

Paper for the Electricity Engineers Annual 2008 Conference: A Climate for Change

Property and Town Planning Trends Affecting the Development of
Electricity Infrastructure

Laurence P. Sherriff
The Environmental Challenge Limited

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ABSTRACT

Electricity projects involving new and existing assets are running into a variety of problems. Many of these problems stem from recent changes to the planning and property regimes. Examples include new or altered planning methods; district and regional plans; national policy statements; national environmental standards; codes on access; Electricity Act case law; and approaches to land valuation.

Electricity businesses must understand and react to these changes.

This paper outlines a sample of changes, albeit important ones for electricity businesses. It also suggests how these changes might be addressed in order to minimise potential problems.

The paper is written for managers, asset investment advisors, network planners, project managers and property and planning experts working in the electricity industry.

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INTRODUCTION

The construction of new electricity infrastructure and the maintenance, replacement and upgrade of existing electricity infrastructure has 'gone through the roof'. At the same time regulation is growing and the public's view of electricity infrastructure is changing; in many situations for the worse. However, I suspect some electricity businesses have been slow to address these changes and in some cases have unknowingly made matters worse for themselves.

I have attempted to identify some of the more important and recent changes and to briefly outline how I think electricity businesses should be tackling these challenges.

PLANNING AND THE RESOURCE MANAGEMENT ACT

District and Regional Plans

Ever since 1991, Government organisations and district and regional councils have been busy writing, consulting on and issuing policy statements and plans. These documents have defined how electricity businesses conduct their business.

Some of these documents are now reaching their expiry dates and are due to be re-written and to pass through public consultation. In the planning world these are referred to as 'second generation' policy statements and plans.

Interest groups and the public are far more savvy and motivated when it comes to participating in the RMA processes. And I am sure a certain percentage of these people will try to limit the activities of electricity businesses by making submissions on the 'second generation' documents.

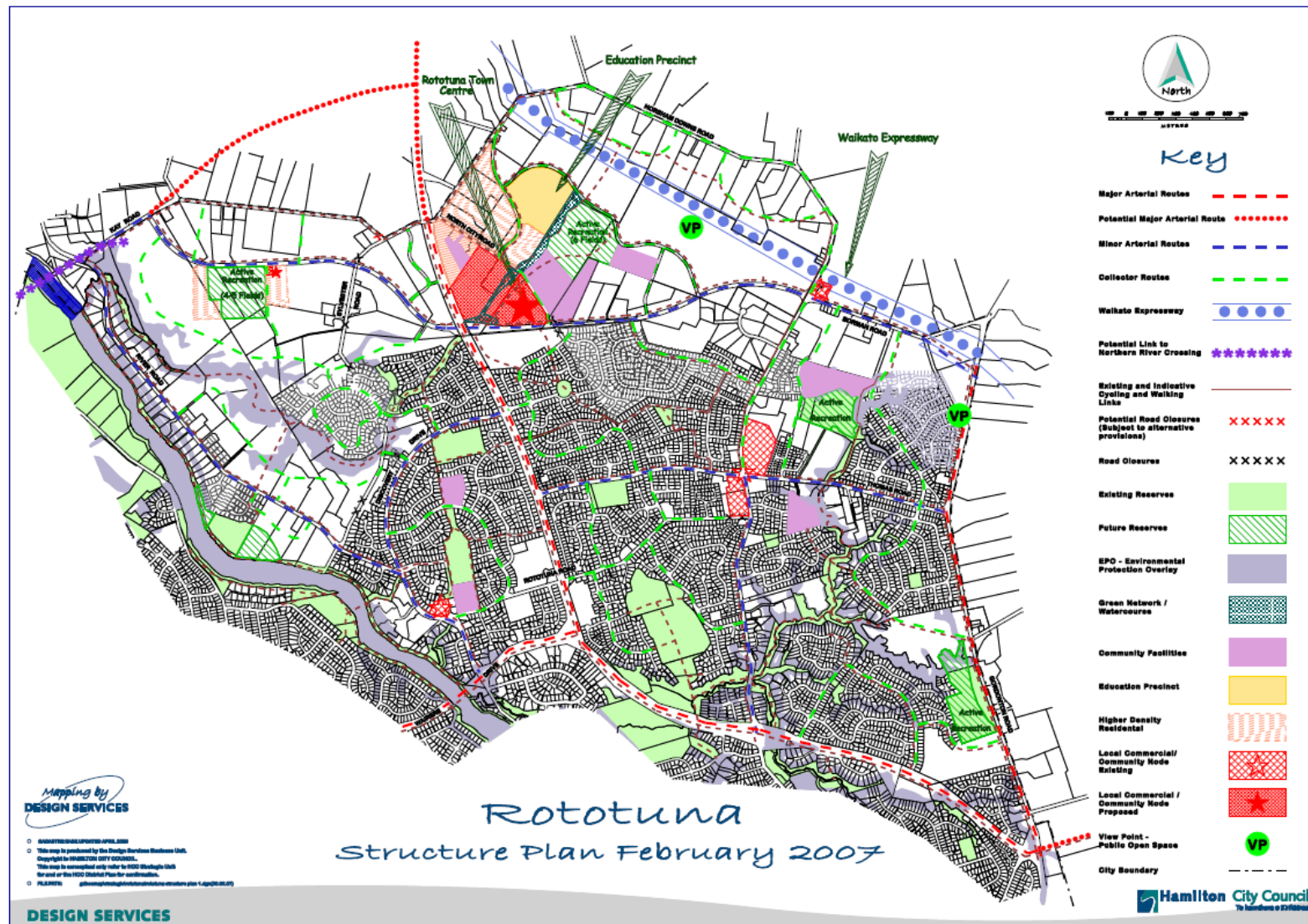
So, it is important for electricity businesses to monitor the status of the policy statements and plans and to actively participate in the development of second generation documents through submissions and if necessary appeals. Remember you only get one chance to participate in these processes every 10 to 15 years and if you miss this opportunity, the implications could be increased regulation resulting in delays and costs. Therefore, I recommend that you visit your council and familiarise yourself with their programme.

