

Local Government Act 2002: statutory test for delegation of Reserves Act 1977 decision-making to local boards

Introduction

1. The Governance Framework Review political working party considered several options in relation to different decision-making powers under the Reserves Act 1977. It has recommended that the governing body delegate the following Reserves Act decision-making powers to local boards:
 - declaring a reserve (section 14(1))
 - requesting the revocation of a Council-owned reserve from the Minister of Conservation, but only for the purpose of managing that reserve under the alternative regime of the Local Government Act 2002 (section 24(1))
 - classifying a reserve (sections 16(1) and 16(2A))
 - reclassifying a reserve (sections 24(1) and 24A).
2. The governing body may delegate decisions to local boards under Schedule 7, clause 36C of the Local Government Act 2002 (LGA). In deciding whether to make a delegation, the governing body must 'weigh the benefits of reflecting local circumstances and preferences (through a delegation) against the importance and benefits of using a single approach in the district (through itself retaining the responsibility, duty, or power concerned)'. Any decision to delegate must be reasonable in an administrative law sense. If the governing body does decide to delegate the decisions, then it remains liable and legally responsible to perform or ensure the performance of these decisions.
3. The benefits of delegating these Reserves Act functions against retaining them at the governing body are set out in the following two sections: the first for declaring a reserve and requesting the revocation of a reserve, and the second relating to classification and reclassification of reserves. The benefits of the two groups of options are broadly similar.

Context

4. Parks and reserves are important public spaces that deliver a wide range of health, recreation and amenity outcomes for Aucklanders. Auckland Council makes substantial investment in open space to contribute to the well-being of Aucklanders.
5. Currently, Auckland is experiencing rapid and sustained population growth, and with this growth comes increased demand for and pressures on open space. However, Auckland Council is also operating within a constrained funding environment, and therefore the growth in demand for parks and open space must be primarily managed through greater utilisation of existing assets.¹

Declaring a reserve or requesting the revocation of a reserve for the purposes of bringing it under the LGA

6. Activities that can take place on parks which communities might wish to promote (or to limit) may be more or less enabled by the park's land status (i.e. whether it is held under the Reserves Act or the LGA). Therefore, the land status is one tool that can be used to manage and enable appropriate activities to be undertaken on open space, and different options provide different benefits for open space with regard to protection, use, flexibility to change and other issues.

¹ Open Space Strategic Asset Management Plan, p 40

7. Under section 14 of the Reserves Act, a local authority can declare any land which it holds in fee simple to be a reserve to be held for any of the purposes in section 17-23, which makes it subject to the provisions of the Reserves Act, rather than the LGA. A decision to declare a reserve must be publicly consulted on under the Reserves Act, and iwi must also be consulted. A decision to declare land a reserve also requires Ministerial consent, which has been delegated to Auckland Council. Currently, the decision to declare land a reserve is made by the Environment and Community Committee, with the relevant local board consulted before the decision is made.
8. Conversely, revoking reserve status under section 24(1) of the Reserves Act will remove land from the Reserves Act regime. In the case of a Crown-owned reserve, revocation will involve a disposal as the land will automatically revert to the Crown. There are three principal reasons for revoking reserve status:
 - Dispose of land: A council-owned reserve has been found to be surplus to requirements, or is no longer fit for purpose, and it has been agreed that it should be disposed of (Panuku Development Auckland is usually involved in this process)
 - Return land to the Crown: A Crown-owned reserve managed by the council has been found to be surplus to requirements, or is no longer fit for purpose, and the council does not wish to manage it any longer. In such instances the Crown will either retain the revoked reserve in the Crown's land bank for future Treaty settlement purposes, or dispose of it.
 - Manage land under the LGA: For example, where a council-owned reserve is occupied by existing activities that are supported by the council but are in breach of the Reserves Act, but where the land will still be retained by the council as open space under the LGA. For example, in early 2017 council requested the revocation of reserve status for the Omaha Reserve to allow an existing golf club and cafe on the reserve to operate lawfully.
9. The decision to request the revocation of reserve status must be publicly consulted on, and the Minister of Conservation must approve the request. The council's decision is currently made by the Environment and Community Committee, with the relevant local board consulted before the decision is made. The ministerial decision to approve the revocation of reserve status has not been delegated to local authorities.
10. The political working party has recommended that the power to request revocation of reserve status should only be delegated in relation to council-owned reserves where the purpose of the revocation is to manage the land under the LGA. Where the revocation is for the purpose of a disposal (either to the Crown or on the open market), the decision will remain with the governing body.

