

Chairperson and Committee Members
REGULATORY MANAGEMENT COMMITTEE

2 OCTOBER 2014

Meeting Status: **Public**

Purpose of Report: For Information

PROPOSED DISTRICT PLAN RULES WITH IMMEDIATE LEGAL EFFECT

PURPOSE OF REPORT

- 1 The purpose of the report is to clarify for the Committee the rules in the Proposed District Plan which have immediate legal effect in accordance with Section 86B(3) of the Resource Management Act 1991.

SIGNIFICANCE OF DECISION

- 2 While the content of this report is a critical step in progressing the PDP, Council's Significance Policy is not triggered.

BACKGROUND

- 3 Section 86B of the Resource Management Act 1991 (RMA) states that a rule in proposed plans and changes does not have legal effect until a decision on submissions relating to the rule is made and publicly notified. The only exception to this are those rules that have immediate legal effect as identified in Section 86B(3):

A rule in a proposed plan has legal effect only once a decision on submissions relating to the rule is made and publicly notified under clause 10(4) of Schedule 1, except if...

- (2) A rule in a proposed plan has immediate legal effect if the rule—*
- (a) protects or relates to water, air, or soil (for soil conservation); or*
 - (b) protects areas of significant indigenous vegetation; or*
 - (c) protects areas of significant habitats of indigenous fauna; or*
 - (d) protects historic heritage; or*
 - (e) provides for or relates to aquaculture activities.*

- 4 Section 86B(5) of the RMA clarifies that immediate legal effect means legal effect on and from the date on which the proposed plan containing the rule is publicly notified under clause 5 of Schedule 1.
- 5 The effect of this section of the RMA is that apart from those provisions identified as having immediate effect, none of the rules in the Proposed District Plan (PDP) will have legal effect until decisions are made and notified on those rules.
- 6 When the PDP was notified in November of 2012, a list of rules having immediate legal effect under section 86B(3) was included in Chapter 1 Introduction and Interpretation. This list included rules in Chapter 3 relating to indigenous vegetation, Chapter 9 relating to contaminated sites, Chapter 10

relating to Historic Heritage and any consequential references to provisions in these chapters.

CONSIDERATIONS

Independent Review of the PDP

- 7 The Council commissioned an independent review of the PDP: Independent Review of the Kāpiti Coast Proposed District Plan (Sylvia Allan and Richard Fowler, 2014). One of the findings of the review was that the list of rules currently set out in the PDP as having immediate legal effect incorporates a number that technically do not have legal effect. In some cases this is due to the limitations of Section 86B(3) of the RMA which restrict the range of rules with immediate legal effect to very specific circumstances. Other reasons are that the operative District Plan provides equivalent protection, or where a rule is poorly worded and is not capable of reasonable interpretation.
- 8 A recommendation of the independent review was that Council undertake a review of the content and scope of the rules listed as having immediate legal effect and:
 - remove from the listing all those which cannot be justified in terms of Section 86B(3);
 - confine those which are justified in limited situations, to those situations only; and
 - provide advice online and in hard copies of the PDP, as to the applicability of remaining rules.
- 9 Based on the recommendations of the independent review, at the meeting on 24 July 2014 Council resolved as follows:

3. The Council undertake a detailed review of the rules of the PDP having legal effect and clarify these provisions as soon as possible.
- 10 Based on this resolution, staff have analysed the PDP and identified those provisions as legitimately having immediate legal effect in accordance with Section 86(B) of the RMA. The list of the rules having immediate legal effect contained in Chapter 1 of the PDP as notified is not correct, and amendments are identified in Attachment 1.
- 11 The main changes to the list of rules that have immediate legal effect are:
 - removal of rules pertaining to contaminated land
 - clarification that the rules apply to scheduled heritage, sites and buildings rather than just historic heritage
 - removal of some rules in Chapter 3 relating to ecological sites

The Process for Amending the List of Rules with Immediate Legal Effect

- 12 In Section 86E, the RMA makes it clear that the list of rules with immediate effect does not form part of the PDP itself even though it is included in the PDP.
- 13 Legal advice from Richard Fowler was provided in Appendix 2 of the independent review report. The advice suggests that the list in Chapter 1 of the PDP identifying which rules have immediate legal effect is not part of the PDP

itself; therefore amending that statement is not subject to the requirements of Schedule 1 of the RMA.

