

Submission to the Department of Conservation

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

Auckland Council, 14 May 2019

**Auckland
Council**

Te Kaunihera o Tāmaki Makaurau



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 proposal to revoke 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 (the Act), delegated to territorial authorities. The reasons for this are outlined below.
3. Substantive justification for the proposed revocation of delegations has not been provided:
 - the Court of Appeal in *Opua Coastal Preservation Inc v Far North District Council* [2018] NZCA 262 did not decide on the lawfulness of the Ministerial delegations to local authorities under the Reserves Act 1977
 - the High Court decision of *Gibbs v New Plymouth District Council* [2006] NZRMA 517 squarely upheld the lawfulness of the Act delegation at issue in that case. This legal case should be relied on, rather than judicial comments on a case which is under appeal with the Supreme Court
 - current legal precedent weighs in favour of the current delegation of Ministerial powers, not against it.
4. Local authorities have experience and skill exercising dual decision-making:
 - 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 the delegation fulfilled the supervisory intent of the Ministerial powers: to ensure compliance with the requirements of the Act
 - the proposed revocation of delegations undermines local decisions and community outcomes without evidence of a problem with dual decision-making by local authorities
 - the most appropriate place to identify additional opportunities, concerns and responses to specific practice by council when exercising dual decision-making (as administering body and under Ministerial delegation) 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. In our view revoking Ministerial delegations would undermine local decision making, co-governance and community outcomes:
 - revoking Ministerial delegations is likely to add significant delays to local communities in respect of 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
 - local communities should not be charged for delegated Ministerial powers being revoked and instead exercised by Department of Conservation staff. Particularly on the large number of reserves they have funded and maintain
 - no changes should be made to any delegations under the Act within the Auckland region that would impact on co-governance arrangements with mana whenua under Ngā Mana Whenua o Tāmaki Makaurau Collective Redress Act 2014, the Ngāti Whātua Ōrākei Claims Settlement Act 2011 and the Ngāti Whātua Kaipara Claims Settlement Act 2013.
6. We consider the Act is outdated and requires legislative reform through repeal and new legislation or significant amendment to better reflect:
 - changes in our community, such as the desire to make it easier to permit clubs to undertake revenue raising activities that support their services
 - the relationship between central and local government in the administration of council-owned and managed reserves, noting that 80% of the nearly 4000 Auckland Council reserves are owned by Auckland Council and are administered without any contribution from central government.

Ngā koringa ā-muri/Next Steps

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

Horopaki/Context

9. This submission responds to correspondence from the Department of Conservation (the Department) to all Chief Executives of territorial authorities dated 14 March 2019.
10. 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.
11. The Department also requested that territorial authorities identify any new delegation proposals that would improve efficiencies.

Tunga whānui/Overall Position

Substantive justification for proposed revocation of delegations not provided

12. The council does not support the proposal to revoke 44 of the 50 Ministerial powers, delegated to territorial authorities under the Reserves Act 1977.
13. The Department has provided no substantive justification for the proposal.
14. The Department's proposal to change Ministerial delegations appears to be based solely on comments made by the Court of Appeal in its decision of *Opuia 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 exercise 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.
15. We are concerned that the Department is seeking to take action in response to the *Opuia* decision, yet the Court did not address the lawfulness of the delegations in this case.
16. We consider the Department would be incorrect and unjustified in advising the Minister based on an assumption that the Court of Appeal "would have" ruled delegations unlawful had they been in issue.
17. Because it was not in issue in the case, the Court did not have the benefit of legal argument on the legality of the delegations including:
 - the extent of the Minister's power of delegation in section 10 of the Act (which explicitly and broadly empowers delegation to local authorities)
 - relevant High Court decisions, including *Gibbs v New Plymouth District Council* [2006] NZRMA 517 (Gibbs)
 - evidence on the practical and legal manner in which local authorities separate types of decision-making and incorporate two-step decision-making processes.

