Appendix 1: Submission from Wellington City Council on the Resource Management (Simplifying and Streamlining) Amendment Bill 2009

Submission to:	**Local Government and Environment Select Committee**
Bill:	**Resource Management (Simplifying and Streamlining) Amendment Bill 2009**
From:	**Wellington City Council**
Date:	**03 April 2009**

Appendix 1

1. Introduction

1.1. Wellington City Council welcomes the opportunity to comment on the Resource Management (Simplifying and Streamlining) Amendment Bill 2009.

1.2. The Council was one of the first major cities to have a fully operative District Plan (4 July 2000) and achieved this by making a conscious effort to limit variations to the Plan and to resolve appeals as quickly as possible. Even so, 9 years on the Council has notified a further 69 plan changes so that it can properly manage development and activities occurring in the City. The requirement to keep plans up to date is a necessary, on-going function of the Council.

1.3. The Council processes on average 900 resource consents a year and 300 other permissions, putting the Council in the top 10 territorial authorities in terms of processing consents.

1.4. Our overall budget for administration of the RMA (ie. plan preparation, resource consent processing and monitoring, enforcement and compliance) is approximately $7m in the 2008/09 year, of which almost $3m is funded through user charges and fees.

1.5. The Council is well aware of the significant administrative workload the Act imposes and for this reason generally supports those provisions that will ease the administrative burden of both the plan development and consent application processes without reducing protection for the environment. Appendix One outlines the provisions supported by the Council.

1.6. This submission concentrates on those provisions we believe will not achieve their intended outcome (ie. a streamlined or simplified process), where environmental outcomes and core RMA decision-making principles may be adversely affected, or where further clarification is required in the legislation to achieve the stated objectives.

1.7. Finally, we highlight a number of other issues that were not included in the Bill but should be considered by the Select Committee. Of particular note is the need for those exercising functions under the Act to take greater consideration of the quality of the built environment.

2. Provisions that relate to public participation

2.1. The Bill contains a number of provisions that collectively may be seen as reducing public participation in the planning process. Specifically:

- 2.1.1. Third party appeal rights (s274 parties) narrowed to those who had already made a submission or are directly affected (cl 131)
- 2.1.2. Presumption for public notification of all resource consents reversed (clause 68)
- 2.1.3. Security for costs re-introduced (cl 133)
- 2.1.4. Appeal filing fee increased to $500.

2.2. The appropriate level of public participation in the process has long been a vexed issue, with successive amendments to standing rights in the Town and Country Planning Act and the RMA as evidence of this. Careful balance is needed between allowing sufficient public participation to add value to the outcomes and ensuring efficient processes to minimise delays to developers and investors. On balance we support all proposals except clause 68 and suggest an amendment to clause 131, as outlined below.

2.2.1. **Third Party Appeal Rights (cl131):**

2.2.2. The Council's experience with appeals involving third parties is that most third parties are either submitters or directly affected. Given this, the proposal to narrow who may become s274 parties (to remove those who represent a relevant public interest) is unlikely to have a significant impact on actual practice. The Council is however concerned at the delays associated with the involvement of some s274 parties.

2.2.3. It is our experience that s274 parties can provide appropriate checks and balances on the appeal process, particularly where appeals are settled through mediated consent orders. However, the Council has experienced situations where s274 parties become involved in an appeal on one matter, using it to pursue other agendas. We consider the role of s274 parties needs to be reviewed to avoid these situations.

2.2.4. **Recommendation:** Proceed with clause 131. Recommend that further work is carried out as part of the phase 2 amendments to clarify the scope and role of s274 parties.

2.2.5. **Presumption now towards non-notification of all consents (cl 68):**

2.2.6. It is agreed that this provision reflects common practice across Councils. Our council notifies around 1.5% of all resource consents processed; less than the national average. Of these around half are limited notified. The Wellington City District Plan makes widespread use of the ability to include a rule in the plan stating that certain applications will be non-notified. It is used for technical matters requiring expert opinion eg. traffic and parking, urban design etc.

2.2.7. We note however, that reversing the presumption may create more work for Councils and therefore not achieve the intended simplified, streamlined process. Councils will likely be asked to amend their plans to include rules in plans stating when applications will be notified (clause 94AAD). Litigation over what matters are specifically identified as requiring full public notification is inevitable; creating new uncertainty, further delays and costs.

