



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

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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



Karen Bartlett
President
LAPA

Dave Cull
President,
LGNZ

DRAFT VERSION TO INSERT COMMENTS

Attachment 1 – Proposed Delegations for Revocation

Section Heading	Power Delegated	Reason	Comment ¹
Section 14 Local authority may declare land vested in it to be a reserve for certain purposes	Section 14(4) Minister must consider resolution and cause it to be gazetted or refuse to do so	The Council would be double dipping - i.e. making a resolution and then considering it again in the shoes of the Minister	The reason for these decisions is to protect the land for the community. It is not clear how the Minister could add value to this decision. The declaration of the land as reserve has the effect of limiting the Council's powers and such decisions are not undertaken lightly. The delegation should remain.
Section 15 Minister may authorise exchange of reserves for other land	Section 15(1) Minister may authorise exchange provided that Minister not exercise power in respect of a reserve vested in an administering body except pursuant to a resolution of that body requesting exchange Section 15(3) The Minister or the administering body, as the case may require, may do all things necessary to effect any exchange, including the payment of money	The delegation enables the Council to control the outcome This delegation is not necessary as s15(3) already authorises the administering body to do these things	See footnote 1. This is necessary if the delegation in section 15(1) is removed (eg signing documents etc).
Section 24 Change of classification or purpose or revocation of reserve	Section 24(1) If Minister considers the change of classification or purpose advisable or if the local authority notifies Commissioner that pursuant to a resolution of the local authority of proposed changes, Minister may make changes Section 24(2)(e) Before classification or purpose is changed or reservation revoked, the Minister must consider proposal and, in the case of objections made to an administering body, the administering body's resolution	The delegation enables the local authority to make the resolution seeking the changes It also enables it to exercise the Minister's powers to agree to the changes. The delegation to a Council is inappropriate It would be exercising the Minister's powers to consider objections made to the administering body's own resolution	See footnote 1 See footnote 1
Section 41 Management Plans	Section 41(1)	The delegation seems inappropriate.	See footnote 1

¹ **As a minimum (and as stated in our submission) we consider that all delegations should remain for non-Crown derived reserves and where public notification under the Reserves Act has occurred.**

	Administering body must prepare and submit to Minister a management for approval	The administering body ends up preparing the plan and approving it. The intention is that there be a separation of powers	
Section 42 Preservation of trees and bush	Section 42(1) The destruction of trees and bush on any historic, scenic, nature or scientific reserve may not occur without a permit granted under s 48A or with the express consent of the Minister	As noted below it would not be appropriate to delegate to administering bodies the Minister's power under s 48A(3) to impose conditions	The comment is unclear. Aside from that, at a practical level an administering body ought properly be able to determine when vegetation should be cleared and any conditions that should apply. The delegation should remain.
Section 45 Erection of shelters, cabins and lodges	Section 45(1) The administering body may with the Minister's prior consent approve certain things	The delegation is inappropriate The administering body makes both the initial decision and the Minister's decision	It is difficult to see how the Minister would add value to what is essentially an operational decision within the confines of the reserve classification and the specific directions within the section. The delegation should remain.
Section 48 Grants of rights of way and other easements	Section 48(1) Where reserve vested in administering body, it may with the consent of the Minister grant rights of ways and easements	The delegation is inappropriate The administering body makes both the initial decision and the Minister's decision	See footnote 1 This delegation is exercised on a very frequent basis and revocation would have a very significant impact.
Section 48A Use of reserve for communication station	Section 48A(1) The administering body of a reserve vested in it acting with the consent of the Minister may grant a licence for certain things Section 48A(3) A licence issued under s 48A(1) must be subject to such terms and conditions as the administering body imposes with the approval of the Minister	The delegation is inappropriate The administering body can give itself consent by exercising the delegation The delegation is inappropriate The administering body makes the initial decision on terms and conditions and can then ratify it by exercising the delegated power.	See footnote 1
Section 51 Introduction of flora and fauna	Section 51(1) For the purpose of restoring, promoting or developing certain reserves, the Minister may authorise the administering body to introduce flora or fauna	The delegation is inappropriate In exercising the power of the Minister, the administering body is able to act in its own interests.	It is difficult to see how the Minister would add value to what is essentially an operational decision within the confines of the reserve classification and the specific directions within the section. The delegation should remain.
Section 53 Powers (other than leasing) in respect of recreation reserves	Section 53(1)(d) Administering body may prescribe not more than 40 days in any year that the public shall not be entitled to have admission to reserve unless on payment of charges provided that with the Minister's prior consent the number of days may be increased	The delegation is inappropriate. The administering body is able to increase the maximum number of days to exclude the public from a reserve unless they pay money; and then confirm the decision by exercising the delegated power.	The comments (ss (d) and (e)) seem to misunderstand the role of local authorities and their accountability to local communities. This would only occur with community support. The delegation should remain.