18. The Court of Appeal's comments in the *Opuia* case do not create a legal precedent.
19. The decision in *Gibbs* supports the Ministerial delegations to the local authorities as lawful. The council argues that this legal case should be relied on, rather than judicial comments on a case which is under appeal with the Supreme Court.
20. Current legal precedent weighs in favour of current delegation of Ministerial powers, not against it.
21. We recommend that the Minister be advised that:
 - the Court of Appeal in the *Opuia* case did not decide on the lawfulness of the Ministerial delegations to local authorities under the Act
 - the High Court decision of *Gibbs v New Plymouth District Council* [2006] NZRMA 517 squarely upheld the lawfulness of the Act delegation at issue in that case. This legal case should be relied on, rather than judicial comments on a case which is under appeal with the Supreme Court
 - current legal precedent weighs in favour of the current delegation of Ministerial powers, not against it.

Proposal undermines local decisions and community outcomes without evidence of a problem

22. Delegation of Ministerial powers to territorial authorities under the Act 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.
23. The most recent delegation of the Ministerial powers to local authorities in 2013 sought to allow for improved decision-making at a local level.
24. The council does not support any proposal that will undermine the primary outcomes sought from the 2013 delegation under the Act. As addressed below, it would be a backwards step to unwind decision-making at the local level and 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.
25. 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.

Local authorities have experience and skill exercising dual decision-making

26. Auckland Council has many years' experience exercising our responsibilities, including delegations, under the Act. Since the establishment of Auckland Council we have invested in clear systems and processes to discharge our functions under the Act and to lawfully exercise the Ministerial delegations.
27. The 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.

28. The council has exercised these Ministerial delegations lawfully and responsibly in service to local communities. In accordance with the Department's guidance material accompanying the 2013 delegations we have fulfilled the supervisory intent of the delegated Ministerial powers, to ensure compliance with the requirements of the Act.
29. Auckland Council is 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.
30. 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 provide an additional layer of challenge and scrutiny in decision-making.
31. Elected officials are supported in their decision-making capacity with formal training and staff advice.
32. 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.
33. These dual roles are frequently implemented for the same proposal. It is the nature of local authority decision-making that councils are required to manage different decision-making roles with respect to a single proposal. This is expressly recognised in section 39(c) of the Local Government Act 2002 and in the Department of Conservation's guidance in relation to the 2013 delegations. Because of this council can ensure that decision-making of the council as *administering body* and decision-making of council as *delegate of the Minister* are separated. In this way the two-step process envisaged by the Act is retained.
34. Key examples of councils exercising dual functions include:
 - the council may be both applicant (as landowner) and consent authority. Councils have also acted in some cases as both appellant and respondent in resource consent appeals (for example *Matamata Piako District Council v Matamata Piako District Council* PT Auckland A41/96; *Auckland Council v Auckland Council* [2018] NZ EnvC 56)
 - council may apply to itself for exemptions under the Building Act 2004 or Health Act 1956
 - in some cases a council has determined it must prosecute itself and, as defendant, has pleaded guilty (*Bay of Plenty Regional Council v Bay of Plenty Regional Council* (Whakatane) DC Tauranga CRN 4087005972, 15 July 1994).

Conflict of interest

35. 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.
36. In our view the delegations do not place the council in a position of conflict of interest, as is suggested in the Department's 14 March letter. While it is possible to conceive of councils as having a conflict of roles, we do not consider this will arise in most cases.

37. We consider that generally conflicts of interest are something held by a particular decision-maker rather than a public institution as a whole. The council as an institution is multi-faceted and has a broad range of corporate and public interests.
38. In a large number of cases the interests of the Minister and council will align completely and there would be no conflict. If ever a perceived conflict did arise, the council would remain free to decline to exercise the delegated power and refer the matter to the Minister.
39. Any conflict is properly managed by ensuring appropriate separation of decision-making functions and adherence to the Department's 2013 guidance.
40. 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 the delegation fulfilled the supervisory intent of the Ministerial powers, to ensure compliance with the requirements of the Act
 - the proposed revocation of delegations undermines local decisions and community outcomes without evidence of a problem with dual decision-making by local authorities.
 - the most appropriate place to identify additional opportunities, concerns and responses to specific practice by council when exercising dual decision-making (as administering body and under Ministerial delegation) 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

41. The following section outlines the impact the revocation of delegations under the Reserves Act 1977 is likely to have, should the proposal proceed.

