2012

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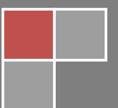
Relationship between the Local Government Act 2002 and the Resource Management Act 1991



THE RMA QUALITY PLANNING RESOURCE

Relationship between the Local Government Act 2002 and the Resource Management Act 1991

The Local Government Act 2002 (LGA) represented the first major revision of local government law for 28 years. This review was also part of a wider legislative reform, which included the reform of earlier legislation to create the Local Electoral Act 2001, and the Local Government (Rating) Act 2002 (which replaced the Rating Powers Act 1988).

The reforms encouraged local authorities to focus on promoting the social, economic, environmental and cultural well-being of their communities, consistent with the principles of sustainable development. This focus changed as a result of changes to the LGA 2002 in 2010 and again in 2012.

The LGA 2002 Amendment Act 2010 introduced a number of 'core' services that councils were required to have regard to, before undertaking any new services. Two years later, as a result of the LGA 2002 Amendment Act 2012, the references to promoting the social, economic, environmental and cultural well beings were replaced by the following statement:

"To meet the current and future needs of communities for good quality local infrastructure, local public services, and performance of regulatory functions in a way that is most cost effective for households and businesses"

There are other changes proposed to the LGA that have been announced but are not yet in force, including provisions relating to development contributions. These changes are part of Phase 2 of the Better Local Government Reform programme. This guidance note has not yet been updated to reflect these changes. For further information on the proposed changes to the LGA 2002 see the Department of Internal Affairs (DIA) website and the Better Local Government webpage.

What is the relationship between the sustainable development approach taken in the LGA and the sustainable management approach in the RMA?

The sustainable development approach is described in section 14(h) of the LGA as:

'In performing its role, a local authority must act in accordance with the following principles:
...
(h) in taking a sustainable development approach, a local authority shall take into account-
(i) the social, economic, and cultural interests of people and communities; and
(ii) the need to maintain and enhance the quality of the environment;
and
(iii)the reasonably foreseeable needs of future generations.'

This clause requires local authorities to take a sustainable development approach when fulfilling its purpose. That is, when deciding which local public service to provide they will have to take into account the social, economic, environmental and cultural interests of their communities as well as the need to maintain and enhance the quality of the environment and the reasonably foreseeable needs of future generations. This principle allows a balanced approach to be undertaken on all decisions made by local authorities.

The sustainable development principle is one of 11 principles governing the way local authorities must provide for the present and future needs of their communities (s14).

The RMA has a single purpose, which is to ensure that natural and physical resources are sustainably managed for present and future generations. This sustainable management purpose and supporting principles in Part 2 of the Act must underpin all decisions made under the RMA, involving the development and assessment of national instruments, plans and resource consents.

In practice, this means that decision makers are required to determine applications for resource consents or plan changes in the same manner as they have prior to the enactment of LGA 2002. Proposals in the Long Term Plan may have environmental implications which conflict with an RMA plan. This does not mean that resource management decisions must comply with the Long Term Plan. Decisions must still be made in accordance with the purpose and principles of the RMA and the policies of the relevant resource management plan.

In other words, the more specific legislative requirements override the more general provisions of the LGA. This relationship issue is discussed in more detail below.

What is the relationship between long term plans under the LGA, and Resource Management Act plans and national instruments under the RMA?

The LGA requires local authorities to consult with their local communities and Crown Agencies to determine what public goods and services the community wants provided. Through this process a council will adopt 'community outcomes' that form part of the Long Term Plan. Councils must show how activities in the plan contribute to its community outcomes.

The Long Term Plan is a ten year strategic planning document, and covers all local authority functions from financial planning and economic development initiatives, to social service provisions such as libraries, housing and community facilities. Long Term Plans must be reviewed triennially.

