



**LAPA**

Local Authority  
Property Association

Who's  
putting local  
issues on  
the national  
agenda?

**We are.  
LGNZ.**

Te Kāhui Kaunihera o Aotearoa.

8 April 2019

Marie Long  
Director: Planning, Permissions, and Land  
Department of Conservation  
PO Box 10420  
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Dear Marie

### **Proposal to revoke certain delegations – Reserves Act 1977**

Thank you for alerting the Local Authority Property Association (LAPA) to the correspondence sent to all Chief Executives of Territorial Authorities dated 14 March 2019.

This response is jointly made by LAPA and Local Government New Zealand. (LGNZ)

The response below is intended to represent the broad range of views of LAPA members, and has been made available to all members and to all local authorities.

LGNZ and LAPA would open by commenting that the case in question (*Opua Coastal Preservation Society v Far North District Council*) is far from typical and should not invoke a wide-reaching response based on one complex set of circumstances.

### **Background to delegations**

There have been extensive delegations to local authorities from as early as 1997. A joint working party between Local Government New Zealand and the Department of Conservation (DOC) was set up in 1997. The outcome of that review was that three primary needs were identified:

- Devolution of a high level of decision making to local authorities;
- Greater flexibility in approaches to management; and
- Standardisation and updating of processes and terminology.

The first of those points resulted in the first set of delegations to local authorities in 1999.

The *Reserves Act Guide* was published around the same time, and provided guidance to local authorities on best practice management of reserves.

In 2013 the existing delegations were implemented. They expanded the former delegations (last updated in 2004) resulting in more comprehensive delegations and the ability for local authorities to make decisions at a local level.

As an appendix to the 2013 delegations, DOC issued a Guide *Exercising the Delegation of Consent to Local Authorities – The Minister's Role* that recognised the different roles of Council when

considering the merits of a proposal as administering body, contrasted with the Minister's decision, which was described as being a "supervisory role in ensuring that the decision was arrived at in compliance with the requirements of the Reserves Act".

Local authorities have adopted the delegation's regime and have implemented systems (which have now been in place for nearly 20 years) to ensure that the delegations are appropriately exercised in accordance with the law.

### **Analysis of cases**

There have been instances in the past where the exercise of delegations by local authorities have been specifically considered by the Courts, and their legality was not questioned.

In *Gibbs v New Plymouth District Council* CIV 2004-443-115 the High Court specifically considered the exercise of a delegated authority by New Plymouth District Council to grant a lease of recreation reserve under section 73(3) of the Reserves Act. The Court stated at paragraphs [21] and [22]:

*Viewed in isolation, s73(1) can be seen as separating out functions of national and local interest respectively. The Minister is responsible for matters of national public interest while the administering authority deals with administrative or local concerns. That interpretation is consistent with s73(3) which distinguishes between the decision whether to make recreation reserve land available for leasing (a Ministerial decision) and the formal execution of any leases granted (by the administering body).*

*While that separation of powers is readily understandable, the differing functions have been merged as a result of the exercise of broad powers of delegation under s10 of the Act. The Minister's decision making powers under s73(3) have been delegated to the Council. The Council now wears both hats in the s73(3) decision making process.*

At paragraph [66] the Court commented on the apparent conflict faced by the Council when exercising dual roles and stated:

*While it may have been open to the Council to decline to exercise delegated powers to make a decision on the grant or otherwise of a lease to bach holders (the Minister being better placed to make a decision having regard to the public interest generally, for example issues of public access to foreshore), it is clear that the Council's dual role in considering local and national issues was appreciated by the Minister when the power to make that decision was delegated. In those circumstances, contrary to Mr Laurenson's submission, I am satisfied that the principles enunciated in *Jefferies and NZI Financial Corporation Ltd* lead to the conclusion that the conflict did not vitiate the Council's ability to deal with the issue.*

This decision (which directly addressed the Council's dual role) supports a conclusion that the Ministerial delegations are in fact lawful.

The most recent decision by the Court of Appeal in *Opua Coastal Preservation Incorporated v Far North District Council* [2018] NZCA 262 which has prompted the DOC proposal to revoke the delegations included *obiter* comments by the Court that referred to the local authority delegations as "highly unusual". However, the legality of the delegations was not argued before the Court as it had been in *Gibbs*, and in making that comment the Court had no evidence as to the method of undertaking the two separate decisions that the Council had undertaken.

Leave to appeal has been granted by the Supreme Court on the wide ground of "whether the Court of Appeal was correct to allow the appeal". Given the potential breadth of the ground that *might* be

argued before the Supreme Court (which may or may not address the delegation issue), it is premature to revoke the delegations until a decision is reached by the Supreme Court.

### **Council approach to decision making**

It is the nature of local authority decision making that Councils are routinely required to manage different decision making roles with respect to a single proposal.

This has statutory recognition in section 39(c) of the Local Government Act 2002 (LGA) which states:

*A local authority should ensure that, so far as is practicable, responsibility and processes for decision-making in relation to regulatory responsibilities is separated from responsibility and processes for decision-making for non-regulatory responsibilities;*

Therefore, it is inherent in the requirement to separate these different roles that local authorities, as a matter of course, have processes in place to ensure that they manage these dual functions in a transparent and lawful manner.