Growth Strategies and Plans

Regional and district councils, and land transportation authorities are starting to get more organised when it comes to planning for growth at both a regional and district-wide level. You may have heard of Long Term Council Community Plans (LTCCP), land transport plans, regional growth strategies, or structure plans. These documents influence the location of urban growth. And urban growth, as you well know, creates new demands on all parts of the national electricity system.

While some authorities may be getting their act together with growth strategies and plans, many don't seem to be aware that most developments require electricity. Put another way, the authorities are remembering to invite the providers of housing, roads, water and waste water services to their planning parties, but are forgetting to put any electricity people on their guest list.

To illustrate this problem, I have included a structure plan extracted from the Hamilton City District Plan, which depicts a large scale development. Structure plans, which map out future district plan zones, infrastructure and other public services, are now a common planning method.



In this case, the local authority drafted a map that included infrastructure services, but did not set aside an area for a substation. This made it very problematic for the local lines company to find a site and significant difficulties were met during the RMA consenting process. If provision had been made for a substation during the development of the structure plan, then none of these problems would have been encountered.

Electricity businesses must therefore take a proactive role by informing local authorities of their own plans. They should also investigate, and if necessary engage in all non-statutory and statutory planning processes initiated by local authorities.

Regulatory Creep

Without doubt regulation has grown exponentially. The biggest growth area has been the RMA and now we are seeing the Building Act beginning to grow.

At the same time there has been a gradual erosion of the existing rights protection afforded by the RMA. This regulatory mechanism allows for the maintenance, replacement and minor upgrading of assets that existed before the enactment of RMA, subject to certain tests.

However, councils are now becoming overly cautious when granting existing use certificates. Furthermore, the Courts have issued decisions that could threaten the protection afforded to existing noise levels emitted from substations.

Fortunately there are avenues available to reduce compliance obligations, although they still require up-front work and expense. One of these avenues is for network utilities to become requiring authorities under the RMA. A requiring authority can designate sites and routes, and can also access the compulsory acquisition powers under the Public Works Act. There are even ways that generators can draw on these powers for line work: either by splitting their business into parts and making one part a requiring authority, or by working with distribution lines companies or Transpower.

Electricity organisations should consider designating existing assets that are likely to be the subject of ongoing maintenance, repair or upgrade and increasing compliance requirements. The equation is simple; compare the cost of a notice of requirement for a designation against the NPV of future resource consent applications, taking into account other benefits such as the added planning protection from other developments. Potential candidates for designations could include existing substations, switchyards, telecommunication, or even existing line routes. When it comes to large 'green field' projects, designations are superior in many ways to resource consent applications.

Other useful options are available. District-wide and region-wide resource consent applications can be made for ongoing or repetitive activities as opposed to making individual applications every time the need arises. Certificate of compliance applications can be used to 'shield' permitted activities for five years from any new resource consent requirements arising from 'second generation' plans. And in situations where a project is a proposal of national significance, you can consider

utilising Ministerial call in powers to obtain a decision on your resource consent application or notice of requirement.

