2020

Plan Components

Alternative Dispute Resolution

THE RMA QUALITY PLANNING RESOURCE

Alternative Dispute Resolution

This guidance has been updated to include changes to the RMA as a result of the Resource Management Amendment Act 2020 (RMAA20) which was enacted on 30 June 2020. For more information about the amendments refer to the RMAA20 Fact Sheets available on the Ministry's website.

The Resource Management Act 1991 (RMA) sets out a statutory procedure for decision making, and also encourages the use of alternative dispute resolution methods. Environmental disputes can often be avoided or resolved through dialogue between the parties involved.

Consultation, negotiation, pre-hearing meetings, facilitation, and mediation can enable parties to reach full or partial settlement at different stages of plan development and resource consent procedures. Arbitration is another available method, although it is seldom used.

Using alternative dispute resolution methods can save time and money, protect long-term relationships, and help parties find creative solutions. The foundation of any alternative dispute resolution process is negotiation, whether parties negotiate directly or use an independent facilitator or mediator.

Guidance note

Context: RMA procedures for managing conflict

Proposed plans, plan changes, and notified resource consent applications often provoke conflict on how development and its adverse environmental effects should be managed. The RMA sets out statutory procedures for managing this conflict.

- Members of the public can make submissions supporting or opposing proposed plans, plan changes, and notified resource consent applications.
- Submitters can speak about their submission at a public hearing. Submitters, plan developers, and resource consent applicants can all present evidence to support their case. The hearing is usually before the council, but applications may also be heard by independent commissioner(s), the Environment Court, or a Board of Inquiry.
- After the hearing, a final decision is made on the application. If there is further disagreement, the matter can be appealed to the Environment Court (unless the Court was the initial decision-maker). With the exception of disagreements on points of law from the Environment Court decision, all the parties involved have to accept the final decision. To find out more, see the Ministry for the Environment Guides "Resolving Resource Management Act concerns" and "Your Guide to the Environment Court".

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You and the Environment Court

The RMA encourages alternative dispute resolution

Through allowing for submissions and hearings, the RMA ensures public participation in decision-making. However, the statutory RMA procedures may not always meet the expectations of all the parties involved. This might be because of:

- The cost of employing expert witnesses and lawyers, the cost of delays, and the cost of losing a case, particularly if costs are awarded against a party
- The time it can take to get a final decision
- The risk to long-term relationships
- The risk to the community's faith in fair process, when some participants perceive that RMA procedures are unfair

- The inability of the RMA to achieve, on its own, creative solutions to environmental problems.

The formal procedures can be a barrier to communication between parties. Submitters can feel that there is an imbalance of power, particularly in their access to information. Applicants may feel that the decision imposed is not the best solution to a perceived problem.

For these reasons, the RMA recognises and encourages a range of alternative dispute resolution methods that enable people to work together directly to manage and resolve conflict. These are increasingly being put into practice.

Alternative dispute resolution methods

Alternative dispute resolution methods can be used throughout the formal RMA process. They enable parties to reach full or partial settlement at different stages of plan development and resource consent processes. The methods are:

- Consultation leading to negotiation for resource consents and designations (Schedule 4). Note, however, that there is no duty to consult (refer s36A)
- Pre-hearing meetings and mediation for resource consents (s.99 and s99A)
- Consultation leading to negotiation in the preparation of a policy statement or plan (Schedule 1)
- The use of mediation to resolve disputes in the preparation of a policy statement or plan (Schedule 1)
- The use of mediation or conciliation by the Environment Court to encourage settlement (s268)
- Arbitration (s356).

Consultation

Consultation can happen at any stage of the formal RMA process, but it is best to start it early. The plan developer or resource consent applicant should actively seek out potentially affected parties to discuss the proposal and learn their views. Open information sharing and flexibility in modifying the proposal to address concerns are the hallmarks of quality consultation.

Consultation should always begin with a face-to-face meeting between parties. This provides the opportunity for parties to understand others' point of view, and potentially avoid later conflict.

Facilitated workshops can be held for large resource consent applications, designations, and plans prepared under the RMA. These workshops usually have an independent facilitator to encourage discussion and understanding among all the parties. The plan developer or resource consent applicant has the incentive for appointing the facilitator.

While consultation for resource consents is not mandatory, it is recognised good practice to consult.

Negotiation

Consultation frequently leads to negotiation. Negotiation involves the parties discussing the matters in dispute directly between themselves and trying to come to an agreement.

Parties often decide to negotiate directly with each other. Their success in reaching a settlement often depends upon their competence in negotiating. First-time negotiators are not likely to have the skills to achieve a good outcome unless they are coached. As with consultation, an independent facilitator can be useful to undertake that coaching.