2.2.8. The Council also has concerns with proposed section 93A regarding the change in the threshold test from *de minimis* effects to more than minor effects. The test will require greater discretion/judgement by officers making the decision regarding whether a party is affected or not. The decision regarding affected parties under the "*de minimis*" test is already difficult and requires a degree of judgement. An example of how this provision amends the decision about an affected party is described below:

> *A proposal for an addition to a new dwelling will create additional shading and bulk and visual dominance effects on the adjoining site to the south. The potential effects created are greater than those provided for as a permitted baseline in the district plan. The additional shading created on the adjoining site will be additional shading of 1 hour in the morning at mid-winter. Under the current legislation the adjoining property owner would definitely be identified as a potentially affected party and their written approval required. The test under the Bill is more difficult. The critical question is likely to be how much shading the property currently receives – for example it may only receive 3 hours at mid-winter and if this is cut by an additional hour then it will only receive 2 hours.*

2.2.9. Proposed new section 94AA (also in cl 68) also raises the threshold test for notification and introduces a new phrase "beyond the immediate environment". In changing the nature of the notification test here too, Council officers will be required to develop new understanding of what that phrase means. Those notification decisions will be challenged and need to litigated before the Court.

2.2.10. In summary, while the proposed provision reflects actual practice it may result in more work for councils if required to update their plans. This is a particular risk for the Wellington City District Plan as members of the community may wish to see the existing non-notification statements balanced by rules stating when notification will be required. The clause will also increase council workload initially as Councils are required to revise their understanding in assessing 'more than minor' effects and what the phrase 'beyond the immediate environment' means. Litigation is likely to increase as council decisions on who is an affected person are challenged.

2.2.11. **Recommendation:** Do not proceed with clause 68 (and any other consequential amendments) as this will create more uncertainty, further costs and delays as Councils amend their plans and Council notification decisions are challenged.

3. Deletion of the non-complying consent category (cl 147)

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3.1. This proposal is of significant concern to this Council. The justification for the deletion of the non-complying consent category is vague, with little real evidence that there is a problem. Removing the consent category will create significantly more work for councils.

3.2. In attempting to develop a plan that followed the effects based approach envisaged by the RMA when it was first introduced, the Wellington City District Plan uses the non-complying consent category primarily as a default mechanism for any activity that is not specifically contemplated by the Plan's rules. It is most commonly used to provide an upper limit to developments. Applicants as well as the Council find this 'line in the sand' approach very helpful and the applicant will commonly amend their plans to avoid non complying activity status. Some examples of developments that default to non-complying include:

- developments in the central area that go beyond 35% of the height standards (eg. maximum of 121m above msl for some sites)
- developments in the outer residential area that exceed the discretionary limit for site coverage of 42% (the permitted standard is 35%)
- developments in the outer residential area that exceed the discretionary limit for building recession planes by more than 3m.

3.3. There are a very small number of situations where certain listed activities (such as landfills, quarries or activities listed in the Health Act eg. Septic tank desludging and disposal of sludge) are not permitted, nor provided for as discretionary activities, thus defaulting on purpose to the non-complying consent category. Rather than deleting the consent category altogether, the Council believes improvements could be made simply by preventing specific activities such as these being listed as non-complying activities.

3.4. The primary concern with the deletion of this consent category is that it will trigger a review of all the objectives and policies in the Plan to ensure that they provide enough scope and guidance to consent processing staff on acceptable levels of development. The policies as currently drafted are not explicit enough for either applicants or council officers to know activities/level of activity go beyond what is generally acceptable or are just not contemplated by a Plan. More precise statements are needed in policies as to the scope of works likely to be approved or declined by the Council (due to their effects).

3.5. It is also noted that decision makers seem to consider applications for non complying activities more seriously as the district plan clearly signals that such activities are not provided for in district plans. This will need to be emphasised through objectives, policies and assessment criteria.

3.6. If this clause proceeds, it is highly likely that a wholesale review of the Wellington City District Plan's policies will occur. This will undermine any administrative savings that would have otherwise been made with the

proposed repeal of the 10 yearly plan review (cl 56); a proposal that we strongly support.

3.7. As part of the rolling review of the Wellington City District Plan, our Council has deleted many Controlled Activities or severely restricted the types of activities classified as Controlled Activities. The case law surrounding Controlled Activities has changed so significantly in the years since the Plan was drafted that it is no longer appropriate for many of the activities it was originally used for. That is, the Council is not able to manage the effects of those activities as it first envisaged due to the limited nature of conditions able to be placed on Controlled Activities. If the Government wishes to reduce the number of consent categories, we recommend the Controlled Activity consent category be deleted. We note however that this would also require councils to review their Plans so would not achieve the goal of reducing costs associated with the Act.