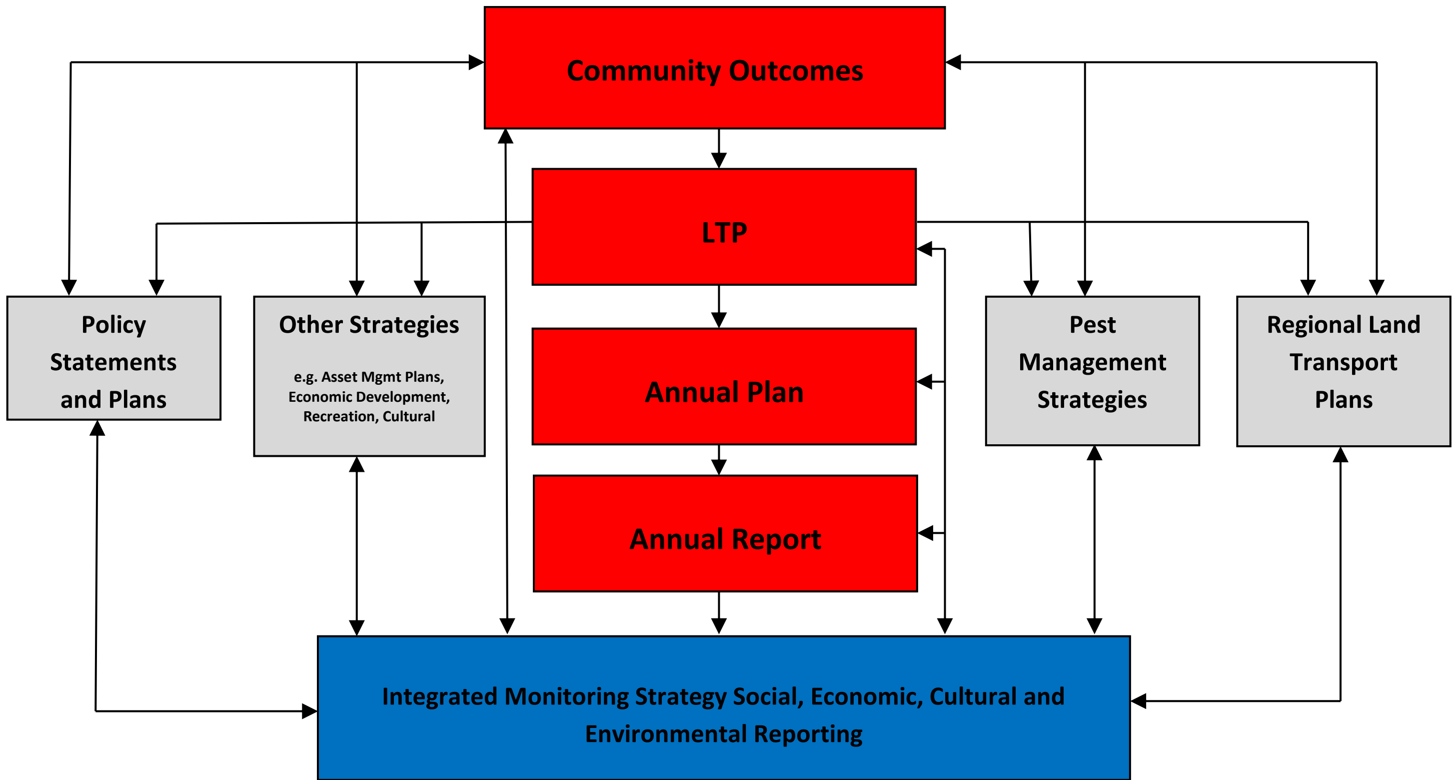
The RMA establishes a hierarchy of policy documents from national instruments to regional policy statements, and regional and district plans. This 'hierarchy' and requirement to ensure consistency between plans, is to promote sustainable management and ensure integrated management of natural and physical resources at a national, regional and local level.

The Long Term Plan does not override the provisions of RMA plans (or other statutory documents), nor is there a legal requirement that new plans and strategies that are adopted, while a Long Term Plan is in force, must conform to it. However, because the Long Term Plan both records the outcomes identified by the community and describes how the local authority will contribute to these, it is expected that local authorities will use this process to inform other plans and strategies.

A key means of delivering some objectives of a plan developed under the LGA is through the RMA. A regional policy statement, regional plan or district plan is also likely to be a key implementation tool.

This diagram shows how the Long Term Plan relates to and impacts on other council strategies and policy documents, which include regional policy statements and regional and district plans.

Figure: How the Long Term Plan relates to and impacts on other council strategies and policy documents



Textural description of the figure

Under the Local Government Act 2002 councils are required to develop Long Term Plans that include community outcomes.

Community outcomes are outcomes that councils intend to achieve in order to meet their purpose. The Long Term Plan is central to the local government planning framework and informs other planning functions undertaken by the local authority. Environmental outcomes from the Long Term Plan may inform and may be incorporated into policy statements and plans under the RMA, pest management strategies, and regional transport plans. Economic, social and cultural outcomes may also feed into these plans and strategies as appropriate.

The long-term funding implications of a local authority's commitments to achieving outcomes in the Long Term Plan are reflected in the Long Term Plan, with more detail on individual programmes for each year being incorporated into the Annual Plan. At the end of each financial year, local authorities are required to report on income and expenditure through their Annual Report, including expenditure on programmes undertaken to achieve outcomes in the Long Term Plan.

Some councils monitor progress towards the achievement of outcomes, plans and strategies. Where this is the case information might be incorporated into an integrated monitoring strategy that meets the monitoring requirements of both the LGA and RMA.