The most effective type of negotiation is the principled approach.

The principled approach relies upon participants overcoming strong negative emotions to focus on working together to resolve the conflict. The principled approach is described in the well-known book, Getting to Yes, by Roger Fisher and William Ury. The four principles that apply to constructive negotiation are:

- Separate the people from the problem
- Focus on interests, not positions
- Generate a variety of possibilities before deciding what to do
- Insist that the result is based on an objective standard.

Pre-hearing meeting

Pre-hearing meetings are encouraged as a means of progressing dialogue between the applicant, the submitters and the consent authority.

Preparing for a pre-hearing meeting

The council may invite or require the applicant and any, or all, of the submitters relating to a consent application to attend a pre-hearing meeting. The council may only require persons to attend a meeting with the consent holder's agreement.

A council may also invite anyone who has made a submission to a proposed policy statement or plan to meet with the council or another person, for the purposes of clarifying or resolving matters. However, unlike the pre-hearing process for resource consents, attendance cannot be required. The requirements for reporting back by the chairperson, and for the council to have regard to the report as outlined, are similar to those for resource consents.

During a pre-hearing meeting

At the pre-hearing meeting, the chairperson/ facilitator conducts a meeting between the plan developer or resource consent applicant, the submitters, and council staff. Parties have the opportunity to speak directly to each other, clarify the proposal and any concerns, and resolve misunderstandings before the hearing. The facilitator can guide parties to:

- Isolate issues
- Develop options
- Consider alternatives
- Reach common ground or an agreement.

For a resource consent application, usually the council employs the facilitator and charges the cost back to the applicant. In most cases, the facilitator will be independent to the council. While s99(4) does provide that a member, delegate or officer of the council may attend and participate in a pre-hearing meeting, it is important for the facilitator to be regarded as neutral by all participants. This enables, for example, council staff to be more forthright in their suggestions, such as introducing draft reports or consent conditions at the pre-hearing meeting, in order to assist parties to focus on realistic outcomes and progress discussion on mitigation options.

At the conclusion of a pre-hearing meeting the chairperson of the meeting must prepare a report and circulate it to all parties who attended, at least five working days before the hearing begins. This report must set out:

1. Those issues that are agreed and those that are outstanding
2. The nature of evidence agreed to be called and an indicative timetable for hearing.

The report excludes anything communicated or made available at the meeting on a without prejudice basis.

After a pre-hearing meeting

If a person required to attend fails to come to the meeting, and does not give a reasonable excuse, the council may decline to process the application, or to consider the persons submission at the hearing itself. In both situations, there is a right of objection under s357A.

The Hearings Committee must have regard to the report in making its decision on the application.

Mediation

In relation to resource consent applications and policy statements or plans, parties must agree to mediation. For disputes on a policy statement or plan the mediation must specifically be conducted by an independent mediator. For resource consents, mediation

must be conducted by a person whom the authority delegates the power to do so, or a person whom the authority appoints to mediate if the Council has lodged the application.

In both cases, the person who conducts the mediation must report the outcome to the consent authority.

Mediation is one of many tools utilised by the Environment Court if one or more of the parties disagree with the Council's decision after a hearing. If an appeal or reference is made to the Environment Court, one of the parties will request mediation, or the Environment Court seeks to see if the parties would work towards resolving the matters by mediation. Parties meet with an independent mediator and work to reach an agreement.

Mediation is more formal than a pre-hearing meeting. More time is taken for the parties to agree on the process before moving onto the substance of the dispute. The parties can choose their own mediator at their own expense, or the Environment Court may appoint one of its commissioners to act as the mediator at no charge to the parties.

Changes were made to the RMA in 2017 to strengthen the role of alternative disputes resolution in the Environment Court. Section 268 was replaced and section 268A introduced to give the Court the discretion whether to require ADR and all parties must participate in the process unless the Court grants leave otherwise. Any person required to attend a judicial conference or ADR may be represented by other people, but only if at least one of those people is authorised to make decisions on their behalf about any matters reasonably expected to arise in the conference or ADR.

The Environment Court uses ADR to settle many matters without the need for a formal hearing. More information can be found about the use of ADR in Court processes in the Everyday Guide and the Environment Court Practice Note 2014

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Arbitration

Arbitration involves the parties choosing an independent person to make a decision on their behalf. This method is seldom used for resource management matters. Because parties have to be equally motivated to get a decision before the matter reaches court, few arbitrations have been carried out.

Using alternative dispute resolution during the RMA process

There are on-going opportunities to use alternative dispute resolution methods throughout the resource consent and plan development process. These methods run alongside the statutory RMA procedures - refer to diagram showing relationship between alternative dispute resolution methods and statutory RMA procedures below.