3.8. **Recommendation:** 1. Do not proceed with clause 147 (and any consequential clauses) as it will trigger the need for Council to review its plan policies resulting in a significant plan change being prepared. 2. If necessary, amend the non-complying consent category so that it may only be used as a default consent category for activities that go beyond the relevant discretionary activity standards. That is, no specific activities should be listed directly in a non-complying rule or default there directly as a result of those activities not being provided for as Permitted, Controlled or Discretionary activities. 3. That Parliament considers deletion of the Controlled Activity consent category as part of the Phase 2 reforms of the Act.

4. Proposed Plans no longer have effect until decisions on submissions notified (cl 86A)

4.1. The Council appreciates the concerns the Government has with plan changes taking effect immediately, but on balance finds that the benefits of the current approach outweigh the costs associated with the proposed change.

4.2. It is agreed that the weighting to be given to proposed plan changes during the consideration of resource consent applications is complex and that it increases report writing requirements. However, there are benefits of having certain plan changes take effect immediately, ie. not all plan changes are designed to prevent development. It enables councils to better manage emerging issues (eg. need for new industrial or commercial areas) or to provide for new activities not anticipated when the Plan was first drafted. Council is concerned also that it will not be able to manage some activities effectively if, as a result of a plan change, landowners are able to apply for certificates of compliance to 'beat the plan change'. The Council has had numerous experiences of this behaviour.

4.3. If this provision is to proceed, we consider the following must occur to improve the intent of the provision. Firstly, this provision must only be pursued in conjunction with clause 148 (specifically clause 14 of the First

Schedule) which limits appeal rights on plan changes. A more robust process that ensures all plan changes are fully considered before having effect has to be coupled with greater security about their certainty once the decision has been made.

4.4. Secondly, we recommend an amendment to the Environment Court declaration process in clause 86A(2)(b). If a council has sought a declaration from the Environment Court that the rules in a notified plan change do take effect immediately then, whilst that declaration is being considered by the Court, no person should be able to lodge a Certificate of Compliance application or Controlled Activity resource consent application for any rule the plan change seeks to amend.

4.5. **Recommendation:** Do not proceed with clause 86A. In the event that this clause is pursued, clause 148 (ie. amendments to clause 14 of the First Schedule) must also proceed as drafted and clause 86A(2)(b) must be amended to ensure that while a declaration is being sought, no person may lodge a Certificate of Compliance application or Controlled Activity resource consent application for any permitted activity standard or rule that the plan change seeks to amend.

5. Further Submissions process revised (cl 148)

5.1. The Council supports the attempt in the Bill to streamline the plan making process by significantly revising the further submission process. The comments in the TAG report on this issue closely represent our own experiences with the further submissions process.

5.2. There are, however, some concerns at how the prescribed process will work in practice. Clarification is needed for proposed clause 8(1) of clause 148. Two scenarios are described below of how local authorities might respond to the proposed process:

Scenario 1: Submissions have been received on a proposal to reduce the current height of all properties in a heritage area. Some affected property owners did not submit at all, while some submitters suggested an alternative proposal whereby some properties in the heritage area remained at the same height, some properties had a reduced height and others have a height increase. Under the Bill as drafted, it is clear that affected persons would include those property owners that did not originally submit. But does it also include those other property owners who submitted, but did not submit on the variable height concept. Given that the subject matter relates to heritage, there are likely to be heritage groups interested in the matter. Is the Council able to seek the views of local heritage groups, who originally supported the proposal in their submission, to obtain their views on submissions to increase height in the heritage area.

Scenario 2: Significant changes are proposed to the bulk and location rules for a residential zone. One submitter (a residents group) asks in its submission for a new permitted activity standard that has the effect of permitting a much greater range of building works. As this proposal would affect a large number of properties in the residential zone (not able to be individually identified), it would make sense for the Council to seek the views of all property owners by a public notice and submission process. This would prevent the prospect of the council failing to correctly identify those that would be affected by the submission.

5.3. In our view, the 'further submissions' process outlined is not clear and without further clarification in the Bill, followed up with guidance on its implementation, it is highly likely that councils will be exposed to even greater risks of judicial review for failure to seek the views of an adversely affected person.

