties (applicant, and officials) with local authorities. This includes consent conditions. We would like the ability to recover reasonable costs arising from this engagement.

Further to this, it is unclear how such advice or support as adviser to an ECP is cost recovered. We would assume the EPA, on instruction from the ECP will secure a local authority's advice and services by way of a contract but this is unclear.

Recommendations

We support the principle of cost recovery that has been provided for in part in the Bill, but this needs to be reviewed and extended to provide for local authorities to recover fairly and reasonably all costs incurred in the three new processes including:

- consultation and engagement with the applicant as an application is developed
- engagement with officials to support the Minister's referral decision for the fast track process
- any provision of information to the ECP and the EPA
- consideration of draft conditions of consent for all the processes
- consideration of draft management plans for the purposes of monitoring of Schedule 4 permitted activities

Development contributions and financial contributions

Clarity is needed to determine whether Development Contributions (DCs) and Financial Contributions (FCs) can be required of fast-tracked projects at the time a resource consent is granted.

S198(1)(a) of the LGA specifies that DCs can be collected when a resource consent is granted under the RMA. Clause 12 of the Bill sets out the relationship between the RMA and the Bill. As worded, a consent issued under that Bill is not granted under the RMA (but then is deemed to have force and effect as though it was under the RMA). This contrasts to the old Housing Accords and Special Housing Areas Act which modified the application of the RMA which meant that consents were still issued under the RMA per se.

While a TA can collect DCs on building consent or service connection, preference is always to take DCs as early as possible. Further, there may be other fast-track consents that would have attracted liability for DCs where no building consent is required later on.

The simple solution would be for a consequential amendment to section 198(1)(a) of the LGA to add the fast-track bill in for DCs.

Similar care is needed to ensure that provision is made for Financial Contributions to also be levied to offset effects in the normal way.

Recommendation

Amend the legislation to ensure DCs and FCs can be required as a condition of consent and payable to the relevant council.