What type of ADR method to use will depend upon:

- The stage of the conflict
- The participants' knowledge of resource management matters, and the quality of advice they are receiving

- The number of parties
- The cultural background of the parties
- The willingness of the parties to work together, rather than have the decision made for them.

Experienced planning practitioners within or outside Council can often identify which plans and resource consent applications the Council is likely to approve. In these cases, facilitated consultation at an early stage can help submitters and Council staff to understand the proposal. It may also help parties to find some common ground and clarify outstanding issues.

Later in the process, council staff may need to decide:

- How to handle contentious legal issues. Will independent legal opinions put the matter to rest, or is it better to go for a statutory declaration from the Environment Court to avoid a full Court case?
- How to handle contentious evidence. Will an independent expert provide more assurance about likely adverse environmental effects and their mitigation?
- How to handle matters of public interest. Should some matters be non-negotiable?

Participation and confidentiality

Participation in consultation, negotiation, facilitation, and mediation meetings is voluntary. The exception is for pre-hearing meetings, where participation is required under section 99(8) or where the Court has directed attendance at ADR under section 268. Other than this exception, parties can choose to not get involved, or to leave at any time. Often, the participants are advised to treat the discussions 'without prejudice'. This means that they can speak freely and frankly so that the whole conflict can be aired. Accusations and off-the-wall suggestions may emerge but should not influence any statutory decision. At the outset, the chairperson of the meeting should clarify what will be recorded in the minutes of the meeting. Particularly once a dispute reaches mediation, this exchange of views should be treated as confidential and non-binding. Parts of an agreement that are not to be included in the public decision may also be treated confidentially.

After an agreement

After an agreement is reached through negotiation or mediation, the parts that relate to the RMA, such as consent conditions, still have to be formalised through the statutory process. The decision-maker can accept or reject these parts of the agreement. The decision-maker is likely to be influenced by the parties agreement on how adverse environment effects should be avoided, reduced or mitigated, but it is not bound to accept the parts of the agreement that relate to the RMA.

The decision-maker is likely to be influenced by the practicality of being able to enforce conditions. The decision-making authority does not need to be informed about confidential parts of the agreement. For example, the Council or the Court will be told if

an arrangement for screen planting on the neighbour's property has been agreed between the parties but is not likely to be told that compensation has been paid.

Similarly, after a negotiation or mediation has resolved matters under appeal, the Environment Court still has to decide through a consent order, to accept or reject those parts of the agreement that relate to the RMA. The Court is likely to reject an agreement that could adversely affect the public interest, goes beyond the scope of the submissions, or suggests conditions which cannot be enforced.

Using a facilitator or mediator

Parties in conflict often have difficulty achieving resolution on their own and may need to be guided towards a principled approach to their discussions. Facilitators and mediators work to shift the parties away from a rigid stance, to define and solve problems together.

A facilitator or mediator is often necessary because of the complexity of environmental planning. Environmental planning disputes are often characterised by:

- Large numbers of submitters, and multiple issues
- A mix of experienced participants and one-time participants, such as neighbours, who are unfamiliar with negotiating or with the RMA
- Imbalances of power.

The facilitator or mediator must have sufficient standing and skill to:

- Listen and communicate well
- Maintain a neutral stance
- Display sufficient confidence to deal with a wide range of people
- Dispel tensions
- Understand the issues
- Know how to progress towards reaching common ground.

The role of the facilitator or mediator is to ensure that:

- Agendas are set in consultation with the participants
- An appropriate neutral venue is selected and the room is arranged to assist discussion
- Ground rules of behaviour are discussed and agreed
- Parties have the opportunity to express their views
- Information is clarified and additional information is sought when necessary
- Interests and priorities are identified
- Common ground is recognised
- A wide range of options are discussed
- Issues in conflict are narrowed down where possible
- Outcomes of facilitated meetings are summarised at the conclusion
- At closure, the agreement of a mediation is nailed.

For small, low-risk cases, the reporting officer or a separate council staff member, can act as a facilitator. For larger, more contentious cases, an independent facilitator from

outside the Council is often used. This ensures that the facilitator is not also involved in assessing the application.

Tools to assist dispute resolution

Consultation, negotiation, facilitation, and mediation draw upon the use of similar tools to achieve dispute resolution.

Ground rules

An early agreement on appropriate behaviour during a meeting is important, to avoid outbursts or 'playing to the audience'. Both will jeopardise frank discussion, and possibly divert the meeting from its purpose. The facilitator or mediator will usually try to introduce rules of courtesy and mutual respect, such as:

- People have the right to speak without interruption
- Long speeches will not be allowed
- Abusive behaviour will not be tolerated
- News media may not attend the meeting
- Participants must clarify their mandate to speak on behalf of groups or the Council.