- 14 The advice considered that if some rules on closer analysis do not fall within Section 86B(3) of the RMA, their inclusion in a list does not change their status, and does not render them of immediate legal effect simply because they have been listed.
- 15 It is therefore possible for the Committee to resolve under Section 86E of the RMA to make amendments to the list.

Implications of Amendments to the list of Rules with Immediate Legal Effect

- 16 Any submissions or further submissions on any of the rules deleted from the list will not be affected.
- 17 The most significant effect is on resource consents for activities undertaken under rules that are deleted from the list. Essentially all activities other than those captured by rules in the amended list will be assessed under the Operative District Plan provisions until a decision is made and notified on the PDP rules.

Financial Considerations

- 18 The costs are within budget.

Legal Considerations

- 19 Legal advice was initially provided by Richard Fowler QC in Appendix 2 of the independent review of the PDP which provided clarity on the statutory ability to make changes to the list. Subsequent to that, meetings were held between Richard Fowler and Simpson Grierson (acting for the Council) to reach an agreed legal understanding. That joint understanding was used to create the amended list contained in Attachment 1 to this report.

Delegation

- 20 The committee may consider this matter under clause 7.19 of the Governance Structure and Delegations. Clause 7.19 gives RMC the following delegation:

"Authority to exercise all of the Council's functions, powers, and duties under the Resource Management Act 1991, except under clause 17 of Schedule 1."

Consultation

- 21 Comments from the community were invited on the independent review of the PDP. The clarification of the rules having immediate legal effect is a response to the independent review of the PDP and the recommendations contained therein.
- 22 Communication on the amendments to rules with immediate legal effect is being factored into the communication and engagement process being developed. As amendments to the list affects users of the PDP rather than submitters, the most effective communication will be through the Council website and a media release. An updated list of rules having immediate legal effect will be sent to submitters also.

Policy Implications

- 23 The district plan is the most significant RMA planning document in the Kapiti community.

Tāngata Whenua Considerations

- 24 Tangata whenua have been involved throughout the PDP process, with particular involvement through the Tangata Whenua District Plan Working Party. Te Whakaminenga O Kāpiti will be advised of progress in this matter at their meeting of 7 October where they will receive their regular update on the PDP. In addition, Iwi who have lodged submissions to the PDP will receive written advice along with other submitters.
- 25 Rules associated with protecting culturally significant sites (such as waahi tapu) are afforded immediate legal effect under Section 86B(3)(d) as the rules protect historic heritage from the point of notification of the PDP.

Publicity Considerations

- 26 Communication with the community, submitters and users of the plan will be important. Users of the plan, particularly those undertaking activities captured by rules having immediate legal effect need to understand the implications of changes to the list of rules.
- 27 The message also needs to be widely communicated that although Council is amending the list of rules having immediate legal effect, the operative provisions and policy framework will prevail in all other cases until a hearing and decision is made on the PDP.
- 28 This is being factored into the development of the communication and engagement plan.

RECOMMENDATIONS

- 29 That the Committee adopt the changes to the list of rules having immediate legal effect as contained in Attachment 1.