Benefits of reflecting local circumstances versus regional consistency

Benefits of reflecting local circumstances and preferences

11. Decisions on the application or revocation of reserve status require the decision-maker to consider whether or not land should be managed in accordance with the Reserves Act. Local knowledge and an understanding of the particular open space in question is critical to this decision.
12. A local board is likely to be better acquainted with open space within its local board area than a committee of the governing body (notwithstanding that particular members of the governing body may be well-acquainted with local issues) because of the nature of their role. Local boards are also likely to be more aware of community preferences for local parks and reserves.
13. As a consequence, it is likely that a delegation would ensure that the decision better reflects the requirements of the Reserves Act and the preferences of the local community.

14. Having these decisions made by local boards would increase accountability to the local community. There would also be benefits in aligning these decision-making powers with other, non-regulatory local board decisions which govern the use of parks, for example the preparation of reserve management plans.

Benefits of a single approach in the district

15. There are also benefits of having a single approach. It is part of the governing body's role to ensure that there is an appropriate mix of open space across the region which best meets both the present and future needs of communities for open space, community services and conservation values. This is reflected in its decision-making power over the acquisition and disposal of open space, and its ability to set regional policy on open space.
16. Retaining the decisions on application or revocation of reserve status at the governing body level is more likely to result in a more consistent approach to land status across Auckland, and a wider view of the impacts of any changes. For example, if all local boards were to take a protective approach to open space, this could have a cumulative effect of creating a regime which is inappropriately weighted against use towards conservation (where it may not be justified). In theory, retaining the decision may allow the council to more effectively manage its open space portfolio across Auckland for the benefit of all Aucklanders. However, this risk could be mitigated by appropriate advice and planning from staff.

Summary

17. After weighing the benefits of reflecting local circumstances and preferences (through a delegation) against the importance and benefits of a single approach in the district (through the governing body retaining the responsibility, duty, or power concerned), we consider that the governing body could delegate these decision-making powers to local boards under schedule 7, clause 36C of the LGA.

Classification and reclassification of reserves

18. The act of classifying a reserve is to "ensure the control, management, development, use, maintenance, and preservation of reserves for their appropriate purposes". Reserves must be classified according to their principal or primary purpose, as defined in sections 17 to 23.
19. The Reserves Act provides a framework of seven classifications that can be applied to reserves based on the current and future 'values' of the reserve: recreation, historic, scenic, nature, scientific², government purpose and local purpose. The local purpose classification can feature a number of different purposes, which allows more flexibility in use e.g. land held for education, social, community purposes, access or roads.
20. Classification has an effect on what is permitted on the reserve, and what leases and licenses for use can be issued. For example, a reserve with 'recreation' classification would not permit any commercial activities to take place.
21. Currently, classification and reclassification decisions are made by the Environment and Community Committee, a committee of the whole, but the view of a local board is sought before the decision. Some of these decisions are made under delegated authority from the Minister of Conservation.
22. Proposed classification decisions under section 16(1), and reclassification decisions under sections 24(1) and 24A must be publicly notified, which provides an opportunity

² Reclassification of reserves that have scenic, nature, scientific or historic classifications can only occur when the specific values that are being conserved have been destroyed or ceased to exist i.e. they cannot be reclassified based on the desire of the community.

for the community to submit on the proposed change. The Reserves Act also requires the council to consult iwi on the proposal.

