2017

Consent Support

Resource consent consultation

Resource consent consultation

This guidance has been updated to include changes to the RMA as a result of the Resource Legislation Amendment Act 2017 (RLAA17). The final part of the RLAA17 came into effect on 18 October 2017. For more information about the amendments refer to the RLAA17 - Fact Sheets and technical guidance available on the Ministry's website.

Section 36A of the Resource Management Act 1991 (RMA) states that an applicant and a local authority do not have a duty under the RMA to consult any person about resource consent applications. Nevertheless, the Court has stated that "consultation is best practice and it is foolish for a party not to consult with those with a known interest in a proposal. Consultation is actively encouraged (if not directed) by the Court". (*Watercare Services Ltd v Auckland Council* [2011] NZEnvC 155)

This guidance note:

- outlines the benefits of consultation for resource consent applicants
- sets out some established principles of consultation
- provides guidance on identifying who should be consulted, including specific guidance on why and when consultation with tangata whenua should be carried out
- provides guidance on how applicants should consult, including specific guidance on consulting with tangata whenua
- outlines the role of councils in consultation, including how councils should communicate with applicants and any interested, affected, and consulted parties
- provides guidance on the systems councils should have in place to support the consultation process
- assists councils in determining whether effective consultation has been undertaken by the applicant.

For more detailed relevant information see also the facilitating consultation with tangata whenua and the consultation for plan development guidance notes. The Ministry for the Environment has also published guidance to tangata whenua and local authorities on Mana Whakahono ā Rohe which is available on the Ministry's website.

In this guidance note, the term tangata whenua is used when referring to consultation with Maori groups with mana whenua over particular areas. Unless otherwise specified, this should be read as being inclusive of consultation with any group that represents tangata whenua interests, be they iwi, hapu, whanau, or iwi authorities.

Guidance note

Introduction to consultation for resource consents

There is no duty under the RMA for applicants and councils to undertake consultation for resource consent applications under s36A of the RMA. Whether to undertake consultation, and the extent and nature of consultation, is up to the applicant. However, consultation is considered best practice by the Courts and is often required to provide a full assessment of environment effects (AEE) that must accompany a resource consent application. Schedule 4 of the RMA (Clause 6(1)(f)) requires that an AEE should include an identification of the persons affected by the proposal, the consultation undertaken, if any, and any response to the views of any person consulted.

Consultation generally occurs with people who may be adversely affected by, or have a specific interest in, a resource consent application, and is essentially a process about:

1. providing enough information to an interested or affected party to enable them to understand a proposed activity
2. discussing the resource consent application with them
3. receiving any comments they might have on the proposal and, where appropriate, amending the proposal to be more acceptable to the consulted parties
4. gaining all the necessary information to provide a thorough and complete application.

When consultation occurs, it should be made clear that the primary objective is a genuine exchange of information and points of view between applicants and people affected or interested in a proposal. It should also be clear that consultation is different to obtaining written approvals from affected parties as part of the notification/non-notification process, though that may be an outcome of the process following consultation in processing an application.

Although there is no statutory duty under the RMA to consult on resource consents, consultation can provide many benefits, including:

- helping an applicant to modify a resource consent application to reduce adverse environmental effects and make it more acceptable (if possible) to affected parties or the wider community
- helping to ensure that all potential effects on the environment have been identified and addressed in the application
- providing information to the local community about a future change that may occur in the area
- building better relationships between the applicant, the council, and any consulted parties, including tangata whenua
- helping the resource consent proposal encounter less opposition in the later stages of the consenting process
- producing a better proposal with more acceptable outcomes.

What are the underlying principles of consultation?

The Environment Court has developed a statement of principles for consultation. These principles have been primarily developed through case law relating to resource consents and notices of requirement.