The situation is by no means unique. For example, any development or work carried out by a local authority on its own land requires that Council to make decisions as both landowner and as a regulatory authority under the Resource Management Act. As a matter of course, relevant decisions are made by separate managers, committees or commissioners who act independently.

The power for the Minister's delegations to local authorities is found in section 10 of the Reserves Act. Section 10(3), recognises that the delegations can be subject to "any general or special directions" by the Minister. As noted above, the current delegations include specific directions by the Minister as to the exercise of the role of the Minister under delegation and the primary considerations to be taken into account.

To the extent that a local authority might be concerned that any particular decision should properly be made by the Minister and not under delegation, it is able to defer to the Minister and elect not to exercise the delegation. For any number of reasons, some local authorities may prefer to refer decisions to DOC and it may be appropriate to incorporate some guidance on that point in an updated version of the *Reserves Act Guide*.

For completeness, if the Supreme Court did determine that the delegations are unlawful, or if the Minister decides to revoke them in any event, we address specific concerns regarding the consequences of the revocation below.

### **Alternatives to revocation of delegations as proposed.**

Much reserve land is non-Crown derived and constitutes land vested in Councils as reserve on subdivision, or fee simple land that Councils have declared to be reserve without Crown compulsion. As was recognised by the Working Group in 1997, to recognise the desirability of the devolution of decision making to local authorities, wherever possible, decisions should continue to be made at a local level. Therefore, in our view, if DOC considers it must revoke the delegations in their current form (and the Supreme Court has not determined that they are unlawful in totality), there should be some exceptions.

In particular, while we have made specific comments in the table, as a general comment, for all of these proposals:

- (a) The delegations should be retained for non-Crown derived reserves; and

- (b) The delegations should be retained where there has been a public notification process followed under the Reserves Act.

As noted above, the existing delegation regime can be made more robust by redrafting the existing supporting Ministerial directions to reflect that Councils may request that the decision be made by the Minister or the Departmental delegate.

### **Legislative reform**

LAPA has been advocating for legislative reform of the Reserves Act since at least 2017 and has written to and met with DOC to discuss primary concerns. The current issues reinforce the need for a comprehensive review.

Ideally, as part of a comprehensive review of the Reserves Act, it may be more appropriate for certain decisions that are currently subject to Ministerial overview to be carried out autonomously by territorial authorities as administering bodies. This would reflect the principles of local government reform undertaken in 2002.

In certain limited cases, such as where there is an element of national significance, it is recognised that the Minister should be the final decision maker.

### **Concerns if delegations are revoked as proposed**

If the proposed revocation of delegations proceeds, we have a number of concerns regarding how future decisions will be resourced and carried out.

- Currently many Councils absorb much of the cost of the decisions made with respect to proposed activities on reserve land. However, if the new regime will incur an external cost (whether by way of administration fee or otherwise) charged by DOC, we would expect it to be passed on to the applicant, resulting in many cases in additional cost to the end customer, or to the ratepayer.
- These changes will inevitably require additional resources within DOC but no explanation or assurances have been given that a sufficient resource will be provided to manage the very significant additional workload.
- As a result of restructuring and loss of local resources at DOC regional offices (including statutory land management) capacity and capability at a local DOC level has significantly reduced. Rather, the local expertise is now generally found within local authorities as this is where the work is currently being undertaken. This presents a very real risk that local decisions will be made at a remote location, without an understanding of the relevant local issues. In our view that cannot improve the quality of decision-making for our local communities.
- There would be related issues around the timeliness of decisions. Our members have commented that, prior to the updates to the delegations in 2013, there were concerns with respect to response and turnaround times within DOC. It is difficult to see that removing the delegations will not result in even greater delays to applicants than were previously experienced.
- The proposed revocation of delegation would have implications for current proposals that are underway at present, where parties have relied on the existing regime in setting their timeframes and processes. Some clarity is needed to determine when any proposed new regime might come into force, and the impact of that on processes currently underway.

- If the delegations are revoked, and DOC becomes needlessly involved in local reserve management decisions, this may potentially lead to Councils creating fewer reserves, and instead preferring to hold land under the LGA.

### Summary

The removal of the delegations would be a backward step for local communities. The more difficult it becomes for local authorities to make local decisions on reserve land, the less local authorities will want to declare land to be reserve. Some local authorities may consider it more expedient to simply hand Crown-derived reserves back to DOC, whether or not it is required for reserve purposes (in which case it would still have Reserves Act protection).

Our preference is that DOC focuses on improving guidance available to local authorities. We are aware a review of the *Reserves Act Guide 2004* has been pending for several years. Local government has offered to be part of the review of the *Guide* but to our knowledge, no meaningful progress has been made.

LGNZ and LAPA remain committed to working with DOC on this issue and more widely on the promulgation of new Guidelines and (in our view) long overdue reform of the Reserves Act.

Yours faithfully



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