Depending upon the stage of the conflict, the degree of confidentiality can also be agreed upon at the meeting.

Peer review of expert evidence

At times, parties need to be convinced that professional evidence is trustworthy. Even the most professional expert can overlook aspects of a proposal and its effects. Decision-makers should always use appropriate experts for peer review for key matters in dispute.

Joint development of a single text

Parties can work together on a text such as policy and rule modifications or resource consent conditions. This approach is useful for keeping all parties up to speed with complex documents.

When using a joint development of a single text:

- Use hard copies of the texts if negotiators are working in pairs.
- Destroy original copies once the parties have agreed on the changes, so there is no confusion about what has been agreed.
- Use electronic devices such as track changes in a Word document, to clarify instantly what a negotiator is proposing and what is agreed on by all the parties.
- Use a data show projection of the text with track changes when many parties are involved. This helps the parties to maintain focus on the wording and to understand its context.

Heads of agreement

Heads of agreement is an agreement in principle that outlines the main points resolved during negotiation or mediation. It is often signed immediately after resolution is reached and ensures that parties do not back track before the more detailed agreement is signed. For instance, the heads of agreement may state that costs will be shared equally, while the detailed agreement may assign the specific amount to each party.

Side agreement

Conditions that apply to a third party, or to land outside the site of the application are ultra vires and cannot be created or enforced. A side agreement can be useful to deal with solutions that are inappropriate to handle within consent conditions. For example, the parties might agree that excavated material from a consent site will be placed on a neighbour's property to form a bund to reduce noise. A side agreement would contain this condition and could be enforced through the civil courts.

A side agreement is a contract between parties and does not involve the decision-maker on the resource consent (usually the council). This means the council cannot and will not approve or enforce a side agreement. Each party should have a side agreement checked by a lawyer before signing it.

Tips for plan developers and resource consent applicants

- Actively seek out the likely potentially affected parties.
- Share information willingly from the outset.
- Make sure the information is clear, easily understood and tailored to the audience.
- Expect to be confronted with strong negative emotions at the early stages of the process.
- Recognise that you may not be trusted and consider ways other parties might work with you. Methods include:
    - For large projects, funding an advocate for interested parties or appointing an independent facilitator, in consultation with them
    - For pre-hearing meetings, encouraging a council to appoint independent facilitators.
- Be willing to persist in finding solutions, including modifying the proposal, putting forward conditions, and considering side agreements.
- Have agreements checked by a lawyer before you sign them.

Tips for submitters

- Recognise that you have more opportunities to influence the outcome near the beginning of the process than towards the end.
- Group together with other submitters who have similar interests.
- Get realistic advice on the likely outcome from the Council decision or Environment Court decision.

- Research and keep asking questions until you fully understand the proposal and its consequences.
- Inform yourself sufficiently to ask questions of the Council and the applicant; find out what standards have been applied in similar situations.
- Develop a relationship with the other parties and negotiate for information and changes yourself or through your representative.
- Initiate negotiations.
- Prepare for negotiations or mediation by
    - Appointing and coaching your negotiators
    - Deciding what you want to achieve
    - Deciding on their mandate to represent you
    - Trying to understand what will motivate the other parties
    - Agreeing on the options that can be offered and the standards that should be applied
    - Knowing the potential consequences of not reaching an agreement.
- Have agreements checked by a lawyer before you sign them.

Tips for Councils

- Adopt dispute resolution policies and convince parties that it is in their interests to use the opportunities.
- Recognise that early active management of disputes is in a Council's interests, as it eventually becomes party to appeals and references.
- Ensure parties are well informed about processes and choices.
- Build pre-hearing meeting time into the plan change schedule.
- Appoint independent facilitators. Unless the proposal is small and low risk, it is usually difficult for the reporting officer handling the consent application or plan change to also be the facilitator. Make sure all parties perceive that the facilitator is unbiased.
- Use ss37 and 37A, in consultation with applicants, to extend the pre-hearing timeframes if that would be useful.
- Initiate peer reviews of legitimate outstanding issues. This may lead to the proposal being modified, or the dispute being laid to rest.
- Remember that views may not be entrenched, even though they are expressed strongly.
- If the submitters at a pre-hearing meeting are not completely opposed to a development, Council staff can introduce consent conditions for discussion.
- When entering into negotiations, once Council becomes a party to an appeal, make sure that the Council representative has a clear mandate to make decisions to a certain level (some local authorities ensure that the chairman of the hearings panel attends the mediation).


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