The Environment Court's statement of principles for consultation are:

- The nature and object of consultation must be related to the circumstances.
- Adequate information of the proposals is to be given in a timely manner so that those consulted know what is proposed.
- Those consulted must be given a reasonable opportunity to state their views.
- While those consulted cannot be forced to state their views, they cannot complain, if having had both time and opportunity, they for any reason fail to avail themselves of the opportunity.
- Consultation is never to be treated perfunctorily or as a mere formality.
- The parties are to approach consultation with an open mind.
- Consultation is an intermediate situation involving meaningful discussions and does not necessarily involve resolution by agreement.
- Neither party is entitled to make demands.
- There is no universal requirement as to form or duration.
- The whole process is to be underlain by fairness.

These principles can be further drawn on from other decisions of the Court to include that:

- there is an overall duty on the part of both parties to act reasonably and in good faith, because consultation is not a one-sided affair
- consultation has overlapping requirements of reasonableness, fairness, open mind, freedom from demands, and the need to avail oneself of the consultation opportunity
- consultation is as much about listening as it is about imparting information, and is more about the quality of information imparted than it is about the quantity
- consultation is not an end or an obligation in itself, it is just one possible method of gathering views from those affected so that they can be taken account of in the decision-making process. The primary obligation is to ensure that the decision-maker has sufficient material before it to make the necessary decisions about Part 2 issues.

Councils also have to consider how consultation principles under the Local Government Act 2002 are addressed when undertaking consultation on resource consent matters.

Why should an applicant consult?

People are generally more comfortable with a development if they have had an opportunity to be informed about a future change, and could provide feedback on the proposal. In some instances, the affected parties may be future neighbours so it is worth an applicant taking the time to consult with existing residents.

Consultation may help identify alternatives if done early which is particularly important for large proposals. Early consultation can lead to the development of a better and more complete resource consent application with fewer adverse effects and/or a more comprehensive set of remediation or mitigation measures. Consultation may also facilitate a good relationship with affected or interested parties and is therefore less likely to lead to entrenched positions, and may increase flexibility in the final decision.

Applicants may be reluctant to consult because they may not wish to 'alert' neighbours or affected parties to the proposal. Often applicants will only discuss a proposal with neighbours if the council has indicated that written approvals will be required, otherwise the application will be notified. This can occasionally lead to tensions which might have been avoided through earlier consultation.

Applicants should be advised that consultation during the development of the proposal may help address and resolve concerns for the applicant, neighbours and affected parties. The use of side agreements to resolve concerns of affected parties is covered later in the guidance note.

Note that any discussion that takes place between an applicant and another party after the application is lodged with the council, cannot be deemed 'consultation' for the purposes of the assessment of environmental effects.

Obviously the need for, and benefits of, early consultation also apply where councils are the applicant.

Who to consult and the role of councils?

Depending on the nature, scale and location of the proposed activity, there are a number of parties that an applicant or the council might consult. This includes:

- regional council, if an application is to be made to the district council
- district councils, if an application is to be made to a regional council
- local community boards of district councils where they exist
- tangata whenua group(s)
- residents' associations/ community groups/ business associations/ recreational associations or clubs
- national and local environmental groups
- individual landowners and tenants
- the local office of the Regional Fish and Game Council
- the local conservancy of the Department of Conservation
- New Zealand Historic Places Trust

- Ministry of Agriculture and Forestry
- New Zealand Transport Agency
- Public Health Services
- service authorities or utility providers, i.e. power companies, airports, port companies, telecommunications companies
- resource user groups.

Councils should consider developing a standard contact list of statutory agencies, utility bodies, tangata whenua groups etc that may be appropriate to consult with. This list could be included as part of an application pack, brochures, or on councils website. Such lists could be particular to localities within the district or region. These lists can become out of date quickly, therefore councils need to ensure the information is regularly updated to avoid inaccuracies.

Councils should provide guidance to applicants on the appropriate tangata whenua group to consult using their records of iwi and hapu within its region or district as required by s35A of the RMA. These records should include:

- the contact details of any iwi authority within the region or district and any groups within the region or district that represent hapu (if requested by hapu)
- the area over which kaitiakitanga is exercised for each iwi authority and hapu (if requested by hapu)
- any iwi planning documents recognised and lodged with the council by iwi authorities.
- any Mana Whakahono ā Rohe entered into (iwi participation arrangement)

What should an applicant do when consulting?