5.4. On balance, it would be simpler to keep the basic structure of the existing further submissions process, amending it in two ways to streamline it. Firstly, no original submitter is able to make a further submission; they can instead use the hearings process to rebut the views of other submitters. Secondly, reduce the timeframes for gathering further submissions from not less than 20 working days to not less than 10 working days.

5.5. **Recommendation:** Do not proceed with changes in clause 148 to clause 8 of the First Schedule. Instead, amend clause 8 of the First Schedule to specify that only persons who have not already made a submission under cl 6 of the First Schedule may make a further submission. Amend clause 7(1)(c) of the First Schedule to reduce the closing date for further submissions from 'not less that 20 workings days' to 'not less than 10 working days'.

6. Prohibition of rules for general tree protection in the urban environment (cl 52)

6.1. Council offers tentative support to this provision based on its previous experiences with managing trees in the district plan.

6.2. The Council originally included a general tree protection rule in its proposed district plan, but found it to be unworkable and the rule was replaced in favour of a schedule of listed trees in the Heritage Chapter of the Plan.

6.3. However, in a recent plan change for a new urban development area the Council did introduce a rule against general bush clearance as this seemed to be the best mechanism for protecting indigenous vegetation (required by s6(c)) on the rural land intended for future Greenfield subdivision.

6.4. Our concern with the proposed provision in the Bill is how to define the 'urban environment'. In relation to the plan change discussed above it is

unclear whether the council would be prevented from putting in place the bush clearance rule given that the land is currently rural land, but intended for future development. If the rule is to proceed, the phrase 'urban environment' needs further clarification. We presume that it is intended to relate to the existing built environment.

6.5. We do not believe that the rule will prevent us from protecting stands of remnant indigenous vegetation, but this will require significant more work to accurately identify and plot those areas or stands of vegetation worthy of a specific listing in the Plan.

6.6. **Recommendation:** If clause 52 proceeds, further clarify the phrase 'urban environment'.

7. Effect of NPS and NES on Plans (cl 40 and 48)

7.1. The Council generally supports the refinement of provisions in the Act to ensure better linkages between national instruments and local authority planning processes. We wish the note, however, that it is critical for both national policy statements and national environmental standards to be written in a clear manner, reflecting the style used in plans already. This will ensure that Councils can more readily adopt them into their plans without further formality, as desired by these amendments.

7.2. **Recommendation:** Proceed with clauses 40 and 48, but note our concerns that national instruments must be written in a clear manner reflecting the style used in plans already.

8. Resource Consent processing timeframes and discounting policy (cl 62, 63, 64, 65 and 25)

8.1. The Council does not support these changes. If the provisions are to proceed then clause 64 needs significant redrafting to remove the uncertainties that now exist due to the redrafting.

8.2. It is now unclear whether more than one request is allowed. At first glance, reading this section by itself, it seems that only one request is allowed, ie. "*A consent authority...may make a written request...*" under subsection 1. The current s92 states "*a consent authority may...request the applicant for consent to provide further information*", *implying that there is no limit to the requests able to be made.* The background material to the Bill states that the intent is that more than one request may be made, but that it is only the first request that can have the processing clock stopped while the information is being gathered by the applicant. This needs clarification in the Bill itself.

8.3. Assuming that the intent is to provide for more that one request, the Council is very concerned that the provisions do not allow the processing clock to be stopped for secondary information requests. It is quite common for complex applications that, upon receiving information from

the first information request, the information triggers the need for yet more information. In these situations, to have the clock still ticking will put considerable constraints on achieving robust decision-making. Instead, it is highly likely that Councils will be forced to decline applications due to the lack of sufficient information based on the precautionary principle. For complex applications, much can be gained by stopping the clock and giving both the council and applicant the chance to negotiate solutions to issues that arise during the process. Whilst this may be seen by the applicant as causing delays, the alternative outcome of the Council declining the consent is not a preferred outcome.

8.4. What does Parliament intend by the phrase '*a reasonable time*' within which the Council must make its further information request (subsection (3))? One interpretation is that the council must make a decision to request further information within 10 working days of receiving the application so that the requirements of subsection 4 can still be met. If this is the intended interpretation, then the subsection should state this to avoid the reader having to infer it based on another subsection.

8.5. Subsection 4 states the applicant must provide the information 10 days before the council makes its decision. In many cases the Council, having received the further information, is in a position to issue the decision within 2-3 days following the receipt of the information. It is assumed that this could still occur because it would be nonsensical to purposefully withhold the decision until the 10 days is completed merely to meet the wording of the Act. The drafting of the subsection should clarify this in plain English with words to the effect that the applicant must provide the information no less than 10 days before the end of the 20 working days allowed by the council to process the application.

