

Maea Petherick

From: Maea Petherick <Maea.Petherick@aucklandcouncil.govt.nz> on behalf of Environment and Community Committee
Sent: Tuesday, April 16, 2019 8:00 AM
To: Environment and Community Committee; All Local Board Members
Subject: Draft submission for feedback on proposal to revoke Ministerial delegations under the Reserves Act 1977
Attachments: Draft submission for feedback - DOC proposal.docx

Tena koutou katoa,

Please find attached the draft submission for feedback to the Department of Conservation on the proposal to revoke Ministerial delegations to Territorial Authorities under the Reserves Act 1977.

The Department of Conservation have granted a time extension which means that the feedback deadline on the draft submission from you is **5pm, 24 April 2019** to Emma.Golightly@aucklandcouncil.govt.nz

If you wish to attend a drop-in session to provide feedback or ask questions on the draft submission, you can do so on 17 April 2019 between 9.30-11.30am Room 2, Level 21, 135 Albert Street or 2-4pm Room 8, Level 28, 135 Albert Street. Another session has been organised for 18 April 2019 at 2-4pm, Room 8, Level 28, 135 Albert Street.

Ngā mihi
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Championing engaged, open and innovative democracy and decision-making for the diverse communities of Tāmaki Makaurau.

Submission to the Department of Conservation

In the matter of the proposal on the revocation
of certain delegations to territorial authorities
under the Reserves Act 1977

Auckland Council, (X) May – 2019



Mihimihi

Ka mihi ake ai ki ngā maunga here kōrero,
ki ngā pari whakarongo tai,
ki ngā awa tuku kiri o ōna manawhenua,
ōna mana ā-iwi taketake mai, tauivi atu.
Tāmaki – makau a te rau, murau a te tini, wenerau
a te mano.
Kāhore tō rite i te ao.

*I greet the mountains, repository of all that has been
said of this place,
there I greet the cliffs that have heard the ebb and
flow of the tides of time,
and the rivers that cleansed the forebears of all who
came those born of this land
and the newcomers among us all.
Auckland – beloved of hundreds, famed among the
multitude, envy of thousands.
You are unique in the world.*

Taitara/ Title: Submission on the revocation of certain delegations to Territorial Authorities under the Reserves Act 1977

Submission to the Department of Conservation.

1. This submission is from Auckland Council (the council) and has been approved by the Environment and Community Committee.

Key Points

2. The council does not support the proposal to revoke 44 of the 50 Ministerial powers within the Reserves Act 1977, delegated to local authorities. The reasons for this are outlined below:
3. Substantive justification for the proposed revocation of delegations has not been proved, and cannot be supported by Auckland Council. The council recommends that the Minister be advised that:
 - the Court of Appeal did not make a decision on the lawfulness of the Ministerial delegations to local authorities under the Reserves Act 1977
 - the Opuia decision has been appealed to the Supreme Court
 - the leading court decision on Ministerial delegations to local authorities under the Reserves Act 1977 is the 2004 High Court decision of *Gibbs v New Plymouth District Council* CIV 2004-443-115
 - there is no justification to change the current Ministerial delegation as the leading court decision supports Ministerial delegations to local authorities under the Reserves Act 1977 as lawful.
4. A clear identification of the problems exercising dual delegations by councils under the Act is lacking and undermines local decision-making and community outcomes. The council recommends that the Minister be advised that:
 - Auckland Council, like other local authorities is very capable and experienced at differentiating and making decisions under the Act as both the administering body and under Ministerial delegation
 - Auckland Council has in the exercise of delegation fulfilled the supervisory intent of the Ministerial powers, to ensure compliance with the requirements of the Act
 - it would be a backwards step to undo decision-making at the local level for local communities. It will cause delay in delivering a range of health, wellbeing and social outcomes under the Auckland Plan for our communities
 - Auckland Council has robust processes and systems to appropriately manage potential or actual conflicts of interest when exercising dual decision-making, including having regard to the Reserves Act Guide 2004. This mitigates the risk raised by the judicial comments in the Opuia decision

- the most appropriate place to identify concerns and responses to specific practice by council when exercising dual decision-making (administering body and under Ministerial delegation) under the Act is through an update of the *Reserves Act Guide 2004*. A review that we note has been pending for several years.
5. Delays in Ministerial decision-making would be inevitable and would be at the expense of local communities. The council recommend that the Minister be advised that:
- revoking Ministerial delegations will add significant delays to all Reserves Act 1977 processes
 - Auckland Council's ability to be responsive to communities and the changing needs of customers will be severely impacted. This could lead to a decline in trust and confidence.

Ngā koringa ā-muri/Next Steps

6. Auckland Council is available to discuss and provide its view to the Minister of Conservation before a decision is made. This is essential given the number of reserves held under Reserves Act 1977 in Tāmaki Makaurau and the number of New Zealanders we serve.
7. We also strongly urges the Minister to talk to a range of local authorities, including Local Government New Zealand, before making a decision.