	<p>Section 53(1)(e) The administering body may grant exclusive use of reserve but not for more than 6 consecutive days, with power for licensee to charge admission fees provided that the Minister may consent to an increase in the number of consecutive days</p>	<p>The delegation is inappropriate. The administering body makes the initial decision on closure and can then increase the period by exercising the Minister's powers.</p>	
<p>Section 54 Leasing powers in respect of recreation reserves (except farming, grazing, or afforestation leases)</p>	<p>Section 54(1) With the prior consent of the Minister the administering body in which a reserve is vested may lease parts of a reserve to a third party</p>	<p>The delegation is inappropriate. The administering body makes an initial decision to lease and then exercises the Minister's powers to grant prior consent.</p>	<p>See footnote 1.</p> <p>Of all the delegations, the leasing powers and particularly section 54, are the ones that are most commonly exercised on a daily basis.</p> <p>The significance of revoking this delegation and the impact on local decision making cannot be over-emphasised.</p>
<p>Section 55 Powers (other than leasing) in respect of reserves</p>	<p>Section 55(2)(a) The administering body of a scenic reserve may, with the prior consent of the Minister, enclose open parts of the reserve.</p> <p>Section 55(2)(d) The administering body of a scenic reserve may, with the prior consent of the Minister, set apart areas for gardens, baths, picnic grounds etc for the public.</p> <p>Section 55(2)(e) The administering body of the scenic reserve may, with the Minister's prior consent, erect buildings on the reserve</p> <p>Section 55(2)(f) The administering body of the scenic reserve may, with the prior consent of the Minister, do such things as it considers necessary, including the erection of buildings and structures for public use to obtain the enjoyment of the sea, lake, river or stream</p> <p>Section 55(2)(g) The administering body of a scenic reserve may, with the prior consent of the Minister, set apart and use part of the reserves as sites for residences etc for the proper and beneficial management and administration of the reserve</p>	<p>The delegation is inappropriate. The administering body makes both the initial decision and the Minister's decision</p> <p>The delegation is inappropriate The administering body makes both the initial decision and the Minister's decision</p> <p>The delegation is inappropriate The administering body makes both the initial decision and the Minister's decision</p> <p>The delegation is inappropriate The administering body makes both the initial decision and the Minister's decision</p> <p>The delegation is inappropriate The administering body makes both the initial decision and the Minister's decision</p>	<p>These delegations are appropriate for the day-to-day administration of the reserves (whether Crown derived or not). These are primarily operational decisions.</p>

Section 56 Leasing powers in respect of scenic reserves	Section 56(1) With prior consent of the Minister, the administering body in the case of a scenic reserve may grant leases or licences Section 56(2) Before granting a lease, the administering body must give public notice	The administering body makes both the initial decision and the Minister's decision This delegation is not necessary	See footnote 1
Section 58 Powers in respect of historic reserves	Section 58(b) With prior consent of the Minister, the administering body may set apart and use part of an historic reserve for residences for officers and staff	The administering body makes both the initial decision and the Minister's decision	See footnote 1
Section 58A Leasing powers in respect of historic reserves	Section 58A(1) With prior consent of the Minister, the administering body of an historic reserve may grant leases or licences	The administering body makes both the initial decision and the Minister's decision	See footnote 1
Section 59A Granting of concessions on reserves administered by Crown	Section 59A(1) The administering body may grant concessions	This seems inappropriate. If administering bodies of vested reserves need the prior consent to Minister to grant leases and licences, why should administering bodies of controlled and managed reserves be able to grant concessions?	Feedback from local authorities is that prior to this delegation being put in place, the granting of such concessions to community organisations was a problem for DOC under its concession regime which is predominantly designed for commercial activities. Councils are better able to accommodate community uses. The delegation should remain.
Section 67 Leasing	Section 67(1)(b) With prior consent of the Minister, the administering body may lease a recreation reserve set apart for racecourse purposes to a racing club	The administering body makes both the initial decision and the Minister's decision	The lease gives effect to the classification. The delegation should remain.
Section 72 Farming by another person or body	Section 72(1) Where a recreation reserve or local purpose reserve is not required for purposes of classification the administering body may enter into an agreement or lease with the Minister to provide for a third party to carry out farming	The delegation is inappropriate as the administering body would end up entering into an agreement with itself	To our knowledge, this section is rarely used, but we appreciate the circularity issue identified in the comment.
Section 73	Section 73(1) Where recreation reserve not currently required for purposes of its classification, the administering body	The administering body makes both the initial decision and the Minister's decision	See footnote 1.

