Ministry for the Environment
Manatū Mō Te Taiao

Resource Legislation Amendments 2017

RESOURCE LEGISLATION AMENDMENTS 2017 – FACT SHEET 14

Changes to objections and Environment Court processes

This is part of a series of 16 fact sheets that give an overview of recent resource legislation amendments.

This fact sheet outlines the changes to objections and Environment Court processes under the Resource Management Act 1991 (RMA).

These changes come into effect at various times, as detailed in the fact sheet.

Objections to council decisions can be heard by an independent commissioner

Previously resource consent applicants who objected to council decisions under section 357A(1)(f) or (g) of the RMA were unable to require their objections to be heard and decided by an independent commissioner. This meant that objections would be heard by councillors by default.

The RMA has been amended to insert section 357AB, which enables resource consent applicants or consent holders to request their objection against a decision be heard by an independent commissioner, if that objection relates to a decision on an application or review described in section 357A(2)-(5).

If an applicant requests their objection be considered by an independent hearings commissioner, the council must use one or more independent commissioners, who:

- cannot be members of the consent authority
- must be accredited, unless there are exceptional circumstances.

Councils retain discretion to appoint independent commissioners to hear any other types of objections under the RMA.

Section 357CA enables commissioners to call for further evidence if that will help them make a decision on an objection. To do so, commissioners can:

- require the person or body who made the objection to provide further information
- require the consent authority to provide further information
- commission a report on any matter raised in the objection.

No statutory timeframes apply to these requests for further information. Section 18A of the RMA requires, however, that every person exercising powers and performing functions under the Act use timely, efficient, consistent, and cost-effective processes that are proportionate to the functions or powers being performed or exercised, and section 21 requires that decision-makers avoid unreasonable delay.

Councils are able to fix fees under section 36 for the costs of the independent commissioner, payable by the applicant.

The intent of this change is to address concerns of actual or perceived bias in decision-making on objections.

This change comes into effect on 18 October 2017.

Limited appeals to the Environment Court

Previously there was a wide scope to appeal decisions on notified resource consent applications to the Environment Court.

Section 120 of the RMA has been amended to remove the ability for parties to appeal decisions on the following types of activities to the Environment Court, except if those activities have non-complying activity status:

- boundary activities (as defined in section 87AAB)
- subdivision consents
- residential activities (as defined in section 95A(6)).

If multiple resource consents for the same activity are considered together in a 'bundle', and one or more of those consents is able to be appealed, the entire 'bundle' of consents can be appealed together.

Decisions can still be challenged to the High Court through judicial review in respect of errors of process.

Section 120 of the RMA has also been amended so that a submitter on an application for resource consent, or for a change of consent conditions, or on a review of consent conditions can only appeal to the Environment Court if their appeal is both:

- related to a matter raised in their submission and
- their submission or the part to which the appeal relates, has not been struck out under section 41D of the RMA.

The intent of these changes are to:

- increase certainty that the council's decision is final for particular types of consents (notwithstanding judicial review)
- encourage submitters and applicants to put their best case to the council, rather than withholding information to then be used at an Environment Court appeal
- encourage greater involvement in plan-making, rather than litigating policy decisions on a consent-by-consent basis
- promote more timely decisions on consents for housing developments.

This change comes into effect on 18 October 2017.

Requiring parties to attend conferences and alternative dispute resolution

Judicial conferences and alternative dispute resolution (ADR) can be useful to resolve or reduce the scope of matters being considered by the Environment Court.

Previously the Environment Court was unable to require parties to attend judicial conferences or ADR.

Section 267 of the RMA has been amended to:

- require an Environment Judge to consider whether to hold a judicial conference as soon as practicable after proceedings are lodged
- enable Environment Judges to require any parties to the appeal, anyone that intends to join under section 274 of the RMA, a council, or a Minister, to attend a conference.

Section 268 of the RMA has been amended to enable the Environment Court to ask one of its members, or another person, to conduct an ADR process at any time after the lodgement of proceedings.

The Court has discretion whether to require ADR. All parties must participate in the process unless the Court grants leave otherwise.

Any person required to attend a judicial conference or ADR may be represented by other people, but only if at least one of those people is authorised to make decisions on their behalf about any matters reasonably expected to arise in the conference or ADR.

The intent of these changes is to:

- establish and agree the scope of the appeal in advance of hearings, to reduce the likelihood of new issues being raised, or frivolous or vexatious appeals being made
- encourage parties to resolve issues and reduce the number of appeals progressing to the Environment Court.

These changes come into effect on 19 April 2017. These changes are explained below.

Changes to powers of Environment Court Judges and Environment Commissioners

Previously, restrictions on the range of orders that Environment Judges and Commissioners could make sitting alone meant that relatively uncomplicated issues often had to be heard by a full quorum of the Environment Court. This placed a large burden on Court resources.

The RMA has been amended to increase the range of orders that Environment Judges and Commissioners can make sitting alone.

Section 279 has been amended to allow the Principal Environment Judge to confer powers on an Environment Judge to sit alone to hear and decide resource consent appeals.

Section 280 has been amended to allow an Environment Judge to confer powers on an Environment Commissioner to sit alone to hear and decide on resource consents appeals after a conference is held.

The intent of these changes is to reduce pressure on the Environment Court, and help resolve matters in a more proportional way.

This change comes into effect on 19 April 2017.