An applicant should:

- take time to understand the principles of consultation
- consider whether consultation may identify new information or alternatives to improve the proposal
- consider whether undertaking consultation would assist in ensuring a thorough assessment of environmental effects
- understand the legal requirements and responsibilities for reporting on consultation.

In line with the principles of consultation, an applicant should provide sufficient information and time for the consulted party to:

- genuinely consider the information provided
- participate (such as through being able to discuss the application or ask questions and make suggestions)
- make informed decisions, particularly if their written approval is subsequently sought.

An early approach to consultation by applicants is consistent with the established principles of consultation in that it:

- provides the parties with an opportunity to exchange information
- represents a genuine attempt to seek and consider views on the proposal.

Consultation may also be an ongoing process, especially for large projects. This may allow the proposal to be progressively modified to produce a project with better environmental outcomes which is more acceptable to the community.

What is the council's involvement in consultation before notification

Councils play an important role in advising, facilitating and, in some cases, initiating consultation for resource consent applications.

Before lodgement of an application, councils should:

- advise applicants if they think consultation may be warranted at the earliest possible stage
- assist applicants to determine the level of consultation that may be required
- assist the applicant in identifying potentially affected parties from a proposal or activity, while clearly stating that a formal assessment of who may be adversely affected under s95E will only be undertaken once the application is lodged
- help applicants facilitate consultation with affected parties where appropriate. For example, where the council has established communication channels with hard-to-reach groups or tangata whenua. Where facilitating, councils need to be clear and agree up-front with the applicant about the respective roles and protocols for engagement as part of the wider consultation process
- provide guidance to applicants on consultation, including providing RMA planning brochures, booklets and/or council web based information relevant to consultation

Councils can also direct applicants to An Everyday Guide to the RMA - Consultation for Resource Consent Applicants which provides general information for applicants on how to consult, and the benefits of consultation.

Parties consulted object to a proposal

Sometimes parties that have been approached through the consultation process may advise the council they object to the proposal before it is lodged. In such instances, council officers should advise these parties that

- the proposal might change before it is lodged - potentially as a result of the consultation.
- they should also be raising their concerns directly with the applicant.
- the council has certain processing procedures to go through with the application once it is lodged, and during this period, notification will be addressed.
- just because they have been consulted, they will not necessarily be considered an affected party, or notified directly if the application is publicly or limited notified.
- until the application is notified, there is no formal ability to object to the proposal.

Parties should be advised when the specific application has been lodged. Councils may consider developing a standard letter to respond to objections received before an application is lodged, informing of the resource consent procedures and the right to object.

However, any issues raised with council before an application is submitted must be adequately included and considered in the officer's report. This will help ensure that a balanced and informed decision is made by the decision-maker.

What is council's involvement in consultation after lodgement

Following lodgement of an application, councils should examine the consultation that has been undertaken and described in the assessment of environment effects (AEE). This should include checking:

- who was consulted, how, and over what time-frame
- the issues that were raised, and how the applicant has addressed the issues in the application
- whether the matters relevant to tangata whenua contained in ss6, 7 and 8 of the RMA have been adequately addressed in the AEE.

Where it is considered that consultation is not adequate, council should either encourage the applicant to undertake consultation, or undertake consultation itself. This may involve

contacting neighbours or affected parties directly, explaining the proposal and procedural matters. It may also involve contacting the relevant tangata whenua group and asking them to prepare a cultural impact assessment.

Why consult with Tangata whenua on resource consents

Section 36A of the RMA specifically states that there is no duty under the RMA to consult any person, including tangata whenua, about resource consent applications. However, the tangata whenua interests recognised in ss6(e), 6(f), 6(g) ,7(a) and 8 of the RMA are required to be considered when making decisions on resource consent applications. These interests can be more readily identified and addressed in applications through consultation with tangata whenua. The duty of early consultation with tangata whenua has also been identified by the Court of Appeal as one of the principles of the Treaty of Waitangi.