Horopaki/Context

8. This submission responds to correspondence from the Department of Conservation (the Department) to all Chief Executives of Territorial Authorities dated 14 March 2019.
9. The Department requested feedback on a proposal to revoke Ministerial powers under the Reserves Act 1977 (the Act) currently delegated to councils. It proposes to revoke 44 of the 50 Ministerial powers currently delegated to local authorities.
10. The Department also requested that territorial authorities identify any new delegation proposals that would improve efficiencies.

Tunga whānui/Overall Position

Substantive justification for the proposed revocation of delegations has not been proved, and cannot be supported by Auckland Council

11. The council does not support the proposal to revoke 44 of the 50 Ministerial powers, delegated to territorial authorities under the Reserves Act 1977.
12. The Department has provided no substantive justification for the proposal.
13. The Department is seeking to justify changes to Ministerial delegations based solely on comments made by the Court of Appeal in its decision of *Opuā Coastal Preservation Inc v Far North District Council* [2018] NZCA 262. The Department has expressed a view of the case that:
- some of the existing Ministerial powers delegated to a council could be potentially unlawful

- councils could have a conflict of interest when they make a decision and then use the delegated Ministerial powers
 - the requirements for the Minister to consult with the council, may mean that council consults with itself, which is potentially another conflict of interest.
14. We are concerned that the Department is seeking to take action in response to the Opu decision, yet the court did not reach a conclusion on the lawfulness of the dual decision-making process in this case. The Department, in undertaking this review, expressly acknowledges that the Court may have decided about the legality of the delegation of Ministerial powers had the Court considered it.
 15. Auckland Council respectfully submits that the Department is erring in its advice to the Minister of Conservation regarding the voracity of the comments made by the Court of Appeal.
 16. The Opu decision has been appealed to the Supreme Court, which could make any changes premature.

The Department has overlooked case law on the lawfulness of Ministerial delegations

17. The leading decision on Ministerial delegations to local authorities under the Act, is the 2004 High Court decision of *Gibbs v New Plymouth District Council* CIV 2004-443-115.
18. This decision supports the Ministerial delegations to local authorities as lawful.
19. The council argues that this legal case should be relied on, rather than judicial comments on a case under appeal to the Supreme Court.
20. We recommend that the Minister be advised that:
 - the Court of Appeal did not make a decision on the lawfulness of the Ministerial delegations to local authorities under the Reserves Act 1977
 - the Opu decision has been appealed to the Supreme Court
 - the leading court decision on Ministerial delegations to local authorities under the Reserves Act 1977 is the 2004 High Court decision of *Gibbs v New Plymouth District Council* CIV 2004-443-115
 - there is no justification to change the current Ministerial delegation as the leading court decision supports Ministerial delegations to local authorities under the Reserves Act 1977 as lawful.

A clear identification of the problems exercising dual delegations by councils under the Act is lacking and undermines local decision-making and community outcomes

21. Delegation of Ministerial powers to local authorities under the Reserves Act 1977 have taken place since 1999. This was intended to deliver three primary outcomes:
 - devolution of a high level of decision-making to local authorities
 - greater flexibility in the approach to reserves management
 - standardisation and updating of process and terminology.

22. Further delegation of the Ministerial powers to local authorities in 2013 sought to allow for improved decision-making at a local level. It also recognised that the Ministerial powers were supervisory to ensure compliance with the requirements of the Act.
23. The council does not support any proposal that will undermine the primary outcomes sought from improved delegation under the Act. It would be a backwards step to unwind decision-making at the local level and to disempower local communities. There is also a risk that the proposed changes will reduce our ability to deliver a range of health, wellbeing and social outcomes under the Auckland Plan for our communities.

Auckland Council has experience and clear systems and processes to exercise its responsibilities and delegations under the Act

24. There is no clear and compelling problem definition to support the Department's proposal. No evidence has been provided by the Department to illustrate unlawful or persistent problems by local authorities exercising dual decision-making under the Act. No evidence has also been provided about local authorities being unable to recognise and manage potential or actual conflict of interest in dual decision-making.
25. The council has more than 20-years' experience exercising its responsibilities and delegations under the Act. We have invested in clear systems and processes to discharge our functions under the Act and to lawfully use Ministerial delegations.
26. Auckland Council, like other local authorities, is very capable of differentiating and making dual decisions under the Act as both the administering body and under Ministerial delegation.
27. The council has exercised these Ministerial delegations lawfully and responsibly in service to local communities. We have fulfilled the supervisory intent of the delegated Ministerial powers, to ensure compliance with the requirements of the Act.
28. Elected members across Auckland Council are experienced at making decisions in an independent and objective manner. This includes making many separate decisions with different legal requirements and acting in different statutory roles. This is business as usual for local authority decision-makers.
29. Auckland Council as a unitary authority frequently balances both territorial and regional responsibilities and the inherent conflicts of interest that some of these responsibilities pose. The dual governance structure made up of the Governing Body: Mayor and 20 councillors: and 21 local boards also provides an additional layer of challenge and scrutiny in decision-making.
30. Elected officials are supported in their decision-making capacity with formal training and staff advice.
31. We have processes and systems to manage any actual and potential conflicts of interest, particularly for dual decision-making situations: as an administering body, under Ministerial delegation, in quasi-judicial circumstances and as a territorial authority with regional council oversight.
32. These dual roles are frequently implemented for the same proposal. Key examples include landowner and resource consent approval; asset-owner, service provider and environmental compliance, monitoring and enforcement.