National Policy Statements and National Environmental Standards

In the coming decade we are likely to see the emergence of several National Policy Statements and National Environmental Standards.

After a long wait, we now have the *National Policy Statement on Electricity Transmission*. This statement sets out objectives and policies for managing the effects of the electricity transmission network under the RMA and must be applied by consent authorities. The objectives and policies will guide decision-makers in drafting plan rules, making decisions on the notification of the resource consents, in the determination of resource consent applications and in considering notices of requirement for designations for transmission activities. Generally, the scope of this statement includes the protection, operation, maintenance, upgrade and development of the National Grid.

Following closely on the coat tails of the NPS are the *Proposed National Environmental Standards for Electricity Transmission*. These standards apply to the National Grid, but exclude substations. The first proposed standard covers the operation, maintenance and upgrade of transmission lines, but does not cover the construction of new lines. The second proposed standard provides controls on activities adjacent to transmission lines, such as construction and excavation.

While the scope of these documents only extends to the National Grid, I am hoping these changes will impart benefits to other high voltage lines and distribution lines. I predict that these documents will encourage consent authorities nationwide to take a consistent approach on the regulation of *all* electricity assets. Take for instance Policy 9 in the NPS which deals with electromagnetic fields (“EMF”). This policy sends a clear signal to councils that the ICNIRP¹ guideline is now the appropriate standard for regulating EMF.

Be aware that these measures may not reduce the number of resource consents required. But they should *standardise* the consenting process for the various types of electricity work and assets. As a result, electricity businesses should be able to formulate consenting strategies for their assets with far more efficiency.

While the transmission NPS and NES will result in benefits for the electricity industry, be aware that some of the other NPS and NES may present serious issues for electricity businesses.

Proposed New Zealand Coastal Policy Statement 2008

On example of a potentially problematic NPS is the Proposed New Zealand Coastal Policy Statement. A Board of Inquiry was recently appointed to seek public feedback on a draft NZ Coastal Policy Statement which will eventually guide councils on how to manage development along our coastline. The statement guides the management of

¹ Commission on Non-Ionizing Radiation Protection

NZ's coastal environment under the RMA and council planning and resource consent decisions must conform to the policies it contains.

For organisations that are planning to upgrade existing assets or make new investments in coastal areas, this is a document you should check to ensure that no new barriers are erected. You will need to make sure that none of your existing or potential activities are classified as “restricted coastal activities”, as these must pass through a highly onerous statutory procedure.

RMA Amendments and Case Law

Over the last few years several key pieces of RMA case law have emerged which could have significant effects on the electricity industry. I will highlight two areas which may require your attention.

The Future Environment

The courts have now made it clear that the state of the *future* environment falls under the definition of environment. Simply speaking, the future environment is defined as activities that could occur “as of right” because they are permitted by the plan, or because they are allowed by a previously obtained resource consent.

This means that when electricity businesses are identifying green-field sites or routes, they should consider the nature of the existing *and* future environment before they attempt to acquire and consent a site. For example, one should check whether residential development will form part of the nearby future environment. This discipline should also be applied to the upgrading of existing sites.

First in First Served

There is now much more competition for natural resources that relate to electricity including land, water and air space. There have now been a number of situations in New Zealand where more than one organisation has competed for the same natural resource via the consenting process. This tends to happen with resources that are publicly owned and where by default the resource consent becomes the property right. Take for instance the competition for the coastal marine areas for mussel farms, or water rights for generation or irrigation.

This year the Court of Appeal released a majority decision overturning previous decisions by the Environment and High Courts. The dispute had arisen between two organisations that were competing for the same water resource via the consenting process. The Environment and High Courts had determined that priority should be given to the application that was ready for notification first. However, the Court of Appeal ruled that the first valid application lodged was entitled to the water.

So if you are serious about a site or route and there is a risk of competition, make sure your application is lodged as quickly as possible, but be sure that it is comprehensive and complete. Also make sure that you respond to any council information requests without delay.

PROPERTY AND ACCESS RIGHTS

Last year I gave a paper on acquiring and consenting routes and sites for electricity infrastructure and outlined the critical success factors. I briefly touched on some of the property issues affecting electricity businesses. If you are interested in this subject I suggest you read this paper, which is available on our website².

Electricity Act Case Law

Since then I have observed some important changes in the property arena. Perhaps the most important event has been the Fernwood Dairies court case, involving a farmer and Transpower. In short, this case centred on section 23 of the Electricity Act, which amongst other things deals with rights of entry to *maintain* existing works. The important points to note are: first, there has been little, if any guidance on how to interpret this all important section of the Act; and second, landowners are becoming increasingly resistant to electricity companies entering onto land to maintain their assets.