8.6. Clause 65 states that the council must continue to process the application if the applicant refuses to provide the information requested. The Council assumes that Parliament is aware that failure to provide such information will mean the applicant runs the risk of the application being declined. The Council, if concerned about the lack of appropriate information to make a decision, will use the precautionary approach of declining the application rather than 'hoping for the best' and trusting that the applicant knows best.

8.7. In summary, these provisions are not supported because they will lower the standard of decision-making and will likely result in an increase of declined applications. This will not achieve the Government aim of streamlining and simplifying the process. If the provisions are to proceed, significant redrafting is required to clarify how they are to work.

8.8. The Council supports clause 25 (requirement to produce a policy on discounting administrative charges for failure to meet consent processing deadlines). This Council has already developed informal guidelines to assist decision-makers when making decisions on objections to consent fees. We accept that not all councils may have such policy guidance in place and so to require such policy is good practice.

8.9. We note with interest that the EPA is given 9 months to consider applications before it; recognition perhaps that some applications take considerably more time to process than 20 working days, or the 70 working days (approx.) for notified applications allowed for local authorities. As a metropolitan city surrounded by a large rural area, the Council has processed very large resource consent applications of a similar scale to those expected to be processed by the EPA (eg. Makara Wind farm application – 5000 submitters, Mill Creek wind farm – 800 submitters, Marine Education Centre - 500 submitters).

8.10. It is our view that the Act's timeframes and other processes do not discriminate very well between simple consents and more complex applications. Complex applications tend to involve a number of issues requiring the input of several experts (hence some delays) any tend to involve further information requests. Likewise, where applications involve submitters then the hearing process can introduce delays as well. Applications of this nature are difficult to consider and the time taken and information required is necessary in order to get the best decision for the environment.

8.11. **Recommendation:** 1. Do not proceed with clause 62-65 as these will adversely affect good decision-making and may increase the number of declined applications. 2. Conditional support is offered for Clause 25 on the basis that the Council has a discounting policy already in place and considers it useful to help make decisions on fee objections. It is also appropriate for simple non-notified applications. 3. Proceed with clause 25.

9. Consent applicants or submitters able to choose independent commissioners for their Hearing Committee

9.1. It is difficult to dispute the view espoused in the TAG report that those who make the rules should not implement the rules. However, a key premise of the RMA is that decision-making is best done by those close to the community affected by the decision (ie. elected councillors). Had the government intended to restrict those decision-making functions to only policy/plan making decisions, it would have done so originally. The Council finds elements of the TAG report unhelpful and contradictory, especially in respect of decision-making processes. For example, it considers that Councils are better placed to make decisions on Notices of Requirements than requiring authorities (ie. clause 110), but apparently are not best placed to make decisions on notified resource consents.

9.2. It is the Council's view that a decision on this issue should not be based on the perceived competency or otherwise of elected officials to make decisions on resource consents. Rather, the council supports the approach because it will provide choice for applicants and submitters, will assist with scheduling hearings and will increase flexibility in managing the hearings process. The Council notes that the legislation provides for the independent commissioner (if requested) to either sit alone, or to sit on a

hearing committee alongside elected councillors and that the decision on which approach is used lies with the Council.

9.3. We endorse the requirement whereby the person requesting the independent commissioner should pay any additional costs associated with that request (cl24). Those having to pay the additional costs will need to be made aware that the costs could be significant.

9.4. **Recommendation:** Proceed with clause 73 (and consequentially clause 24) on the basis that it will assist in scheduling hearings on time, and it is not a reflection of the competency of elected officials to sit on hearings committees. The Council supports the proposal that those requesting independent commissioners should pay the additional costs associated with that request.

10. Bill limits appeals on plans (district plan changes) to questions of law and prevents 'whole of plan change' appeals (cl 148, specifically amendments to cl 14 of the First Schedule)

10.1. The Council considers this change is a significant amendment to the current approach and finds the issues, outlined below, to be very finely balanced.

10.2. On the one hand, the amendment will have significant benefits for the plan making process by reducing the burden of defending wide ranging appeals. This Council has notified 69 plan changes, 11 variations and 3 designations since the plan became operative in July 2000. The Council is presently working through 57 separate appeals before the Environment Court. A significant portion of officer time and legal costs (roughly $400k annually) is invested in managing the appeals process. Enabling plan appeals to be only on points of law should reduce the delays in having plans take full effect and ultimately improve environmental outcomes sooner.