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ATTACHMENTS:

Attachment 1: Amended list of rules with immediate legal effect

ATTACHMENT 1: Amended List of Rules with Immediate Legal Effect

(Additions underlined and deletions ~~struck through~~)

The following rules shall have immediate legal effect under section 86B(3):

- ~~▪ Rule 3A.1.5.2~~
- ~~▪ Rule 3A.2.3~~
- ~~▪ Rule 3A.3.4 in relation to ecological sites and historic heritage only~~
- Rule 3A.3.1 (a) and ~~(d)~~ (c)
- ~~▪ Rule 3A.3.2~~
- ~~▪ Rule 3A.3.3 in relation to areas only~~
- ~~▪ Rule 3A.3.5 in relation to ecological sites only~~
- ~~▪ Rule 3A.3.7 in relation to ecological sites only~~
- Rule 3A.3.8 in relation to ecological sites and scheduled historic heritage sites and buildings only
- Rule 3A.3.10.2 in relation to ecological sites only
- ~~▪ Rule 3A.3.11 in relation to ecological sites only~~
- Rule 3A.4.2 (a), ~~(d)~~ and ~~(f)~~ (c)
- ~~▪ Rule 3A.4.5~~
- ~~▪ Rule 3A.1.1~~
- Rule 3A.5.2 in relation to ecological sites only
- Rule 5C.3.1 in relation to ecological site K066 only
- ~~▪ Rule 7A.1.10~~
- ~~▪ Rule 7A.2.2 in relation to ecological sites and historic heritage only~~
- Rule 7A.3.6 in relation to ecological sites only
- Rule 7A.3.7 in relation to ecological sites only
- Rule 7A.5.4 in relation to ecological sites only
- Rule 7A.5.9 in relation to ecological sites and scheduled historic heritage sites and buildings only
- ~~▪ Rule 8.1.8 in relation to historic heritage only~~
- Rule 8.4.2 in relation to scheduled historic heritage buildings only

- ~~▪ Rule 9E.1.2 in relation to water and soil protection~~
- ~~▪ Rule 9E.1.3 in relation to water and soil protection~~
- ~~▪ Rule 9E.1.6 in relation to water and soil protection~~
- ~~▪ Rule 9E.2.1 in relation to water and soil protection~~
- ~~▪ Rule 9E.3.2 in relation to water and soil protection~~
- ~~▪ Rule 9E.4.1 in relation to water and soil protection~~
- Rule 10A.1.1 to and including Rule 10A.1.8 in relation to scheduled historic heritage sites and buildings only
- Rule 10A.2.1 in relation to scheduled historic heritage sites and buildings only
- Rule 10A.2.2 in relation to scheduled historic heritage sites and buildings only
- Rule 10A.3.2 to and including Rule 10A.3.8 in relation to scheduled historic heritage sites and buildings only
- Rule 10A.4.1 to and including Rule 10A.4.3 in relation to scheduled historic heritage sites and buildings only
- Rule 10A.5.1 to and including Rule 10A.5.5 in relation to scheduled historic heritage sites and buildings only
- ~~▪ Rule 11A.1.8 to Rule 11A.1.12 in relation to ecological sites and historic heritage only~~
- Rule 11A.3.6 in relation to ecological sites and scheduled historic heritage sites and buildings only
- Rule 11A.3.7.2 and Rule ~~11A.3.7~~ 11A.3.8.2 in relation to ecological sites only
- Rule 11A.4.1 ~~to Rule 11A.4.4~~ in relation to ecological sites and historic heritage only
- Rule 11B.1.2.2 in relation to historic heritage buildings and sites only
- ~~▪ Rule 11B.1.3 to Rule 11B.1.5 in relation to ecological sites and to historic heritage only~~
- Rule 11B.3.1 in relation to scheduled historic heritage sites and buildings
- Rule 11B.3.2 to Rule 11B.3.4 in relation to ecological sites and to scheduled historic heritage sites and buildings
- ~~▪ Rule 11B.4.1 and Rule 11B.4.2 in relation to ecological sites and to historic heritage~~

- Rule 11B.5.1 in relation to ecological sites and to scheduled historic heritage sites and buildings
- Rule 12C.1.1 in relation to scheduled historic heritage buildings only
- Rule 12C.2.2 in relation to scheduled historic heritage buildings only
- Rule 12C.3.2 in relation to scheduled historic heritage buildings only