It is best practice for applicants to undertake consultation with tangata whenua when developing proposals that are within an area of interest to tangata whenua, or involve resources of particular interest to tangata whenua. Councils can assist this process by identifying the relevant iwi authorities and/or hapu, the areas in which they may be interested, and the issues that tangata whenua are generally concerned about.

Where councils have identified that tangata whenua may be affected by a proposal, applicants should be encouraged to consult with tangata whenua at the earliest possible stage in the development of their proposals. This is particularly important when the proposal will clearly affect a known waahi tapu, or sites or species of importance to tangata whenua. Early consultation is also far more likely to be appreciated by the tangata whenua concerned.

Larger organisations who lodge consents regularly may have established their own agreements with particular iwi or hapu on how they will consult; they will be well aware of consultation expectations.

Tangata whenua groups may be interested in a proposal for a number of different reasons, including their historical association with a particular area; and/or quite differently, as neighbours or landowners. Individuals within tangata whenua groups may also be interested in an application as general members of the public. This means it is important to make it clear from the outset why consultation is being undertaken and how the tangata whenua groups consulted may be affected.

If a council has entered into a Mana Whakahono ā Rohe (iwi participation arrangement) with an iwi authority (under s58L), the arrangement may explicitly define the way in which consultation must be undertaken with the relevant iwi on resource consent proposals. If this is the case, any consultation must be undertaken in accordance with this iwi participation arrangement. Even if there is not a Mana Whakahono ā Rohe iwi participation arrangement in place, tangata whenua groups may have different ways in

which they would like to be consulted or engaged. For example, some tangata whenua groups have specific resource management advisors who are authorised to speak on their behalf on some issues but must go back to the iwi or hapu on others. Some tangata whenua groups may also expect payment for their time spent in consultation exercises.

What sorts of issues are tangata whenua generally concerned about?

The primary council duty is to keep and maintain records under s35A on which iwi and hapu to consult; the Minister may require this information to be provided within timeframes specified in regulations. However, councils should also have a good understanding of tangata whenua values in the area and the types of activities that could adversely affect these values.

Some types of activity that may be of concern or interest to tangata whenua are:

- disturbance or modification of traditional and ancestral sites, such as battle sites, particularly in greenfield areas
- any activities near marae or kainga (settlement)
- activities near or on urupa (burial ground) (such as house building, earthworks etc.)
- discharges (particularly of waste) to water
- other activities potentially compromising the purity or mauri (spirit/life-force) of waters (inland, coastal or offshore)
- any activities potentially compromising the integrity of or access to food resources (mahinga kai) and food gathering areas such as dredging near shellfish beds, discharges into harbours, the placement of structures or subdivision in the coastal marine area, and discharges to air
- any activities potentially compromising access to natural resources, such as timber, stones, flax, and fish
- any activities that disturb indigenous flora and fauna, such as the clearance of bush or damming or diversion of waterways.

Specific lists of activities should be created for each iwi authority, hapu, and/or whanau and can be used as a general guide to provide advice on when consultation with tangata whenua may be warranted. When in doubt, they should be asked if they are concerned or interested in the proposal and would like to be consulted.

It is generally not the activities themselves that are of particular concern to tangata whenua, but how certain activities have potential to impact on things that are valued by tangata whenua. For example, both water and the coastal environment are highly valued by tangata whenua. Consultation with tangata whenua for discharge applications to water may often be warranted, particularly where it involves the discharge of treated sewage into coastal water or rivers.

Iwi management plans, Mana Whakahono ā Rohe (iwi participation arrangements), other iwi planning documents, and cultural impact assessments undertaken for other resource

consent applications can assist with the identification of the types of activities of interest to tangata whenua and how to consult with them.

When should councils consult with tangata whenua on resource consents?

While the primary responsibility for consulting with tangata whenua should rest with an applicant, councils should also take a proactive role in facilitating consultation with tangata whenua under the RMA. This is due to the need for councils to develop long-term working relationship with tangata whenua for resource management purposes and to fulfill their role in providing good, robust advice to applicants on resource consent matters. It is important this consultation is done in accordance with any policies and/or protocols councils may have developed with tangata whenua within their region or district including any Mana Whakahono ā Rohe (iwi participation arrangement) that they have entered into.