Directing councils to acquire land

If a person considers that a plan provision, or a proposed provision, renders their land incapable of reasonable use, they can seek a direction from the Environment Court through an appeal, or by applying to change the plan under Schedule 1 of the RMA.

Previously, if the Environment Court agreed that the provision renders the land incapable of reasonable use, and places an unfair and unreasonable burden on the person who has interest in that land, the Court could only direct the council to change, delete or remove the provision.

This meant that councils could not retain such provisions, even if they considered there was a high level of public interest in doing so, for example to protect historic heritage or biodiversity.

Section 85 of the RMA has been amended to introduce an alternative remedy if the threshold is met. The Environment Court can now direct councils to acquire the land, part of the land or an interest in land from the affected landowner under the Public Works Act 1981, instead of changing the provision.

The intent of this change is to allow flexibility for when a council would prefer to keep the plan provisions in place, rather than change, delete or remove them.

This change comes into effect on 19 April 2017.

Criteria for alternative remedies

The alternative remedy can only be used if all of the following criteria are met:

- the landowner (or spouse, civil union partner or de facto partner of the landowner) must have acquired the land or interest in the land before the provision was first included in the plan
- the provision must have remained in substantially the same form from when it was first included in the plan, to when the Environment Court considered it
- the Environment Court must be satisfied that the provision meets both of the two 'reasonable use' tests:
    - renders the land incapable of reasonable use
    - places an unfair or unreasonable burden on the person.
- the council must decide that acquiring the land, or interest in the land, is appropriate, instead of removing, deleting or replacing the provision
- the owner of the land or interest in land must agree to the council acquiring the land or interest affected by the provision.

An interest in land is generally a right that a person enjoys over land owned by someone else, such as an easement, a lease, or a covenant. For example, if a person has a lease to graze land that becomes restricted by a plan provision, and the section 85(3B) tests are met, the council may agree to acquire the lease under the Public Works Act 1981 (see section 28 of this Act).

The new remedy does not apply to regional coastal plan provisions, but the Environment Court can still direct changes to those provisions if the two 'reasonable use' tests are met.

The change does not apply to designations or heritage orders, which are addressed by separate existing land acquisition processes under sections 185 and 198 of the RMA.

Does a provision meet the threshold?

Reasonable use is defined in section 85 of the RMA as "the use or potential use of the land for any activity whose actual or potential effects on any aspect of the environment or on any person (other than the applicant [or appellant]) would not be significant".

The courts decide whether the section 85(3B) tests are met; the amendments did not make any changes to the tests. The Ministry offers the following general guidelines to councils, however, based on our research into case law. Please be aware this is not legal advice, and case law is subject to change.

The starting point is that plan provisions are reasonable, in light of the public interest in sustainable management, as justified in the section 32 evaluation. A challenge to this under section 85 needs evidence to show that the land is now incapable of reasonable use, and that this is an unfair and unreasonable burden.

The need to obtain a resource consent under the RMA is not in itself sufficient to mean that land is incapable of reasonable use – the test depends more on site-specific effects from the activity status, plan objectives and policies, etc. Site-specific provisions limited in time may help avoid instances where a new plan provision would meet the section 85(3B) tests in a few locations.

Reasonable use is not the same as optimum financial reward.

Land characteristics and inherent physical constraints and values should be considered. For example, it is not (in principle) unreasonable to restrict buildings and development on land vulnerable to coastal erosion or where it would damage important archaeological sites.

It is ultimately the Environment Court's decision whether a particular provision renders land incapable of reasonable use, and places an unfair or unreasonable burden on the person. The test is very high, and has not changed as a result of these amendments. Fifteen cases to the Planning Tribunal, Environment Court and High Court between 1991 and 2013 involved applications for relief under section 85. Of these, only the following three were determined to meet the test.

Case name and citation	Notes
Hastings v Auckland City Council ENC Auckland [A068/01]	The council proposed to apply a very restrictive open space (conservation) zoning to an entire site. That was found to place an unfair burden on a landowner, particularly where protection against indigenous vegetation clearance was already provided for in other plan provisions. The proposed conservation zoning would not allow for any development that would enable economic use, even if it had no significant adverse effects on the environment.
Mullins v Auckland City Council PT Decision No A35/96	The plan proposed to introduce restrictive density rules that rendered three pre-formed building sites (which had been formed by a cross lease prior to notification of the plan) incapable of reasonable use. The Court's solution was to apply site-specific provisions that were also limited in time.
Steven v Christchurch City Council [1998] NZRMA 289	A heritage classification was found to be unreasonable in circumstances where: • a building was in very poor condition, requiring substantial costs to bring it up to a minimum standard • it was conceivable that the council may have applied to demolish it on grounds that it was causing an adverse effect on the neighbourhood.

Land acquisition

Fact Sheet 16 details changes to compensation under the Public Works Act. Detailed information about the process of land acquisition is available on the Land Information New Zealand website, at www.linz.govt.nz/crown-property/acquisition-and-disposal-land/public-works.

Fact sheets in this series

This is one of a series of 16 fact sheets providing an overview of amendments to the:

- Resource Management Act 1991
- Conservation Act 1987
- Reserves Act 1977
- Public Works Act 1981
- Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012.

The full set of fact sheets is available on our website:
www.mfe.govt.nz/publications/rma/resource-legislation-amendments-2017-fact-sheet-series

Find out more

Contact the Ministry for the Environment by emailing info@mfe.govt.nz, or visit www.mfe.govt.nz/rma.

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