10.3. The amended approach also importantly reinforces a key principle of the RMA that local councils are the primary policy makers for matters affecting their local environment and community, not the Environment Court.

10.4. However, the Council is very concerned at the implications this change would have on the council hearing process. We anticipate that the 'user-friendly, less formal' approach to council hearings (necessary to ensure lay people feel comfortable in an otherwise imposing environment) will change as submitters feel compelled to use lawyers and expert witnesses to present the most robust case possible. The Council is concerned this will lead to a very legalistic, adversarial process and will consequently intimidate those unable to afford experts to assist them. The Council is concerned that this change may result in more legalistic debates about process occurring at the hearing, diverting attention away from the core environmental issues.

10.5. We anticipate that submitters will want to question other submitters, ie. cross examination in order to fully test the evidence put forward by particular submitters. Currently, only the chair of a Hearing Committee can ask questions of the submitters. However, with more onus on a robust hearing and testing of the evidence presented, we expect submitters may wish to formalise this by being able to directly cross-examine other submitters.

10.6. Councils will very likely need to amend their own committee structures to reflect the increased need for robust decisions. This Council currently delegates to a Hearings Committee (usually three councillors) the duty to conduct the hearing and make a recommended decision to the full council. It is then expected that the full council will adopt the recommendation of the hearings committee without further debate because natural justice requires that only those who've read/heard the evidence should be the ones to make the decision. The Council will need to consider whether this approach is appropriate under the proposed provisions.

10.7. This is a particularly vexed issue; with the advantages to the Council very clear in respect of the plan making process, but the adverse implications being spread across the council and submitters involved in the Council hearing process. On balance, the Council considers the proposed amendments are appropriate but only if significant further direction is given to Councils on:

- whether Councils are expected to adopt more formal procedures for Council hearings (including whether cross-examination of submitters is anticipated), and
- how to ensure that individuals or community groups with little or no funding will receive a fair and equitable hearing, and
- whether councils should amend their committee structures to manage the robust hearings responsibilities.

10.8. **Recommendation:** Proceed with clause 148, specifically the amendments to clause 14(2) of the First Schedule. Recommend that the Ministry be required to update their guidance material to councils on managing the hearings process to address concerns about increased use of experts, whether cross-examination can occur, how to ensure lay people can still fully participate in the process and whether changes are needed to council structures for conducting hearings.

11. Provisions relating to trade competition

11.1. The Council generally supports any attempts to reduce efforts by any person or persons to abuse planning processes to stymie the activities of their trade competitors. However there are a number of concerns with the provisions as drafted and these need further revision if they are to achieve the objectives sought.

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11.2. **The 'effects of trade competition' (several clauses, specifically cl51)**

11.2.1. Clause 51 proposes to amend s74(3) by adding the "or the effects of trade competition". In doing so, it responds to a recent High Court case (General Distributors Limited v Waipa District Council) in which a trade competitor sought to argue that any effects arising from trade competition, whether directly or indirectly could legitimately be considered. This argument was rejected by the Court, which quite rightly found that (Wylie J):

> "It follows that s74(3) does not preclude a territorial authorial preparing or changing its district plan, from considering those wider and significant social and economic effects which are beyond the effects ordinarily associated with trade competition. Indeed it is obliged to do so in terms of s74(1)."

This decision is supported by a considerable number of other cases, including by the Supreme Court (Discount Brands), where Blanchard J. found that:

> "....significant economic and amenity values did have to be taken into account. Such effects on amenity values would be those which had a greater impact on people and their communities than would be caused simply by trade competition."

11.2.2. Given this, it is unclear why the Minister for the Environment found it necessary to propose a change to this clause. Further, the clause proposed may have several unintended consequences. By prohibiting consideration of both trade competition and its effects, without further clarification of which particular effects this includes, it is considered likely that the Courts may re-interpret the established case law on this issue. A reasonable interpretation of the proposed clause is that consideration of all effects arising either directly or indirectly from trade competition could not be considered by a decision maker under the Act contrary to the established case law outlined above. This would have serious and significant implications for resource management practice across the country.