Councils may wish to consult directly with tangata whenua when:

- resource consent proposals are likely to affect the matters referred to in ss6(e), 6(f), 6(g) and 7(a) of the RMA
- the council knows that tangata whenua have a special relationship with the area affected by the application
- council is aware that tangata whenua may be concerned with the activity that is proposed (e.g. aquaculture) or the resource that may be impacted on (e.g. water allocation).

The council's role may range from contacting the tangata whenua concerned to verifying the record of consultation provided by the applicant. In the case of some significant proposals, councils may effectively take control of the consultation process: this may include arrangements for hui, attendance by applicants, commissioning cultural impact assessments, and seeking expert advice from tangata whenua groups. Where council takes a lead in consulting directly with tangata whenua, there is a need to ensure correct protocol. This often includes:

- following tikanga Maori (e.g. mihi, karakia)
- providing a koha (gift or contribution) to the marae, relying on guidance from the marae komiti
- using te reo Maori if possible, and where appropriate
- involving the Council's iwi liaison officer, if available.

Councils should not view consultation as a one-off process for application but aim to build working relationships with tangata whenua. This may involve putting in place policies, processes, and channels that facilitate:

- consultation between consent applicants and tangata whenua, including fulfilling the Council's obligations to keep and maintain records for each iwi authority and hapu within its region or district

- tangata whenua involvement in the consent process such as being provided with copies of applications or sitting on hearings committees.

When should councils forward applications to tangata whenua for comment?

If the council has entered into a Mana Whakahono ā Rohe with an iwi authority, any consultation (including forwarding resource consent applications for comment) must be undertaken in accordance with the arrangement, if that arrangement gives details as to how the council consults iwi in relation to resource consent applications.

In any case, many councils have existing arrangements with tangata whenua to send them copies of all or some of newly lodged applications for resource consent and/or summarised lists of applications received. These arrangements are primarily used to identify whether the tangata whenua group have any interest and/or concerns about the application(s), and whether they want to see a full copy of an application (where a list is used). Statutory acknowledgements may also require that councils forward summaries of all applications to a particular tangata whenua group.

It is important that you know whether your council has an existing arrangement for consultation with tangata whenua or specific administration processes outlined in a Mana Whakahono ā Rohe. If they do, then the applicant needs to know what this means, for example, will someone from the tangata whenua group make contact? Or is that the responsibility of the council? Will there be a bill for such input? If tangata whenua have provided an electronic address for service, Councils must send any lists of applications to this electronic address, otherwise they can choose to mail them, , or arrange for a tangata whenua representative to review the applications at a specially convened meeting. Any process should be efficient, effective and well understood by both tangata whenua and council.

Arrangements for distribution and review of applications can form the basis of operational agreements between councils and tangata whenua. These agreements can provide an effective 'safety-net ', ensuring that tangata whenua are given the opportunity to have input into the resource consent process where:

- applicants have not consulted them
- the applications are generally straightforward and are less significant
- a number of tangata whenua groups may have a potential interest.

How should councils communicate with affected, interested and consulted parties?

People who have been consulted by applicants may contact the council for advice on the consent process, and to determine what their rights are. Potentially affected or interested parties may also contact the council to express their concern or interest about a proposal, before or during the consent process. In these situations, the council should:

- explain why the application needs resource consent and outline the process that consent application must go through
- provide advice on consultation, what it means to be an affected party, and outline the procedural matters including the rights and obligations of the parties involved (see the Ministry for the Environment booklets Getting in on the Act and Your Rights as an Affected Person for guidance)
- provide clear advice to consulted parties on how the council determines who may be affected parties under s95E of the RMA; be clear that if they have been consulted, that does not automatically mean they are deemed to be adversely affected.

