



**Resource Management Law Association
of New Zealand Inc.**

RMA Consent Processing at Auckland Council – Practice Update

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Hearing Process, Decision Deliberation, Preparation Processing
and Issues Arising



Why have hearings?

- The law requires them – s39 RMA (cf s100)
- Fundamental principle to ‘have our say’
- Forum (and process) to evaluate competing interests and views
- Justice must manifestly be seen to be done



Essential concept – natural justice

- Parties have a right to be heard and a right to respond to what others say
- Independence of decision makers
- No bias
- Fair process that guarantees these rights



Hearing Process

- Cmrs start with a standard format
- But are flexible to adapt to the needs of the parties, cultural circumstances and the issues at stake
- Will look to the professionals to expedite the hearing in a fair manner to all parties



Expectations of Officers

- Present the materials to that point in sequence
- Provide a recommendation (NB s42A makes this optional, not mandatory)
- Support the recommendation with a logical assessment of the materials to that point
- Propose conditions (always, if possible)
- Focus on relevant resource management issues
- Assist at the hearing on matters arising
- Provide a considered response to the cases presented



Expectations of Applicants

- Politeness and respect (especially for lay submitters and Council officers)
- Tell the panel in opening what is not in issue and why; and what is in issue, why and what the applicant's position is
- Do not summarise the evidence
- Deal with legal issues succinctly and with authorities as necessary
- Answer questions
- Practice oral replies



Tips for Submitters

- State the background to the submission but focus on the issues at large
- Keep up with the information flow
- Provide the alternate assessment, evidence and conditions



From Hearing to Decision

- Directions and Minutes
- Decision to Adjourn for Reply, Adjourn for Further Information, or Close
- Deliberations
- Decision Writing
- Conditions



Closing Hearing

- At end of Hearing if no issues remain.
- Adjourn for written reply – agree date for reply (s37 may be required).
- Adjourn to consider whether further information is required – which may require reconvening and a s37.
- After initial deliberation – advice to Council which advise date and time of closing.



Deliberation

- Location, length and style depends on hearing material, difficulty, co-commissioner competence / skills / trust, thoroughness of reply and consent authority response to hearing.
- Minimal requirements from Council.
- No staff – but maybe for conditions once primary decision reached.
- Final or interim decision?



Decision Writing

- Useful but not essential to have a decision template.
- Sometimes helpful to have key programmatic elements drafted by staff.
- Task distribution depends on many factors – key of which is competence and willingness - and the Chair's tolerance for syntax and grammar



Conditions

- If conditions modified beyond hearing, need to consider:
 - Whether to review with Council – and if so whether this introduces any issues of natural justice;
 - Whether to seek applicant's views on modifications;
 - Whether third party views should be sought.



Decision Finalising

- Provide draft decision to staff for technical review (typos and egregious errors of fact only).
- Depending on circumstance – review conditions and amendments.
- NOT an opportunity for Council to further its case off-line.



What makes my job easier?

- Clear, analytical s42A identifying the key facts and values to be determined?
- Remember – a s42A report is not mandatory; has become standard practice.
- Specialist report authors available.
- Well-structured evidence on same lines.
- Written reply that clearly addresses issues and conclusions on hearing matters.



What makes my job less easy?

- Jargon-based evidence / reports.
- Opinion not well- or appropriately founded.
- Personality / ad hominem critiques
- Officer responses that have not taken account of the at-hearing material and simply reiterate the s42A report
- Co-commissioners inadequately prepared and/or who play the expert
- Attempts at technical knock-outs and point scoring
- Failure to recognise personal conflicts



Potential Problems

- Timelines to conclude hearing (and decision) if too much time is absorbed up front.
- Risk of taking too much information “as read” in order to “be efficient” and having to re-examine that material at decision time.
- Sacrificing the participation benefits for apparent efficiency gains.
- Process over substance.
- “Hung” decision committees.



Specters

- Appeal
- Judicial Review
- Public opprobrium
- Collegial ridicule



The Aftermath – Don't expect to be loved!

- We have decided an appeal is a pointless exercise. Assuming we win on points of law, we would still need to go back before the same decision-making committee (DMC) who collectively overlooked the key merits of our project, appeared to misunderstand important evidence and submissions and selectively ignored CRP's information to reach a "no" decision.
- Assuming we decide to undertake another application we will need to clarify, for a new decision-maker, the confused thinking of this DMC on issues they identified as having too much uncertainty. The information is there and there was an appropriate answer provided to every question – the DMC simply didn't appear to understand it or otherwise believed it was less risky to decline consent.
- The decision makers must have the right mix of expertise to assess the merits and risks of marine projects. Our DMC didn't. The DMC needs at least one scientist who has the mental firepower to understand all the evidence, and at least one person who understands how risk and uncertainty is managed in the real world.