What regard must be given to the decision-making and consultation principles under the LGA when following specified processes in the RMA?

The decision making and consultation principles (sections 76-90) of the LGA are designed to apply only where no requirements are specified in other relevant local government legislation. For example, a decision about notifying a resource consent application would be made under the processes of the RMA, not under the LGA.

A general principle of law is that specific provisions contained in one Act override the general provisions contained in another Act. The LGA has general consultative principles that must be applied when consulting with the local community. As there are no specific processes for carrying out consultation under the RMA about how the community should be consulted when preparing a policy statement or plan, under schedule 3(4), local authorities are required to apply the consultative provisions contained in the LGA when consulting with the wider community. Schedule 1(3C) of the RMA makes this specific by stating that consultation undertaken to fulfil the requirements of other legislation can be used to inform the preparation of RMA plans. For this to occur, the consultation must have been carried out in the last 36 months and the people involved must have been advised that the information obtained from that consultation was also to apply in relation to RMA processes.

What processes are available to address conflicts between policies in the different plans and strategies that a council produces, and also for conflicts between decisions made under the various plans and strategies?

Section 80 of the LGA states that if a decision of a local authority will be significantly inconsistent with, or is anticipated to have consequences that will be significantly inconsistent with any adopted policy or statutory plan required by the LGA or any other enactment (such as the RMA), the local authority must, when making the decision, clearly identify:

- the inconsistency
- the reasons for the inconsistency: and
- whether the local authority intends to amend the policy or plan as a result of the decision.

This provision does not give authority to disregard or override a legally binding instrument such as a policy statement or plan under the RMA, or any other approval given under another act.

What impact does the Local Government (Rating) Act 2002 have on the availability of landowner names and addresses for RMA process purposes?

The Privacy Commissioner has advised that rating information can be used by local authorities for resource management purposes, for example identification of affected parties. This is on the basis that the public interest in ensuring efficient administration overrides the private interest in protecting that information.

Local authorities generally cannot release this information to third parties for other purposes.

What is the relationship between the financial contribution provisions in the RMA and the development contribution provisions in the LGA?

Development contributions (DCs) and financial contributions have a similar meaning in both Acts. Contributions can be taken in the form of money, land or a combination of both.

Financial contributions help promote the sustainable management of natural and physical resources in terms of section 5 of the RMA. This narrow focus has restricted local authorities' ability to promote other social, economic and cultural policy objectives.

In particular, financial contributions tend to focus on the direct marginal impact of the effects of particular developments without considering the wider cumulative impact of multiple developments on the infrastructure and community facilities of a district. This is the main reason for allowing local authorities to take development contributions under the LGA. This allows for better integration with the rest of the financial management provisions that local authorities must comply with.

Local authorities can still decide to continue with the present approach to taking financial contributions in district and regional plans. The LGA however requires that each local authority has a policy on development contributions or financial contributions. Councils may choose to use a combination of both financial and development contributions.

Where a local authority decides to use a combination of financial and development contributions care must be taken to ensure that contributions are not taken twice for the same type of development. This is referred to as 'double dipping'.

As noted above, there are changes proposed to the LGA that will affect development contributions and this guidance note has not been updated to reflect those changes. For further information on changes to the LGA see the Better Local Government section of the DIA website.

What are the requirements for contributions under the LGA?

Section 102 of the LGA 2002 requires local authorities to have a policy on financial and/or development contributions. This must state (among other things) how the capital expenditure from the increased demand on infrastructure and community facilities resulting from growth is to be funded by development contributions, financial contributions, or other sources of funding. This policy must be made available for public inspection.

If development contributions are required to be paid by an applicant, the local authority must keep available for public inspection the full methodology that demonstrates how the calculations for those contributions were made.

If financial contributions are required, the local authority *'must keep available for public inspection the provisions of the district plan or regional plan prepared under the Resource Management Act 1991 that relate to financial contributions.'*

This policy must be made available at the principal office of the local authority and such other place where members of the public will have reasonable access to the methodology, provisions or plan.

As noted above, there are changes proposed to the LGA that will affect development contributions and this guidance note has not been updated to reflect those changes. For further information on changes to the LGA see the Better Local Government section of the DIA website.

Financial contribution provisions in RMA plans are required to avoid, remedy or mitigate any potential adverse environmental effects generated by activities. They are also taken to provide for community facilities, such as reserves, and to provide for the increased demand placed on infrastructure. The taking of FCs for infrastructure does not always rest comfortably with the RMA as it is often based on fiscal rather than environmental considerations.