33. The council considers that the many processes, systems and practices we have in place allow legally robust dual decision-making while managing any potential or actual conflict of interest. This mitigates the risk raised by the judicial comments in the Opuia decision.
34. We are also guided by the Reserves Act Guide 2004 and through sharing and debating practice with other local authorities and officials from the Department.
35. The council recommends that the Minister be advised that:
 - Auckland Council, like other local authorities is very capable and experienced at differentiating and making decisions under the Act as both the administering body and under Ministerial delegation
 - Auckland Council has in the exercise of delegation fulfilled the supervisory intent of the Ministerial powers, to ensure compliance with the requirements of the Act
 - it would be a backwards step to undo decision-making at the local level for local communities. It will cause delay in delivering a range of health, wellbeing and social outcomes under the Auckland Plan for our communities
 - Auckland Council has robust processes and systems to appropriately manage potential or actual conflicts of interest when exercising dual decision-making, including having regard to the *Reserves Act Guide 2004*. This mitigates the risk raised by the judicial comments in the Opuia decision
 - the most appropriate place to identify concerns and responses to specific practice by council when exercising dual decision-making (administering body and under Ministerial delegation) under the Act is through an update of the *Reserves Act Guide 2004*. A review that we note has been pending for several years.

Ngā whakaaweawe a Kaunihera/Impacts on council

36. The following section outlines the impact the revocation of delegations under the Reserves Act 1977 would have, should the proposal proceed.

Auckland is experiencing fast-paced growth and we need to empower and meet diverse community needs

37. Tāmaki Makaurau is the largest and fastest growing region in New Zealand.
38. Auckland's parks and reserves provide critical social infrastructure that support and respond to this growth. They provide opportunities for all Aucklanders to participate in sport and recreation and for a range of social and environmental outcomes.
39. Tāmaki Makaurau is one of the most diverse cities in the world with over 180 ethnicities. 40 percent of the population was born overseas.
40. It is essential that council have the most efficient and effective decision-making processes. This enables the council to provide accessible services, social and cultural infrastructure that are responsive to Aucklanders diverse and evolving needs.
41. The Ministerial delegations are essential to manage the enormous scale and volume of decisions that are required for the effective and efficient administration of reserves, as required under the Reserves Act 1977.

42. Tāmaki Makaurau has over 4000 parks and reserves amounting to over 18,000 parcels of land. Auckland Council also has 792 leases that authorise sporting and community organisations to occupy recreation reserves and local purpose reserves.
43. The continually evolving processes and systems that council has had in place to implement the delegations since 1999 has ensured that council can deliver effective service for our local communities under the Reserves Act 1977.

Delays in Ministerial decision-making would be inevitable and would be at the expense of local communities

44. The number of reserves that we administer means council will likely request decisions from the Minister on weekly basis if the delegations were to be revoked. These decisions would relate to:
 - reserve management plans
 - classification (recreation, scenic, historic, local purpose) and reclassification
 - land exchanges
 - easements
 - leases and licences.
45. Seeking approval under the Reserves Act 1977 from the Department on any of the above matters would lead to significant delays. The council also seeks an understanding from the Department on how it proposes to resource the significant volume of work required to process these decisions.
46. These delays would have a pronounced impact on our ability to deploy and manage community infrastructure, programmes and activities that are core to our local government function. It would reduce our ability to effectively improve the quality of our environment and social wellbeing across our communities.
47. These issues would be exacerbated in Auckland because of growth and associated high-speed change in infrastructure and the tensions around the delivery of multiple outcomes from scarce resources managed under the Reserves Act 1977.
48. The council is concerned that the Ministerial decision-making would be undertaken with little understanding of the local issues. We do not see any benefit to decision-making from this perspective and we are concerned that this would ultimately cause unnecessary delay to delivering health and wellbeing benefits to our local communities. This could lead to a decline in trust and confidence in local and central government.
49. The proposed revocation of delegations will mean that the Minister (or delegate in the Department) will largely focus on whether procedural steps were followed.
50. The council recommend that the Minister be advised that:
 - revoking Ministerial delegations will add significant delays to all Reserves Act 1977 processes
 - council's ability to be responsive to communities and the changing needs of customers will be severely impacted. This could lead to a decline in trust and confidence.

Ngā koringa ā-muri/Next Steps

51. Auckland Council is available to discuss and provide its view to the Minister of Conservation before a decision is made. This is essential given the number of reserves held under Reserves Act 1977 and the number of New Zealanders they serve.
52. We also strongly urges the Minister to talk to a range of local authorities, including Local Government New Zealand, before making a decision.

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