<p>Leasing of recreation reserves for purposes of farming, grazing, afforestation or other purposes</p>	<p>may with the prior consent of the Minister if reserve vested in the administering body, grant a lease, otherwise only Minister can grant leases</p> <p>Section 73(2) Likewise, for afforestation</p> <p>Section 73(3) Leases of recreation reserves where inadvisable or inexpedient to revoke reservation of recreation reserve</p> <p>Section 73(5) Prior consent of Minister before any member of administering body becomes the lessee of land under control of administering body</p> <p>Section 73(6) Any lease under s 73 may with approval of administering body be surrendered</p>	<p>The administering body makes both the initial decision and the Minister's decision</p> <p>The administering body makes both the initial decision and the Minister's decision</p> <p>Delegation is inappropriate</p> <p>Delegation is unnecessary</p>	<p>These delegations are appropriate for the day-to-day administration of the reserves (whether Crown derived or not). These are primarily operational decisions.</p>
<p>Section 74 Licences to occupy reserves temporarily</p>	<p>Section 74(1)(b)(ii) Licences may be granted in the case of any reserve except a nature reserve by the Commissioner</p>	<p>This delegation is misconceived. This power relates to Crown vested reserves managed by the Department</p>	<p>Agree</p>
<p>Section 75 Afforestation by administering body</p>	<p>Section 75(1) With prior consent of the Minister an administering body of a recreation reserve may afforest it.</p> <p>Section 75(2) Minister may refuse to give consent</p>	<p>The administering body makes both the initial decision and the Minister's decision</p> <p>The administering body makes both the initial decision and the Minister's decision</p>	<p>See footnote 1.</p> <p>Section 75(2) sets out very clear guidelines as to the basis on which decisions should be made.</p> <p>The delegation should remain.</p>
<p>Section 16 Classification of reserves</p>	<p>Section 16(1) Minister must by GN classify reserves according to their primary purpose provided that where reserves are controlled or managed by a Council the Minister must not classify without consulting it</p> <p>Section 16(4) Before classifying a reserve, the Minister must give public notice</p>	<p>The delegation effectively means the Council consults with itself.</p> <p>If the previous delegation is revoked this will need to be revoked as well</p>	<p>See footnote 1.</p> <p>If Crown derived reserve is classified for the purpose for which it is currently held the delegation should remain. The original purpose is simply being reconfirmed.</p>

<p>Section 18 Historic reserves</p>	<p>Section 18(2)(e) Except where the Minister otherwise determines, the indigenous flora and fauna and natural environment of an historic reserve shall as far as possible be preserved</p>	<p>The Minister may wish to maintain control of these decisions</p>	<p>See footnote 1. This is an operational decision.</p>
<p>Section 19 Scenic reserves</p>	<p>Section 19(2)(a) Except where the Minister otherwise determines, the indigenous flora and fauna and natural environment of a scenic reserve classified for its scenic values shall as far as possible be preserved and exotic fauna and flora shall be exterminated</p> <p>Section 19(3)(a) Except where the Minister otherwise determines, the flora and fauna, ecological associations and natural environment and beauty of a scenic reserve classified for the purpose of providing suitable areas to develop for purposes of generating scenic beauty or interest, shall as far as possible be preserved</p>	<p>The Minister may wish to maintain control of these decisions</p> <p>The Minister may wish to maintain control of these decisions</p>	<p>See footnote 1. These are operational decisions.</p>
<p>Section 24 Change of classification or purpose or revocation of reserve</p>	<p>Section 24(3) No change of classification or purpose of a scenic, nature or scientific reserve to a recreation, historic, government purpose or local purpose should be made except where the Minister considers the purpose etc no longer appropriate because of destruction of bush or natural features</p> <p>Section 24(5) Minister may change the classification or purpose or revoke the reservation of an historic reserve by reason of destruction of historic features</p>	<p>The Minister may wish to maintain control of these decisions given the importance of the type of reserve</p> <p>The Minister may wish to maintain control of these decisions given the relative importance of historic reserves</p>	<p>It is accepted that these type of reserves and issues may have more than local significance so that Ministerial oversight is valid.</p> <p>Not opposed to these delegations being revoked.</p>
<p>Section 42 Preservation of trees and bush</p>	<p>Section 42(1) Minister must consent to cutting or destruction of bush on any historic, scenic, nature or scientific reserve except in accordance with a permit under s 48A or with the express consent of the Minister and subject to any terms and conditions the Minister chooses to impose</p>	<p>The section 48A permit issue has been dealt with in the table above The Minister may wish to maintain control over the circumstances of providing express consent to destroying or cutting down bush.</p>	<p>At a practical level an administering body ought properly be able to determine when vegetation should be cleared and any conditions that should apply. The delegation should remain.</p>

<p>Section 50 Taking or killing of fauna</p>	<p>Section 50(1) The Minister in the case of a scenic, historic, nature or scientific reserve and the administering body of any recreation, government purpose or local purpose reserve may grant any qualified person authorisation to take and kill any specified type of fauna and authorise the use of firearms etc.</p>	<p>The Minister may wish to maintain control over authorisations on the killing etc of fauna on scenic, historic, nature and scientific reserves</p>	<p>At a practical level an administering body ought properly be able to manage pests as part of its standard land management and control.</p> <p>The delegation should remain.</p>
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Attachment 2 – Proposals to amend / expand delegations

Section Heading	Power Delegated	Reason	Comment

DRAFT