11.2.3. Wellington City Council, similar to many other territorial authorities, have established objectives and policies within the District Plan seeking to locate particular retail and other commercial activities in town centres. This policy approach is based on well established resource management reasons, including:

- to ensure sustainable use of transport, by reducing vehicles trips and vehicle kilometres, by locating commercial activities in established
- reducing vehicle emissions
- enhancing accessibility to essential services and facilities for all members of society, including those who are socially disadvantaged or without access to a private vehicle

- maintaining centres of sufficient intensity to support increased residential development in and around them (a central tenet of the growth management strategy)
- maximising the effectiveness of existing public infrastructure already provided in established centres
- retaining the viability and vitality of established centres to enable them to fulfil important social and economic functions

11.2.4.	**Recommendation:** Do not proceed with clause 51 (and all other related clauses). If clause 51 does proceed, amend the provision to specify the particular effects to which regard is not to be had, ie. those effects directly related to trade competition. The redrafted clause could read as follows: *"In preparing or changing any district plan, a territorial authority must not have regard to trade competition or the direct effects of trade competition."* It is also recommended that Parliament make it clear that this does not include the indirect economic, social and environmental effects, which are beyond those ordinarily associated with trade competition.

11.3. **Managing submissions made by a trade competitor** (cl 72, 139, 148)

11.3.1. Whilst we accept the need for provisions that prevent trade competitors from abusing planning processes, we anticipate difficulties enforcing the provisions which limit the scope of submissions able to be made by a trade competitor. We recommend that the Ministry provide explicit guidance in this respect as soon as possible. Guidance should include how to manage the decision by local authorities to reject submissions considered to be related to direct effects of trade competition, and how to manage the process if that decision is challenged. The guidance should also include examples or scenarios of issues likely to be raised by trade competitors in submissions.

11.3.2. We are concerned that decisions to reject submissions by trade competitors will lead to an increase in judicial reviews.

11.3.3.	**Recommendation:** Proceed with clauses 72, 139 and 148 in relation to trade competition but ensure that the Ministry provides detailed guidance on how to manage submissions by trade competitors.

12. Costs relating to local authority involvement in Ministerial call-in or agreed direct referrals to the Environment Court

12.1. The Council generally supports the intent of the revised call-in provisions (cl 35, 93, 95, 99-104) and the new direct referral provisions (cl 60). Our main concern with these provisions is that it is unclear from the legislation

whether councils are able to recover their costs of being involved in both processes.

12.2. It appears that these costs are to be borne by the relevant local authority and its ratepayers. This is unreasonable when the legislation directs that the local authority must be involved in, or administer certain parts of, the process.

12.3. If these provisions proceed without responding to this concern, Councils may be reluctant to agree to direct Environment Court referrals because at least if they make the initial decision themselves they are able to recover their costs from the applicant. If a decision is appealed to Court, the Council's initial defence has already been prepared and paid for as part of the council consent hearing. Unless a cost benefit analysis supports the direct referral process, local authorities may be reluctant to agree.

12.4. **Recommendation:** proceed with cl 35, 93, 95, 99-104 and 60, but provide for new provisions that specify that local authority is able to recover the costs of its involvement in the process from the applicant.

13. Further Matters to be included in this Bill and/or Phase 2 of the Minister's proposed amendments.

13.1. There are a number of other matters which the Council wishes the Select Committee to consider during its review of the Bill.

13.2. **References required in RMA to s15 of the Prostitution Reform Act**

13.2.1. The High Court recently made a decision on a judicial review of the process followed by the Wellington City Council in approving a resource consent to the increased activities of a brothel and in deciding that the consent was to be processed without public notification (Mount Victoria Residents Association Incorporated v The Wellington City Council And Anor HC Wn Civ-2008-485-1820 [5 March 2009]).

13.2.2. The Council accepts the decision of the Court that the Council should have considered s15 of the Prostitution Reform Act during its notification and substantive decisions. However, the Council is concerned that other local authorities may make a similar error of law when considering brothel applications. The RMA has always been regarded as a complete code (ie. reference is not required to other legalisation to complete decision-making required under the Act). Plainly this is no longer the case and it is recommended that relevant cross references are made to s15 of the Prostitution Reform Act within appropriate sections 93-94AAE (the notification provisions) and section 104 (consideration of applications).

13.2.3. **Recommendation:** Insert cross references to s15 of the Prostitution Reform Act into the relevant notification provisions (s93-94AAE) and section 104 of the RMA.

13.3. **Appropriate policy direction on the quality of urban development**

13.3.1. The RMA gives insufficient emphasis to achieving quality urban development outcomes. That this country's principal land use planning legislation is largely silent on urban growth, urban management and urban quality is a significant omission and differs from almost all other OECD countries. In particular there is no reference to good urban design within the Act. There is a clear need for greater direction within the Act on national principles for urban management; supported by a suite of national policy statements.