Transpower proposed to improve its 220 kV line by replacing each of the three single conductors with duplex conductors and by strengthening some of its towers on the Fernwood land. Section 23 authorises the replacement and upgrade, as a function of line maintenance, as long as there is no *injurious affect* on the land. Put simply, injurious affection refers to any measurable losses on land value. Fernwood was of the view that the work would result in an injurious affect on his land.

Importantly, the Court defined the matters that require consideration when determining if the work would cause injurious affection. These were:

- Encroachment – where the work would exclusively occupy more space on the underlying land than the existing works did before;
- Effects on amenities that affect the underlying land, for example, visual effects that affect land value;
- The stigma effect, being reasonable or unreasonable fears about power lines that affect the value of the land.

The court did raise another matter, namely the effects of carrying out maintenance, such as disturbance to pasture. However, for reasons I will not go into the Court determined that this was not a relevant matter.

The outcome of this case has been that we now have some idea of what actions might cause injurious affection when maintaining or upgrading an existing line. In saying this, I have no intention of describing what these actions might be because it is not possible to make an interpretation without having specific knowledge of a project. However, I can provide this advice. One, read the case – it is actually quite an interesting read and it also answers a few other critical questions on the Electricity Act; two, obtain a legal opinion from a lawyer with Electricity Act expertise; and three, develop a company policy on access and maintenance which is based on the Fernwood Dairies case.

I can't stress enough, the importance of this case. The reason for this is that if you conduct maintenance on an existing line which results in an injurious affect on the land, you risk losing your statutory interest. If this happens, your only options are to:

² www.tec.net.nz

negotiate a new easement or lease; attempt to compulsorily acquire the land; or to remove your asset before you get a trespass notice!

Draft National Code of Practice for Utilities Access to the Road and Rail Corridors

This draft code seeks to provide a framework for managing corridors while providing access rights to utility operators. In other words, it should standardise and make more certain the opportunity to utilise road and rail corridors for electricity cables and lines.

While I realise that there is much more detail to get through on this code, it is a welcome development, particularly for those of us who are establishing new routes and attempting to gain access to state highways and motorways.

Valuation Methods

Another property issue plaguing the electricity industry is land valuation. Of particular interest is the debate over the value of electricity easements for line routes. There is a clear disagreement amongst valuers on the appropriate method for valuing these rights.

The first group are arguing that the consideration, which is comprised of an easement fee and injurious affection, should be based on the value of the land. This approach stems from the Public Works Act, or what is known as the ‘before and after’ method. The theory behind this argument is that the landowner should be left in a no better or worse position afterwards, than they were before the works commenced.

The second group are arguing that the consideration should be based on the value of other easements, that is the market for easements and not the value of the land. This presumably takes into account the value that electricity companies are willing to place on an easement, or what it is worth to their operation. This approach is reinforced by the belief that SOEs, lines companies and even the Government are now less inclined towards public good, and more inclined towards profit.

There is also the added argument around the notion of ‘betterment’. In layman’s terms this means that if an existing line is removed at the same time a new easement is acquired, then an amount is deducted from the total which is equal to value of the betterment.

There are economic arguments supporting both sides of the debate. However, I am not here today to pass my judgement on these arguments. Instead I have limited my observations to the effects of the debate itself.

My belief is that while this split continues to fester, landowner solidarity on the issue will continue to grow. In turn, it will become more difficult for electricity companies to approach landowners to acquire easements, leases or land. Furthermore, the split will cultivate distrust of valuation methods and the resulting uncertainty will allow landowners to promote other methods such as rentals. The reality is that rentals will disadvantage both landowners and electricity companies.

The solution to this problem is that the electricity industry must adopt a standard process and method for the valuation of electricity easements. Without it, uncertainty will continue to reign.

Compulsory Acquisition under the Public Works Act

Last but not least, there is the matter of compulsory acquisition under the Public Works Act. Little use has been made of these powers in the electricity industry, but we are likely to witness changes in the future particularly with lines projects.

These powers exist for very good reasons. Often it is highly beneficial if a negotiator is able to politely suggest to a ‘difficult’ landowner in the later stages of a project that a lines business might be forced to compulsorily acquire their land if it is backed into a corner. Sometimes this is all it takes to push through vital negotiations that would otherwise stall.

Without these powers, an electricity business can be rendered impotent when negotiating with landowners for new line routes. And there will always be a small percentage of landowners who will try to take advantage of a situation when their cooperation is desperately needed. Nonetheless, any decision to compulsorily acquire must be strategic and supported by carefully staged negotiation tactics and a consideration of the alternatives.

END