In some circumstances, council officers may also be required to:

- suggest to consulted parties that they put any concerns in writing in a letter to the council; the reporting officer is then obliged to advise the decision-maker of their concerns and how it was dealt with.
- explain why non-RMA matters cannot be taken into account as part of the assessment
- provide an explanation of how a controlled and restricted discretionary activity, and the permitted baseline, affect the council's discretion.

Many councils use a standard letter to respond to interested and consulted parties. This letter should cover the following matters:

- Confirm whether the application is lodged. If so, state where in the process the application is, e.g. "a decision has yet to be made under s95A-G of the RMA on whether the application will be publicly notified, limited notified or non-notified".
- Ensure that you express technical terms in plain English.
- Confirm that their letter (or email or record of the phone call) and this response will be on the site file so that the reporting planner is aware of their concerns.
- Provide a description of the consent processes, including the determination of affected persons and who has responsibility for decisions.
- If the applicant has approached them, explain why they have been approached and the constructive purpose of consultation; explain also that this does not automatically mean their written approval will be required, and that they do not have the right to veto the application.
- State how they can find out more information if or when the application is lodged.

Councils can also make use of existing sources of information such as booklets in the Ministry for the Environment's Everyday Guide to the RMA series.

Many councils now have public notices for notified resource consent applications on their websites, and some now include a list of all consents that have been received by the council.

Council officers should take care when communicating with interested, consulted or affected parties. Every effort should be made to confine discussions to matters of fact and process considerations. Council staff should avoid giving any opinion on the merits of an application.

What are the effective forms of consultation

The actual form of consultation undertaken by an applicant will largely depend on what the proposal entails, its complexity and scale of environmental effects, and the relationship with the parties to be consulted. The form and extent of consultation undertaken therefore needs to be decided on a case-by-case basis.

Examples of consultation methods are:

- meetings/hui: these should be open-ended and open-minded discussions with individuals or groups
- public forums or open days (often used for larger applications). Carefully manage these sessions so the proposal does not sound like a done deal
- exchange of letters and informative material
- 'house-meetings' of community or specific interest groups
- workshops
- site visits
- telephone discussions (which may include the establishment of 'Hotlines' or 'Infolines')
- websites.

Councils should not be concerned about the way in which an applicant has consulted, but rather whether the consultation has been effective. The focus should be on the outcome of any consultation; and on how the applicant has addressed the concerns or issues that have been raised in the application.

How to assess the effectiveness of the consultation

Councils need to determine whether the assessment of environment effects addresses all the relevant effects and meets the requirements of s88 of the RMA. In some situations it is only through consultation that a full assessment of effects can be provided that address all the relevant issues and concerns. This is particularly likely where there are matters of significance to tangata whenua or community groups, or when the activity is large-scale with significant effects.

Assessing the effectiveness of consultation will depend on the nature of the application and the effect it has generated. These factors will vary: a large-scale activity with widespread effects would normally involve an applicant undertaking extensive consultation over a period of months, using a range of different methods. For a small-scale activity where the effects are contained and/or minor, consultation may be limited to the surrounding residents or a single neighbour. An AEE should cover all or some of the following points, to the level of detail that is appropriate to the proposed activity:

- an overview of the consultation undertaken
- details of the information submitted to the consulted parties
- a record of the consultation process, including who was consulted, with dates and times of meetings and discussions
- a summary of what was discussed, supported by any minutes and a list of the parties in attendance
- the opinions, comments and concerns of the parties consulted
- the timeframe given to those consulted to review the proposal and provide comment
- a record of any changes or modifications to the proposal that have been made to address the concerns of those consulted, including potential conditions
- a statement of whether any side agreements were made.

Councils should consider developing internal checklists or policies to determine whether consultation has been effective and this may be incorporated into a plan.

The record of consultation provided by applicants will assist council to determine how the application has been developed, and particularly, how the local community and interested parties have been involved in developing and shaping the proposal. This record can assist in assessing who may be adversely affected by the application once it is lodged.

Where it is somewhat uncertain whether the details of the consultation are accurate, the council officer may consider calling the parties concerned to confirm the detail of their responses to the applicant. However, this needs to be managed carefully in a manner that does not compromise the neutral role of the council officer.