Benefits of reflecting local circumstances versus regional consistency

Benefits of reflecting local circumstances and preferences

23. Decisions to classify or reclassify a reserve require the decision-maker to consider the current and future values of the reserve, and then classify that reserve in accordance with the requirements and purposes of the Reserves Act.
24. Local knowledge and understanding of the land, and the requirements and preferences of the community, is critical to ensure that the appropriate classification is identified for each reserve.
25. As discussed above, because of the nature of their role local boards are likely to be better acquainted with the current values of open space within their local board areas. They are also better placed to reflect the local community's views about how a reserve should be used, and therefore what its classification should be.
26. Similarly, there are also benefits of a delegation in aligning these decision-making powers with other non-regulatory decisions which are closely related. For example, local boards have decision-making over leases and licenses for parks and reserves, but are not empowered to make classification decisions where this is necessary to provide for an existing use of the reserve which is not in line with its existing classification, or to allow a new use.
27. To the extent that these inconsistent uses better reflect the actual values of the reserve, and the preferences of the community, then local boards will be better placed to make a classification or reclassification decision for that reserve that is consistent with the requirements and purposes of the Reserves Act.
28. As above, having these decisions made locally would increase accountability to the local community.

Benefits of a single approach in the district

29. Conversely, there are benefits of using a single approach across the district through retaining classification and reclassification decisions at the governing body level.
30. The governing body is responsible for ensuring an appropriate mix of open space across the region. Classification and reclassification decisions have an effect on the use of reserves, and so could ultimately impact upon the mix of open space across the regional network. If the governing body retains these decisions, it is more likely to ensure the regional view is provided for when making such decisions.
31. If classification and reclassification decisions are delegated, there is a risk that decisions may prioritise local community interests over impacts on the regional open space network. For example, some commercial activities, such as early childhood centres or sports clubs, provide a valid community service but have the potential to negatively impact open space values and the availability of open space for the rest of the community. This risk could be mitigated through ensuring that local boards have appropriate advice about the impacts of a proposal.
32. The governing body also retains allocated (non-regulatory) decision-making for 'regional open space strategy and policy, including open space network plan[s]', which allows a regional view of the overall network to be taken, including developing policy about how local decisions should be made, if necessary.
33. Finally, the governing body retaining the decision-making power would likely result in more consistent application of classifications across the region (although the

classification regime within the Reserves Act would provide some consistency regardless, even if decisions were to be made by different local boards).

Summary

34. After weighing the benefits of reflecting local circumstances and preferences (through a delegation) against the importance and benefits of a single approach in the district (through the governing body retaining the responsibility, duty, or power concerned), we consider that the governing body could delegate these decision-making powers to local boards under schedule 7, clause 36C of the LGA.

Other considerations

35. The impact the proposed delegation on the capacity of the organisation needs to be considered. Currently, the organisation is able to adequately service all elected members. It is possible that this proposal could result in an increase in requests for advice from local boards, but staff consider that this could be absorbed within existing work programmes and no additional resource is required at this time.
36. In addition, as these are regulatory decisions, it is important that there is a high degree of rigour in the advice provided to local boards and impartiality in decision making including management of conflicts of interest. Appropriate advice will reduce the risk of successful legal challenges to decisions.

Separation of regulatory and non-regulatory decisions

37. One of the key governance principles set out in section 39(c) of the LGA requires that the responsibility and processes for regulatory and non-regulatory decision-making should be separated so far as is practicable. However, this provision is not a bar to delegation of Reserves Act regulatory decisions.
38. Under the Reserves Act, the council has both regulatory and non-regulatory powers. Given the close relationship between the various regulatory and non-regulatory decisions under the Reserves Act, we do not consider that it is practicable to keep regulatory and non-regulatory decisions separate.