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

42. Tāmaki Makaurau is the largest and fastest growing region in New Zealand.
43. 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.
44. Tāmaki Makaurau is one of the most diverse cities in the world with over 180 ethnicities. 40 per cent of the population was born overseas.
45. 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.
46. 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 Act.

47. Tāmaki Makaurau has over 4000 parks and reserves amounting to over 18,000 parcels of land. Auckland Council also has approximately 1400 leases and licences that authorise sporting and community organisations to occupy recreation reserves and local purpose reserves.
48. The continually evolving processes and systems that council have had in place to implement the delegations has ensured that council can deliver effective service for our local communities under the Act.

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

49. Delays in Ministerial decision-making would be inevitable and would be at the expense of local communities. In our view revoking Ministerial delegations would undermine local decision making, co-governance and community outcomes.

Delay

50. The number of reserves that we administer means council will likely request decisions from the Minister on a weekly basis if the delegations were to be revoked. These decisions would primarily relate to:
 - reserve management plans
 - classification and reclassification
 - land exchanges
 - easements
 - leases and licences.
51. Seeking approval under the Act from the Department on any of the above matters is likely to lead to significant delays. The council seeks an understanding from the Department on how it proposes to resource the significant volume of work required to process these decisions.
52. 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.
53. 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 in respect of council parks managed under the Act.
54. The council is concerned that Ministerial decision-making would be undertaken with little understanding of the local issues. This would ultimately cause unnecessary delay in delivering health and wellbeing benefits to our communities. We may see a decline in community trust and confidence in both local and central government.

Cost

55. We are concerned about the additional costs associated with the delegated Ministerial powers being revoked and instead exercised by Department of Conservation staff. Your cost-recovery model suggests that the community will ultimately bear the cost of Ministerial decisions, most often on a large number of reserves they have funded and maintain. This would include all community leases and easements for infrastructure under reserves. This cost could be significant over time.

Co-governance

56. There are a number of co-governance entities established under their own legislation in Tāmaki Makaurau including:
- Tūpuna Maunga Authority
 - Ngāti Whātua Ōrākei Reserves Board
 - Te Poari o Kaipātiki ki Kaipara
57. We are particularly concerned that no changes are made to any delegations under the Act within the Tāmaki Makaurau region that would impact on co-governance arrangements with mana whenua. Specifically, Ngā Mana Whenua o Tāmaki Makaurau Collective Redress Act 2014, the Ngāti Whātua Ōrākei Claims Settlement Act 2011 and the Ngāti Whātua Kaipara Claims Settlement Act 2013.
58. Future Treaty Settlements involving land held under the Act would need to be treated similarly to existing settlement provisions, for example Hunua Falls Scenic Reserve.
59. We understand that the Chair of the Tūpuna Maunga Authority is corresponding with the Minister of Conservation directly on this matter.
60. The Ngāti Whātua Ōrākei Reserves Board and Te Poari o Kaipātiki ki Kaipara may also choose to address this matter directly with the Minister of Conservation.
61. The council recommend that the Minister be advised that:
- revoking Ministerial delegations is likely to add significant delays to local communities in respect of 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
 - local communities should not be charged for delegated Ministerial powers being revoked and instead exercised by Department of Conservation staff particularly on the large number of reserves they have funded and maintain
 - no changes should be made to any delegations under the Act within the Auckland region that would impact on co-governance arrangements with mana whenua under Ngā Mana Whenua o Tāmaki Makaurau Collective Redress Act 2014 the Ngāti Whātua Ōrākei Claims Settlement Act 2011 and the Ngāti Whātua Kaipara Claims Settlement Act 2013.

The Reserves Act 1977 is nearly 50 years old, is outdated and needs reform

62. The Act is nearly 50 years old and in our view is outdated in many respects. This can be seen in the increasingly common decision by local councils not to hold land as a reserve under the Act and instead hold the land under the Local Government Act 2002.
63. We consider the Act is outdated and requires legislative reform through repeal and new legislation or significant amendment to better reflect:
- changes in our community, such as the desire to make it easier to permit clubs to undertake revenue raising activities that support their services

- the relationship between central and local government in the administration of council-owned and managed reserves, noting that 80% of the nearly 4000 Auckland Council reserves are owned by Auckland Council and are administered without any contribution from central government.

Ngā koringa ā-muri/Next Steps

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

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