13.3.2. **Recommendation:** Amend the Act to include reference to good urban design. Require the Ministry to develop a range of national policy statements on matters such as: urban design; housing choice and affordable housing; transit-orientated development; landscape and heritage.

13.4. **Use of non-statutory policy and other levers**

13.4.1. The last five years has seen a considerable growth in the development of non-statutory urban policy by local authorities. This includes the development of regional urban growth strategies, strategic plans at a citywide level, and place-based plans for specific areas where growth is planned. These instruments are being used to manage elements of growth outside of the statutory RMA processes. There are also a range of other levers being utilised, such as land purchase and development, joint ventures and incentives.

13.4.2. These non-statutory mechanisms and levers have been effective at managing certain elements of urban growth and development and they should be recognised as complementary approaches to the statutory approaches. However the value and effectiveness of these mechanisms can be enhanced further by bringing some of them into a statutory framework and thereby ensuring that the appropriate linkages are made between different policy documents and by providing additional implementation means.

13.4.3. **Recommendation:** That explicit reference is made in the Act to the relevance of Council approved policies in making decisions on resource consents.

13.5. **Compliance costs of the RMA, s328 Excessive noise directions**

13.5.1. The Council thoroughly supports all provisions in the Bill that increase the fines for offences under the Act.

13.5.2. The Council is aware of one other area where it believes that costs incurred by the council should be able to be recovered from the person committing the offence. In relation to the council's duty to manage excessive noise, the Council notes that there is no mechanism in the RMA to recover the costs incurred by the Council in rendering alarms inoperable. These costs are around $15,000 a year to the Council. Recovery of costs is only available under section 336(20(b) where property has been seized etc. Seizing an alarm is generally considered impractical for Councils.

13.5.3. We recommend that a new subsection is added to section 328 which enables councils to recover the costs associated with attending alarm call-outs. This could be worded as:

> " ss (8) Where the Local Authority has entered a place to render an alarm inoperable that is producing or contributing to excessive noise, the owner of the property shall be liable for all reasonable costs incurred by the Local Authority".

Reasonable costs would include contracting a locksmith and possibly council officer time.

13.5.4. **Recommendation:** Amend section 328 by adding a new subsection to enable local authorities to recover the costs of attending alarm call-outs.

13.6. **Streamlining work under the Enforcement Notice provisions (s327(3) RMA)**

13.6.1. The Council recommends that the period that excessive noise directions can remain in place for be increased from 72 hours to a minimum of 7 days, though preferably longer. It is not uncommon for a noise issue to reoccur soon after the 72 hour period is completed. In the worst cases this results in a constant repetitive cycle of issuing excessive noise directions. Enabling a longer period that the excessive noise direction is in force for will save Council costs and improve the noise environment for those affected.

13.6.2. **Recommendation:** Review the appropriateness of the 72 hour period in section 327 (3) of the RMA.

13.7. **Section 32 reports**

13.7.1. The requirement to produce section 32 reports (justifying the need for a plan change) adds significant time and costs to the plan preparation process. There is no question that the appropriate consideration of alternatives and justification of policies must be done in order to assess whether a plan change is required. However, to require the production of a specific report summarising all the work carried out that

contributed to plan change is unnecessary as, in our experience, these reports repeat other reports required to be prepared as part of the plan change. Council papers, for example, that seek approval to notify a plan change are the main document officers must prepare and these set out the issues, justify why a plan change is necessary and the options considered as part of the process. Currently, section 32 reports are appended to the council papers.

13.7.2. **Recommendation:** Delete s35(5) and (6) of the RMA, which is the requirement to prepare a summary of the evaluation carried out and the reasons for that evaluation.

13.8. **Section 35 monitoring reports**

13.8.1. The monitoring requirements for territorial authorities are onerous. Monitoring needs to be more specific to policies and less focussed on state of the environment issues, which are more relevant for regional councils. Councils struggle to find the resources to achieve the requirements and it can divert scarce resourcing from other more important areas for little practical benefit. In practice, monitoring is carried out on a needs basis, ie. as part of the section 32 requirement to consider alternatives and justify policies.

13.8.2. **Recommendation:** Review the monitoring requirements for territorial authorities, specifically to repeal section 35(2)(a) and section 35(2A).

14. Representation at the Local Government and Environment Select Committee

The Council would like to take up the opportunity to present to the select committee.

On behalf of Wellington City Council:

Kerry Prendergast
Mayor