



LAPA

Local Authority
Property Association

Who's
putting local
issues on
the national
agenda?

**We are.
LGNZ.**
Te Kāhui Kaunihera o Aotearoa.

14 May 2020

Carl Walrond/David Griffin
Statutory Land Management
Department of Conservation
PO Box 10420
Wellington 6143

Dear Carl and David

IMPROVEMENTS TO RESERVES ACT ADMINISTRATION

Thank you for initiating the meeting between the Department, Local Government New Zealand (LGNZ) and the Local Authority Property Association (LAPA). The recent Covid-19 lockdown has made it seem the meeting took place a very long time ago, yet it was as recently as the 18th of March. I will record that those in attendance were yourselves, Clare Wooding (LGNZ), Donna Hurley (Simpson Grierson representing LAPA), Robert Cant (LAPA) together with Michael Wood (Simpson Grierson/LAPA) and Renee Julius (LAPA). Michael and Renee took part via video feed.

Robert undertook to write to the Department to summarise the position of the LAPA and LGNZ.

The first point to note is that the letter from the LAPA to DOC dated 22 March 2017 remains important in terms of the points raised. I will not repeat that letter in detail but will reinforce a few points.

Delegations

Since that letter in 2017, there was the Appeal Court *obiter dictum* in the *Schmuck* case which cast doubt on the wisdom of the same agency making two decisions (those of the Minister and the territorial authority as administering body) in relation to granting easements over reserve land. Following the Appeal Court *obiter* DOC sought feedback from Councils on the prospect of the current delegations of the Minister's consenting role being revoked. LAPA/LGNZ submitted against the revocation of the delegations in a letter/submission dated 7 May 2019. Since then, the Supreme Court has reversed the Appeal Court decision in *Schmuck* and the validity of the delegation was not challenged on appeal.

DOC has asked for feedback on how Local Authorities are addressing the need for separate decision making when carrying out these dual functions.

As discussed at the meeting, local authorities have long experience in dealing with potential conflicts due to their wide range of functions and responsibilities. The most common examples occur when a Council is undertaking a project requiring a resource consent. These can involve contentious matters such as coastal protection works, or a sewerage treatment plant, where the Council as the applicant needs to apply to the Council in its regulatory capacity. In such cases, it is routine for potential conflicts to be identified and carefully managed. This often involves bringing in independent expertise such as a hearing commissioner. It is also routine for less contentious decisions to be made on things such as building consents, where a Council might be building a

structure needing building consent. Councils have to ensure that there are clear demarcations between the separate decision-making responsibilities and delegations where it wears “two hats”, so that it is clear there is no influence on the regulatory arm, for example, from the property operational arm. This is routine and occurs on a daily basis. The importance of clear demarcation of roles is also addressed in the governance principles set out in section 39 of the Local Government Act 2002, which provides in section 39(c):

“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;”

The Local Government Act 2002 emphasises the importance of community decisions occurring at a local level with the purpose of local government including enabling “democratic local decision-making and action by, and on behalf of, communities.”¹ To revoke the delegations would see decisions on local reserve matters made remotely from local communities. It is difficult to see how this would advance sound administration. Turning back the clock to practices where “the Crown” (central Government) had a supervisory role would be strongly resisted by Councillors and local communities and would conflict with the purpose of local government. From our observations, we anticipate that DOC is not resourced to effectively undertake this supervisory role. It would have to build up a significant amount of expertise itself, and it is difficult to see where it would recruit such expertise quickly. It is important to recognise that the *Schmuck* case is far from typical and is not symptomatic of underlying issues with the exercise of the delegations. This suggests the delegations, some of which have been in place for 20 years or so, are being exercised effectively. The *Schmuck* case was problematic well before the Minister delegated the consenting role to Councils.

Reserves Act Guide Update

It does need to be recognised that not all Local Authorities have specialists in the Reserves Act on their staff. Smaller Councils will sometimes struggle with the complexity inherent in the Act.

A typical example would be a sports club lease on Recreation Reserve. If the Reserve is vested, the provisions of section 54 of the Reserves Act apply, but if the Council is appointed to control and manage the same reserve, the provisions of section 59A will apply dictating that the Council follow the Concession provisions in the Conservation Act 1987. It would be easy for the inexperienced Council officer not to recognise the difference, and use the wrong provisions.

LAPA/LGNZ are of the view that a full review of the Act is desirable. The meeting recognised that was unlikely to be a priority in the immediate future. What was discussed as a viable alternative was to update the “Reserves Act Guide” that was released early in the millennium. While the existing document does not reflect subsequent legislative changes nor the delegations issued since, the majority of the Guide will remain relevant in substance. It probably just needs updating, rather than a complete re-write.

LAPA/LGNZ would like to see the Department prioritise an update of this important educational tool. If the Guide can be brought up to date, LAPA and LGNZ can be part of an education campaign

1 Section 10(1)(a) Local Government Act 2002.

informing Councils of the updated Guide and encouraging its use. Web based access to an updated Guide could make access much easier for Council staff considering Reserves Act issues.

LAPA/LGNZ would welcome the opportunity to be part of a review/update of the Reserves Act Guide.

Review of Reserves Act – late 1990s

Robert mentioned at the meeting that he was aware a LGNZ/DOC working party was formed in the mid-1990s to review the Act. Much time and effort was put into the review, which progressed as far as a draft Bill to go before Parliament. The Bill was due to be presented to Parliament a month or two before the 1999 general election. When the National/NZ First government was replaced with a Labour/Alliance Government the new Minister (Hon Sandra Lee) wouldn't progress work done by the previous administration. The momentum was lost completely and a lot of good work went to waste.

If a copy of that draft Bill could be found, the changes may still be sound, and potentially be the basis of reform of the Act. Robert's memory was that the bill would have been drafted mid-late 1999. Robert recalls asking Graeme Goodwin (DOC – SLM manager) if he could locate a copy prior to his retirement, but without success. It is recommended that perhaps one last effort be made to locate a copy of that Bill before we look to start from scratch.

Summary

LAPA/LGNZ remains of the view that the existing delegations should not be withdrawn. DOC does not have the capacity to revert to this supervisory role.

In the short term, we ask DOC to prioritise an update of the Reserves Act Guide. When the review is complete the updated guide would be made available on relevant websites, incorporating examples of best practice. LAPA/LGNZ would welcome the opportunity to be part of updating the Guide.

As we have articulated previously, legislative reform would be desirable to provide meaningful improvements in reserve administration, albeit we recognise this is may not be a priority in 2020. DOC is encouraged to try to locate the 1999 draft Bill amending the Act. LAPA/LGNZ would also welcome the opportunity to be part of a review of the Reserves Act 1977.

Thank you once again for initiating the meeting. While the timing could have been better, a lot of positive discussion took place and we are pleased to see improving the Reserves Act administration has some momentum again. LAPA/LGNZ remain willing and able to be part of improving the way the Act is administered.

Yours Sincerely



Flash Sandham
President, LAPA



Malcolm Alexander
Chief Executive, LGNZ