Attempts to fund 'growth' infrastructure have often floundered under the RMA due to:

- high compliance costs in negotiation, mediation and litigation;
- considerable delay, and therefore poor responsiveness to changes in the social and economic environment;
- difficulty in establishing clear and quantifiable links between the environmental effects of a development and the amount of the financial contribution;
- decisions challenged and overturned by the Environment Court;
- piecemeal and slow development leading to fluctuating revenue streams; and
- as a consequence of the above, insufficient certainty for robust financial planning.

DCs developed through the Long Term Plan process can only be challenged in the High Court on points of law and judicial review on process. Provisions under the RMA are subject to appeal to the Environment Court on merit as well as to the High Court on points of law and process.

DCs give local authorities the scope to more effectively address the funding and provision of infrastructure; they also afford district plans and regional plans to deal with mitigating the environmental effects of development.

Where a DC has not been paid, a local authority can:

- prevent the commencement of a resource consent
- withhold a section 224(c) certificate under the RMA in respect of subdivision
- withhold a code compliance certificate under the Building Act 1991
- prevent a service connection.

Where a developer refuses to pay FCs associated with permitted activities, the only option available to local authorities is to deal with it in a similar manner to any other debtor. Where it relates to a condition of a resource consent, a local authority can also take enforcement action under the RMA for non-compliance with a condition of a resource consent.

Whilst the RMA process is potentially more litigious, expensive and time consuming, it enables local authorities to determine that FCs have effect once decisions on submissions are publicly notified (s86B)). Local authorities can also choose to delay these provisions coming into effect until after a plan is made operative (s86B). In this case, local authorities will need to take a cautious approach to spending these contributions until the

provisions have been confirmed, as the provisions may be subject to challenge and subsequent change.

A number of councils are likely to continue to use the financial contribution provisions contained in their district and regional plans for policy and administrative reasons. However, where a city/district is experiencing high growth, or the existing policy/contributions are seen as inadequate, councils may decide to use the more streamlined process contained in the LGA with respect to the provision for infrastructure. In this case, local authorities may need to initiate a plan change to remove any financial contribution provisions that are being duplicated under the RMA.

What links are there between the monitoring requirements in the LGA and those in the RMA?

The LGA 2002 obliged councils to report on the community's progress in achieving community outcomes not less than once every three years. This provision was repealed in 2010, as a result of which such monitoring became discretionary rather than mandatory. This compares with the five-yearly requirement for councils in the RMA to report on the efficiency and effectiveness of policies, rules, or other methods in its policy statement or its plan as required by section 35(2A). The monitoring that is undertaken to satisfy the requirements of the RMA will be an important part of the environmental monitoring work that is required for the Long Term Plan.

An integrated approach to environmental monitoring will be required to ensure the best use of the information gathered by local authorities. Through an integrated approach to monitoring, information systems can be set up or amended so the right information is collected at the right time. An integrated system will also help to ensure that information is provided to meet a number of different legislative requirements.

More detailed information on this topic can be found in the Monitoring Steps component of the Quality Planning website. This resource provides best practice tips and examples of integrated monitoring strategies developed by a number of local authorities. This best practice guidance is a starting point for those local authorities who are preparing environmental monitoring strategies.

What are the differences between the decision making processes in the RMA and the LGA?

The RMA has a codified submissions and hearings process, where it sets out the process and timeframes to be followed, the manner in which hearings must be conducted, and the matters that must be taken into account in making decisions. This quasi-judicial process allows for councils' RMA decisions to be appealed to the Environment Court. Any submitter or further submitter can also be a 'party to proceedings' in the Environment Court unless doing so on trade competition grounds.

RMA decisions can also be challenged in the High Court on points of law and process. For example, decisions relating to whether resource consent applications should, or should not be notified.

The LGA does not codify the way consultation and decision making is undertaken by local authorities. Each local authority must however ensure that its decision making processes 'promote compliance' with sections 77, 78, 80, 81 and 82 as applicable.. The effect of this is that a local authority's decision-making processes must:

- involve consideration of all reasonably practical options;
- involve consideration of the views of persons likely to be affected by a decision;
- identify any significant inconsistency between the decision and any policy or plan adopted by a local authority;
- provide opportunities for Maori to contribute to the processes; and
- promote compliance with the principles of consultation, including giving interested persons a reasonable opportunity to present their views.

The LGA contains consultation principles that should be applied when consulting within the public. This is not a mandatory requirement under the LGA, as it is under the RMA.

Members of the public can only challenge LGA decisions in the High Court on the basis that the correct process has not been followed or on a point of law. Legal challenges cannot be made on the merits of the decision. This is the main point of difference between RMA and LGA decisions.

Other sources of information include:

Local Government **KNOWHOW** guides to the Local Government Act: produced by SOLGM, LGNZ and the Department of Internal Affairs.

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